

**STATE OF HAWAI‘I**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**OFFICE OF CONSERVATION AND COASTAL LANDS**  
**Honolulu, Hawai‘i**

April 26, 2024

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

**REGARDING:** Request for Administrative Fines and Other Penalties for Conservation District Enforcement OA 24-14 Regarding the Alleged Unauthorized Clearing of Land, Unauthorized Removal of 106 Trees, Unauthorized Spreading of Mulch, Unauthorized Fence Lines and Encroachment and Removal of Resources Upon State Land Located at and Makai of Tax Map Key: (1) 5-6-003:053

*The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board’s powers, duties, privileges, immunities, and liabilities.*

**AGAINST:** Sushil Garg, manager of LKG HI Properties, LLC, and manager of Greystone HI Investments, LLC, and Benjamin Lassary, Vice President of RCA Trade Center Inc. For the Alleged Unauthorized Clearing of Land, Unauthorized Removal of 106 Trees, Unauthorized Spreading of Mulch, and Encroachment and Removal of Resources Upon State Land

**AGAINST:** Yue-Sai Kan Trust (Yue-Sai Kan, Trustee)  
Yue-Sai Kan, individually

For the Alleged Unauthorized Fence Lines on Unit 1

**AGAINST:** Association of Unit Owners of Marconi Point Condominium and/or Makai Ranch, LLC<sup>1</sup>  
For the Alleged Unauthorized Boundary Fence

**LANDOWNERS:** State of Hawai‘i (submerged land)  
Owners of Units within the Marconi Point Condominium Property Regime

**LOCATION:** Kahuku, Ko‘olauloa, O‘ahu

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<sup>1</sup> When the fence was erected, the Marconi Point Condominium Property Regime had not been turned over to a management agency or an association of unit owners and was still within the “developer control period.” Makai Ranch, LLC, is the developer.

**TAX MAP KEY:** (1) 5-6-003:053 Upon and Makai of

**SUBZONES:** General and Resource (submerged land)

**EXHIBITS:**

A	Location Map and 4/23/2021 Aerial
B	Mōlī Existing on Site
C	Observation of Area
D	1971 LUC action/Various Maps of the Conservation District
E	Attorney General Op. No. 17-1
F	West Boundary Fence
G	Certified Shoreline Photos
H	Driving on the Beach
I	Workers & Equipment
J	Noticer of Alleged Violation
K	Email from Garg
L	Marconi Coastal Vegetation Impacts
M	Damage to State Resources
N	Before and After Comparison
O	Wave Run Up
P	Sea Grant 12/22/2023 Drone
Q	Map of Boundary Fence Area
R	Offending Fences
S	Correspondence to Yue Sai Kan
T	Penalty Schedule

### **SUMMARY**

In mid-October 2023, the Office of Conservation and Coastal Lands (OCCL) received complaints regarding vegetation clearing in the shoreline area at the Marconi Point Condominium Property Regime (CPR). OCCL conducted a site inspection with other departmental staff, and active work in the shoreline was observed. OCCL staff verified that the coastal strand of vegetation was significantly altered. The coastal vegetation provides important critical habitat to native and endangered species. In addition, the vegetation provides important ecosystem functions and potential coastal hazard mitigation. Other alleged unauthorized land uses, such as fence lines, in the Conservation District were also observed.

This report will focus on the alleged unauthorized land uses in the Conservation District and damages to public lands

### **DESCRIPTION OF AREA (EXHIBITS A, B & C)**

The subject area is located along the currently undeveloped<sup>2</sup> northern shoreline of O‘ahu within the ahupua‘a of Kahuku in the district of Ko‘olauloa. The subject property is under

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<sup>2</sup> The entire property is comprised of approximately ninety (90) acres and has been divided into thirty-two (32) units. The units have been sold off to individual owners. OCCL staff notes that the

a Condominium Property Regime (CPR) with the remnants of the historic Marconi Radio Station to the south (mauka) of the subject area. Turtle Bay Resort and its conservation easement area (Kalaeokauna'oa or Kahuku Point), located in Honakaoe ahupua'a, is to the west; submerged State land and the Pacific Ocean is to the north; vacant private land is to the East with the US Fish & Wildlife James Campbell National Wildlife Refuge beyond.

The shoreline makai of the subject property is utilized for camping, fishing, recreation, and reflection by humans. Turtles are known to nest in the area and haul out on the shoreline.<sup>3</sup> OCCL staff has been to this area on at least four occasions. Staff has observed 'ilio holo i ka uua (Hawaiian monk seal) basking in the sun, four mōlī (Laysan albatross) chatting and dancing, while nearby another mōlī protects its chick in a shallow nest on the ground. Mōlī gliding in the wind above and offshore, while a ūlilī (wandering tattler) hurries along the shoreline. A single mōlī sat in the corner of a right angle behind two perpendicular fences. A dead shearwater was observed on the front of a sand dunes. The putrid smell of a blob of dead whale permeated the air as staff inspected its spine that was baking in the sun, while surfers caught waves offshore.

#### **CONSERVATION DISTRICT (EXHIBIT D)**

The unauthorized land uses took place on the fast lands (mauka of the shoreline) that lies in the General subzone of the Conservation District and the submerged lands (makai of the shoreline), that lies in Resource subzone of the Conservation District.

The State Land Use Commission at its September 17, 1971, meeting, pursuant to its consideration of petition A71-286 retained in the Conservation District, "150-feet inland from the upper reaches of the wash of waves." Therefore 150-feet inland from the shoreline lies within the General subzone.

The submerged lands makai of the shoreline in the Resource subzone of the Conservation District, are "owned by the State and held in public trust for the people of the State." See Attorney General Op. No. 17-1. **(Exhibit E)**

#### **ALLEGED UNAUTHORIZED LAND USES**

*Relating to grading, removing, harvesting, extraction of any material or natural resource on land (vegetation clearing in the Conservation District and State Land)*

On October 14-15, 2023, the OCCL received three separate complaints regarding vegetation clearing and potential disturbance to the endangered nalo meli maoli (Hawaiian yellow-faced bee), mōlī, and their habitats at the Marconi Point CPR.

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property developers are currently in litigation against the City and County of Honolulu in the United States District Court regarding developing the land without a Special Management Area permit.

The case is *Makai Ranch, LLC, Marconi Farms, LLC, MP Unit 21, LLC, and RCA Trade Center Inc. v. City and County of Honolulu, Department of Planning and Permitting, et. al., under case number 1:2023cv00230.*

<sup>3</sup> <https://www.northshoreland.org/kalaeokaunaoa-kahuku-point/>

On October 17, 2023, Department staff conducted a site visit to the subject property, which, due to its remote nature, required staff to hike two miles to the area from the Turtle Bay Hotel's parking lot and public shoreline access area, across the Hotel's Conservation Easement to the property.

From the beginning of the property boundary line with the Conservation Easement, at what staff believes to be an unauthorized boundary fence<sup>4</sup> (**Exhibit F**) the coastal vegetation consisting of naupaka and beach heliotrope had been removed, cut to the ground and pulverized into mulch. Staff observed remnants of pruned Heliotrope, where robust trees and native naupaka shrubbery once covered the ground, as illustrated in the certified shoreline photos of 2023 and other department documentation of the area. (**Exhibit G; Exhibit A**)

Staff continued along the shoreline and noticed tire tracks on the beach. At approximately three fourths of the way along the property, staff came across four workers actively utilizing vegetation removal equipment consisting of chainsaws, machete, and other equipment. At that time, the workers appeared to be within the General subzone of the Conservation District. A chipper, excavators, and other vegetation removal, mulching, or loading equipment were parked nearby within the Conservation District. (**Exhibit H, I**)

An oral request to stop work was made by Department staff but initially was rebuffed. Upon locating the supervisor ("Ben"), department staff reiterated their request to stop work immediately. Following further discussions with the supervisor, staff notes that the land clearing work did stop.

Staff observed that the Heliotrope and native naupaka populations had been extensively cleared and mulched in both the fast lands/General subzone and submerged land/Resource subzone of the Conservation District.

On October 19, 2023, a Notice of Alleged Violation was issued to all property owners within the CPR for the unauthorized land uses in the Conservation District. (**Exhibit J**)

On October 30, 2023, staff met with Sushil Garg<sup>5</sup> in response to the alleged unauthorized work and Notice. Mr. Garg stated that he had hired "Ben" through the previous owner, as Ben was familiar with the property. Mr. Garg expressed a concern regarding the dry brush and fire. Mr. Garg stated that he did not know about the importance of the vegetation. The meeting was followed up by an email from Mr. Garg to staff. (**Exhibit K**)

On January 31, 2024, a site inspection was performed by DOFAW and OCCL staff to further assess the area of disturbance. DOFAW investigated the disturbance to the yellow-faced bees and their habitat and OCCL investigated the disturbance to vegetation throughout the Conservation District. The vegetation that had been mulched on-site and spread over the ground throughout the Conservation District now were in piles. Without

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<sup>4</sup> OCCL staff is unable to locate any records of approved-permits with the City and County of Honolulu that would allow the construction of the boundary fence between the Turtle Bay properties and the subject property. Based on OCCL staff review of prior certified shorelines, which include photographs, staff believes the unauthorized boundary fence was likely constructed in 2022.

<sup>5</sup> Sushil Garg is the managing agent of LKG HI Properties, LLC, which owns a majority of the beachfront properties at the CPR.



the coastal vegetation, it appears the reach of the surf was much more landward as evidence by the distribution of the mulch.

OCCL has concerns about siting mulch in the Conservation District because of the possibility of invasive coconut rhinoceros beetle (CRB) infestation. OCCL sifted the mulch and observed bugs, ants, a centipede, but no large CRB grub that would indicate the presence of a CRB infestation. DOFAW staff conducted a drone survey of the area to document the extent of the vegetation damage and staff counted trees and stumps for GIS location. Staff alleges that about 2-acres of land that lies within the Conservation District was disturbed. 106 stumps of Heliotrope were counted, with about 40 stumps appearing makai of the shoreline. **(Exhibits L, M, N)**

Staff notes that the vegetation (naupaka and beach Heliotrope) removed is an important part of a natural and healthy beach, dune, and backshore environment. Since the alleged unauthorized clearing and tree removal has taken place, the reach of the surf or highest wash of the waves appears to be much further mauka/landward. Drone footage taken on December 22, 2023, illustrates this by examining and comparing past drone footage taken on October 31, 2023. This is further evidenced in drone photos, taken on December 22, 2023, which show the upper limit of debris left by the highest wash of waves that appears to contain, but not limited to, the recently mulched coastal vegetation and on the ground inspection of the wash of waves of January 31, 2024. **(Exhibits O & P)**

#### *Relating to unauthorized structures in the Conservation District*

During OCCL's site inspections of October 2023 through January 2024, staff observed two fence lines that extend into the Conservation District and a fence line that parallels the shoreline. The OCCL has no record of correspondences, applications, or authorizations for fences within the Conservation District for this property. Further the offending fence lines appear to have been created in 2022. There is no record of a certified shoreline at this moment in time to ensure the fence line(s) could be properly sited outside of the Conservation District.

OCCL staff notes, based on consultation with DOFAW and the U.S. Fish and Wildlife Service, any fence-line in this area without proper authorization is likely to adversely affect the Mōlī that nest in this area. For more information, see the staff submittal relating to the taking of the mōlī named Ho'okipa under the Division of Forestry & Wildlife's agenda items.

Fences that have been erected in this area without proper authorization cannot be fully analyzed as to whether they comply with the Conservation District rules and considered impacts to the mōlī because there are no documented permits or plans for such fences.

#### **Boundary Fence (Exhibits F, Q)**

The subject fence is located at the boundary between TMK 5-6-003:54 (owned by Turtle Bay) and the subject parcel. The area where the fence extends into the Conservation District is noted as "easement 1 (10 ft. wide) for private beach access (0.221 acre more or less)." The easement is considered a "common element" of the CPR for all owners to utilize.

OCCL staff cannot locate any State or county records that would indicate that this fence has any permits from the State or the City and County of Honolulu's Department of Planning and Permitting. OCCL's jurisdictional authority ends at the Conservation District boundary, so OCCL can only seek enforcement relating to this fence within the Conservation District.

OCCL did not authorize any fence to be placed within the Conservation District at this location. As the easement upon which the fence is located is a "common element" of the CPR, the entire CPR is responsible for this violation.

### **Fences on Unit 1 (Exhibit R)**

There are two fence lines on this unit. One appears to be a shade cloth fence that extends into the Conservation District. The other fence line appears to be a wrought iron fence running parallel to the shoreline. On January 31, 2024, staff observed numerous mōlī on the property socializing. At the western property boundary, a solidary moli was observed behind the iron wrought fence of Unit 1.

OCCL cannot locate any State or county records that would indicate that these fences have any permits from the State or the City and County's Department of Planning and Permitting. OCCL's jurisdictional authority ends at the Conservation District boundary, so OCCL can only seek enforcement relating to this fence within the Conservation District.

OCCL did not authorize any fence to be placed within the Conservation District at Unit 1 of the CPR. Ms. Yue-Sai Kan, a Trustee of the Yue-Sai Kan Trust, was made aware of the Conservation District, and its restrictions, in correspondence from OCCL dated August 16, 2022. **(Exhibit S)**

### **APPLICABLE LAWS**

The Board has statutory authority to impose civil administrative fines for the above-discussed violations, as further discussed below.

The Board is authorized to recover money due the State for damage done to any public lands by wrongful entry and occupation or by wrongful removal therefrom or destruction of any property. HRS § 171-7(7).

Land uses in the Conservation District are regulated by Hawai'i Revised Statutes (HRS) Chapter 183C and the administrative rules promulgated thereunder, which are found in Hawai'i Administrative Rules (HAR) Chapter 13-5.

The Department, through OCCL, regulates land use in the Conservation District by the issuance of permits and site plan approvals. HRS §183C-6. Permit(s) or approval(s) by the department or board for land use(s) in the Conservation District must be obtained *before* proceeding with any land use. HAR §13-5-6(d).

This Board and the Department are statutorily required to enforce land use regulations on Conservation District lands, including the collection of fines for violations of land use. HRS § 183C-3.

Land uses, and associated permit or site plan approvals required by the State, in the General and Resource subzones of the Conservation District are governed by HAR §13-5-22.<sup>6</sup> Land use, for purposes of HAR Chapter 13-5, means:

- (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;
- (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;
- (3) The subdivision of land; or
- (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land. HAR § 13-5-2.

In addition to the general definition of “land use,” HAR Chapter 13-5 further describes specific land uses allowed within the Conservation District and what level of departmental review for such uses is required.

Staff notes that this submittal proposes resolution for unauthorized land uses within the Conservation District and removing State resources in violation of State law and administrative rule. There are other Federal and Honolulu County laws that may be applied to these circumstances to regulate and further enforce upon the unauthorized activities that may be occurring on the property that are beyond the scope of the department’s authority.

Staff has assessed the land uses in the Conservation District at the subject property and identified the unauthorized land uses to be as follows:

*Laws relating to grading, removing, harvesting, extraction of any material or natural resource on land (vegetation clearing in the Conservation District and State Land)*

**Tree removal** is identified as a land use regulated under HAR §13-5-22 (“Selective removal of individual trees...for non-commercial purposes provided that each tree is replaced on a one-to-one-basis with trees that are appropriate to the site location with preferences to trees that are endemic or indigenous to Hawai’i”). Tree removal in the Conservation District requires site plan approval by the department prior to any work being conducted. HAR §§13-5-22(b)(2), P-11(B-1).

“Site plan” means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping. HAR §13-5-2.

**Basic land management**, including routine weed control, clearing of understory, and tree pruning, utilizing chemical and mechanical control methods, which involves no grubbing or grading, in accordance with state and federal laws and regulations, in an area greater

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<sup>6</sup> “[A]ll identified land uses and their associated permit or site plan approval requirements listed for the protective and limited subzones also apply to the resource subzone, unless otherwise noted.” HAR § 13-5-24(a).

[A]ll identified land uses and their associated permit or site plan approval requirements listed for the protective, limited, and resource subzones also apply to the general subzone, unless otherwise noted.” HAR § 13-5-25(a).

than one acre, is identified as a land use regulated under HAR §13-5-22. This type of basic land management in the Conservation District requires site plan approval by the department prior to any work being conducted. HAR §§13-5-22(b)(2), P-13(B-1). Further, the rules state that the department or board reserves the right to require departmental or board approval if it is determined that the proposed action may cause significant negative secondary impacts on natural or cultural resources, or the surrounding community.

Clearing land for fire pre-suppression and prevention is also an identified land use regulated under HAR § 13-5-22. This type of land management requires both a site plan approval by the department *and* a fire buffer plan approved by the department. HAR §§13-5-22(b)(2), P-13(B-3).

“Land” is defined as all real property, fast or submerged, and all interests therein, including fauna, flora, minerals, and all such natural resources, unless otherwise expressly provided. HAR §13-5-2.

“Grubbing” means the removal of vegetation by scraping, dislodging, or uprooting vegetation that breaks the topsoil. *Id.*

**Mulch spreading** is a “land use not otherwise identified” in HAR §13-5-25(G-2)(D-1). Any land use not otherwise identified in the administrative rules requires a board permit and potentially a management plan. HAR §13-5-25(c)(4).

“Management plan” means a project or site-based plan to protect and conserve natural and cultural resources. HAR §13-5-2.

Further, the basic of definition of “land use” includes the placement of any solid material on land that remains on the land for more than thirty days. HAR §13-5-2.

The spreading of mulch is inconsistent with the framework of the Conservation District that is designed to preserve the State’s fragile natural ecosystems and is contrary to the prohibition on waste and disposal facilities in the Conservation District. HRS §§ 183C-1, 183C-4.

**Destruction and removal of any tree or shrub** is prohibited on public property. HAR §13-221-28(d).

The shoreline below the high-water mark is State land. The removal of vegetation on State land constitutes unauthorized land use on State land. The Board is authorized to set, charge, and collect reasonable fines for engaging in any prohibited use of public lands or conducting any prohibited activity on public lands. HRS §171-6(15).

*Laws relating to unauthorized structures in the Conservation District*

**The construction of a fence** within or that extends into the Conservation District is identified as a land use regulated under HAR §13-5-22. If it is a new fence, a departmental permit is required prior to constructing said fence. HAR §13-5-22(P-13)(C-1). If the fence is constructed or placed as an accessory to existing facilities or uses, site plan approval by the department is required prior to construction. HAR §13-5-22(P-9)(B-1).

Further, the construction of a fence in the Conservation District meets the basic definition of “land use,” which includes the placement or erection of any solid material on land if that material remains on the land for more than thirty days. HAR §13-5-2.

### **PENALTIES**

Any person, firm, government agency, or corporation violating any provision of the Conservation District statutes or rules is subject to the penalties prescribed in HRS § 183C-7.<sup>7</sup>

HRS 183C-7 provides that any person violating HRS Chapter 183C or HAR Chapter 13-5 shall be fined not more than \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

The Board may set, charge, and collect the fine based on the value of the natural resource that is damaged, the market value of the natural resource damaged, and any other factor it deems appropriate, such as the loss of the natural resource to its natural habitat and the environment and the cost of restoration or replacement. These remedies are cumulative and in addition to any other remedy allowed by law. HRS § 183C-7(b).

In December 2010, the Board adopted the Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land or Natural Resources, to provide guidance in the assessment of administrative sanctions and promote consistency within the department. This violation penalty schedule applies to the instant matter. **(Exhibit T)**

OCCL staff treats each case individually when assessing penalties for violations of Conservation District laws using the Penalty Schedule Guideline and looks at factors that can allow for upward or downward adjustments. See HAR §13-1-70.

*Penalties relating to grading, removing, harvesting, extraction of any material or natural resource on land (vegetation clearing in the Conservation District and State Land)*

### **Tree removal**

Naupaka is considered a native “shrub.” Heliotrope is an invasive species tree, however, it provides necessary and critical habitat for numerous native species, including the indigenous and endangered yellow-faced bee.

The removal of any invasive tree is to be considered as removal/clearing of vegetation. Penalty Schedule Guideline at 5.

Departmental staff counted 106 tree stumps within the cleared area. If each tree were cleared individually over time, this could be a minor harm to the resource. However, based on the high number of trees cleared and their importance to the endangered yellow-faced bee, OCCL staff finds that the tree removal at the CPR’s shoreline area constitutes **major harm to the resource** and the penalty range shall be \$10,000-\$15,000.

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<sup>7</sup> “Any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in chapter 183C, HRS.” HAR §13-5-6(a).

### **Basic Land Management / Vegetation removal**

The clearing of the naupaka, heliotropes, and other vegetation at the CPR's shoreline area was approximately two acres. Based on table 3 of the Penalty Schedule Guidelines, removal of more than 10,000 square feet of vegetation constitutes **major harm to the resource** and provides that the penalty range shall be \$10,000-\$15,000. Penalty Schedule Guideline at 6.

Two acres is 87,120 square feet.

### **Mulch Spreading**

The mulch in this instance was the pulverized naupaka, heliotrope, and invertebrates that lived within the plants.

Mulch spreading is a "land use not otherwise identified" in HAR §13-5-25(G-2)(D-1). Any land use not otherwise identified in the administrative rules requires a board permit and potentially a management plan. HAR §13-5-25(c)(4). Therefore, the spreading of the mulch at the CPR shoreline area constitutes **major harm to the resource** and provides that the penalty range shall be \$10,000-\$15,000.

### **Removal/Destruction of Tree or Shrub on State Land**

The removal or destruction of any tree or shrub from State land is prohibited. As the landowner and his agent(s) did not even attempt to obtain permission from the State to remove and destroy these trees and shrubs, the staff finds that this violation constitutes **major harm to the resource**. The penalty for removing or destroying any tree or shrub from public lands is a \$500 fine, in addition to administrative costs and damages incurred by the department. HAR §13-221-3.

In addition to the fines, administrative costs, and damages provided for above, when there is damage to or theft of natural resources, the Board may also charge and collect a fine that is appropriate considering the value of the natural resource that is damaged or the subject of theft. In arriving at an appropriate fine, the Board may consider the market value of the natural resource damaged and any other factor it deems appropriate, such as the loss of the natural resource to its natural habitat and environment and the cost of restoration or replacement. These remedies are cumulative. HRS § 171-6(15).

### *Penalties relating to unauthorized structures in the Conservation District*

#### **Fence Construction**

Construction of a fence or placement of any solid material within the Conservation District requires a departmental permit. Land uses identified to have a permit prerequisite, such as construction of a fence, constitute **major harm to the resource** and the penalty range shall be \$10,000-\$15,000.

#### **DISCUSSION**

Staff notes that while the landowners could have applied for permits or authorization for the above-discussed land uses, it would be highly unlikely that the land uses would have

been allowed in the Conservation District due to the impact the land uses would have on wildlife, including but not limited to native and endangered species. Land uses in the Conservation District are discretionary for the purpose of conserving, protecting, and preserving the important natural and cultural resource of the State through appropriate management and use to promote their long-term sustainability.

### **Vegetation and Tree Removal**

The removal of 106 heliotrope trees, numerous naupaka, and other vegetation has caused substantial adverse impacts to the existing natural resources within the ecosystem. The naupaka and heliotrope trees constituted one of three known habitats of yellow-faced bees. The biggest threat to their extinction is habitat loss and alteration. See *DOFAW Submittal*. OCCL is aware that other native species utilized the vegetation, such as shearwaters that are likely to burrow in the sand under the vegetation.

OCCL staff notes that naupaka, and other shoreline vegetation, is critical to maintain shoreline ecosystems with sandy dunes. The vegetation clearing that occurred at the CPR has already adversely affected the shoreline—by removing the stabilizing shoreline vegetation, the highest wash of the waves now goes far beyond where it did previously and will have long-term effects on erosion in the area if it is not remediated soon and properly.

Further, approximately 40 of the 106 tree stumps appear to be on State unencumbered land. At no time did the department, or any authorized representative, give anyone permission to enter State land clear vegetation and remove and destroy approximately 40 trees.

Given that 40 of the 106 trees removed were makai of the shoreline, in 40 instances an unauthorized action upon State land was committed.

Given the number of trees removed, the type of trees and vegetation, the function of the flora as habitat to endangered species, ecosystem services, and potential coastal hazard mitigation, the maximum penalty shall be recommended for the removal of 106 trees; and the clearing of 2-acres of land.

### **Mulch Spreading**

Mulch was spread over approximately 2-acres of the area of clearing. Mulch is known as a breeding site for the invasive Coconut Rhinoceros Beetle (CRB) that is detrimental to palms, bananas, pineapple, kalo and potentially other crops. Further, the mulch that was spread was the pulverized material of the cleared vegetation and contained the remains of numerous endangered and indigenous yellow-faced bees.

The spreading of the mulch created a complicated situation for OCCL staff—OCCL would typically advise a violator to remove unauthorized mulch, however, at site visits DOFAW and USFWS staff observed the yellow-faced bees being attracted to the mulch. This is likely because the bees' pheromones from their nests and pulverized individuals were attracting them to the mulch. So, as the mulch could contain eggs or other parts of the bees, and there was no sign of a CRB infestation, OCCL staff recommended that the landowner consult with a biologist, USFWS, and DOFAW prior to removing the mulch. OCCL staff believes the mulch is still in place.

## **Removal/Destruction of Tree or Shrub on State Land**

The land clearing on state land was conducted without State permission. Further, as demonstrated by the DOFAW staff submittal, this clearing resulted in the loss of extremely important habitat for endangered, indigenous, yellow-faced bees and seabirds. From OCCL's perspective, the vegetation was extremely important to maintain the integrity of the shoreline and the ecosystem as a whole.

