

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

October 11, 2019

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

Land Board Members:

SUBJECT: REQUEST APPROVAL TO AUTHORIZE THE CHAIRPERSON TO NEGOTIATE, ENTER INTO, AMEND, EXTEND, AND TERMINATE A MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, DIVISION OF FORESTRY AND WILDLIFE, HALEAKALA RANCH COMPANY, PUBLIC ACCESS TRAILS HAWAII, AND THE SIERRA CLUB, MAUI GROUP FOR PUBLIC USE AND ACCESS TO A PORTION OF HALEAKALA TRAIL, DISTRICT OF MAKAWAO, AHUPUA'A OF KALIALINUI, MAUI, TMK: (2)2-3-005:004;

AND

REQUEST TO AUTHORIZE THE CHAIRPERSON, PURSUANT TO CHAPTER 13-221, HAR, UPON A DETERMINATION OF NEED, TO ESTABLISH A REASONABLE SCHEDULE OF VISITING HOURS FOR ALL OR PORTIONS OF THE TRAIL, OR TO CLOSE OR RESTRICT THE PUBLIC USE OF ALL OR ANY PORTION THEREOF, WHEN NECESSARY FOR THE PROTECTION OF THE AREA OR FOR THE SAFETY AND WELFARE OF PERSONS OR PROPERTY, BY THE POSTING OF APPROPRIATE SIGNS INDICATING THE EXTENT AND SCOPE OF CLOSURE.

SUMMARY

The Haleakala Trail is a historic trail that provides a route through upcountry Maui to the summit of Haleakala, for which an approximately three-mile portion crosses through lands owned by Haleakala Ranch Company (HRC). Prior to a July 18, 2016 court order that settled ownership of the trail in fee simple by the state, HRC questioned state ownership of the trail and held that the use of the trail by the public presented operational, safety, and liability concerns. In an effort to provide for public use of the trail while addressing HRC's concerns, the Department and HRC entered into and maintained a memorandum of agreement that provided for guided hikes on the trail. Following the court order and settlement, citing changed circumstances, the parties terminated that agreement and agreed to enter into negotiations for a new agreement to provide for public use of the trail. Pursuant to that goal, the Division of Forestry and Wildlife has negotiated a draft Memorandum of Agreement with Haleakala Ranch Company, Public Access

Trails Hawaii (PATH), and the Sierra Club, Maui Group (SCM), to provide public access to and use of the Haleakala Trail. The proposed MOA provides quarterly guided hikes lead by a certified guide, establishes a web-based reservation system, and enables additional hikes to be requested by one of the Parties. This submittal requests approval to complete the negotiations and enter into that agreement.

BACKGROUND

The Haleakala Trail (also known as the “Haleakala Bridle Trail”, hereinafter referred to as the Trail), is known from historic records to provide a route from upcountry Maui to the summit of Haleakala (Exhibit 1). Remnant portions of the trail are found beyond the top of Olinda Road, where the trail traverses through lands owned by Haleakala Ranch Company (HRC), mauka to the Haleakala Highway. Beyond that point, the trail continues outside HRC property through Haleakala National Park.

In May 2000, following research conducted by the Division of Forestry and Wildlife (Division) in consultation with the Department of the Attorney General, the Division determined that there was significant evidence to support the conclusion that the trail is a non-vehicular public right-of-way owned by the state in fee simple under the jurisdiction of the Board of Land and Natural Resources, pursuant to the Highways Act of 1892 (Act), codified in §264-1(b), Hawaii Revised Statutes (HRS).

In a letter to the department dated May 15, 2003, HRC informed the department that it did not agree that the state owns the trail and provided an explanation to support its position. Concerned citizens notified the department that they believed that the state owned the trail and that the trail should be opened to the public for unregulated access. The department declined to do so, but engaged HRC in discussions to develop opportunities for public access to the trail through the establishment of scheduled guided hikes. Those discussions culminated in the development of a memorandum of agreement between the department and HRC that provided for guided hikes using a reservation system. The MOA was approved by the board at its May 11, 2012 meeting and executed by the parties upon approval.

Seeking relief, on January 18, 2011, Plaintiffs Public Access Trails Hawaii (PATH) et al. filed a claim against HRC and the state in circuit court. The lawsuit asked the court to determine that the state owns the trail and to order the state to open the trail. On December 26, 2012, the state entered into a Joint Prosecution Agreement (JPA; Exhibit 2) with the plaintiffs to pursue state ownership of the trail. The provisions of the JPA included the dismissal of claims against the state in the lawsuit. The JPA acknowledged that the plaintiffs did not agree on a number of issues related to the management, terms of use, and regulation of the use of the trail, identified as *Access and Management Issues* in section F of the JPA. The JPA further provided that the state would act in good faith to work with the plaintiffs to come to agreement on the access and management issues in the event that the plaintiffs prevailed in the lawsuit.

In April 2014, the plaintiffs and the state prevailed. A settlement agreement was reached, in which HRC agreed not to appeal the verdict. The final court order was filed on July 18, 2016. In a letter to Suzanne D. Case, Chairperson of the Board of Land and Natural Resources (Board), dated August 1, 2016, HRC requested that the MOA be terminated on the grounds that

ownership and management of the trail have now been determined to be the responsibility of the state. That request was granted by the Board on July 14, 2017 and the MOA was thereby terminated (Exhibit 3).

In its July 14, 2017 request to the Board to terminate the MOA, the Division indicated that it intended to engage in discussions with the parties of the JPA regarding the *Access and Management Issues*, and to pursue a potential agreement with the Plaintiffs or other appropriate entities to establish reasonable terms for public use of the trail that will better accommodate the public. Pursuant to that goal, staff convened a series of meetings with PATH, HRC, and SCM to negotiate and enter into a new MOA with those parties that would serve to enable the public to have reasonable access to the trail while addressing concerns that the landowner has expressed about impacts to operations, public safety, and liability. Those discussions have resulted in an agreement to enter into a new MOA, for which a draft is attached here as Exhibit 4, and for which approval is requested herein from the Board to authorize the Chairperson to enter into.

ANALYSIS

In its analysis of approaches to address the access and management issues cited in the JPA, the Division noted certain circumstances that are relevant to a consideration of the level and frequency of potential public use of the Trail. These include:

- HRC maintains that unguided public use of the trail may result in adverse impacts to its ranching operations, risks to public safety, and exposure to liability.
- The Trail is currently not marked and maintained, such that it is not generally possible for most members of the general public to be able to follow and stay on the trail without a guide, presenting the risk of trespassing onto HRC lands.
- The exact route of the trail identified in the court documents is not necessarily the most practical route to follow, such that in practice, it is likely, whether marked or not, that users will stray off of the exact location of the trail, thereby trespassing onto HRC property.
- Parking is currently limited both at the top and bottom of the trail and both locations present safety issues and capacity concerns.

In light of these considerations, the Division sought to develop an agreement that would provide for guided hikes using a reservation system, while ensuring that sufficient opportunities are provided to enable the public to have reasonable access to the trail. The terms of the MOA establish respective roles and responsibilities of the parties to establish and maintain a reservation system by which the public may participate in hikes along the trail that are interpretively guided by representatives from one or more of the parties. The proposed draft MOA provides for a reservation system using an existing platform operated by SRC for hikes led by their organization. Opportunities for hikes will be provided on the first Saturday of each quarter and may be scheduled on additional days with the mutual consent of the parties. Hikes will be led by trained, certified guides and limited to 20 participants.

With regard to land disposition and applicable land use regulations, the Trail presently comprises unencumbered state lands and will remain so unless set aside or designated otherwise by the Board. An alternative to that disposition would be to set aside the trail as a Na Ala Hele program trail under the Division's management. In coordination with Land Division staff, the Division evaluated these alternatives and noted the following considerations:

- The Division's Na Ala Hele Program is directed under HRS 198D to maintain an inventory of state trails and accesses, and to designate selected trails among that inventory as Program Trails.
- Program Trails are a subset of trails that are typically improved, constructed, and maintained in accordance with the program's trails management plan and standards.
- The vast majority of the hundreds of trails and accesses on the inventory are not designated as program trails and remain unencumbered state lands or are not owned by the department.

Given that the Division does not intend to improve, construct, and maintain the Trail at this time, that use is intended to be limited to the guided hikes, and that the proposed MOA is temporary in nature, it is our recommendation that the trail remain as an unencumbered inventory trail while its use as envisioned under the proposed MOA remains in effect. Therefore, under the proposed MOA, all activities on the Trail will be subject to regulation under chapter 13-221, Hawaii Administrative Rules (HAR). If, at any time in the future, the Division recommends use of the Trail that involves improvements, construction, and maintenance, we will reevaluate the disposition with consideration to set aside as a Program Trail.

Finally, we note that the Division received a request from HRC in a letter dated June 21, 2017 (Exhibit 5), that the state enforce a legal closure of the Trail during all times in which guided hikes are not scheduled pursuant to the MOA. Section 13-221-4, HAR, Closing of Areas, authorizes the Board or its authorized representative to establish visiting hours or close areas when necessary for the protection of the area or for the safety and welfare of persons or property, by the posting of appropriate signs. In reply to that request, staff communicated to HRC that the establishment of the guided hikes and reservation system created under the MOA is expected to alleviate the impacts from inappropriate public use of the Trail, and that we would prefer to enforce closure of the Trail only if a need to do so is demonstrated to exist after implementation of the guided hike program. Therefore, in acknowledgement that a need may arise in the future to exercise authorities under §13-221-4, staff recommends that the Board authorize the Chairperson to exercise those authorities upon a determination of need.

