

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

September 26, 2025

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

Maui

Request to Conduct Two (2) Public Hearings on the Island of Maui Regarding Kaheawa Wind Power, LLC's Application to Direct Lease State Lands for the Continued Operation of Kaheawa Wind Power I, Ukumehame and Wailuku Districts on the island of Maui Further Identified by Tax Map Keys (TMKs) (2) 4-8-001: portion of 001 and 3-6-001: portion of 014 and;

Decision Making Regarding the Scope of the Appraisal for the Determination of the Annual Fair Market Rental Value of Kaheawa Wind Power I Located in the Ukumehame and Wailuku Districts on the island of Maui Further Identified by Tax Map Keys (TMKs) (2) 4-8-001: portion of 001 and 3-6-001: portion of 014.

APPLICANT:

Kaheawa Wind Power, LLC, a Delaware Limited Liability Company

LEGAL REFERENCE:

Sections 171-17, and 95.3, Hawaii Revised Statutes (HRS), as amended.

LOCATION and AREA:

Portion of Government lands with an area of 200 acres, more or less, situated at Ukumehame, Lahaina, Wailuku, Maui, identified as Tax Map Key: (2) 4-8-001: portion of 001 and 3-6-001: portion of 014, as shown on the map attached as **Exhibit A**.

ZONING:

State Land Use District:	Conservation
County of Maui CZO:	Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act  
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

## CHAPTER 343 - ENVIRONMENTAL IMPACT STATEMENTS:

This action before the Board (1) requests approval to conduct two public hearings and (2) requests the Board determine the scope for the appraisal of the subject site. These actions do not involve the use of State lands and funds and therefore, does not trigger HRS Chapter 343 and Hawaii Administrative Rules (HAR) § 11-200.1.<sup>1</sup>

## BACKGROUND INFORMATION:

### Land Disposition:

General Lease No. S-5731 (GL 5731) encumbers 200 acres, more or less, and was issued to Kaheawa Wind Power, LLC (KWP) for the construction, operation, and maintenance of a wind farm facility, Kaheawa Wind Power I, for a term of twenty (20) years, commencing on February 1, 2005 and expiring on January 31, 2025. Subsequently, on July 15, 2005, GL 5731 was amended to include a non-exclusive access easement (Kaheawa Pastures access road) as well as a perpetual non-exclusive easement for electric transmission lines, and a non-exclusive easement for overhead transmission lines.

Shortly before the expiration of GL 5731, KWP requested a Holdover of the lease upon its expiration. At the December 13, 2024, Board of Land and Natural Resources (Board) Meeting, the Board approved a one-year Holdover of GL 5731 (agenda item D-7; see **Exhibit B**) for the period of February 1, 2025 to January 31, 2026.

On July 9, 2025, KWP submitted an application requesting a direct lease of the State lands currently encumbered by the Holdover. If awarded a new lease, KWP intends to continue to operate and maintain the existing Kaheawa Wind Power I (KWP I) facility. It is Staff's understanding that KWP does not intend to place new improvements on the land.

### Project Area and Site Description:

KWP I currently consists of twenty (20), 1.5-megawatt wind turbines that produce 30 megawatts of electricity, an operations and maintenance building, a warehouse and storage facility, a substation, access roads, and an underground power collector system (see **Exhibit C**).

Staff notes that within the KWP I lease area, there are several improvements associated with and exclusively for the operation of the KWP II facility. These improvements include a substation, a battery energy storage system (BESS) facility, and an electrical collection system. For the purposes of the valuation for KWP I, these improvements should be excluded as they have a separate land disposition (GL 6004).

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1. While this action does not trigger HRS Chapter 343, the request for the State lease does as it proposes the use of State lands. Staff notes that Applicant has published a Draft Environmental Impact Statement (EIS) for the proposed project which was published in the August 8, 2025 edition of *The Environmental Notice*. A digital copy of the Draft EIS can be found online at [https://files.hawaii.gov/dbedt/erp/Doc\\_Library/2025-08-08-MA-DEIS-Kaheawa-Wind-1-Continued-Use-Project.pdf](https://files.hawaii.gov/dbedt/erp/Doc_Library/2025-08-08-MA-DEIS-Kaheawa-Wind-1-Continued-Use-Project.pdf)



REMARKS:Public Hearing:

HRS § 171-95.3(c) mandates,

To inform the public prior to the lease of public land or the renewal of a lease of public land for a proposed renewable energy project under this section, the department of land and natural resources shall conduct not less than two public hearings on the island where the public land to be leased for the proposed renewable energy project is located; provided that the notice of the hearing shall be published as provided in section 1-28.5. The board shall prepare and distribute an outline of the proposals for the renewable energy project and receive testimony from interested parties and the general public at each public hearing.

Accordingly, Staff is requesting that the Board consent to Land Division conducting two (2) public hearings on the Island of Maui regarding KWP's request to lease State lands at the subject TMKs, approve the content and form of the informational material to be distributed at the public hearings (**see Exhibit D**), and allow the Chairperson to delegate a hearings officer(s) for the public hearings to collect testimony on behalf of the Board.

The public hearings are tentatively scheduled for November 6, 2025 and December 4, 2025 to ensure that the regulatory requirements are met so the Board can hear KWP's lease request prior to the expiration of the Holdover.

Scope of the Appraisal:

As stated earlier, on July 9, 2025, KWP I submitted their application for a direct lease of the subject State lands. A new lease is being pursued because KWP I was selected by Hawaiian Electric as part of their Maui Stage 3 Request for Proposals, which is a competitive bidding process developed by Hawaiian Electric in coordination with the Hawaii Public Utilities Commission to procure renewable energy sources for Maui's electric grid in response to anticipated energy resource shortfalls. In anticipation of lease negotiations with KWP, Staff is preparing an appraisal request to determine KWP I's annual fair market rent.

On September 4, 2025, at a meeting with KWP and its counsel, the subject of the appraisal and scope was brought up as a point for discussion; however, a consensus could not be reached, thus today's request for decision making on this matter is being brought before the Board.

Staff believes that the Board has the discretion to assume ownership of all improvements, fixtures, machinery and equipment installed at KWP I at the termination of the Holdover.

The Holdover states:

2. That this holdover shall be subject to all the terms and conditions of General Lease No. 5731, including by not limited to payment of rent, in the amount of TWO HUNDRED SIXTY-THREE THOUSAND AND NO/100 DOLLARS (\$263,000.00) per annum in an equal semi-annual installments on February 1<sup>st</sup> and August 1<sup>st</sup>.

4. That at the expiration or other early termination of this holdover, the Lessee shall: (a) remove all improvements from the premises described in General Lease No. S-5731, including by not limited to all wind turbine foundations, infrastructure and road, subsurface improvements, with no depth limitation, and restore the premises to its original natural condition, all to the satisfaction of the Lessor; and (b) peaceably deliver unto the Lessor possession of the premises in a clean and orderly condition. Furthermore, upon the expiration, termination, or revocation of this holdover, should the Lessee fail to remove any and all of Lessee's personal property from the premises, after notice thereof, the Lessor may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the person property. This provision shall survive the expiration or early termination of the holdover.

...

It is understood that, except as provided herein, should there be any conflict between the terms of General Lease No. S-5731 as aforesaid amended and the terms of this Section 4 of the holdover, the terms and conditions of this Section 4 shall control and specifically to the removal requirements and the removal bond requirement herein.

GL 5731 reads in relevant part:

9. Improvements. The Lessee shall at its own cost and expense, within three (3) years from the commencement of the lease term, complete the construction of a 30-megawatt wind power project or Project Improvements, in accordance with plans and specifications submitted by the Lessee to and approved in writing by the Chairperson and in full compliance will all applicable laws, ordinances, rules and regulations, such approval not to be unreasonably withheld or delayed. Initial construction or installation of the Project Improvements shall not commence until the Department of Land and Natural Resources has been provided evidence of full financing of the construction costs of the project, and the construction and installation of the Project Improvements shall be completed free and clear from all liens and claims.

11. Ownership of improvements. During the term of this lease, the improvements constructed by the Lessee, including without limitation all additions, alterations and improvements thereto or replacements thereof and all appurtenant fixtures, machinery and equipment installed therein, shall be the property of the Lessee. As the early termination for whatever reason or expiration of this lease, all existing improvements and all additions, alterations and improvements thereto or replacements thereof and all appurtenant fixtures, machinery and equipment installed therein shall be removed at the Lessee's sole expense, unless the Lessor elects to assume ownership of improvements as provided herein.

59(g). Additional definitions. "Project Improvements" includes wind turbines, all appurtenant meteorological towers and equipment, electrical components (overhead and underground power lines and their supporting structures, transformers, switching and connection enclosures, metering systems, communication lines and auxiliary equipment,), service buildings, access controls (gates, cattle guards and fences), safety and wind project identification signage, erosion and fire control features and roads that may be used in connection therewith located on the premises.

The Holdover does not remove Board's right to assume ownership of the improvements granted in GL 5731.<sup>2</sup> The Holdover states, "this holdover shall be subject to all the terms and conditions of General Lease No. 5731..." The Holdover then goes on to discuss the additional removal requirements at the expiration or early termination of the Holdover in Section 4. KWP's counsel contends that Section 4 of the Holdover directs that the Holdover is controlling. However, the Holdover language is clear, the Holdover states that Section 4 is solely intended to control the "the removal requirements and the removal bond requirement herein."

KWP's counsel asserts that the appraisal should not include improvements and thus be valued as unimproved land. KWP believes that the Holdover terms and conditions supersede the terms and conditions of the original lease, GL 5731, and thus the improvements that were installed by KWP should continue to be retained by KWP at the termination of the Holdover. KWP's position statement is attached as **Exhibit E**.

Staff notes that KWP's Holdover request to the Board did not address the Board's rights to retain the improvements on KWP I. The submittal is attached as **Exhibit B**. Nowhere in the submittal is it requested or contemplated that the Board will waive its right to retain the improvements on KWP I at the termination of the Holdover. Staff believes that it was not the Board's intent to waive its right to assume ownership of the improvements in the lease when it required the removal bond provisions in the Holdover.

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<sup>2</sup> KWP acknowledges the Board's right, "Paragraph 11 [of GL 5731] does reference an election mechanism under which DLNR could choose to assume ownership of certain improvements at expiration." See, page 5 of **Exhibit E**.

Furthermore, in similar situations the Board has required Lessees to pay for improvements they built. On Hawaii Island, General Lease No. S-4302 (GL 4302) was set to expire. The Lessee requested a lease extension but was unable to submit the required documents prior to the expiration of the lease. On May 9, 2025, as item D-3, the Board approved a one-year holdover of the lease. The submittal is attached as **Exhibit F**. The submittal states, “Upon the expiration of the holdover, the ownership of existing improvements will revert back to the State. If the Lessee is awarded a direct lease, such lease would include both land and existing improvements, and the lease rent would be appraised accordingly.” The submittal also required a removal bond and provided the Board sole discretion to decide whether to require the removal of the improvements or to allow the improvements to remain on site.

It should also be noted that KWP and their counsel disclosed to Staff that when KWP submitted their bid package to Hawaiian Electric, anticipated lease rent was included in their cost/rate estimates. The way the situation was characterized by KWP’s counsel, it was understood by Staff that if the appraised value of the land came back higher than what was contemplated in KWP’s bid package, then the increased costs may prohibit KWP from delivering the electricity at the rates KWP proposed in their bid package. It is important to note that KWP **DID NOT** consult with Land Division Staff regarding potential rent nor appraisal scope prior to their Hawaiian Electric bid submission. Furthermore, Staff does not believe this issue should be resolved by preventing the Board from exercising its rights under GL 5731 (which KWP agreed to when it initially signed the lease), ultimately denying the Department from receiving fair compensation for the use of public lands.

Finally, regardless of the State’s renewable energy priorities, the Board has a public trust duty to responsibly manage Hawaii’s natural resources. The KWP I site is located on 5(b) public trust lands. The Hawaii Supreme Court states the Board is obligated “to use reasonable skill and care in managing the public lands trust” and the Board’s conduct is to be judged “by the most exacting fiduciary standards.”<sup>3</sup> In fulfilling its trust responsibilities, the Board should make every effort to obtain the best value for the use of public trust land. Accordingly, staff recommends the Board include improvements in the scope of the appraisal request to establish fair market value.

In the alternative, staff does recognize the Board has the discretion to retain the improvements at the termination of the Holdover. Should the Board so desire, the Board may elect not to retain the improvements and the appraisal for the new lease would be based solely on land value. However, the Board should be aware that by doing so it could be conceived as the State subsidizing a private for-profit business as it would be similar to giving a discount in rent and contrary to the Board’s decision in the previously referenced example of GL 4302 on Hawaii island.

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3 See, OHA v. HCDCH, 117 Hawaii 174, 195, 177 P.3d 884, 905 (2008)

RECOMMENDATIONS:

That the Board:

1. Grant permission to conduct two public hearings on the island of Maui for Kaheawa Wind Power, LLC's request to lease State lands.
2. Approve the content and form of the informational material presented in Exhibit D to be distributed at the public hearings.
3. Authorize the Chairperson to:
  - a. Set the date, location, and time of the public hearings; and
  - b. Appoint a hearings officer(s) for the two (2) public hearing.
4. Require Kaheawa Wind Power, LLC to reimburse all costs incurred by Land Division to hold the public hearings, including but not limited to travel costs, venue costs, and costs to procure audio visual equipment.
5. Declare, after consideration of the relevant documents and discussion that the appraiser shall:
  - a. Determine the annual fair market rental value, including any percentage rent, if applicable, as of the Date of Valuation for both land and improvements. The rent so determined should include the first 10 years of a new 20-year lease, as well as appropriate stepped increases for the second 10-year period, pursuant to Section 171-17, HRS, and should reflect the value of the existing improvements as of the Date of Valuation for the entire 20-year period.

OR


- b. Determine the annual fair market rental value, including any percentage rent, if applicable, as of the Date of Valuation for unimproved land. The rent so determined should include the first 10 years of a new 20-year lease, as well as appropriate stepped increases for the second 10-year period, pursuant to Section 171-17, HRS, and should reflect the unimproved land value as of the Date of Valuation for the entire 20-year period.

Respectfully Submitted,



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Andrew Tellio,  
Appraisal and Real Estate Specialist




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Lauren Yasaka, Staff Planner

APPROVED FOR SUBMITTAL:



 Dawn N. S. Chang, Chairperson

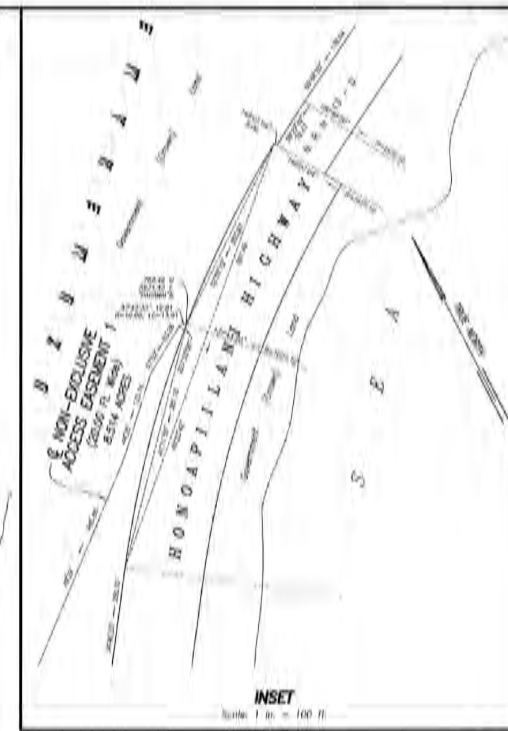
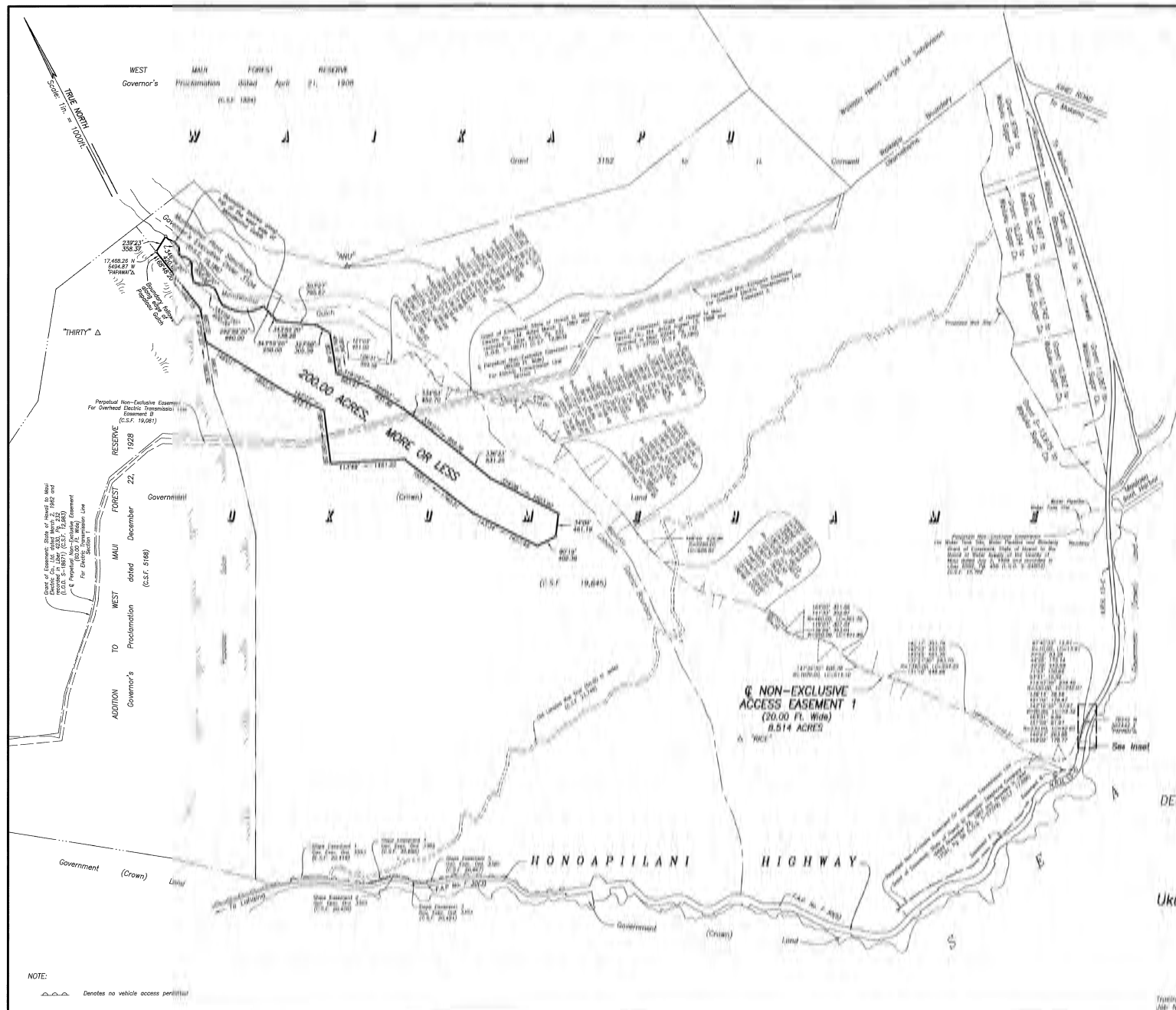


Exhibit A

STATE OF HAWAII  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
SURVEY DIVISION

Reid K. Siorot = Acting State Land Surveyor

**UKUMEHAME WIND FARM**  
Ukumehame, Lahaina and Wailuku, Maui, Hawaii

Scale: 1 inch = 1000 feet  
May 2, 2005

Tracing by J. G. Lucas  
Job No. 100-71(03)

For Description See C.S.F. 24,027  
**H.S.S. PLAT 1004-C**

**AMENDED**

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

December 13, 2024

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

Maui

Decision Making Regarding the Denial or Approval of a One-Year Holdover of General Lease No. S-5731, Kaheawa Wind Power, LLC, Lessee, Ukumehame, Lahaina, Wailuku, Maui, identified as Tax Map Key: (2) 4-8-001: portion of 001

APPLICANT:

Kaheawa Wind Power, LLC.

LEGAL REFERENCE:

Sections 171-40, Hawaii Revised Statutes (HRS), as amended.

LOCATION and AREA:

Portion of Government lands with an area of 200 acres, more or less, situated at Ukumehame, Lahaina, Wailuku, Maui, identified as Tax Map Key: (2) 4-8-001: portion of 001, as shown on the map attached as **Exhibit A**.

ZONING:

State Land Use District:	Conservation
County of Maui CZO:	Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act  
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

See discussion below.

as amended  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
December 13, 2024 KH

**Exhibit B**



DCCA VERIFICATION:

Place of business registration confirmed: Yes  
Registered business name confirmed: Yes  
Applicant in good standing confirmed: Yes

CURRENT USE STATUS AND CHARACTER OF USE:

Encumbered by General Lease No. S-5731 for construction, operation, and maintenance of a wind farm facility for the generation of electrical power to be sold to an electric utility company, together with access and electrical transmission line easements.

TERM OF LEASE:

Original term of 20 years, commencing on February 1, 2005 and expiring on January 31, 2025.

CURRENT ANNUAL RENTAL:

\$202,500.00 or percentage rent of three and one-half percent (3.5%) of gross revenue, to the extent such amount exceeds the minimum annual rent in any year.

HOLDOVER LEASE COMMENCEMENT DATE AND TERM:

February 1, 2025 for a term of one-year, expiring January 31, 2026.

HOLDOVER LEASE ANNUAL RENT:

The current annual rent of \$202,500 was effective since February 1, 2015. Staff recommends applying an annual increase of 3%<sup>1</sup> from 2015 to 2025 to derive the annual rent payable during the requested holdover, i.e.  $\$202,500 \times 1.30 = \$263,250$ , say, \$263,000, payable equally on February 1, 2025 and July 1, 2025.

PERFORMANCE BOND:

Continuation of the current performance bond amount at \$1,500,000 and add a removal bond upon determination of removal cost of all improvements.

REMARKS:

General Lease No. S-5731 (GL 5731) was issued to Kaheawa Wind Power, LLC (KWP) for a term of twenty (20) years, commencing on February 1, 2005. It encumbers 200 acres,

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<sup>1</sup> In the annual renewal of Revocable Permits, Land Division has been using 3% per annum as an increase for cases that did not have an appraisal done.

more or less, and currently has 20 wind turbines producing 30 megawatts of electricity. On September 25, 2024, KWP requested a holdover of the lease upon the expiration of GL 5731. KWP's intent is to continue to operate the wind turbines and apply for a new lease with a term of at least twenty (20) years. KWP is currently negotiating with Hawaiian Electric to execute a new power purchase agreement (PPA) for the new 20-year term. The new PPA is to be executed November 15, 2024, or sooner, but the PPA is subject to KWP's satisfaction of the land rights requirements of Hawaiian Electric for which KWP requires the Board of Land and Natural Resources' (Board) approval.<sup>2</sup>

To qualify for a holdover of the lease, Lessee must be compliant with Chapter 343 of the Hawaii Revised Statutes (HRS) and GL 5731.<sup>3</sup> GL 5731 requires compliance with all permits including, without limitations, the Habitat Conservation Plan (HCP), the Incidental Take Licenses (ITL), and the Conservation District Use Permit (CDUP) (the CDUP also requires, inter alia compliance with the HCP). Noncompliance with the HCP, ITL, or CDUP constitutes a default under GL 5731.

#### A. CHAPTER 343, HRS COMPLIANCE

Any action involving the use of State lands triggers a Chapter 343, HRS review and, unless found exempt, an environmental assessment (EA) or environmental impact statement (EIS) must be produced by the applicant. The one-year holdover is a use of State land that serves as a trigger under Chapter 343, HRS.

When evaluating potential environmental impacts, Hawaii Administrative Rules (HAR) subsection 11-200.1-13(a) requires agencies to evaluate the sum of effects of the proposed action on environmental quality when considering the significance of potential effects of an action. Further, HAR 11-200.1-13(b)(9) states, "*In determining whether an action may have a significant effect on the environment, **the agency shall consider every phase of a proposed action, the expected impact, and the proposed mitigation measures.** In most instances, an action shall be determined to have a significant effect on the environment if it may: ...have a substantial and adverse effect on a rare, threatened, or endangered species, or its habitat.*" (emphasis added)

Staff notes that the applicant is pursuing a new 20-year lease after the holdover period and has begun their work on an Environmental Impact Statement (EIS). Their EIS preparation notice was published in the October 23<sup>rd</sup> edition of *The Environmental Notice*.

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2 The instant submittal shall not be construed as the Land Division or the Board's intent to consider or approve any new lease for the use and occupancy of the same State lands for KWP's operation of a wind farm for the additional 20 years, as contemplated by the PPA. KWP has only submitted an application to the Land Division for a one-year holdover lease at this time, and therefore, Land Division is only requesting the Board to consider the one-year holdover lease. If KWP applies for a new 20-year lease for the continued operation of its wind farm, the Land Division (and likely other Divisions) will return the matter to the Board for consideration of that request as a new matter.

3 HRS 171-36(a)(4) provides the no lease shall be made to any person who is in arrears in the payment of taxes, rents, or other obligations owed to the State or any county.

At this time, Staff has concerns that the holdover lease may be considered a phase of a proposed action (i.e. the proposed new 20-year lease) and could thus be seen as segmentation pursuant to HAR 11-200.1-10 which states that *“A group of actions proposed by an agency or an applicant shall be treated as a single action when:*

- (1) The component actions are phases or increments of a larger total program;*
- (2) An individual action is as necessary precedent to a larger action;*
- (3) An individual action represents a commitment to a larger action; or*
- (4) The actions in question are essentially identical and a single EA or EIS will adequately address the impacts of each individual action and those of the group of actions as a whole.*

In this case, there is a potential that the holdover lease could be considered as an individual action that is a necessary precedent to a larger action (the new 20-year lease request).

