

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

July 22, 2022

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

Board Members:

SUBJECT: REQUEST APPROVAL OF: 1) THE ACQUISITION OF PRIVATE LANDS; 2) ISSUANCE OF MANAGEMENT RIGHT-OF-ENTRY TO DIVISION OF FORESTRY AND WILDLIFE; 3) AUTHORIZE DIVISION OF FORESTRY AND WILDLIFE TO CONDUCT PUBLIC HEARING ON THE ISLAND OF MOLOKA'I FOR PROPOSED ADDITION TO THE MOLOKA'I FOREST RESERVE, MAKOLELAU, KONA DISTRICT, MOLOKA'I, TAX MAP KEYS (2) 5-5-001:013, 5-5-001:022, 5-5-001:036 AND 5-5-001:038; AND

REQUEST AUTHORIZATION FOR THE CHAIRPERSON TO ENTER, AMEND, EXTEND, AND TERMINATE A MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, DIVISION OF FORESTRY AND WILDLIFE AND THE NATURE CONSERVANCY TO CONVEY THE REMAINING PARCEL, TAX MAP KEY (2) 5-5-001:015 TO THE STATE.

APPLICANT AGENCY:

Division of Forestry and Wildlife (DOFAW).

PRIVATE LANDOWNER:

Alpha Omega Holding, LLC, a Delaware limited liability company (Seller).

The Nature Conservancy, a District of Columbia nonprofit organization (Grantor).

LEGAL REFERENCE:

Sections 107-10, 171-11 and 171-30, Hawaii Revised Statutes, as amended.

LOCATION:

Privately-owned land situated at Makolelau, Kona District, Moloka'i as shown on the attached map labeled **Exhibit A**.

AREA:

Parcel 1: 5-5-001:013: 506.561 acres, more or less
Parcel 2: 5-5-001:015: 515.750 acres, more or less
Parcel 3: 5-5-001:022: 6.188 acres, more or less
Parcel 4: 5-5-001:036: 8.105 acres, more or less
Parcel 5: 5-5-001:038: 8.972 acres, more or less
Total Area: 1,045.576 acres, more or less

ZONING:

State Land Use Classification:	Parcel 1:	Agricultural (506.561 acres)
	Parcel 2:	Agricultural (254.75 acres) Conservation (261 acres)
	Parcels 3, 4, 5:	Conservation (23.265 acres)
County Zoning:	Parcel 1:	Agricultural (506.561 acres)
	Parcel 2:	Agricultural (254.75 acres) Conservation (261 acres)
	Parcels 3, 4, 5:	Conservation (23.265 acres)

CURRENT USE:

Vacant and unencumbered.

CONSIDERATION:

Parcels 1, 3, 4, 5: Gratis, property offered to the State as a donation.
Parcel 2: Acquire at a future date when funds are available.
See Remarks Section for further discussion.

PURPOSE:

Forest Reserve purposes.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Pursuant to Section 343-5 (a) (1), HRS, an environmental assessment (EA) is not required where State or County funds are being used for the acquisition of unimproved real property. As the subject lands are unimproved, an EA is not required. Inasmuch as the Chapter 343, environmental requirements apply to the Applicant's use of the lands, the Applicant shall be responsible for compliance with Chapter 343, HRS, as amended.

APPLICANT REQUIREMENTS:

1. Obtain an appraisal report to determine the value of the properties to be acquired;
2. Provide survey maps and descriptions for the privately-owned properties according to State Department of Accounting and General Services Survey Division standards;
3. Obtain a title report for the privately-owned properties subject to review and approval by the Department; and
4. Conduct a Phase I Environmental Site Assessment and, if this Phase I identifies the potential for hazardous materials release or the presence of hazardous materials, conduct a Phase II environmental sampling and analysis plan and perform any and all remediation, abatement and disposal as may be warranted and as satisfactory to the standards required by the Federal Environmental Protection Agency and/or the State Department of Health, all at no cost to the State and to the satisfaction of the Department.

