

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

June 26, 2015

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

EO-4355

Hawaii

Consent to the County of Hawaii, Department of Parks and Recreation Entering Into a Memorandum of Understanding with The United States Department of the Interior, Fish and Wildlife Service to Establish an Area of Critical Habitat for Three Endangered Native Plant Species on State Lands under the Management and Control of the County of Hawaii by Governor’s Executive Order No. 4355, Kealakehe, North Kona, Hawaii, Tax Map Key: (3)7-4-020:007 portion.

APPLICANT:

County of Hawaii (County), Department of Parks and Recreation

REQUEST:

The County is requesting Board consent on a Memorandum of Understanding between the County and The United States Department of the Interior, Fish and Wildlife Service (FWS) to create a “No Development Area” which will provide critical habitat for three endangered native plant species upon State lands currently set-aside to the County of Hawaii under Governor’s Executive Order No. 4355 (EO 4355) for the Kealakehe Wastewater Reclamation Field, North Kona Golf Course and/or Public Park Purposes.

LEGAL REFERENCE:

Section 171-11, Hawaii Revised Statutes, as amended.

CURRENT USE STATUS:

Governor’s Executive Order No. 4355 (EO 4355) to the County for the Kealakehe Wastewater Reclamation Field, North Kona Golf Course and/or Public Park Purposes.

LOCATION:

Portion of Government lands situated at Kealakehe, North Kona, Hawaii, identified by Tax Map Key: (3) 7-4-020:007 por., as shown on the attached map labeled Exhibit A.

AREA:

A 22 acre area and an 8 acre area totaling 30 acres, more or less of the total 193 acres under EO4355.

TERM:

20 years, expiring on June 30, 2025.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The County shall be responsible for ensuring compliance with Chapter 343, HRS.

APPLICANT TERMS AND CONDITIONS:

The County shall be responsible for providing the State of Hawaii, Department of Land and Natural Resources with a fully executed copy of the Memorandum of Understanding within thirty (30) days of execution.

BACKGROUND:

On February 20, 1991, the County of Hawaii and Kealakehe Associates, Inc. (KAI) entered into a Development Agreement for Construction and Operation of a Golf Course in North Kona, Hawaii (Development Agreement) and Agreement for Lease of Real Property Set Aside to the County of Hawaii by the State of Hawaii (Lease) for the construction and operation of a golf course on the subject property. Shortly thereafter, the County sought approval of the Board of Land and Natural Resources for the set-aside of the subject lands to the County.

At its meeting of March 8, 1991, under agenda item F-2, as amended, the Board approved the County's requested set-aside for purposes of the Kealakehe Wastewater Reclamation Field and North Kona Golf Course. The County planned to use treated gray water from the Kealakehe Sewage Treatment Plant to irrigate the fairways and greens of the proposed golf course. The Board's approval of the set-aside was made subject to a number of conditions that were later incorporated into Executive Order No. 3665 signed on July 18, 1995.

At its meeting of April 26, 1991, Item F-1-b, the Board approved the Lease between the

County and KAI. The County issued KAI a notice to proceed with construction on June 10, 1991. The terms of the Lease and Development Agreement were both supposed to be 55 years commencing from the date of the notice to proceed. But KAI encountered financial problems and the golf course was not built.

In August of 2001, the County notified KAI that KAI was in default on the Development Agreement and the agreement was canceled. Subsequent mediation between the parties terminated without resolution in 2002.

In 2009, Mayor William P. Kenoï requested that DLNR amend the executive order to allow for the development of a portion of the subject land as an active regional park that would provide a variety of recreational opportunities for the people of West Hawaii. However, the County wanted to retain the right to develop a golf course on the site (perhaps on a smaller scale), and to use reclaimed water for irrigation purposes. Accordingly, the County sought to add public park purposes to the wastewater reclamation and golf purposes already permitted under the executive order.

After assessing the options available, staff recommended that Executive Order No. 3665 be cancelled and the same land be reset aside to the County under a new executive order to include the broader purposes.

At its meeting of November 22, 2010, under agenda item D-4, as amended, the Board approved the cancellation of Executive Order No. 3665 and the reset aside of the same land under new EO 4355 for Wastewater Reclamation Field, North Kona Golf Course and/or Public Park Purposes.

On October 17, 2012, the FWS published rules proposing to designate 18,776 acres on Hawaii island as critical habitat for three plant species: wahine noho kula (*Isodendron pyrifolium*), ko'oko'olau (*Bidens micrantha* ssp. *ctenophylla*), and uhiuhi (*Mezoneuron kavaïense*). The entire parcel of land encumbered by EO 4355 was included within the 18,776 acres.