Also, based on data regarding the amount of take, Staff believes that KWP’s wind farm operation has had a significant impact on species of concern, including, but not limited to, nēnē (Hawaiian goose), ‘ua‘u (Hawaiian petrel), and ‘ōpe‘ape‘a (Hawaiian hoary bat). Accordingly, staff has concerns that approval of a one-year holdover will continue to have a significant effect on threatened and endangered species and, therefore, requires the preparation of an EA or EIS.

However, as will be discussed below, KWP is engaged in mitigation efforts which are a part of their 2006 HCP that was prepared in conjunction with their ITL. Staff notes that the HCP and ITL are not coterminous with the GL as their expiration dates are in January 2026. Further, KWP is a producer of clean energy.

In the alternative, the Board may find the subject request is exempt from the preparation of an environmental assessment pursuant to the Exemption List for the Department of Land and Natural Resources, General Exemption Type 1 that exempts, “Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing”, Part 1, Item 40, “Leases of state land involving negligible or no expansion or change of use beyond that previously existing.” Staff notes that the significance criteria contained in HAR 11-200.1-13(b) is not absolute but applies “in most cases”. Therefore, the Board may legally have the discretion to exempt the holdover, provided there is a justification to do so.

In addition, pursuant to HAR 11-200.1-12, *“A proposing agency or applicant may incorporate information or analysis from a relevant prior exemption notice, final EA, or accepted EIS into an exemption notice, EA, EISPN, or EIS, for a proposed action whenever the information or analysis is pertinent and has logical relevancy and bearing to the proposed action”.*

For this project, a Final EIS and Final EA/Finding of No Significant Impact (FONSI) were

completed. The Board could potentially rely on these prior studies as a basis to exempt the holdover. However, staff cautions that the Final EIS and Final EA/FONSI were completed in 1999 and 2004 (the EA specifically analyzes only visual impacts), respectively, and their age may potentially render the studies stale. Staff notes the Department has consistently gone on record stating that EIS and EA over 10-years-old are potentially outdated and studies, such as those for biological resources, should be updated accordingly. The 1999 Final EIS is publicly available and can be found online at: [https://files.hawaii.gov/dbedt/erp/EA\\_EIS\\_Library/1999-10-08-MA-FEIS-Kaheawa-Pastures-20mw-Windfarm.pdf](https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/1999-10-08-MA-FEIS-Kaheawa-Pastures-20mw-Windfarm.pdf) and the 2004 Final EA found at [https://files.hawaii.gov/dbedt/erp/EA\\_EIS\\_Library/2004-11-23-MA-FEA-Kaheawa-Pastures-Wind-Energy.pdf](https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2004-11-23-MA-FEA-Kaheawa-Pastures-Wind-Energy.pdf).

Additionally, staff notes, the Final EIS and subsequent EA did not study the project as it currently exists. The KWP project relies on a Final EIS that was prepared for Zond Pacific that was published on October 8, 1999. This EIS proposed the installation of 27, Zond Z-48 turbines, each producing 750 Kilowatts, for a total output of 20 Megawatts (MW). The Z-48 turbines have a lattice tower height of 50 meters and a rotor diameter of 48 meters, resulting in a total height of 74 meters. In comparison, KWP utilizes 20 GE turbines, each producing 1.5 MW, for a total output of 30 MW. The GE turbine has a tower height of 55 meters and a rotor diameter of 70.5 meters, resulting in a total height of approximately 90 meters. As the GE turbine is 16 meters taller than Z-48 turbine, KWP was required to prepare an EA analyzing **only** the visual impacts of its proposed facility as part of their Conservation District Use Application (CDUA) process. KWP's Final EA/FONSI was published on November 23, 2004.

Moreso, the studies in the Final EIS, regarding avifauna and mammalian resources, were widely based on scientific assumptions some of which were determined through the monitoring of downed bird numbers from static meteorological towers at the project site and data from windfarm projects around the continental US and Europe. Given that over 20 years has passed, there is now empirical data available for this specific windfarm project at this specific site. The impacts and mitigation measures that were originally contemplated in the Final EIS could be found considerably different from the situation today. This difference is reflected in the 2006 HCP and ITL and subsequent amendments. For example, in the 1999 Final EIS, it concluded that the 'ōpe'ape'a occurs infrequently and in very low numbers and therefore the risk to bats is considered low and no mitigation measures are required. However, 7 years later, the 2006 HCP and ITL considers the take and mitigation of 20 bats (1 per year). Then, 10 years later in 2016, the ITL had to be amended to increase the bat take to 50 bats (3 to 5 per year). Staff also notes that the ITL was amended in 2012 to increase the take limits of the 'ua'u and the a'o (Newells' Shearwater) from 25 to 38 and from 4 to 8, respectively.

Finally, as discussed below, staff has concerns whether the mitigation efforts both already conducted and planned for the holdover period, as it pertains to the nēnē, will be sufficient to offset the significant impacts to the threatened and endangered species caused by the project.

Ultimately, while staff recognizes that the Board has the discretion to exempt the holdover, staff believes that there may not be sufficient justification to do so in light of the facts and information available. If the Board does not exempt the holdover, then its only option is to deny the holdover as there is not enough time to complete an EA or EIS prior to the expiration of the lease.

## B. HCP/ITL<sup>4</sup>

Federal and state law prohibits the “take” or kill of threatened or endangered species. Penalties are both criminal and civil for the take of threatened or endangered species. When development projects or land management activities cannot avoid take of endangered or threatened species, the landowner may seek an ITL from the Department if such take is incidental to an otherwise lawful activity. In this case, the wind farm is considered to be a lawful activity, thus allowing KWP to apply for an ITL, which must be accompanied by a HCP that meets the requirements in HRS Chapter 195D, including incidental take measures for minimization, mitigation, monitoring, and provide for a net recovery benefit to the affected species.

The current HCP and ITL for KWP were approved by the Board in 2006 and are scheduled to expire in January 2026. The HCP and ITL, as well as the subsequent amendments are publicly available at: <https://dlnr.hawaii.gov/wildlife/hcp/approved-hcps/>, listed as the first entity under “Wind Energy Facilities and Structures.”

KWP’s annual reports to the Endangered Species Recovery Committee are also available at the same link.

KWP has begun working with DOFAW on either amending or renewing the HCP and ITL for any future project that goes beyond January 2026. It should be noted that KWP cannot operate without holding a valid ITL and HCP.

Staff notes that the HCP and ITL contemplate that mitigation for the incidental take of endangered or threatened species should occur, at the very least, concurrently with the taking. That means that the mitigation credit should always be equal to, or higher than the take number, so as to minimize the negative effects on the species, but many permittees have difficulty with keeping up mitigation credits on par with the take estimate.

### 1. Nēnē Mitigation

The 2006 HCP and ITL allows for the take and mitigation of 60 nēnē. The mitigation requirement under the HCP is one credit for every take or kill and mitigation is expected to occur prior to or on par with take. To date, there have been 37 nēnē fatalities (i.e. direct take), but the cumulative take is estimated at 55 nēnē. Staff notes that the cumulative take

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<sup>4</sup> The decision to approve, disapprove, or modify a proposed HCP and ITL, and the decision to find a default under an existing HCP and ITL are discretionary decisions of the BLNR. The HCP and ITL are not considered entitlements.

is based on an equation that takes into account nēnē fatalities that could not be accounted for (i.e. bodies not found) and the reproductive potential that is lost when a nēnē is killed in addition to the known fatalities.<sup>5</sup>

Staff notes that as of April 5, 2024, KWP had only 22.6 credits (see April 4, 2024 letter attached as **Exhibit B**). Since April 5, 2024, KWP has diligently worked with DOFAW to raise their nēnē mitigation credits through creative solutions and the funding of nēnē propagation work. As of October 2024, KWP has approximately 45 credits and needs to complete approximately 10 more credits to mitigate their current cumulative take of 55. Nevertheless, per the HCP, KWP needs a total of 60 mitigation credits prior to the expiration of their HCP and ITL in January 2026 in addition to an additional 5 credits to mitigate lost productivity due to delayed mitigation.

Staff notes that while KWP is behind on their mitigation obligations DOFAW has confirmed that this is not uncommon and KWP has not breached its HCP.<sup>6</sup>

## 2. A‘o (Newell’s Shearwater) and ‘Ua ‘u (Hawaiian Petrel) Mitigation

As stated earlier, the 2006 HCP and ITL allowed for the take and mitigation of 25 a‘o and 4 ‘ua‘u. The ITL was amended in 2012 to allow for the take and mitigation of 38 a‘o and 8‘ua‘u. To date, KWP has taken no ‘a‘o.

KWP’s mitigation for the potential take of ‘a‘o included funding surveys for potential mitigation sites on east Maui and the construction of the Makamaka‘ole Seabird Enclosure which was constructed in 2013.

The Makamaka‘ole Seabird Enclosure is located in a Natural Area Reserve (NAR) and required extensive inter-departmental coordination to obtain the approvals for its construction and maintenance.

It should be noted that KWP had allowed the fence to fall into disrepair and had stopped paying its contractor to manage the enclosure. However, on September 18, 2024, a memorandum of agreement (MOA) was executed by Chairperson Chang and KWP which requires KWP and Kaheawa Wind Power II, LLC to provide \$750,000.00 in funding for the Makamaka‘ole seabird enclosure to be rebuilt. The MOA is attached as **Exhibit B**. On October 29, 2024 DOFAW confirmed a check for the full amount has been received.

In addition to the construction of the enclosure, KWP’s mitigation activities have included predator monitoring and trapping, artificial burrow checks and monitoring, seabird social attraction using decoys and sound systems, and maintenance of vegetation and the enclosure. According to DOFAW, KWP has completed its mitigation credits for the ‘a‘o.

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<sup>5</sup> This equation to determine the cumulative take is applicable to all other species covered under the HCP/ITL.

<sup>6</sup> Only the Board is vested with the authority to find a breach of the HCP under specific statutory criteria pursuant to HRS § 195D-21(d). To date, the Board has not made such a determination.

To date, KWP has a direct take of 8 ‘ua‘u and a cumulative take of approximately 23 ‘ua‘u. KWP’s mitigation for the take of ‘ua‘u included funding breeding protection efforts on Lāna‘i. It is anticipated that DOFAW will be issuing a letter sometime in the near future confirming that mitigation for the ‘ua‘u has been completed.

Staff requests DOFAW keep the Board informed of its progress on the design, planning, and construction of the Makamaka‘ole Seabird Enclosure, KWP’s take of endangered and threatened species, and its mitigation efforts. Staff will continue to consult with DOFAW on these matters as, if the Board approves the requested one-year holdover and upon expiration of said holdover, the terms of the HCP, ITL, CDUP, existing lease, and HRS 171-36(a)(4) will prohibit the issuance of a new lease to KWP if it is not in compliance with the HCP, ITL, or CDUP requirements at that time.

### 3. ‘Ōpe‘ape‘a (Hawaiian Hoary Bat) Mitigation

As stated earlier, the 2006 HCP and ITL allowed for the take and mitigation of 20 bats and in 2016 the ITL was amended to increase the take to 50 bats (3 to 5 per year). To date, KWP has a direct take of 13 ‘ōpe‘ape‘a and a cumulative take of approximately 32.

KWP’s mitigation for the take of ‘ōpe‘ape‘a is complete and included funding ecological research on East Maui for \$750,000. The research was published in 2023 and is available online at <https://peerj.com/articles/14365/>.

As a voluntary measure, KWP has also conducted acoustic monitoring for bat activity at the project since 2008. KWP has been providing the acoustic monitoring information to the Endangered Species Recovery Meeting at their annual review of KWP’s HCP.

### C. Assignment of Lease

GL 5731 states that a fifty-one (51) percent sale or transfer of ownership interest of this lease (and/or change in ownership interest of the ownership chain) triggers the assignment of lease provision, which requires prior Board consent, and the Board may assess a premium based on the assignment of lease premium analysis that is attached as Exhibit B to the lease. GL 5731 is attached as **Exhibit C**.

In this case, KWP’s upstream ownership has changed twice.<sup>7</sup> Staff considered taking this matter to the Board as staff believes that the Board has a public trust duty to recognize and

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<sup>7</sup> The consideration paid for the sale and assignment of the upstream owners’ interest in KWP were in the several hundred million dollar range each. Based on the information provided by KWP and the assignment premium policy and formula attached as an exhibit to the KWP lease, staff had preliminarily estimated the Board could assess a premium (a discretionary decision, not a mandatory requirement) in the amount of several million dollars which would have been public trust revenues to the State with OHA receiving a portion. However, because a determination has been made finding no assignment occurred *under the four corners* of the Lease, staff is not recommending the Board consent, or assess a premium for the assignment and sale of the upstream owners’ interest in KWP.

evaluate the ownership transfers of KWP to determine if an assignment premium is applicable. In the *Pohakuloa* and *Mauna Kea* cases, the Supreme Court found the Board has a fiduciary duty over ceded lands in the Conservation District and, as a result, converted what otherwise would be a landlord's reserved right in a lease (e.g. right to inspect the leased premises) into an obligation under the public trust doctrine. The KWP lands are ceded lands in a Conservation District. As such, staff believes the Department and Board have a duty to recognize and evaluate the fiscal impacts to public trust beneficiaries.<sup>8</sup> Ultimately, the Attorney General reviewed the lease and opined that the four corners of the document do not support an assignment premium analysis as no assignment has occurred.<sup>9</sup>

Staff consulted with DOFAW and OCCL for this submittal. The subject lease is in compliance pertaining to rent, insurance, and performance bond. Other than the issues raised above regarding a possible transfer without Board consent and HRS 343, Staff has no objections to the request.

ACTIONS: That the Board:

1. Deny a one-year holdover of General Lease No. S-5731 for the period of February 1, 2025 to January 31, 2026.

OR

2.
  - a. Declare, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200.1, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

OR

- b. Declare that the project may have a significant impact on the environment, but that by incorporating the information in the previously accepted Final EIS, Final EA/FONSI, and HCP documents, that the Board is sufficiently informed on the environmental impacts of the one-year holdover and that the impacts on the environment are the same as disclosed in the previous documents and can therefore be considered exempt from the preparation of a new EA or EIS.

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<sup>8</sup> Recipients of the State's share of the sales proceeds would be DLNR and OHA.

<sup>9</sup> Although a decision to assess (or not assess) a premium for the assignment of a lease is typically a discretionary decision of the Land Board, in this peculiar instance the Attorney General has determined the decision to determine whether an assignment occurred is a legal question for the Department of the Attorney General. Staff notes that there have been prior instances where the sale or transfer occurred in the upstream owners of the lessee (e.g., InSite and Puna Geothermal), and the staff recommended and the Board consented to the assignment of the leases but no premium was assessed due to the: (i) premium policy and formula were not attached to or incorporated into the lease; or (1) calculations following the formula did not warrant the State sharing in the sales proceeds.



3. Grant KWP a one-year holdover of General Lease No. S-5731 for the period of February 1, 2025 to January 31, 2026, the holdover shall be conditional upon KWP being compliant with Chapter 343, HRS and the terms of GL 5731, under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - a. The standard terms and conditions of the most current holdover of lease form, as may be amended from time to time;
  - b. Review and approval by the Department of the Attorney General; and
  - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Add a condition to the holdover agreement that requires KWP (Lessee) to completely remove all improvements (at the end of the term or upon earlier termination) including, but not limited to, all wind turbine foundations with no depth limitation<sup>10</sup> and posting a removal bond. Lessee shall pay all costs incurred by Lessor to remove said improvements, including any costs to procure a consultant to estimate the cost of removal.

Respectfully Submitted,



Andrew Tellio, Appraisal and Real Estate Specialist

And



Lauren Yasaka, Planner

APPROVED FOR SUBMITTAL:



*RT* Dawn N. S. Chang, Chairperson

Land Board Meeting: December 13, 2024; D-7: Approved as amended.

**Approved as amended.** See attached page.

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<sup>10</sup> GL 5731 currently limits removal of wind turbine foundations to two (2) feet below surface level.

Land Board Meeting: December 13, 2024; D-7 Approved as amended.

**Approved as amended.** The Board approved recommendations 2.b., 3 and 4 as amended below:<sup>1</sup>

2.b. Declare that the project may have a significant impact on the environment, but that but incorporating the information in the previously accepted Final EIS, Final EA/FONSI, and HCP documents, that the Board is sufficiently informed on the environmental impacts of the one-year holdover and that the impacts on the environment are the same as disclosed in the previous documents and can therefore be considered exempt from the preparation of a new EA or EIS for the one-year term.

3. Grant KWP a one-year holdover of General Lease No. S-5731 for the period of February 1, 2025 to January 31, 2026, the holdover shall be conditional upon KWP being compliant with Chapter 343, HRS and the terms of GL 5731, under the terms and conditions cited above, [<sup>2</sup>] which are by this reference incorporated herein and further subject to the following:

- a. The standard terms and conditions of the most current holdover of lease form, as may be amended from time to time;
- b. Review and approval by the Department of Attorney General; and
- c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

4. Add a condition to the holdover agreement that requires KWP (Lessee) to completely remove all improvements (at the end of the term or upon earlier termination) including, but not limited to, all wind turbine foundations with no depth limitation and posting a removal bond. Lessee shall pay all costs incurred by Lessor to remove said improvements, including any costs to procure a consultant to estimate the cost of removal. [<sup>3</sup>]

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<sup>1</sup> New language indicated by underscoring. Recommendations 1 and 2.a of the staff submittal were not approved.

2 Chair Chang noted Board found KWP be compliant and exempt for the holdover period pursuant to its approval of recommendation 2.b above, which Deputy Attorney General Danica Swenson confirmed.

3 Chair Chang and Deputy Attorney General Swenson noted that removal of improvements would only be triggered if KWP does not secure a new lease for the premises after expiration of the holdover period.



**MEMORANDUM OF AGREEMENT**

**BETWEEN**

**THE STATE OF HAWAII, DEPARTMENT OF LAND AND  
NATURAL RESOURCES, DIVISION OF FORESTRY AND WILDLIFE**

**AND**

**KAHEAWA WIND POWER, LLC,  
KAHEAWA WIND POWER II, LLC, AND  
KAHUKU WIND POWER, LLC**

**REGARDING**

**MAKAMAKA‘OLE SEABIRD ENCLOSURE**

This Memorandum of Agreement (“Agreement”) is effective this 18 day of September, 2024 (“Effective Date”) by and between the State of Hawai‘i, Department of Land and Natural Resources (“DLNR”), Division of Forestry and Wildlife (“DOFAW”), whose mailing address is 1151 Punchbowl Street, Honolulu, Hawai‘i 96813, and Kaheawa Wind Power, LLC (“KWP”), Kaheawa Wind Power II, LLC (“KWP II”), and Kahuku Wind Power, LLC (“Kahuku”), whose mailing addresses are c/o TerraForm Power, 200 Liberty Street, 14th floor, New York, New York 10281 (DOFAW, KWP, KWP II, and Kahuku collectively referred to herein as the “Parties” and each individually as a “Party”), regarding the Makamaka‘ole Seabird Enclosure, which is located in the West Maui Forest Reserve and Kahakuloa Natural Area Reserve at Tax Map Keys (2) 3-1-006:001 and 3-1-006:003 (“Makamaka‘ole Seabird Enclosure”).

KWP, KWP II, and Kahuku are Delaware-incorporated limited liability companies. KWP and KWP II operate wind power projects in Wailuku, Maui, Hawai‘i. Kahuku operates a wind power project in Kahuku, O‘ahu, Hawai‘i.

**PURPOSE**

This Agreement sets forth the terms and understanding between the Parties regarding the repair, services, and maintenance of the Makamaka‘ole Seabird Enclosure. This Agreement is intended to clarify the terms of the Habitat Conservation Plans (HCPs), Incidental Take Licenses (ITLs), and Implementing Agreements (IAs) for each of KWP, KWP II, and Kahuku.

This Agreement is designed to detail the specifics of the working relationship between the Parties to the mutual benefit of the Parties, the communities they serve, and Hawai‘i’s rare species at Makamaka‘ole Seabird Enclosure.

**Exhibit B**

KWP's HCP is dated January 2006 (the "KWP HCP") and was approved by the State of Hawai'i's Board of Land and Natural Resources (the "Board") on January 13, 2006. KWP, DOFAW, and the United States Fish and Wildlife Service ("USFWS") entered into an implementation agreement, dated January 26, 2006 and amended February 26, 2006 (the "KWP IA"), for the implementation of the KWP HCP at KWP's wind power project. Pursuant to the Board's approval and the issuance of a federal permit, DOFAW issued KWP "ITL-08" on January 30, 2006. "ITL-08" was amended in 2012 to amend the take limits for Hawaiian petrel and Newell's shearwater and amended in 2016 to amend the take limits for Hawaiian hoary bat (as amended, the "KWP ITL"). The KWP ITL has a 20-year term from its issuance on January 30, 2006. The KWP ITL expires on January 30, 2026.

KWP II's HCP is dated December 2011 (SWCA, 2011) and was amended in October 2019 (SWCA, 2019) (as amended, the "KWP II HCP"). The Board approved the KWP II HCP on November 11, 2011, and approved the amendments on November 8, 2019. KWP II, DOFAW, and USFWS entered into an implementation agreement, dated December 28, 2011 (the "KWP II IA"), for the implementation of the KWP II HCP at KWP II's wind project. Pursuant to the Board's approval and the issuance of a federal permit, DOFAW issued KWP II "ITL-15" on January 5, 2012. "ITL-15" was amended in 2014 and 2019 to add level of take tiers for the Hawaiian goose and Hawaiian Hoary Bat (as amended, the "KWP II ITL"). The KWP II ITL has a 20-year term from its issuance on January 5, 2012. The KWP II ITL expires on January 5, 2032.

Kahuku's HCP is dated March 2010 (SWCA, 2010) (the "Kahuku HCP" and, together with the KWP HCP and KWP II HCP, the "HCPs"). The Board approved Kahuku's HCP on March 11, 2010. Kahuku, DOFAW, and USFWS entered into an implementation agreement, dated June 7, 2010 (the "Kahuku IA" and, together with the KWP IA and the KWP II IA, the "IAs"), for the implementation of the Kahuku HCP at Kahuku's wind project. Pursuant to the Board's approval and the issuance of a federal permit, DOFAW issued Kahuku "ITL-10" on June 7, 2010 (the "Kahuku ITL" and, together with the KWP ITL and KWP II ITL, the "ITLs"). The Kahuku ITL has a 20-year term from its issuance on June 7, 2010. The Kahuku ITL expires on June 7, 2030.

This Agreement incorporates by reference each of the HCPs, ITLs, and IAs.

For purposes of this Agreement, "Covered Seabird Species" means the Hawaiian petrel (*Pterodroma sandwichensis*) and Newell's shearwater (*Puffinus auricularis newelli*). Other terms as used in this Agreement will have the same meanings set forth in the HCPs, ITLs, and IAs, as well as any terms specifically defined in regulations adopted by the DLNR.

