

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

November 9, 2017

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

Hawaii

Issuance of Right-of-Entry Permit to the United States Geological Survey on Lands Encumbered by Governor's Executive Order No. 2577 to the County of Hawaii, Waiohinu, Ka'u, Hawaii, Tax Map Key: (3) 9-5-002:065.

APPLICANT:

United States Geological Survey.

LEGAL REFERENCE:

Section 171-55, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Waiohinu, Ka'u, Hawaii, identified by Tax Map Key: (3) 9-5-002:065, as shown on the attached map labeled Exhibit A.

AREA:

91,970 square feet, more or less.

ZONING:

State Land Use District: Urban  
County of Hawaii CZO: Industrial

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

Tax Map Key (3) 9-5-002:065 is encumbered by Executive Order No. 2577, County of Hawaii, For road construction and maintenance baseyard site purposes.

TERM OF RIGHT-OF-ENTRY:

Five years.

CONSIDERATION:

Gratis.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with the Division of Land Management's Environmental Impact Statement Exemption List, approved by the Environmental Council and dated June 5, 2015, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class 5, No. 1, that states "Conduct surveys or collect data on existing environmental conditions (e.g., noise, air quality, water flow, water quality, etc.)." Exhibit B

DCCA VERIFICATION:

Applicant is a Government agency and therefore not required to register with the DCCA.

APPLICANT REQUIREMENTS:

Applicant shall:

- 1) Provide written concurrence from the County of Hawaii.

REMARKS:

**BACKGROUND:**

Under Governor's Executive Order (GEO) No. 322, dated April 12, 1928, the Waiohinu Court House lot at Waiohinu, Kau, Hawaii was set aside under the control and management of the then Board of Supervisors of the County of Hawaii for Court House and Tax Office Purposes.

Both the Court House and Tax Office were subsequently relocated to Naalehu, Kau. The County converted the site for use by the Department of Public Works as its Bureau of Road Construction and Maintenance, Kau District Office and Material Warehouse. By letter dated October 15, 1970, the County of Hawaii requested a change in usage of the site under GEO No. 322 to a permanent baseyard.

At its meeting of November 10, 1970 under agenda item F-2, the Board of Land and Natural Resources approved of and voted to recommend to the Governor of Hawaii, issuance of Governor's Executive Orders cancelling GEO No. 322 covering the former Waiohinu Court House lot at Waiohinu, Kau, Hawaii and re-setting the property aside to the County of Hawaii for road construction and maintenance baseyard purposes. GEO No. 2576, cancelling Executive Order No. 322, and GEO No. 2577 re-setting aside the property were signed by the Governor on August 17, 1971.

**REQUEST:**

The United States Geological Survey (USGS) is requesting a right-of-entry onto the subject property for the purposes of placing scientific equipment to, among other things, monitor seismic activity in order to rapidly report earthquake locations and magnitudes to the public, generate ShakeMaps for emergency responders, acquire seismic waveforms for the developing safer building codes, generate forecasts of future earthquakes, and issue Earthquake Early Warnings before strong shaking arrives. The agreement between the USGS and the County of Hawaii shall be for a period not to exceed five years (Exhibit C, sample agreement).

The location of the County baseyard encumbered under GEO No. 2577 has been determined by the USGS to be an ideal site for their monitoring equipment. As the data gathering operation does not conform to the allowed uses under the set aside, the USGS is requesting a right-of-entry from the Board of Land and Natural Resources.

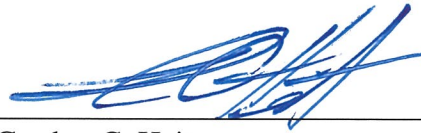
Staff believes the information provided by the USGS equipment will provide invaluable data with regards to seismic activity and is recommending the Board issue a right-of entry for a period not to exceed five (5) years. This right-of-entry will allow for the placement of seismic monitoring equipment on land encumbered under GEO No. 2577 to the County of Hawaii.

**RECOMMENDATION:** That the Board

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. Authorize the issuance of a right-of-entry permit to United States Geological Survey covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time;

- B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
- C. Authorize the Chairperson to issue future rights-of-entry to the Applicant for the temporary placement of Earthquake Monitoring Equipment on the subject land.