## **Fencing**

The fence lines are detrimental and interfere with the life cycle of the mōlī (Laysan albatross) creating separation, anxiety, and trauma to the protected bird. Fences block the adults when caring for their egg and young as they take turns watching over the nest. When the birds are ready to leave the nest, fences may block the flight path of the very important initial first flight. Staff notes that more information regarding the impact the land uses had on the yellow faced bee, albatross, and other native or endangered wildlife will be provided by DOFAW's agenda items.

## **Certified Shoreline Considerations**

Due to the unauthorized tree removal and land clearing on both State land and the subject property, it appears the shoreline has migrated mauka. To ensure the preservation and protection of the Conservation District, staff recommends that a new certified shoreline be sought to clearly demarcate the Conservation District Resource and General Subzones, which roll with the highest wash of the waves inland (mauka) 150-feet from the shoreline.

The most recent shoreline certification for the CPR property was recently certified on October 30, 2023. **(See Exhibit H)** Certification of the shoreline is valid for twelve months from the date of certification. HAR § 13-222-11(a). OCCL staff respectfully requests that the Board authorize the department to review the certified shoreline due to the extreme change in topography of the area.

## **FINDINGS**

Based on the above summarized information, OCCL staff has concluded the following regarding the alleged unauthorized land uses:

1. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause, or allow the removal of the 106 trees within the Conservation District General and Resource subzones, which includes 40 trees on state land, without legal authority to do so;
2. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause, or allow the clearing of approximately two-acres of Conservation District land;
3. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause, or allow the clearing of 40 trees and vegetation on state land, without legal authority to do so;



4. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause or allow the spreading of mulch over approximately two-acres of land;
5. That the unauthorized tree and vegetation removal has caused the shoreline to migrate mauka/landward;
6. That the unauthorized tree and vegetation removal has caused irreparable harm to the shoreline ecosystem;
7. That the Condominium Property Regime of Marconi Point Condominiums at TMK: (1) 5-6-003:053 did in fact authorize, cause, or allow the boundary fence on the west side of the property to be constructed in the Conservation District, without legal authority to do so; and
8. That the Yue-Sai Kan Trust/Yue-Sai Kan, Trustee, did in fact authorize, cause, or allow two fence lines in the Conservation District, without legal authority to do so; and
9. That the unauthorized fences authorized, caused, or allowed by the Yue-Sai Kan Trust/ Yue-Sai Kan, Trustee, and the Condominium Property Regime of Marconi Point Condominiums are harmful to the ecosystem(s) within the Conservation District.

**AS SUCH, STAFF RECOMMENDS AS FOLLOWS:**

That the Board adopt the findings and conclusions set forth above and impose the following administrative fines:

**1. Regarding unauthorized removal of trees and vegetation:**

- a. Pursuant to HRS §183-7, Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$1,590,000 for violating the provisions of HAR §13-5-25 for the removal of 106 Heliotrope trees;
- b. Pursuant to HRS §183-7, Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$15,000 for violating the provisions of HAR §13-5-25 for clearing of over 1-acre of land;
- c. Pursuant to HRS §183-7, Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$15,000 for violating the provisions of HAR §13-5-25 for the spreading of mulch over 1-acre of land;
- d. Pursuant to HRS, §171-6(15), Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$20,000 for removing or destroying 40 Heliotrope trees on unencumbered State lands;

- e. As all of the above-listed actions were taken intentionally by Mr. Benjamin Lassary pursuant to his employment by Mr. Sushil Garg, Mr. Sushil Garg and Mr. Benjamin Lassary shall be held jointly and severally liable for all fines imposed;
- f. Therefore, the total amount of fines that Mr. Sushil Garg and Mr. Benjamin Lassary are jointly and severally liable for constitute \$1,640,000;
- g. The \$1,640,000 in fines for which Mr. Sushil Garg and Mr. Benjamin Lassary are jointly and severally liable for shall be paid to the Department within ninety (90) days;
- h. Mr. Sushil Garg, as the majority landowner of the subject area, shall provide the department with plans for the removal of all mulch spread within the Conservation District within thirty (30) days to obtain the department's approval of such plan;
- i. Mr. Sushil Garg, as the landowner, shall provide plans to restore the Conservation District to its condition prior to the land clearing activities of October 2023 within sixty (60) days to obtain the departments' approval;
- j. A land disposition shall be required and obtained by Mr. Sushil Garg, or his representative(s), to perform restoration work upon State land to restore it to its condition prior to the land clearing activities of October 2023;
- k. In the event that Mr. Sushil Garg, or a future owner of his property, fail to provide the above-listed plans or fail to restore the shoreline to the department's satisfaction, Mr. Sushil Garg shall be liable for the costs incurred by the department to remediate the shoreline; and
- l. That the Board shall authorize the Department of the Attorney General to file a Notice of Pendency of Action with the deed or deed instrument of Mr. Sushil Garg's property at the Bureau of Conveyances, pursuant to HRS §§171-6.4(c), 501-151, & 634-51.

**2. Regarding the western boundary fence within the Conservation District:**

- a. Pursuant to HRS §183C-7 the landowners of Tax Map Key (TMK): (1) 5-6-003:053 are fined \$15,000 for violating the provisions of HAR §13-5-25;
- b. The landowners of TMK (1) 5-6-003:053 shall pay all fines within ninety (90) days;
- c. The landowners of TMK: (1) 5-6-003:053 shall remove the indicated fence lines within twenty-one (21) days; and

- d. In the event that the landowner(s) of TMK (1) 5-6-003:053 fail to pay all fines or remove all indicated fence lines, that the Board authorize the Department of the Attorney General to seek enforcement and compliance in the Circuit Court of the State of Hawai'i.

**3. Regarding the unauthorized fences within the Conservation District:**

- a. Pursuant to HRS §187C-7, the Yue-Sai Kan Trust/Yue-Sai Kan Trustee is fined \$30,000 for violating the provisions of HAR §13-5-25;
- b. The Yue-Sai Kan Trust/Yue-Sai Kan, Trustee shall pay all fines within ninety (90) days;
- c. The Yue-Sai Kan Trust/Yue-Sai Kan, Trustee shall remove all indicated fence lines within twenty-one (21) days; and
- d. In the event that the Yue-Sai Kan Trust/Yue-Sai Kan, Trustee fails to pay all fines or remove all indicated fence lines, that the Board authorize the Department of the Attorney General to seek enforcement and compliance in the Circuit Court of the State of Hawai'i.

**4. That the Board order a new certified shoreline application to be submitted by the landowner(s) of TMK (1) 5-6-003:053 within ninety (90) days.**

- a. The landowners should endeavor to obtain a new certified shoreline as soon as possible to resolve the shoreline boundary uncertainty that was created by the extreme clearing of vegetation at the shoreline;
  - b. The Conservation District shall be demarcated within thirty (30) days of the Departments' receipt of the new certified shoreline;
5. That in the event of failure of the above-mentioned landowners or future owners of Tax Map Key: (1) 5-6-003:053, to comply with any order imposed in connection with this enforcement action, they shall be fined an additional \$15,000 per day, pursuant HRS §183C-7 until this order is complied with;
  6. That in the event of failure of the above-mentioned landowners or future owners of Tax Map Key: (1) 5-6-003:053, to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs;
  7. That the Board delegate authority to the Chairperson to effectuate the above recommendations, subject to such conditions as may be prescribed by the Chairperson to best serve the interest of the State, without further consultation with the Board, subject to review and approval by the Department of the Attorney General; and

8. The above noted conditions of Enforcement file OA 24-14 shall be recorded with the deed instruments of Tax Map Key: (1) 5-6-003:053 at the Bureau of Conveyances pursuant to HAR §13-5-6(e).

Respectfully submitted,



K. Tiger Mills, Staff Planner  
Office of Conservation and Coastal Lands

Approved for submittal:



Dawn N.S. Chang, Chairperson  
Board of Land and Natural Resources

MC



TMK: (1) 5-6-003:053 April 23, 2021

Exhibit A - Location in 2021





Exhibit A Location Map





Mōli: Nesting; Cruising; Chatting and Dancing  
 Portion of Educational Sign Regarding Albatross Nesting Area





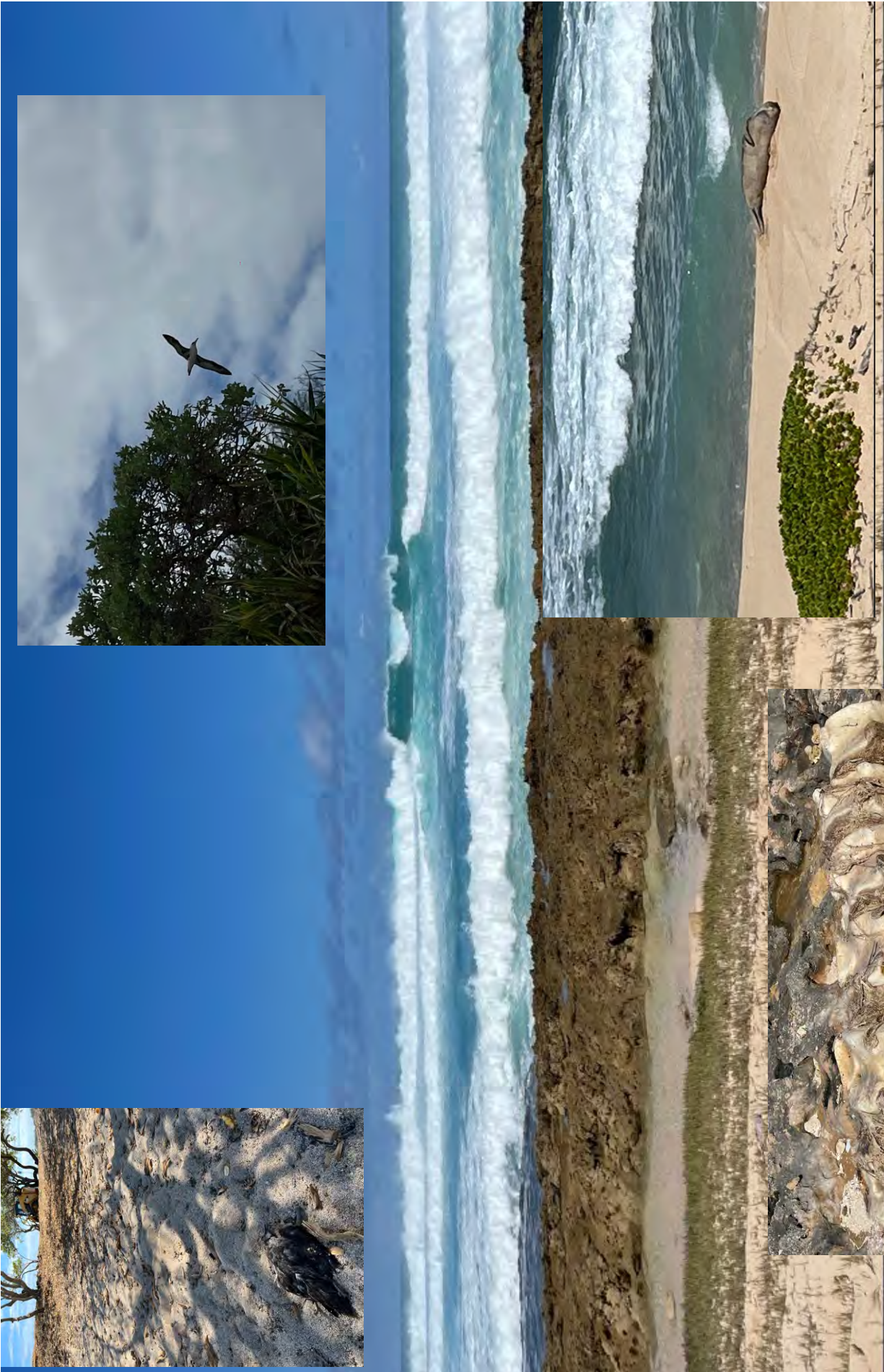
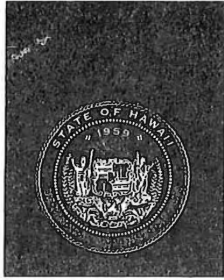


Exhibit C Observations





STATE OF  
HAWAII

DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT  
**LAND USE COMMISSION**

P. O. BOX 2359 • HONOLULU, HAWAII 96804

September 20, 1971

JOHN A. BURNS  
Governor

SHELLEY M. MARK  
Director Department  
of Planning and Economic  
Development

GORO INABA  
~~WALTER H. S. CHOI~~

Commission Chairman  
EDDIE TANGEN

~~RAYMOND SAKAHASHI~~  
Vice Chairman  
TATSUO FUJIMOTO

Executive Officer

COMMISSION MEMBERS

Alexander J. Napier

Shelley M. Mark

Sunao Kido

Eddie Tangen

Leslie E. L. Wung

Tanji Yamamura

Stanley S. Sakahashi

TO WHOM IT MAY CONCERN:

At its meeting on September 17, 1971, the Land Use Commission considered petition A71-286 initiated by the Commission and voted to affirm and modify the zoning of the following parcels that were rezoned during the 1969 5-year boundary review, which are located within the City and County of Honolulu.

The areas described below were subject to this action:

<u>TAX MAP KEY</u>	<u>OWNER</u>	<u>ACRES</u>	<u>LOCATION</u>
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A. RETAINED IN THE URBAN DISTRICT

5-3-13: 3, 4, & 5	Mary A. Mendes Raymond Rezentes & Wife Lawrence Ching & Wife	3.7 acres	Hauula
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B. RETAINED IN THE CONSERVATION DISTRICT

2-5-20:77	Wilbert Choi & Wife	18,000 sq. ft.	Makiki
2-5-20: 2, 3, 4, 5, & 6	Wilbert Choi & Wife State of Hawaii	29.1 acres	Makiki
2-3-37: por. 21	State of Hawaii (See Map)	4.4 acres	Waikiki

C. RECLASSIFIED INTO THE URBAN DISTRICT THE AREA BELOW THE 40 FOOT CONTOUR LINE & RETAINED IN THE CONSERVATION DISTRICT THE AREA ABOVE THE 40 FOOT CONTOUR LINE (See Map)

8-4-01: por. 8 & 9	John T. Waterhouse		Lahilahi Pt., Waianae
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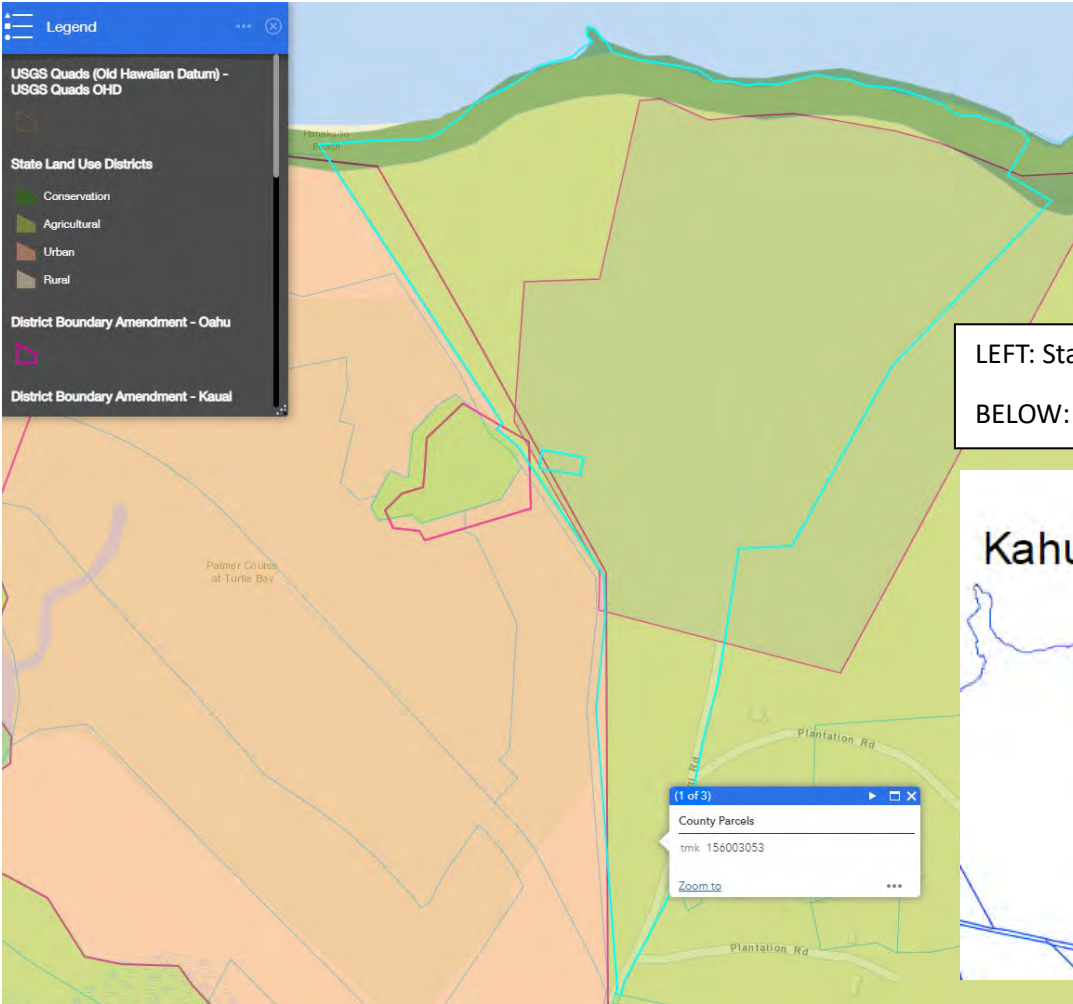


To Whom it may Concern:

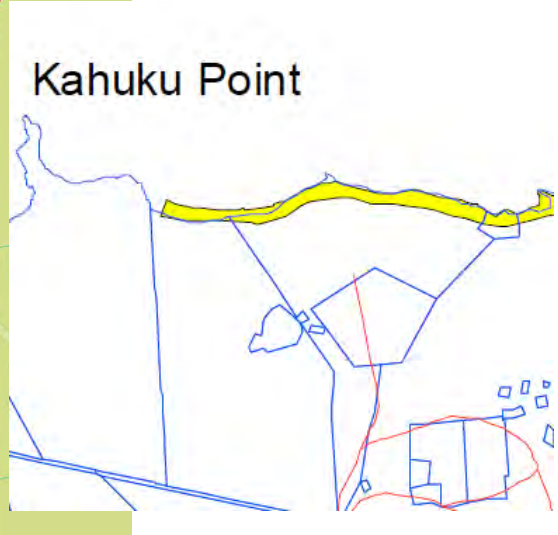
-3-

September 20, 1971

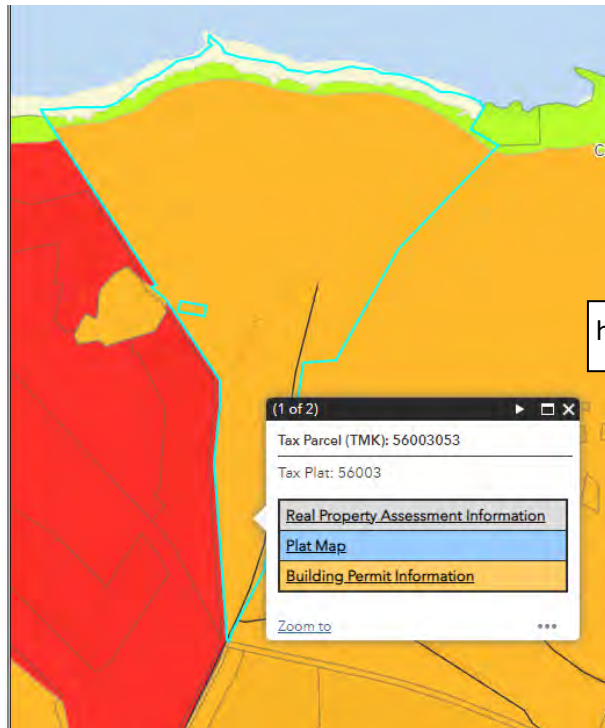
cc: Board of Water Supply  
Water Sales Division, Bd. of Water Supply  
Planning Division, DPED  
Planning Branch, DAGS  
Land Use Commission  
Office of Ombudsman  
Building Department, C & C of Honolulu



LEFT: State Land Use District Map  
BELOW: Conservation District Subzone Map



Luc.hawaii.gov



<https://dlnr.hawaii.gov/occl/subzone-maps/>

Various Government Agency Maps Indicating the Conservation District

City and County of Honolulu's Parcels & Zoning Information App at <https://www.honolulugis.org/>

DAVID Y. IGE  
GOVERNOR



DOUGLAS S. CHIN  
ATTORNEY GENERAL

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
425 Queen Street  
Honolulu, Hawaii 96813

RUSSELL A. SUZUKI  
FIRST DEPUTY ATTORNEY  
GENERAL

December 11, 2017

The Honorable Suzanne D. Case  
Chairperson, Board of Land and Natural Resources  
State of Hawai'i  
1151 Punchbowl Street, Room 130  
Honolulu, Hawai'i 96813

Dear Chairperson Case:

RE: Shoreline Encroachment Easements

#### **INTRODUCTION**

By memorandum dated August 10, 2017, you asked for our advice regarding the Board of Land and Natural Resource's practice of requiring private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline.

#### **QUESTIONS AND SUMMARY ANSWERS<sup>1</sup>**

1. What is the dividing line between public and private property with respect to oceanfront property?

Short answer: The State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." For convenience, we refer to this description as the

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<sup>1</sup> The intent of your memorandum is clear even though it does not directly ask specific questions. We have taken the liberty of setting out questions we believe are raised.

Op. No. 17-1

"shoreline." This use of the term "shoreline" is closely related to but not exactly the same as the "certified shoreline" described in chapter 205A, Hawaii Revised Statutes (HRS). This line (the shoreline) is identical to -- and indeed defines -- the dividing line between public and private property (the ownership line).<sup>2</sup>

2. How is the ownership line affected when there is landward migration of the shoreline caused by erosion or sea level rise?

Short answer: By definition, if the shoreline moves landward, then the ownership line also moves mauka.<sup>3</sup>

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

Short answer: The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land covered by these statutes. This result is fortified by the Supreme Court's decision in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The Court held that the statutes do not "imperatively require" abrogation of common law rules or "evinced an express legislative intent to do so."

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

Short answer: No. The Hawai'i Supreme Court has specifically considered and rejected such claims. As to federal

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<sup>2</sup> The shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute addresses the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure. We have not found it necessary to address that question in providing this advice.

<sup>3</sup> The term "mauka" means "inland." *Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073, note 3 (2006). A "mauka" movement of the ownership line means toward the mountain or (equivalently) away from the sea.

taking law, the State's inchoate rights in the property existed prior to private ownership. The interest lost was not part of private title to begin with and cannot be the basis of a taking claim.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

Short answer: No. Ownership of land by erosion or sea level rise is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. Therefore the statutes requiring that the Attorney General review and approve land acquisitions do not apply.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Short answer: Yes, applicable statutes specifically provide for the payment of fair market value in most cases.

## **DISCUSSION**

### **1. What is the dividing line between public and private property with respect to oceanfront property?**

It is the uniform law of every coastal state that land below (seaward or "makai" of) the shoreline is owned by the State and held in public trust<sup>4</sup> for the people of the State.<sup>5</sup>

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<sup>4</sup> The public trust doctrine is a common law doctrine, inherited from England and dating back to Roman law, dictating that all submerged lands are the property of the state and held in trust for the people. *Shively v. Bowlby*, 152 U.S. 1 (1894). The seminal United States case for the public trust doctrine is *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892). The seminal case in Hawai'i is *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899). In Hawai'i the public trust is also recognized in the Constitution, article XI, section 1.

<sup>5</sup> The same issue can arise as to rivers, lakes, or other bodies of water. Indeed *Illinois Cent. R.R. Co.*, see *supra* note 4,

Most states define the shoreline/ownership boundary as the mean high tide mark. *Purdie v. Attorney Gen.*, 143 N.H. 661, 666, 732 A.2d 442, 446-47 (1999):

The few States that reject the mean high tide mark as the public-private shoreland boundary do so on distinct histories not applicable to our State. See, e.g., *Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 77 (1968) (Hawaii boundary based on Hawaiian King's issuance of royal patents in 1866); *Bell v. Town of Wells*, 557 A.2d 168, 171-72 (Me.1989) (Massachusetts and Maine adopted mean low water as boundary line based on 1647 Massachusetts ordinance); cf. *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. at 88-89, 649 A.2d at 608 (refusing to adopt Massachusetts rule for New Hampshire).

See also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.")

*Purdie* rightly identifies Hawai'i as a state with a unique approach to defining the shoreline. This approach was initiated and explained in three landmark cases, all authored by then Chief Justice William S. Richardson.

In *Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the Court considered the ownership line in the context of a request to register land title in the land court:

Clinton R. Ashford and Joan B. S. Ashford, the appellees, petitioned the land court to register title to certain land situate on the Island of Molokai. The lands are the makai (seaward) portions of Royal Patent 3004 to Kamakaheki and Royal Patent 3005 to Kahiko, both issued on February 22, 1866.

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concerned sale of land filled land reclaimed from Lake Michigan. Freshwater shorelines present some extraneous complications and are not further considered in this letter.



The question before this court is the location of the makai boundaries of both parcels of land, which are described in the royal patents as running 'ma ke kai' (along the sea). The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U. S. Coast and Geodetic Survey.

50 Haw. at 314-15, 440 P.2d at 76-77.

The Court held that the boundary (ownership line) was not the mean high water mark. Rather the boundary -- pursuant to Hawaiian custom as established by kama'aina<sup>6</sup> testimony -- is further mauka, specifically: `

along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves, and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.

50 Haw. at 14, 440 P.2d at 77 (1968). That landmark ruling was confirmed and elaborated on in *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), and *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). See *Sotomura*, 55 Haw. at 182, 517 P.2d at 62:

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves

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<sup>6</sup> "Kama'aina" is defined as "Native-born, one born in a place, host." Other relevant senses include "acquainted [with], familiar." M. Pukui & S. Elbert, *Hawaiian Dictionary* 9 (rev. ed. 1986).

*Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073 (2006), as amended (Feb. 28, 2006).

over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

See *Sanborn*, 57 Haw. at 182, 562 P.2d at 773 (1977):

The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves.

**2. How is the ownership line affected when the shoreline moves landward or mauka because of erosion or sea level rise?**

These same cases address and resolve the issue of whether and how ownership changes when the shoreline moves landward or mauka due to erosion or rising sea levels.

*Sotomura* is particularly relevant. In that case, the private owner indisputably owned the land in the past. In fact, the private owner had registered the property in the land court. The land court had determined the seaward boundary of the property and described it by distances and azimuths. The shoreline moved mauka due to erosion. The Court framed the question as "whether title to land lost by erosion passes to the state." The Court noted that this was an issue of first impression in Hawai'i.

The Court held that the answer was "yes," making clear that the ownership was fluid and specifically that it changed with erosion:

We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise

location of the high water mark on the ground is subject to change and may always be altered by erosion.

55 Haw. at 180, 517 P.2d at 61.

Even the previous determination of boundaries in land court was not binding where the actual shoreline was altered by erosion:

This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion.

55 Haw. at 181, 517 P.2d at 61 (citing *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973)).<sup>7</sup>

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<sup>7</sup> *Sotomura* has a complex and murky path after the Hawai'i Supreme Court decision. The United States Supreme Court rejected the owners' petition for certiorari. 419 U.S. 872 (1974). Landowners then sued the County and State officials in federal court. The federal district court judge was the Honorable Dick Yin Wong. Judge Wong was previously the state land court judge. It was his decision that the Hawai'i Supreme Court reversed in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977).

Judge Wong ruled in federal court that the Hawai'i Supreme Court deprived landowners of due process by deciding the case on a basis not presented by the parties or actually litigated. Judge Wong also held that the Hawai'i Supreme Court's decision "ignore[ed] vested property rights" and "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution." *Sotomura v. Hawaii County*, 460 F. Supp. 473, 482-83 (D. Haw. 1978).

Although Judge Wong wrote the decision, it appears that Judge Samuel King entered the judgment. Defendants appealed but the

Importantly, the Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

55 Haw. at 183, 517 P.2d at 62.

One reason for that common law rule (now abrogated in part by statute, section 171-2, HRS) is the tradeoff between accretion and erosion: "since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action." *Id.* (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)). See *Application of Banning*, 73 Haw. 297, 303-04, 832 P.2d 724, 728 (1992), where the Court explained that accretion belongs to the littoral landowner.

*Sotomura* also relied on the public trust doctrine, citing to *King v. Oahu Ry. & Land Co.*, 11 Haw. at 723-24, for the proposition that:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

55 Haw. at 184, 517 P.2d at 63. Public policy therefore "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. at 182, 517 P.2d 61-62.

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appeal was untimely. See *Sotomura v. Hawaii County*, 679 F.2d 152 (9th Cir. 1982).

This public policy remains in effect as the Court has repeatedly ruled. *Application of Banning*, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); *Diamond v. Dobbin*, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

The Court reached the same result in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *Sanborn* also concerned property registered in the land court where the shoreline moved mauka from the land court boundary. The Court framed the issue as:

In addressing the issue of the Sanborns' beachfront title line, the primary question is whether the line is to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration are to prevail.

57 Haw. at 588, 562 P.2d at 773.

The Court specifically held that the land court boundary was subject to change in the event of erosion:

We hold that, regardless of whether or not there has been permanent erosion, the Sanborns' beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the Sanborns' title line as being 'along the high water mark at seashore', we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.

57 Haw. at 590, 562 P.2d at 774.

The Ninth Circuit Court of Appeals made the same ruling in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). The court there considered ownership of land that was mauka of the shoreline when ceded land was granted to the Territory in 1898. The land later became makai of the shoreline because of erosion. The court specifically held that the property moved from private to public ownership.

[T]he holdings in *Sotomura* and *Zimring*<sup>8</sup> require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

*Napeahi v. Paty*, 921 F.2d 897, 903 (9th Cir. 1990).

For these reasons and based on the cases cited above, we advise that the law in Hawai'i is that when the shoreline boundary migrates landward or mauka because of erosion or sea level rise, the State owns the additional submerged land that results from the migration.

**3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?**

A concern has been raised as to a trio of statutes that require Board and Attorney General approval of acquisitions of real property or interests in real property. The statutes are sections 26-7, 107-10, and 171-30, HRS.<sup>9</sup>

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<sup>8</sup> *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). This case is discussed in more detail below.

<sup>9</sup> Section 26-7, HRS provides in relevant part:

The department [of the attorney general] shall . . . approve as to legality and form all documents relating to the acquisition of any land or interest in lands by the State

Section 107-10, HRS, provides in relevant part:

No real property or any right, title, or interest therein shall be acquired by agreement, purchase, gift, devise, eminent domain, or otherwise, for any purpose, by the State or any department, agency, board, commission, or officer thereof, without the

We advise that those statutes are not applicable to change in the ownership line caused by landward or mauka migration of the shoreline due to erosion or sea level rise. As we now show, the possibility of boundary changes due landward or mauka migration of the shoreline due to erosion and accretion is already part of the State's ownership of public trust land. That possibility already encumbers private littoral land. *Sotomura*, 55 Haw. at 183, 517 P.2d at 62. When the State comes into possession of land because of erosion or sea level rise, the State is not "acquiring" property within the meaning of the statutes.

*State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d. 725 (1977), is a key case supporting this proposition. *Zimring*

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prior approval of the attorney general as to form, exceptions, and reservations.

Section 171-30, HRS, provides in relevant part:

(a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:

- (1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.
- (2) Encumbrances, in the form of leases, licenses, or otherwise on public lands, needed by any state department or agency for public purposes or for the disposition for houselots or for economic development.

The board shall upon the request of and with the funds from the state department or agency effectuate all acquisitions as provided under this section.

addressed ownership of lands newly created by a 1955 lava flow that extended the shoreline and added 7.9 acres of land in the Puna area. One of the issues in that case was whether the lava extension was ceded land acquired by the State from the federal government. The State argued that the federal government transferred the lands to the State under section 5(b) of the Admission Act. The opponents countered that the only lands that passed to the State under section 5(b) were those lands ceded to the United States by the Republic of Hawaii in 1898. They argued that the lava extension did not exist in 1898, and could not have been ceded to the United States. The Hawaii Supreme Court disagreed with the opponents and sided with the State. The Court held that the term "property," as used in the Joint Resolution of Annexation, is "extremely broad," and includes "property which is real, personal and mixed, choate and inchoate, corporal or incorporeal." *Id.* at 122-23, 566 P. 2d at 736.

The lava land was an inchoate property right in 1898. When the lava land was later created, that circumstance resulted in the ripening of State ownership of ceded land even though the land did not exist in 1898.

*Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), is on point for the proposition that an inchoate property interest in the possibility of erosion was also "public property" under the Joint Resolution of Annexation. In that case, a native Hawaiian sued the State, alleging that the State had a trust duty under the Admission Act to claim ownership of 1.75 acres shorefront property Kona. It was undisputed that "at the time the public land was ceded by the Republic of Hawaii to the United States in 1898, it did not include the 1.75 acres in contention." 921 F.2d at 902. However, that did not "end the inquiry." Relying on *Zimring* and *Sotomura*, the Ninth Circuit ruled that the land passed from private to public ownership because of erosion -- automatically and as a matter of law:

There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to



conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

921 F.2d at 903.

We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it by erosion or sea level rise. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property under any of the statutes cited above.

This conclusion is bolstered by the Hawai'i Supreme Court's recent ruling in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The issue in that case was whether the State owned seawalls and land under the seawalls because the general public used the seawalls as a walkway. The State argued that under section 264-1, HRS, property could only be dedicated to the State by "deed of conveyance" accepted by the State. The State also cited to and relied on the other statutes cited above. The Court rejected this argument, holding that an "implied dedication" is not a "dedication" covered by section 264-1, HRS.

Instead implied dedication is a common law doctrine, not addressed or abrogated by section 264-1, HRS, or by the other statutes discussed above. The Court articulated a strict standard for statutory abrogation of common law rights:

The Hawaii Revised Statutes, and in particular, HRS §§ 264-1(c)(1), 171-30, 26-7, 107-10, and 520-7, do not "imperatively require" abrogation of common law implied dedication, nor do they evince an express legislative intent to do so. Minneapolis Fire & Marine Ins. v. Matson Nav. Co., 44 Haw. 59, 67-68, 352 P.2d 335, 340 (1960); Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983).

140 Haw. at 452, 403 P.3d at 229.

We believe the Court would view the statutes in the same way with respect to land gained by erosion or sea level rise -- there is no express intention to abrogate common law principles to the effect that the State owns the land without the need for affirmative action by either the Land Board or the Attorney General.

This conclusion is consistent with case law from other jurisdictions which have generally viewed a state's interest in land that may come to the public trust in the future as either a vested or contingent future interest. For example in *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2012), the Texas Supreme Court said:

A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust.

Similarly in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015), *cert. denied*, 2017 WL 1550808 (U.S. Oct. 2, 2017) the court ruled against a taking claim. Under North Carolina common law the dry sand portion of plaintiffs' property had always been encumbered by the public trust. Thus enforcement of that public trust did not interfere with or "take" any pre-existing right. See generally Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate*, 30 Stan. Envtl. L.J. 51, 87 (2011).

**4. Does this result violate private owners' due process rights or constitute a "taking" of private property?**

In *Application of Sanborn*, 57 Haw. 585, 596, 562 P.2d 771, 777-78 (1977), the Sanborns argued that the Court's ruling raised constitutional issues, including a takings claim.

The Sanborns contend that both the Hawaii and federal constitutions would be violated if this court fixes the Sanborns' title line along the upper reaches of the wash of waves. It is contended that such an adjudication would be a taking of private property for

public use without just compensation and also, by allegedly denying *res judicata* to the 1951 decree, would be a violation of due process *per se*.

The Court rejected these arguments, because its ruling was simply an application of existing Hawai'i law:

Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the Sanbors' [sic] title extends to a line 'along high water mark'. We affirm the holding in *McCandless, supra*, that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.

*Id.* This ruling resolves the issue in state courts.

Nor are there viable federal claims, notwithstanding the suggestion to the contrary in *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978). As explained in the previous section of this opinion, the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land. And conversely, the possibility that the seaward boundary may migrate inherently burdens private shoreline property.

This is important to the putative taking claim because the threshold question in any taking case is whether "private property" is being taken at all. As the Supreme Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

Similarly, in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. See also *Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the

claimant has established a 'property interest' for purposes of the Fifth Amendment."); *Conti v. U.S.*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking."); *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place.").

Property rights are protected by the federal and state constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). *Cf. Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 707 (2010) ("State law defines property interests.").

As noted above, the Hawai'i Supreme Court has definitively ruled:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.

*Sotomura*, 55 Haw. at 183, 517 P.2d at 62.

It follows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus there is no taking.

**5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?**

As shown by the discussion of question 3, ownership of land by erosion or sea level rise occurs pursuant to the common law and is a ripening of a pre-existing inchoate right in the land. This ripening is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. It follows

that the Attorney General does not have to review the ownership change and does not have to review or approve "documents relating to" the ownership.

We note that all of the cases discussed above (*Ashford*, *Sotomura*, *Sanborn*, and *Napeahi*) were decided after enactment of the three laws. None of the cases imposed the additional requirement that the Attorney General or the Board approve State ownership. In light of those cases, we do not believe the Supreme Court would require Attorney General approval. See *Gold Coast*, 140 Haw. at 455, 403 P.3d at 232: "These provisions express no intent to abrogate common law implied dedication, nor have they ever been mentioned by our courts as having any relevance to the doctrine."

Conversely, we do not believe the Court would uphold a hypothetical refusal by the Attorney General to approve ownership by reason of change in the shoreline.

**6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?**

Not only can the Board require a former landowner to pay fair market value, but it must do so under current law. Applicable statutes specifically require fair market value in most cases. See, e.g., section 171-13, HRS (requiring that easements be sold for fair market value determined pursuant to section 171-17(b), HRS).

This requirement could be changed by the Legislature. We understand that the Department has introduced appropriate legislation but has not been successful.

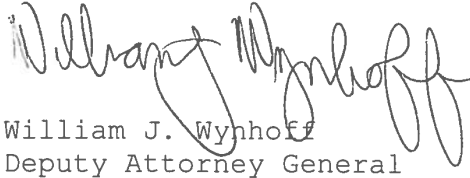
**CONCLUSION**

For these reasons, we conclude that the State owns additional public land resulting when the shoreline has migrated landward or mauka due to erosion or sea level rise, that this migration does not give rise to a constitutional claim by the former owner, that this result is not affected by laws relating to the acquisition of real property, that the Attorney General

The Honorable Suzanne D. Case  
December 11, 2017  
Page 18

does not need to give prior approval in connection with such land, and that the Board can and should charge former owners fair market value in return for an easement interest in the land.

Very truly yours,



William J. Wynhoff  
Deputy Attorney General

APPROVED:



Douglas S. Chin  
Attorney General

WJW:w

Op. No. 17-1





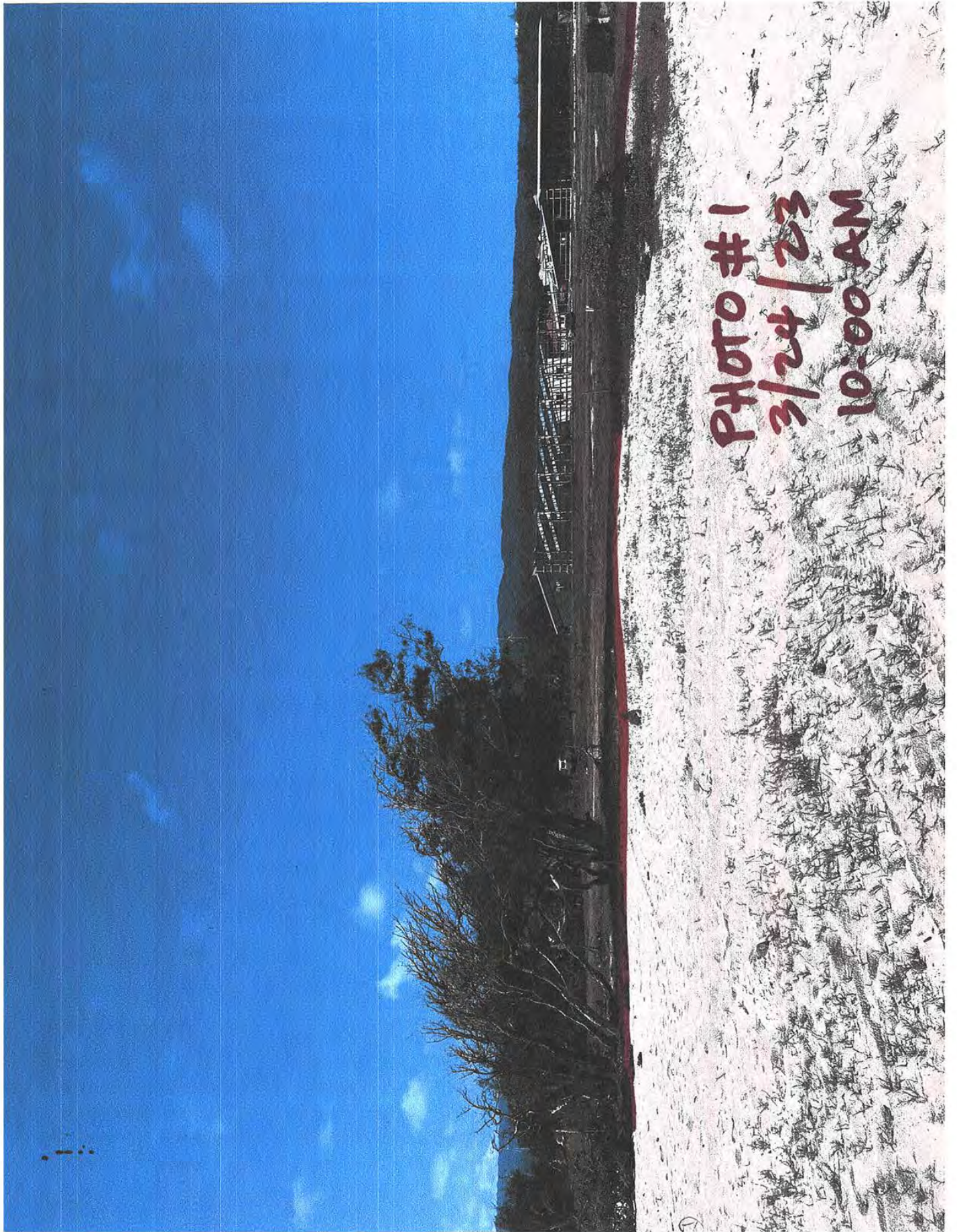
Google Maps 2017

WESTERN BOUNDARY FENCE

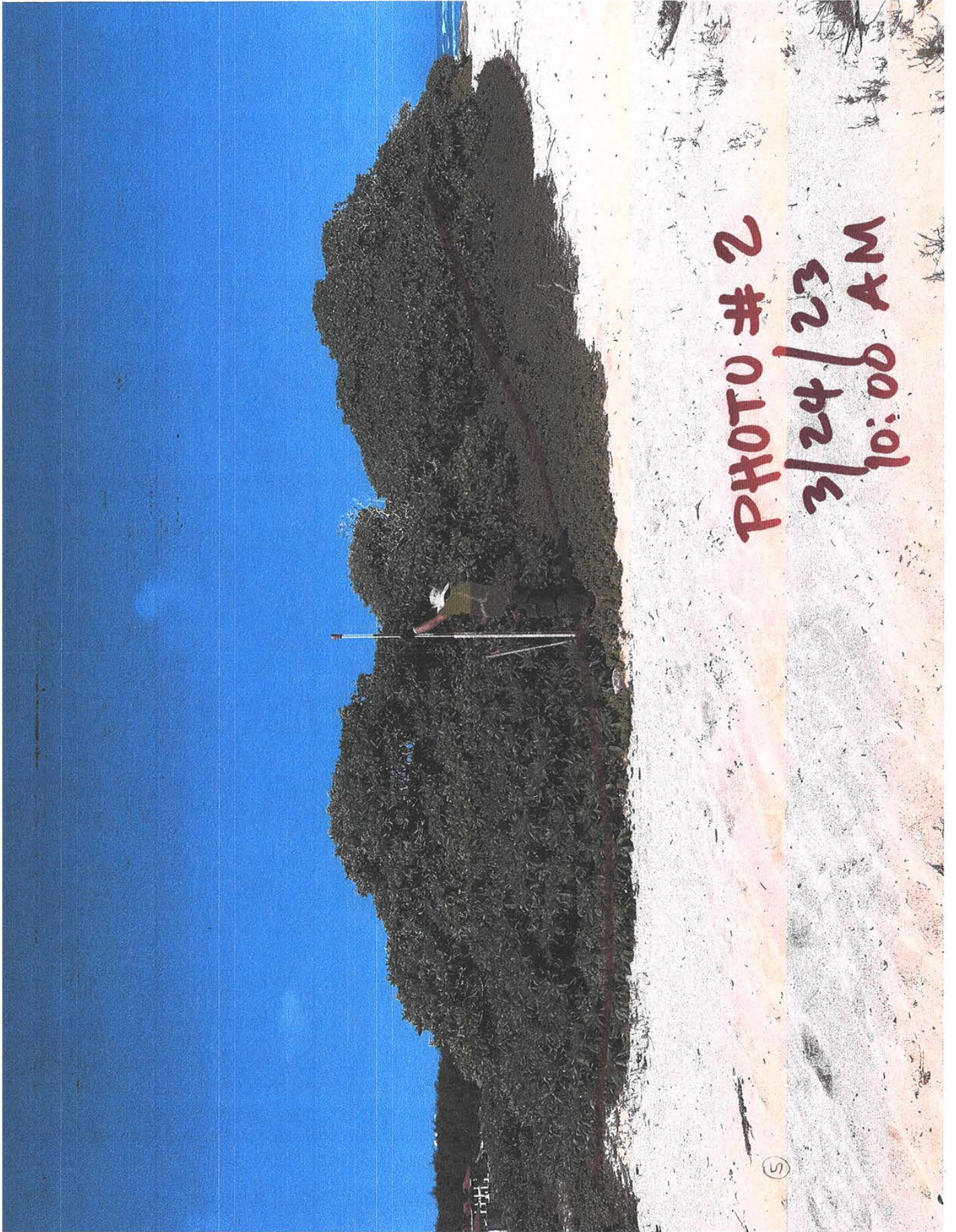


DLNR-OCCL January 31, 2024

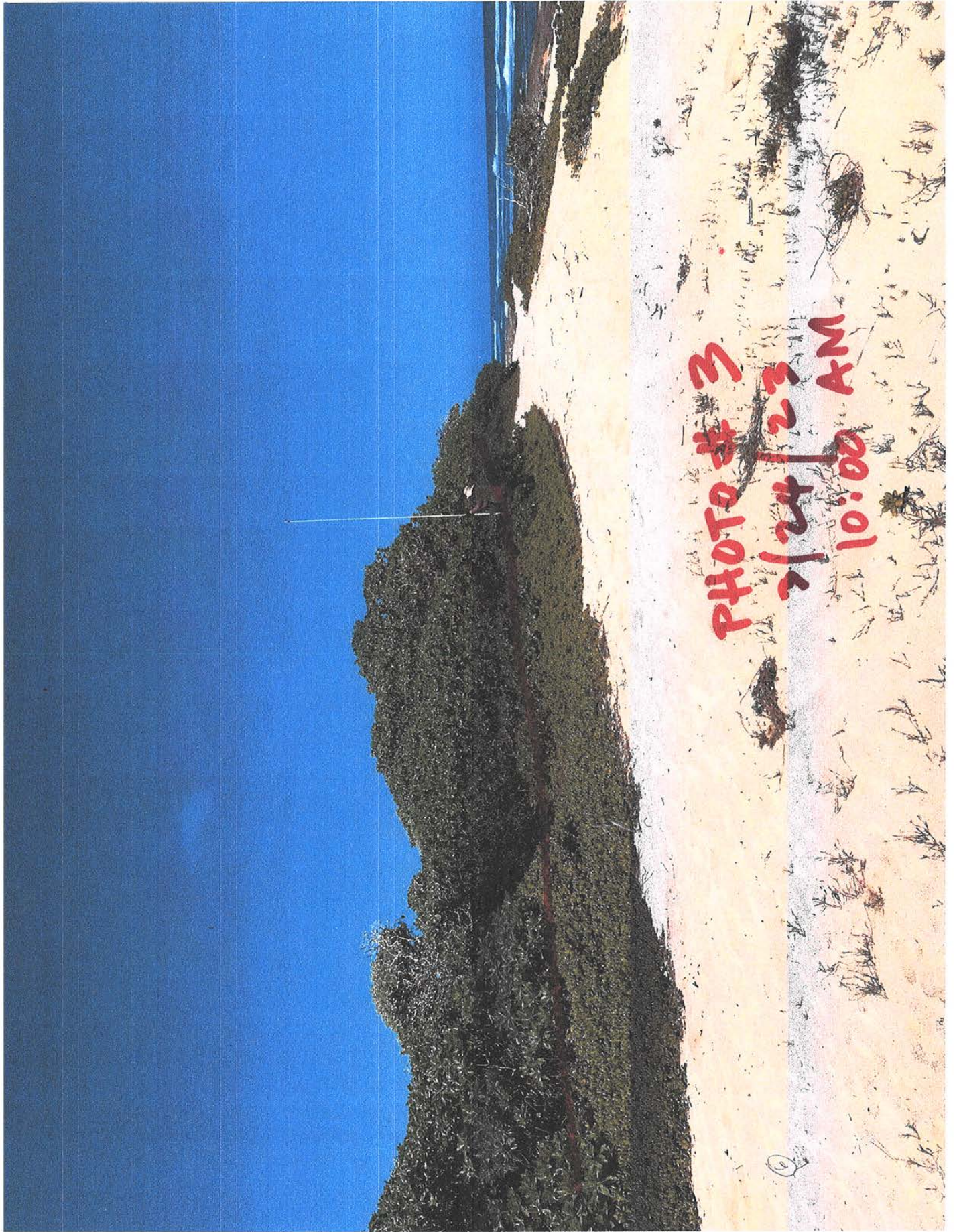




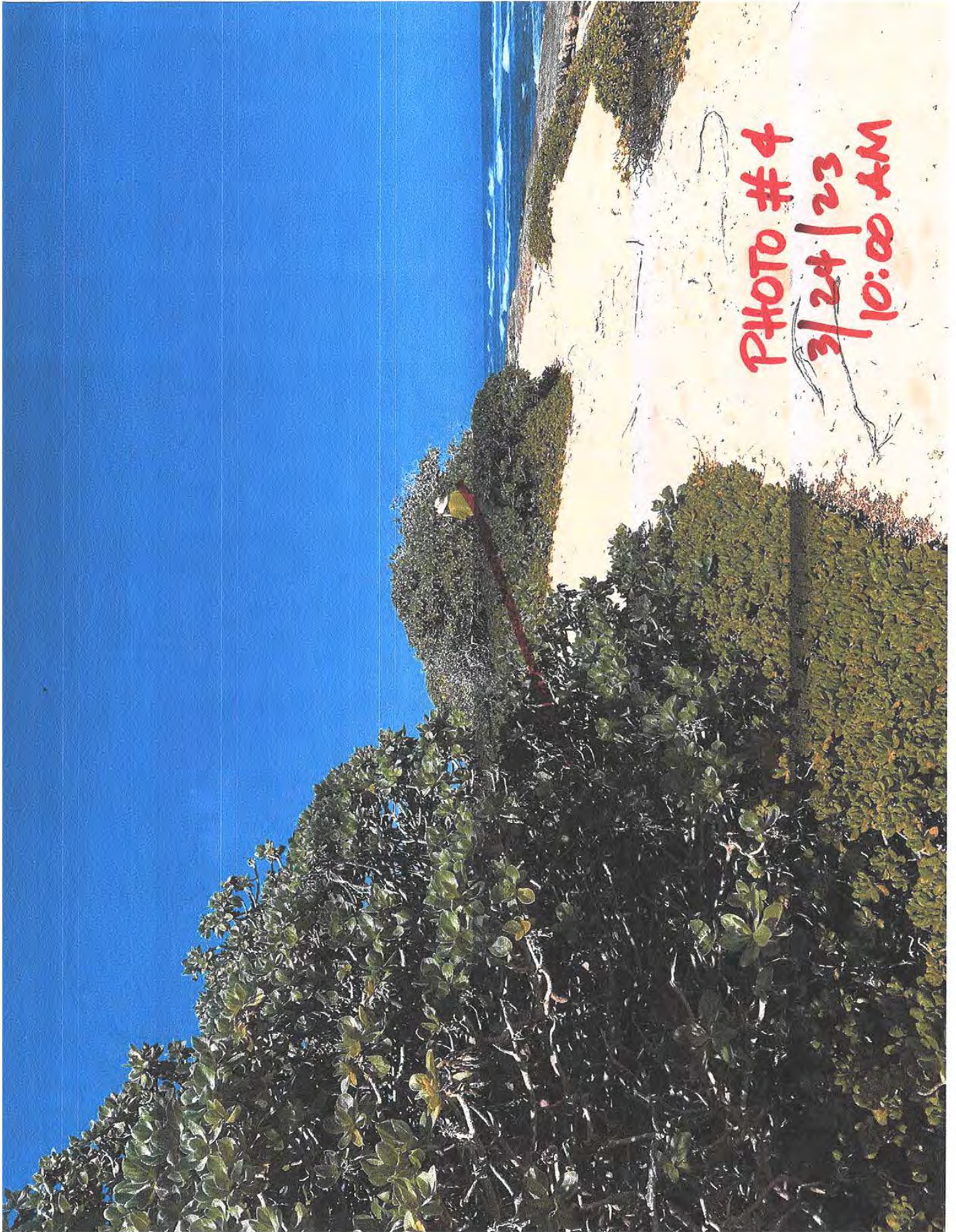




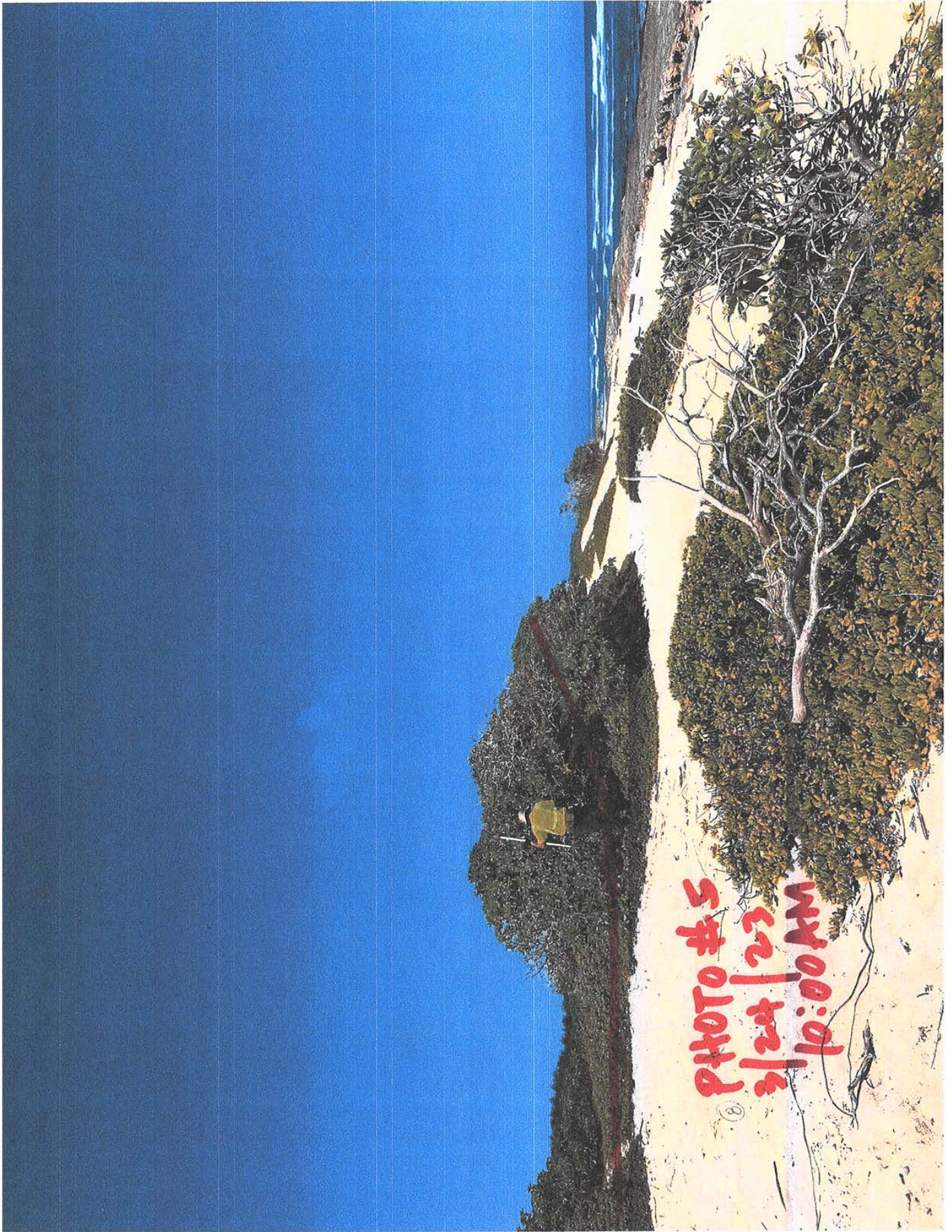




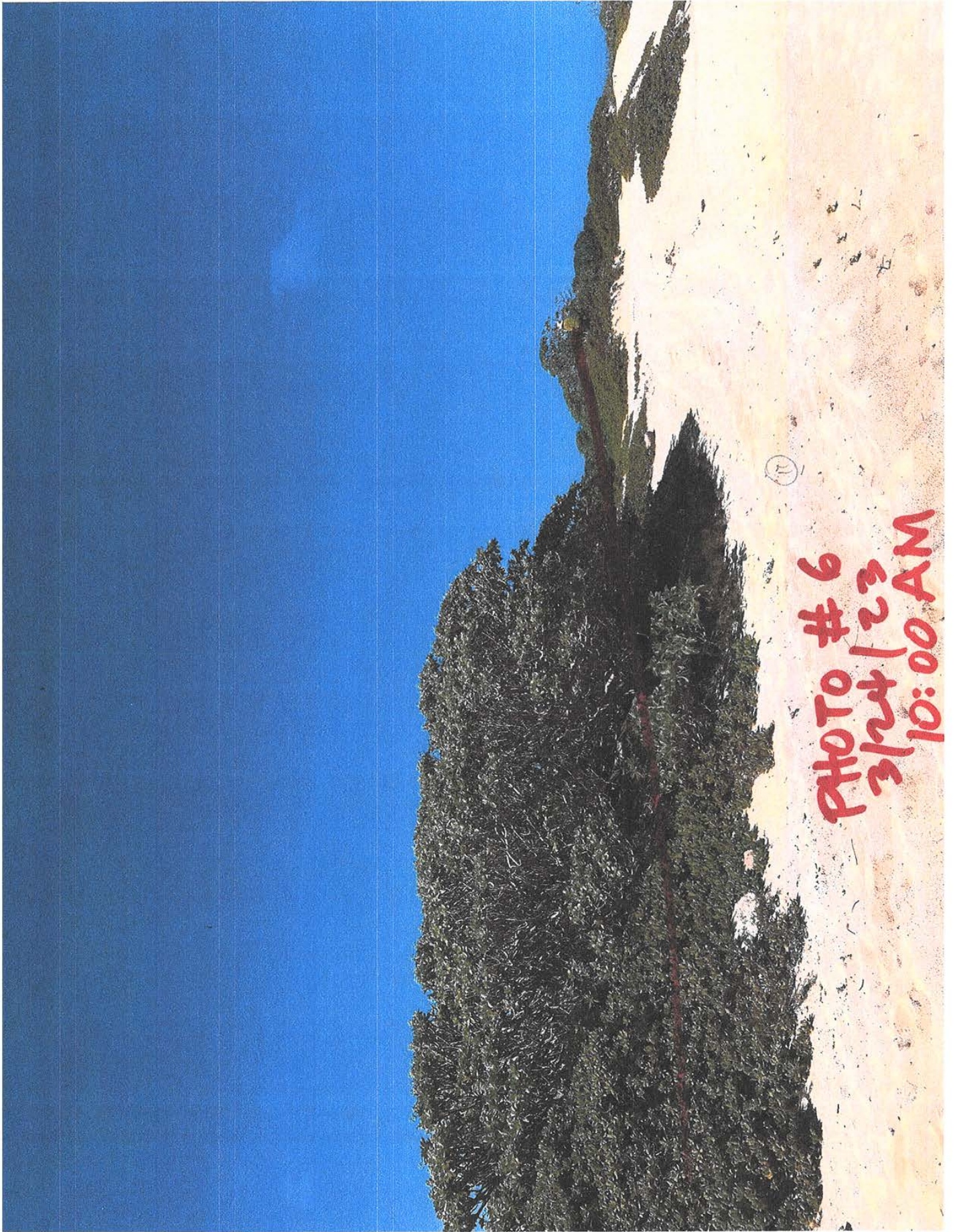




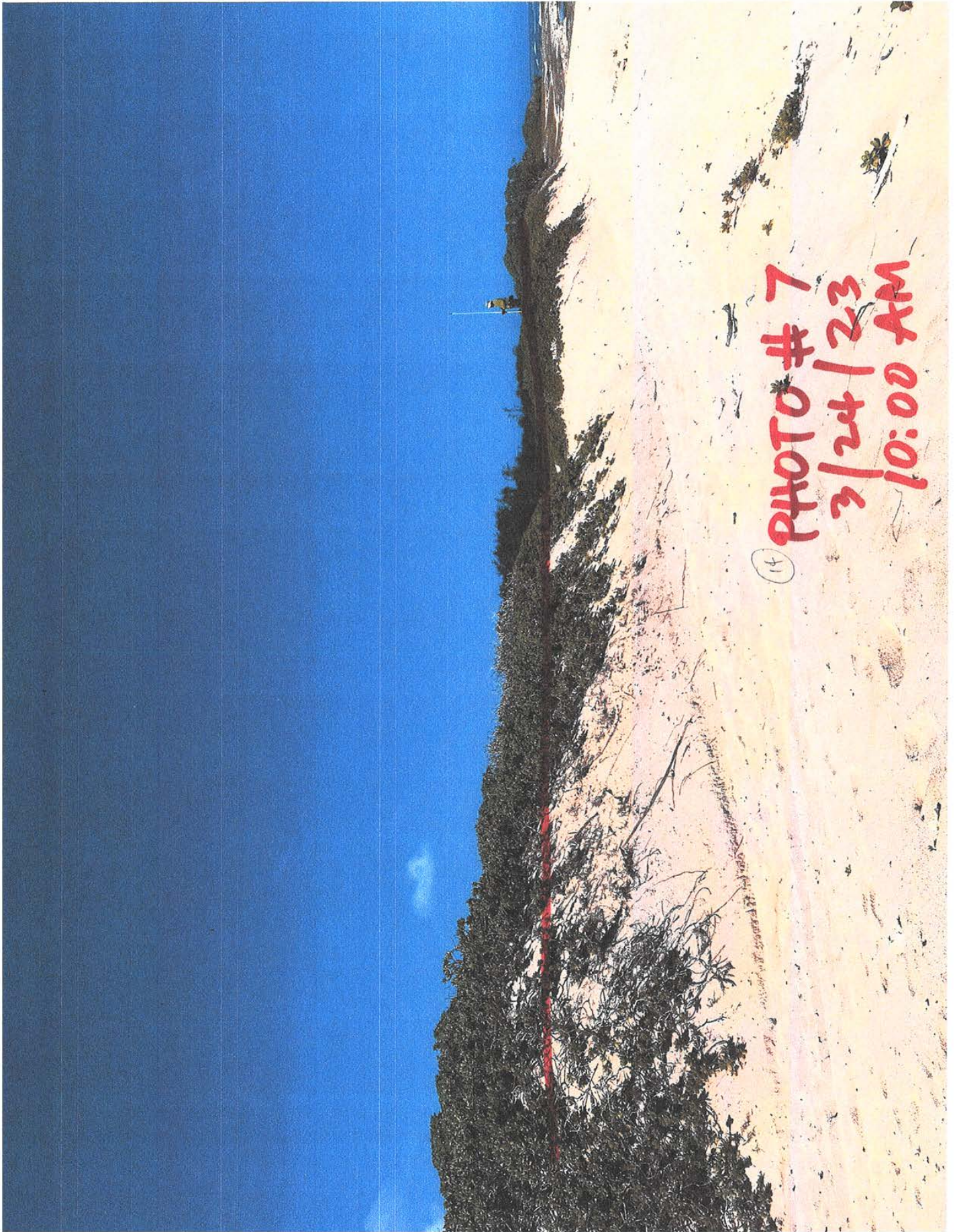