## **RECITALS**

WHEREAS, the HCPs contemplate proposed mitigation measures for the Covered Seabird Species that are expected to more than offset the anticipated take by the wind projects and

contribute to recovery of the species (KWP HCP at 40-43, 58-60; KWP II HCP at 65-72, 87-88; Kahuku HCP at 75);

WHEREAS, the HCPs provide that the mitigation measures for the Covered Seabird Species include the management and protection of colonies of the Covered Seabird Species by fencing to exclude predators and ungulates, trapping and removal of predator and ungulate, facilitating social attraction, and other similar measures in West Maui, with the preferred mitigation site being Makamaka‘ole, West Maui (KWP HCP at 58-61; KWP II HCP at 94-95, 111; Kahuku HCP at 82);

WHEREAS, KWP and KWP II finished construction of two predator-proof fences to establish two enclosures (together, the “Makamaka‘ole Seabird Enclosure”) on September 5, 2013 and removed all mongooses from within the Makamaka‘ole Seabird Enclosure as of January 24, 2014;

WHEREAS, KWP, KWP II, and Kahuku contemplated pooling resources and were partners in developing a comprehensive plan for management and protection activities at the Makamaka‘ole Seabird Enclosure (Kahuku HCP at 82);

WHEREAS, KWP and KWP II entered into contractual relationships with multiple entities during the course of work at Makamaka‘ole Seabird Enclosure, most recently with Maui Nui Seabird Recovery Project (“MNSRP”), to perform its management and protection activities at Makamaka‘ole Seabird Enclosure from May 1, 2020 through January 31, 2023;

WHEREAS, KWP and KWP II’s respective contractors were responsible for the performance of regular fence checks and maintenance, and no breaches of the fence by mongooses were documented between January 2014 and January 2023 when the fence check and maintenance contracts were in place;

WHEREAS, Kahuku’s HCP provides an outline for “Makamaka‘ole Seabird Mitigation and Management Plan with KWP and KWP II” (Kahuku HCP Appendix 14), where the Makamaka‘ole Seabird Enclosure was only one potential option for Kahuku’s mitigation obligations (Kahuku HCP at 82-86);

WHEREAS, Kahuku’s HCP contemplates that “if mitigation efforts at another seabird colony are identified as a greater need or having a greater potential benefit, priority will be given to other colonies on East Maui, West Maui or Kaua‘i or in other areas as determined by DLNR and USFWS” (Kahuku HCP at 83);

WHEREAS, Kahuku’s HCP contemplates Kahuku, KWP, and KWP II’s continued social attraction, inspections of the fences and bait boxes, inspections for predators, and expenditure of funds through 2030 (Kahuku HCP Appendix 14);

WHEREAS, KWP and KWP II bear fiscal responsibility for the maintenance and management of Makamaka‘ole Seabird Enclosure, including that required conservation efforts are funded in full;

WHEREAS, Kahuku did not implement or fund mitigation at the Makamaka‘ole Seabird Enclosure, and instead funded both (a) the Kaua‘i Endangered Seabird Recovery Project (KESRP) to conduct surveys for seabird nesting colonies and (b) funded DOFAW to conduct a barn owl predator control project on Kaua‘i (see Kahuku FY2017 annual report), which fully mitigated for Kahuku’s permitted take of the Covered Seabird Species;

WHEREAS, KWP, KWP II, and Kahuku each warranted that it “has, and will expend, such funds as may be necessary to fulfill its obligations under [its respective] HCP” (KWP IA at 8; KWP II IA at 8; Kahuku IA at 8);

WHEREAS, KWP, KWP II, and Kahuku’s costs of the HCP are to be provided as an annual operating expense paid *pari passu* with other operating expenditures (e.g., operation and maintenance costs, insurance, payroll, lease payments to the State of Hawai‘i, audit costs, and agency fee costs) and ahead of both debt service to lenders and dividends to equity investors (KWP HCP at 75; KWP II HCP at 139; Kahuku HCP at 100);

WHEREAS, Kahuku’s HCP provides a \$2.74 million overall expenditure limit for HCP mitigation measures (Kahuku HCP at 85), which limit Kahuku has exceeded and will continue to exceed;

WHEREAS, KWP’s HCP and IA provides a \$3.76 million maximum Guaranty Agreement amount for mitigation and monitoring over the life of the project (KWP HCP at Appendix 12; KWP IA at 4.1.1(e)), which limit KWP has exceeded and will continue to exceed;

WHEREAS, KWP exceeded its maximum mitigation and monitoring spend by more than \$700,000 through 2023, has continued to spend on mitigation and monitoring in 2024, and has committed to spending into the future, further surpassing its obligation set forth in the IA;

WHEREAS, KWP II’s HCP provides that in relation to the first tier of mitigation efforts that “budgeted amounts are estimates and are not necessarily fixed” and “KWP II will provide the required conservation measures in full, even if the actual costs are greater than anticipated” (KWP II HCP at 105);

WHEREAS, KWP II’s HCP contemplates KWP II’s inspections of the predator-proof fence, trapping of predators, assurance of social attraction playbacks and decoys continuing, monitoring and maintenance of bait boxes, and the expenditure of funds at Makamaka‘ole Seabird Enclosure through 2031 and that such activities are to be performed by KWP II (KWP II HCP, Appendix 11);



WHEREAS, KWP II's HCP contemplates KWP II's length of commitment to mitigation at the Makamaka'ole Seabird Enclosure, stating that such "duration [would] be determined based on results" (KWP II HCP, Appendix 19);

WHEREAS, in December 2022, KWP and KWP II were provided with credit letters from DOFAW and USFWS, indicating they had met their mitigation obligations under the HCPs for the Newell's shearwater;

WHEREAS, KWP and KWP II mistakenly believed, and communicated with DOFAW Staff via email correspondence, meetings, phone calls, and reports between June 2022 and January 2023 regarding their misunderstanding, that upon reaching their mitigation obligations for the Newell's shearwater, KWP and KWP II would be relieved of all responsibilities and duties to the Makamaka'ole Seabird Enclosure and sought to transfer management responsibilities to DOFAW upon receiving credit letters in December 2022;

WHEREAS, KWP's HCP, KWP II's HCP, and Kahuku's HCP do not contemplate any transfer of management responsibilities to any entity upon completion of mitigation obligations;

WHEREAS, KWP and KWP II ceased all management activities at Makamaka'ole Seabird Enclosure on January 31, 2023 and their contractual relationship with MNSRP expired;

WHEREAS, in March 2023, DOFAW conducted an inspection of the Makamaka'ole Seabird Enclosure and found the predator-proof fence to be in a dilapidated condition, and subsequently, there was an incursion of predators into the seabird colony that resulted in the lethal take of two (2) Newell's shearwaters in April and May 2023;

WHEREAS, based on its experience with predator-proof fences, DOFAW concluded that the condition of the fence could not have occurred in the months that KWP and KWP II had been absent from the site;

WHEREAS, DOFAW concluded that \$700,000 will repair the extent of the damaged predator-proof fence that can be attributed to KWP and KWP II's inaction, but the actual cost to replace the predator-proof fence with a different design and size (Exhibit 1) is much higher and DOFAW is seeking other sources of financing to fully replace the remainder of the fence and expand the fenced area;

WHEREAS, DOFAW requested \$750,000 from KWP and KWP II, including \$700,000 to cover costs of repair and \$50,000 to temporarily stabilize the enclosure in the interim before fence replacement;

WHEREAS, KWP I and KWP II agree to provide DOFAW with \$750,000, which includes approximately \$50,000 for stabilization efforts at the Makamaka'ole Seabird Enclosure, and

\$700,000 towards replacement of the fence as outlined in the scope of work (Exhibit 1), with DOFAW and other partners providing the remaining \$1,050,000 and any other costs incurred;

WHEREAS, DOFAW communicated to KWP and KWP II that their Makamaka‘ole Seabird Enclosure should continue and KWP and KWP II desire to move forward with such responsibilities;

WHEREAS, KWP and KWP II acknowledge that their HCP-contemplated management responsibilities at the Makamaka‘ole Seabird Enclosure must continue through the end of each project’s life-term, unless each entity seeks to amend their respective HCPs, and now seek to resume their management responsibilities at the Makamaka‘ole Seabird Enclosure;

WHEREAS, the predator-proof fence at the Makamaka‘ole Seabird Enclosure is intended to and must be completely predator-proof for this mitigation site to effectively function;

WHEREAS, the Parties wish to enter into this Agreement to clarify the rights and responsibilities of each Party under the applicable HCPs, ITL and IAs, and acknowledge that this MOA does not amend any of the applicable HCPs, ITLs, and IAs;

WHEREAS, Kahuku completed its mitigation obligations for Covered Seabird Species through other options set forth in its HCP and has no further commitments to the Makamaka‘ole Seabird Enclosure;

WHEREAS, DOFAW and its conservation partners plan to continue on-going conservation efforts concurrently to KWP and KWP II’s activities at Makamaka‘ole Seabird Enclosure;

WHEREAS, the Parties deem it mutually advantageous and desirable to cooperate and agree to the following provisions:

I. KWP and KWP II Responsibilities.

KWP and KWP II agree to:

- a. Remit a one-time aggregate payment of Seven Hundred Fifty Thousand dollars (\$750,000) to DOFAW for interim fence stabilization and replacement at Makamaka‘ole Seabird Enclosure, to be conducted in accordance with the Scope of Work (Exhibit 1);
- b. Except for the fence repair and re-stabilization, which is addressed in Part II below, resume each entity’s respective responsibilities to the Makamaka‘ole Seabird Enclosure pursuant to the HCPs, which may be performed by an appropriate contractor, as soon as reasonably practicable:
  - i. KWP and KWP II are mutually responsible for:
    1. Inspections of the fence;
    2. Predator monitoring within the fence; and

3. Bait boxes;
  - ii. KWP II shall continue social attraction of the Covered Seabird Species as needed;
- c. For purposes of this Agreement, “inspections of the fence” means and includes, but is not limited to:
  - i. At each visit to the site, the fence will be inspected for holes, deterioration, rust, or other defects, regardless of whether KWP and KWP II believe the defect(s) affect the effectiveness of the fence;
  - ii. Every inspection will be documented with dates, times, personnel present, and photographs of any observed defect; and
  - iii. Any holes, deterioration, rust, and other defects impacting the fence’s ability to deter predators observed during an inspection must be corrected within thirty (30) days of the inspection, either by KWP and KWP II or by providing DOFAW or MNSRP with adequate funding for materials and labor for repairing such defects in the fence.
- d. For purposes of this Agreement, “predator monitoring” means and includes, but is not limited to:
  - i. Tracking tunnels to monitor for rodent and mongooses to be run on a quarterly-basis (tracking tunnels for this Agreement are the same as tracking tunnels utilized in the Kahuku HCP at Hamakua Marsh, see Kahuku HCP at Appendix 11, page 5);
- e. For purposes of this Agreement, “bait boxes” means and includes:
  - i. Bait stations used to control rats and mongooses;
  - ii. Coordinating with DOFAW and MNSRP to determine the best actions for the bait boxes in conjunction with the rodent contraceptive trials;
  - iii. Deploying the “bait boxes” year-round following protocols set forth by the Hawai‘i Department of Agriculture;
  - iv. Bait boxes will be checked and replenished as necessary;
  - v. All bait take documented;
- f. For purposes of this Agreement, “social attraction” means and includes, but is not limited to:
  - i. Playbacks of the Covered Seabird Species calls playing at the appropriate time from the enclosures;
  - ii. Decoys of the Covered Seabird Species placed at appropriate places throughout the enclosures;
- g. Continue to perform regular site visits (including through the engagement of a contractor) to fully perform KWP and KWP II’s obligations under this Agreement;
- h. Continue each entities’ obligations at Makamaka‘ole Seabird Enclosure through the life-term of each project (KWP: 2026; KWP II: 2032);
- i. Obtain all State-required permits necessary to do the activities outlined in this Agreement;

- j. Respect all other on-going conservation efforts occurring at Makamaka‘ole Seabird Enclosure or in its near vicinity, including but not limited to the activities discussed in MNSRP’s Ongoing Activities (Exhibit 2);
- k. Seek HCP amendment if any entity seeks to withdraw from its obligations at Makamaka‘ole Seabird Enclosure;
- l. Submit periodic reports including quarterly and annual reports, describing activities and results of the programs at Makamaka‘ole Seabird Enclosure to DOFAW and the Endangered Species Recovery Committee, as necessary (KWP IA at 5; KWP II IA at 5).
- m. Work in good faith with DOFAW, and any contractors, on determining responsibilities under the scope of work within the existing and/or expanded enclosure area(s) with regards to HCP obligations compared to other DOFAW initiatives.

## II. DLNR Responsibilities.

DOFAW agrees to:

- a. Accept KWP and KWP II’s payment of Seven Hundred Fifty Thousand dollars (\$750,000) to be applied to perform the Scope of Work (Exhibit 1) on the Makamaka‘ole Seabird Enclosure fence;
- b. Utilize the Seven Hundred Fifty Thousand dollars (\$750,000) to:
  - i. Provide materials for the repair and re-stabilization of the fence until it is complete;
  - ii. Utilize DOFAW’s Native Ecosystems Protection and Management Program (NEPM) to rebuild and realign the fence; and
  - iii. Oversee construction of the fence repair and re-stabilization;
  - iv. Provide KWP and KWP II a report of how funding was allocated and spent, including timing of activities.
- c. Utilize other funding sources to fully fund and complete the full replacement of the fences at Makamaka‘ole Seabird Enclosure that results in a larger fence line and enclosure area, including but not limited to fencing, labor, culverts, additional traps, predator eradication from new areas, and removal of the existing fence;
- d. Utilize other funding sources to manage any aspects of the Makamaka‘ole Seabird Enclosure outside the scope of the KWP I or KWP II HCP, including maintenance and management of new sections of fence and new areas within the expanded enclosure;
- e. Continue to utilize DOFAW NEPM and other conservation partners to complete other ongoing maintenance and repair to the fence;
- f. Timely process applications for permits that authorize KWP and KWP II or its contractor entry into the Natural Area Reserve and Forest Reserve to conduct the activities outlined in this Agreement or are otherwise required to effectuate this Agreement;
- g. Decline to pursue penalties against KWP and KWP II for the lethal take of the two (2) Newell’s shearwaters, that occurred since January 31, 2023 when KWP and

KWP II ceased management of the Makamaka'ole Seabird Enclosure, that were not covered by the HCPs and ITLs;

- h. Timely provide KWP and KWP II with updated credit letters for the Covered Seabird Species and work with KWP and KWP II to determine the appropriate balance of mitigation credit allocation between them on an annual basis;
  - i. DOFAW reserves the right to adjust the credits for Newell's shearwater for KWP and KWP II to account for the two (2) Newell's shearwater fatalities described in Section II above.
- i. Keep KWP and KWP II's designated person of contact informed of conservation activities being implemented by DOFAW's conservation partners at Makamaka'ole Seabird Enclosure to reduce the likelihood of any accidental damage or harm to the conservation activities.
- j. Work in good faith with KWP I and KWP II, and any contractors, on determining responsibilities under the scope of work within the existing and/or expanded enclosure area(s) with regards to HCP obligations compared to other DOFAW initiatives.

THE PARTIES FURTHER AGREE THAT:

- 1. Term. This Agreement will remain in effect throughout the current terms of the projects operated by KWP and KWP II or until KWP and KWP II successfully amend their respective HCPs to relieve them of the above-listed obligations, whichever is earlier.
- 2. Force Majeure. Neither Party will be liable for any delay in performance caused by force majeure or circumstances beyond the reasonable control of the Party affected including, but not limited to, acts of God, fire, flood, substantial snowstorm or other weather condition, or of a public enemy, acts of the Government in either its sovereign or contractual capacity, war, terrorism, embargo, any United States or foreign government regulation, direction or request, accident, disease, pandemic or epidemic, mass health issues, quarantine restrictions, strike or other labor difficulties, dispute or labor trouble, civil unrest, freight embargoes, natural disasters, or any failure, disruption or delay of any transportation, utilities, power, equipment or communications system, critical electronic systems, acts of terrorism, mass shootings, other emergencies that disrupt a Party's operations, or any other or similar cause beyond that Party's reasonable control.

The Party which is so prevented from performing shall give prompt notice to the other Party of the occurrence of such event of force majeure, the expected duration of such condition and the steps which it is taking to correct such condition. This Agreement may be terminated by either Party by written notice upon the occurrence of such event of force majeure which results in a delay of performance hereunder exceeding thirty (30) days.

- 3. Status of Parties. Each Party to this Agreement is an independent of each other; under no circumstances should any employees of one Party be deemed employees of the other

Party for any purpose. This Agreement does not create a partnership, joint venture, or agency relationship between the Parties of any kind or nature. This Agreement does not create any fiduciary or other obligation between the Parties, except for those obligations expressly and specifically set forth herein. Neither Party shall have any right, power, or authority under this Agreement to act as a legal representative of the other Party, and neither Party shall have any power to obligate or bind the other or to make any representations, express or implied, on behalf of or in the name of the other in any manner or for any purpose whatsoever contrary to the provisions of this Agreement. Each Party acknowledges that the relationship of the Parties hereunder is non-exclusive.

4. Trademarks. No Party to this Agreement will use any names, service marks, trademarks, trade names, logos or other identifying names, domain names or identifying marks of the other Party in any sales promotion work or advertising, press release or any form of publicity, without written permission from the Party that owns the marks. Any permitted use of a Party's marks must comply with the owning Party's requirements, including but not limited to using the "®" indication of a registered trademark.
5. Compliance with Laws. Each Party to this Agreement will comply with all applicable state and federal laws, rules, regulations, and executive orders governing equal employment opportunity, immigration, and nondiscrimination, including the Americans with Disabilities Act.
6. Severability. If any provision of this Agreement shall for any reason be found invalid, illegal, unenforceable or in conflict with any valid controlling law, such provision shall be separated from this Agreement. This Agreement shall be interpreted and construed as if the provision held invalid, illegal, unenforceable, or the conflict had never been contained herein. Such invalidity, illegality, unenforceability, or conflict shall not affect any other provision.
7. Modification. Any modification or amendment of this Agreement or any scope of activity hereunder will be effective only if made in writing and signed by an authorized signatory of each Party.
8. Entire Agreement. This Agreement contains the entire understanding between the Parties concerning the subject matter of this Agreement and supersedes any and all prior understandings, agreements, representations, and warranties, express or implied, written or oral, between the Parties concerning the subject matter of this Agreements; provided that this Agreement shall be read in conjunction with the HCPs, ITLs, and IAs and does not constitute an amendment to the HCPs, ITLs, and IAs.
9. Disclaimer. Nothing in this Agreement shall be construed as affecting the delegated authority or responsibilities of the Board.
10. Termination. Any Party may terminate this Agreement upon thirty (30) days written notice to the other Parties. The termination of this Agreement shall not alter any

Party's obligations, duties, or requirements under the HCPs, ITLs, or IAs.

11. Responsibility. Each Party is responsible for damages to the other Party to the extent such damages are determined by a court of competent jurisdiction to be attributable to the negligent or willful acts or omissions of the offending Party's employees and agents when acting under the offending Party's direction and supervision. KWP and KWP II recognize an obligation to pay DLNR's attorneys' fees or costs only when assessed by a court of competent jurisdiction. Notwithstanding the terms of this Agreement or any other document: (i) other than for employees of KWP, KWP II, or Kahuku acting under the direction and supervision of KWP, KWP II, or Kahuku, as applicable, KWP, KWP II, or Kahuku is not responsible for any actions of any third parties, and (ii) no person may bind KWP, KWP II, Kahuku, or DLNR unless they are an authorized signatory.

12. Operational Contacts. Each Party agrees to designate a point of contact, as named below, to be responsible for effectively communicating to the other Parties day-to-day or operational matters.

DOFAW hereby designates: Afsheen Siddiqi, [REDACTED],  
[REDACTED] as its point of contact for this Agreement.

KWP, KWP II, and Kahuku each hereby designate: Molly Stephenson, [REDACTED]  
[REDACTED] as its point of contact for this Agreement.

In the event that the above-listed points of contact change for either Party, the Party must inform the other Party in writing of such a change and provide a new point of contact in writing within ten (10) business days of being aware of such change.

13. Principal Contacts. All notices, bills, demands, payments, accounting or other communications that is required to give under the provisions of this Agreement shall be given in writing and shall be deemed to have been given if hand delivered, emailed, or if mailed by United States mail, prepaid to the Party or Parties at the address noted below or such other address as a Party may designate in writing from time to time:

State of Hawaii  
Department of Land and Natural Resources:  
Administrator, Division of Forestry and Wildlife  
1151 Punchbowl Street, Room 325 Honolulu, Hawaii 96813  
[REDACTED]

Kaheawa Wind Power, LLC,  
Kaheawa Wind Power II, LLC, and  
Kahuku Wind Power, LLC  
Legal Department  
200 Liberty Street 14th Floor

New York, NY 10281





IN WITNESS THEREOF, the Parties hereto have executed this Memorandum of Agreement as of the last date written below.

KAHEAWA WIND POWER, LLC,  
a Delaware limited liability company

By:   
Printed Name: Ben Stafford  
Its: Chief Operating Officer

KAHEAWA WIND POWER II, LLC,  
a Delaware limited liability company


By:   
Printed Name: Ben Stafford  
Its: Chief Operating Officer

KAHUKU WIND POWER, LLC,  
a Delaware limited liability company

By:   
Printed Name: Ben Stafford  
Its: Chief Operating Officer


STATE OF HAWAI'I  
DEPARTMENT OF LAND AND NATURAL  
RESOURCES

Delegation of Authority granted to the Chairperson  
to Execute this MOA by the Board of Land  
and Natural Resources at its meeting on  
May 27, 2015, Item C-1.

  
Chairperson Dawn N.S. Chang

Date: 09-18-24

APPROVED AS TO FORM:

  
Deputy Attorney General  
State of Hawai'i

**Title:** Makamaka‘ole Seabird Enclosure Stabilization and Replacement

**Scope of Work:** Interim fence stabilization and replacement of fence

### **Project Background**

In 2014, two predator-proof enclosures were constructed in the Makamakaole area of the W. Maui FR, and W. Maui NAR with a combined acreage total of 9.2 acres. Since then, the area has been kept free of predators and social attraction techniques have been used to attract seabirds to artificial burrows. The project was slow to start but over the last few years it has begun to produce ‘a’o (Newell’s shearwater). There are currently returning adult birds in artificial burrows beginning the 2024 reproductive cycle. A single chick has been produced each of the last three years in enclosure A. This success is significant but is being undermined by the deterioration of the fencing surrounding the burrows. There have been two recent incidents where predators have taken ‘a’o in enclosure B at the site. The site needs immediate stabilization. Beyond just stabilization it is critical to secure funding for the replacement of the fences so that the investments are not lost.

### **Project Scope of Work**

This SOW includes \$750,000.00 to be contributed, in total, by Kaheawa Wind Power, LLC (“KWP”) and Kaheawa Wind Power II, LLC (“KWP II”) to fund fence stabilization until full replacement of the fences is complete and a portion of the labour cost to build the new predator exclusion fence, with improvements in techniques and materials to ensure the longevity of the structure. DOFAW will provide the balance of necessary funding (~\$1,050,000) to complete the project. The fence will be improved and expanded by connecting the two sites with contour segments that will increase the size and will delete two mauka to makai segments that have erosion issues, and where the hood has been plagued by strong winds that have blown sections of the fence down entirely. The integrity of the two systems will be maintained and construction of the new fences will occur just outside of the older fences or on the existing fence line, depending on terrain requirements.

### **Justification for Funding**

Beyond seabird recovery this predator-proof site will continue undergoing intensive non-native vegetation replacement with native cover to provide refuge for PEPP plant species, and rare, threatened, and endangered land snail species managed by the SEPP program. The site is currently being used as an out-planting site to establish a population of *Wikstroemia villosa*. The site is also suitable to establish populations of several plant species of concern including but not limited to *Alectryon macrococcus*, *Asplenium dielectum*, *Bidens conjuncta*, *Bidens micrantha* ssp. *kalealaha*, *Clermontia oblongifolia* ssp. *mauiensis*, *Ctenitis squamigera*, *Cyanea asplenifolia*, *Cyanea glabra*, *Cyanea kunthiana*, *Cyanea lobata*, *Cyanea magnicalyx*, *Cyrtandra filipes*, *Cyrtandra munroi*, *Diplazium molokaiense*, *Hesperomannia arborescens*, *Hesperomannia arbuscula*, *Huperzia mannii*, *Isodendrion pyriforme*, *Kadua laxiflora*, *Peucedanum sandwicense*, *Phyllostegia bracteata*, *Pteris lidgatei*, *Remya mauiensis*, *Santalum haleakalae* var. *lanaiense*, and *Wikstroemia villosa*, all of which are included in the Maui Landscape Conservation Plan recently awarded in the America the Beautiful Challenge.

At their current combined footprint, the predator-free enclosures are a significant resource warranting continued investment. Predator-proof enclosures are favored in most species recovery planning and can be leveraged for future funding. This investment will allow an expansion into native dominated habitat between the two current enclosures. At 47.2 acres this will be a valuable site beneficial to Forest Resource Management, Wildlife Management, and NEPM sections of DOFAW. The improvements in materials are expected to double the timeframe of replacement.

### **Seabird Exclosure at Makamaka'ole Rebuild**

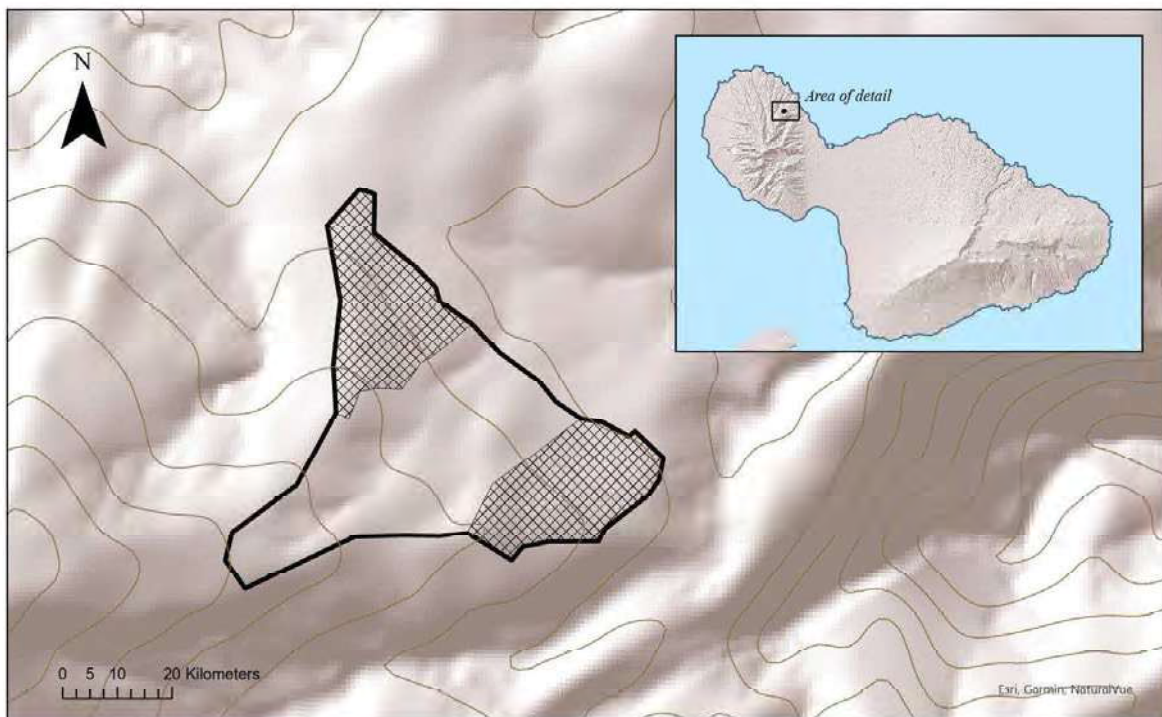
#### **Materials (Provided by DOFAW):**

Total material cost: \$339,339.60



PRODUCT - FOB Kahului, Maui	Order
4" Galv Steel Pipe 10 1/2 ft - sch. 40	245
4" Pressed fit galv stel caps	245
2 7/8 Galv steel Pipe 10 1/2 ft - sch. 40	977
2 7/8" Pressed fit galv stel caps	977
S/S Hex bolts bolts x 1/4"-20 x 4"	2000
S/S Hex bolts, 1/4"-20 x 5"	600
S/S flat washers, S/S 1/4"	7500
S/S Hex nuts S/S 1/4" - 20	4000
S/S lock washers, 1/4"	4000
S/S Hex bolts 1/4" -20 x 1"	1,200
S/S 18-8 Fender Washers #10 x 1"	10,000
S/S 18-8 Blind rivets 1/8 - ( 5/8) 0.501"-0.625"	10,000
9 ga. 3" EZ Tie	10,000
9 ga. 4" EZ Tie	2500
EZ Quick Tie Tool	3
Aquamesh .5X.5 16G 60W 100'L BLK	100
Gates	6
Galv. Touch up paint	25
S/S Hood Bracket	1222
S/S Hood 12'	510

Exclosure A area: 4.7 acres  
Exclosure B area: 4.5 acres  
Exclosure A removed fence length: 656 feet  
Exclosure B removed fence length: 581 feet  
New makai fence length: 492 feet  
New mauka fence length: 1394 feet  
New total perimeter length: 4921 feet  
New Area Enclosed: 20.6 acres

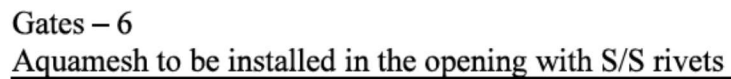
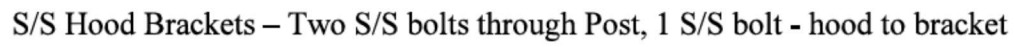
## Site Map



**Makamaka'ole Seabird Protection Site, West Maui**

 Proposed exclosure       Current exclosure boundaries

S/S Hood sections are 12' - holes 8" for S/S blind rivets (hood drawing labels not for this job)



- Estimated cost per foot with supplemental materials = \$285.00  
(Supplemental materials include culverts in new makai fence section)
- Total fence length = 4,921 feet X \$285/foot = \$1,402,485

KWP and KWP II provide \$750,000 for Makamaka‘ole Seabird Exclosures rebuild. This funding provides: DOFAW contracts and provides materials for fence stabilization until new construction is complete; DOFAW contracts fence rebuild and realignment; and DOFAW oversees construction of replacement fence.