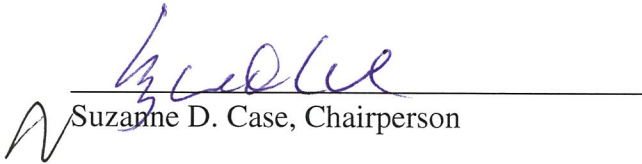
Respectfully Submitted,



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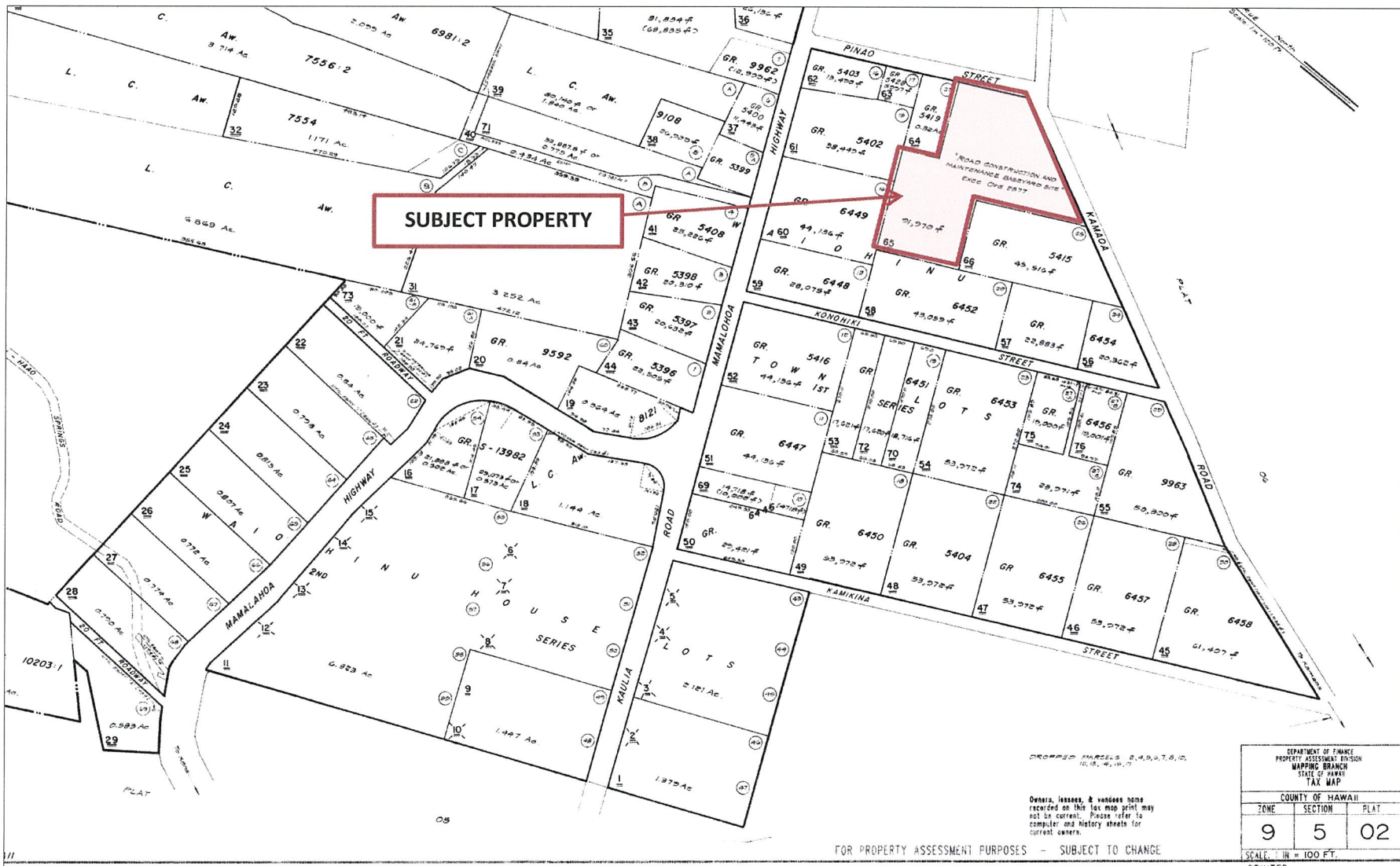
Gordon C. Heit  
District Land Agent