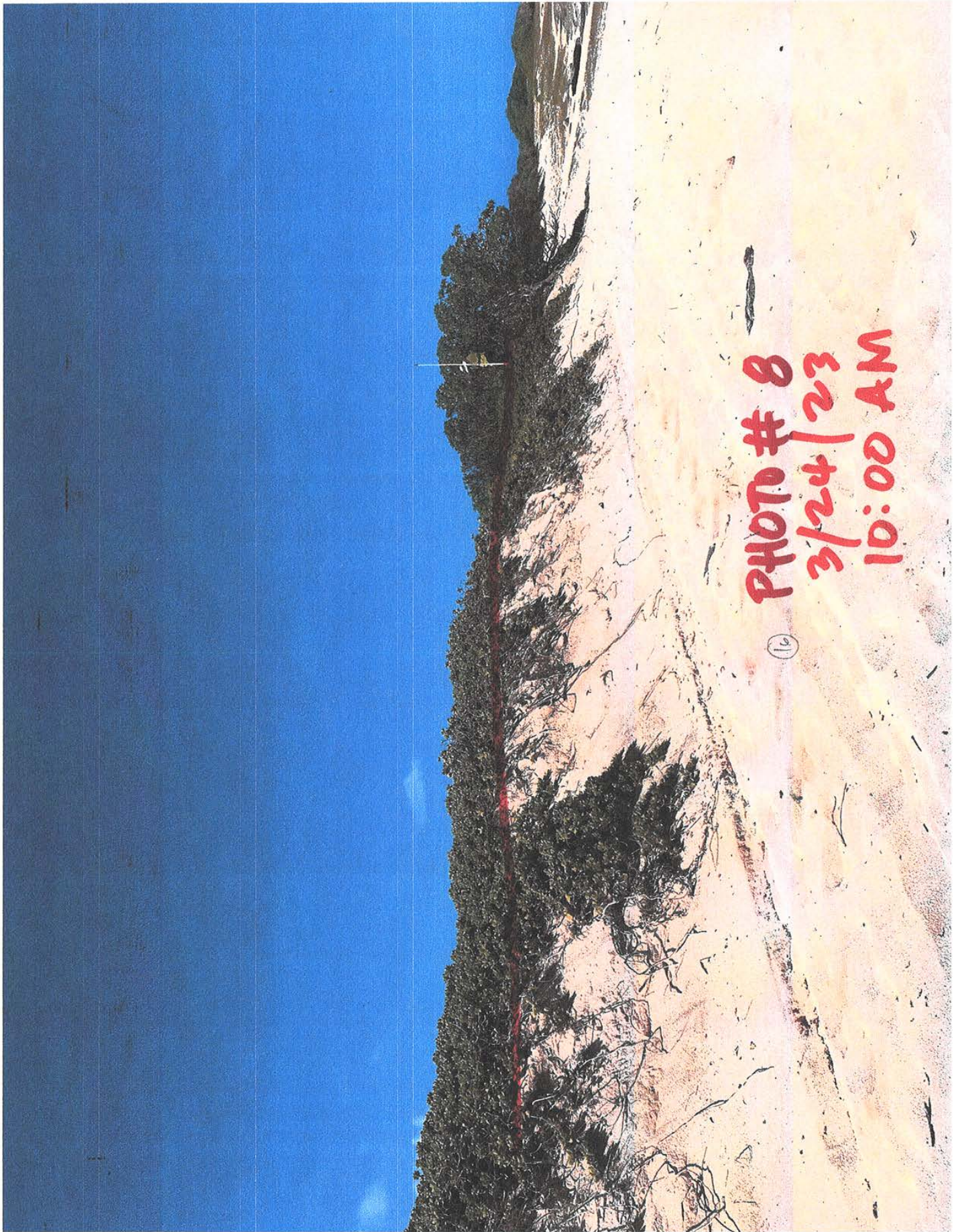




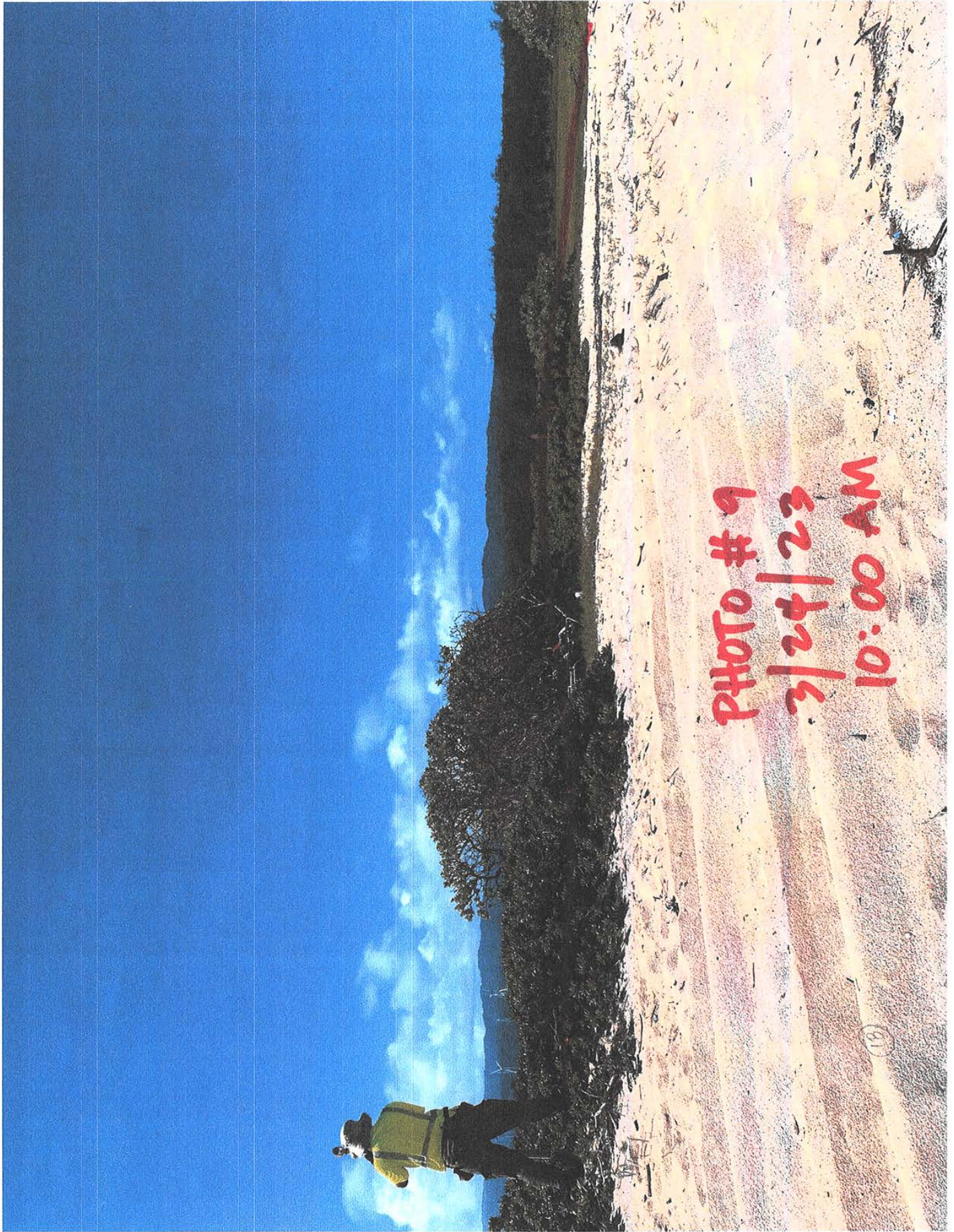




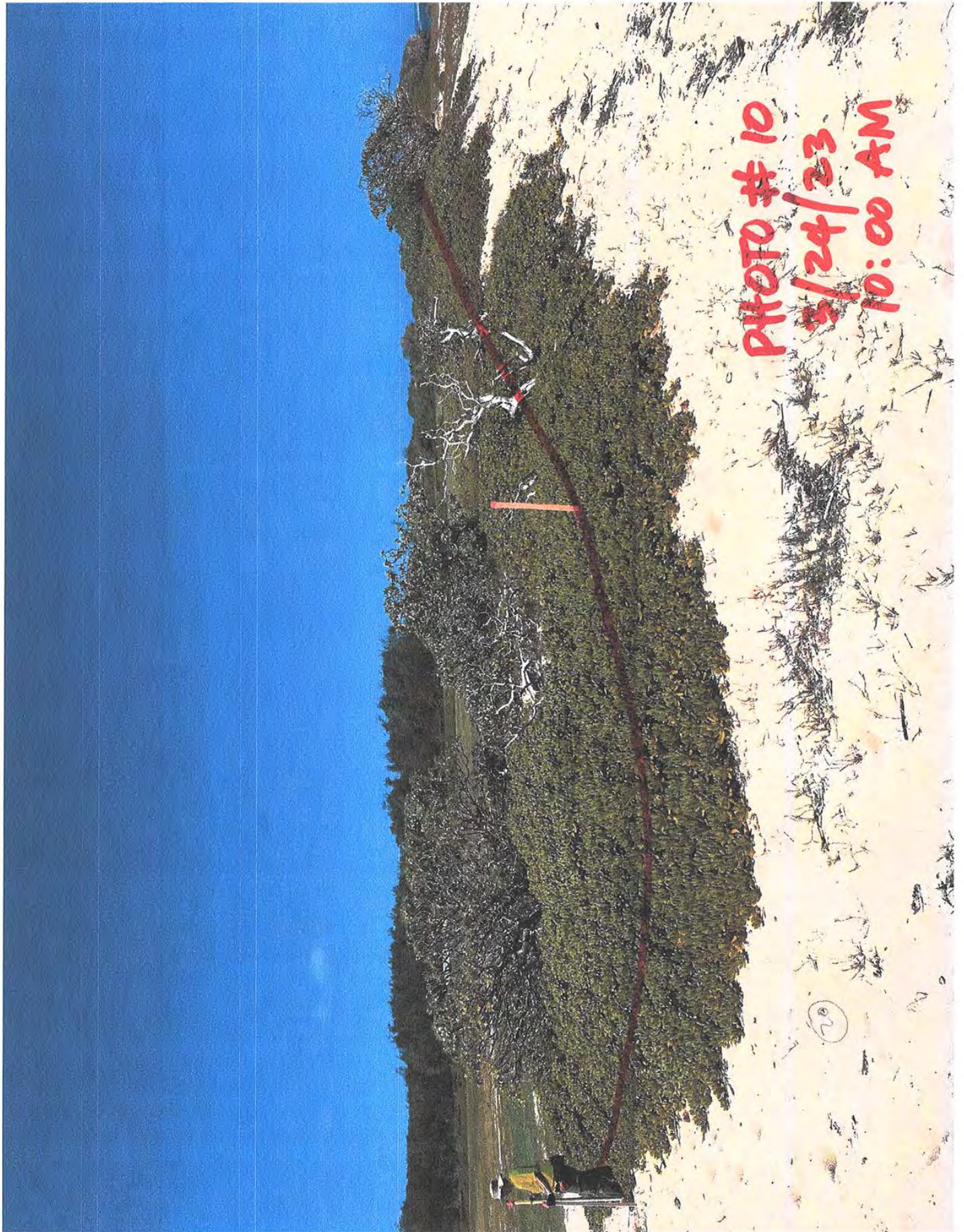




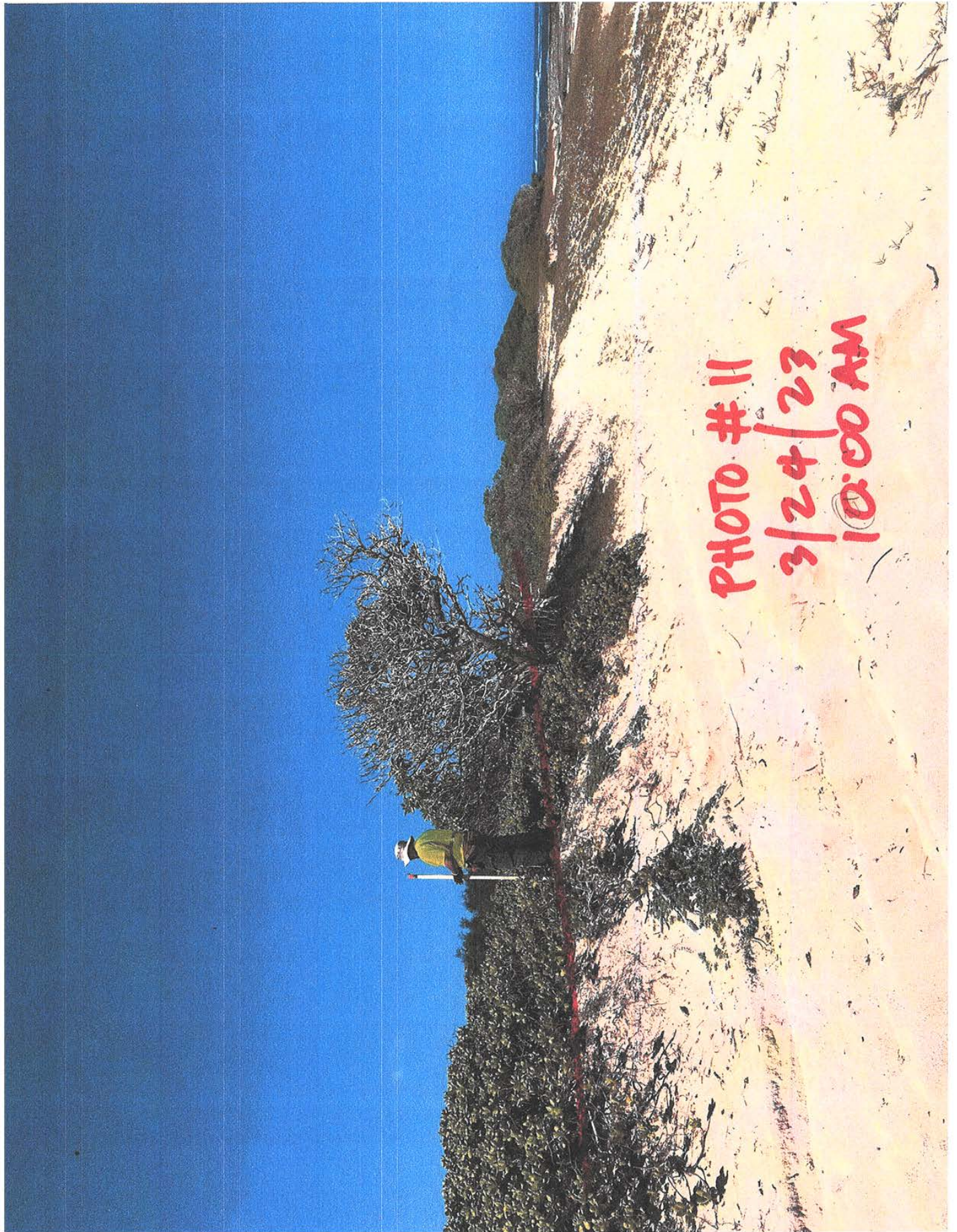




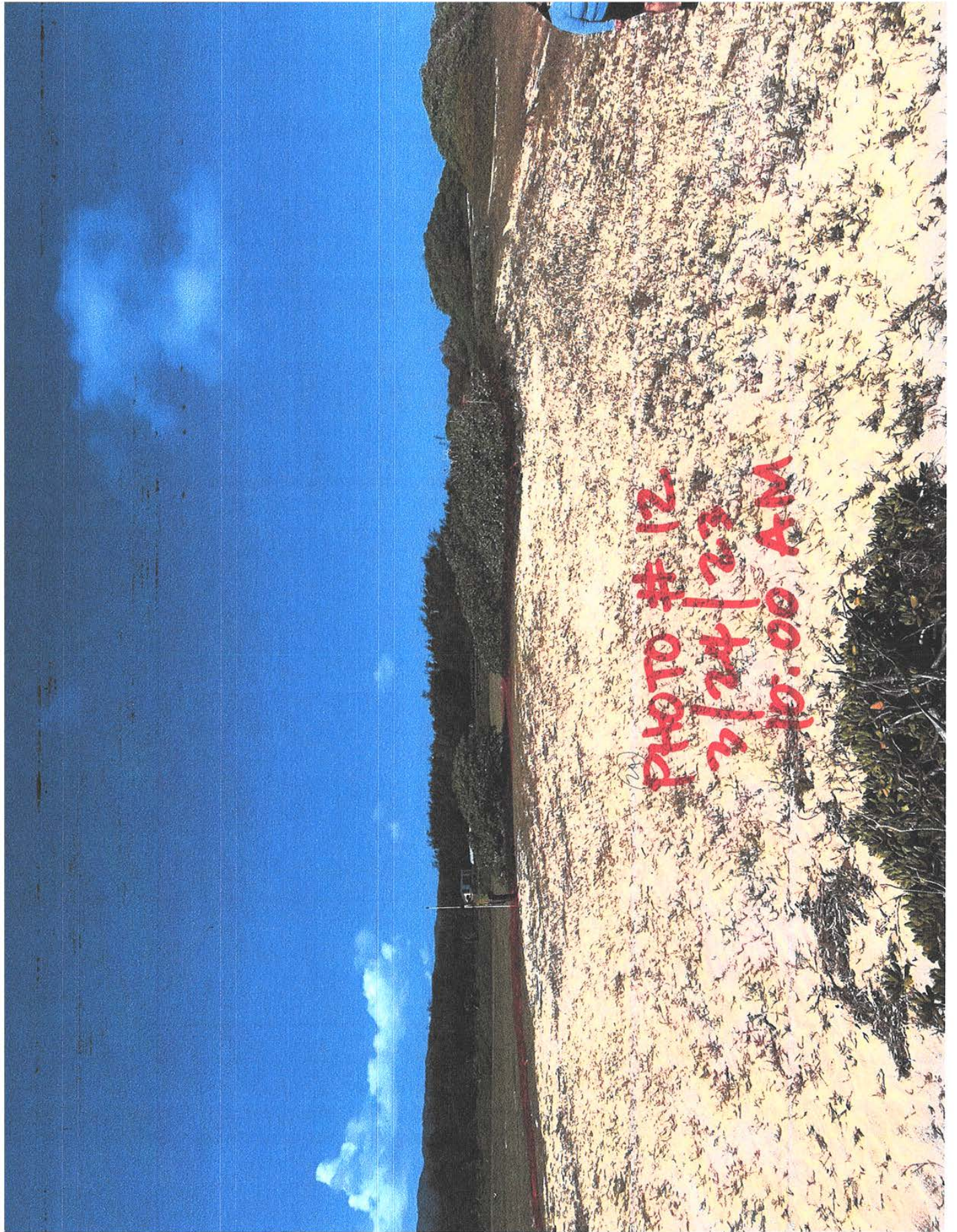




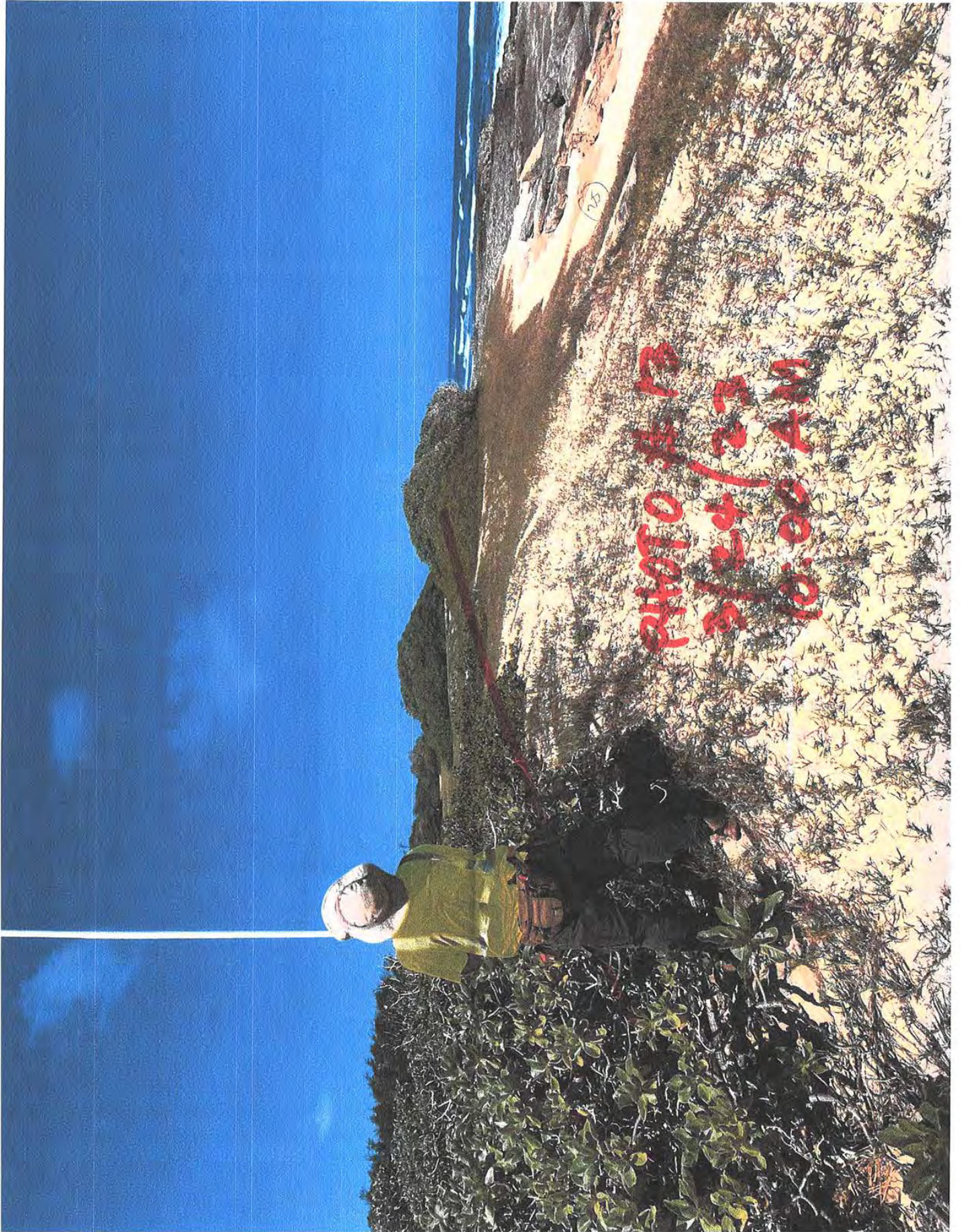




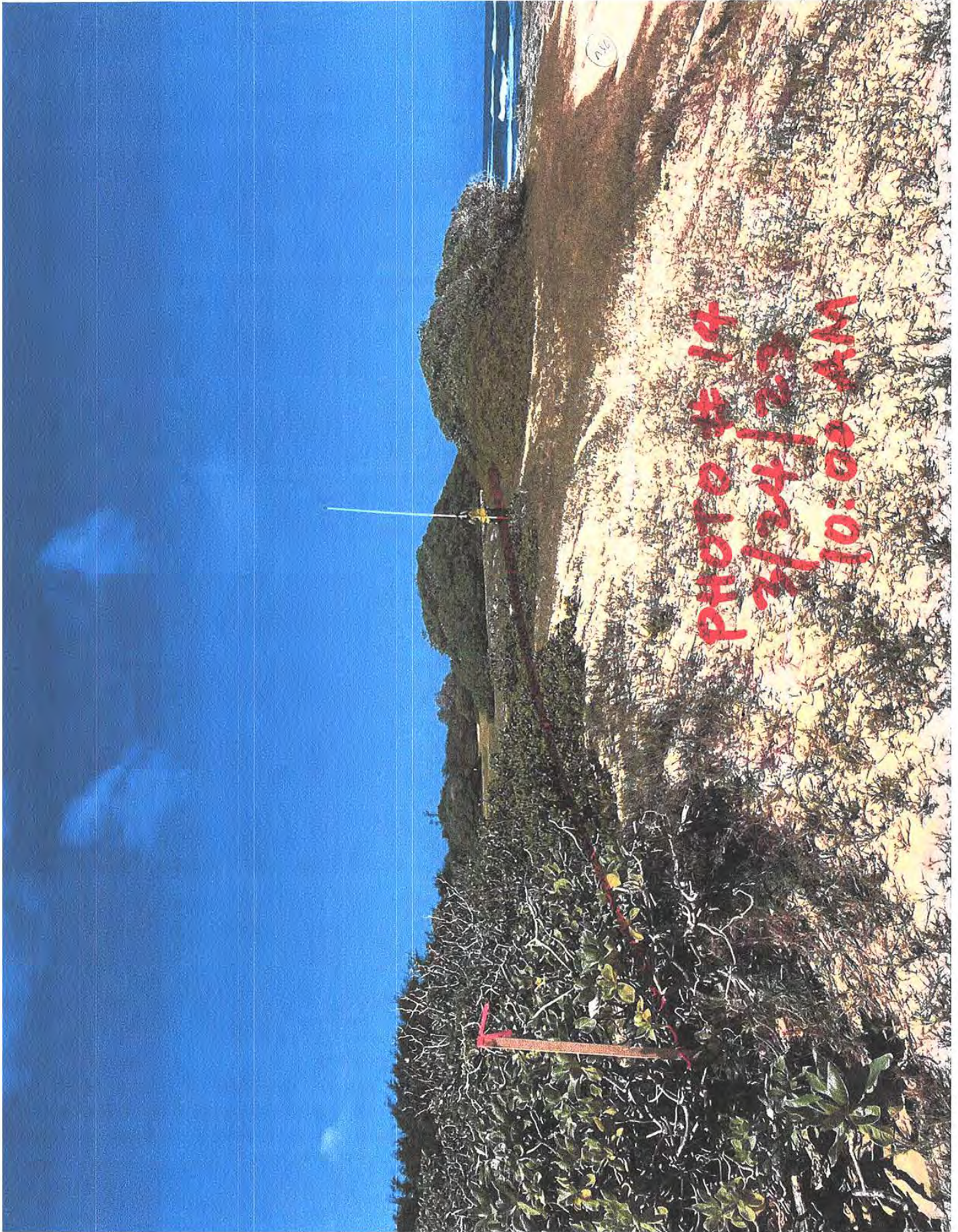




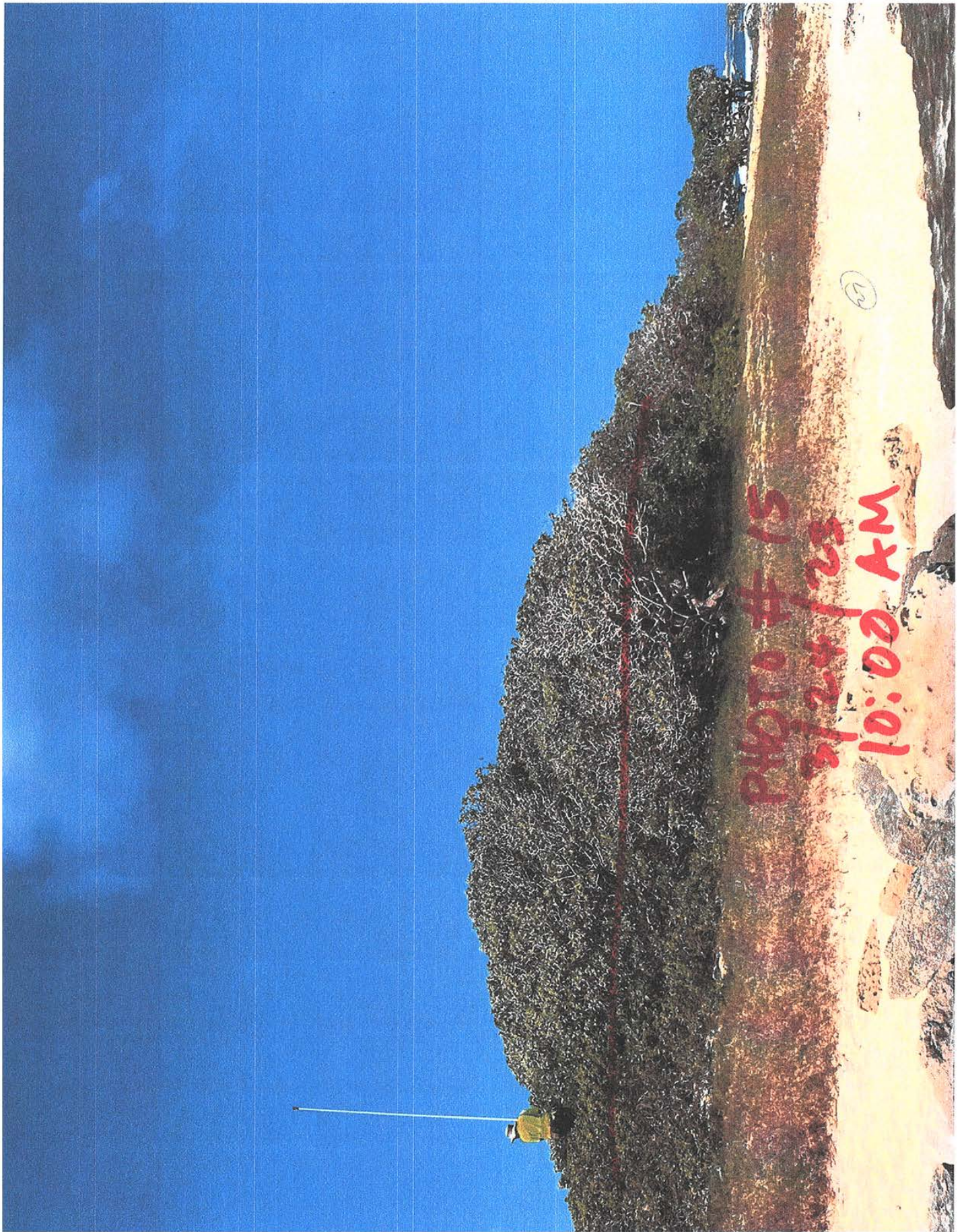




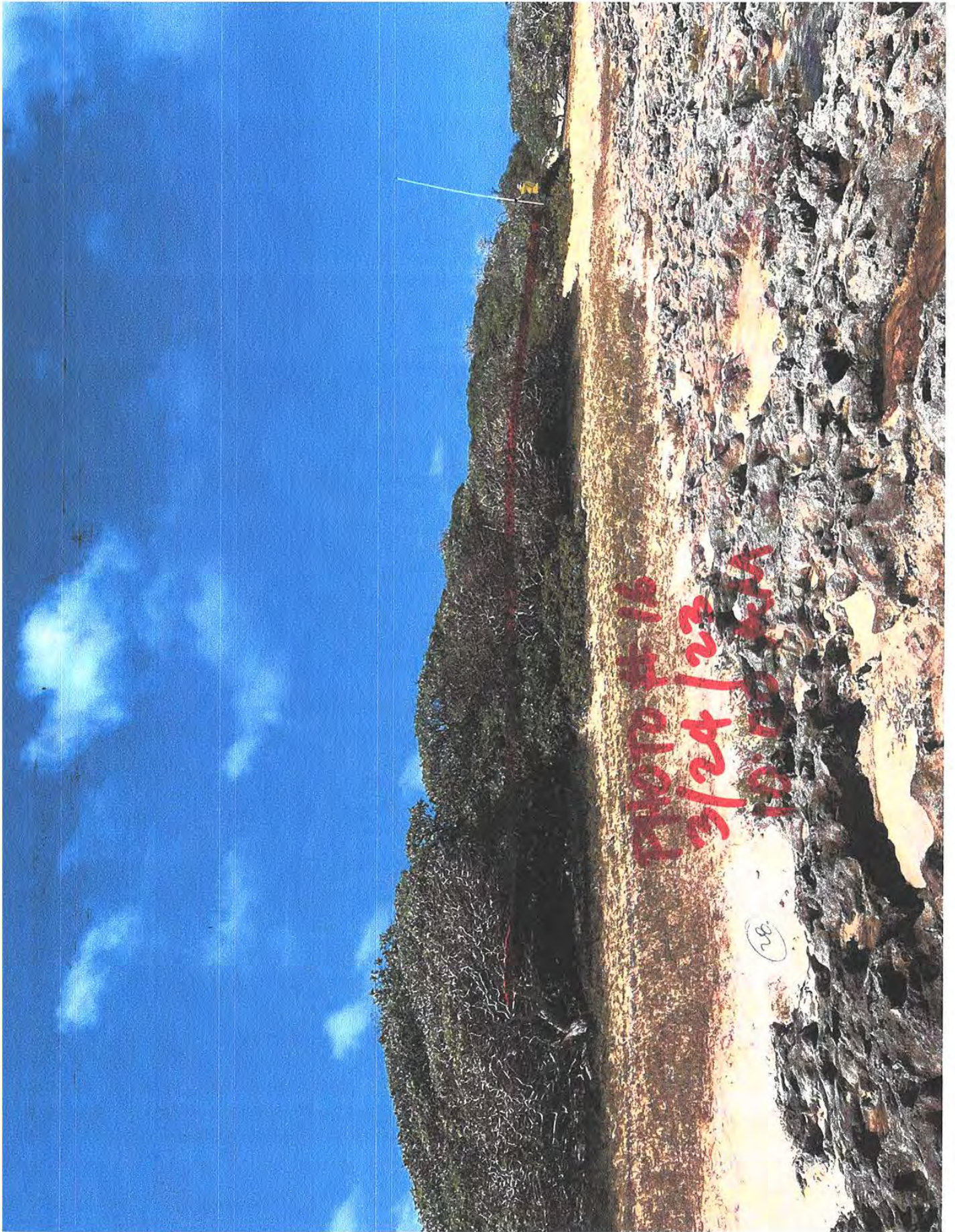




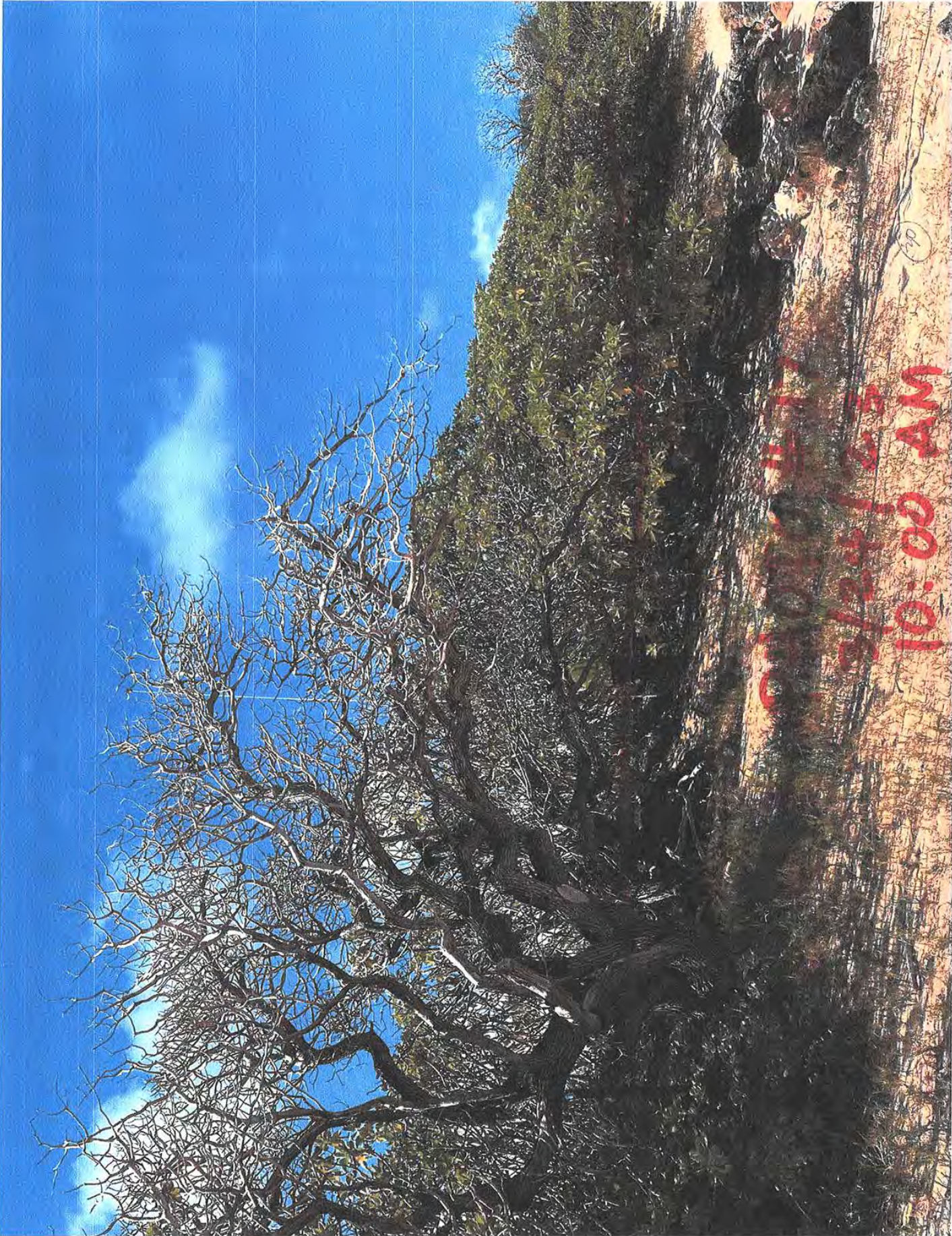