#### **Final Products:**

- Stabilization of current predator-proof fences. 9.2 acres;
- Expansion to 20.6 acres of predator free habitat; and
- Continued and future refugia for ‘a’o, ‘ua’u, ‘akē‘akē, land snails, and rare plants.

#### **Partners**

- United States Fish and Wildlife Service
- National Fish and Wildlife Foundation
- State of Hawai‘i, Division of Forestry and Wildlife (Habitat Conservation Program, Plant Extinction Prevention Program, Snail Extinction Prevention Program, Native Ecosystems Protection & Management Program)
- Maui Nui Sea Bird Recovery Project
- Mauna Kahalawai Watershed Partnership
- American Bird Conservancy
- Kaheawa Wind Power and Kaheawa Wind Power II

**Start Date:** May 1, 2024, Materials purchased or in final processing of POs, Labor to be encumbered into existing NEPM and MNSRP PCSU projects.

**(Estimated) End Date:** December 31, 2024, stabilization of current enclosures all funds encumbered; Completion of replacement by January 1, 2026.

#### **Primary Contacts:**

Department of Land and Natural Resources  
Peter Landon



Maui Nui Seabird Recovery Project  
Jay Penniman, Manager



#### **Project Budget**

Item	Cost
Stabilization Materials & Labour	\$50,000.00
New Fence Materials	\$340,000.00
New Fence Construction	\$1,410,000.00
<b>Total</b>	<b>\$1,800,000.00</b>



24 May 2024

To: Danica L. Swenson  
Deputy Attorney General

From: Jay F. Penniman  
MNSRP Manager

Re: Makamaka‘ole Seabird Exclosures

Makamaka‘ole Seabird Exclosures were constructed as mitigation for take of listed seabirds at the Kaheawa Wind Energy facilities on west Maui in 2014. The exclosures were managed by the wind energy companies and their contractors through 2022, when DOFAW took over responsibility. MNSRP contracted with Kaheawa Wind Power, LLC (“KWP”) and Kaheawa Wind Power II, LLC (“KWP II”) to manage the exclosures in 2020, 2021 and 2022 and has continued management for DOFAW through the present.

When MNSRP began managing the seabird exclosures the fence was in a severe state of disrepair, there was no established seabird monitoring protocol, predator traps were rusted and enclosing boxes were rotted. Seabird artificial burrows in area A lacked secondary covers for temperature moderation and many were rotted, requiring immediate rebuilding. KWP I and KWP II provided funding for these repairs.

In the three years of management by MNSRP, Maui DOFAW has provided significant support through the Native Ecosystems Protection and Management (NEPM) section and DOFAW administration wildlife program has partnered in finding funding (including with the USFWS) to keep management activities ongoing. MNSRP has also brought in American Bird Conservancy, Oikonos and Kito Impact Foundation to partner in keeping the project funded.

#### Ongoing projects within and around the Makamaka‘ole Seabird Exclosures

‘A‘o (*Puffinus newelli*, Newell’s shearwater) – Attracted with social attraction techniques of call playbacks and decoys there are now some 50 adults attending the colony each year, the majority of them in exclosure A. One chick has been produced each of the last three years. MNSRP has developed a database to manage reproductive monitoring data, effort and results of predator trapping and baiting in and around the exclosures, and fence maintenance and repair activity.

‘Akē‘akē (*Hydrobates castro*, band-rumped storm petrel) – Social attraction and artificial burrows have been in place for one year. No birds have been attracted to date. Project is ongoing.

‘Ua‘u (*Pterodroma sandwichensis*, Hawaiian petrel) – Social attraction drew a few birds in in the first two years of the project, no birds have been documented on the ground since then. Birds are still heard calling over Makamaka‘ole stream adjacent to enclosure B. The enclosures are potential sites for translocation of birds (Lāna‘i sourced as the birds there appear to be appropriate genetically).

Seabird monitoring is done with toothpicked burrow entrances, game cameras and regular visits to the site by MNSRP biologists to collect data cards and document activity by toothpick movement. All data and camera images are stored in the MNSRP database. Cameras are also used to document predator behavior and trap efficacy with all data and images stored in the MNSRP database.

Until 2024 rodenticide (Diphacinone) was used in bait boxes within both enclosures to control rodents, which have never been completely eliminated. In 2024 MNSRP began the first field trials for a rodent contraceptive (Evolve). These trials will continue through at least the next year. In order to get an adequate sample size and recognize impacts, it may be necessary to continue longer.

In 2023, with funding through DOFAW, from USFWS, and including partner funding from American Bird Conservancy and Oikonos, ‘akē‘akē social attraction was initiated. Ceramic artificial burrows have been installed and ‘akē‘akē calls are broadcast nightly. This will be an ongoing project with burrow monitoring, both toothpicks and cameras. The same funding covered the Plant Extinction Protection Program (PEPP) to collect ‘ākia (*Wikstroemia villosa*) seed, propagate them and outplant within enclosure A. These plants will be monitored and nurtured as they mature, by both MNSRP and PEPP. Additional native plants will be added as they become available as the enclosure vegetation is managed to gradually return to a native plant dominated condition.

DOFAW Maui Forestry has out-planted ‘Ōhi‘a (*Metrosideros polymorpha*) in enclosure B, These plants will be monitored and nurtured by MNSRP and Forestry. Additional native plants will be added as they become available as the enclosure vegetation is managed to gradually return to a native plant dominated condition.

When the fence has been rebuilt, enclosing truly appropriate habitat for ‘ua‘u, ‘a‘o and ‘akē‘akē, the Makamaka‘ole Seabird Enclosure will achieve sufficient area and habitat to be a significant site for future ‘ua‘u and ‘a‘o translocations to assure stable breeding populations on Maui for both species. In addition, Maui Snail Extinction Prevention Program (SEPP), may be interested to build snail castles to restore endangered native land snail populations on Mauna Kahalawai.

Vegetation management has been a significant aspect of site management. With the newly fenced area, this will increase. Fence line maintenance, invasive weed removal and nurturing of existing native plants will continue. As stated above, appropriate native plants will continue to be introduced to the site to restore the native plant community.

## **Exhibit 2**



**Signature:** 

**Email:** 

Return by Mail ( ) Pickup ( ) To:

This document contains \_\_\_\_ pages

Tax Map Key No.: (2) 4-8-001:portion of 001

STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

GENERAL LEASE NO. S-5731

between

STATE OF HAWAII

and

KAHEAWA WIND POWER, LLC

covering a Portion of Government (Crown) Land of Ukumehame

situate at Ukumehame, Lahaina, Wailuku, Maui, Hawaii

Exhibit C



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STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

GENERAL LEASE NO. S-5731

THIS LEASE, made this 19<sup>th</sup> day of January 2005, by and between the STATE OF HAWAII, hereinafter referred to as the "Lessor," by its Board of Land and Natural Resources, called the "Board," whose address is Post Office Box 621, Honolulu, Hawaii, 96809, and KAHEAWA WIND POWER, LLC, a Delaware limited liability company, hereinafter referred to as the "Lessee," whose address is c/o UPC Wind Management, LLC, 100 Wells Avenue, Suite 201, Newton, Massachusetts, 02459.

WITNESSETH:

Lessor, pursuant to Section 171-95(a)(2), Hawaii Revised Statutes, for and in consideration of the rent to be paid and of the terms, covenants and conditions herein contained, all on the part of Lessee to be kept, observed and performed, does lease unto Lessee, and Lessee does lease from Lessor the premises at Ukumehame, Lahaina, Wailuku, Island of Maui, State of Hawaii situate in the County of Maui and temporarily identified as "Lease Area (for Wind Farm Purposes) together with access and electrical transmission line easements," more particularly described in Exhibit A attached hereto and made a part hereof. Lessee understands and agrees that Exhibit A is only a temporary map. Within six (6) months from lease commencement, Lessee shall, at its own cost, provide to the Lessor a survey-standard CAD map of the legal metes and bounds of the parcel (which shall not exceed 200 acres) together with the access and electrical transmission line easements, by a surveyor licensed to do business in Hawaii and in accordance with the standards established by the Department of Accounting and General Services (DAGS), Land Survey Division, such map to be confirmed and converted to a CSF map and description by the DAGS Land Survey Division. The parties hereto specifically agree to amend this Lease by replacing Exhibit A with the DAGS Land Survey Division CSF map and description.

TO HAVE AND TO HOLD the premises unto Lessee for the term of twenty (20) years with an option to extend for an additional twenty (20) years subject to Paragraph 57, commencing on the 1st day of February, 2005, up to and including the 31<sup>st</sup> day of January, 2025, unless sooner terminated as hereinafter

provided, Lessor reserving and Lessee yielding and paying to Lessor at the Office of the Department of Land and Natural Resources, Honolulu, Oahu, State of Hawaii, an annual rental as provided hereinbelow:

A. First year rent waived. All rent shall be waived for the first year of the term.

B. Minimum Annual Rent. For the second (2nd) to tenth (10th) years of the term, Lessee shall pay a Minimum Annual Rent of ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000) due in equal semi-annual installments on January 1st and July 1st, payable in advance, without notice or demand.

C. Percentage Rent. For the second (2nd) to tenth (10th) years of the term, the Lessee shall pay Percentage Rent in an amount equal to TWO AND ONE-HALF PERCENT (2.5%) of Gross Revenue, as defined below, to the extent such amount exceeds the Minimum Annual Rent in any year. Any Percentage Rent over and above the Minimum Annual Rent shall be due and payable within thirty (30) days of the end of the second year of the term and within thirty (30) days of each anniversary date thereafter. Each payment shall be accompanied by a Rent Report as defined below.

D. Gross Revenue defined. "Gross Revenue" shall be defined as all revenues earned relating to electrical energy generated on the premises by Lessee and delivered to purchasers of generated electricity or used in-house ("Energy"), and all revenues from green tag/certificates, pollution or environmental credits or offsets, and carbon credits (collectively "Green Certificates"), excluding, however, all revenues from other sources, including without limitation, federal and/or state production and investment tax credits, financing activities or the sale of the wind farm project. Gross Revenue shall be calculated in any given period on the basis of actual sales of Energy and Green Certificates. Energy and/or Green Certificates generated at the premises that are donated or bartered shall, for the purpose of calculating Gross Revenue, be valued at the rate of their most recent prior sale by the Lessee to the recipient of the donated or bartered Energy and/ Green Certificates or at prevailing commercial rates, whichever is higher.

E. Rent Reports. Lessee shall keep an accurate record and account of all Gross Revenues earned for the payment period in accordance with acceptable record keeping practices



within the business community. Lessee shall forward to the Lessor itemized statements ("Rent Reports") showing the amount actually earned for the last payment period. The Rent Reports shall be in reasonable and sufficient detail to enable Lessor to verify the accuracy of the rental payments provided for herein.

F. Rental reopenings, dates. The rental reserved, including both the Minimum Annual Rent and Percentage Rent shall be reopened and redetermined as of the day following the expiration of the tenth (10th) year of the term (hereinafter referred to as "11th-Year Reopening") and at Repowering (as defined in Paragraph 59).

G. Rental reopenings, conduct of. The rental for any ensuing period shall be the fair market rental at the time of reopening, provided that for the 11th-Year Reopening only, the Percentage Rent shall not be less than 2.5% nor higher than 3.5%. Except as provided herein, the provisions in Hawaii Revised Statutes, Chapter 658A, shall be followed. At least six (6) months prior to the time of reopening, the fair market rental shall be determined by a staff appraiser or independent appraiser, as allowed by law, whose services shall be contracted for by the Lessor, and the Lessee shall be promptly notified by certified mail, return receipt requested, of the fair market rental as determined by Lessor's appraiser; provided, that should the Lessee fail to notify Lessor in writing within thirty (30) days after receipt thereof that Lessee disagrees with the fair market rental as determined by Lessor's appraiser and that Lessee has appointed its own appraiser to prepare an independent appraisal report, then the fair market rental as determined by Lessor's appraiser shall be deemed to have been accepted by Lessee and shall be the fair market rental as of the date of reopening. If Lessee has notified Lessor and appointed his appraiser as stated hereinabove, Lessee's appraiser shall complete his appraisal and the two appraisers shall then exchange their reports within forty-five (45) days from the date of Lessee's appointment of the appraiser.

The two appraisers shall review each other's reports and make every effort to resolve whatever differences they may have. However, should differences still exist fourteen (14) days after the exchange, the two appraisers shall within seven (7) days thereafter appoint a third appraiser who shall also prepare an independent appraisal report based on the review of the two appraisal reports prepared and any other data. Copies thereof shall be furnished to the first two appraisers within forty-five (45) days of the appointment. Within twenty (20)

days after receiving the third appraisal report, all three shall meet and determine the fair market rental in issue. The fair market rental as determined by a majority of the appraisers shall be final and binding upon both Lessor and Lessee, subject to vacation, modification or correction in accordance with the provisions of Sections 658A-23 and 658A-24, Hawaii Revised Statutes. Each party shall pay for its own appraiser and the cost of the services of the third appraiser shall be borne equally by the Lessor and the Lessee. All appraisal reports shall become part of the public record of the Lessor.

In the event that the appraisers are unable to determine the fair market rental before the reopening date, or by the foregoing prescribed time, whichever is later, the Lessee shall pay the fair market rental as determined by Lessor's new appraised value until the new rent is determined and the rental paid by Lessee shall then be subject to retroactive adjustments as appropriate to reflect the fair market rental determined as set forth hereinabove. However, Lessee or Lessee's appraiser's failure to comply with the procedures set forth above shall constitute a waiver of Lessee's right to contest the new rent, and the Lessee shall pay the rent as determined by Lessor's appraiser without any retroactive adjustments.

H. Repowering. Lessee shall notify Lessor in writing of any intent to repower the Wind Project no less than nine (9) months prior to Repowering. The Lessee shall be responsible for obtaining any permits or approvals necessary for any Repowering. Following receipt of a Repowering notice by Lessee, new Minimum Annual Rent and Percentage Rent shall be renegotiated in accordance with Section G. above.

I. Interest and service charges. The interest rate on any and all unpaid or delinquent rentals shall be at one percent (1%) per month, plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

RESERVING UNTO LESSOR THE FOLLOWING:

1. Minerals and waters. (a) All minerals as hereinafter defined, in, on or under the premises and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove the minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of the minerals by any means whatsoever, including strip mining. "Minerals," as used herein, shall mean any or all oil, gas,



coal, phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources, in, on, or under the land, fast or submerged; provided, that minerals shall not include sand, gravel, rock or other material suitable for use and used in general construction in furtherance of Lessee's permitted activities on the premises and not for sale to others. (b) All surface and ground waters appurtenant to the premises and the right on its own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of the premises required in the exercise of this right reserved; provided, however, that as a condition precedent to the exercise by the Lessor of the rights reserved in this paragraph, just compensation shall be paid to the Lessee for any of Lessee's improvements taken, damaged or rendered unusable or commercially unproductive at the site.

2. Prehistoric and historic remains. Any regulatory rights and ownership of the State of Hawaii over prehistoric or historic remains found in, on or under the premises, established pursuant to state law, including Chapter 6(E) Hawaii Revised Statutes.

3. Ownership of improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater system(s) located on the land prior to or on the commencement date of this lease, excluding those improvements constructed during the term of this lease unless provided otherwise.

LESSEE AND LESSOR COVENANT AND AGREE WITH EACH OTHER AS FOLLOWS:

1. Payment of rent. The Lessee shall pay the rent to the Lessor at the times, in the manner and form provided in this lease and at the place specified above, or at any other place Lessor may from time to time designate, in legal tender of the United States of America.

2. Taxes, assessments, etc. Lessee shall pay or cause to be paid, when due, the amount of all taxes, rates, and assessments of every description as to which the premises or any part, or any improvements, or the Lessor or Lessee, are now or may be assessed or become liable by authority of law during the term of this lease; provided, however, that with respect to any

assessment made under any betterment or improvement law which may be payable in installments, Lessee shall be required to pay only those installments, together with interest, which becomes due and payable during the term of this lease. All taxes and assessments for partial years during the term of this lease shall be prorated. Lessee shall have the right, at its own cost and expense, to refuse to pay and to contest the amount or validity of any tax or assessment by an appropriate proceeding diligently conducted in good faith which shall operate to prevent the collection of any such tax or assessment so contested or the sale of the premises to satisfy the same. Pending final judgment in an appeal from any such proceeding, Lessor shall not have the right to pay, remove, or discharge any tax or assessment thereby contested, provided that Lessee shall protect Lessor and the premises from any lien by adequate surety bond or other appropriate security.

3. Utility services. The Lessee shall be responsible for obtaining any utility services deemed necessary for Lessee's use and enjoyment of the premises and shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, as to which the premises or any part, or any improvements, or Lessee may become liable for during the term as a result of Lessee's use. The Lessee is authorized to grant to Maui Electric Company, Limited, hereinafter referred to as "MECO," a right of entry upon the premises for the construction, maintenance, repair and operation of MECO's poles, wire lines, underground power lines, guys, conduits and other appliances and equipment as may be necessary for the transmission of electricity to be used for light and power and communication and control circuits.

4. Covenant against discrimination. The use and enjoyment of the premises shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

5. Sanitation. The Lessee shall keep the premises and improvements in a strictly clean, sanitary and orderly condition.

6. Waste and unlawful, improper or offensive use of premises. The Lessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or

offensive use of the premises or any part thereof, nor, without the prior written consent of the Lessor which shall not be unreasonably withheld, conditioned or delayed, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.

7. Compliance with laws. The Lessee, in its exercise of its rights under this lease, shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force.

8. Right to Enter. The Lessor or the County and their agents or representatives shall have the right to enter and cross any portion of the premises for the purpose of performing any public or official duties; provided, however, in the exercise of these rights, the Lessor or the County shall not interfere unreasonably with the Lessee or Lessee's use and enjoyment of the premises.

9. Improvements. The Lessee shall, at its own cost and expense, within three (3) years from the commencement of the lease term, complete the construction of a 30-megawatt wind power project or Project Improvements, in accordance with plans and specifications submitted by the Lessee to and approved in writing by the Chairperson and in full compliance with all applicable laws, ordinances, rules and regulations, such approval not to be unreasonably withheld or delayed. Initial construction or installation of the Project Improvements shall not commence until the Department of Land and Natural Resources has been provided evidence of full financing of the construction costs of the project, and the construction and installation of the Project Improvements shall be completed free and clear from all liens and claims. Any grading, realigning and/or paving of the existing access road by the Lessee for the safe transporting of heavy equipment to the premises during the construction phase shall be at the Lessee's sole cost and expense. Thereafter, the Lessee shall not construct, place, maintain or install on the premises any building, structure or improvement of any kind except with the prior written approval of the Chairperson and upon those conditions the Chairperson may impose, including but not limited to any adjustment of rent, unless otherwise explicitly provided in this lease. The Lessee shall name the Lessor as an obligee on all its contractor bonds and guaranty agreements, including but not limited to: (a) Performance Bond and Labor and Materialman's Bond issued by Goodfellow Brothers,

Inc., and (b) the guaranty agreements issued by GE Company and ABB, Inc.

10. [Intentionally omitted.]

11. Ownership of improvements. During the term of this lease, the improvements constructed by the Lessee, including without limitation all additions, alterations and improvements thereto or replacements thereof and all appurtenant fixtures, machinery and equipment installed therein, shall be the property of the Lessee. At early termination for whatever reason or expiration of this lease, all existing improvements and all additions, alterations and improvements thereto or replacements thereof and all appurtenant fixtures, machinery and equipment installed therein shall be removed at the Lessee's sole expense, unless the Lessor elects to assume ownership of improvements as provided herein. Wind turbine foundations shall be removed to a depth of two (2) feet below grade. Those improvements of which Lessor assumes ownership shall transfer to the Lessor free of cost and free of subsequent liability to the Lessee. Throughout the term of the lease, Lessee shall not permit any claim of lien made by any mechanic, materialman, laborer or other similar liens to stand against the premises for work or labor done, services performed, or materials used or furnished to be used in or about the premises for or in connection with any construction, improvements or maintenance or repair thereon made or permitted to be made by Lessee, its agents or sublessees. Any liens, encumbrances or claims of third parties with respect to any of the foregoing, shall be expressly subordinate and subject to the rights of the Lessor under this lease.

12. Repairs to improvements. The Lessee shall, at its own expense, keep, repair, and maintain all buildings and improvements hereafter constructed or installed on the premises by Lessee in good order, condition and repair, reasonable wear and tear excepted. The Lessee shall also be obligated to repair and maintain any improvements shared with Lessor to the extent of Lessee's use of such improvements.

13. Liens. The Lessee shall not commit or suffer any act or neglect which results in the premises, any improvement, or the leasehold estate of the Lessee becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this lease, and shall indemnify, defend, and hold the Lessor harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses. The Lessee shall have



the right to contest any attachments or liens recorded against Lessor or the premises and resulting from any works of improvement made by or for Lessee provided (i) Lessee contests such attachment or lien by appropriate proceeding diligently conducted in good faith, and (ii) at the request of Lessor, Lessee shall furnish a lien release bond or other security acceptable to Lessor in the principle amount of such attachment or lien.

14. Character of use. The Lessee shall use or allow the premises to be used solely for the following purpose(s): (i) to conduct wind and weather monitoring activities, including the erection, relocation, maintenance and operation of anemometers and other wind and weather monitoring equipment, steel towers, concrete slabs, fences and buildings to properly operate, house, protect and otherwise facilitate Lessee's wind and weather monitoring activities, the location of such equipment and related facilities to be determined by Lessee in its sole discretion; (ii) the erection, relocation, maintenance and operation of large wind turbine generators ("Turbines") and all related equipment and improvements necessary or useful for the conversion of wind energy into electricity, including but not limited to steel towers, foundations and concrete pads, footings, guy wires, anchors, fences and other fixtures and facilities, maintenance, security, office and/or guest facilities, staging areas for the assembly of equipment, required lines and substation facilities to transfer power from the Turbines to power transmission lines, energy storage devices, and other power production equipment, all in such number and in such locations as Lessee, in its sole discretion, may determine; (iii) the erection, maintenance and operation of power transmission lines, poles, anchors, support structures, underground cables, substations and interconnection facilities and associated roads for access and for installation and maintenance purposes as Lessee in its sole discretion deems to be necessary or appropriate to transmit power and transport workers, tools, material, equipment and other necessary items to and from or across the premises; and (iv) the use and enjoyment of the free flow of wind across the premises without interference from Lessor. Lessor also hereby grants to Lessee a non-exclusive easement in gross on, over and across any and all access routes to and from the premises for purposes of ingress and egress to and from the premises.

15. Assignments, etc. Except as otherwise provided in this lease, the Lessee shall not transfer, assign, or permit any other person to occupy or use the premises or any portion

thereof or transfer or assign this lease or any interest herein, either voluntarily or by operation of law, except by way of devise, bequest, or intestate succession and any transfer or assignment made contrary to the terms hereof shall be null and void; provided that with the prior written approval of the Board the assignment and transfer of this lease, or any portion, may be made in accordance with current industry standards, as determined by the Board; provided, further, that prior to the approval of any assignment of lease, the Board shall have the right to review and approve the consideration paid by the Assignee and may condition its consent to the assignment of the lease on payment by the Lessee of a premium based on the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the straight-line depreciated cost of improvements and trade fixtures being transferred to the Assignee pursuant to the Assignment of Lease Evaluation Policy adopted by the Board on December 15, 1989, as amended, a copy of which is attached hereto as Exhibit B. The premium on any subsequent assignments shall be determined as specified in the above-mentioned Evaluation Policy.

If the Lessee is a partnership, joint venture or corporation, the sale or transfer of 51% or more of ownership interest or stocks by dissolution, merger or any other means shall be deemed an assignment for purposes of this paragraph. Notwithstanding the above, a sale or transfer by Lessee of an ownership interest in the project greater than 51% in connection with any tax financing of the project shall not be deemed an assignment for purposes of this Paragraph 15, provided that Lessee retains control of the partnership, joint venture or corporation.

Notwithstanding the foregoing provisions of this Paragraph 15, Lessee shall at all times have the right to sell, assign, encumber, or transfer any or all of its rights and interests under this lease without Lessor's consent and without payment of any premium to any entity predominantly owned or controlled by or under common ownership or control with Lessee; provided, however, that the term of any such transfer shall not extend beyond the term of this lease and that any and all such transfers shall be expressly made subject to all of the terms, covenants and conditions of this lease. No such sale, assignment, transfer, or easement shall relieve Lessee of its obligations under this lease.

16. Subletting. The Lessee shall not rent or sublet the whole or any portion of the premises, without the prior

written approval of the Board; provided, however, that prior to this approval, the Board shall have the right to review and approve the rent to be charged to the proposed sublessee and that in the case where the Lessee is required to pay rent based on a percentage of its gross receipts, the receipts of the sublessee or any subsequent sublessees shall be included as part of the Lessee's gross receipts, and the Board shall have the right to revise the rent of the premises based upon the rental rate charged to the sublessee including the percentage rent, if applicable, and provided, further, that the rent may not be revised downward.