APPROVED FOR SUBMITTAL:



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Suzanne D. Case, Chairperson



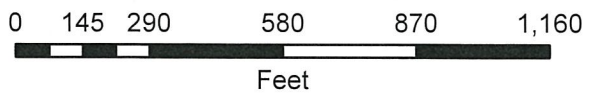
**SUBJECT PROPERTY**

DEPARTMENT OF FINANCE PROPERTY ASSESSMENT DIVISION MAPPING BRANCH STATE OF HAWAII TAX MAP		
COUNTY OF HAWAII		
ZONE	SECTION	PLAT
9	5	02
SCALE: 1" = 100 FT. PRINTED		

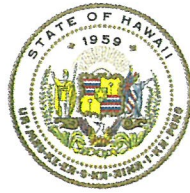
FOR PROPERTY ASSESSMENT PURPOSES - SUBJECT TO CHANGE

# EXHIBIT A

Executive Order No. 2577



DAVID Y. IGE  
GOVERNOR OF HAWAII



SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
FIRST DEPUTY

JEFFREY. T. PEARSON, P.E.  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

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

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

October 16, 2017

**DECLARATION OF EXEMPTION**

Regarding the preparation of an environmental assessment under the authority of  
Chapter 343, HRS and Section 11-200-8, HAR

Project Title:	Issuance of Right-of-Entry Permit to the United States Geological Survey, Onto State Lands Encumbered by Governor's Executive Order No. 2577
Project Number:	Ref. Governor's Executive Order No. 2577
Project Location:	Waiohinu, Kau, Hawaii, Tax Map Key: (3) 9-5-002:065
Chapter 343 Trigger(s):	Use of State Lands
Project Description:	The United States Geological Survey has requested a right-of-entry permit onto the State land covered by Governor's Executive Order No. 2577 issued to the County of Hawaii for road construction and maintenance baseyard purposes. Land Division believes the USGS will provide invaluable data for future earthquake predictions, and is amenable to providing written authorization in the form of the requested right-of-entry.
Consulted Parties:	Office of Conservation and Coastal Lands; County of Hawaii Planning Department
Authorization:	Delegation under Board of Land and Natural Resources' action of September 25, 2015, agenda Item D-17, as amended.
Exemption Class & Description:	<p>Activities and actions associated with this project fall under the following Exemption Classes and Descriptions which are included in the Exemption List for the Department of Land and Natural Resources (approved by the Environmental Council on June 5, 2015) <a href="http://oeqc2.doh.hawaii.gov/Agency_Exemption_Lists/State-Department-of-Land-and-Natural-Resources-Exemption-List-2015-06-05.pdf">http://oeqc2.doh.hawaii.gov/Agency_Exemption_Lists/State-Department-of-Land-and-Natural-Resources-Exemption-List-2015-06-05.pdf</a></p> <p>Exemption Class 5, "Basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource." Item 1, "Conduct surveys or collect data on existing environmental conditions (e.g., noise, air quality, water flow, water quality, etc.)"</p>

**EXHIBIT B**

Declaration of Exemption – ROE to USGS

Page 2

Determination:	The Board of Land and Natural Resources declares that this project will likely have minimal or no significant impact on the environment and is therefore exempt from the preparation of an environmental assessment under the above exemption classes.
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NP 2825 HI: Waimea Fire Stn. #9

## Site Access Agreement for Seismic Monitoring

### By U.S. Geological Survey

This is an agreement between Waimea FS#9 ("Property Owner or Designated Representative") and the U.S. Geological Survey ("USGS"), a bureau of the U.S. Department of the Interior, regarding seismic monitoring activities to be conducted by USGS at Kamuela, HI 96743