BACKGROUND:

Makolelau is in southeast Moloka'i Island approximately 7 miles east of Kaunakakai, the primary urban center on the island. Access is via Kamehameha V Highway. The property includes five (5) unimproved Tax Map parcels that extend from the oceanfront across the highway to Moloka'i Forest Reserve lands at an elevation of 3,500 feet, providing for a diverse environment and multiple micro-habitats. Adjacent parcels in the Kawela and Kamalo ahupua'a form the East Moloka'i Watershed Partnership. The watershed feeds into two culturally and ecologically important fishponds in the lower Makolelau flats. The Makolelau acquisition connects the other parcels creating over 13,500 acres of managed corridor that would complete a series of protected areas encompassing the south shore of the island.

Partial surveys conducted by The Nature Conservancy (TNC) in 2016 documented endangered species populations, native mesic habitat and dryland forest. This area is designated as critical habitat to numerous rare, threatened, and endangered species. Notably, the endangered Hawaiian hoary bat, 'ōpe'ape'a had over 180 detections registered using coastal bat detectors. Ten listed endangered plant species are known to occur at Makolelau, some of which provide food and habitat for the State's only endemic goose, the nēnē. The USFWS also designated 427 acres of the Makolelau acquisition as critical habitat for 36 listed endangered plants and 2 forest bird species.

Primary threats to this unique and rare ecosystem are invasive plants and feral animals. Feral animals strip away plants and groundcover, which allows invasive species to crowd out native plants. Aggressive management is needed to effectively reduce these threats. If not acquired, housing and commercial development would disrupt the ridge to reef ecosystem and flat portions of the property that border the highway could be developed which could cause a disruption to reef ecosystems through increased erosion and sedimentation.

To facilitate restoration efforts, an updated survey for species identification and development of a management plan are high priority actions. Management of the property under the management authority of the State would be consistent with the goals

and management of the Moloka'i Forest Reserve for various public purpose uses such as forest watershed protection for water supplies, erosion reduction and native species protection, as well as recreation. Cooperative efforts with community groups and other state and federal partners will provide a base for research and management planning, as well as reduction of threats to the watershed, rare species, and ecosystems. Other initiatives include construction of hooved animal-proof fence lines that would allow for ungulate management and erosion control. Outplanting of native species and implementing invasive species control will foster the recovery of the ecosystem. Restoration of existing access roads will provide easier access to high elevation mesic sections and will serve as firebreaks for areas susceptible to wildfires. Once acquired by the State, the property is planned be added to the Moloka'i Forest Reserve.

REMARKS:

In its March 11, 2022, BLNR meeting, Item C-1, the board approved the request for the Chairperson to enter into a sub-grant agreement between the Department of Land and Natural Resources and The Nature Conservancy (TNC) to acquire lands in Makolelau, Kona District, Moloka'i, TMKs: (2) 5-5-001:013; 5-5-001:015; 5-5-001:022; 5-5-001:036; 5-5-001:038. The submittal may be accessed at the following link:

<https://dlnr.hawaii.gov/wp-content/uploads/2022/03/C-1.pdf>.

Approval of the sub-grant agreement allows DOFAW to use the U.S. Fish and Wildlife Service (USFWS) Recovery Land Acquisition (RLA) grant for TNC to acquire the Makolelau parcels. Together with TNC matching funds and the Seller's land donation the total cost of fee acquisition for all five parcels is \$2,917,000. The purchase price was supported by the fair market value based on an appraisal contracted for by TNC.

The fee acquisition cost breakdown includes:

<u>Funding Source</u>	<u>Type</u>	<u>Amount</u>
USFWS RLA Grant:	Federal Grant	\$1,800,000
The Nature Conservancy	Private Funding	\$617,000
Alpha Omega Holding, LLC	Land Donation	\$500,000
Total Funding Secured:		\$2,917,000

Upon acquisition of the parcels from the Seller, TNC will encumber all five (5) parcels with a Notice of Federal Participation (NOFP) as required by the RLA grant and convey at gratis four (4) of the parcels, excluding TMK (2) 5-5-001:015, to DOFAW. The warranty deed for the four parcels will be consistent with the State's standard form, except amended to include the NOFP language which states that the property was acquired with federal funds and must be managed in accordance with the terms and conditions of the grant. DOFAW will work with the USFWS to finalize NOFP language which will be included in the warranty deed.