17. Indemnity. Except to the extent caused by the negligent or intentional acts of the Lessor or its employees, contractors or agents, the Lessee shall indemnify, defend, and hold the Lessor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of the Lessee or its employees, contractors or agents relating to the Lessee's use, occupancy, maintenance, or enjoyment of the premises; 2) any failure on the part of the Lessee to maintain the portion of the premises in the Lessee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Lessee's non-observance or non-performance of any of the terms, covenants, and conditions of this lease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments. In case the Lessor shall, without any fault on its part, be made a party to any litigation commenced by or against the Lessee with respect to this lease or Lessee's occupancy or use of the premises (other than condemnation proceedings), the Lessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the Lessor; furthermore, the Lessee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the Lessor in enforcing the covenants and agreements of this lease, in recovering possession of the premises, or in the collection of delinquent rental, taxes, and any and all other applicable charges attributable to the premises.

18. Liability insurance. The Lessee shall procure and maintain, at its cost and expense and acceptable to Lessor, in full force and effect throughout the term of this lease,

commercial general liability insurance, with a minimum combined occurrence and annual limitation of Five Million Dollars (\$5,000,000) with an insurance company or companies licensed to do business in the State of Hawaii. The policy or policies of insurance shall name the State of Hawaii as an additional insured. The insurance shall cover the entire premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the premises in the use or control of the Lessee.

The Lessee, prior to entry and use of the premises or within fifteen (15) days from the effective date of this lease, whichever is sooner, shall furnish the Lessor with a certificate(s) showing the policy(s) to be initially in force, keep the certificate(s) on deposit during the entire lease term, and furnish a like certificate(s) upon each renewal of the policy(s). This insurance shall not be cancelled, limited in scope of coverage, or nonrenewed until after thirty (30) days written notice has been given to the Lessor.

The Lessor shall retain the right at any time to review the coverage, form, and amount of the insurance required by this lease. If, in the opinion of the Lessor, the insurance provisions in this lease do not provide adequate protection for the Lessor, the Lessor may require Lessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Lessor's requirements shall be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The Lessor shall notify Lessee in writing of changes in the insurance requirements and Lessee shall deposit copies of acceptable insurance policy(s) or certificate(s) thereof, with the Lessor incorporating the changes within thirty (30) days of receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit Lessee's liability under this lease nor to release or relieve the Lessee of the indemnification provisions and requirements of this lease. Notwithstanding the policy(s) of insurance, Lessee shall be obligated for the full and total amount of any damage, injury, or loss caused by Lessee's negligence or neglect connected with this lease.

It is agreed that any insurance maintained by the Lessor will apply in excess of, and not contribute with, insurance provided by Lessee's policy.



19. Bond, performance. The Lessee shall, at its own cost and expense, within seventy-five (75) days from the commencement of the term of this lease, procure and deposit with the Lessor and thereafter keep in full force and effect during the term of this lease (and any additional period of time that the Lessee requires to remove the Project Improvements and restore the premises) a good and sufficient surety bond, conditioned upon the full and faithful observance and performance by Lessee of all the terms, conditions, and covenants of this lease, in an amount equal to ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000). This bond shall provide that: (a) in case of Lessee's uncured breach or default of any of the lease terms, covenants, conditions, and agreements, the Lessor may draw upon the bond for liquidated and ascertained damages and not as a penalty, and (b) that upon the expiration, cancellation or early termination of this Lease, the Lessor may draw upon the bond in order to remove the Project Improvements (except for access roads) and to restore the premises to its original or better condition. Any portion of a bond or security deposit held by Lessor and not applied to cure a breach or default of Lessee hereunder or not applied to remove the Project Improvements and restore the premises as herein provided shall be returned to Lessee. This provision shall survive the expiration, cancellation or other early termination of this Lease.

20. Lessor's lien. Subject to the other provisions of this lease, the Lessor shall have a lien on all the buildings and improvements placed on the premises by the Lessee, on all property kept or used on the premises, whether the same is exempt from execution or not and on the rents of all improvements and buildings located on the premises for all Lessor's costs, attorney's fees, rent reserved, for all taxes and assessments paid by the Lessor on behalf of the Lessee, and for the payment of all money provided in this lease to be paid by the Lessee, and this lien shall continue until the amounts due are paid.

21. Mortgage. Except as provided in this lease or in any separate instrument executed by the Chairperson, the Lessee shall not mortgage, hypothecate, or pledge the premises, any portion, or any interest in this lease without the prior written approval of the Chairperson and any mortgage, hypothecation, or pledge without the approval shall be null and void. Upon due application and with the written consent of the Chairperson, the Lessee may mortgage this lease, or any interest, or create a security interest in the leasehold of the public land to a third

party to the extent necessary to secure financing for the project. If the mortgage or security interest is to a recognized lending institution in either the State of Hawaii or the United States, the consent may extend to foreclosure and sale of Lessee's interest at the foreclosure to any purchaser, including the mortgagee or holder, without regard to whether or not the purchaser is qualified to lease, own, or otherwise acquire and hold the land or any interest. The interest of the mortgagee or holder shall be freely assignable. The term "mortgagee or holder" shall mean and include any mortgagee or holder of a security interest in the premises and Lessee's interests under the lease, as well as any insurer or guarantor of the obligation or condition of the mortgage, including the Department of Housing and Urban Development through the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, the Small Business Administration, Farmers Home Administration, or any other Federal agency and their respective successors and assigns or any lending institution authorized to do business in the State of Hawaii or elsewhere in the United States; provided, that the consent to mortgage to a non-governmental holder shall not confer any greater rights or powers in the holder than those which would be required by any of these Federal agencies.

Should Lessee mortgage any of its interest as provided in the preceding paragraph, Lessee and Lessor expressly agree between themselves and for the benefit of any mortgagee or holder (collectively, "Lenders") as follows:

(a) The Lenders shall have the right to do any act or thing required to be performed by Lessee under this lease, and any such act or thing performed by a Lender shall be as effective to prevent a default under this lease and/or a forfeiture of any of Lessee's rights under this lease as if done by Lessee itself.

(b) No default which requires the giving of notice to Lessee shall be effective unless a like notice is given to all Lenders. If Lessor shall become entitled to terminate this lease due to an uncured default by Lessee, Lessor will not terminate this lease unless it has first given written notice of such uncured default and of its intent to terminate this lease to each Lender and has given each Lender at least thirty (30) days to cure the default to prevent such termination of this lease. Furthermore, if within such thirty (30) day period a Lender notifies Lessor that it must foreclose on Lessee's interest or otherwise take possession of Lessee's interest under

this lease in order to cure the default, Lessor shall not terminate this lease and shall permit such Lender a sufficient period of time as may be necessary for such Lender, with the exercise of due diligence, to foreclose or acquire Lessee's interest under this lease and to perform or cause to be performed all of the covenants and agreements to be performed and observed by Lessee. Upon the sale or other transfer of any interest in and rights granted hereunder by any Lender, such Lender shall have no further duties or obligations hereunder.

22. Breach. Time is of the essence in this lease and if the Lessee shall fail to pay the rent, or any part thereof, at the times and in the manner provided within thirty (30) days after delivery by the Lessor of a written notice of breach or default, or if the Lessee shall become bankrupt, or shall abandon the premises, or if this lease and premises shall be attached or taken by operation of law, or if any assignment is made of the Lessee's property for the benefit of creditors, or if Lessee shall fail to observe and perform any of the covenants, terms, and conditions contained in this lease and on its part to be observed and performed, and this shall continue for a period of more than sixty (60) days after delivery by the Lessor of a written notice of breach or default, by personal service, registered mail or certified mail to Lessee at its last known address and to each Lender or holder of record having a security interest in the premises, and subject to the provisions of Paragraph 21 above, the Lessor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises, or any part thereof, and upon or without the entry, at its option, terminate this lease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, at the option of the Lessor, all buildings and improvements and personalty not removed by Lessee within three-hundred sixty-five (365) days after such termination shall remain and become the property of the Lessor; furthermore, Lessor shall retain all rent paid in advance to be applied to any damages. The Lessee may request a twelve-month license following termination to remove such improvements and personalty.

23. Condemnation. If at any time, during the term of this lease, any portion of the premises should be condemned, or required for public purposes by any county or city and county, the rental shall be reduced in proportion to the value of the portion of the premises condemned. The Lessee shall be entitled to receive from the condemning authority the proportionate value

of the Lessee's improvements so taken in the proportion that it bears to the unexpired term of the lease; provided, that the Lessee may, but shall not be required to in the alternative, remove and relocate its improvements to the remainder of the premises occupied by the Lessee. The Lessee shall not by reason of the condemnation be entitled to any claim against the Lessor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Lessor. The foregoing rights of the Lessee shall not be exclusive of any other to which Lessee may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the premises were leased, the Lessee shall have the option to surrender this lease and be discharged and relieved from any further liability; provided, that Lessee may remove the improvements constructed, erected and placed by it within any reasonable period allowed by the Lessor.

24. Inspection by prospective bidders. The Lessor shall have the right to authorize any person or persons to enter upon and inspect the premises at all reasonable times following a published notice for its proposed disposition for purposes of informing and apprising that person or persons of the condition of the lands preparatory to the proposed disposition; provided, however, that any entry and inspection shall be conducted during reasonable hours after notice to enter is first given to the Lessee, and shall, if the Lessee so requires, be made in the company of the Lessee or designated agents of the Lessee; provided, further, that no authorization shall be given more than two years before the expiration of the term of this lease.

25. Acceptance of rent not a waiver. The acceptance of rent by the Lessor shall not be deemed a waiver of any breach by the Lessee of any term, covenant, or condition of this lease, nor of the Lessor's right of re-entry for breach of covenant, nor of the Lessor's right to declare and enforce a forfeiture for any breach, and the failure of the Lessor to insist upon strict performance of any term, covenant, or condition, or to exercise any option conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option.

26. Extension of time. Notwithstanding any provision contained in this lease, when applicable, the Board may for good cause shown, allow additional time beyond the time or times



specified in this lease for the Lessee to comply, observe, and perform any of the lease terms, conditions, and covenants.

27. Justification of sureties. Any bonds required by this lease shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawaii Revised Statutes; provided, however, the Lessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with the Lessor security in certified checks, certificates of deposit (payable on demand or after a period the Lessor may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the Lessor a deed or deeds of trust of real property, all of a character which is satisfactory to Lessor and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the Lessor shall be determined by the Lessor, and that the Lessee may, with the approval of the Lessor, exchange other securities or money for any of the deposited securities if in the judgment of the Lessor the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Lessee, but only upon the written consent of the Lessor and that until this consent is granted, which shall be discretionary with the Lessor, no surety shall be released or relieved from any obligation.

28. Waiver, modification, reimposition of bond and liability insurance provisions. Upon substantial compliance by the Lessee of the terms, covenants, and conditions contained in this lease on its part to be observed or performed, the Lessor at its discretion may in writing, waive or suspend the performance bond and/or improvement bond requirements or may, in writing, modify the particular bond(s) or liability insurance requirements by reducing its amount; provided, however, that the Lessor reserves the right to reactivate the bonds or reimpose the bond(s) and/or liability insurance in and to their original tenor and form at any time throughout the term of this lease.

29. Quiet enjoyment. The Lessor covenants and agrees with the Lessee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Lessee to be observed and performed, the Lessee shall and may have, hold, possess, and enjoy the premises for the term of the lease, without hindrance or interruption by the Lessor or any other person or persons lawfully claiming by, through or under it.

30. Surrender. The Lessee shall, at the end of the term or other sooner termination of this lease, restore and peaceably deliver unto the Lessor possession of the premises in a clean and orderly condition and with or without the Project Improvements as in accordance with Paragraph 11 of this lease. Furthermore, upon the expiration, termination, and/or revocation of this lease, should the Lessee fail to remove any and all of Lessee's personal property from the premises within the prescribed period, after notice thereof, the Board may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all reasonable costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the termination of the lease.

31. Non-warranty. Except as set forth in this Paragraph 31 and Paragraph 32 below, Lessor does not warrant the condition or prior uses of the premises, as the same are being leased as is. Notwithstanding the foregoing, Lessor promises, represents and warrants to Lessee that (i) Lessor owns the entire premises in fee simple, subject to no liens or encumbrances except as disclosed in writing to Lessee in a title report or other document delivered to Lessee on or prior to the execution of this lease by Lessor; (ii) Lessor and each person signing this lease on behalf of Lessor has the full and unrestricted power and authority to execute and deliver this lease, and to lease the premises and the rights herein granted; and (iii) there are no tenants on the premises, or such tenants have prior to or concurrent with the execution of this lease, delivered a subordination agreement to Lessor in form and substance satisfactory to Lessee.

32. Hazardous materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Lessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the

industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Lessee's business, and then only after written notice is given to Lessor of the identity of such materials and upon Lessor's consent which consent may be withheld at Lessor's sole and absolute discretion. Lessor hereby consents to the lawful and reasonable use of lubricating oil and grease, normal paint and cleaning compounds. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Lessee.

Lessee agrees to indemnify, defend, and hold Lessor harmless, from any damages and claims resulting from the release of hazardous materials on the premises if (i) such release is caused by any person other than Lessor and such release occurs on or at any portion of the premises that is under the control of Lessee or (ii) such release is caused by Lessee or persons acting under Lessee and such release occurs on or at any portion of the premises that is not under the control of Lessee. These covenants shall survive the expiration or earlier termination of the lease.

For the purpose of this lease "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

33. Fire and extended coverage insurance. The Lessee, at its cost and expense, shall procure and maintain at all times during the term of this lease, fire and extended coverage insurance with an insurance company(s) licensed to do business in the State of Hawaii, insuring all buildings and improvements erected on the land leased in the joint names of Lessor and Lessee, with the standard mortgage clause for any Lender, as their interest may appear, in an amount equal to the

replacement cost of the facilities and shall pay the premiums at the time and place required under the policy.

In the event of total or partial loss, any proceeds derived from the policy(s) shall be used by the Lessee for rebuilding, repairing, or otherwise reinstating the same facilities in a good and substantial manner according to plans and specifications approved in writing by the Board; provided, however, that with the approval of the Lessor, the Lessee may surrender this lease and pay the balance owing on any mortgage and the Lessee shall then receive that portion of the proceeds which the unexpired term of this lease at the time of the loss or damage bears to the whole of the term, the Lessor to be paid the balance of the proceeds.

The Lessee shall furnish the Lessor on or before the commencement date of this lease, a certificate showing the policy(s) to be in full force and effect and shall furnish a like certificate upon each renewal of the policy(s). Each certificate(s) shall contain or be accompanied by an assurance of the insurer not to cancel the insurance, limit the scope of the coverage, or fail or refuse to renew the policy(s) until after thirty (30) days written notice has been given to the Lessor.

All rights or claims of subrogation against the State of Hawaii, its officers, employees, and agents are waived.

34. Compliance with CDUP. The Lessee shall comply with all terms and conditions of Conservation District Use Permit (CDUP) No. MA-3103 as approved by the Board at its meeting of January 24, 2003 under agenda item D-9 and as may be thereafter amended.

35. Wind data rights. Upon termination or expiration of this lease for whatever reason, the Lessee shall provide the Lessor with copies of all Wind Data relating to the premises. The Lessor shall have an unlimited license to use such data for any purpose, whether for its own purposes or for distribution to third parties, without charge.

36. Further assurances. (a) Each of the parties to this lease agrees to perform all such acts (including but not limited to, executing and delivering such instruments and documents) as reasonably may be necessary to fully effectuate each and all of the purposes and intent of this lease, including consents to any assignments, pledges, subleases or transfers permitted under Paragraphs 15, 16 and 21 herein as may be



required by any Lender or required in connection with the transfer by Lessee of the rights granted under this lease.

(b) Lessor expressly agrees that it will from time to time enter into reasonable nondisturbance agreements with any Lender which requires such an agreement providing that Lessor shall recognize the rights of the Lender and not disturb its possession of the premises so long as it is not in default of any of the provisions of this lease. Lessor and Lessee further agree that they shall, at any time during the term of this lease within (10) days after a written request by the other party, execute, acknowledge and deliver to the requesting party a statement in writing certifying that this lease is unmodified and in full force and effect (or modified and stating the modifications). The statements shall also state the dates on which the payments and any other charges have been paid and that there are no defaults existing or that defaults exist and the nature of such defaults.

(c) The Lessor may not take any action on the premises which interferes with or is incompatible with Lessee's use and enjoyment of the premises or which in any way interferes with the wind flow across the premises. Lessor may replace, rebuild, or reconstruct any improvement in existence on the premises at the time of execution of this lease in the same or substantially the same form as such improvement existed at such time, and Lessor may build, construct, or locate new improvement(s) on the premises, provided that any such improvement(s) shall not (i) interfere with the wind flow across the premises, (ii) interfere with or obstruct Lessee's rights under this lease or its operations on the premises, nor (iii) impede or obstruct Lessee's access to the premises. In no event during the term of this lease shall Lessor construct, build, or locate or allow others to construct, build, or locate any wind energy conversion system, wind turbine, or similar project on the premises. Lessee shall have the right to remedy any such interference by any appropriate means.

37. Notices. All notices or other communications required or permitted hereunder, including notices to Lenders, shall, unless otherwise provided herein, be in writing, shall be personally delivered, delivered by reputable overnight courier, or sent by first class mail and postage prepaid, addressed to the parties at the addresses set forth on the first page of this lease. Notices personally delivered shall be deemed given the day so delivered. Notices given by overnight courier shall be deemed given on the first business day following the mailing

date. Notices mailed as provided herein shall be deemed given on the third business day following the mailing date. Notice of change of address shall be given by written notice in the manner detailed in this Paragraph 37, provided that Lessee's mailing address shall at all times be the same for both billing and notice. In the event there are multiple Lessees hereunder, notice to one Lessee shall be deemed notice to all Lessees.

38. Hawaii law. This lease shall be construed, interpreted, and governed by the laws of the State of Hawaii.

39. Exhibits - Incorporation in lease. All exhibits referred to are attached to this lease and hereby are deemed incorporated by reference.

40. Headings. The article and paragraph headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this lease.

41. [Intentionally omitted].

42. Time is of the essence. Time is of the essence in all provisions of this lease.

43. Archaeological sites. In the event any unanticipated sites or remains such as shell, bone or charcoal deposits, human burials, rock or coral alignments, pavings, or walls are found on the premises, the Lessee and the Lessee's agents, employees and representatives shall immediately stop all land utilization and/or work and contact the Historic Preservation Office in compliance with Chapter 6E, Hawaii Revised Statutes.

44. [Intentionally omitted.]

45. Clearances. The Lessee shall be responsible for obtaining all necessary federal, state or county clearances, permits and approvals.

46. Hunting. No hunting shall be allowed on the premises during the term of this lease.

47. Records. The Lessee shall prepare, maintain, and keep records in accordance with acceptable record keeping practices. A clear, complete, detailed record and accounting of business affecting payment due the Lessor and Project Improvements, electric production and delivery to the power

purchaser shall be maintained at a location in Hawaii for a period of at least four (4) years following payment of rent. Further, the Lessee shall prepare, maintain and keep records of Wind Data, as defined herein, and management practices conducted on the premises, including but not limited to, the use of pesticides, for the term of this lease or as required by law or any permit.

48. Audit and examination of books, etc. The Lessee shall, at all reasonable times, permit the Lessor and/or its authorized agents and employees, upon reasonable notice given by the Lessor, to audit, examine and to make copies of all books, accounts, records and receipts of the Lessee, including any power purchase agreements, for the purpose of verifying the amount of electric production and delivery to the power purchaser and/or proceeds received by the Lessee from the premises or for the purpose of determining and enforcing compliance with the provisions of this lease. If an audit shows a deviation of more than three percent (3%) from the Gross Revenue rental payment made to the State, the Lessee shall pay the difference and pay for the cost of the audit. The Lessee shall immediately pay all such additional amounts due plus interest from the date such payment was originally due and payable but in no case later than thirty (30) days after notice of the additional amount due.

49. Environmental regulations. Lessee shall comply with all applicable federal, state and county environmental impact regulations, including but not limited to Chapter 343, Hawaii Revised Statutes, as amended, and regulations governing historic preservation. Within thirty (30) days after the expiration or termination of this lease, Lessee shall conduct a Phase One Hazardous Waste Evaluation (record research only). In addition, Lessee shall be required to remove and abate any hazardous materials that have been released, disposed of or stored by Lessee on or at the premises during the term hereof promptly following the expiration or termination of this lease to the extent required by then existing federal, state and county environmental impact regulations. This Paragraph 49 shall survive the expiration or termination of this lease.

50. Fair interpretation. The parties agree that the terms and provisions of this lease embody their mutual intent and that such terms and conditions are not to be construed more liberally in favor, nor more strictly against, either party.

51. Partial invalidity. If any term or provision of this lease, or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this lease or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be effected thereby, and each remaining term and provision of this lease shall be valid and enforceable to the fullest extent permitted by law.

52. Survey and boundary stakeout. The Lessee shall be solely responsible for any survey and boundary stakeout of the leased premises.

53. [Intentionally omitted.]

54. Counterparts. This lease may be executed and recorded in counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument.

55. Complete agreement. This lease, and the exhibits and riders hereto, contains the entire agreement between the parties hereto with respect to the subject matter hereof and any prior agreements, discussions or understandings, written or oral, are superceded by this lease and shall be of no force or effect. No addition or modification of any term or provision of this lease shall be effective unless set forth in writing and signed by the authorized representatives of the parties.

56. Renewable energy producer. Lessee understands and agrees that this Lease is being issued by direct negotiation pursuant to Section 171-95, Hawaii Revised Statutes (HRS). Throughout the term of this Lease, the Lessee shall be and remain a "renewable energy producer" and Lessee shall not assign or transfer this Lease to any entity that does not qualify as a "renewable energy producer." A violation or other breach of this provision shall be considered a material default under this Lease.

57. Extension of lease term. Provided the Lessee is in full compliance with all of the terms and conditions of this Lease, Lessee may exercise its option to extend this Lease for an additional twenty (20) year term by submitting a written request to Lessor no later than nine (9) months prior to the expiration of the Lease. The Minimum Annual Rental and Percentage Rent during any extended term shall be determined in accordance with Section G (Rental reopenings, conduct of) of



this Lease. Notwithstanding the foregoing, any extension of this Lease is contingent upon and subject to the parties mutually agreement on such terms and conditions to be added to or amended in the Lease for the purpose of achieving the most current industry leasing standards for wind energy projects.

58. Public Utilities Commission approval. The Lessee shall obtain approval from the Public Utilities Commission for the power purchase agreement with MECO and shall provide Lessor written evidence of such approval. The Lessee shall also provide Lessor a copy of the duly executed power purchase agreement with MECO.

59. Additional definitions. As used in this lease, unless clearly repugnant to the context:

(a) "Chairperson" means the Chairperson of the Board of Land and Natural Resources of the State of Hawaii or his successor

(b) "County" means the County of Maui.

(c) "Days" shall mean calendar days, unless otherwise specified.

(d) "Holder of record of a security interest" means a person who is the owner or possessor of a security interest in the land leased and who has filed with the Department of Land and Natural Resources and with the Bureau of Conveyances of the State of Hawaii a copy of this interest.

(e) "Lessee" means and includes Lessee and its successors or permitted assigns.

(f) "Premises" means the land leased and all buildings and improvements now or hereinafter constructed and installed on the land leased.

(g) "Project Improvements" includes wind turbines, all appurtenant meteorological towers and equipment, electrical components (overhead and underground power lines and their supporting structures, transformers, switching and connection enclosures, metering systems, communication lines and auxiliary equipment), service buildings, access controls (gates, cattle guards and fences), safety and wind project identification signage, erosion and fire control features and roads that may be used in connection therewith located on the premises.

(h) "Renewable energy producer" means any producer of electrical energy produced by wind that sells all of the net power produced from the demised premises to an electric utility company regulated under Chapter 269, Hawaii Revised Statutes. Up to twenty-five percent of the power produced by a renewable energy producer and sold to the utility may be derived from fossil fuels.

(i) "Repowering" means: (1) the renewal or replacement of the majority (more than 80%) of the wind turbines as evidenced by, but not limited to, contemporaneous replacement of the wind turbines with different models or (2) a significant modification to that portion of the Wind Project located on the premises such that a significant revision to the existing land use permit or a new land use permit is required for the premises. The following shall not constitute Repowering: (1) reuse of the Project Improvements, including roads, erosion control and premises access improvements, meteorological towers or transmission interconnection related to the premises, (2) replacement of the Wind Project substation for any reason, (3) replacement of wind turbines on the premises with substantially the same make and model in the same locations, or (4) replacement of any or all of the wind turbines and Project Improvements on the premises as a result of casualty or loss.

(j) "Waste" includes, but is not limited to, (1) permitting the premises, or any portion, to become unduly eroded or failure to take proper precautions or make reasonable effort to prevent or correct the erosion; (2) permitting a substantial increase in noxious weeds in uncultivated portions of the premises; and (3) failure to employ all of the usable portions of the premises.

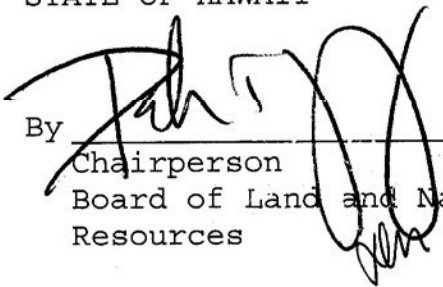
(k) "Wind Data" means maps showing the locations and orientation of anemometer or other towers, including UTM coordinates and heights of towers, all wind survey data collected (data shall be formatted to include at a minimum monthly speed, direction and other useful reports generated by off-the-shelf commercial software provided by the manufacturer of the wind monitoring equipment) and any interpretations, reports or conclusions derived from this data.

(l) "Wind Project" means the wind energy facility consisting of wind turbines interconnected by an electrical collection system and their associated project improvements. A Wind Project may extend across State land and other ownership in a given area.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on December 10, 2004.