The Department therefore agrees under the MOA to limit public use of the Trail to the visiting hours provided through the guided hike system using reasonable efforts ensure that use is limited to the guided hikes provided under the terms of the MOA.

CHAPTER 343 ENVIRONMENTAL REVIEW

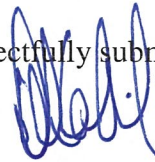
In accordance with the requirements of chapter 343, HRS, an environmental assessment is not required as this request does not include approval of an action, pursuant to §§343-2 and 343-5(a).

RECOMMENDATIONS

That the Board:

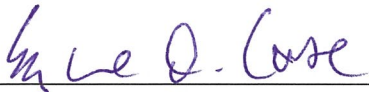
1. Approve that the Department enter into a Memorandum of Agreement with Haleakala Ranch Company, Public Access Trails Hawaii, and the Sierra Club, Maui Group to provide public access to and use of the Haleakala Trail.
2. Authorize the Chairperson to negotiate, amend to include any terms as may be appropriate, finalize, and execute the draft Memorandum of Agreement (Exhibit 4), subject to approval as to form by the Department of the Attorney General.
3. Authorize the Chairperson, pursuant to Chapter 13-221, HAR, upon a determination of need, to establish a reasonable schedule of visiting hours for all or portions of the Trail, or to close or restrict the public use of all or any portion thereof, when necessary for the protection of the area or for the safety and welfare of persons or property, by the posting of appropriate signs indicating the extent and scope of closure.

Respectfully submitted,



David G. Smith, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land & Natural Resources

MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF HAWAII, DEPARTMENT OF
LAND AND NATURAL RESOURCES, HALEAKALA RANCH COMPANY, PUBLIC ACCESS
TRAILS HAWAII, AND THE SIERRA CLUB, MAUI GROUP FOR PUBLIC ACCESS TO
HALEAKALA TRAIL

This Memorandum of Agreement, made and entered onto on this _____ day of _____, 2019, by and between the STATE OF HAWAII, by its Board of Land and Natural Resources, hereinafter referred to as "DLNR", HALEAKALA RANCH COMPANY, a Hawaii corporation, hereinafter referred to as "HRC", the Sierra Club, Maui Group and hereinafter referred to as SCM, and Public Access Trails Hawaii, hereinafter referred to as PATH, collectively referred to as "the Parties".

WITNESSETH

WHEREAS, the historic trail known as the Haleakala Trail (Trail) is a public trail under the jurisdiction of the Board of Land and Natural Resources; and

WHEREAS, the Trail comprises unimproved, unencumbered state lands subject to regulation under chapter 13-221, Hawaii Administrative Rules (HAR); and

WHEREAS, the Trail traverses HRC property identified as Tax Map Key (2) 2-3-005:004; and

WHEREAS, public use of the Trail may result in persons, purposefully or inadvertently, entering onto HRC property; and

WHEREAS, PATH and SCM are community-based non-profit organizations that organize and lead hikes for their constituents on Maui; and

NOW, THEREFORE, it is mutually agreed by the Parties hereto that:

1) Hikes

- a) Shall be by reservations as provided under this agreement only, pursuant to chapter 13-221-4, Hawaii Administrative Rules; and
- b) Shall be confined to pedestrian hiking only, i.e., no bicycles, skateboards, motorcycles, or other vehicles, or horses, pets, or other animals will be allowed, with the exception of animals serving disabled persons who are able to walk the trail with the assistance of their service animals; and
- c) Shall be limited to not more than 20 participants, not including members of the Parties; and

- d) Shall be conducted on the Trail only, and not on HRC property, unless directed otherwise by a representative of HRC, or in the event of an emergency or other circumstance for safety reasons; and
- e) Shall be accompanied by a representative of one of the Parties, who will serve as the guide; and
- f) Shall be subject to this agreement and shall be in compliance with Chapter 13-221, HAR, Unencumbered Lands.

2) The Parties will:

- a) Cooperate to establish, lead, and maintain, for use by the general public, a program of guided Hikes on the Trail, consistent with the terms of this agreement; and
- b) Cooperate to establish a guide certification training module to be completed by any representatives of the Parties serving as guides; and
- c) Administer the guide certification training module to any of their representatives designated to serve as guides; and
- d) Ensure that any representatives serving as guides have satisfactorily completed the guide certification training module; and
- e) Designate certified guides to lead hikes through the reservation system; and
- f) Require that all participants in hikes have signed the Parties' trail use agreement and waiver of liability, attached herein as Exhibit A, and submit copies of those to DLNR; and
- g) Notify DLNR of any injuries, hazards, unsafe conditions, damage, disrepair, or other issues on the trail or adjacent areas that warrant attention or remedy; and
- h) Cooperate to develop a set of interpretive materials and information to be provided to participants on the Hikes.

3) SCM will:

- a) Maintain a web based reservation system to enable the public to participate in scheduled Hikes lead by representatives of the Parties who will serve as certified guides; and
- b) Schedule a Hike on the first Saturday of each quarter, or as soon after as practicable in the case that a Hike must be cancelled for safety or other unanticipated reasons; and

- c) Schedule Hikes on additional days upon a request from one of the Parties, with the mutual agreement of the Parties. The requesting Party shall be responsible to provide a guide for the Hike; and
- d) Designate a representative to serve as a certified guide, in coordination with the Parties, to lead two of the annual quarterly hikes, unless circumstances warrant otherwise.

4) HRC will:

- a) Designate a representative to serve as a certified guide, in coordination with the Parties, to lead two of the annual quarterly hikes, unless circumstances warrant otherwise; and
- b) Assist with Hikes to provide appropriate or relevant information, guidance, routing, and direction to ensure public safety and compatible activities, including allowing participants to enter upon portions of HRC lands adjacent to the Trail, if warranted, under HRC direction.

5) DLNR will:

- a) Make reasonable efforts to limit public use of the trail to the visiting hours provided by the Hikes conducted under this agreement, including through the exercise of authorities provided under Section 13-122-4, HAR; and
- b) Provide technical assistance, interpretive materials, and signage, as may be appropriate, for use on the trail or Hikes; and
- c) Assist with Hikes to provide appropriate or relevant information, guidance, and direction to ensure public safety and compatible activities.

This Memorandum of Agreement may be amended by mutual agreement of the Parties or terminated by any of the Parties upon 60-days-notice to the Parties.

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Agreement as of the date first above written.