USGS monitors seismic activity in order to rapidly report earthquake locations and magnitudes to the public, generate ShakeMaps for emergency responders, acquire seismic waveforms for developing safer building codes, generate forecasts of future earthquakes, issue Earthquake Early Warnings before strong shaking arrives, support tsunami warning efforts, and publicly archive data for use by scientists who study earthquake rupture behavior, earth structure, wave propagation and attenuation, recurrence, and fault structure. As part of this effort, USGS wishes to conduct seismic monitoring on the Property, and the Property Owner /Designated Representative wishes to assist in the effort by providing USGS access to the Property for this purpose. In consideration of these purposes and the mutual promises set out in this agreement, USGS and the Property Owner/Designated Representative agree to the following:

1. Grant of License. Subject to the terms and conditions of this agreement, the Property Owner/Designated Representative hereby grants USGS and its representatives a license to enter the Property for the limited purpose of conducting seismic monitoring through the location, operation, and maintenance of and retrieval of data from seismic monitoring equipment (collectively, the "USGS Equipment") on and at the Property.
2. Limitations on Use.
  - a. Entry onto the Property by USGS and its representatives may occur only at reasonable times and after reasonable notice to the Property Owner /Designated Representative.
  - b. While on the Property, USGS and its representatives shall use all reasonable efforts not to interfere with the Property Owner/Designated Representative's use of the Property or delay any other activities that are being undertaken on the Property.
  - c. USGS and its representatives shall consult with the Property Owner /Designated Representative prior to locating any USGS Equipment on the Property and shall locate the USGS Equipment to minimize interference with the Property Owner's activities on the Property.
  - d. USGS shall locate, maintain, and operate the USGS Equipment on the Property in accordance with applicable law and with all reasonable diligence and precaution to avoid damage to the land, property or personnel of the Property Owner or Designated Representative.
  - e. USGS shall not permit any mechanics or other liens to be filed against the Property by reason of labor or materials furnished to the Property at USGS' request.

(Please return this 3-page "Site Access Agreement" in the enclosed envelope)

# EXHIBIT C

- f. Upon expiration or earlier termination of this agreement, USGS and its representatives shall remove the USGS Equipment and shall restore those areas of the Property on which the USGS Equipment was located to the condition existing prior to the commencement of activities under this agreement, reasonable wear and tear excepted.
3. Nature of the Work. USGS has advised the Property Owner/Designated Representative that in order to record seismic activity the USGS Equipment must be located so it does not move during seismic events. As a result, placement of the USGS Equipment on the Property may require construction of concrete pad(s) on Property to which the USGS Equipment is bolted and housed. The Property Owner/Designated Representative agrees to such installation or fixing of the USGS Equipment to the Property *provided that* (i) the work does not adversely affect the Property in which the USGS Equipment is located and (ii) USGS complies fully with the limitations on use set out in this agreement.
4. Condition of the Property. Property Owner/Designated Representative and USGS agree that the monitoring on and at the Property is solely for the purposes of research into earthquake hazards and that no inquiry regarding site specific conditions of any other kind at the Property has been or will be conducted by USGS. USGS further acknowledges and agrees that the Property Owner has made no representation and warranty concerning the condition of the Property or the fitness of its use for seismic monitoring.
5. USGS Equipment. All USGS Equipment located or used on or at the Property shall remain the property of the United States and will not become a fixture, as defined in applicable law, or lose identity as personal property by being attached to any real property. USGS shall have the right to remove any and all of the USGS Equipment at any time from the Property.
6. Liability. Under Federal law in effect at the time of the signing of this agreement, USGS is precluded from indemnifying, holding harmless, and defending the Property Owner/Designated Representative for use of the Property for the purposes set out in this agreement. Federal law does provide, however, through the Federal Tort Claims Act (28 U.S.C. §2671 *et seq.*), a means of addressing claims for personal injuries or property damage caused by the negligent or wrongful act or omission of any employee of the United States while acting within the course of his or her employment. Consistent with this legal authority, USGS agrees to cooperate, to the extent allowed by law, in the submission of claims pursuant to the Federal Tort Claims Act against the United States for personal injuries or property damage resulting from the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his or her employment, arising out of this agreement.
7. Term and Termination of the Agreement. This agreement shall be in effect from the date of the latest date signed and dated below by the Property Owner/Designated Representative and USGS and shall continue for 5 \* years from that date unless terminated (with or without cause) earlier by either the Property Owner/Designated Representative or USGS by providing fifteen (15) days advance notice in writing, sent by certified mail or a recognized overnight common carrier courier service that guarantees next-day delivery to the applicable designated representative of the other party, as follows:  
 (\* Not to exceed 5 years)