REMARKS:

The County and FWS have worked out an agreement that will allow for critical habitat to be established in two designated areas of the parcel and leave the remaining areas available for development of a regional park. The Memorandum of Understanding (MOU) provides a framework of responsibility for the development, management, and maintenance of the designated critical habitat areas. Refer to attached Exhibit B.

The MOU was sent out for comments to the agencies listed in the following table and their comments are discussed below:

Federal Agencies	Response
Natural Resource Conservation Service	No Response
State Agencies	Response
Dept. of Health - Environmental Planning	No Response
Dept. of Hawaiian Homes Land	No Response
DLNR - Historic Preservation	No Response
DLNR - Forestry and Wildlife	No Comments
OCCL	No Response
CWRM	* Regarding identification of water source
DOT - Highways	No Response
Hawaii County Agencies	Response
Planning Dept.	* Park development comments
Police Department	No Objections/No Comments
Dept. of Public Works	No Comments
Environmental Management	* Boundary determination
Fire Department	No Comments
Other Agencies	Response
Office of Hawaiian Affairs	No Response

*See discussion below

CWRM (Commission on Water Resource Management) – The comments received indicated that the County has not yet identified the water source for the Kealakehe Regional Park project and should coordinate with County Department of Water Supply to incorporate the project into the County’s Water Use and Development Plan.

Planning Dept. – Comments indicated that the designation of “no development areas” adjacent to the planned regional park are fully compatible with the Kona Community Development Plan.

Environmental Management – Comments question whether the boundary areas for the remaining areas of the regional park/wastewater treatment areas are affected.

All commenting agency responses were forwarded to the County Department of Parks and Recreation for their incorporation into the master plan of the Kealakehe Regional Park.

Staff believes that the proposed critical habitat areas are appropriate uses of the lands and are consistent with the purposes of EO 4355.

RECOMMENDATION:

That the Board consent to the County of Hawaii, Department of Parks and Recreation entering into a Memorandum of Understanding with The United States Department of the Interior, Fish and Wildlife Service to establish an area of critical habitat for three endangered native plant species on State lands under the management and control of the County of Hawaii by Governor's Executive Order No. 4355, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following:

1. Review and approval by the Department of the Attorney General; and
2. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Candace Martin
Land Agent

APPROVED FOR SUBMITTAL:

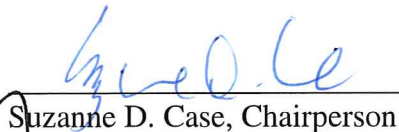
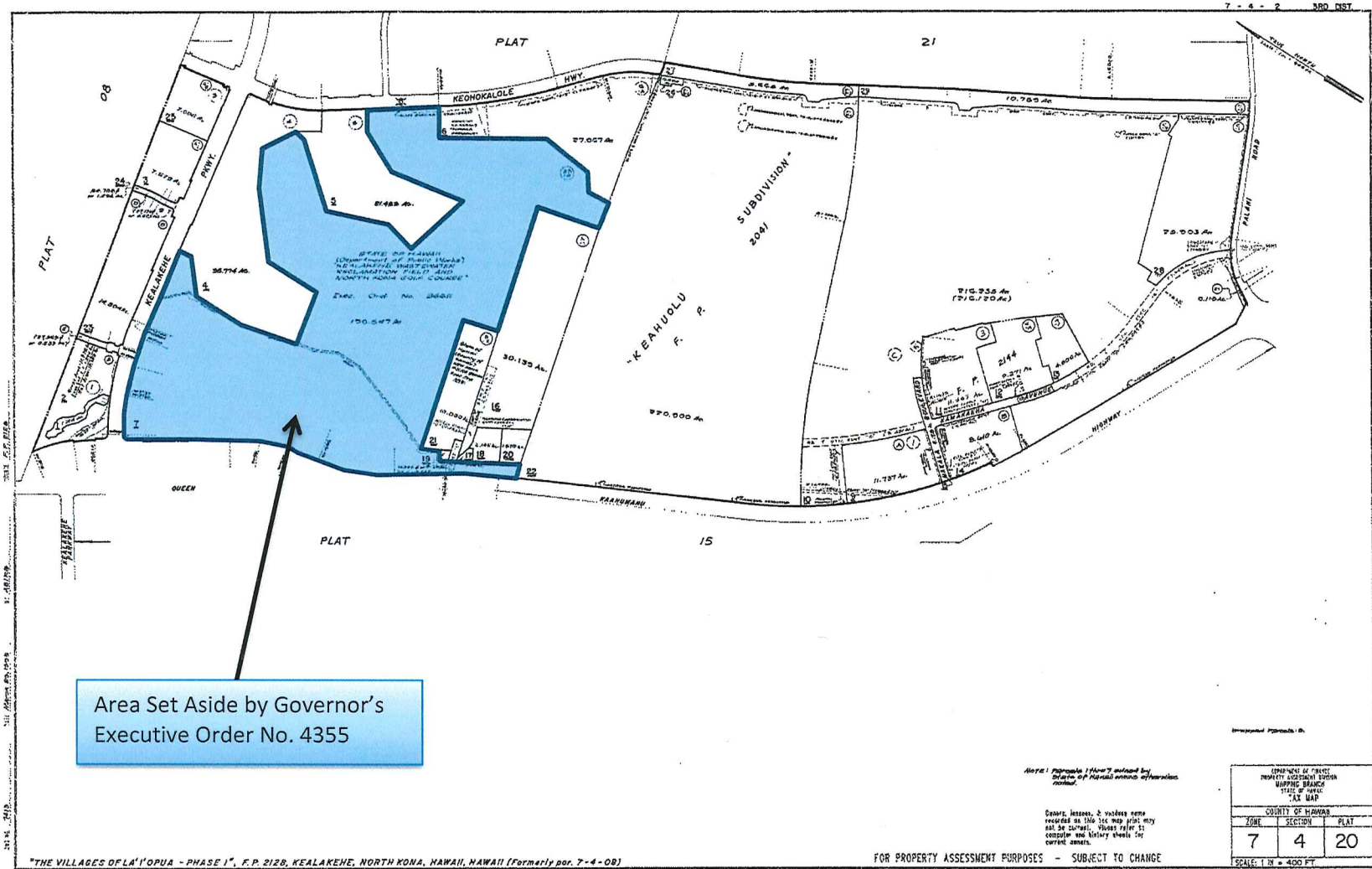