By  \_\_\_\_\_  
Chairperson  
Board of Land and Natural  
Resources

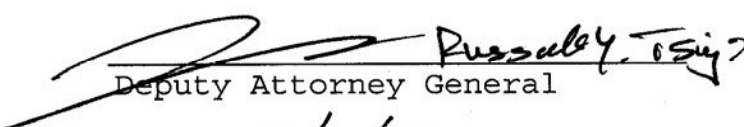
LESSOR

KAHEAWA WIND POWER, LLC

By  \_\_\_\_\_  
Its  
VICE PRESIDENT

LESSEE

APPROVED AS TO FORM:

  
Deputy Attorney General

Dated: 12/29/04

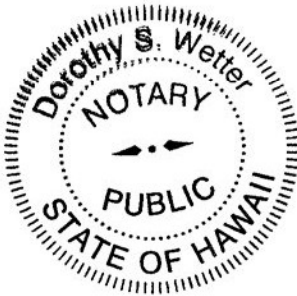
PRELIM. APPR'D.  
Department of the  
Attorney General

STATE OF HAWAII

COUNTY OF Maui

)  
) SS.  
)

On this 3rd day of January, 2005,  
before me personally appeared Mike Gresham  
and \_\_\_\_\_, to me personally known,  
who, being by me duly sworn or affirmed, did say that such  
person(s) executed the foregoing instrument as the free act and  
deed of such person(s), and if applicable in the capacity shown,  
having been duly authorized to execute such instrument in such  
capacity.



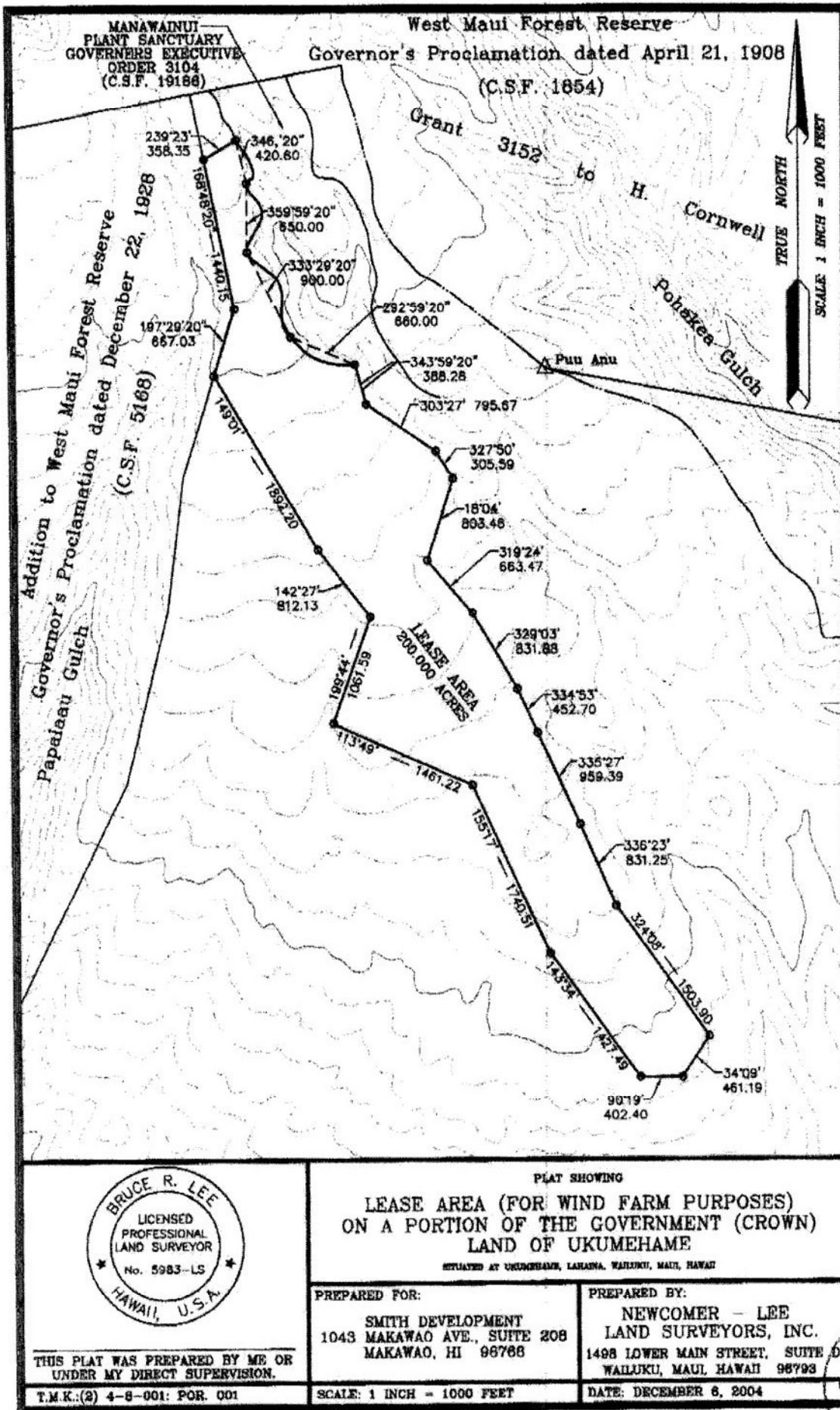
Dorothy S. Wetter  
Notary Public, State of Hawaii

Dorothy S. Wetter

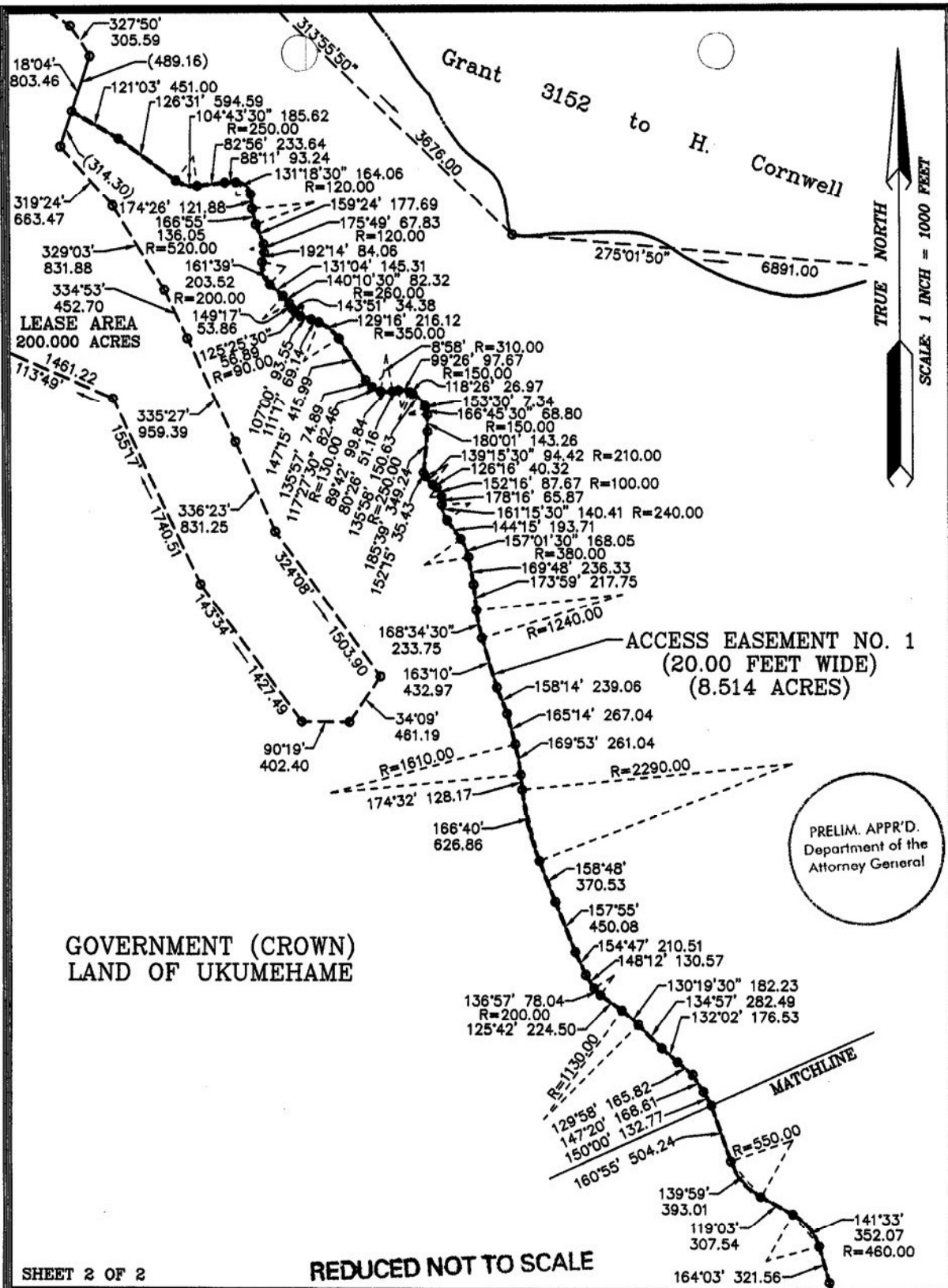
My commission expires: NOV. 23, 2007











THIS PLAT WAS PREPARED BY ME OR  
UNDER MY DIRECT SUPERVISION.

T.M.K.:(2) 4-8-001: POR. 001

PLAT SHOWING  
ACCESS EASEMENT NO. 1 AFFECTING  
A PORTION OF THE GOVERNMENT (CROWN)  
LAND OF UKUMEHAME

SITUATED AT UKUMEHAME, LAHAINA, WAILUKU, MAUI, HAWAII

PREPARED FOR:

SMITH DEVELOPMENT  
1043 MAKAWAO AVE., SUITE 208  
MAKAWAO, HI 96768

PREPARED BY:

NEWCOMER - LEE  
LAND SURVEYORS, INC.  
1498 LOWER MAIN STREET, SUITE D,  
WAILUKU, MAUI, HAWAII 96793

SCALE: 1 INCH = 1000 FEET

DATE: JANUARY 17, 2005

8.5" X 14"

DWG NO. 6665AE (ML) JOB NO. 04-6665

EXHIBIT "A"

## ASSIGNMENT OF LEASE EVALUATION POLICY

### 1. Enabling Statute.

Act 104, effective May 24, 1989, amended Chapter 171-36(a) (5) to read in part:

"... provided further that prior to the approval of any assignment of lease, the board shall have the right to review and approve the consideration to be paid by the assignee and may condition its consent to the assignment of the lease on payment by the lessee of a premium based on the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee;" (revision underlined)

### 2. Qualifying Leases.

This policy shall be applicable to the subject lease.

### 3. Prior Approval.

Prior to giving its consent to an assignment, DLNR must receive (i) the name, legal composition and address of any proposed assignee, (ii) a complete copy of the purchase agreement and the proposed assignment agreement, including the total consideration to be paid by the assignee for the assignment whether by cash, credit or otherwise, and (iii) the best available financial statement or balance sheet no older than 1 year prior to date of purchase agreement of the proposed assignee or any other such statement, audited or certified as correct by a financial officer of the proposed assignee.

Assignments of lease shall not be entered into until the Attorney General has reviewed the proposed assignment and the Land Board have given their approval. Such assignments shall be entertained only if they meet the criteria set forth in Section 171-36(a) (5), HRS.

### 4. Qualifications of Assignee.

If qualification was required of a lessee as a pre-condition of the lease, the prospective assignee must also be qualified to assume the lease.

EXHIBIT "B"



5. Consideration to be Paid.

Prior to review by the Attorney General and approval by the Land Board, the lessee (assignor) must present with written evidence of the consideration to be paid by the assignee and any other cost data that the state may require.

6. Payment of Premium.

The act permits the state to receive from the lessee (assignor) a premium based on the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee. The value of the inventory of merchandise and any other tangible assets in the sale of a business shall be deducted from the consideration paid. The appropriate cost index is then applied to determine the adjusted depreciated cost.

All lessees shall be required to furnish the state with the actual costs of construction of all improvements and renovations within 30 calendar days after its completion as well as the purchase costs of all trade fixtures acquired for the lessee's operation on the premises within 30 calendar days after their purchase. Lessees shall be required to furnish evidence of the actual costs by copy of the construction contract, receipts or otherwise. Lessees shall also be required to furnish an inventory of all personal property placed on the premises. Records of all costs incurred by the lessee for construction of improvements or renovations as well as trade fixtures submitted by the lessee shall be maintained in the lease file and shall include the Construction Cost Index for Apartments, Hotels, Office Buildings (CCI) and the Honolulu Consumer Price Index for All Urban Consumers (CPI) as published by the U.S. Department of Labor, Bureau of Labor Statistics for the year construction is completed.

The replacement cost for improvements or renovations is calculated by using the CCI for the evaluation year divided by the CCI for the year in which the improvements or renovations were completed (base year). The result is then multiplied by the original cost of the improvements or renovations. For trade fixtures, the cost is similarly calculated by using the CPI for the purchase year (base year) and the evaluation year.

Depreciation of improvements and trade fixtures will be determined on a straight line basis. Depreciation of improvements or renovations will be determined in the same proportion that the expired term of the improvements or renovations bear to the whole term. The whole term will be

from the date the construction of the improvements or renovations are completed until the termination date of the lease. Depreciation of trade fixtures will be determined in the same manner, except that the whole term will be the anticipated life of the trade fixture.

The premium will be a maximum of 50% of the excess. The percentage will decrease by 5% after every 5 years of the term has elapsed in accordance with Schedule C. The sliding scale will encourage long term occupancy and prevent speculation as well as recognize the investment, effort, and risk of the lessee.

In cases where the lessee is unable to furnish the Department of Land and Natural Resources with evidence of the actual cost of construction of improvements because the lessee has performed the work itself, the State may determine the cost or the lessee shall have the option of paying for an appraiser, to be selected by the Department of Land and Natural Resources, to determine what the improvements would have cost if the labor had been performed by a third party rather than the lessee. The lessee shall exercise its option by giving written notice to the lessor within thirty (30) calendar days after completion of construction of the improvements. If the lessee fails to exercise its option within this period, the lessor shall have the right to determine the cost of the improvements.

Schedule D attached provides a typical example of the evaluation calculations using Schedule A to calculate the replacement cost for improvements or renovations and depreciation, Schedule B to calculate the cost and depreciation for trade fixtures, and Schedule C to obtain the premium percentage.

7. Non-qualifying Deductions.

The statute only recognizes tangible items. Intangibles such as "goodwill", business name recognition, etc., are not deductible.

8. Subsequent Assignments.

If the consideration for any subsequent assignment includes the purchase of existing tenant owned improvements, the evaluation will be conducted in a similar manner as the first assignment. An example is shown on Schedule E.

Using Schedule E, the consideration the assignor paid less included inventory and any premiums will be used to obtain the adjusted depreciated cost of improvements and trade fixtures. Also, the Base Year is redefined to be the date

the assignor received the Consent of the Board to occupy the premises. The holding period (redefined Base Year to assignment date), or actual occupancy of the assignor, is used in place of the "expired term" when calculating depreciation. Depreciation will be calculated by dividing the holding period by the whole term of the lease (The whole term will remain unchanged).

The change in the CCI will be reflected by comparing the CCI for the redefined base year to the most current CCI.

The holding period will be the basis for determining the appropriate premium percentage. Subtracting the included inventory and any premiums from the consideration the assignor paid will result in a reassessment of the market value of the improvements. If additional improvements were constructed by the assignor, they will be treated in the same manner as improvements constructed by an original lessee.

The excess of subtracting the adjusted depreciated consideration the assignor paid and the adjusted depreciated cost of additional improvements, if any, from the consideration the assignor received will be used against the appropriate premium percentage to determine the amount payable to the state.

9. Rights of Holders of Security Interest-Agricultural Leases only.

In the event of foreclosure or sale, the premium, if any, shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid.

10. When state-owned improvements are included in the leased premises, improvement renovation requirements shall be recognized as being tenant-owned improvements for evaluation in the policy.

In other words, the total expenditure of the lessee to fulfill the requirement would be treated as though a new improvement was constructed.

PRELIM. APPR'D.  
Department of the  
Attorney General



SCHEDULE A.      Adjusted Depreciated Cost of Improvements or Renovations

1.    Adjusted Cost of Improvements or Renovations.

Multiply the actual cost of the improvements or renovations by the most recent U.S. Construction Cost Index for Apartments, Hotels, Office Buildings (CCI)\* and divide the result by the CCI of the year construction was completed (base year) to get the adjusted cost of improvements or renovations.

2.    Depreciation

Determine the depreciation percentage on a straight-line basis by dividing the expired term of the improvements or renovations by the whole term of the improvements or renovations, the whole term beginning on the date the improvements or renovations are completed to the expiration date of the lease. Multiply the adjusted cost of the improvements or renovations by the depreciation percentage to determine the depreciation.

3.    Depreciated Cost of Improvements or Renovations

Subtract the depreciation from the adjusted cost of improvements or renovations. The balance is the depreciated cost of improvements or renovations.

\*As published by the U.S. Department of Labor, Bureau of Labor Statistics

Example

	Actual cost:	\$500,000
	CCI (most recent):	121.1
	CCI (base year):	102.3
1.    Adjusted Cost of Improve- ments or Renovations	Expired term:	57 mos.
	Whole term:	408 mos.

$$\text{Actual Cost} \times \frac{\text{CCI (most recent)}}{\text{CCI (base year)}}$$

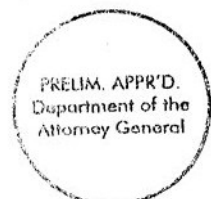
$$\$500,000 \times \frac{121.1}{102.3} = \$591,887$$

2.    Depreciation

$$\$591,887 \times \frac{57 \text{ mos.}}{408 \text{ mos.}} = \$82,690$$

3.    Adjusted Depreciated Cost of Improvements or Renovations

$$\$591,887 - \$82,690 = \underline{\$509,197}$$



SCHEDULE B.      Adjusted Depreciated Cost of Trade Fixtures

1.    Adjusted Cost of Trade Fixture.

Multiply the actual cost of the trade fixture by the most recent Honolulu Consumer Price Index for All Urban Consumers (CPI)\* and divide the result by the CPI of the year in which the purchase was made (base year).

2.    Depreciation.

Determine the depreciation percentage on a straight-line basis by dividing the expired term of the trade fixture by its anticipated life. Multiply the adjusted cost of the trade fixture by the depreciation percentage to determine the depreciation.

3.    Depreciated Cost of Trade Fixtures.

Subtract the depreciation from the adjusted cost of the trade fixture. The balance is the depreciated cost of the trade fixture.

\*As published by the U.S. Department of Labor, Bureau of labor Statistics

Refrigerator

Example

1.    Adjusted Cost of Trade  
      Fixture

Actual cost:	\$1,510
CPI (most recent):	118.1
CPI (base year):	104.6
Expired term:	57 mos.
Whole term:	96 mos.
(Anticipated life)	

Actual Cost X  $\frac{\text{CPI (most recent)}}{\text{CPI (base year)}}$

$\$1,510 \times \frac{118.1}{104.6} = \$1,705$

2.    Depreciation

$\$1,705 \times \frac{57 \text{ mos.}}{96 \text{ mos.}} = \$1,012$

3.    Adjusted Depreciated Cost of Trade Fixture

$\$1,705 - \$1,012 = \$ 693$

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Attorney General

SCHEDULE C.      Premium Percentages

1. For the first 5 years, the premium is 50% of the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee. The percentage will decrease by 5% after every 5 years of the total term has elapsed.

<u>Years</u>	<u>Percentage</u>
1 - 5	50%
6 - 10	45%
11 - 15	40%
16 - 20	35%
21 - 25	30%
26 - 30	25%
31 - 35	20%
36 - 40	15%
41 - 45	10%
46 - 50	5%
51 -	0%

As an example, if a 55 year lease was assigned after 57 months, the premium percentage would be 50%. If the assignment occurs after 130 months (10+ years), the percentage would be 40%.

2. The Board of Land and Natural Resources may impose a ten percent (10%) surcharge if the assignor has not performed lease covenants to improve or use the property.

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SCHEDULE D. Assignment of Lease Calculations

1. Subtract from the consideration for the assignment that amount, if any, that is attributable to inventory.
2. Calculate the Adjusted Depreciated Cost of Improvements or Renovations (see Schedule A).
3. Calculate the Adjusted Depreciated Cost of Trade Fixtures (see Schedule B).
4. Calculate the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee by subtracting the amounts derived by no. 2 and 3 from the amount in no. 1 above.
5. Determine the appropriate premium percentage (see Schedule C). Multiply by the excess, if any, derived by no. 4.

Example

A lease is being assigned 57 months after completion of the improvements at a consideration of \$600,000.

The initial cost of the improvements was \$500,000 while the current year CCI and base year CCI were 121.1 and 102.3, respectively. The whole term for the improvements is 408 months.

For the trade fixtures, the initial cost was \$1,510 with the current year CPI and base year CPI being 118.1 and 104.6, respectively. The total life expectancy is 96 months.

1.	Net Consideration:		\$600,000
2.	Adj Cost Imp/Ren:	\$591,887	
	Depreciation:	- 82,690	
	Adj Dep Cost Imp/Ren:		-509,197
3.	Adj Cost Trade Fixtures:	1,705	
	Depreciation:	- 1,012	
	Adj Dep Cost Trade Fixtures:		- 693
4.	Excess:		\$ 90,110
5.	Premium:	Percentage: 50%	\$ 45,055



SCHEDULE E.      Subsequent Assignment of Lease Calculations

1. Subtract from the consideration the assignor received for the assignment that amount, if any, that is attributable to inventory to derive the net consideration received.
2. Subtract from the consideration the assignor previously paid for the assignment that amount, if any, that was attributable to inventory. Also, subtract from the consideration the assignor previously paid for the assignment that amount, if any, that was attributable to premiums. The net consideration paid is now defined to be the value of improvements as of the date of the occupancy by the assignor.
3. Using the result from no. 2, calculate the Adjusted Depreciated Value of Improvements or Renovations (see Schedule A).
4. Subtract the amount derived by no. 3 from the amount in no. 1 to determine the amount by which the consideration received for the assignment, whether by cash, credit, or otherwise, exceeds the adjusted depreciated value of improvements being transferred to the assignee.
5. Determine the appropriate premium percentage (see Schedule C). Multiply by the excess, if any, derived by no. 4.

Example

An assignor is assigning a lease 107 months after receiving the consent of the Board. Occupancy or the holding period is defined to be 107 months. The consideration received is \$1,000,000.

The consideration paid by the assignor was \$600,000 while the current year CCI and redefined base year CCI were 156.4 and 121.1, respectively. The whole term was 408 months.

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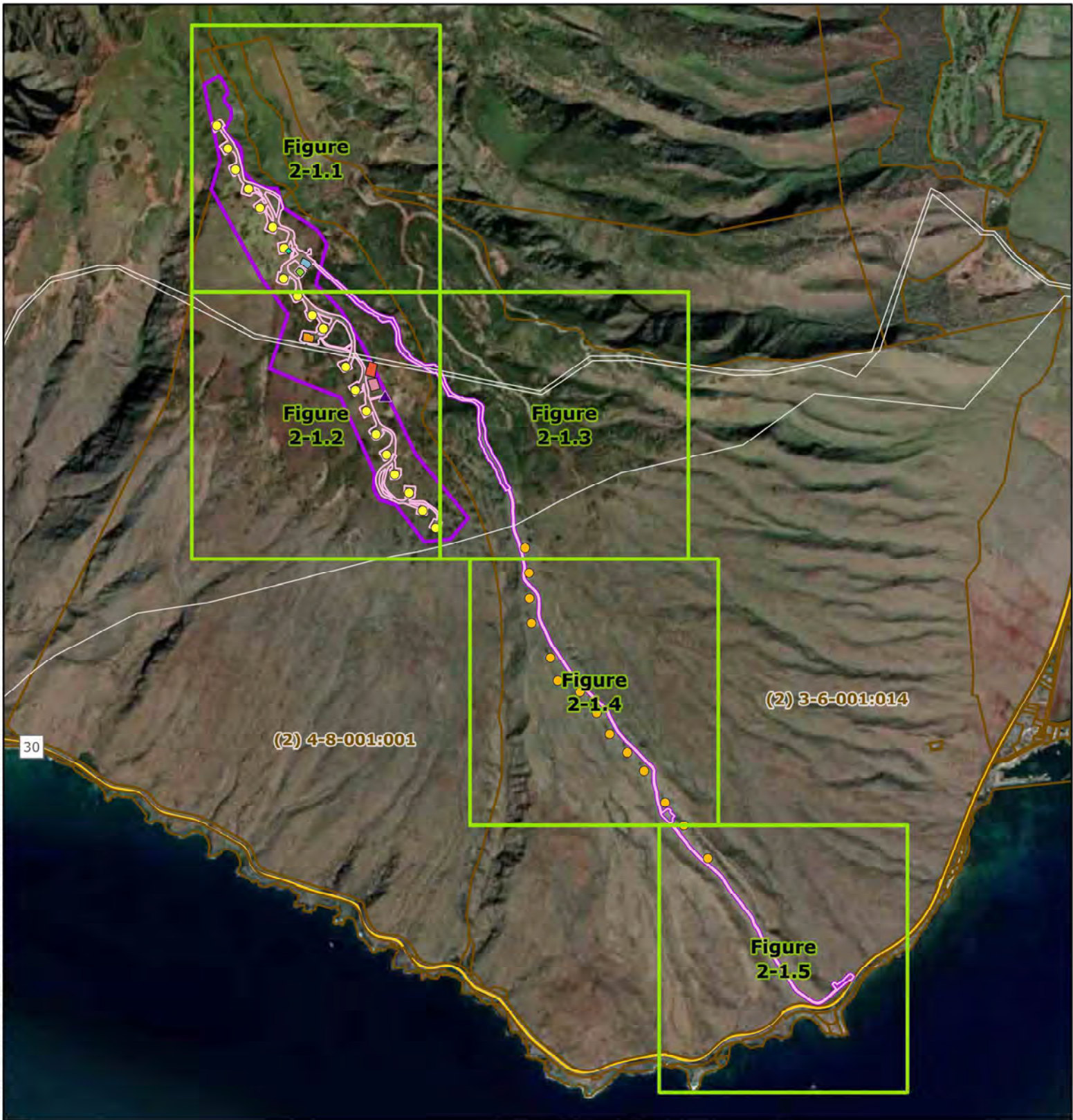
No inventory was included in either consideration.  
However, a premium of \$45,055 was paid to the state by the  
previous occupant from the \$600,000 consideration.