USGS:	Property Owner/D.R.: (Please fill in mailing address below)
U.S. Geological Survey	
Earthquake Science Center	
345 Middlefield Rd., MS-977	
Menlo Park, CA 94025	

*(Please return this 3-page "Site Access Agreement" in the enclosed envelope)*

8. Transfer or Sale of Property. Reasonably in advance of any assignment, transfer, sale (including without limitation by foreclosure or deed in lieu of foreclosure), or abandonment of the Property, the Property Owner shall give written notice (including applicable contact information) to (i) USGS of such action and to (ii) any assignee, transferee or purchaser of the Property of this agreement and the presence of USGS Equipment on the Property.
9. Authority. The Property Owner/Designated Representative represents and warrants that the Property Owner owns the Property and has the legal authority to enter into this agreement and grant the license it provides.


The Property Owner/Designated Representative and USGS hereby agree to the terms and conditions of this agreement as on the date(s) written below.

PROPERTY OWNER/ DESIGNATED REP.      U.S. GEOLOGICAL SURVEY:

\_\_\_\_\_  
Date

Aug. 29, 2017  
Date

\_\_\_\_\_  
Signature

  
Signature

\_\_\_\_\_  
Print Name

James A. Smith  
Print Name

\_\_\_\_\_  
Title

Field Operations Manager, NSMP  
Title

*(Please return this 3-page "Site Access Agreement" in the enclosed envelope)*

Legal Restrictions on Indemnification and Insurance Provisions

In Agreements with the U.S. Geological Survey

(Background on Paragraph 6 "Liability")

The U.S. Geological Survey is unable, as a matter of Federal law, to include two types of liability provisions in access agreements that many non-governmental entities are able to enter into for similar types of work: the U.S. Geological Survey may not agree to provisions requiring documentation of insurance coverage or indemnification.

The U.S. Geological Survey is an agency of the United States Government. A Federal agency cannot execute an indemnification/hold harmless agreement unless specifically authorized by the U.S. Congress in a particular matter or case. A Federal agency may only expend public funds when authorized by the U.S. Congress through appropriations acts or other legislation. An agreement to indemnify or hold harmless is in essence an agreement to pay funds to cover another party's losses in the future and in an indefinite (and potentially unlimited) amount. As a result, reviewing courts have concluded that indemnification/hold harmless agreements are contracts or obligations to pay money before that money is appropriated by Congress. An agreement to pay public funds before money is appropriated by Congress is a violation of the Federal Anti-Deficiency Act, 31 U.S.C. §§1341, 1350 and the Adequacy of Appropriations Act, 41 U.S.C. §11. California Pacific Utilities Co. v. United States, 194 Ct. Cl. 703 (1971).

Unless there is specific Congressional authorization for an indemnification/hold harmless provision in a particular access agreement, the U.S. Geological Survey may not legally agree to provide such a provision. It is able, however, to enter into a substitute provision that provides similar protection while meeting the requirements of Federal law. This substitute provision is based on the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* That Act provides for the payment of money damages for personal injuries or property damage caused by the negligent or wrongful act or omission of any employee of the United States while acting within the course of his or her employment. The language of this substitute provision is made in Item #6 in the "Site Access Agreement for Seismic Monitoring".

The U.S. Geological Survey also is unable to provide documentation of insurance coverage. The United States is "self insured" and does not carry liability insurance; instead, the Federal government disposes of its liabilities under the Federal Tort Claims Act. Absent specific statutory authority, a Federal agency cannot purchase insurance. *See, e.g.* 19 Comp.Gen. 798. As a result, the United States cannot produce a certificate of insurance. However, the Federal government can and will dispose of all proper claims under the Federal Tort Claims Act.