HALEAKALA RANCH COMPANY

By: _____

Title: _____

SIERRA CLUB HAWAII, MAUI GROUP

By: _____

Title: _____

PUBLIC ACCESS TRAILS HAWAII

By: _____

Title: _____

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL
RESOURCES

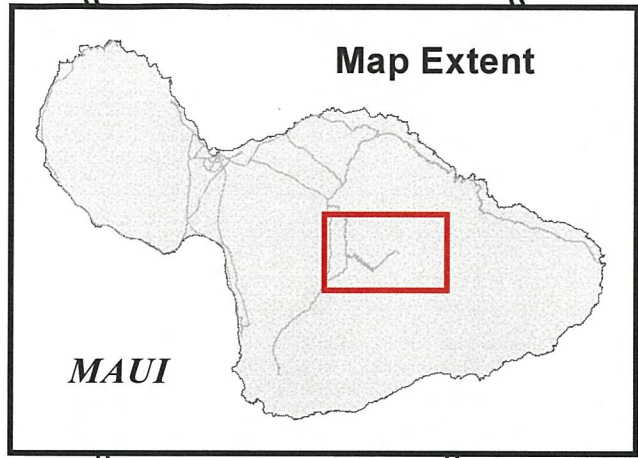
By: _____

Suzanne D. Case

Chairperson, Board of Land and Natural
Resources

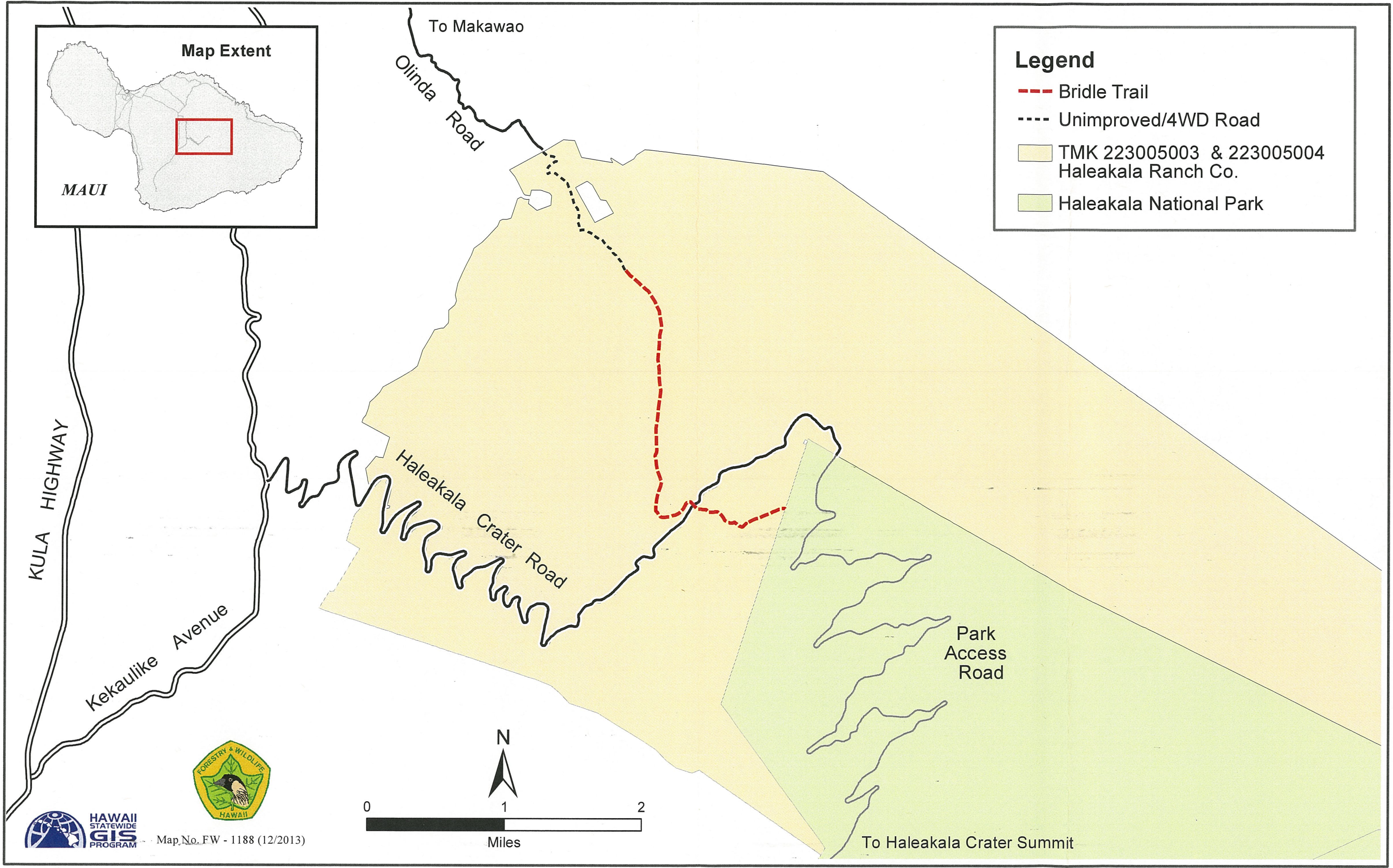
APPROVED AS TO FORM:

Deputy Attorney General

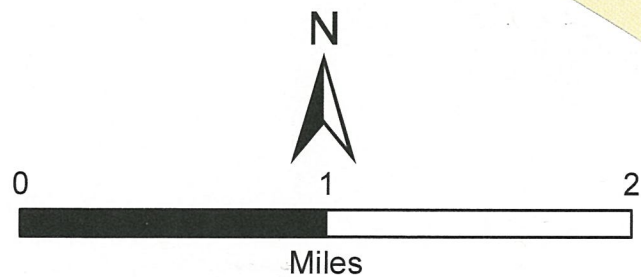


Legend

- Bridle Trail
- Unimproved/4WD Road
- TMK 223005003 & 223005004
Haleakala Ranch Co.
- Haleakala National Park



Map No. FW - 1188 (12/2013)



JOINT PROSECUTION AGREEMENT

This Joint Prosecution Agreement ("*Agreement*") is entered on this 26 day of December, 2012, by and between the "Plaintiffs," identified below, and the "State," identified below. This Agreement is subject to Court approval. If not approved by the Court, then the Agreement is null and void, *ab initio*.

A. Definitions

"*Certified Class Members*" means collectively the class action members certified by Court Order, filed December 2, 2011, and modified by Court Order filed September 10, 2012.

"*Plaintiffs*" means collectively: PUBLIC ACCESS TRAILS HAWAII, a Hawai'i Nonprofit Corporation, and DAVID BROWN, JOE BERTRAM, III; KEN SCHMITT, individually, and on behalf of the Certified Class Members.

"*State*" means collectively: WILLIAM AILA, JR. in his official capacity as the Director of the State of Hawai'i DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawai'i BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES.

"*Parties*" means collectively Plaintiffs and State.

"*HRC*" means Defendant Haleakala Ranch Company.

"*Court*" means the Court of the Second Circuit, State of Hawai'i.

"*Complaint*" means the complaint brought by Plaintiffs on behalf of themselves and the Certified Class Members against the State and HRC, filed in Court on January 18, 2011.

"*Action*" means Civil Number 11-1-0031(3), related to the Complaint.

"*Trail*" means that trail, identified in historical maps and documents by names such as "Haleakala Trail," "Haleakala Bridle Trail," "Road to Haleakala," "Haleakala Mountain Trail," "Haleakala road to the summit," or "government road," and as further described in the Complaint, which crosses lands owned by HRC.

"*HRS*" means Hawai'i Revised Statutes.

"*HRCP*" means the Hawai'i Rules of Civil Procedure.

"*Favorable Ruling*" means a final judgment in favor of either of the Parties on the Joint Prosecution Claim either from the Court if no appeal is taken or after all

appeals have been fully resolved. If any appeal results in remand, then the term means a final judgment by the Court after remand.

B. Background

1. The Complaint includes seven claims for relief enumerated as Count I through Count VII.

2. Two of the claims for relief are Count III (relating to the Highways Act of 1892 and HRS § 264-1) and Count IV (relating to quiet title and HRS ch. 669), which claims generally allege that the Court should vest title to the Trail in the State of Hawai'i, either in fee simple or a lesser interest, such as an easement (collectively "*Joint Prosecution Claim*").

3. The Court recently granted Plaintiffs' motion to file a first amended complaint to allege or reallege a § 1983 claim against the State ("*the Federal Claim*"), which has not been filed with the Court, in light of the Parties' efforts to reach this Agreement.

4. The Federal Claim and Counts I, II, V, VI and VII of the Complaint are hereinafter referred to as the "*Remaining Claims*."

5. The Parties desire to jointly prosecute against HRC the Joint Prosecution Claim, subject to the terms of this Agreement.

C. Contingencies and Related Consideration by Respective Parties

1. The terms and conditions of this Agreement are contingent on the following:

- a. That the Court approves this Agreement as to the Certified Class Members, based on a motion that shall be filed by Plaintiffs consistent with the terms of this Agreement ("*Agreement Motion*").
- b. That the Court grants the State leave to file a cross-claim against HRC substantially in the form attached hereto as **Exhibit A** (the "*Cross-Claim*"), as requested in the Agreement Motion, or similar relief to the State as necessary to permit it to prosecute the Joint Prosecution Claim against HRC.
- c. That the Court grants Plaintiffs leave to dismiss without prejudice the claims against the State in the Action, as requested in the Agreement Motion.

D. Other Consideration by the State and Related State Issues

1. The State shall, at minimum, join with the Plaintiffs on substantive motions in Court against HRC with respect to the Joint Prosecution Claim, or join and support any appellate arguments in either or both of the Hawai'i appellate courts related to the Joint Prosecution Claim.

2. The State shall coordinate with Plaintiffs in the preparation of evidence for motions, evidentiary hearings, and/or trial against HRC on the Joint Prosecution Claim. This may include, but not be limited to, assisting with and providing declarations or testimony from experts from the State of Hawai'i, such as the Na Ala Hele abstractor on title or abstract issues.

3. In the event that Plaintiffs prevail on any claims for relief against HRC, the State shall not object to any efforts by Plaintiffs to seek from HRC attorneys' fees and costs of suit pursuant to the private attorney general doctrine, and/or as otherwise permitted by law.

E. Other Consideration by Plaintiffs and Related Plaintiffs Issues

1. Plaintiffs shall join in, or cooperate with, efforts taken by State to affirmatively prosecute the Joint Prosecution Claim.

2. Plaintiffs shall not file the Federal Claim, except upon the conditions set forth in Section F of this Agreement.

3. If both of the Parties fail in obtaining a Favorable Ruling on the Joint Prosecution Claim, and the Court determines title to the Trail is vested in HRC, Plaintiffs and the Certified Class Members shall not, with respect to the Trail, reallege any claim, and/or allege any other claims, against the State (including any agency or employee of the State).

4. Notwithstanding the foregoing, this Agreement shall not in any way affect the Remaining Claims and prayers for relief against HRC.

F. Agreements Relating to Access and Management Issues

1. In the event the Court determines that title to the Trail is vested in the State of Hawai'i, there remain the following types of issues over which the Parties have not reached agreement, hereinafter referred to collectively as the "*Access and Management Issues*": (1) the rights of the public to access the Trail; (2) the extent of the public's right of access; (3) whether the State has authority to limit or deny public access to the Trail;

(4) how the Trail should be maintained, improved, preserved and protected for the public's benefit; (5) whether HRC's ranch activities should be a factor in considering the public's access to the Trail; (6) the extent of State of Hawai'i funding and other resources available, if any, for managing the Trail; (7) whether management of the Trail by the State is necessary; and (8) any similar types of issues.