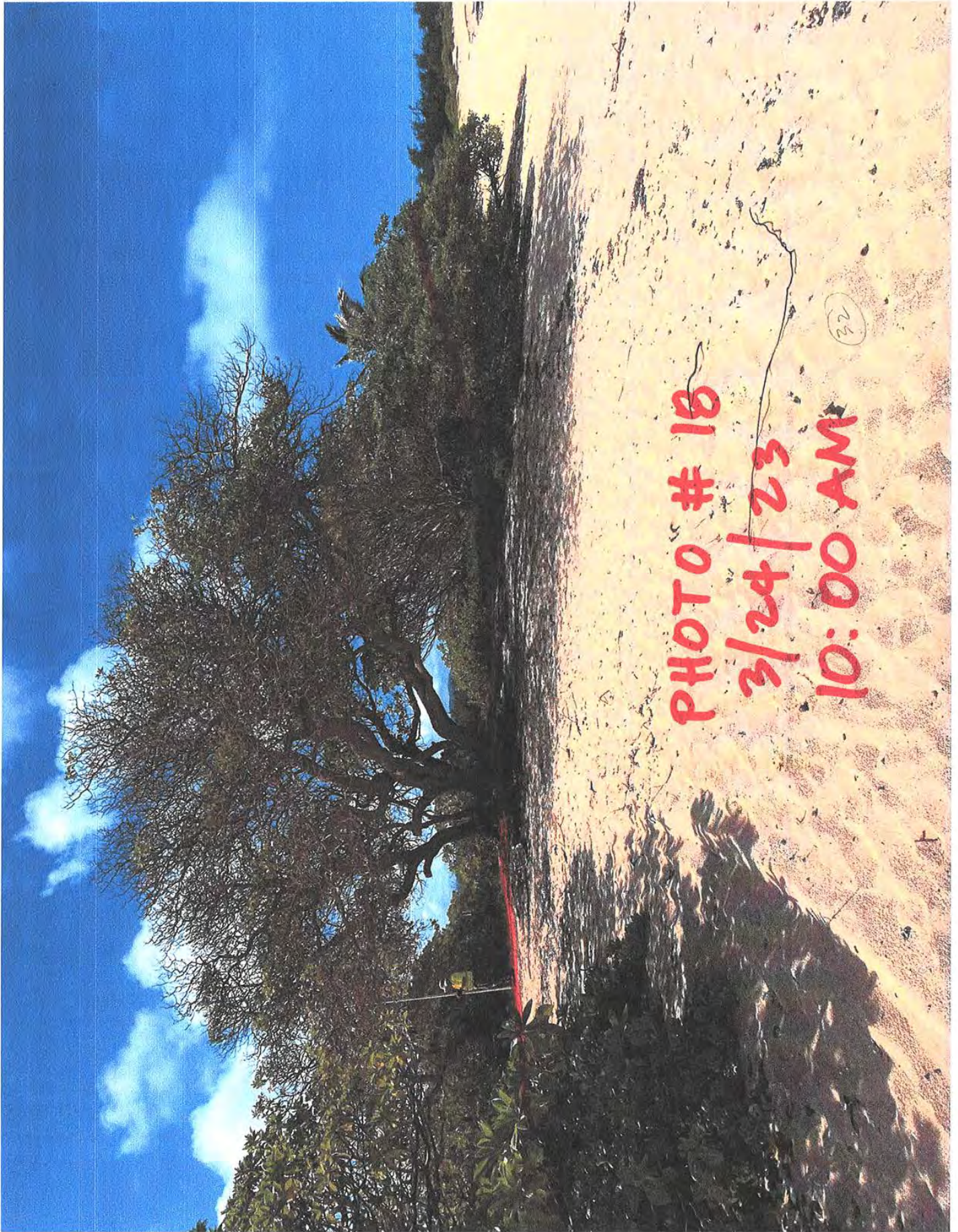




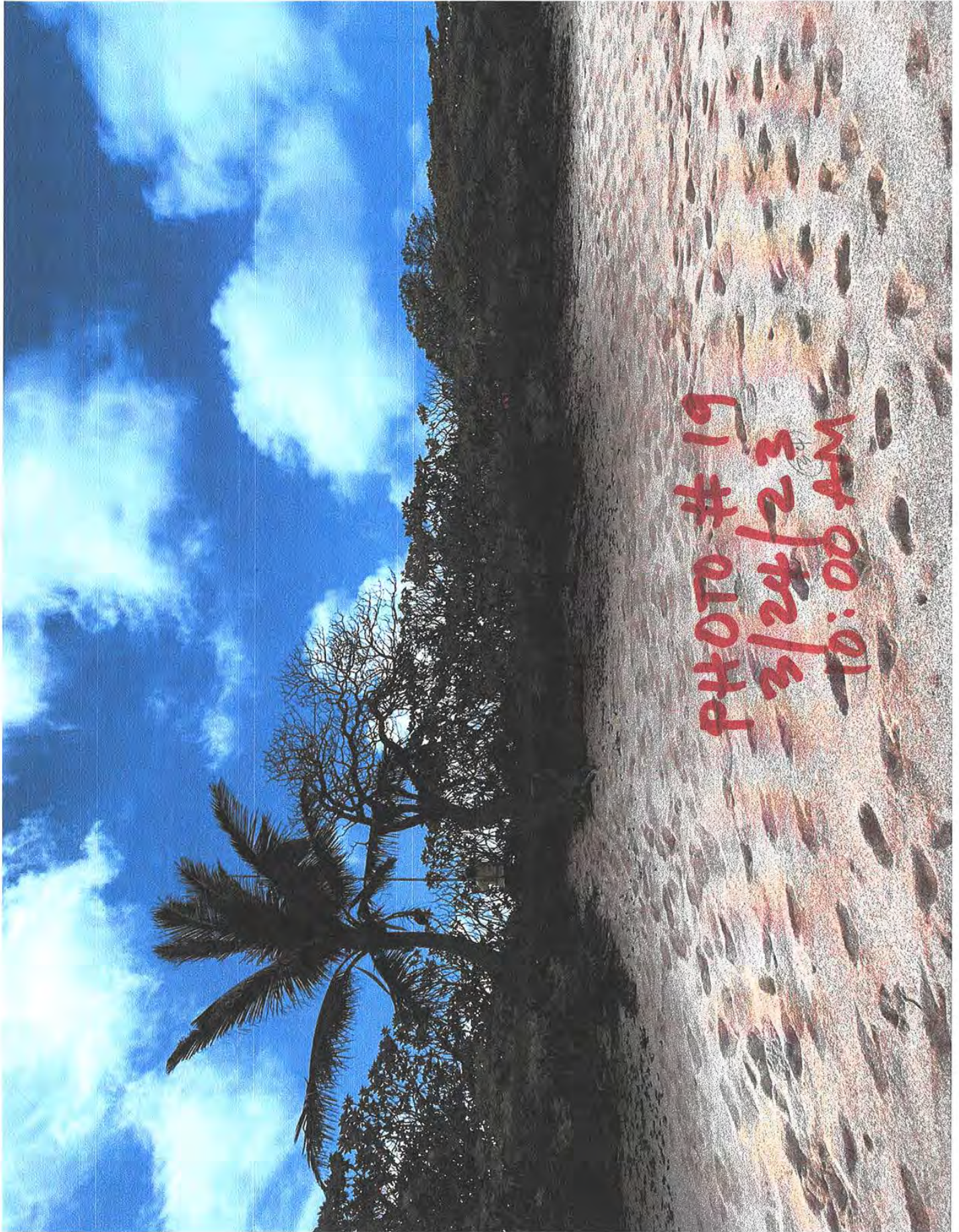




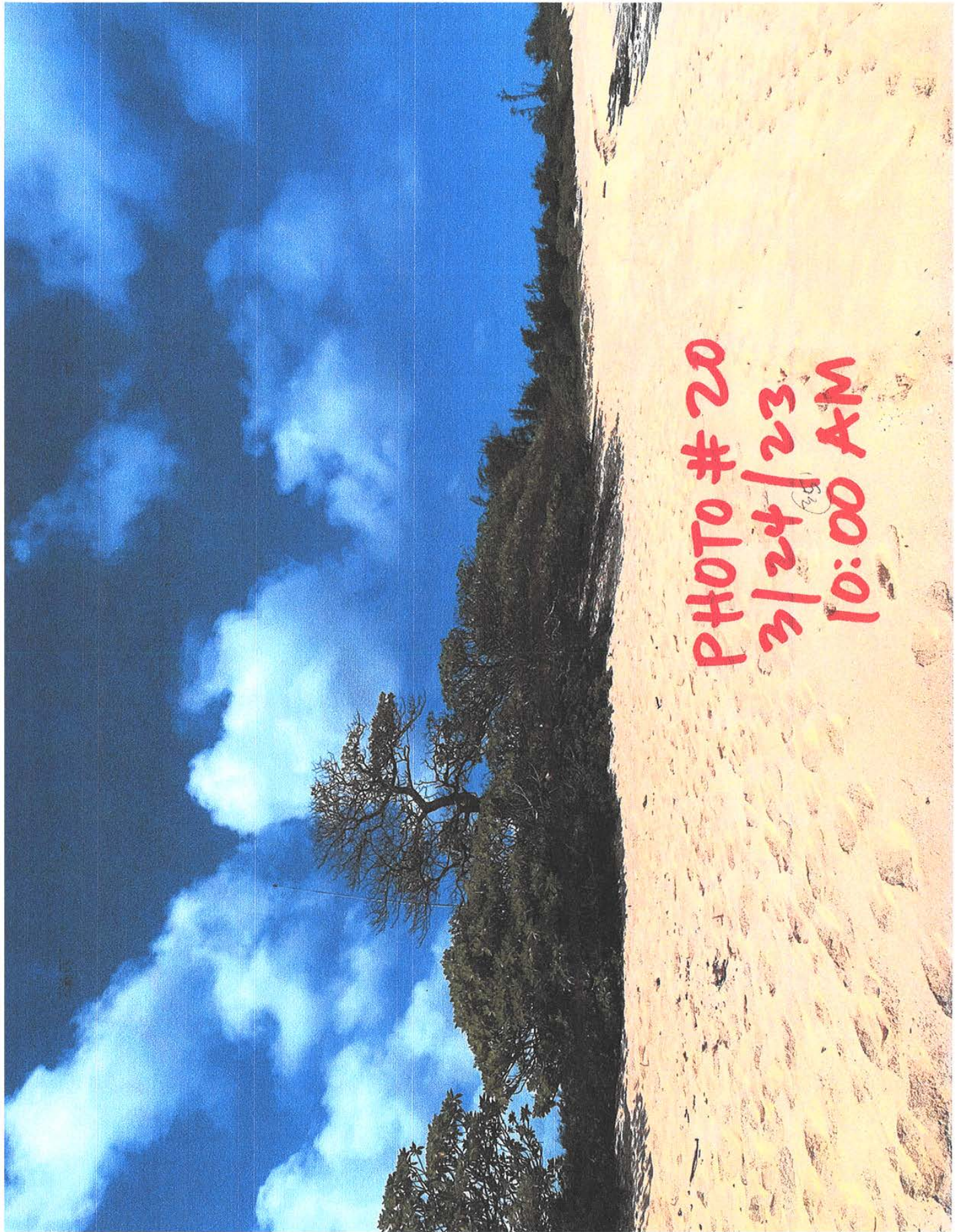




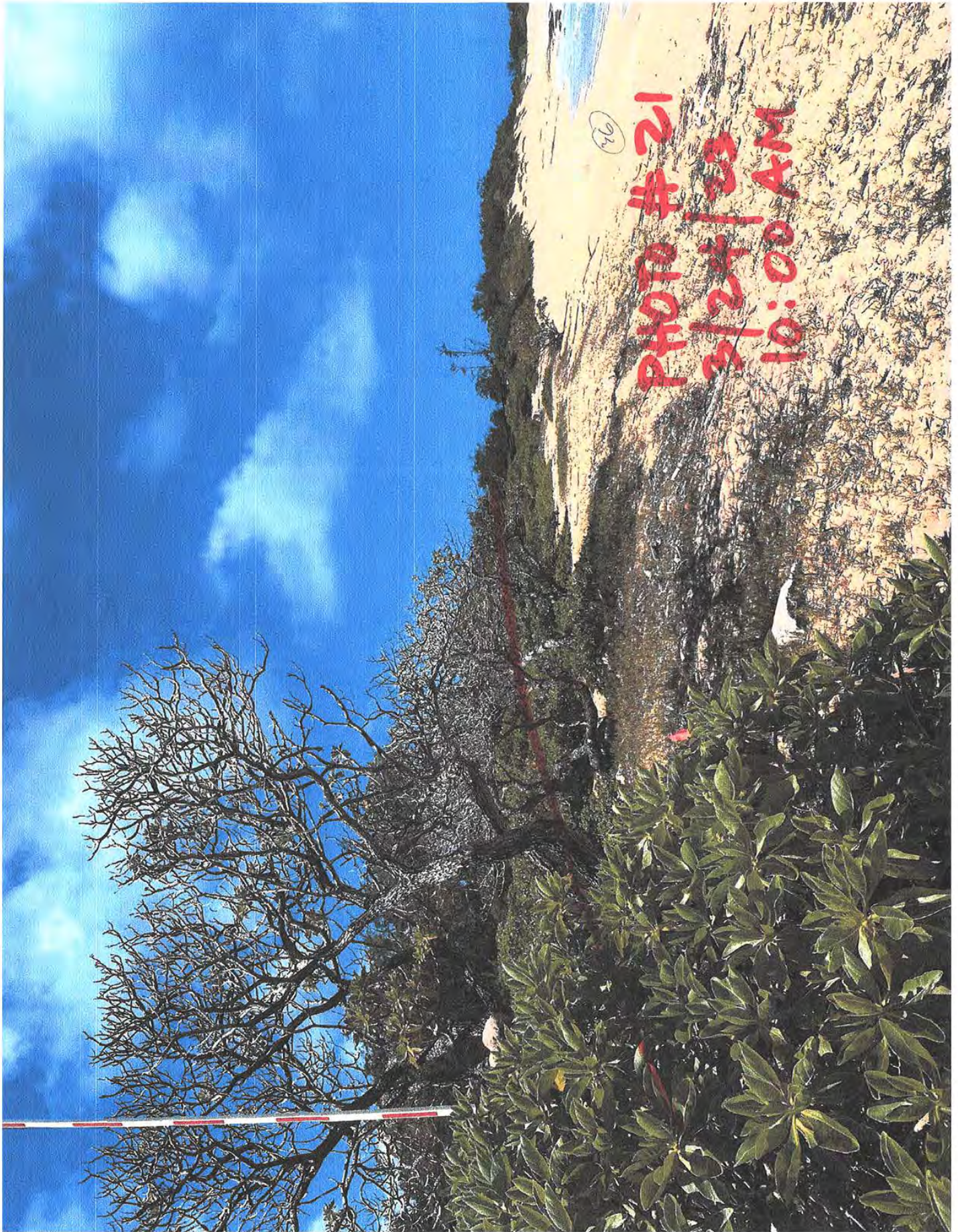




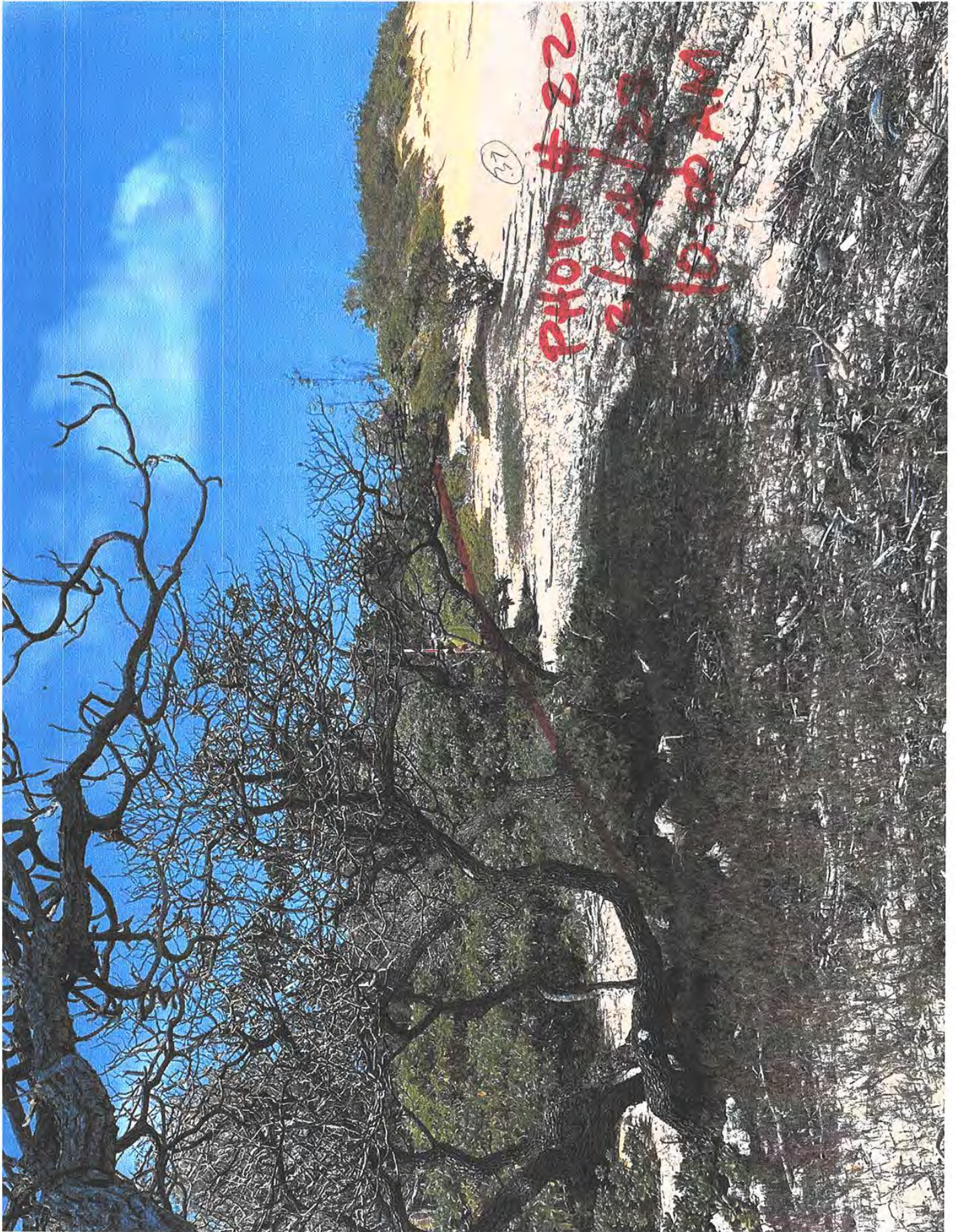




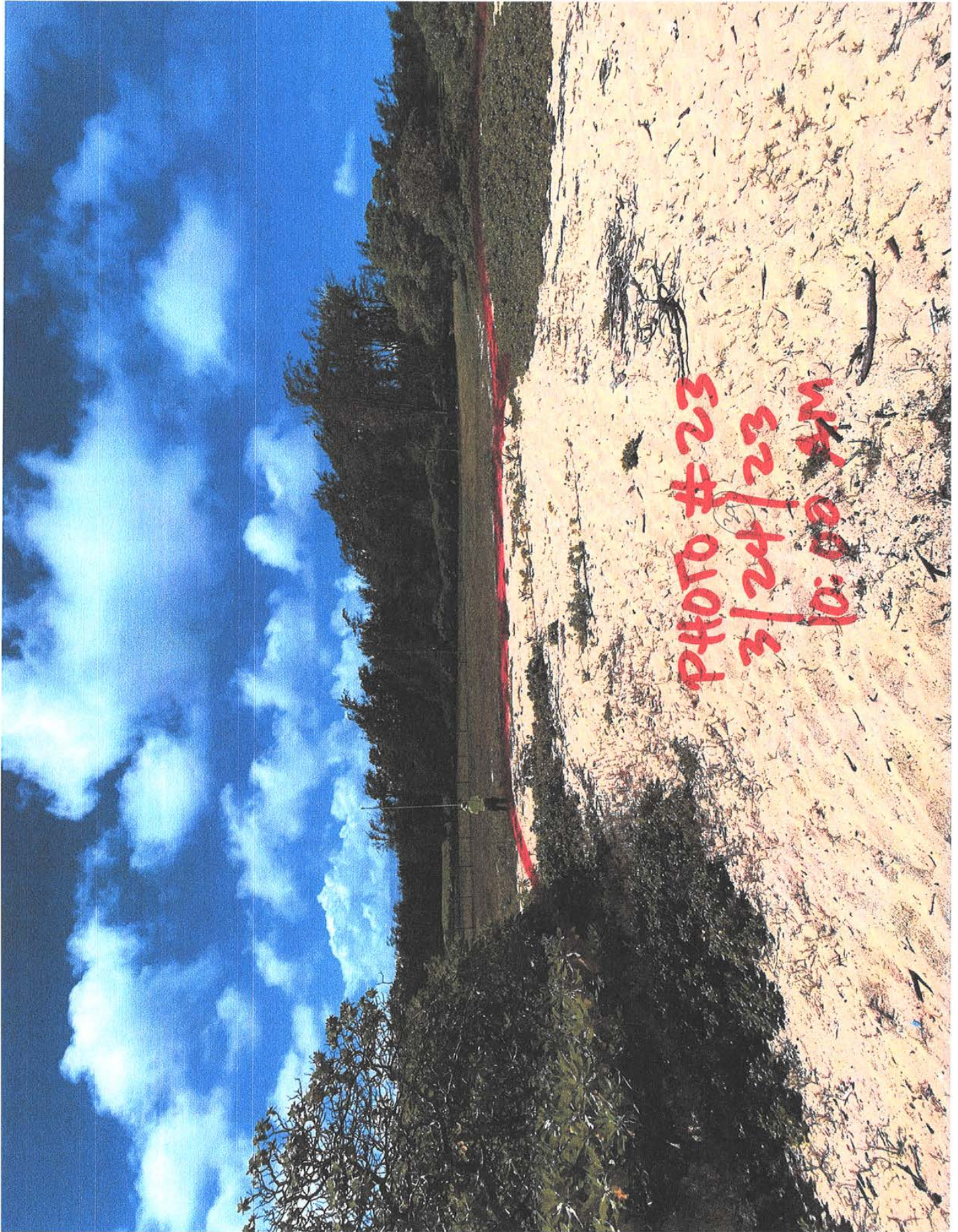














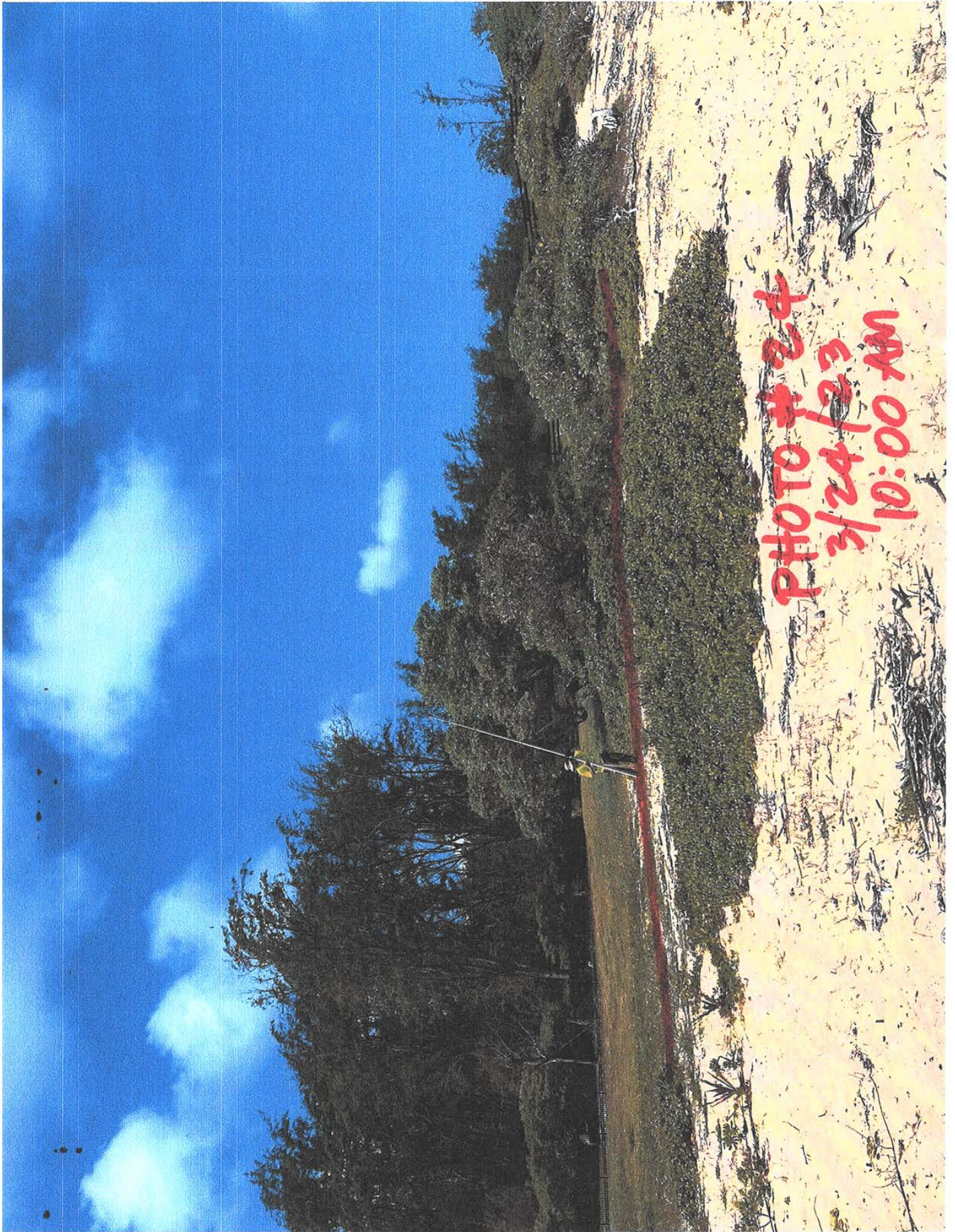


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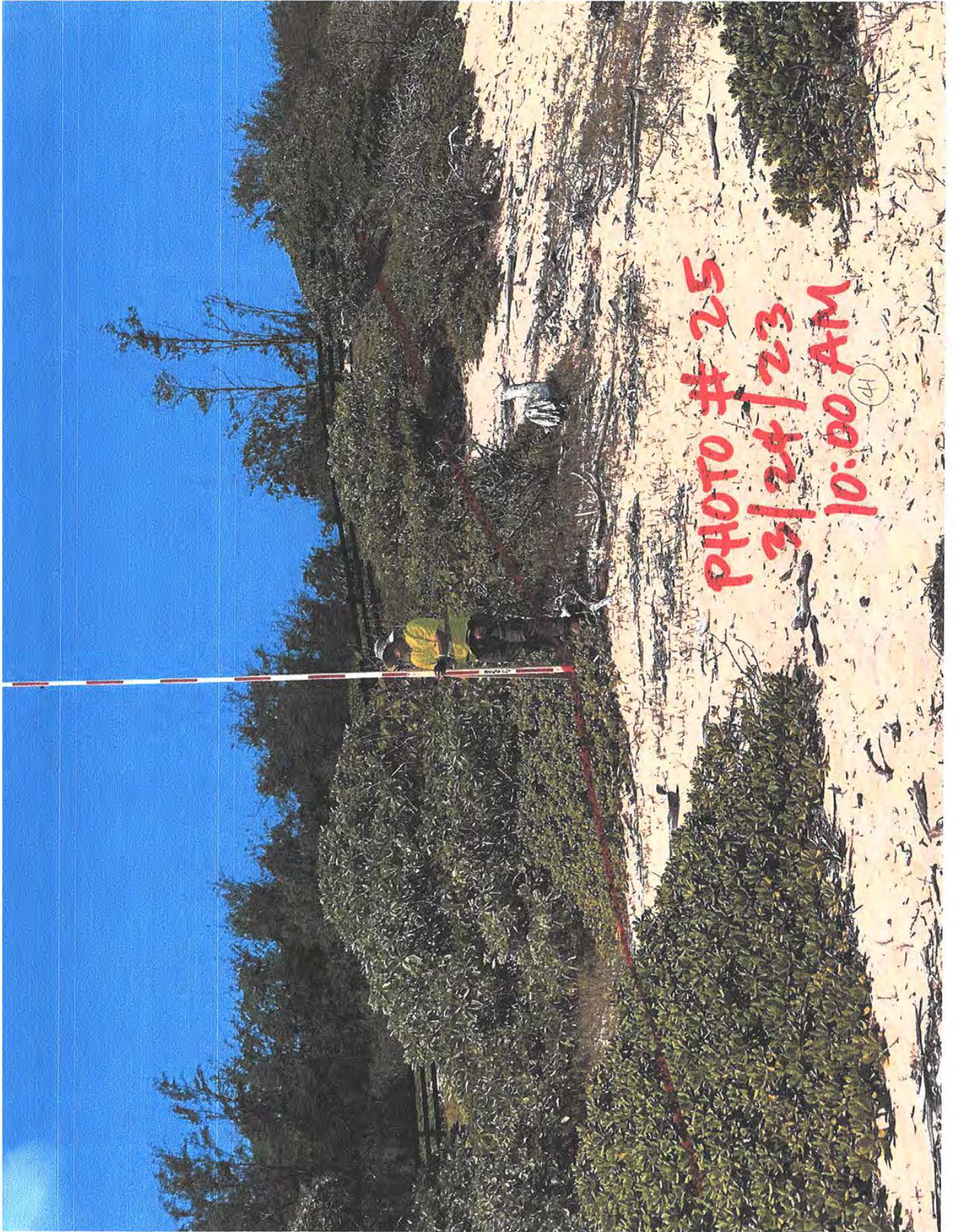