Suzanne D. Case, Chairperson

EXHIBIT A



Area Set Aside by Governor's Executive Order No. 4355

"THE VILLAGES OF LA'I OPUA - PHASE I", F.P. 2126, KEALAKOHE, NORTH KONA, HAWAII, HAWAII (Formerly par. 7-4-08)

FOR PROPERTY ASSESSMENT PURPOSES - SUBJECT TO CHANGE

COUNTY OF HAWAII		
ZONE	SECTION	PLAT
7	4	20
SCALE: 1" = 400 FT.		
PRINTED:		

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE COUNTY OF HAWAI'I

AND

**THE UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE**

WHEREAS the United States Fish and Wildlife Service (“**Service**”) is the federal agency charged with the authority to conserve fish and wildlife nationwide, and to enforce compliance with the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), as amended (“**ESA**”); and

WHEREAS the County of Hawai'i (“**County**”) has the rights via Governor's Executive Order No. 4355 executed 11 March 2011 to develop the 197-acre area referred to as The Kealakehe Regional Park in North Kona, County and State of Hawai'i (Tax Map Key (3) 7-4-020:007); and

WHEREAS by proposed rule published on October 17, 2012, in the Federal Register (77 FR 63928), the Service proposed designating land as critical habitat for three plant species: wahine noho kula (*Isodendrion pyriforme*), ko'oko'olau (*Bidens micrantha* ssp. *ctenophylla*), and uhiuhi (*Mezoneuron kawaiense*) in the lowland dry ecosystem, all of which have now been listed as endangered species under the ESA; and

WHEREAS the Service and the County desire to enter into this Memorandum of Understanding (“**MOU**”) and work together to contribute to the conservation and recovery of the three (3) listed plant species – wahine noho kula, ko'oko'olau, and uhiuhi, as well as their lowland dry ecosystem. The three aforementioned endangered species, other ESA listed species, ESA candidate species *Hylaeus anthracinus* (Hawaiian yellow-faced bee), and potential ESA candidate species *Capparis sandwichiana* and *Polyscias (Reynoldsia) sandwichensis*, are intended to benefit from this MOU and are herein collectively referred to as “**Covered Species**” (Exhibit A). This MOU is also intended to contribute to the conservation and recovery of other species of the lowland dry ecosystem that may be listed or become candidate species in the future, and which may or may not currently be present on Kealakehe Regional Park land; and

WHEREAS the terms of this MOU continue a long-term cooperative relationship between the Service and the County, and the Service will consider the benefits of the County's conservation measures, including this MOU, in weighing the benefits of designating Kealakehe Regional Park land as part of critical habitat versus the benefits of not including portions of this land when considering future designations of, or revisions to, critical habitat, in accordance with Section 4(b)(2) of the ESA; and

WHEREAS, the Service also has entered, (or is in the process of entering), into separate Memoranda of Understanding with various surrounding property owners, including but not

County of Hawai‘i Memorandum of Understanding

limited to the State of Hawai‘i, Hawai‘i Housing Finance and Development Corporation (Tax Map Key (3) 7-4-020:004), the State of Hawai‘i Department of Hawaiian Home Lands (Tax Map Key (3) 7-4-020-:005) and Lanihau Properties, LLC (Tax Map Keys (3) 7-4-008:005 and 081), in furtherance of its mandate to insure the recovery and continued existence of Covered Species in the area and with a view toward collaboration amongst the Service and all affected landowners.