2. Notwithstanding the terms of this Agreement, neither of the Parties waives any of their respective rights they may have with respect to the Access and Management Issues.

3. In the event either of the Parties obtains a Favorable Ruling on the Joint Prosecution Claim, the following provisions shall apply:

- a. The Parties shall, as soon as practicable thereafter, engage in good faith settlement discussions, with or without participation of HRC, with the goal of arriving at agreement on the Access and Management Issues in the form of a "*Trail Access and Management Agreement*;" provided the Parties acknowledge any such Agreement will require at a minimum the approval of the Hawai'i Board of Land and Natural Resources in an open meeting noticed and conducted pursuant to HRS chapter 92 and any other applicable law.
- b. If the Parties execute a Trail Access and Management Agreement without the participation of HRC, they shall thereafter collectively make demands upon HRC necessary to fulfill it.
- c. If HRC refuses to fully accept the Trail Access and Management Agreement, the State shall take necessary and appropriate action to enforce said Agreement including but not limited to seeking judicial relief consistent with said Agreement. Plaintiffs, individually and/or on behalf of the Certified Class Members, may seek to join or intervene in any such action, but are not required to do so.
- d. If the Parties cannot reach agreement on the Access and Management Issues after good faith settlement efforts between themselves the following provisions shall apply:
 - i. Plaintiffs may seek to enforce against HRC, including seeking injunctive relief, any right of public access they claim they have as the result of either of the Parties prevailing on the Joint Prosecution Claim.

- ii. Plaintiffs on their own behalf and on behalf of the Certified Class Members may file a new action in the Second Circuit Court, naming the State (or its agencies or employees) as defendants, including, but not limited to, alleging or realleging against the State the Remaining Claims and the Federal Claim, and any new facts. The State shall not claim that the new action is barred by dismissal of claims pursuant to this Agreement but reserves all other rights and defenses, including the right to seek removal to federal court.

G. Miscellaneous Provisions

1. *Privileges and Work Product.* In pursuing the Joint Prosecution Claim against HRC, the Parties shall maintain between the Parties confidences regarding their strategy and drafts and assert and defend the attorney-client privilege or work product doctrine to the extent permitted by law in joint prosecution of claims by co-plaintiffs.
2. *Fees and Costs.* As to each other, each of the Parties shall bear their own attorneys' fees and costs with respect to this Agreement and with respect to the Action.
3. *Cooperation.* The rule of good faith and fair dealing shall apply to this Agreement and all parts thereof, and all actions contemplated thereto. In addition the Parties and their attorneys shall reasonably cooperate with each other in carrying out this Agreement.
4. *Effect of Material Breach.* A Party's sole remedy for a material breach is to seek from the Court a return to the status quo before this Agreement was signed. If either of the Parties believes there is a material breach of this Agreement, the Party shall provide notice and a two week opportunity to cure. If after two weeks the noticing Party believes the other Party has failed to cure or sufficiently cure the material breach, the Party may seek Court relief to return the case to the status quo before this Agreement was signed.
5. *No Party Deemed Drafter.* The Parties each having reviewed this Agreement, and each being represented by counsel agree that for purposes of construction of any provision of this Agreement, no party shall be deemed to be the sole author of any of the provisions in this Agreement, including its exhibits.
6. *Choice of Law, Venue.* This Agreement shall be governed by the laws of the State of Hawai'i and the exclusive venue for any dispute regarding this Agreement or its terms shall lie in the Circuit Court of the Second Circuit of the State of Hawai'i,

provided, however, that the State reserves the right to remove any claims to the federal district court to the extent removal is authorized by law.

7. *Complete Terms.* This Agreement supersedes each and every other prior agreement between the Parties; the terms are contractual and not a mere recital. This Agreement shall not be altered, amended, or modified except by a writing executed by the Parties.

8. *No Admission.* This Agreement, its contents, and the partial settlement it evidences, are not to be construed as an admission of any claim made by Plaintiffs, but are to be construed strictly as a compromise and partial settlement of claims between the Parties hereto for the purpose of avoiding controversies, litigation, and expenses.

9. *Survival of Provisions.* If any provision hereof or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remaining provisions hereof, or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby.

10. *Counterpart Execution.* The Parties agree that this Agreement and its exhibits may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the Parties hereto, notwithstanding all of the Parties are not signatory to the original or the same counterparts. For all purposes, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

WHEREFORE, the undersigned Parties hereby sign and execute this Joint Prosecution Agreement on the date set forth above.

"PLAINTIFFS"

PUBLIC ACCESS TRAILS HAWAII

By its President
David H. Brown

David H. Brown

Ken Schmitt


Joe Bertram, III

Approved as to form:

Tom Pierce
Attorney for Plaintiffs

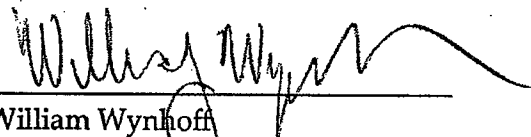
"STATE"

WILLIAM AILA, JR. in his official capacity as the Director of the State Of Hawai'i DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawai'i BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES



By Chairperson of Board of Land and Natural Resources
William Aila, Jr.

Approved as to form:



William Wynhoff
Deputy Attorney General

WHEREFORE, the undersigned Parties hereby sign and execute this Joint Prosecution Agreement on the date set forth above.

"PLAINTIFFS"

PUBLIC ACCESS TRAILS HAWAII

David Henderson Brown

By its President
David H. Brown

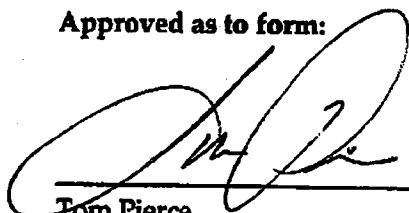
David Henderson Brown

David H. Brown

Ken Schmitt

Joe Bertram, III

Approved as to form:



Tom Pierce
Attorney for Plaintiffs

"STATE"

WILLIAM AILA, JR. in his official capacity as the Director of the State Of Hawai'i DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawai'i BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES

By Chairperson of Board of Land and Natural Resources
William Aila, Jr.

Approved as to form:

William Wynhoff
Deputy Attorney General

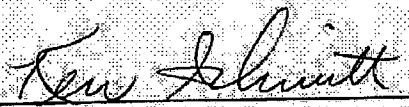
WHEREFORE, the undersigned Parties hereby sign and execute this Joint Prosecution Agreement on the date set forth above.

"PLAINTIFFS"

PUBLIC ACCESS TRAILS HAWAII

By its President
David H. Brown

David H. Brown



Ken Schmitt

Joe Bertram, III

Approved as to form:

Tom Pierce
Attorney for Plaintiffs

"STATE"

WILLIAM AILA, JR. in his official capacity as the Director of the State Of Hawai'i DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawai'i BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES

By Chairperson of Board of Land and Natural Resources
William Aila, Jr.

Approved as to form:

William Wynhoff
Deputy Attorney General

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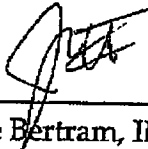
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By Chairperson of Board of Land and Natural Resources
William Aila, Jr.

Approved as to form:

William Wynhoff
Deputy Attorney General

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

July 14, 2017

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

Land Board Members:

SUBJECT: REQUEST APPROVAL TO TERMINATE MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, DIVISION OF FORESTRY AND WILDLIFE, NA ALA HELE TRAILS AND ACCESS PROGRAM AND HALEAKALA RANCH COMPANY FOR ACCESS TO HALEAKALA BRIDLE TRAIL, DATED MAY 11, 2012.

BACKGROUND

The Highways Act of 1892 (Act), codified in §264-1(b), Hawaii Revised Statutes (HRS), provides that all trails and non-vehicular rights-of-way in existence at the time of the Act or later built by the government are declared to be public rights-of-way:

"All trails, and other non-vehicular rights-of-way in the State declared to be public rights-of-ways by the Highways Act of 1892, or opened, laid out, or built by the government or otherwise created or vested as non-vehicular public rights-of-way at any time thereafter, or in the future, are declared to be public trails. A public trail is under the jurisdiction of the state board of land and natural resources unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county".

Applicability of the Act in practice requires that a records search and title abstract be conducted to develop evidence of state ownership of a trail of interest pursuant to this law.

The Division performed such an abstract in May 2000 in order to determine whether an alleged historic trail crossing private lands owned by Haleakala Ranch Company (HRC) is a public trail. The subject trail is thought to traverse HRC's working livestock ranch from the mauka end of Olinda Road to the Haleakala Highway. Beyond that point, the trail continues outside HRC property through Haleakala National Park. The exact alignment was unknown, although there are wooden fingerposts and remnants of stone ahu that may mark the historic route (Exhibit 1).

Based on the records search and abstract, in consultation with the Department of the Attorney General, the Division concluded that there was significant evidence to support state ownership of the trail.

In a letter to the department dated May 15, 2003, HRC informed the department that it did not agree that the state owns the trail and provided an explanation to support its position. Certain concerned citizens notified the department that they believed that the state owned the trail and that the trail should be opened to the public for unregulated access. The department declined to do so, but engaged HRC in discussions to develop opportunities for public access to the trail through the establishment of scheduled guided hikes. Those discussions culminated in the development of a memorandum of agreement (MOA; Exhibit 2) between the department and HRC that provides for a minimum of two guided hikes per year, scheduled using a reservation system maintained by the department, and led by a representative from the department or HRC. The MOA was approved by the board at its May 11, 2012 meeting and executed by the parties upon approval.