Exhibit H Driving on the Beach







JOSH GREEN, M.D.  
GOVERNOR | KE KIA'ĀINA  
SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
KA 'OIHANA KUMUWAIWAI 'ĀINA  
P.O. BOX 621  
HONOLULU, HAWAII 96809

DAWN N.S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
LAURA H.E. KAAKUA  
FIRST DEPUTY  
M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER  
AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:OCCL:TM

ENF: OA 24-14

### NOTICE OF ALLEGED VIOLATION

#### CERTIFIED MAIL RETURN RECEIPT

Trustee of the Yue-Sai Kan Trust  
Marconi Farms LLC  
Trustee of the Yarden Dankner Trust  
Trustee of the Dennis E Breen Trust  
Trustee of the Mary E Breen Trust  
Wayne M M K Hu  
Hui Kawela LLC  
Native Farmlands & Security LLC  
Luigi LLC  
Trustee of the C. Kalani Schrader Trust  
Greystone HI Investments LLC  
RCA Trade Center Inc.  
MP Unit 21 LLC  
Richard J. Snow  
BSS HI Properties

OCT 19 2023

**SUBJECT:** Alleged Violations Within the Conservation District for the Unauthorized Clearing of Land, Tree Removal, Spreading of Mulch, Two Fence line Extensions Located at Kahuku, Ko'olauloa, O'ahu, Upon and Makai of Tax Map Key: (1) 5-6-003:053

**LANDOWNERS:**

**NOTICE IS HEREBY GIVEN** you may be in violation of the Hawaii Administrative Rules (HAR) Title 13 Chapter 5, providing for land uses within the Conservation District, enacted pursuant to Hawaii Revised Statutes (HRS), Chapter 183C.

A site inspection conducted on October 17, 2023, revealed the shoreline habitat has been impacted by land clearing and tree removal. It appears the removed vegetation has been mulched and spread over the cleared land. There appears to be two fence lines extending into the Conservation District. **(Exhibits A, B, C, D & E)**

The Department of Land and Natural Resources (DLNR) has determined pursuant to HAR, §13-5-6, no land use (s) shall be conducted in the Conservation District unless a permit or approval is first obtained from the Department of Board.



Pursuant to HAR, §13-5-2, "Land use" means:

- (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;
- (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;
- (3) The subdivision of land; or
- (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land: and

Pursuant to HAR, §13-5-6, any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in Hawaii Revised Statutes (HRS) Chapter 183C.

Pursuant to HRS, 183C-7, the Board of Land and Natural Resources may subject individuals to fines of up to \$15,000.00 per violation in addition to administrative costs. Should you fail to immediately cease such activity after written or verbal notification from the department, willful violation may incur an additional fine of up to \$15,000.00 per day per violation for each day in which the violation persists.

This notice is to inform you that the alleged land clearing, tree removal, spreading of mulch, and fence line extensions within the Conservation District were not reviewed nor authorized by the Department of Land and Natural Resources under HAR, Chapter 13-5. Of concern to the Department is that habitat for the endangered yellow face bee and native birds has been altered. Mulch is a breeding site for the invasive Rhino Beetle that is infesting and killing palms.

This matter will be scheduled for a decision by the Board of Land and Natural Resources at a time and date to be announced. In the meantime, if you have received any authorizations for the alleged unauthorized work in the Conservation District or would like to propose potential mitigative actions, please inform the Department within 30-days so we can consider such information. Please note any information provided may be used in civil proceedings. Should you have any questions, contact Tiger Mills of the Office of Conservation and Coastal Lands at (808) 587-0382.

Sincerely,



---

Dawn N. S. Chang, Chairperson  
Board of Land and Natural Resources

MC

C: ODLO/DOFAW/DOCARE-OAHU  
City-DPP  
USFWS





October 17, 2023

Fence line #1 in the Conservation District



November 18, 2022

**EXHIBIT A**





October 17, 2023 Work taking place in the Conservation District. **EXHIBIT B**





October 17, 2023 Clear cut tree above; Fence line #2 below

**EXHIBIT C**



Exhibit J Notice of Alleged Violation





October 17, 2023 Work upon submerged land

**EXHIBIT D**



Exhibit J Notice of Alleged Violation





October 17, 2023 Mulch everywhere

**EXHIBIT E**



Exhibit J Notice of Alleged Violation



**Mills, Kimberly T**

---

**From:** Sushil Garg [REDACTED]  
**Sent:** Wednesday, November 15, 2023 3:03 PM  
**To:** Mills, Kimberly T  
**Subject:** [EXTERNAL] Fw: Citation

Hi Tiger:

I typed the email incorrectly previously. Hopefully, you will receive this one. Thanks.

Sushil Garg

---

**From:** Sushil Garg <[REDACTED]>  
**Sent:** Tuesday, November 14, 2023 9:24 AM  
**To:** kimberley.mills@hawaii.gov <kimberley.mills@hawaii.gov>  
**Subject:** Citation

Hi Tiger:

Thanks for meeting with me to help clarify things. As I mentioned, a number of lots we recently purchased had a lot of dead brush, dry grass, dead trees etc. which posed a fire hazard given the dry season and high winds often prevalent at Marconi Point. As such, we asked a contractor to clean up all the dead brush in the area. We realize now that they also cleaned up the conservation areas, which caused the notice of citation issued by your office. We truly regret any miscommunication and the resulting removals in conservation areas and, as we discussed, we are fully committed to developing and implementing a remediation plan to help appropriately restore the conservation area.

Regarding the specific details we discussed, our understanding is that in the short term, we need to remove the mulch with a biologist present. We have contacted a biologist familiar with the area and are trying to get her to provide supervision for mulch removal asap. While we hope to get a commitment from her this week, she seems to be unusually busy right now. If you have the names of any qualified biologists you are able to provide, we'd love to reach out to them to see if they can help expedite this.

Additionally, as soon as we are able to prepare an appropriate remediation plan working with the experts, we will provide it to your office for your review and feedback before we proceed with any work. While we certainly wish we are able to retain experts rapidly enough to prepare an appropriate remediation plan prior to the November 19<sup>th</sup> date set forth in the Notice, we would appreciate additional extensions of time needed to ensure we can proceed appropriately with a plan that will meet your approval. Your ongoing help and understanding in this matter is greatly appreciated.

Also, we don't have the email addresses of the other people in the citation that we would like to address and therefore, ask for your help if forwarding this to the appropriate recipients. If you can copy me when you forward the email, I can have everyone's email for the future correspondence.

Sincerely;



Sushil Garg



Sushil Garg



# Marconi Coastal Vegetation Impacts

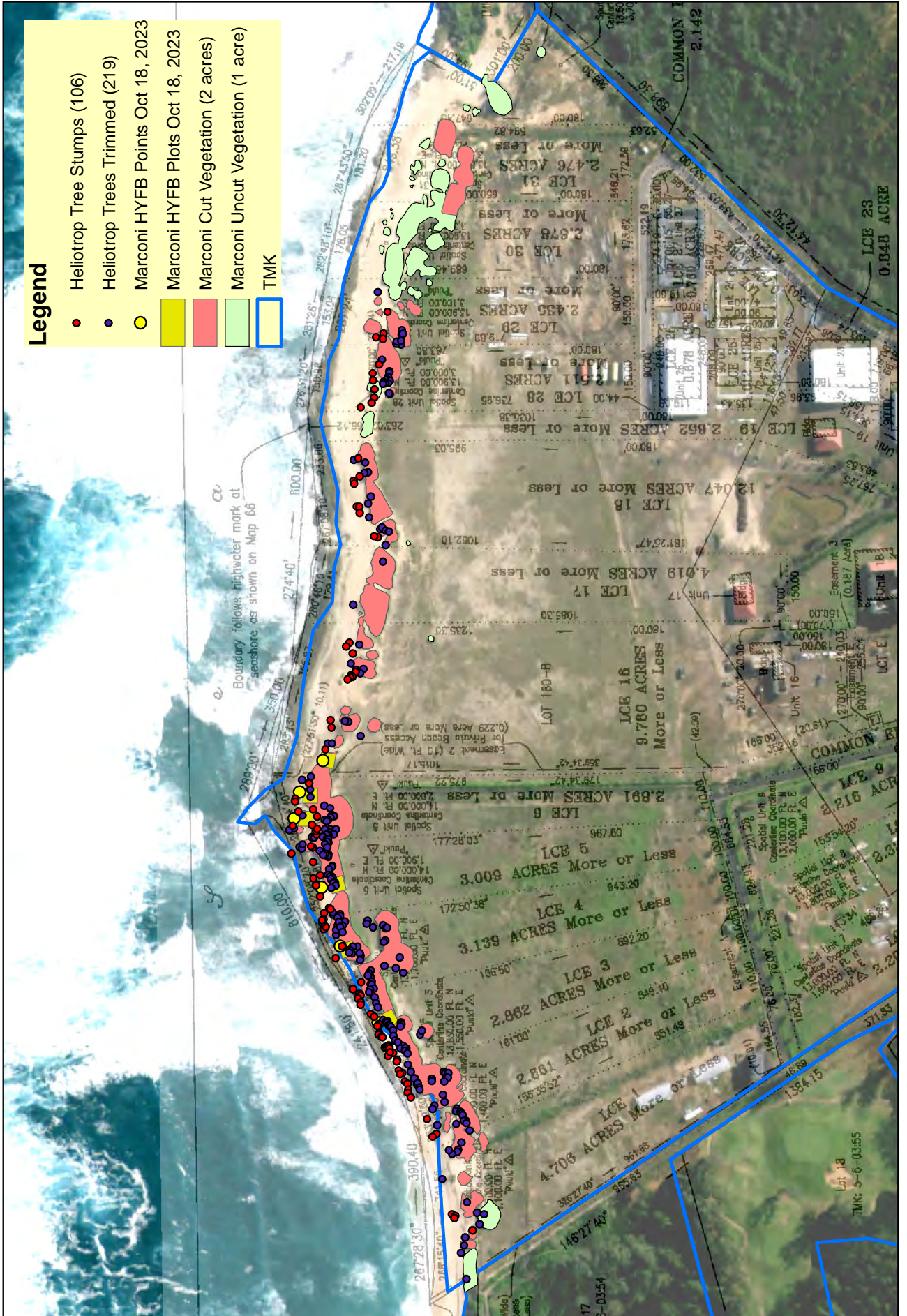


Exhibit L Marconi Coastal Vegetation Impact



DAMAGE TO STATE RESOURCES



























DLNR-OCCL 10/18/2023



Certified shoreline Photo from ags.hawaii.gov





DLNR-OCCL 01/31/2024



Certified shoreline Photo from ags.hawaii.gov



DLNR-OCCL January 31, 2024







DLNR-OCCL January 31, 2024





Exhibit O Wave Run Up

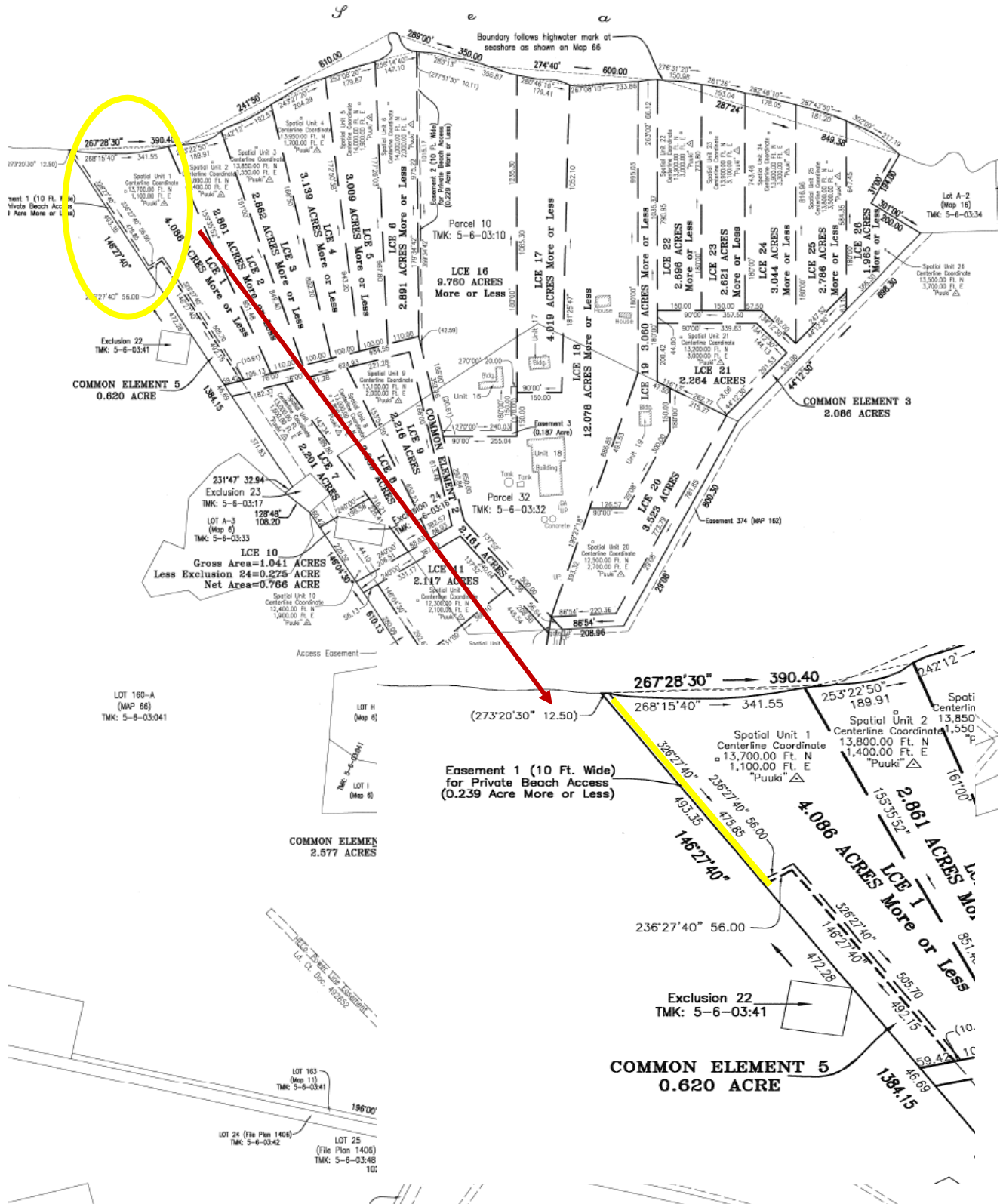




12/22/2023 Drone footage of wave run up

Sea Grant Agent: There appear to be two wash lines. The regular high tide line is along the top crest of the remaining dune. The upper reach of the high wash of the waves is indicated by the second wash line marked by mulch and other organic material left in a wave created pattern mauka of the remaining dune. There is evidence of raking which left mechanical or man-made patterns leading into mulch piles. The raking into the mulch piles disrupts the mauka wash line indicating the upper reach of the high wash of the waves.





Western Boundary Fence Area provides beach access to CPR.

Exhibit Q Map of Boundary Fence Area





DLNR-OCCL 12/22/2023

Fence lines at TMK: (1) 5-6-003:053. To the left is what appears to be a shade cloth fence. Running across an area noted as Unit 1 is what appears to be an iron wrought fence running parallel with the shoreline. To the right is the western boundary fence of the property.



DLNR-OCCL 1/31/2024 What appears to be a shade cloth fence east boundary of Unit 1.





DLNR-OCCL 1/31/2024 What appears to be an iron wrought fence running parallel with the shoreline across Unit One.



Mōlī, an indigenous, vulnerable, near threatened seabird behind an alleged unauthorized fence.



DAVID Y. IGE  
GOVERNOR OF  
HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

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

ROBERT K. MASUDA  
FIRST DEPUTY

M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER

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

REF:OCCL:TM

Correspondence: OA-23-16

Yue Sai Kan

AUG 16 2022

SUBJECT: Conservation District Use Application (CDUA) for Agricultural Use Located at 56-1095 Kamehameha Hwy., Kahuku, Ko'olauloa, O'ahu, Portion of Tax Map Key: (1) 5-6-003:053

Dear Yue Sai Kan:

The Office of Conservation and Coastal Lands (OCCL) is unable to process your Conservation District Use Application (CDUA) as it is incomplete. While we note the application listed an agent/consultant, you did not sign off on the Authorization of Agent on the last page of the CDUA which was missing on your application.

The CDUA should describe all facets of the project: there should be a description of the components, its dimensions, and its creation methodology. Please keep in mind that the CDUA should be viewed as a **standalone document** that any person from the public can review and understand the project in detail. If your intention was to use the Draft Environmental Assessment (EA) to supplement the information in the CDUA application, your CDUA application should reference the Draft EA and page number where the information can be found. Please also ensure that terminology used in both documents are consistent as not to confuse the reader.

The CDUA states 'please see attached DEA' but the draft Environmental Assessment (EA) does not contain any specific responses required for the CDUA application. Further, in reviewing your draft EA, it appears that the County should be processing this document as the approving agency is listed as the Department of Planning and Permitting in the project summary and the proposed use is agricultural operations and a farm dwelling outside of the shoreline setback. Please submit the final Environmental Assessment with any future CDUA.

Based upon a cursory inspection of the draft EA, the OCCL strongly suggests that the EA be amended to contain relative information regarding the site of the proposed land use(s) and information specific to the proposal. Superfluous information should be removed. The Office of Planning and Sustainable Development's Environmental Review Program's website <http://www.doh.hawaii.gov/erp/> has a wealth of information regarding Environmental Impact Statement (EIS) rules and an online library of EA's and EIS's that your draft EA could be



patterned after or contact the ERP should there be questions regarding the development of the EA.

The OCCL on behalf of the Department of Land and Natural Resources regulates land uses in the Conservation District. The makai [seaward] portion of parcel 053 lies within the General subzone of the Conservation District. According to your information, you are proposing Agriculture in this area. Agriculture is an identified land use that could be applied for pursuant to the Hawai'i Administrative Rules (HAR) §13-5-23 L-1 AGRICULTURE. Dependent upon the size of the project, a CDUA would need to be filed for a Board permit or a Departmental permit. Therefore, to authorize, deny, or modify the proposed land use would be at the discretion of either the Board of Land and Natural Resources or the Chairperson of the Board.

Please read the rules and regulations of the Conservation District noted as the Hawai'i Administrative Rules (HAR) Chapter 13-5 in its entirety **and abide by the rules** if you will be resubmitting an application. In your review of subchapter 4 of our rules, please note §13-3-31 Permit applications, (b) For private landowners of the subject parcel(s), the application shall be signed by landowners whose property interests constitute or exceed 85% of the fee ownership of the subject parcel(s). Please obtain signatures of 85% of the fee ownership of parcel 053 to submit an application.

We are returning your check #115 for \$250.00. Should there be any questions regarding this correspondence, contact Tiger Mills of our Office at (808) 587-0382 or at [kimberly.mills@hawaii.gov](mailto:kimberly.mills@hawaii.gov).

Sincerely,



K. Tiger Mills, Staff Planner  
Office of Conservation and Coastal Lands

C: ODLO  
City  
-DPP

Attach: Ck. #115 (\$250)



**TABLE OF CONTENTS**

**1 INTRODUCTION.....1**

**2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES.....1**

**2.1 PENALTY CALCULATION.....2**

    2.1.1 Identified Land Use Penalties.....3

    2.1.2 Non-Identified Land Use Penalties.....4

    2.1.3 Tree Removal.....5

    2.1.4 Vegetation Removal/Vegetation Clearing.....5

    2.1.5 Additional Considerations and Factors .....6

    2.1.6 Continuing Violations and Permit Non-Compliance.....6

    2.1.7 In-Kind Penalties .....7

    2.1.8 Penalty Adjudication .....9

**3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES.....10**

    3.1 PRIMARY RESTORATION DAMAGES .....11

    3.2 COMPENSATORY DAMAGE CALCULATION .....12

    3.3 ADJUDICATION OF DAMAGES.....13

**APPENDIX A: GUIDELINE FRAMEWORK TABLES**

**APPENDIX B: DEFINITIONS**

**APPENDIX C: REFERENCES**

**APPENDIX D: DAMAGES EXAMPLES**

**APPENDIX E: PENALTY CALCULATION WORKSHEET**

**CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES AND ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES**

September 2009

*Relating to penalties for violations within the Conservation District Act 217*



## 1 INTRODUCTION

Hawaii Revised Statutes (HRS) §183C-7 was amended on July 7, 2008 to increase the maximum penalty for a Conservation District violation to up to \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

This document, *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land and Natural Resources* is intended to provide the Office of Conservation and Coastal Lands (OCCL) with a framework to systematically carry out its enforcement powers, in the determination and adjudication of civil and administrative penalties. These guidelines are to be used for internal staff guidance, and should be periodically reviewed to determine their effectiveness, and whether refinements are needed. These guidelines are consistent with HAR §13-1, Subchapter 7, Civil Resource Violation System (CRVS).

## 2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES

The charging and collecting of penalties is an enforcement tool that may be used to ensure future compliance by the responsible party and others similarly situated. The penalty amount(s) shall be enough to ensure immediate compliance with HAR §13-5 and HRS §183C, and cessation of illegal activities. Penalties will be assessed for each action committed by an individual(s) that conducts an unauthorized land use and that impairs or destroys natural resources protected under Chapter §183C, HRS.

The Staff will treat each case individually when assigning conservation district penalties using the following framework, and additional considerations and factors for upward or downward adjustments. The staff of the OCCL (Staff) will use these penalty schedule guidelines to issue violation notices and to make recommendations to the Board of Land

and Natural Resources (Board), Chairperson of the Board of Land and Natural Resources (Chairperson), or Presiding Officer, whom may ultimately adjudicate the Conservation District penalties. These guidelines presume that all cases in which a violation has occurred, the Chairperson, Board, or Presiding Officer may also assess administrative costs, damages to public land or natural resources, and costs associated with land or habitat restoration.