NOW, THEREFORE, the Service and the County (hereafter “**Parties**”) enter into this MOU to address the conservation of the Covered Species.

1.0 AUTHORITY

The Service enters into this MOU pursuant to the authority provided in Section 1 of the Fish and Wildlife Coordination Act (“**FWCA**”), 16 U.S.C. 661, and the Fish and Wildlife Act of 1956 (“**FWA**”), 16 U.S.C. 742a-k. FWCA and FWA grant the Service broad statutory authority to enter into voluntary agreements with non-federal entities to restore and enhance habitat for federal trust fish, wildlife, and plant resources.

2.0 TERM OF MOU

This MOU will become effective upon the date of the last signature and will expire 20 years from July 1, 2015 (“**Termination Date**”), or sooner if terminated by either party pursuant to Section 6.0.

3.0 SPECIFIC OBLIGATIONS OF EACH PARTY

3.1 Obligations of the County of Hawai‘i.

3.1.1 No Development Area. The County agrees it will not construct or permit the construction of buildings or other improvements, or undertake or permit any other land disturbance activities, on 30.0 acres of high quality, native dry forest habitat in the portions of Tax Map Key (3) 7-4-020: 007 described in this paragraph that are within the area proposed for the Kealakehe Regional Park, Kailua-Kona, Hawai‘i (aka. the “**No Development Area**”). During the term of this MOU, the No Development Area will therefore be available for the conservation and recovery of the Covered Species and their lowland dry ecosystem.

The No Development Area is comprised of two sections. The first section of the No Development Area is 22.0 acres located within the proposed Kealakehe Regional Park. This section is located adjacent to the 2.9 acres and 1.3 acres of State of Hawai‘i, Hawai‘i Housing Finance and Development Corporation (“**HHFDC**”) land (Tax Map Key (3) 7-4 020: 004) and 21.7 acres of State of Hawai‘i, Department of Hawaiian Home Lands (“**DHHL**”) land (Tax Map Key (3) 7-4-020: 005). These parcels combined with the 22.0 acres proposed for the Kealakehe Regional Park and lands belonging to HHFDC and DHHL, comprise a total preserve area of 476.96 acres and are depicted on the map attached as Exhibit B. The 22.0 acres set aside by the County and 4.22-9 acres of HHFDC lands, totaling 26.24-9 acres, will be referred to within this MOU as “**Area #1**”. Work or access by the County in the HHFDC portion of Area #1 will require Right of Entry approval by HHFDC. The second portion of the No Development Area is 8.0 acres within the County’s proposed Kealakehe Regional Park and is located adjacent to DHHL’s land

County of Hawai‘i Memorandum of Understanding

comprising the Lesser Aupaka Preserve (Tax Map Key (3) 7-4-020: 006). This 8.0 acre No Development Area will be referred to within this MOU as “**Area #2**” and is depicted on the map attached as Exhibit C.

An off-site No Development Area that is not under County jurisdiction totalling 15.863 acres of high quality, native dry forest habitat is located in portions of Tax Map Keys (3) 7-4-008: 005 and 081 owned by Lanihau Properties, LLC (“**Lanihau**”) in Kailua-Kona, Hawai‘i. The area is comprised of 7.012 acres makai and 8.851 acres mauka in two separate parcels that is split by the Ane Keohokalole Highway. Conservation activities intended to benefit Covered Species are allowed per a MOU with Lanihau and the Service effective until December 31, 2033. These areas will be collectively referred to within this MOU as “**Area #3**” and are depicted on the map attached as Exhibit D. Access to Area #3 is restricted to the Ane Keohokalole Highway which has been granted by Lanihau per their MOU with the Service. Work or access by the County in Area #3 will require Right of Entry approval by Lanihau.

3.1.2 Conservation Activities in Areas #1, #2, and #3. If necessary, the County will execute a metes and bounds survey for their portions of Area #1 and #2. The County will install and maintain a six (6) foot tall ungulate-proof fence for their approximate 3,500-foot perimeter of Area #1 and 2,400-foot perimeter of Area #2. The County will construct via a bulldozer and mechanically maintain a twenty (20) foot wide firebreak and fenceline for their portion of these two (2) fences. The County will also mechanically maintain a twenty (20) foot firebreak for the two fences in Area #3. The fence and firebreak will be located outside of the lava flow as recommended by the Service. The County will maintain the firebreaks for each of the four (4) fences described above for the duration of the MOU. **Note:** DHHL is responsible for conservation activities, including firebreak maintenance, for their portion of the perimeter fences located in Areas #1 and #2, per their MOU with the Service.