Seeking relief, on January 18, 2011, Plaintiffs Public Access Trails Hawaii (PATH) et al. filed a claim against HRC and the state in circuit court. The lawsuit asked the court to determine that the state owns the trail and to order the state to open the trail. On December 26, 2012, the state entered into a Joint Prosecution Agreement (Agreement; Exhibit 3) with the plaintiffs to pursue state ownership of the trail. The provisions of the Agreement included the dismissal of claims against the state in the lawsuit. The Agreement acknowledged that the plaintiffs did not agree on a number of issues related to the management, terms of use, and regulation of the use of the trail, identified as *Access and Management Issues* in section F of the Agreement. The Agreement further provided that the state would act in good faith to work with the plaintiffs to come to agreement on the Access and Management Issues in the event that the plaintiffs prevailed in the lawsuit.

In April 2014, the plaintiffs and the state prevailed. A settlement agreement was reached, in which HRC agreed not to appeal the verdict. The final court order was filed on July 18, 2016. In a letter to Suzanne D. Case, Chairperson of the Board of Land and Natural Resources, dated August 1, 2016, HRC requested that the MOA be terminated on the grounds that ownership and management of the trail have now been determined to be the responsibility of the state (Exhibit 4). The MOA provides for termination upon approval by this Board.

ANALYSIS

At the time of the establishment of the MOA, HRC disputed any claims of state ownership of the Haleakala Bridle Trail. The purpose of the MOA was to establish an agreement that would allow for reasonable terms for public use, while addressing concerns expressed by the landowner concerning ownership, liability, and impacts on HRC's ranching operations taking place on the lands through which the trail passes. The conditions of the MOA included the establishment of a sign-up system, scheduling of guided hikes, and regular coordination with HRC on routes and events. Under the MOA, all hikes are to be guided by a department, HRC, or third party representative agreeable to the department and HRC.

The maintenance of the reservation system and the guided hikes requires a significant commitment of staff time that is unusual for a public trail and places a substantial burden of expense on an already stretched Na Ala Hele program. Given the legal resolution of the ownership of the trail, the considerable expense required to implement the MOA, and the obligations of the state to act in good faith to resolve the *Access and Management Issues* identified in the Joint Prosecution Agreement, staff concurs that termination of the MOA with HRC is appropriate at this time. Staff is still pursuing potential agreement with the Plaintiffs or other appropriate entities to establish reasonable terms for public use of the trail that will better accommodate the public. Pursuant to that goal, staff have been in contact with PATH, HRC, and the Maui Chapter of the Sierra Club to engage in discussions to resolve the *Access and Management Issues* identified in the Agreement.

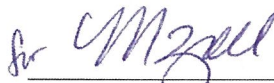
CHAPTER 343 ENVIRONMENTAL REVIEW

In accordance with the requirements of chapter 343, HRS, an environmental assessment is not required as this request does not include approval of an action, pursuant to §§343-2 and 343-5(a).

RECOMMENDATIONS

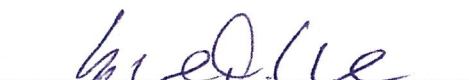
That the Board of Land and Natural Resources approve that the subject MOA be terminated, effective immediately.

Respectfully submitted,

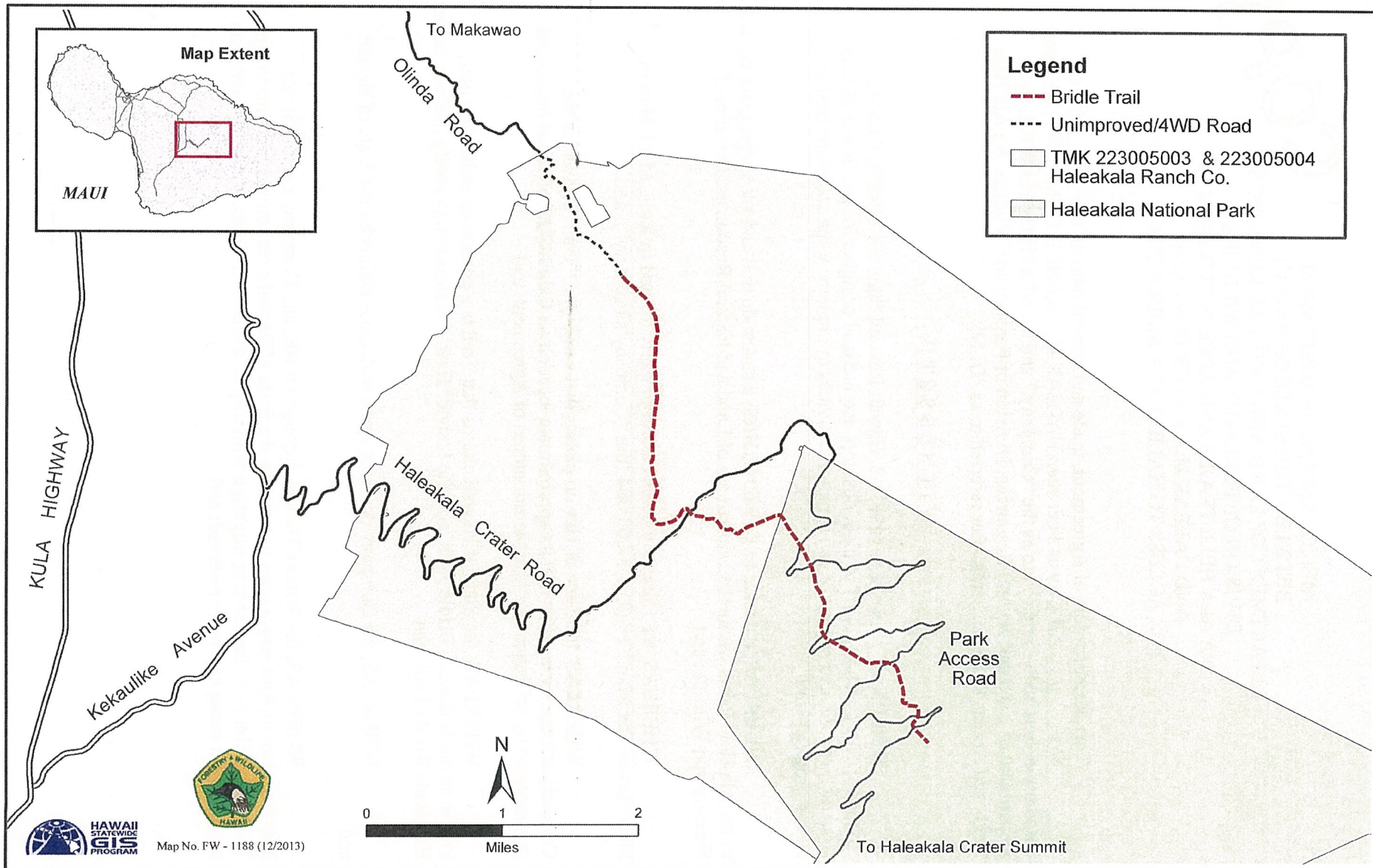


David G. Smith, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land & Natural Resources



MEMORANDUM OF AGREEMENT
BETWEEN THE STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF FORESTRY AND WILDLIFE
NA ALA HELE TRAILS AND ACCESS PROGRAM
AND HALEAKALA RANCH COMPANY
FOR ACCESS TO HALEAKALA BRIDLE TRAIL

COPY

This Memorandum of Agreement, made and entered onto on this 11 day of May, 2012, by and between HALEAKALA RANCH COMPANY, a Hawaii corporation, hereinafter referred to as the "Company," and the STATE OF HAWAII, by its Department of Land and Natural Resources, Division of Forestry and Wildlife, Na Ala Hele Trails and Access Program, hereinafter referred to as "DLNR."

WITNESSETH:

WHEREAS, pursuant to §198D-2, Hawaii Revised Statutes ("HRS"), DLNR is charged with the responsibility to plan, develop, acquire land or rights for public use of land, construct, restore, and engage in coordination activities to implement the statewide trail and access program; and

WHEREAS, pursuant to § 198D-2, HRS, a statewide trail and access program known as Na Ala Hele exists within the Department of Land and Natural Resources, Division of Forestry and Wildlife; and

WHEREAS, the Company owns certain property located in Kula, Maui, Hawaii, identified as Tax Map Key (2) 2-3-005:004 (the "Company's Property"); and

WHEREAS, the State of Hawaii claims that a trail (the "Trail") traverses the Company's Property, as shown in its approximate location on Exhibit "A" attached hereto and incorporated by reference into this Memorandum of Agreement; and

WHEREAS, the State of Hawaii claims that Trail is a portion of an historic trail, known as the Haleakala Bridle Trail, and the State of Hawaii claims real property interests in the Haleakala Bridle Trail; and

WHEREAS, the Company does not agree with those claims by the State of Hawaii; and

WHEREAS, the State of Hawaii, through DLNR, and Company agree that this Memorandum of Agreement does not resolve the State of Hawaii's real property claims to the Trail or any claims in the pending litigation with respect thereto, all rights, claims and defenses of the parties being expressly reserved; and

WHEREAS, the Company desires to provide, without charge, public access to and recreational use of the Trail.