TNC will retain ownership of the fifth parcel, TMK (2) 5-5-00:015 until such time that DOFAW is able to raise funds to acquire the property. The original intent of the acquisition was that DOFAW purchase the fifth parcel from TNC at the time of acquiring the four donated parcels in a single transaction. TNC intends to sell the remaining

parcel to DOFAW at the amount of the TNC matching funds (\$617,000) or less. Since consideration will be paid for the fifth parcel, DOFAW contracted for an appraisal conducted Medusky and Co., Inc. which determined a fair market value that supports the purchase price.

During the 2022 legislative session, DOFAW sought to secure \$650,000 in Capital Improvement Project (CIP) funding for the acquisition. However, the legislature did not appropriate funding in the final budget for fiscal year 2023. DOFAW will submit the FY2023 Legacy Land Conservation Program (LLCP) grant application as a possible funding source as well as CIP funding request for the 2023 legislative session. However, further delays in the sale from the Seller to TNC may jeopardize the entire acquisition. Therefore, DOFAW along with TNC believe that the best course of action is for TNC to acquire all five parcels from the Seller and convey the four donated parcels to DOFAW upon closing. DOFAW requests that the Board authorize the execution of a non-binding Memorandum of Understanding (MOU) with TNC, stating the DOFAW will conduct its best efforts to obtain funding to purchase the final parcel and describing the terms and conditions for acquisition. A draft of the MOU is attached as **Exhibit B**. TNC will be responsible for management of the remaining parcel until DOFAW obtains sufficient funding and acquires the parcel.

Upon receiving the requisite funding for the remaining parcel, DOFAW, if necessary, will prepare an updated appraisal report to establish fair market value subject to the condition and encumbrances of the day prior to the closing of the property by TNC. As the fifth parcel serves as the RLA grant match and therefore must also be encumbered with the grant restrictions upon TNC's close with the present seller. The updated appraisal will value the remaining parcel prior to closing or before the RLA NOFP takes effect. The purpose for this is to avoid having the RLA NOFP impact the fair market value of the parcel. DOFAW believes that this is appropriate because the intent was for TNC to acquire and transfer all five parcels to DOFAW upon closing. However, the delay in completing the acquisition is caused solely by DOFAW's inability to secure funding for the fifth parcel, not by any action on the part of TNC. Therefore, DOFAW believes that this would be the most equitable outcome for the parties. Other conditions that must be fulfilled prior to closing includes TNC providing an updated title report and conducting an updated or new Phase I Environmental Site Assessment (ESA) report. DOFAW will return to the Board for approval to acquire the fifth parcel once funding is obtained and due diligence is completed.

DOFAW was assisted in conducting the due diligence for the subject parcels by Land Division and the Attorney General. The title reports for all five parcels, dated May 5, 2021, showed that there were no encumbrances or encroachments on the parcels. The seller submitted an affidavit confirming there were no unrecorded leases. Confirming there are no outstanding liens on the property, the exception regarding liens was also removed. The Department confirmed acceptance of the updated title report.

Due to the cost of conducting a new property survey and preparing survey maps and descriptions, as well as time constraints to complete the acquisition, DOFAW and Land Division are working with DAGS Survey Division to review existing descriptions of the property that will be included with the warranty deed. Existing sub-division maps dated October 28, 1982 provides descriptions for all five (5) parcels. The Survey Division has checked for mathematical correctness and approved use of the descriptions for the

warranty deed. DOFAW will work with DAGS Survey to prepare property descriptions and maps to be included in the Executive Order setting aside the property to DOFAW.

A Phase I ESA report was completed by Lehua Environmental, Inc., on behalf of TNC with the Department as an additional user, in April 2022. The site inspection identified small quantities of solid waste near the Kamehameha V Highway, however there was no evidence of hazardous release or impact to the property. The seller contracted for the removal of the debris which included such items as abandoned vehicles, appliances and building materials. Through its staff on Moloka'i, TNC and DOFAW confirmed that debris removal was completed, and the area is otherwise vacant and unencumbered. The report concluded that there was no evidence of Recognized Environmental Conditions (RECs) that could impact the property.