For the entire ~~26.249~~ acres of Area #1, 8.0 acres of Area #2, and 15.863 acres of Area #3 (approximately ~~50.148.8~~ total acres), the County will control nonnative plant species sufficiently to prepare the land for out-planting of Covered Species and other native plant species by the Service (or entities working under a contract, grant, or cooperative agreement with the Service). Site preparation for out-planting is extremely important. The County plans to cut and spray all woody invasive species. The County plans to chip the woody material to reduce fuels and make it available to be used as mulch for out-planting. The County will spray woody stumps two or three times if regrowth occurs. The County will also weed whip and spray grasses. To ensure complete kill, the County will allow the grass to regrow and respray any young growth. Per the schedule outlined in the accompanying table attached as Exhibit E, the County will control nonnative plant species at a minimum of ten (10) acres per year until the entirety of Areas #1, #2 and #3 are prepared for out-planting. During that initial weeding time period, the County will continue weed control following initial preparation of the site as recommended by the Service’s technical advisor (or working with the Service).

Once all ~~50.148.8~~ acres have been prepared sufficiently for out-planting, the Service may take over maintenance of weeding as early as year six (6). However, the County will conduct spot treatment and weed control of the entire area at least once every five (5) years, including year twenty (20) of the MOU. No area should go longer than five (5) years without being

County of Hawai‘i Memorandum of Understanding

weeded by the County. Likewise, visual sweeps for certain weeds, such as haole koa (*Leucaena leucocephala*), may be prudent to occur at more frequent intervals, such as every three (3) years rather than every five years. Maintenance of weeds is especially important and must occur earlier in the MOU term while the out-planted native plants are establishing themselves.

Pre-emergent herbicide shall not be used except as the County deems necessary within firebreaks to minimize the effort and cost necessary to maintain the firebreak vegetation-free every year for the duration of the MOU.

3.1.3 Work by the Service or Other Entities. The County will allow entry access and work by the Service (or entities working under a contract, grant, or cooperative agreement with the Service) to conduct conservation measures in Areas #1 and #2 under the County’s jurisdiction. Conservation measures that the Service may undertake include fencing to exclude ungulates, control of nonnative plant species, out-planting of Covered Species and other native plant species, bulldozing an access trail, building infrastructure of irrigation and provision of supplemental water to out-planted individuals, and other related actions (e.g., mulching and fertilizing, predator control, and pest management). This work will be conducted only to the extent allowed by Federal law and will be addressed in a separate agreement between the Parties. As determined by the Parties, such agreement will specify access requirements and may also specify the design and specification of other conservation measures to be performed. Small-scale land disturbance activities for the express purpose of implementing ecosystem conservation measures described in this MOU will be allowed by the County, as well as regular monitoring by the Service.

3.1.4. Right of Entry for HHFDC and Lanihau. The Service agrees that the County’s performance of the conservation activities in the No Development Area is contingent upon receipt of a Right of Entry from HHFDC in favor of the County for work or access in the HHFDC portion of Area #2 and receipt of a Right of Entry from Lanihau in favor of the County for work or access in Area #3. To the extent feasible, the Service, therefore, will provide technical assistance to the County in support of the County’s effort to obtain Rights of Entry from HHFDC and Lanihau. Should the County be unsuccessful in securing any required Rights of Entry through no fault of the County’s, the County’s obligation to fulfill the terms of this MOU with respect to the affected lands shall be suspended until such time that the appropriate Right of Entry is secured.

3.1.5 Funding. The County will pay for the activities listed in Section 3.1.2. Beyond the activities listed in Section 3.1.2, the only additional cost to be borne by the County is the water bill for out-plants estimated as, but not limited to, \$2,100 total over 20 years (Exhibit E). The County’s portion of the total conservation activities for these fully-managed ~~50.148.8~~ acres over 20 years would be approximately 2/3 of the total cost, with the remainder provided by the Service (or its partners) to the extent of availability of appropriations.

3.1.6 The County of Hawai‘i’s Reserved Uses. Notwithstanding Section 3.1.1, the County reserves the right to designate and use the No Development Area for open space, preservation, natural drainage course, passive park, and other uses that do not adversely impact the Covered Species or materially interfere with the Service’s permitted activities under Section 3.1.2. In addition, the County further reserves the right to grant one or more conservation or preservation

County of Hawai‘i Memorandum of Understanding

easements affecting the No Development Area. The Service will be given the opportunity by the County to review and approve each proposed use or easement for land within the No Development Area for consistency with the terms and intent of this MOU.