WHEREAS, it is agreed that the access to and use of the Trail permitted under this Memorandum of Agreement is intended and understood to be use of the Company's Property for "recreational purposes" within the meaning of the Hawaii Recreational Use Statute, HRS chapter 520;

NOW, THEREFORE, it is mutually agreed by the parties hereto that:

A. The Company will:

1. Permit members of the public and representatives of Na Ala Hele access over and across the Trail on the Company's Property without charge for a minimum of two (2) hiking events ("Event") each year to meet reasonable demand; provided that:

a. Each Event shall take place on such dates and during such times as the Company shall determine in coordination with DLNR. The Company reserves the right to reschedule within 60 days any Event at any time if the Company determines, in its discretion, that the condition of the Trail, the weather, or any circumstance hazardous to the public so requires.

b. The Event will be confined to pedestrian hiking only, i.e., no bicycles, skateboards, motorcycles, or other vehicles, or horses, pets, or other animals will be allowed, with the exception of animals serving disabled persons who are able to walk the trail with the assistance of their service animals.

c. Due to potential dangers associated with being on a working livestock ranch, participants shall not be permitted to hike or otherwise access or use any other portions of the Company's Property.

2. Define the specific route for each Event and, in coordination with DLNR, arrange the attendance of a Company and/or DLNR representative, or other Third Party agreeable to the Company and DLNR, to lead the hiking event.

3. Provide a plainly worded Company waiver or release of liability form, which shall be signed by each member of the public, or a parent or guardian for a child younger than eighteen (18) years of age, as a requirement for participation in the hiking event. The Company shall not permit any person to participate in an Event until he or she (or, if applicable, their parent or legal guardian) has signed both Company and DLNR waiver forms.

4. Permit the passage of emergency vehicles and equipment necessary to provide assistance when a wildland fire or injury to Event participants occurs.

5. All hiking events will be subject to this agreement and HRS chapter 198D.

B. DLNR will:

1. Defend and indemnify to the full extent allowed and specified in HRS § 198D-7.5 (as the same may from time to time be amended) the Company, its officers, directors, stockholders, employees, representatives, agents, successors, and assigns, from claims or losses caused by or resulting from the public's use of the Haleakala Bridal Trail or the Company's Property under the terms of this Memorandum of Agreement.
2. Have the authority to terminate and/or reschedule any Event within 60 days upon assessment that conditions are considered too hazardous and dangerous for public access.
3. Establish a hike information and reservation system for public participation in the Events.
4. Provide a plainly worded DLNR waiver or release of liability form, which shall be signed by each member of the public, or a parent or guardian for a child younger than eighteen (18) years of age, as a requirement for participation in the hiking event. DLNR shall not permit any person to participate in an Event until he or she (or, if applicable, their parent or legal guardian) has signed both Company and DLNR waiver forms.
5. In coordination with the Company, arrange for the attendance of a representative of Na Ala Hele or a trail guide authorized by the Company at each Event.

C. The Company and DLNR will require each member of the public participating in an Event to do the following:

1. Be responsible for determining his/her own ability to complete the hike along the Trail. Each child under the age of eighteen (18) years shall have the permission of a parent or guardian.
2. Prior to or at the time of the Event, submit to DLNR and/or the Company properly executed Company and DLNR waiver/release forms.
3. Be responsible for the clean up and removal of all trash and debris resulting from the public member's participation in the Event.
4. Notify the accompanying Company and/or DLNR representative immediately upon discovering damage to or disrepair of the Company's Property resulting from any Event.
5. Notify the accompanying Company and/or DLNR representative immediately upon discovering any hazardous or unsafe conditions on or within fifty (50) feet of the Trail or on the Company's Property.

6. Notify the accompanying Company and/or DLNR representative immediately of any injuries to persons or damage to property that may have occurred as a result of the Event.

7. When bringing children, supervise them at all times. All children under the age of eighteen (18) years of age shall be accompanied by an adult chaperone.

8. Arrange transportation to the trail head and a pickup at the destination upon hike completion.

This Memorandum of Agreement may be amended upon the mutual approval of the Company and the Chairperson of the Board of Land and Natural Resources or his/her representative or terminated upon approval of the Board of Land and Natural Resources.

IN WITNESS WHEREOF, Haleakala Ranch Company and the State of Hawaii have executed this Memorandum of Agreement as of the date first above written.

HALEAKALA RANCH COMPANY

By: *Don G. S.*

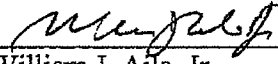
Its *President.*

By: *JCCC*

Its *Vice President / General Man.*

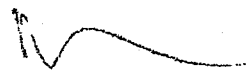
Approved by the Board of Land and Natural
Resources on May 11, 2012

STATE OF HAWAII, DEPARTMENT
OF LAND AND NATURAL RESOURCES

By: 
William J. Aila, Jr.

Chairperson of the Board of Land and Natural
Resources

APPROVED AS TO FORM:


William J. Wynhoff
Deputy Attorney General

STATE OF HAWAII

)
) SS.
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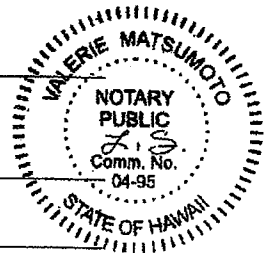
COUNTY OF

On this 16TH day of MAY, 2012, before me personally appeared
DON YOUNG and J. SCOTT MEIDEL, to me personally
known, who, being by me duly sworn or affirmed, did say that such person(s) executed the
foregoing instrument as the free act and deed of such person(s), and if applicable in the capacity
shown, having been duly authorized to execute such instrument in such capacity.

Valerie Matsumoto
Notary Public, State of Hawaii

VALERIE MATSUMOTO
(Print name)

My commission expires: FEB 29 2016



NOTARY CERTIFICATION

Document Date: Not Dated Number of Pages: 6

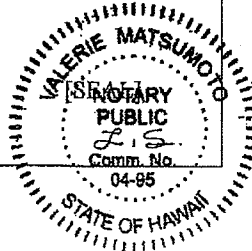
Name: Valerie Matsumoto Second Circuit

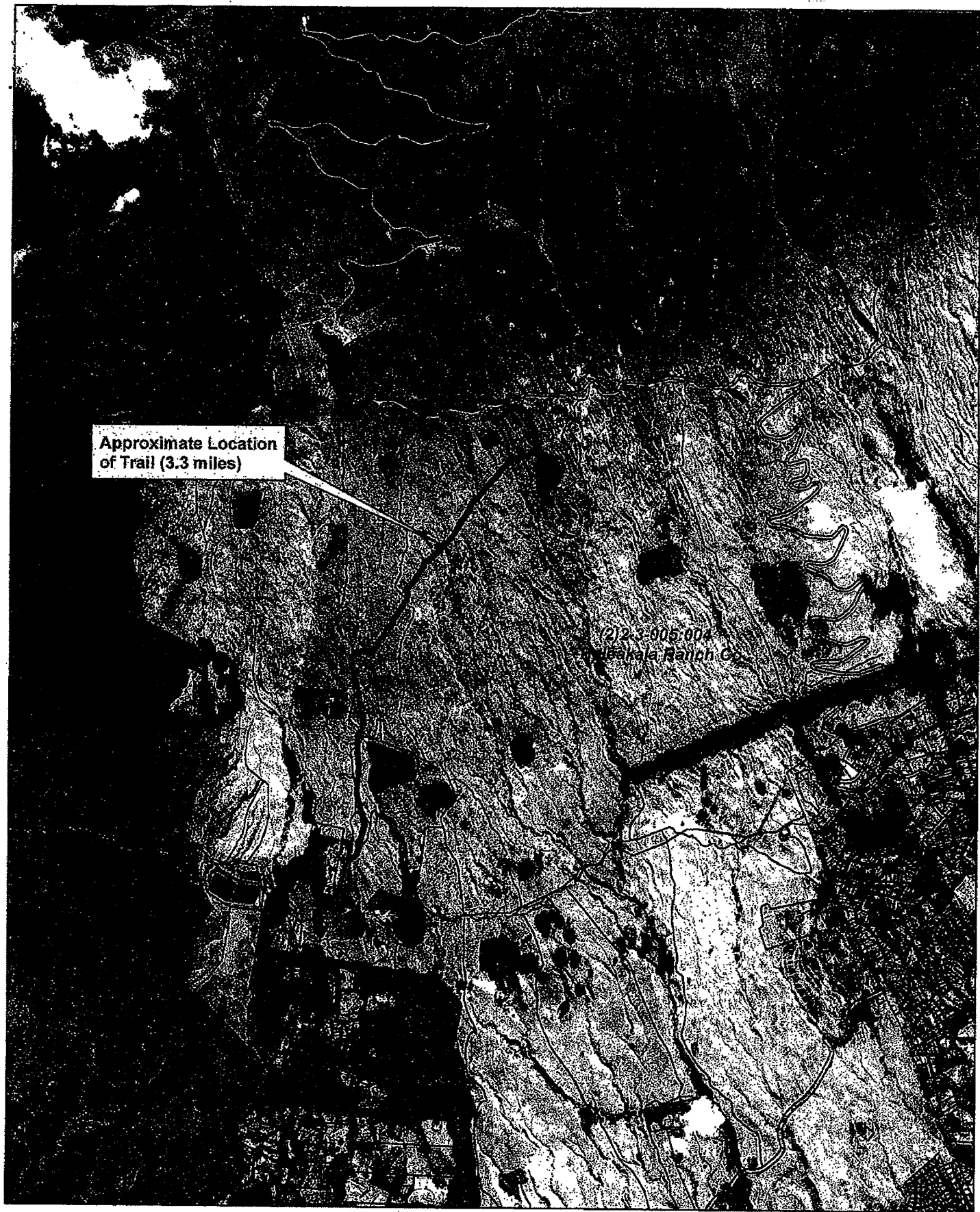
Document Description:

Memorandum of Agreement between the State of Hawaii Depart-
ment of Land and Natural Resources Division of Forestry and
Wildlife Na Ala Hele Trails and Access Program and Haleakala
Ranch Company for access to Haleakala Bridle Trail

Valerie Matsumoto
Notary Signature

5-16-2012
Date





Approximate Location
of Trail (3.3 miles)

(2) 2-3-005-004
Bakala Ranch Co.