In addition to approving the acquisition, the Board is requested to approve an immediate management right of entry to DOFAW. This will allow DOFAW to assume management of the property upon acquisition, rather than waiting until completion of the public hearings and set aside.

RECOMMENDATIONS: That the Board:

1. Authorize the acquisition of the subject private lands 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 warranty deed document form, as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
2. Authorize the issuance of a management right-of-entry permit to the Division of Forestry and Wildlife covering the subject parcels under the terms and conditions cited above, effective immediately upon acquisition by the State, 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; and
 - B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Pursuant to Section 183-11, HRS, as amended, authorize the Division of Forestry and Wildlife to conduct a public hearing on the Island of Moloka'i regarding the designation of the subject lands to be included in the Molokai Forest Reserve. Further, pursuant to 183-12 HRS, authorize the Chairperson to:

- A. Set the date, location, and time of the public hearing; and
 - B. Appoint a hearing master(s) for the public hearing.
4. Authorize the Chairperson to enter into a Memorandum of Understanding (MOU) between the Department of Land and Natural Resources and The Nature Conservancy for the future acquisition of Parcel 2, TMK (2) 5-5-001:015.
- A. The standard terms and conditions of the attached MOU document, as may be amended;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

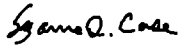
Respectfully Submitted:

for



David G. Smith, Administrator

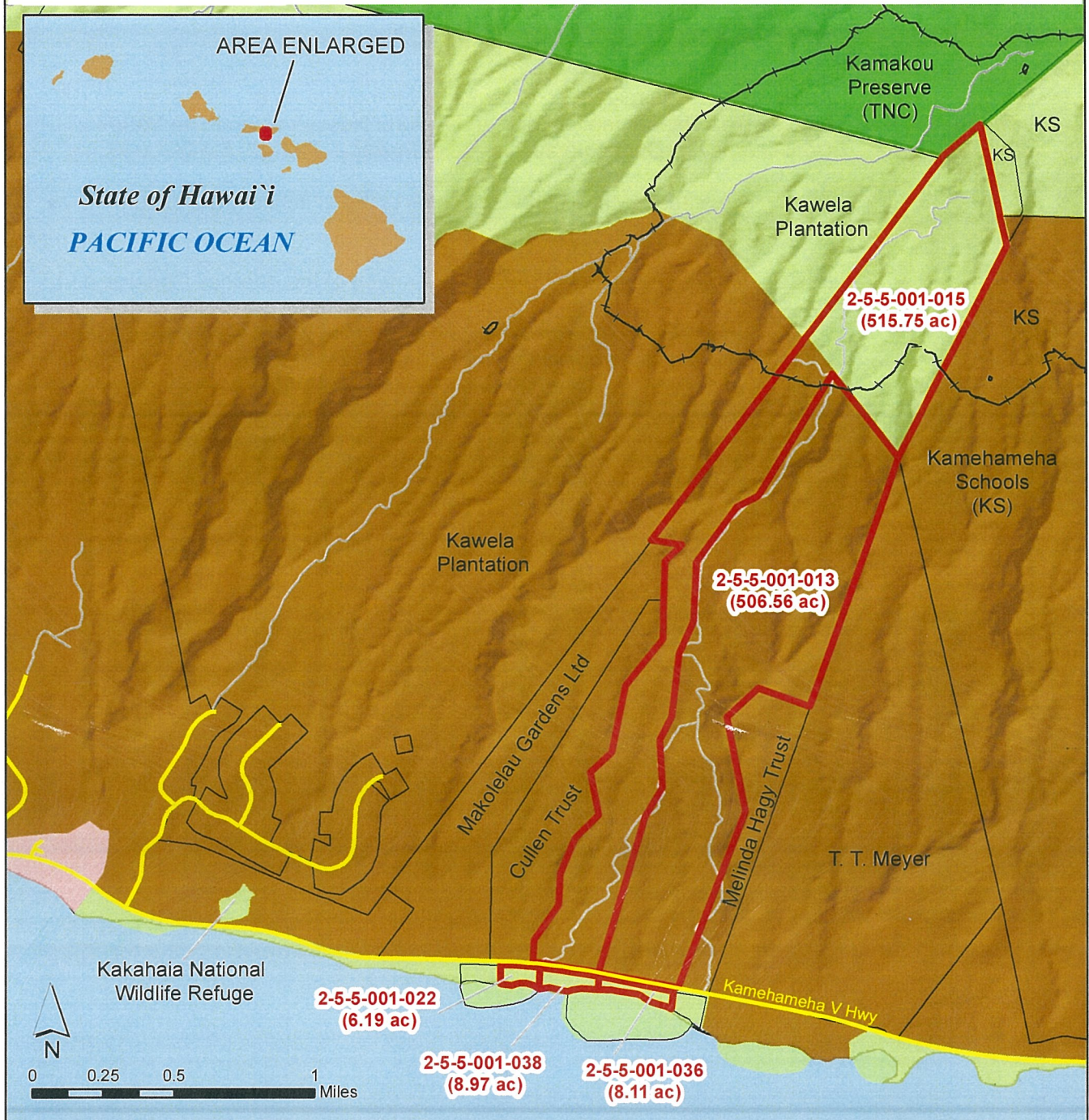
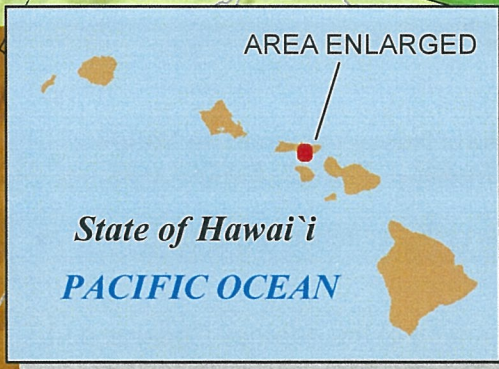
APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson



Acquisition of Alpha Omega Holdings, LLC at Makolelelau, Island of Molokai



Legend

- | | | |
|---|--------------------------------------|--|
| Alpha Omega Holdings, LLC Tract: Tax Map Key (ac) | State Land Use District: Agriculture | East Molokai Watershed Partnership Fence |
| The Nature Conservancy Preserve | Conservation | Roads |
| Adjacent Parcels (Owner) | Urban | 4WD Roads |

May 13, 2021

Data Sources: TNC; HI Office of Planning; County of Maui.

**Memorandum of Understanding between
The Nature Conservancy and The State of Hawaii
In support of the
Makolelau Forest Acquisition Project**

This Memorandum of Understanding (the "MOU") is entered into on _____, between The State of Hawaii, by and through its Department of Land and Natural Resources (the "State"), and The Nature Conservancy ("TNC"). The State and TNC are hereinafter referred to collectively as the "Parties".

RECITALS:

- A. TNC has entered into an Option Agreement for the purchase of fee title to the Makolelau Property situated at Molokai, County of Maui, State of Hawai'i, consisting of 1,045 acres, more or less, and bearing tax map key numbers ("TMK No.") (2) 5-5-001:013; (2) 5-5-001:015; (2) 5-5-001:036; (2) 5-5-001:038; (2) 5-5-001:022 (the "Property"). The Property is a key acquisition for the State in furtherance of its Makokelau Forest Acquisition Project (the "Project").
- B. Four of the parcels (TMK Nos. (2) 5-5-001:013; (2) 5-5-001:036; (2) 5-5-001:038; (2) 5-5-001:022) will be transferred to the State in fulfillment of the terms and conditions contained in that certain Subgrant Agreement dated _____ executed between the State and TNC for the subgrant of Federal Recovery Land Acquisition Grant Agreement Number F20AP00349, in which funds were subawarded to TNC in support of its acquisition of the Property.
- C. The parties wish to confirm the terms and conditions upon which TMK No. (2) 5-5-001:015 (the "Remaining Parcel") will be conveyed to the State to finalize its land acquisition of the Makolelau Property in support of the above-referenced Project.