3.2 Obligations of the Service.

3.2.1 Work in No Development Areas. The Service shall at all times designate a Service employee to act as contact person under this MOU. The Service will develop a work plan describing the activities that will take place in Areas #1, #2, and #3 and will submit the draft work plan to the County sixty (60) days prior to commencement of activities for comment. The work plan shall include the schedule of planned activities, list of authorized individuals, and a point of contact. Prior to finalizing the work plan, the Service shall take into account any reasonable concerns or recommendations raised by the County.

For its actions in Areas #1, #2, and #3, the Service will comply with the National Historic Preservation Act as necessary.

As indicated in section 3.1.3 of this MOU, the Service (or entities working under a contract, grant, or cooperative agreement with the Service) may, to the extent of the availability of appropriations, (1) bulldoze the twenty (20) foot firebreak and fenceline for the two (2) fences in Area #3; (2) install two (2) six (6) foot-tall ungulate-proof fences in Area #3; (3) bulldoze access trail(s) and install irrigation infrastructure to provide supplemental water to out-planted individuals within Areas #1, #2, and #3; (4) flag native plants to be protected during weeding, prior to the County performing any weeding in Areas #1, #2, and #3; and (5) conduct large-scale weeding efforts once the County has completed the initial weeding effort in the entire 50.148.8 acres and before the five (5) weeding intervals required of the County, as needed. Any such work will be addressed in a separate agreement(s) between the Service and landowners of Areas #1, #2, and #3.

For its actions in Areas #1, #2 and #3, the Service shall be responsible to inspect and maintain the integrity of all ungulate fences (inclusive of gates and appurtenances).

3.2.2 Access Notification. Unless otherwise authorized by law, the Service shall submit a request for access onto the County’s No Development Area via email or in writing forty-eight (48) hours prior to desired access.

3.2.3 Reporting. To the extent that the Service has undertaken work in Areas #1, #2, and/or #3, the Service will submit an annual report to the County summarizing the activities completed and a work plan for the upcoming year.

3.2.4 Protection of the County of Hawai‘i. The Service or the responsible party conducting work pursuant to a cooperative agreement, grant agreement, or contract with the Service shall ensure that all applicable laws and rules are complied with, including but not limited to ensuring that any necessary permits, especially for work with ESA species, are obtained for work the Service implements or funds. Furthermore, the County will have the right to review and approve the scope of work for each cooperative agreement, grant, or contract.

3.2.5 Funding. The Service (or its partners) will pay for all activities described in Section 3.2.1 to the extent of the availability of appropriations. As a result, the Service's portion of the total conservation activities for these fully-managed 50,148.8 acres over 20 years would be approximately 1/3 of the total cost (Exhibit E).

4.0 MODIFICATIONS

Modifications to this MOU may be proposed by either party and shall become effective upon the written concurrence of both parties.

5.0 DISPUTE RESOLUTION

5.1 Dispute Resolution. The parties recognize that disputes concerning implementation of, compliance with, or termination of this MOU may arise from time to time. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the parties may later agree, subject to Section 5.3.

5.2 Informal and Non-Mandatory Dispute Resolution Process. Unless the parties agree upon another dispute resolution process, the parties may use the following process to attempt to resolve disputes:

- (a) The aggrieved party will notify the other party of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.
- (b) The party alleged to be in violation will have thirty (30) days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.
- (c) Within thirty (30) days after such response was provided or was due, individual representatives of the parties who have authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.
- (d) If any issues cannot be resolved through such negotiations, the parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

5.3 Notwithstanding the foregoing provisions of this Section, in case of threat of imminent breach of this agreement, emergency, other imminent harm, or if the parties are unable

to reach agreement on a dispute resolution process as described above, the parties shall each be entitled to terminate the MOU pursuant to section 6.

6.0 TERMINATION

This MOU may be terminated by either party following ninety (90) days written notification to the other party.

7.0 MISCELLANEOUS PROVISIONS

7.1 Temporary Prevention of Performance. In the event that the County is wholly or partially prevented from performing obligations under this MOU because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the County, including, but not limited to third party actions, sudden actions of the elements not identified as changed circumstances, or actions of a non-participating federal agency, state agencies, or local jurisdictions, the County shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, provided that:

- (a) The suspension of performance is of no greater scope and no longer duration than is required by the unforeseeable cause;
- (b) Within forty-five (45) days after the occurrence of the unforeseeable cause, the County shall give the Service written notice describing the condition, an estimate of how long the County expects it to persist, and how the County plans to remedy the effects of the temporary suspension of performance;
- (c) The County shall use its best efforts to remedy its inability to perform (however, this paragraph shall not require the County to incur extraordinary expenses or settlement of any strike, walk-out, lock-out, or other labor dispute on terms which in the sole judgment of the County is contrary to its interest); and
- (d) When the County is able to resume performance of its obligations, the County shall give the Service written notice to that effect.