1.	Net Consideration <u>Received</u> :		\$1,000,000
2.	Consideration <u>Paid</u> :	\$600,000	
	Premium:	<u>- 45,055</u>	
	Net Consideration <u>Paid</u> :		\$554,945
3.	Adj Value Consideration (improvements):		
	\$554,945 X $\frac{156.4}{121.1}$	=	\$716,708
	Depreciation:		
	\$716,708 X $\frac{107 \text{ mos.}}{408 \text{ mos.}}$	=	<u>-187,960</u>
	Adj Dep Value Consideration:		- <u>528,748</u>
4.	Excess:		\$ 471,252
5.	Premium: Percentage:	45%	<u>\$ 212,063</u>

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Attorney General



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**Kaheawa Wind 1  
Continued Use  
Project**

**Figure 2  
Limits of Disturbance  
Index Map**

**MAUI COUNTY, HI**

Detail Map Grid	Warehouse Building and Yard
Project Area	HECO Switchyard and KWP 2 Substation
Limit of Disturbance	HECO Switchyard and KWP 1 Substation
TMK Boundary	KWP 2 Battery Storage Facility
State Highway	O&M Building and Yard
<b>Existing Facilities</b>	
KWP 1 Existing Wind Turbines	Existing Rain Catchment Structure
KWP 2 Existing Wind Turbines	KWP 1 Existing Met Tower
	Hawaiian Electric Transmission Lines

**Reference Map**

**Exhibit C**



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WGS 1984 UTM Zone 4N

0 250 500 1,000  
US Feet

NOT FOR CONSTRUCTION

## Kaheawa Wind 1 Continued Use Project

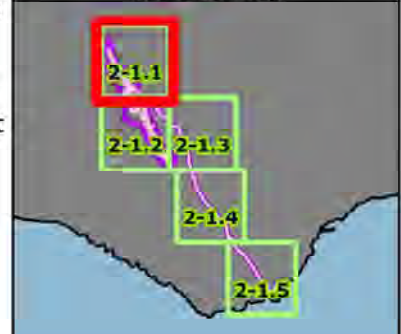
**Figure 2-1.1  
Limits of Disturbance  
Index Map**

MAUI COUNTY, HI

-  Project Area
-  Limit of Disturbance
-  TMK Boundary
- Existing Facilities
  -  KWP 1 Existing Wind Turbines

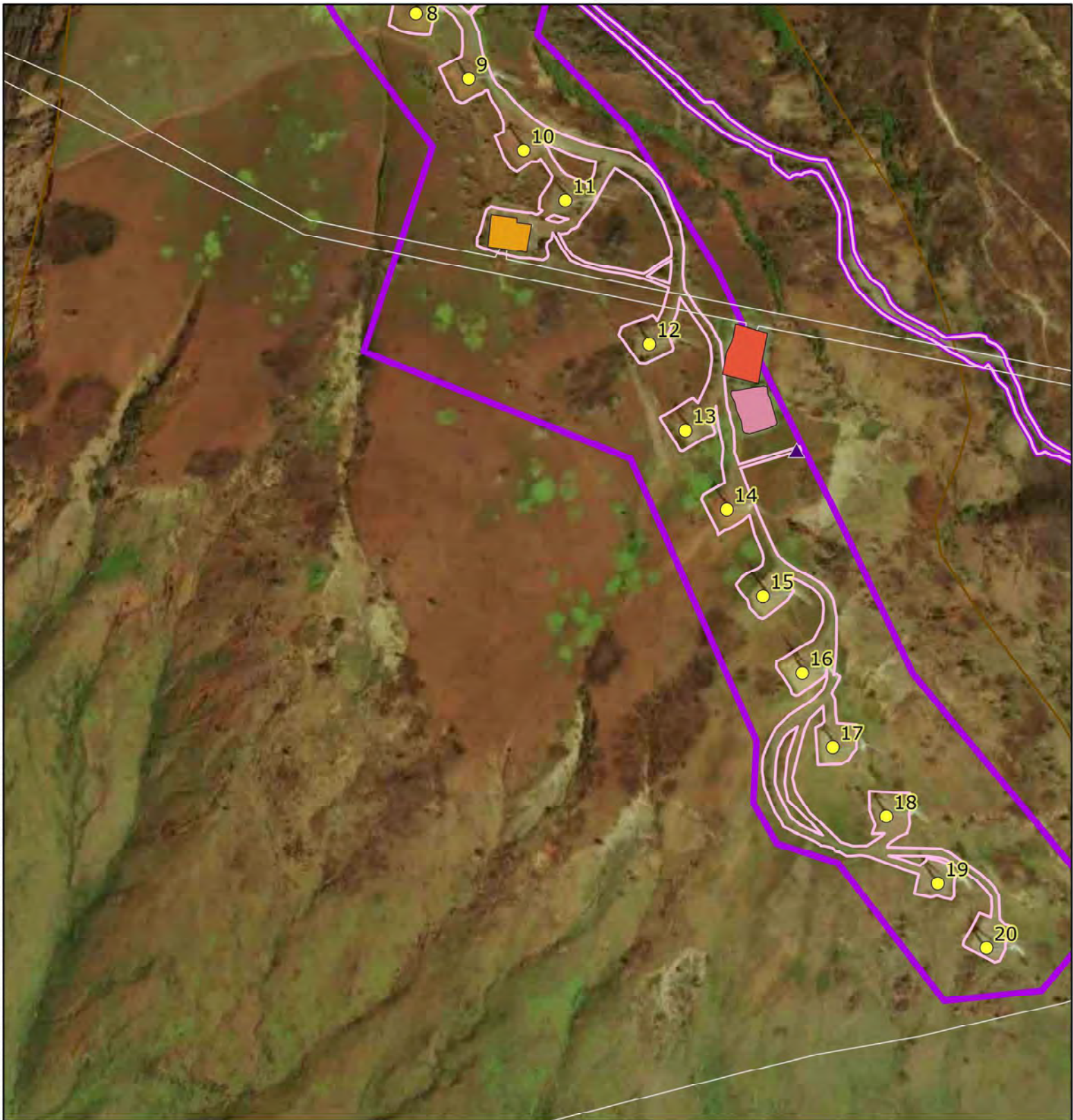
-  Warehouse Building and Yard
-  O&M Building and Yard
-  Existing Rain Catchment Structure

### Reference Map





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WGS 1984 UTM Zone 4N




0 250 500 1,000  
US Feet

NOT FOR CONSTRUCTION



## Kaheawa Wind 1 Continued Use Project





**Figure 2-1.2  
Limits of Disturbance  
Index Map**

MAUI COUNTY, HI

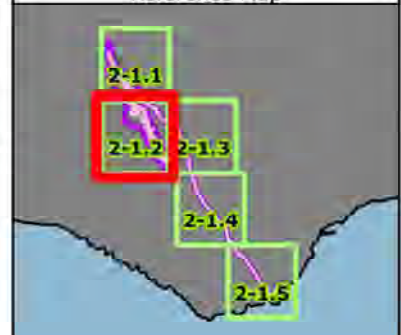
-  Project Area
-  Limit of Disturbance
-  TMK Boundary

### Existing Facilities

-  KWP 1 Existing Wind Turbines
-  KWP 1 Existing Met Tower

-  HECO Switchyard and KWP 2 Substation
-  HECO Switchyard and KWP 1 Substation
-  KWP 2 Battery Storage Facility
-  Hawaiian Electric Transmission Lines

### Reference Map





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WGS 1984 UTM Zone 4N




0 250 500 1,000  
US Feet

NOT FOR CONSTRUCTION



## Kaheawa Wind 1 Continued Use Project

**Figure 2-1.3  
Limits of Disturbance  
Index Map**

MAUI COUNTY, HI

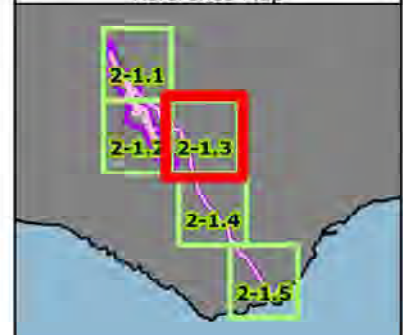
-  Project Area
-  Limit of Disturbance
-  TMK Boundary

### Existing Facilities

-  KWP 1 Existing Wind Turbines
-  KWP 2 Existing Wind Turbines

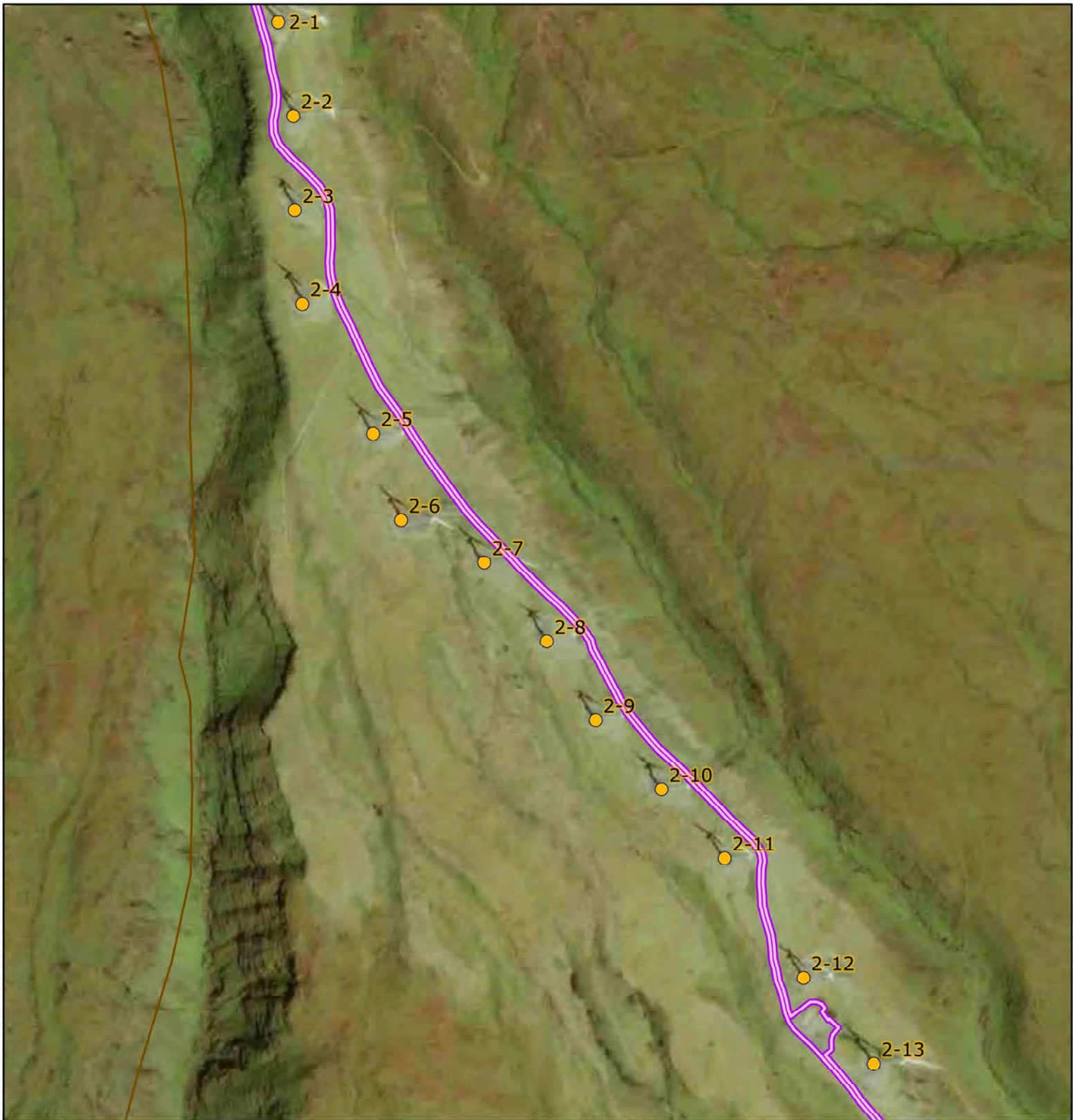
Hawaiian Electric  
Transmission Lines

### Reference Map





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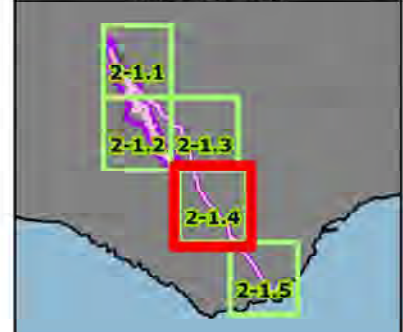
## Kaheawa Wind 1 Continued Use Project

**Figure 2-1.4  
Limits of Disturbance  
Index Map**

MAUI COUNTY, HI

-  Project Area
-  Limit of Disturbance
-  TMK Boundary
- Existing Facilities
-  KWP 2 Existing Wind Turbines

Reference Map





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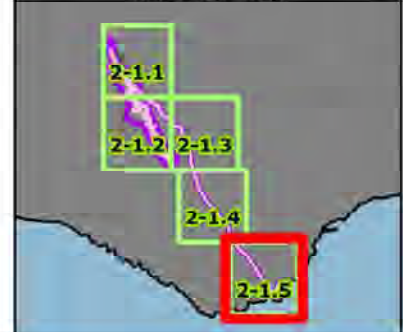
# **Kaheawa Wind 1 Continued Use Project**

**Figure 2-1.5  
Limits of Disturbance  
Index Map**

MAUI COUNTY, HI

- Project Area
- Limit of Disturbance
- TMK Boundary
- State Highway
- Local Roads
- Existing Facilities
  - KWP 2 Existing Wind Turbines

## **Reference Map**



## Kaheawa Wind Power 1 Project Summary

Subject: Request to conduct public hearings regarding a new lease for Kaheawa Wind Power, LLC on the Island of Maui

### I. SUMMARY

Kaheawa Wind Power, LLC (KWP 1 or Applicant) proposes to continue to operate its wind energy generation facility and lease approximately 200 acres, a portion of TMK (2) 4-8-001:001, Kaheawa Pastures, Ukumehame Ahupua'a, Island of Maui owned by the State of Hawai'i, State Department of Land and Natural Resources (DLNR) Land Division.

The Applicant is the current lessee under General and Holdover Lease No. S-5731 with the current term ending on January 31, 2026 and has applied for a new lease with DLNR to permit the facility to continue operations for an additional term of approximately twenty years. The new long-term lease would require no construction or physical improvements beyond maintenance activities.

### II. BACKGROUND

- The 30-megawatt KWP 1 project on Maui has been operating since 2006, capable of delivering clean energy for approximately 17,000 homes on the island each year. KWP 1 is a highly productive source of renewable power and is an essential contributor to resource diversity and system reliability on Maui.
- With the planned retirement of Maui's aging fossil-fueled generation fleet, KWP 1 displaces higher-cost fossil fuel generation, supplying affordable renewable energy at rates lower than conventional generation. The lower cost to consumers provides long-term cost stability and reduces ratepayer exposure to fossil fuel price volatility.
- The Applicant is operating under a 20-year Power Purchase Agreement (PPA) that will expire in June 2026 and was selected by Hawaiian Electric as part of the Stage 3 Request for Proposals (RFP) competitive bidding process to pursue a new PPA delivering renewable energy to Maui's electric grid for an additional 20 years. A new PPA will also include a substantial community benefits program, along with a funding commitment that is over three times the minimum utility guidance.
- KWP 1 is currently covered under an existing Environmental Impact Statement (EIS) pursuant to HRS Chapter 343. To cover the additional 20 years of continued use of

the leased area, a new draft EIS has been prepared, along with a new draft Habitat Conservation Plan (HCP) under HRS Chapter 195D. Both the EIS and HCP draft documents were published on August 8, 2025 through the State Office of Planning and Sustainable Development, Environmental Review Program (ERP) for public comment.

#### References Cited:

Kaheawa Wind Power 1 DRAFT Environmental Impact Statement. Published on August 8, 2025 and available online at [https://files.hawaii.gov/dbedt/erp/Doc\\_Library/2025-08-08-MA-DEIS-Kaheawa-Wind-1-Continued-Use-Project.pdf](https://files.hawaii.gov/dbedt/erp/Doc_Library/2025-08-08-MA-DEIS-Kaheawa-Wind-1-Continued-Use-Project.pdf).

Kaheawa Wind Power 1 DRAFT Habitat Conservation Plan. Published on August 8, 2025 and available online at [https://files.hawaii.gov/dbedt/erp/Other\\_TEN\\_Publications/2025-08-08-MA-Draft-HCP-Kaheawa-Wind-Power-I.pdf](https://files.hawaii.gov/dbedt/erp/Other_TEN_Publications/2025-08-08-MA-Draft-HCP-Kaheawa-Wind-Power-I.pdf).



# KAHEAWA WIND 1

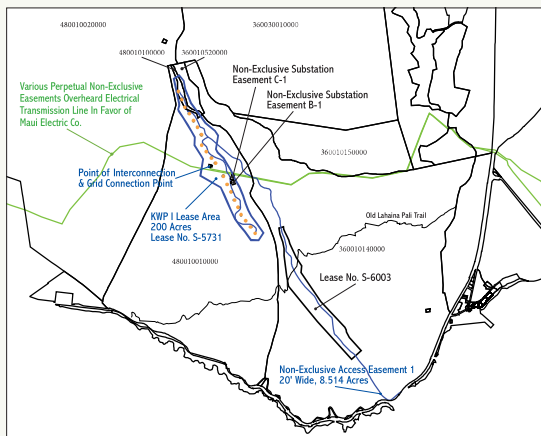
Continuing to Deliver Renewable Power to Maui for Future Generations

## Project Description

### Operating the Wind Farm as it is Today

- ▶ Delivering affordable renewable energy
- ▶ Extending the life for the next 20 years
- ▶ Providing grid reliability

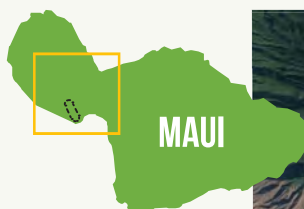
TerraForm Power operates Kaheawa Wind I and II in Kaheawa Pastures above Mā'alaea. Maui's first wind farm since 2006, Kaheawa Wind I has a production capacity of 30 MW, serving approximately 17,000 households annually, and contributing to energy affordability, grid reliability, energy security, and the state's movement towards 100% renewable energy by 2045.



**SITE MAP:** No changes to the existing layout are proposed at TMK 4-8-001-001-6001



**INTERCONNECTION ROUTE:** Point of interconnection is located at the existing KWP I substation and the interconnection route will remain the same



# KAHEAWA WIND 1

Continuing to Deliver Renewable Power to Maui for Future Generations

## Project Benefits



### **Deliver clean, renewable, locally generated energy at far below the cost of fossil fuels**

- + Kaheawa Wind 1 proposes to deliver clean energy to Maui below the cost of fossil fuels and below its current rate
- + Unlike fossil fuel powered generators that expose consumers to price volatility, Kaheawa Wind 1's cost of energy will remain fixed over its contract term
- + Kaheawa Wind 1 is committed to offering prevailing wages for future refurbishments at the facility



### **Maximize value of existing infrastructure & provide essential energy resource diversity**

- + Kaheawa Wind is an essential contributor to resource diversity and system reliability on Maui, and is a highly productive wind site
- + Hawaiian Electric has demonstrated that Kaheawa Wind 1 is essential to maintaining grid reliability standards
- + Extending the life of Kaheawa Wind 1 will reduce future land disturbance required to build new generating resources to replace it



### **Deliver a new community benefits program**

- + Kaheawa Wind 1 will collaborate with the community on design and delivery of a new community benefits program that reflects Maui's needs and choice, to be delivered with local, non-profit partners
- + Reflecting our commitment to a just transition for Maui, Kaheawa Wind 1 has committed to a program funding level significantly above HECO's Stage 3 guidance



# KAHEAWA WIND 1

Continuing to Deliver Renewable Power to Maui for Future Generations

## Community Engagement & Benefits

**Furthering a legacy of safety, environmental stewardship, and respect for the land and community**

### Our Approach

Community engagement is connecting human to human. It is seeing and honoring the whole person. It is an opportunity to listen and learn, and collectively, strengthen relationships with each other. We believe in collaborative participation and ensuring decision making is developed through a community-led approach.

### Community Benefits

Kaheawa Wind I is committed to providing **\$300,000 per year for the 20-year PPA term of the project**. That's three times more than the Hawaiian Electric annual funding guidance.

With ongoing outreach and the community's input, a Community Benefits Program (CBP) will be tailored to the needs and choice of our host community. The CBP will be implemented in 2027 and administered through a local Maui-based partner(s).

### We need your input!

- What types of community benefits are you interested in?
- What community programs and initiatives would you like see supported on Maui?



Visit [www.kaheawawind.com](http://www.kaheawawind.com)  
to complete a short survey.



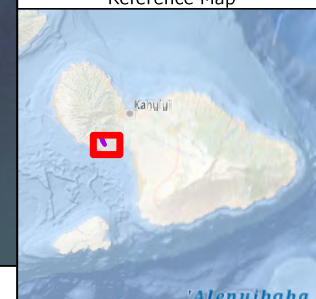
# Kaheawa Wind 1 Continued Use Project

**Figure:  
Site Plan**

MAUI COUNTY, HI

- Project Area
- TMK Boundary
- State Highway
- Existing Facilities
  - KWP 1 Existing Wind Turbines
  - HECO Switchyard and KWP 1 Substation
  - HECO Switchyard and KWP 2 Substation
  - O&M Building and Yard
  - Warehouse Building and Yard
  - KWP 2 Battery Storage Facility
  - Hawaiian Electric Transmission Lines

Reference Map



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WGS 1984 UTM Zone 4N

0 0.25 0.5 1 Miles

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Yamamoto | Hetherington  
a limited liability law company

## **MEMORANDUM**

To: Department of Land and Natural Resources  
Attn: Ian Hirokawa (Via Email: [ian.c.hirokawa@hawaii.gov](mailto:ian.c.hirokawa@hawaii.gov))  
Andrew Tellio (Via Email: [andrew.r.tellio@hawaii.gov](mailto:andrew.r.tellio@hawaii.gov))

Cc: Cindy Young, Esq. (Via Email: [cindy.y.young@hawaii.gov](mailto:cindy.y.young@hawaii.gov))

From: Dean T. Yamamoto  
Writer's Direct Dial: (808) 540-4501  
Email: [dyamamoto@yamamotolaw.com](mailto:dyamamoto@yamamotolaw.com)

Date: August 29, 2025

Re: Kaheawa Wind Power - Legal Framework for Treatment of Wind Turbine Improvements Under Hawaii Law

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### **I. INTRODUCTION.**

This memorandum provides a legal framework for understanding the treatment of wind turbine improvements located on State lands under that certain General Lease No. S-5731, between the State of Hawaii (the “State” or “Lessor”), by its Board of Land and Natural Resources (“BLNR”), and Kaheawa Wind Power, LLC (“KWP” or “Lessee”), dated January 19, 2005, as amended and extended from time to time (collectively, the “Lease”).<sup>1</sup> The analysis that follows sets out the key questions and provides answers grounded in the Lease, controlling Hawaii Supreme Court precedent, and applicable county real property tax ordinances.

The questions addressed are as follows:

- 1. Do wind turbines automatically revert to the Department of Land and Natural Resources (“DLNR”) when the Lease expires?<sup>2</sup>**

**No, there is no automatic reversion.** The Lease expressly distinguishes

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<sup>1</sup> General Lease No. S-5731, dated January 19, 2005, between BLNR and KWP (the “Original Lease”), as amended by Amendment of General Lease No. S-5731, dated March 11, 2005, as further amended by Amendment No. 2 of General Lease No. S-5731, dated July 15, 2005, as further amended by Amendment No. 3 of General Lease No. S-5731, dated December 7, 2007, and as extended by Holdover of General Lease No. S-5731, dated January 30, 2025 (the “Holdover”).

<sup>2</sup> Under the Lease, the Lessor is the State, by and through BLNR. The Department of Land and Natural Resources (DLNR) is the State agency that administers the leases under BLNR’s oversight. For ease of reference, this memorandum refers to DLNR when discussing the State’s position as Lessor.

**Exhibit E**

between pre-existing improvements, which were reserved to DLNR, and improvements constructed during the Lease term (defined as “Project Improvements,” including wind turbines). Under Paragraphs 3 and 11 of the Lease, Project Improvements are the property of KWP and are subject to removal obligations at expiration. Nothing in the Lease provides for automatic reversion of the turbines to DLNR, and Hawaii law does not create such a reversionary right.

**2. Under Hawaii law, are wind turbines considered fixtures (real property) or personal property?**

**Wind turbines are personal property, not fixtures.** The Hawaii Supreme Court, in Kaheawa Wind Power, LLC v. County of Maui (“Kaheawa Wind”), held that wind turbines are not fixtures, and therefore, do not constitute real property.<sup>3</sup> Applying the statutory definitions set forth in Hawaii Revised Statutes (“HRS”) §§ 231-1 and 248-1, together with the common law fixture test, the Court concluded that turbines are removable without substantial damage and are not “necessary to the utility of the land” itself. Their function is tied to a specific business use – generation of electricity – rather than to the general utility of the land. Both the Court’s analysis and the Lease provisions confirm that the turbines retain their character as personal property.

**3. How do counties treat wind turbines for tax purposes?**

**Counties uniformly treat wind turbines as personal property.** Each Hawaii county has adopted ordinances that exempt renewable energy improvements, including wind turbines, from taxation as real property. For example, the Revised Ordinances of Honolulu (§ 8-10.12), the Maui County Code (§ 3.48.520), the Hawaii County Code (§ 19-82), and the Kauai County Code (§ 5A-11.30) all establish exemptions for renewable or alternate energy improvements. These exemptions demonstrate legislative recognition that, although physically affixed, wind turbines are properly treated as equipment rather than fixtures. If turbines were real property, no such exemptions would be necessary. This uniform county treatment reinforces the conclusion that turbines are personal property and not subject to reversion with the land.