1 inch = 3,140 feet

EXHIBIT A



JSM 20100329

JOINT PROSECUTION AGREEMENT

This Joint Prosecution Agreement ("**Agreement**") is entered on this 26 day of December, 2012, by and between the "**Plaintiffs**," identified below, and the "**State**," identified below. This Agreement is subject to Court approval. If not approved by the Court, then the Agreement is null and void, *ab initio*.

A. Definitions

"**Certified Class Members**" means collectively the class action members certified by Court Order, filed December 2, 2011, and modified by Court Order filed September 10, 2012.

"**Plaintiffs**" means collectively: PUBLIC ACCESS TRAILS HAWAII, a Hawai'i Nonprofit Corporation, and DAVID BROWN, JOE BERTRAM, III; KEN SCHMITT, individually, and on behalf of the Certified Class Members.

"**State**" means collectively: WILLIAM AILA, JR. in his official capacity as the Director of the State of Hawai'i DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawai'i BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES.

"**Parties**" means collectively Plaintiffs and State.

"**HRC**" means Defendant Haleakala Ranch Company.

"**Court**" means the Court of the Second Circuit, State of Hawai'i.

"**Complaint**" means the complaint brought by Plaintiffs on behalf of themselves and the Certified Class Members against the State and HRC, filed in Court on January 18, 2011.

"**Action**" means Civil Number 11-1-0031(3), related to the Complaint.

"**Trail**" means that trail, identified in historical maps and documents by names such as "Haleakala Trail," "Haleakala Bridle Trail," "Road to Haleakala," "Haleakala Mountain Trail," "Haleakala road to the summit," or "government road," and as further described in the Complaint, which crosses lands owned by HRC.

"**HRS**" means Hawai'i Revised Statutes.

"**HRCP**" means the Hawai'i Rules of Civil Procedure.

"**Favorable Ruling**" means a final judgment in favor of either of the Parties on the Joint Prosecution Claim either from the Court if no appeal is taken or after all

appeals have been fully resolved. If any appeal results in remand, then the term means a final judgment by the Court after remand.

B. Background

1. The Complaint includes seven claims for relief enumerated as Count I through Count VII.

2. Two of the claims for relief are Count III (relating to the Highways Act of 1892 and HRS § 264-1) and Count IV (relating to quiet title and HRS ch. 669), which claims generally allege that the Court should vest title to the Trail in the State of Hawai'i, either in fee simple or a lesser interest, such as an easement (collectively "*Joint Prosecution Claim*").

3. The Court recently granted Plaintiffs' motion to file a first amended complaint to allege or reallege a § 1983 claim against the State ("*the Federal Claim*"), which has not been filed with the Court, in light of the Parties' efforts to reach this Agreement.

4. The Federal Claim and Counts I, II, V, VI and VII of the Complaint are hereinafter referred to as the "*Remaining Claims*."

5. The Parties desire to jointly prosecute against HRC the Joint Prosecution Claim, subject to the terms of this Agreement.

C. Contingencies and Related Consideration by Respective Parties

1. The terms and conditions of this Agreement are contingent on the following:

- a. That the Court approves this Agreement as to the Certified Class Members, based on a motion that shall be filed by Plaintiffs consistent with the terms of this Agreement ("*Agreement Motion*").
- b. That the Court grants the State leave to file a cross-claim against HRC substantially in the form attached hereto as **Exhibit A** (the "*Cross-Claim*"), as requested in the Agreement Motion, or similar relief to the State as necessary to permit it to prosecute the Joint Prosecution Claim against HRC.
- c. That the Court grants Plaintiffs leave to dismiss without prejudice the claims against the State in the Action, as requested in the Agreement Motion.

D. Other Consideration by the State and Related State Issues

1. The State shall, at minimum, join with the Plaintiffs on substantive motions in Court against HRC with respect to the Joint Prosecution Claim, or join and support any appellate arguments in either or both of the Hawai'i appellate courts related to the Joint Prosecution Claim.
2. The State shall coordinate with Plaintiffs in the preparation of evidence for motions, evidentiary hearings, and/or trial against HRC on the Joint Prosecution Claim. This may include, but not be limited to, assisting with and providing declarations or testimony from experts from the State of Hawai'i, such as the Na Ala Hele abstractor on title or abstract issues.
3. In the event that Plaintiffs prevail on any claims for relief against HRC, the State shall not object to any efforts by Plaintiffs to seek from HRC attorneys' fees and costs of suit pursuant to the private attorney general doctrine, and/or as otherwise permitted by law.

E. Other Consideration by Plaintiffs and Related Plaintiffs Issues

1. Plaintiffs shall join in, or cooperate with, efforts taken by State to affirmatively prosecute the Joint Prosecution Claim.
2. Plaintiffs shall not file the Federal Claim, except upon the conditions set forth in Section F of this Agreement.
3. If both of the Parties fail in obtaining a Favorable Ruling on the Joint Prosecution Claim, and the Court determines title to the Trail is vested in HRC, Plaintiffs and the Certified Class Members shall not, with respect to the Trail, reallege any claim, and/or allege any other claims, against the State (including any agency or employee of the State).
4. Notwithstanding the foregoing, this Agreement shall not in any way affect the Remaining Claims and prayers for relief against HRC.

F. Agreements Relating to Access and Management Issues

1. In the event the Court determines that title to the Trail is vested in the State of Hawai'i, there remain the following types of issues over which the Parties have not reached agreement, hereinafter referred to collectively as the "*Access and Management Issues*": (1) the rights of the public to access the Trail; (2) the extent of the public's right of access; (3) whether the State has authority to limit or deny public access to the Trail;

(4) how the Trail should be maintained, improved, preserved and protected for the public's benefit; (5) whether HRC's ranch activities should be a factor in considering the public's access to the Trail; (6) the extent of State of Hawai'i funding and other resources available, if any, for managing the Trail; (7) whether management of the Trail by the State is necessary; and (8) any similar types of issues.

2. Notwithstanding the terms of this Agreement, neither of the Parties waives any of their respective rights they may have with respect to the Access and Management Issues.

3. In the event either of the Parties obtains a Favorable Ruling on the Joint Prosecution Claim, the following provisions shall apply:

- a. The Parties shall, as soon as practicable thereafter, engage in good faith settlement discussions, with or without participation of HRC, with the goal of arriving at agreement on the Access and Management Issues in the form of a "*Trail Access and Management Agreement*;" provided the Parties acknowledge any such Agreement will require at a minimum the approval of the Hawai'i Board of Land and Natural Resources in an open meeting noticed and conducted pursuant to HRS chapter 92 and any other applicable law.
- b. If the Parties execute a Trail Access and Management Agreement without the participation of HRC, they shall thereafter collectively make demands upon HRC necessary to fulfill it.
- c. If HRC refuses to fully accept the Trail Access and Management Agreement, the State shall take necessary and appropriate action to enforce said Agreement including but not limited to seeking judicial relief consistent with said Agreement. Plaintiffs, individually and/or on behalf of the Certified Class Members, may seek to join or intervene in any such action, but are not required to do so.
- d. If the Parties cannot reach agreement on the Access and Management Issues after good faith settlement efforts between themselves the following provisions shall apply:
 - i. Plaintiffs may seek to enforce against HRC, including seeking injunctive relief, any right of public access they claim they have as the result of either of the Parties prevailing on the Joint Prosecution Claim.

- ii. Plaintiffs on their own behalf and on behalf of the Certified Class Members may file a new action in the Second Circuit Court, naming the State (or its agencies or employees) as defendants, including, but not limited to, alleging or realleging against the State the Remaining Claims and the Federal Claim, and any new facts. The State shall not claim that the new action is barred by dismissal of claims pursuant to this Agreement but reserves all other rights and defenses, including the right to seek removal to federal court.

G. Miscellaneous Provisions

1. *Privileges and Work Product.* In pursuing the Joint Prosecution Claim against HRC, the Parties shall maintain between the Parties confidences regarding their strategy and drafts and assert and defend the attorney-client privilege or work product doctrine to the extent permitted by law in joint prosecution of claims by co-plaintiffs.