NOW THEREFORE, the State and TNC agree to the following terms and conditions for the purpose of conveying the Remaining Parcel to the State:

AGREEMENT:

- 1. The State confirms its intention to purchase the Remaining Parcel from TNC for the fair market value as determined by an appraisal contracted for by the State.
- 2. The State will use best efforts to secure funding for the acquisition of the Remaining Parcel.
- 3. Acceptance of the Remaining Parcel is conditioned upon the State conducting a Phase 1 Environmental Site Assessment no earlier than 180 days prior to closing. The State has been provided with the Phase 1 Environmental Site Assessment that was prepared by Lehua Environmental Inc. and submitted to TNC on May 5, 2022.
- 4. Upon confirmation that the State has procured the requisite funding and closing dates have been identified, TNC will cause Title Guaranty of Hawaii to provide an updated Title

Report for the remaining Parcel, which will be subject to review and acceptance by the State.

5. TNC will not further transfer, mortgage, subdivide, pledge, hypothecate or otherwise encumber the Remaining Parcel while TNC holds fee title without prior written approval of the State, except for the recording of a Notice of Federal Participation as may be required pursuant to Federal Recovery Land Acquisition Grant Agreement Number F20AP00349.
6. The State will prepare an updated appraisal report as appropriate, to establish the current fair market value of the Remaining Parcel at time of closing, but subject to the condition of the Remaining Parcel and encumbrances on title as of the day prior to the transfer of the Property from Alpha Omega Holdings LLC to TNC.
7. The parties agree that upon mutual agreement as to a closing date and timeline for fulfillment of the above items, the parties will work together collaboratively and in good faith to effect a timely closing of the Remaining Parcel.
8. Any notices under this MOU shall be sent to the principal contacts at the emails and addresses set forth below. Email notice shall be deemed sufficient unless otherwise indicated.

For TNC:

Ulalia Woodside Lee, Executive Director
923 Nuuanu Ave.
Honolulu, HI 96817
Ulalia.woodside@tnc.org

And

Melinda Ching, Senior Attorney
mching@tnc.org

[And](#)

[Michael Conner, Associate Director, CA Lands Program](#)
mconner@tnc.org

For the State:

Emma Yuen
State of Hawaii, Department of Land and Natural Resources
Division of Forestry and Wildlife
1151 Punchbowl Street, Room 325
Honolulu, HI 96813
emma.yuen@hawaii.gov

And

Julie China, Deputy Attorney General

julie.h.china@hawaii.gov

These principal contacts may be changed at any time by means of advance notice to the other Parties.

9. This MOU will become effective when the Parties have all executed this MOU (the "Effective Date"), and will remain in effect for five (5) years after the Effective Date ("Termination Date") or until the Remaining Parcel is transferred to the State, whichever is earlier. This MOU may be renewed annually for up to three additional one-year terms by written consent from all Parties.
10. The purpose of this MOU is to record in writing the understanding of each Party of the matters described herein to avoid misunderstanding and to accomplish the objectives of this MOU. By signing this MOU, the Parties agree to participate in and work towards the objectives of this MOU. This MOU is not legally binding and does not impose any enforceable obligation on the Parties. In implementing this MOU, each Party shall be bound by and subject to Hawaii law, applicable policies and regulations.
11. The Parties agree to fund their own expenses associated with the implementation of this MOU and the activities contemplated herein unless otherwise indicated herein. Activities proposed by this MOU shall be subject to the availability of funds.
12. The Parties agree that they are not entering into a legal partnership, joint venture or other such business arrangement, nor is the purpose of the MOU to enter into a commercial undertaking for monetary gain. No Party will refer to or treat the arrangements under this MOU as a legal partnership or take any action inconsistent with such intention.

IN WITNESS WHEREOF, the Parties execute this MOU in duplicate, effective as of the last date written below.

THE STATE OF HAWAII,
Department of Land and Natural Resources

THE NATURE CONSERVANCY

Name
Title
Date

Name
Title
Date