As discussed more fully below, the Lease, Hawaii Supreme Court precedent, and county ordinances collectively establish that wind turbines remain the property of KWP and do not revert to DLNR at Lease expiration.

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<sup>3</sup> See Kaheawa Wind Power, LLC v. County of Maui, 146 Hawai‘i 76, 456 P.3d 149 (2020).



## II. **BACKGROUND.**

Questions have arisen regarding the treatment of wind turbine improvements at the expiration of the Lease and whether such improvements, including turbines, should revert to the State. The answer is clear upon review of the Lease provisions, Hawaii law governing fixtures and personal property, and county real property tax ordinances.

Although the turbines are integral to the renewable energy project during the Lease term, their connection to the land is temporary and does not satisfy the legal definition of fixtures. The Hawaii Supreme Court has addressed this issue directly in Kaheawa Wind, holding that wind turbines are not fixtures, and therefore, do not constitute real property.<sup>4</sup> Consistent with that precedent, Hawaii's counties uniformly exclude wind turbines and other renewable energy equipment from the definition of real property for purposes of taxation.

Accordingly, any treatment of the turbines as fixtures that automatically revert to the State at Lease expiration is inconsistent with the Lease, contrary to Hawaii Supreme Court precedent, and at odds with county tax treatment. The more accurate interpretation is that the turbines and related equipment remain the personal property of KWP.

## III. **DISCUSSION.**

### A. **Project Improvements Do Not Automatically Revert to DLNR at Lease Expiration.**

The Lease provisions governing ownership of improvements make clear that Project Improvements constructed by KWP during the Lease term remain the property of KWP and do not automatically revert to DLNR upon expiration.

#### 1. **Paragraph 3 – Pre-existing improvements reserved to DLNR.**

Paragraph 3 of the Lease expressly reserves to DLNR only those improvements that existed on the premises prior to or at the commencement of the Lease. It provides in relevant part:

Reserving unto Lessor the following: . . . The ownership of all improvements . . . located on the land prior to or on the commencement date of this lease, excluding those improvements constructed during the term of this lease unless provided otherwise.<sup>5</sup>

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<sup>4</sup> See id. at 93, 456 P.3d at 166 (holding that “wind turbines cannot be construed as ‘real property’ subject to the County’s taxation”).

<sup>5</sup> See Lease at 5 (paragraph 3).

This language confirms that improvements existing before the Lease remain with DLNR, while improvements constructed during the Lease term are expressly excluded from DLNR's ownership.

2. Paragraph 59(g) – Project Improvements defined to include turbines.

The Lease defines "Project Improvements," as including wind turbines and all associated facilities:

"Project Improvements" includes wind turbines, all appurtenant meteorological towers and equipment, electrical components (overhead and underground power lines and their supporting structures, transformers, switching and connection enclosures, metering systems, communication lines and auxiliary equipment), service buildings, access controls (gates, cattle guards and fences), safety and wind project identification signage, erosion and fire control features and roads that may be used in connection therewith located on the premises.<sup>6</sup>

This expansive definition leaves no doubt that the turbines, together with their supporting infrastructure, are classified as Project Improvements under the Lease.

3. Paragraph 9 – Authorization to construct Project Improvements at KWP's cost.

KWP's authority to construct Project Improvements is set out in Paragraph 9, which states, in relevant part, that:

The Lessee shall, at its own cost and expense, . . . complete the construction of a 30-megawatt wind power project or Project Improvements.<sup>7</sup>

This provision underscores that the Project Improvements were built at KWP's sole expense and risk, reinforcing that they are not part of DLNR's ownership interest.

4. Paragraph 11 – Ownership remains with KWP during the Lease.

Most importantly, Paragraph 11 establishes that improvements constructed by KWP remain its property:

During the term of this lease, the improvements constructed by the Lessee, including without limitation all additions, alterations and

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<sup>6</sup> See Lease at 7-8 (paragraph 59(g)).

improvements thereto or replacements thereof and all appurtenant fixtures, machinery and equipment installed therein, shall be the property of the Lessee. At early termination for whatever reason or expiration of this lease, all existing improvements . . . shall be removed at the Lessee's sole expense, unless the Lessor elects to assume ownership of improvements as provided herein.<sup>8</sup>

This language confirms that Project Improvements, including the turbines, remain KWP's property during the Lease. The removal obligation reinforces the conclusion that ownership rests with KWP unless otherwise agreed. These provisions also confirm that KWP alone bears the cost and the risk of constructing and, if required, removing the Project Improvements. In that context, it would be inconsistent for those same improvements to be simultaneously treated as assets of DLNR for purposes of calculating rent, since the Lease framework expressly allocates both ownership and responsibility to KWP.

Paragraph 11 does reference an election mechanism under which DLNR could choose to assume ownership of certain improvements at expiration. That language, however, must be read in conjunction with the subsequent Holdover. Section 4 of the Holdover sets forth comprehensive removal obligations and establishes a removal bond, and by its terms supersedes any inconsistent provisions of the Original Lease.<sup>9</sup> In approving the Holdover, BLNR noted in its meeting minutes that removal would only be required if KWP failed to secure a new lease after the Holdover term, confirming that the

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<sup>8</sup> See Lease at 8 (paragraph 11).

<sup>9</sup> See Holdover at § 4. Section 4 of the Holdover, in effect, replaces Paragraph 30 of the Original Lease, and provides in pertinent part:

That at the expiration or other early termination of this holdover, the Lessee shall:  
(a) remove all improvements from the premises described in General Lease No. S-5731, including but not limited to all wind turbine foundations, infrastructure and road, subsurface improvements, with no depth limitation, and restore the premises to its original natural condition . . . Furthermore, upon the expiration, termination, or revocation of this holdover, should the Lessee fail to remove any and all of Lessee's personal property from the premises, after notice thereof, the Lessor may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the expiration or early termination of the holdover.

Lessee shall furnish a removal bond . . . to ensure the removal of all of the improvements on the premises, including but not limited to all wind turbine foundations, infrastructure and road, subsurface improvements, with no depth limitation, and restoration of the premises to its original natural condition to the satisfaction of the Lessor. . . . the terms and conditions of this Section 4 shall control and specifically to the removal requirements and the removal bond requirement herein.

Holdover was intended as an interim extension rather than a termination point for ownership of Project Improvements.<sup>10</sup> In this context, the Paragraph 11 election mechanism is no longer operative, as the Holdover requires removal and leaves no continuing option for DLNR to elect to assume ownership. Accordingly, the turbines remain KWP's personal property at the end of the Holdover and do not automatically revert to DLNR as part of the land.

5. Controlling principle.

Read together, these provisions establish a framework in which pre-existing improvements remain with DLNR, while Project Improvements constructed during the Lease term, including the wind turbines, remain the property of KWP. At expiration, KWP bears contractual obligations to remove the Project Improvements, but those obligations do not transfer ownership to DLNR. Nothing in the Lease creates an automatic reversionary right, and the Holdover confirms that removal would only be required if a new lease were not secured. The controlling principle is that DLNR has no automatic right of reversion in the turbines or other Project Improvements upon expiration of the Lease.

**B. Wind Turbines Are Personal Property, Not Fixtures.**

Whether wind turbines should be treated as fixtures (real property) or as personal property has been directly addressed by the Hawaii Supreme Court. The Court's decision in Kaheawa Wind is controlling and establishes that wind turbines are not fixtures and therefore do not constitute real property.<sup>11</sup>

1. Hawaii Supreme Court precedent and statutory definitions.

In Kaheawa Wind, the Court considered whether KWP's wind turbines should be classified as real property for purposes of Maui County's property tax assessment.<sup>12</sup> The Court's analysis turned on both the statutory definitions of real property under Hawaii law and the common law fixture test.<sup>13</sup>

Hawaii Revised Statutes ("HRS") §§ 231-1 and 248-1 define "real property" for taxation purposes in substantially identical terms. Both provisions include not only land, structures, and improvements, but also "machinery and equipment" as part of real

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<sup>10</sup> See BLNR, Minutes of Meeting (Jan. 2025) (approving Holdover of General Lease No. S-5731). In the approval notes, Chair Chang, with confirmation from Deputy Attorney General Danica Swenson, stated that removal of improvements would be required only if KWP failed to secure a new lease following expiration of the Holdover period.

<sup>11</sup> See Kaheawa Wind, 146 Hawai'i at 93, 456 P.3d at 166.

<sup>12</sup> Id. at 80, 456 P.3d at 153.

<sup>13</sup> Id. at 90-93, 456 P.3d at 163-166.

property for taxation purposes.<sup>14</sup> HRS § 248-1, which provides the operative definition for county taxation purposes, states, in relevant part:

“Property” or “real property” means and includes all land and appurtenances thereof and the buildings, structures, fences, and improvements erected on or affixed to the same, and any fixture that is erected on or affixed to such land, buildings, structures, fences, and improvements, including all machinery and other mechanical or other allied equipment and the foundations thereof, whose use thereof is necessary to the utility of such land, buildings, structures, fences, and improvements, or whose removal therefrom cannot be accomplished without substantial damage to such land, buildings, structures, fences, and improvements, excluding, however, any growing crops.<sup>15</sup>

Although the statutory language includes machinery and equipment in the definition of real property, the Court in Kaheawa Wind emphasized that the statutory definition must be applied consistently with the common law fixture test.<sup>16</sup> That test requires examination of three elements: (1) the degree of annexation to the land, (2) the adaptation of the item to the land’s use, and (3) the intent of the parties as to permanence.<sup>17</sup> Applying this framework, the Court found that the turbines could be removed without substantial damage, were not “necessary to the utility of the land,” and served a specific business purpose – the generation of wind energy – rather than the general utility of the land.<sup>18</sup>

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<sup>14</sup> See HRS § 231-1, which provides the general definition of “real property” for taxation purposes and is substantively similar to § 248-1. The statute defines “real property” as:

“Property” or “real property” has the meaning defined herein, and, to the extent applicable to other chapters of the law under title 14 administered by the department includes other subjects or measures of tax. “Real property” includes all land and appurtenances thereof and the buildings, structures, fences, and improvements erected on or affixed to the land, and any fixture which is erected on or affixed to the land, buildings, structures, fences, and improvements, including all machinery and other mechanical or other allied equipment and the foundations thereof, whose use is necessary to the utility of the land, buildings, structures, fences, and improvements, or whose removal therefrom cannot be accomplished without substantial damage to the land, buildings, structures, fences, and improvements, excluding, however, any growing crops.

<sup>15</sup> HRS § 248-1.

<sup>16</sup> See Kaheawa Wind, 146 Hawai‘i at 92-93, 456 P.3d at 165-166.

<sup>17</sup> See id.

<sup>18</sup> See id.

The Court therefore held that, despite the statutory inclusion of machinery and equipment within the definition of real property, the “wind turbines are not ‘fixtures,’ and do not constitute ‘real property.’”<sup>19</sup>

2. Application to the Lease.

This reasoning applies directly here. The Lease expressly defines turbines and associated equipment as “Project Improvements” owned by KWP, and Paragraph 11 confirms they remain the property of KWP during the Lease. While the turbines are affixed to foundations, the Court’s analysis makes clear that physical attachment alone does not transform equipment into real property when its use is project-specific and it can be removed without substantial harm.

3. Governing principle.

The statutory definitions of real property under HRS §§ 231-1 and 248-1, together with the Hawaii Supreme Court’s application of the common law fixture test in Kaheawa Wind, establish that wind turbines are properly treated as personal property, not fixtures. The Lease provisions reinforce this classification by expressly reserving ownership of Project Improvements to KWP. The governing principle is that turbines, though integral to the project during the Lease, are personal property and therefore cannot be deemed to revert to DLNR at Lease expiration.

C. **County Real Property Tax Ordinances Confirm that Wind Turbines Are Treated as Personal Property.**

In addition to the Lease provisions and Hawaii Supreme Court precedent, the treatment of wind turbines under county real property tax ordinances further confirms that turbines are regarded as personal property rather than real property. Each county has adopted exemptions or carve-outs that recognize renewable energy equipment as distinct from taxable real property.

1. City and County of Honolulu.

The Revised Ordinances of Honolulu (“ROH”) expressly recognize renewable energy facilities as distinct from real property for tax purposes. ROH § 8-10.12(d) defines a “renewable energy improvement” as:

[A]ny construction or addition, alteration, modification, improvement, or repair work undertaken upon or made to any building, property, or

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<sup>19</sup> See id. 146 Hawai‘i at 93, 456 P.3d at 166.



land that results in . . . [t]he production or storage of energy from a source . . . that does not use fossil fuels . . . [including] wind.<sup>20</sup>

Wind turbines clearly fall within this definition, as they are structures and equipment built on land to generate energy from wind rather than fossil fuels.

In addition, ROH § 8-10.12(b) provides that, “[t]he portions of land actually used for the active production or storage of renewable energy shall be exempt from 80 percent of its value” for purposes of real property taxation.<sup>21</sup> This land-based exemption, together with the recognition of “renewable energy improvements” reflects a deliberate distinction between renewable energy equipment and ordinary real property improvements.

This treatment confirms that wind turbines, while physically affixed to land, are classified separately from real property for tax assessment purposes. The exemption would be unnecessary if wind turbines were fixtures or real property, as such property would automatically be subject to real property taxation. Instead, Honolulu’s ordinance demonstrates that turbines are treated as equipment or improvements distinct from the underlying land, consistent with their classification as personal property.

## 2. Maui County.

The Maui County Code (“MCC”) likewise exempts what it terms “alternate energy improvements” from real property taxation. MCC § 3.48.520 defines such improvements to include construction that produces energy from non-fossil fuel sources, including wind. It further provides that the “value of all improvements in the County (not including a building or its structural components, except where alternate energy improvements are incorporated into the building and then only that part of the building necessary to such improvement) actually used for an alternate energy improvement shall be exempted from the measure of the taxes imposed by this chapter.”<sup>22</sup>

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<sup>20</sup> See ROH § 8-10.12(d).

<sup>21</sup> See ROH § 8-10.12(b).

<sup>22</sup> See MCC § 3.48.520, which states, in relevant part:

A. As used in this section, “alternate energy improvement” means any construction or addition, alteration, modification, improvement, or repair work undertaken upon or made to any building which results in:

1. The production of energy from a source, or uses a process which does not use fossil fuels, nuclear fuels or geothermal source. Such energy source may include but shall not be limited to solid wastes, wind, solar, or ocean waves, tides, or currents . . .

B. The value of all improvements in the County (not including a building or its structural components, except where alternate energy improvements are incorporated into the building and then only that part of the building necessary to such improvement) actually

Wind turbines fall squarely within this definition as “alternate energy improvements” because they are structures and equipment used to produce energy from wind, a non-fossil fuel source. By expressly exempting the value of such improvements from real property taxation, Maui County confirms that turbines are not taxable real property but rather equipment distinct from the underlying real estate. Because the KWP project is located in Maui County, this exemption is directly applicable and controlling.

3. Hawaii County.

The Hawaii County Code (“HCC”) adopts the same approach, exempting “alternate energy improvements” from real property taxation. HCC § 19-82 provides that the “value of all improvements in the County . . . actually used for an alternate energy improvement shall be exempted from the measure of the taxes imposed by this article.”<sup>23</sup> This exemption plainly encompasses facilities such as wind turbines, confirming that they are not treated as taxable real property.

4. Kauai County.

The Kauai County Code (“KCC”) provides an explicit exemption for commercial renewable energy facilities from real property taxation. KCC § 5A-11.30 defines “energy generation improvements” to include:

[M]achinery, equipment, structures, transmission lines, generators, associated prime movers, measuring and regulating equipment, and any other physical improvements that are normally operated together to produce electric power, but does not include the owner's residence or other property improvements that are non-essential to the production, storage, or distribution of alternative renewable energy.<sup>24</sup>

The operative exemption clause then provides:

Energy generation improvements shall be 100% exempt from real property taxes and the lands underlying areas that are designated

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used for an alternate energy improvement shall be exempted from the measure of the taxes imposed by this chapter.

<sup>23</sup> See HCC § 19-82.

(a) The value of all improvements in the County (not including a building or its structural components, except where alternate energy improvements are incorporated into the building, and then only that part of the building necessary to such improvement) actually used for an alternate energy improvement shall be exempted from the measure of the taxes imposed by this article.

<sup>24</sup> See KCC § 5A-11.30

and approved for commercial alternative energy facilities shall be 50% exempt from real property taxes provided the form of energy being produced originates from an alternative renewable energy source.<sup>25</sup>

This structure demonstrates that Kauai treats wind turbines and associated renewable energy equipment as “energy generation improvements” that are fully exempt from real property taxation. By expressly exempting these improvements, the ordinance confirms that wind turbines are regarded as equipment distinct from the underlying land and not taxable as real property.

5. Uniform county treatment as a controlling legal principle.

Taken together, these county ordinances demonstrate a consistent policy choice that wind turbines and similar renewable energy facilities are treated as equipment, not as taxable real property improvements. If turbines were legally considered real property, such exemptions would be unnecessary. By carving out wind turbines from real property taxation instead of treating them as fixtures inseparable from the land, each county has reinforced that such improvements are legally distinguished from the underlying real estate and retain their status as personal property. This distinction affects tax treatment and aligns with statutory interpretations and case law in Hawaii holding that turbines are personal property.

**IV. CONCLUSION.**

The governing legal framework for wind turbines improvements in Hawaii is clear. The Lease expressly provides that project improvements constructed by KWP, including wind turbines, remain the property of the lessee or KWP during the term and are subject to removal obligations upon expiration. Nothing in the Lease creates an automatic right of reversion in favor of DLNR, and the limited election provision has been superseded by the Holdover, which was further clarified in BLNR’s meeting minutes.

Hawaii Supreme Court precedent likewise confirms that wind turbines are not fixtures but personal property. Applying statutory definitions and the common law fixture test, the Court held that turbines are removable without damage to the land and serve a business purpose (generation of electricity), not the utility of the land itself.

Finally, county real property tax ordinances across Honolulu, Maui, Hawaii, and Kauai consistently exempt wind turbines and similar renewable energy improvements from real property taxation. The fact that each county has chosen to specifically exempt wind turbines from real property taxation, rather than automatically assessing them as fixtures or integral components of real property, demonstrates that these improvements

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<sup>25</sup> See KCC § 5A-11.30(c)(1).

are recognized as legally distinct from the underlying real estate and maintain their character as personal property.

This consistent treatment across the Lease, precedent, and county ordinances underscores that ownership and economic responsibility for the turbines rests with KWP. Within that framework, it would be inconsistent to also treat the turbines as DLNR's assets for purposes of setting lease rent, since the Lease allocates both construction costs and removal obligations solely to KWP. Such an interpretation would conflict with the allocation of rights and obligations reflected in the Lease and confirmed by Hawaii law.

Taken together, the Lease, judicial precedent, and county ordinances establish that wind turbines are personal property belonging to KWP. The Hawaii Supreme Court is ultimately dispositive here. The Court announced that it would "only consider property to be a 'fixture' under Zangerle if the land to which the alleged fixture is attached cannot be purposefully utilized without its presence. Applying this test, . . . wind turbines are not 'fixtures,' and do not constitute 'real property.'"<sup>26</sup> Accordingly, under the governing legal framework, the wind turbines remain the personal property of KWP and are not subject to reversion to DLNR at Lease expiration.

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<sup>26</sup> See Kaheawa Wind, 146 Hawai'i at 93, 456 P.3d at 166. In so holding, the Court was referencing the common law test set forth in Zangerle v. Republic Steel Corp., 60 N.E.2d 170 (1945).

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

May 9, 2025

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

GLS-4302

**Hawaii**

Authorize a One-Year Holdover of General Lease No. S-4302, Yamada Transfer, Inc., Lessee; Require Lessee to Post a Removal Bond Covering the Cost of Removing all Improvements from the Lease Premises at the end of the Holdover Period in the Event the Board Elects such Removal, Waiakea House Lots, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-2-037:089.

APPLICANT:

Yamada Transfer, Inc., lessee, a Hawaii for-profit corporation.

LEGAL REFERENCE:

Sections 171-40, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands of Waiakea House Lots situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: (3) 2-2-037:089, as shown on the attached map labeled Exhibit A.

AREA:

4.82 acres, more or less.

ZONING:

State Land Use District: Urban  
County of Hawaii CZO: MG-1a (General Industrial – 1 acre min.)

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON

May 9, 2025 KH

**Exhibit F**

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act  
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rules (HAR) § 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on November 10, 2020, the subject request is exempt from the preparation of an environmental assessment pursuant to General Exemption Type 1 that states, "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing," and Part 1, Item 40 that states, "Leases of State land involving negligible or no expansion or change of use beyond that previously existing," The proposed holdover of the existing lease of land with existing improvements constitutes a de minimis action that will probably have minimal or no significant effect on the environment and should be declared exempt from the preparation of an environmental assessment and the requirements of § 11-200.1-17, HAR.

DCCA VERIFICATION:

Place of business registration confirmed:	YES
Registered business name confirmed:	YES
Applicant in good standing confirmed:	YES

CURRENT USE STATUS:

Encumbered by General Lease No. S-4302, Yamada Transfer, Inc., for general industrial purposes.

CURRENT LEASE TERM AND ANNUAL RENT:

Original term of 55 years, commencing on May 12, 1970 and expiring May 11, 2025. A reopening appraisal performed as of May 12, 2020 set the annual rent for the period May 12, 2020 through May 11, 2025 at \$166,340.00 payable in two semi-annual installments on the 12<sup>th</sup> day of May and November.

HOLDOVER LEASE COMMENCEMENT DATE AND TERM:

May 12, 2025 for a term of one-year, expiring May 11, 2026.



HOLDOVER LEASE ANNUAL RENT:

Continuation of the current annual rental amount and payment terms.

PERFORMANCE BOND:

Continuation of the current bond amount, which is twice the annual rent.

BACKGROUND:

General Lease No. S-4302 (GLS-4302) was sold to Robert M. Yamada, Maile E. Chong, Ronald L. Yamada and Donald K. Yamada dba Yamada Transfer by way of public auction. The lease was issued for a term of 55 years commencing on May 12, 1970 and expiring May 11, 2025.

At its meeting of April 25, 1975, agenda item F-1-h, the Board approved an assignment of lease from the five individuals to their corporate successor, Yamada Transfer, Inc.

REMARKS:

The Lessee expressed intent to apply for a lease extension pursuant to Act 149, Session Laws of Hawaii 2018 (Act 149). However, although staff remained in contact with the Lessee to inquire on the status of the application, the Lessee did not submit an application for lease extension. The Lessee explained that it was not able to submit the application at this time due to the inability to provide an appraisal report for their existing improvements. At this point, there is not sufficient time for staff to properly review a lease extension application, including a review of the appraisal of the improvements, and bring it before the Board prior to the expiration of the lease.

As an alternative, staff brings this request for a one-year holdover, effective May 12, 2025 and expiring on May 11, 2026. During the holdover period, staff understands that Lessee intends to pursue a new direct lease for the subject property pursuant to Act 114, Session Laws of Hawaii 2024 (Act 114). Act 114 authorizes the Board to award direct leases not to exceed a term of 35 years for commercial and industrial use on parcels up to five acres.<sup>1</sup> Although not required by Act 114, staff recommends that the Lessee shall provide their substantial improvement plan and negotiate a development agreement as required under Act 149, in order to qualify for a direct lease. At the time that a direct lease may be considered by the Board, staff intends to recommend that the Lessee be required to complete the substantial improvements as part of its

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<sup>1</sup> The Subject Property is 4.82 acres.

approval of a direct lease. Staff is proceeding in this manner due to concerns about setting a precedent where a future lessee could pursue a direct lease instead of a lease extension in order to avoid constructing substantial improvements required by Act 149.

Upon expiration of the holdover, the ownership of existing improvements will revert back to the State. If the Lessee is awarded a direct lease, such lease would include both land and existing improvements, and lease rent would be appraised accordingly. Furthermore, David S. De Luz Sr. Enterprises, Inc. (De Luz) is a sublessee of the Subject Property.<sup>2</sup> In the event that De Luz expresses an interest in obtaining the lease, staff will bring a recommendation to the Board to award the new lease by public auction rather than direct negotiation.

As part of the holdover approval, staff recommends that the Lessee be required to provide a removal bond covering the complete removal of the existing improvements at the end of the holdover period, in the event the Board elects to have them removed. The bond shall be posted no later than the 60<sup>th</sup> day of the holdover period in an amount acceptable to the Chair. This would alleviate the State of the responsibility for removing improvements that have outlived their useful lives at its own cost, especially in the event the Lessee does not obtain a new lease. At the end of the holdover period, the Board, in its sole discretion, shall decide whether to require the removal of improvements or allow them to remain on the premises under a new lease issued by direct negotiation or public auction.

#### RECOMMENDATION:

That the Board:

1. Declare that, after considering the potential effects of the proposed dispositions as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment as a de minimis activity.
2. Authorize a One-Year holdover for General Lease No. S-4302, Yamada Transfer, Inc., Lessee, for the period of May 12, 2025 to May 11, 2026, under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - a. The standard terms and conditions of the most current holdover of

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<sup>2</sup> Three subleases were previously received by the Hawaii District Land Office but were not processed for consent at that time. After-the-fact consents are being presented to the Board concurrent with this submittal at the May 9, 2025 BLNR meeting.

lease form, as may be amended from time to time;

- b. Review and approval by the Department of the Attorney General; and
  - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Require the Lessee post a removal bond to remove all improvements at the end of the holdover period, and pay all costs incurred by Lessor to remove said improvements, including any costs to procure a consultant to estimate the cost of removal.


Respectfully Submitted,

*Candace Martin*

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Candace Martin  
Acting District Land Agent

APPROVED FOR SUBMITTAL:



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Dawn N.S. Chang, Chairperson

## EXHIBIT A