2. *Fees and Costs.* As to each other, each of the Parties shall bear their own attorneys' fees and costs with respect to this Agreement and with respect to the Action.

3. *Cooperation.* The rule of good faith and fair dealing shall apply to this Agreement and all parts thereof, and all actions contemplated thereto. In addition the Parties and their attorneys shall reasonably cooperate with each other in carrying out this Agreement.

4. *Effect of Material Breach.* A Party's sole remedy for a material breach is to seek from the Court a return to the status quo before this Agreement was signed. If either of the Parties believes there is a material breach of this Agreement, the Party shall provide notice and a two week opportunity to cure. If after two weeks the noticing Party believes the other Party has failed to cure or sufficiently cure the material breach, the Party may seek Court relief to return the case to the status quo before this Agreement was signed.

5. *No Party Deemed Drafter.* The Parties each having reviewed this Agreement, and each being represented by counsel agree that for purposes of construction of any provision of this Agreement, no party shall be deemed to be the sole author of any of the provisions in this Agreement, including its exhibits.

6. *Choice of Law, Venue.* This Agreement shall be governed by the laws of the State of Hawai'i and the exclusive venue for any dispute regarding this Agreement or its terms shall lie in the Circuit Court of the Second Circuit of the State of Hawai'i,

provided, however, that the State reserves the right to remove any claims to the federal district court to the extent removal is authorized by law.

7. *Complete Terms.* This Agreement supersedes each and every other prior agreement between the Parties; the terms are contractual and not a mere recital. This Agreement shall not be altered, amended, or modified except by a writing executed by the Parties.

8. *No Admission.* This Agreement, its contents, and the partial settlement it evidences, are not to be construed as an admission of any claim made by Plaintiffs, but are to be construed strictly as a compromise and partial settlement of claims between the Parties hereto for the purpose of avoiding controversies, litigation, and expenses.

9. *Survival of Provisions.* If any provision hereof or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remaining provisions hereof, or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby.

10. *Counterpart Execution.* The Parties agree that this Agreement and its exhibits may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the Parties hereto, notwithstanding all of the Parties are not signatory to the original or the same counterparts. For all purposes, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

WHEREFORE, the undersigned Parties hereby sign and execute this Joint Prosecution Agreement on the date set forth above.

"PLAINTIFFS"

PUBLIC ACCESS TRAILS HAWAII

By its President
David H. Brown

David H. Brown

Ken Schmitt


Joe Bertram, III

Approved as to form:

Tom Pierce
Attorney for Plaintiffs

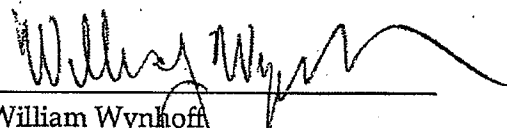
"STATE"

**WILLIAM AILA, JR. in his official
capacity as the Director of the State Of
Hawai'i DEPARTMENT OF LAND AND
NATURAL RESOURCES and chair of the
State of Hawai'i BOARD OF LAND AND
NATURAL RESOURCES;
DEPARTMENT OF LAND AND
NATURAL RESOURCES; BOARD OF
LAND AND NATURAL RESOURCES**



By Chairperson of Board of Land and
Natural Resources
William Aila, Jr.

Approved as to form:



William Wynhoff
Deputy Attorney General

WHEREFORE, the undersigned Parties hereby sign and execute this Joint Prosecution Agreement on the date set forth above.

"PLAINTIFFS"

PUBLIC ACCESS TRAILS HAWAII

David Henderson Brown

By its President
David H. Brown

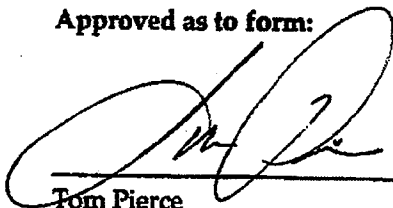
David Henderson Brown

David H. Brown

Ken Schmitt

Joe Bertram, III

Approved as to form:



Tom Pierce
Attorney for Plaintiffs

"STATE"

WILLIAM AILA, JR. in his official capacity as the Director of the State Of Hawai'i DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawai'i BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES

By Chairperson of Board of Land and Natural Resources
William Aila, Jr.

Approved as to form:

William Wynhoff
Deputy Attorney General


WHEREFORE, the undersigned Parties hereby sign and execute this Joint Prosecution Agreement on the date set forth above.

"PLAINTIFFS"

PUBLIC ACCESS TRAILS HAWAII

By its President
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Approved as to form:

Tom Pierce
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DEPARTMENT OF LAND AND NATURAL RESOURCES; BOARD OF LAND AND NATURAL RESOURCES

By Chairperson of Board of Land and Natural Resources
William Aila, Jr.

Approved as to form:

William Wynhoff
Deputy Attorney General



HALEAKALA RANCH

• EST. MAUI 1888 •

August 1, 2016

Suzanne Case, Chairperson
Board of Land and Natural Resources
1151 Punchbowl Street
Honolulu, HI 96813

RE: Termination - Memorandum of Agreement re: Haleakala Bridle Trail

Dear Chairperson Case:

Based on the litigation and final court order that was filed July 18, 2016, I believe the Memorandum of Agreement (MOA) between Haleakala Ranch and the Department of Land & Natural Resources (DLNR) regarding the Haleakala Bridle Trail (HBT) should be terminated.

The MOA was initially proposed in 2007 in a collaborative effort between the Ranch and DLNR to avoid litigation regarding ownership of the trail and provide public access through a program of guided hikes. The MOA was approved by the Board of Land & Natural Resources in 2012 when both HRC and the State (DLNR) were defendants in the lawsuit regarding the HBT. The State subsequently reached an agreement with the Plaintiffs that resulted in the State joining the Plaintiffs to prosecute the claim of ownership of the HBT in Phase I of the lawsuit. In April 2014 the State prevailed in a jury trial on this claim and all parties reached a Settlement Agreement in December 2014, in which the Ranch agreed to not appeal the verdict of State ownership, and in return all remaining claims against HRC were dismissed. The Court approved the Settlement Agreement and has now filed the final order.

Although we continue to have serious concerns regarding public access of the segment of unmarked and unimproved trail that goes across private Ranch lands which are actively used in our ranching operations, we recognize that the State now has ownership of the trail and the responsibility to manage public access.

In summary, we respectfully request the Board of Land & Natural Resources approve the termination of the Memorandum of Agreement with Haleakala Ranch regarding the Haleakala Bridle Trail.

Please let me know if you have any questions or concerns.

Thanks for your support and assistance with this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Young", with a stylized flourish at the end.

Don Young
President & CEO

Cc: Michael Gibson – Ashford Wriston
Scott Fretz – DLNR Maui Branch Manager
Scott Meidell – HRC Vice President



HALEAKALA RANCH

• EST. MAUI 1888 •

June 21, 2017

Mr. Scott Fretz
State of Hawaii
Department of Land and Natural Resources
Division of Forestry and Wildlife
1955 Main Street, Suite 301
Wailuku, HI 96753

Via Electronic Mail: scott.fretz@hawaii.gov

Dear Mr. Fretz,

Thank you for your letter of June 8, 2017 as well as our ongoing dialog regarding the Haleakala Bridle Trail. We appreciate your acknowledgement of our concerns regarding public use of the trail, your position regarding the May 11, 2012 Memorandum of Agreement and related consideration of an alternative guided hiking program.

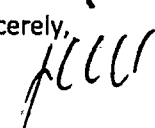
In your letter, you also inquired as to our thoughts or interest in participation in a guided hiking program. We continue to believe that a guided hiking program is the best public access solution for the HBT due to significant operational, liability and public safety considerations that exist along the unfenced and unmarked trail as it passes through Haleakala Ranch Company pastures. As recently discussed, we are interested in working with the State to develop such a program involving HRC that would serve as the exclusive form of public access for the HBT. As you know, we have the proven ability to provide safe and high-quality guided hiking experiences on the HBT that would address future public access needs, would be coordinated with all Ranch operations, and would require minimal support or resources from the State. We request an opportunity to discuss this further with you.

It is our perspective that such a solution should be clearly communicated and enforced by the State as the only mode of permitted access to the HBT. Absent an enforceable policy that provides for closure of the trail to public use outside of a guided hiking program, HRC's reasonable and documented concerns regarding public safety and operational challenges to the Ranch would not be adequately addressed even with such a program in place. It is our understanding that, not only is it within the State's purview and authority to manage, and where appropriate, restrict access to State lands as conditions warrant, it is a common Best Management Practice for many trails and other State assets throughout Hawaii. It is our firm opinion that the operational, liability and safety considerations that exist along the unfenced and unmarked trail warrant formal restrictions to access to the HBT and would be especially critical in the context of a guided hiking program. The current position taken by the State recommending that the

HBT not be used by the public is insufficient to address current and future safety, operational & liability issues as well as the effective enforcement of private property rights by HRC as the abutting and affected landowner.

We look forward to discussing this further at your earliest convenience.

Sincerely,



J. Scott Meidell
Vice President
Real Estate & Land Management

cc: Don Young, President
Jordan Jokiel, Land Manager
Michael Gibson, Esq. – Ashford Wriston