### 2.1 PENALTY CALCULATION

The penalty range for these actions will be substantially determined based on the type of permit that would have been required if the individual(s) had applied to the Department of Land and Natural Resources (Department) or Board for pre-authorization to conduct the identified use, under Hawaii Administrative Rules (HAR) §13-5-22, 23, 24, 25. Assessing the penalties according to the Conservation District permit type accounts for the level of review or scrutiny the unauthorized use would have received by the Department or Board in order to avoid damage to the natural resource. This graduated permit review framework corresponds to the level of actual or potential "harm to the resource"<sup>1</sup> caused by the violation.

Once the baseline for the penalty range has been established according to the required permit, the penalty may be adjusted appropriately upward or downward according to the "harm to resource" caused or potentially caused by the violator's action and additional considerations and factors (See 2.1.4),<sup>2</sup> within the assigned penalty range. Where Staff was unable to associate the unauthorized use with a typical land use identified in HAR §13-5, Staff may try to associate the action with the most similar identified land use in HAR §13-5, or according to the "harm to the resource" caused by the violation. Table 1

<sup>1</sup> "Harm to resource" is an actual or potential impact, whether direct or indirect, short or long term, impact on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration (See Appendix B: Definitions) Adapted from Florida Department of Environmental Protection 2000 Administrative Fines and Damage Liability, Ch. 62B-54.

<sup>2</sup> Penalty amounts may be adjusted up or down, based on additional considerations, such as the actual extent of the direct damage, significance of any other indirect impacts, environmental record of the violator, responsiveness of violator, etc. (See 2.1.4 Additional Considerations and Factors).



was created to demonstrate the penalty ranges for the type of required permit and "harm to resource" (See 2.1.1 or Appendix A).

The first two of the following sections explain the identified and non-identified land use framework. The next four sections: Tree Removal, Additional Considerations and Factors, Continuing Violations and Permit Non-Compliance, and In-Kind Penalties, provide guidance for the upward or downward adjustment of penalties based on the initial framework discussed in Section 2.1.1, Identified land use penalties.

**2.1.1 Identified Land Use Penalties**

The violation penalty range associated with each required permit will be assessed in accordance with the following harm to resource indices in this graduated framework.

**Table 1. Penalty Guideline Framework**

Harm to resource or potential for harm to resource	Identified land use permit guideline with the letter	Penalty Range
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

**Major Harm to the Resource/ Board Permit (D)**

Violations identified with the required permit prefix (D) may incur a penalty in the range of \$10,000 - \$15,000 as a Board permit would have been required to minimize the possibility of causing "major harm to the resource." Examples of "major harm(s) to the resource" may include actions that cause substantial adverse impact to existing natural resources within the surrounding area, community, ecosystem or region, or damage to the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Such actions may include, but are not limited to, unauthorized single-family residences or unauthorized structures, grading or alteration of topographic features, aquaculture, major marine construction or dredging, unauthorized shoreline structures, major projects of any kind, mining and extraction, etc.

**Moderate Harm to the Resource/Departmental Permit (C)**

Violations identified with the required permit prefix (C) may incur a penalty in the range of \$2,000-\$10,000, as a Departmental permit would have been required, due to the possibility of causing "moderate harm to the resource." Examples of "moderate harm(s) to the resource" may be adverse impacts that degrade water resources, degrade native ecosystems and habitats, and/or alter the structure or function of a terrestrial, littoral or marine ecosystem. Such actions may include, but are not limited to, unauthorized landscaping causing ground disturbance, unauthorized alteration, renovation or demolition of existing structures or facilities, such as buildings and shoreline structures, maintenance dredging, agriculture, and animal husbandry, etc.

**Minor Harm to the Resource/Site Plan Approval (B) Permit**

Violations identified with the required permit prefix (B) may incur penalties as a site plan approval would have been required to assure that "minor harm(s) to the resource" are minimized. "Minor harm(s) to the resource" may incur a penalty of \$1,000-\$2,000 and could be actions causing limited to short-term direct impacts including, but not limited to, small-scaled construction, construction of accessory structures, installation of temporary or minor shoreline activities or similar uses.

**Very Minor Harm to the Resource/(B) Permit**

In instances in which a permit with the B prefix should have been sought but are considered to have only caused "very minor harm(s) to resource" a penalty of up to \$1,000 may be incurred. These "very minor harm(s) to the resource" could be actions in which the impact on the water resource or terrestrial, littoral or marine ecosystem was temporary or insignificant, and was not of a substantial nature either individually or cumulatively.

**2.1.2 Non- Identified Land Use Penalties**

Violations in which an unauthorized use is not identified in HAR §13-5-22, 23, 24, 25, Staff may try to associate the action with the most similar identified land use in HAR



§13-5 or according to the "harm to the resource" caused by the violation. Refer to the above section, *Identified Land Use Penalties*, for the most similar required permit prefix. To categorize the violation as a "harm to resource" when no similar use is identified in HAR §13-5, Staff will refer to Table 1 and the definitions of the four violation types of "harm to resource" (See Appendix B: Definitions).

### 2.1.3 Tree Removal

Violation penalties for the removal of any federal or state listed threatened, endangered, or commercially valuable tree may incur a fine of up to \$15,000 per tree. Removal of any native tree may incur a fine of up to \$1,000 per tree. The removal of any invasive tree shall be considered as removal/clearing of vegetation.

The Board, Department, or Presiding Officer also has the option of considering the removal of more than one tree as a single violation, similar to the removal/clearing of vegetation.<sup>3</sup> If violation is considered as one violation, a fine amount of up to \$15,000 may be incurred, utilizing the guidelines for Major, Moderate, Minor, and Very Minor outlined in this schedule. However, the removal of any federally or state listed threatened or endangered tree shall be considered on a one violation per tree basis, with a maximum penalty of up to \$15,000 per tree.

### 2.1.4 Vegetation Removal/Vegetation Clearing

Past Staff recommendations and Board decisions have treated some cases of tree or removal as one citation of vegetation clearing/vegetation removal, this practice may be continued in violations resulting in minor or very minor harm to the resource. In accordance with the identified land uses within HAR §13-5 the assessment of vegetation removal has been based on a single citation of removal/clearing determined by the square footage of vegetation removed (See Table 3 Vegetation Removal). However, the

<sup>3</sup> While Staff and Board decisions in MA-01-09, OA-05-40 and HA-06-08 have treated the removal of non-native, invasive, or noxious trees as one citation of "clearing" with mandatory remediation plans.

Department may see fit to assess the removal/clearing of threatened, endangered, or commercially valuable plants similar to the modified tree removal framework and may be penalized on an individual plant basis of up to \$15,000 per plant.

Table 3. Vegetation Removal

Action	Commensurate Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. of vegetation	Minor	\$1,000-\$2,000
Clearing of invasive or noxious vegetation	Very Minor	Up to \$1,000*

Note: The clearing of threatened, endangered or commercially valuable plants will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant. According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq. ft., or clearing 10,000 sq. ft. Staff could assess a penalty of \$10,000.

### 2.1.5 Additional Considerations and Factors

After Staff applies the Conservation District violation graduated penalty framework to identify the violation penalty range (1, 2, and 3 found above), the Staff may incorporate several considerations into the final assessed conservation district penalty including but not limited to, those factors identified in HAR §13-1-70 Administrative Sanctions Schedule; Factors to be Considered.

### 2.1.6 Continuing Violations and Permit Non-Compliance

Each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense.

\* Provided the harm to the resource and offsite damage were minimal.



Violation of existing approved Conservation District Use Permit (CDUP) conditions will be assessed on a case-by-case basis. Existing permit violations, in which deadlines are not met, may be individually assessed by the Staff as to prior violator conduct, knowledge, and compliance. Violation of permit conditions involving initiation and/or completion of project construction, notification of start and completion dates, failure to file legal documents, etc., may be considered very minor within the existing framework, although it should be noted that such actions may result in permit revocation. Failure to perform proper cultural, archeological, or environmental impact studies or failure to implement proper best management practices as identified in the standard permit conditions may be assessed more severely by Staff, as a moderate or major harm to the resource, due to the potential of greater adverse impacts to natural resources from the violator's failure to comply with the permit conditions, may have occurred.

#### 2.1.7 In-Kind Penalties

Once the penalty amount has been established through the framework above, the Department may determine that the full payment or some portion of the penalty may be paid as an in-kind penalty project.<sup>5</sup> This would not serve as a way to avoid payment but as a way to reduce the cash amount owed while allowing the Department to consistently enforce its rules. The in-kind penalty project is not designed to credit the violator for restoration or remediation efforts that may be already required, but to offset a portion of the cash penalty assessed. The in-kind penalty should be enough to ensure future compliance with HAR §13-5 and HRS §183C, by the violator and to deter other potential violators from non-compliance.

In-kind penalties will only be considered if (1) the responsible party is a government entity, such as a federal agency, state agency, county agency, city agency, university, or school board, or if (2) the responsible party is a private party proposing an environmental

<sup>5</sup> In-Kind Penalty framework has been adapted from Florida Department of Environmental Protection, 2007, Program Directive 923, Settlement guidelines for civil and administrative penalties.

restoration, enhancement, information, or education project. In-kind penalties are limited to the following specific options:

- a. **Material and/or labor support for environmental enhancement or restoration projects.** The Department will give preference to in-kind projects benefiting proposed government-sponsored environmental projects. For shoreline violations, this may include state beach nourishment projects and dune restoration projects.
- b. **Environmental Information and Environmental Education projects.** Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's, and preferably the OCCL's, mission to protect and conserve Hawaii's Conservation District Lands.
- c. **Capital or Facility Improvements.** Any capital or facility improvement project proposed must demonstrate how the improvement will directly enhance the Department's and/or public's use, access, or ecological value of the conservation property.
- d. **Property.** A responsible party may propose to donate land to the department as an in-kind penalty. Donations will be handled by the Department's Legacy Lands program or similar program.



**3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES**

Penalties to recoup damages to public lands or natural resources for the purposes of enforcement and remediation may be assessed in addition to Conservation District violation penalties assessed by the aforementioned guidelines. The assessed total value of the initial and interim natural resource(s) damaged or lost (compensatory damages) and the cost of restoration or replacement of the damaged natural resource(s) (primary restoration cost) along with any other appropriate factors, including those named in HAR §13-1-70, may be adjudicated by the Board. The total value may be estimated on a per annum basis, and then may be used to calculate the net present value of the initial and interim loss of natural resource benefits, until the ecosystem structure, function, and/or services are restored.

The cost of a full-scale damage assessment by the Department would be an administrative cost, which could be recouped by the Board from the landowner or offender pursuant §HRS 183C-7. In some cases, the damage to public lands or natural resources may occur on more than one ecosystem or habitat type, (e.g., sandy beaches, seagrass beds, and coral reefs). In such instances, damages for all impacted systems will be handled cumulatively.

Since all the ecosystem services provided by the ecosystem in question cannot be quantified (e.g., the aesthetic value), the values obtained are lower bound estimates, and may be applied to systems similar to the referenced ecosystem using the benefit transfer method. These valuations, to account for the loss of ecosystem services and the cost to restore them, may be applied to Hawaiian ecosystems on public lands: such as Koa and Ohia forests, coral reefs, seagrass beds, wetlands, dune and beach ecosystems, and other important Hawaiian ecosystems.

While each case is unique and individual in nature, the Department may not be able to conduct detailed damage assessments in each case, and may refer to past precedent,

**2.1.8 Penalty Adjudication**

Violation penalties may be adjudicated similarly to the harm to resource indices in the penalty guideline framework.

Comparable Harm to Resource	Identified Harm to Resource and Penalty Range	Penalty Adjudicator
Major	\$10,000-\$15,000	Board
Moderate	\$2,000-\$10,000	Board
Minor	\$1,000-\$2,000	Chairperson or Presiding Officer
Very Minor	up to \$1,000	Chairperson or Presiding Officer

**Major and Moderate Harm to the Resource**

The Board may adjudicate penalties to violations categorized as causing or potentially causing major or moderate harm(s) to the resource. The Board may also adjudicate cases in which repeat violations, repeat violators, or egregious behavior were involved, or moderate to significant actual harm to the resource occurred. The Board may also adjudicate the payment of part or all, of the penalty as part of an In-kind penalty.

**Minor and Very Minor Harm to the Resource**

The Board may delegate to the Chairperson or a Presiding Officer the power to render a final decision in minor and very minor conservation district violations in order to provide expeditious processing and cost effective resolution. The Chairperson or appointed Presiding Officer may adjudicate penalties to minor and very minor violations characterized by inadvertent or unintentional violations and those violations which caused minor or very minor harm to the resource.



economic ecosystem valuations, and other published environmental valuations to estimate and assess damages on smaller scales (for valuations and publication examples see Appendix C: References and Appendix D: Damages Examples). Using the benefit transfer method to apply past precedents and published valuations in some situations would allow the Department to focus its administrative duties and time on remediation and restoration efforts. However, as ecological valuation and research continue, more comprehensive estimates may be produced and utilized.

The Board may allow restoration activities and damage penalties to be conducted and/or applied to a site different from the location of the damaged area where similar physical, biological and /or cultural functions exist. These assessed damages are independent of other, city, county, state and federal regulatory decisions and adjudications. Thus, the monetary remedies provided in HRS §183C-7 are cumulative and in addition to any other remedies allowed by law.

### 3.1 PRIMARY RESTORATION DAMAGES

The cost of land or habitat restoration or replacement, the cost of site monitoring, and site management may be assessed and charged as primary restoration damages. Restoration efforts will aim to return the damaged ecosystem to a similar ecological structure and function that existed prior to the violation. In cases in which the damaged ecosystem was predominately composed of non-native species, restoration efforts must re-vegetate Conservation District land and public lands with non-invasive species, preferably native and endemic species when possible. The use of native and endemic species may thus result in the restoration of ecological structure and function critical for the survival of endemic Hawaiian species.

Returning the damaged and or severely degraded site to a condition similar to or better than its previous ecological structure and function (e.g., a terrestrial system such as a Koa (*Acacia koa*) forest) would include: (1) calculating the level of ecosystem services to be restored from carbon sequestration, climate regulation, nutrient cycling, air and water purification, erosion control, plant and/or wildlife habitat, and any other services which

may be valued; (2) purchase, production and out-planting of Koa seedlings; and (3) monitoring, maintenance, and management for the time period of mature growth of ~40-60 years, to achieve mature canopy structure, native under-story, and an acceptable level of lost ecosystem structure, function and/or services restored.

### 3.2 COMPENSATORY DAMAGE CALCULATION

Compensatory damages to public lands or natural resources may be assessed and charged to the violator to compensate for ecosystem damage and lost initial and interim ecosystem services to the public. All Divisions of the Department may coordinate their resources and efforts along with existing ecosystem valuations and publications (See Appendix C and D for examples) to derive the estimated total value of the natural resource damaged until the ecosystem structure, function, and services are estimated to be recovered.

The total value of the natural resource that is lost or damaged may include the initial and interim values of the ecosystem services provided by the natural resource or habitat, and the social-economic value of the degraded site, until the ecosystem structure, function, and/or services are restored. Assessing the damages to the resource could include: estimating the loss of ecosystem services of carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism, fisheries, society, cultural inspiration and practices, and any other services which may be valued.

These natural resource damages may be assessed using economic valuation techniques to estimate the total value(s) of the natural resource(s) damaged on a per area basis, including: total ecosystem service value, total annual benefits, the market value of the natural resource, or any other factor deemed appropriate. The total value of the present and interim natural resource damage may be estimated by calculating the net present value of these lost benefits, values and services. The net present value may be calculated using a discount rate to scale the present and future costs to the public, of the interim losses of ecosystem services over the restoration time. The restoration time may be



estimated as the number of years for the damaged natural resource or ecosystem to reach maturity and/or the ecosystem structure and function to be restored similar to the pre-violation state. The discount of future losses and accrued benefits may be used in the valuation of mitigation efforts performed by the violator. For example the restoration conducted immediately after damage occurred may be calculated to have a higher present benefit worth than the benefit of restoration activities undertaken a year or two later.

In other instances, a habitat equivalency analysis (HEA) or a resource equivalency analysis (REA) may be used to scale equivalent habitat or wildlife losses for estimating both ecosystem damage penalties and restoration efforts.

### 3.3 ADJUDICATION OF DAMAGES

The adjudication of primary restoration damages and compensatory damages will be adjudicated by the Board due to the complexity of the assessment process and to assure proper checks and balances, including adequate public notice and a public hearing.

In addition to the damages and penalty violations assessed, the Department is allowed to recoup all administrative costs associated with the alleged violation pursuant to HRS §183C-7(b). All penalties assessed will be in compliance with HRS §183C-7(c) and will not prohibit any person from exercising native Hawaiian gathering rights or traditional cultural practices.

## APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

Harm to resource or potential for harm to resource	Identified land use permit Designating with the letter	Penalty Range
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

Table 2. Vegetation Removal

Action	Commensurable Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. Vegetation	Minor	\$1,000-\$2,000
Clearing of Invasive or noxious Vegetation	Very Minor	Up to \$1,000*

Note: According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq. ft., as clearing 10,000 sq. ft. Staff could assess a penalty of \$10,000. The clearing of threatened, endangered or commercially valuable plants, will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant.



## APPENDIX B: DEFINITIONS

### Definitions:

- (1) "Baseline" means the original level of services provided by the damaged resource.
- (2) "Benefit Transfer Method" estimates economic values by transferring existing benefit estimates from studies already completed for another location or issue.<sup>7</sup>
- (3) "Board" means the Board of Land and Natural Resources.
- (4) "Board Permit" means a permit approved by the Board of Land and Natural Resources.
- (5) "Chairperson" means the chairperson of the board of land and natural resources
- (6) "Civil Resource Violations System" or "CRVS" means a system of administrative law proceedings as authorized under chapter 199D, HRS, and further prescribed in Subchapter 7, 13-1, HAR, for the purpose of processing civil resource violations.
- (7) "Compensatory Damages" means damages for compensation for the interim loss of ecosystem services to the public prior to full recovery.
- (8) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.
- (9) "Department" means the Department of Land and Natural Resources.
- (10) "Departmental Permit" means a permit approved by the Chairperson.
- (11) "Discounting" means an economic procedure that weights past and future benefits or costs such that they are comparable with present benefits and costs.
- (12) "Ecosystem Services" means natural resources and ecosystem processes, which may be valued according to their benefits to humankind.

*For example: carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism.*

<sup>7</sup> Ecosystem Valuations [http://www.ecosystemvaluation.org/benefit\\_transfer.htm](http://www.ecosystemvaluation.org/benefit_transfer.htm)

*recreation, scientific discovery, fisheries, society, cultural inspiration and practices, and any other services which may be valued.*

- (13) "Grossly negligent" violation means conscious and voluntary acts or omissions characterized by the failure to perform a manifest duty in reckless disregard of the consequences.<sup>8</sup>
- (14) "Harm to resource" means an actual or potential impact, whether direct or indirect, short or long term, acting on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration as is defined as follows:
  - (a) "Major Harm to resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics
  - (b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).
  - (c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.
  - (d) "Very Minor Harm to Resource" means an action in which the impact on the water resource or terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

*For example, "major harm to the resource(s)" would be associated with a major land use violation that would have likely required a Board Permit, such as building a house, while a "minor harm to the resource(s)" may be*

<sup>8</sup> Definition adapted from Florida Department of Environmental Protection, 2000 Administrative Fines and Damages Liability, Ch. 62B-54.



*associated with minor land uses requiring an administrative Site Plan Approval, for building a small accessory structure.*

- (15) "Knowing" violation means an act or omission done with awareness of the nature of the conduct.
- (16) "Net Present Value" means the total present value (PV) of a time series of cash flows.
- (17) "OCCL Administrator" means the Administrator of the Office of Conservation and Coastal Lands.
- (18) "Party" means each person or agency named or admitted as a party.
- (19) "Person" means an appropriate individuals, partnership, corporation, association, or public or private organization of any character other than agencies.
- (20) "Presiding Officer" means the person conducting the hearing, which shall be the chairperson, or the chairperson's designated representative.
- (21) "Primary Restoration Damages" means the costs to restore the damaged site to its prior baseline state.
- (22) "Site Plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.
- (23) "Willful violation" means an act or omission which is voluntary, intentional and with the specific intent to do something the law forbids, or fail to do something the law requires to be done.

#### APPENDIX C: REFERENCES

- Cesar, H., van Benkeren, P., Pritz, S., Dierking J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
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#### APPENDIX D: DAMAGES EXAMPLES

##### Examples of Damage Assessments and Possible Remediation Efforts

The following are only brief past estimates used in Hawaii and other states; they are by no means comprehensive or limiting. These are intended to be examples for possible assessments and remediation efforts not as templates. As previously stated each case will be handled individually to account for unique ecological, economic and cultural impacts. The following are organized by habitat type.

##### Coral

###### Florida Department of Environmental Protection (Civil Damages):

The DEP can impose fines of up to \$1,000/m<sup>2</sup> of reef damaged and is dependent on the absence of extenuating circumstances such as weather conditions, disregard of safe boating practices, navigational error, whether the vessel operator was under the influence of drugs or alcohol etc.

###### Cesar et al 2002 (Ecosystem Service Valuation)

Cesar et al. used a Simple Coral Reef Ecological Economic Model (SCREEN) to assess Hawaiian coral reefs based on the annual benefits of the coral reefs to recreation/tourism, property amenities, biodiversity, fisheries and education. The annual benefits and total economic value could then be expressed on a 'per area' basis. This study found the total annual benefits of the coral reefs of Hanauma Bay to be \$37.57 million (\$2,568/m<sup>2</sup>), of the coral reefs in Kiheti to be \$28.09 million (\$65/m<sup>2</sup>) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m<sup>2</sup>).

###### Piiaa enforcement (KA-02-10) (Primary Restoration Cost)

Damage to Coral reef ecosystems was assessed for restoration activities according to Florida guidelines, as \$5,830,000 for 5,380 m<sup>2</sup> of coral reef damage. This calculation



was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd<sup>3</sup> of beach sand. However between 30,000-50,000 yd<sup>3</sup> was estimated to be impacted, totaling \$2,300,000-\$3,900,000. While cleaning the sediment from the reef was estimated to cost approximately \$845,000 (for the 13 acres, or \$65,000 for 10m<sup>2</sup>). This totaled between \$3,100,000 and \$4,700,000, and did not include coral colony re-establishment. An additional \$630,000 was estimated for the 10-year monitoring period, (however studies by Cesar et al. 2003 estimated a 25 year period for recovery of ecological impacts).

*Thus damage to corals may be calculated as follows:*

# Number of square meters of coral damaged  
 X Multiplied by \$1,000 (or estimated value of coral on per/area basis)  
 (#m2 x \$1000)

Plus the estimated net present value of ecosystem services lost until recovery. (This may be more if damage to an area such as Hanauma Bay with increased recreational economic revenue.)

- +Plus cost of Remediation
- +Plus Cost of cleaning sediment from reef
- +Plus Cost of cleaning sediment/mud from beach sand
- +Plus Cost of coral reestablishment
- +Plus Cost of Monitoring
- +Plus Cost of Management

**Seagrass beds (Compensatory Damage)**

The Florida DEP fines offenders \$100/yard<sup>2</sup> of damage to seagrass beds for the first yd<sup>2</sup> damaged and \$75/yard<sup>2</sup> per each additional yd<sup>2</sup> damaged.

- \$100 for the first yard damaged
- + \$75 per each additional yard
- or net present total value of ecosystem services lost until recovery
- +vegetation planting
- +monitoring

**Sand Beaches (ex. Of Primary Restoration Costs)**

Minimum penalty cost of restoration and potential negative ecological, social and environmental impacts should be included in the assessment of damaged, degraded or lost sandy beaches. As one of Hawaii's greatest natural resources the following should be included in the minimum penalty assessment, however, as ecological valuation and research continue, more comprehensive estimates may be produced. In KA-02-10 P1aa, \$390,000 fine was estimated to clean 5,000 yd<sup>3</sup> of beach.

- +Cost of lost revenue due to altered Beach resources (compensatory)
- +primary restoration costs
- +Plus cost of cleaning of sediment/mud from beach area (if necessary)
- +Plus cost of beach nourishment (sand replacement)
- +Plus cost of native dune vegetation

(In some circumstances the loss of beach resources may be assessed in conjunction with other ecological impacts listed above, such as coral reefs and sea grass beds.)



**APPENDIX E: PENALTY CALCULATION WORKSHEET**

Violator's Name(s): \_\_\_\_\_  
 TMK: \_\_\_\_\_  
 OCCL Staff Member: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Part 1 - Penalties**

Violation Type	Permit Prefix (D,C,B)	Harm to Resource (actual & potential)	Tree or Vegetation Status	Penalty Range	Adjustments (Mark Adj. Choice #1-8)	Multi-day (# days)	Total
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							

Penalty Total: \_\_\_\_\_

**Penalty Adjustments and Descriptions (please attach additional adjustments and descriptions, including but not limited to those listed in §13-1-70)**

1. Actual environmental damage extent (onsite)

Description: \_\_\_\_\_

2. Actual environmental damage extent (offsite)

Description: \_\_\_\_\_

3. Does the violator's have a history of violations? \_\_\_\_\_

4. Was the violation repetitious or of a long duration? \_\_\_\_\_

5. Was the violator Responsive and exhibit a level of cooperation of with the Department and/or Staff? \_\_\_\_\_

6. Does the Violator have a Financial Hardship? \_\_\_\_\_

7. Did the violator receive Economic or commercial gain through non-compliance? \_\_\_\_\_

8. Other. \_\_\_\_\_

Description: \_\_\_\_\_

Total Adjustment: up/down \_\_\_\_\_

Multi-day penalties

Number of days to multiply penalty: \_\_\_\_\_

Reasoning: \_\_\_\_\_

Total multi-day: \_\_\_\_\_