7.2 No Partnership. This MOU shall not make or be deemed to make any party to this MOU the agent for or the partner of any other party.

7.3 Notices. Any notice permitted or required by this MOU shall be in writing, delivered personally or by overnight or certified mail, to the persons listed below, or shall be deemed given five (5) business days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as either party may from time to time specify to the other party in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by overnight or certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

County of Hawai'i Memorandum of Understanding

Field Supervisor
United States Fish and Wildlife Service
Pacific Islands Fish and Wildlife Office
300 Ala Moana Boulevard, Suite 3-122
Honolulu, Hawai'i 96850
Telephone: 808-792-9400
Facsimile: 808-792-9580
Email:

Director of Parks & Recreation
County of Hawai'i
101 Pauahi Street, Suite 6
Hilo, Hawai'i 96720
Telephone: 808-961-8311
Facsimile: 808-961-8411
Email: parks_recreation@hawaiiicounty.gov

7.4 No Federal Contract. Notwithstanding any language to the contrary in this MOU, this MOU is not intended to create, and shall not be construed to create, an enforceable contract between the parties.

7.5 Duplicate Originals. This MOU may be executed in any number of duplicate originals. A complete original of this MOU shall be maintained in the official records of each of the parties hereto.

7.6 No Third-Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to the ESA or other federal or state laws, this MOU shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this MOU to maintain a suit for personal injuries or damages pursuant to the provisions of this MOU. The duties, obligations, and responsibilities of the parties to this MOU with respect to third parties shall remain as imposed under existing law.

7.7 Relationship to the Endangered Species Act (ESA) and Other Authorities. The terms of this MOU shall be construed in accordance with the ESA and other applicable federal and state laws. In particular, nothing in this MOU is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this MOU is intended to limit or diminish the legal obligations and responsibilities of the Service pursuant to section 4 of the ESA. In addition, nothing in this MOU will limit the right or obligation of any federal agency to engage in consultation required under Section 7 of the ESA or other federal laws.

7.8 Availability of Funds. Implementation of this MOU by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this MOU will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The parties acknowledge that the Service will not be required under this MOU to expend any federal agency's appropriated funds, unless and until an

County of Hawai‘i Memorandum of Understanding

authorized official of the agency affirmatively acts to commit to such expenditures as evidenced in writing.

7.9 References to Regulations. Any reference in this MOU to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

7.10 Applicable Laws. All activities undertaken pursuant to this MOU must be in compliance with all applicable state and federal laws and regulations.

7.11 Successors and Assigns. The intention of the parties is that this MOU shall apply to their respective successors and assigns.

7.12 No Commitment to Exclude; No Waiver. Nothing in this MOU shall be construed as a commitment to exclude County property from critical habitat designation. However, as set forth above, in recognition of the long-term cooperative relationship between the Service and the County and in accordance with the ESA, the Service will consider the benefits and outcomes of this MOU when considering future designations of, or revisions to, critical habitat affecting County lands.

7.13 Subject to Approvals by the County Council and the Department of Land and Natural Resources. This MOU shall be subject to approvals by the County Council and the Department of Land and Natural Resources as determined necessary by the County of Hawai‘i and the State of Hawai‘i, respectively.

7.14 Advance Review of Press Releases. The County will obtain prior approval of all press releases, published advertisements or other statements intended for the public that refer to this MOU or to the Service, or the name or title of any Service employee in connection with this MOU.

7.15 Endorsements; Use of Logo. Nothing in this MOU may be interpreted to imply that the United States, the Department of the Interior, or the Service endorses any action or policy of any other Party. The parties will not take any action or make any statement that suggests or implies such endorsement. Use by the County of any federal insignia, logo or design is prohibited without written authorization of the Service.

County of Hawai'i Memorandum of Understanding

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum of Understanding to be in effect as of the date of the last signature executed below:

UNITED STATES DEPARTMENT OF THE
INTERIOR FISH AND WILDLIFE SERVICE

COUNTY OF HAWAI'I

By: _____

Title: Field Supervisor

Date: _____

APPROVED AS TO FORM AND
LEGALITY:

Deputy Attorney General, State of Hawaii

Date: _____

By: _____

William P. Kenoi

Title: Mayor

Date: _____

APPROVED AS TO FORM AND
LEGALITY:

Deputy Corporation Counsel

Date: _____

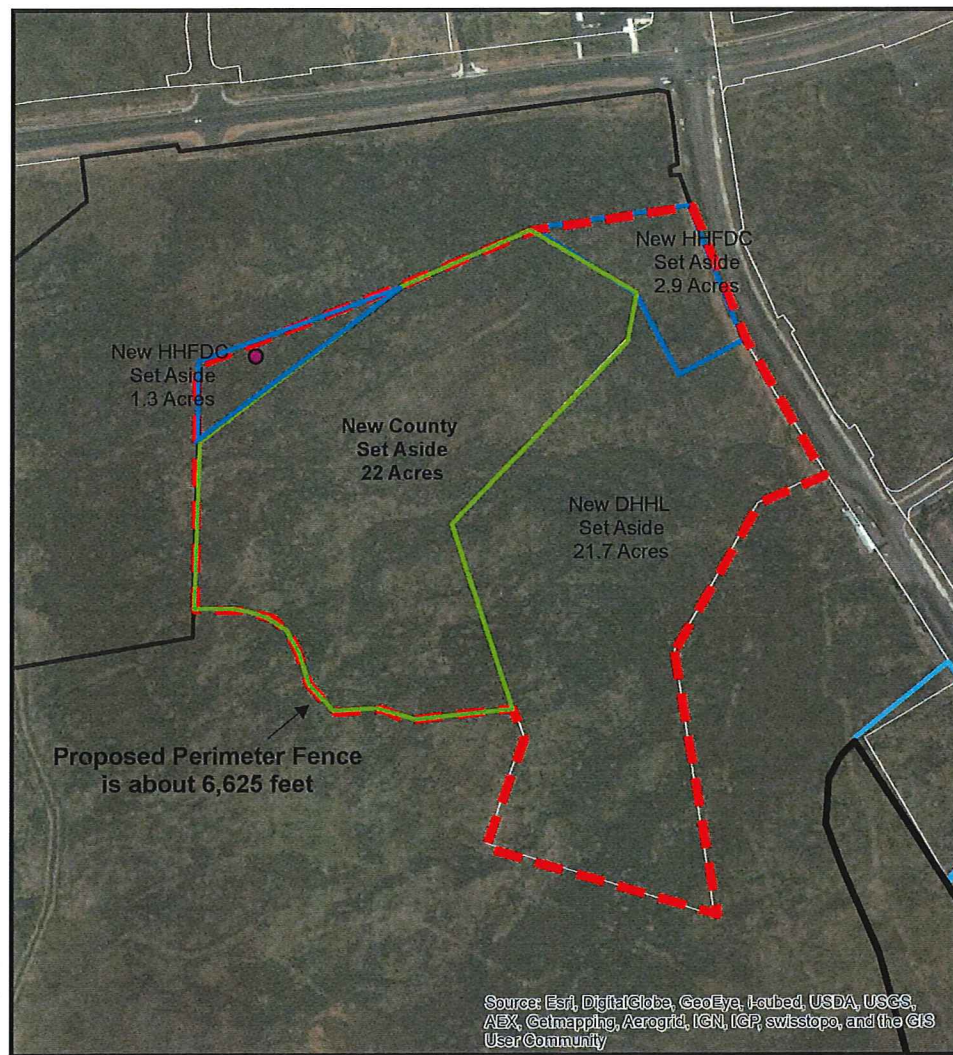
Attachments:

- Exhibit A – List of Covered Species
- Exhibit B – Map of No Development Area, Area #1
- Exhibit C – Map of No Development Area, Area #2
- Exhibit D – Map of No Development Area, Area #3
- Exhibit E – Schedule and Estimated Budget for Conservation Activities

EXHIBIT A – List of Covered Species

Species as recognized under the Endangered Species Act (50 CFR Part 17) or other species of the lowland dry ecosystem	Revised taxonomic name, if appropriate	Protected Status
Plants		
ko'oko'olau (<i>Bidens micrantha</i> ssp. <i>ctenophylla</i>)		Endangered
hala pepe (<i>Pleomele hawaiiensis</i>)	<i>Chrsyodracon hawaiiensis</i>	Endangered
wahine noho kula (<i>Isodendrion pyriform</i>)		Endangered
uhiuhi (<i>Mezoneuron kawaiiense</i>)		Endangered
ma'aloa (<i>Neraudia ovata</i>)		Endangered
'aiea (<i>Nothoestrum breviflorum</i>)		Endangered
loulou (<i>Pritchardia affinis</i>)	<i>Pritchardia maideniana</i>	Endangered
maiapilo (<i>Capparis sandwichiana</i>)		No status
'ohe makai (<i>Reynoldsia sandwicensis</i>)	<i>Polyscias sandwichensis</i>	No status
Animals		
yellow-faced bee (<i>Hylaeus anthracinus</i>)		Candidate
Blackburn's sphinx moth (<i>Manduca blackburni</i>)		Endangered

EXHIBIT B – Map of No Development Area, Area #1



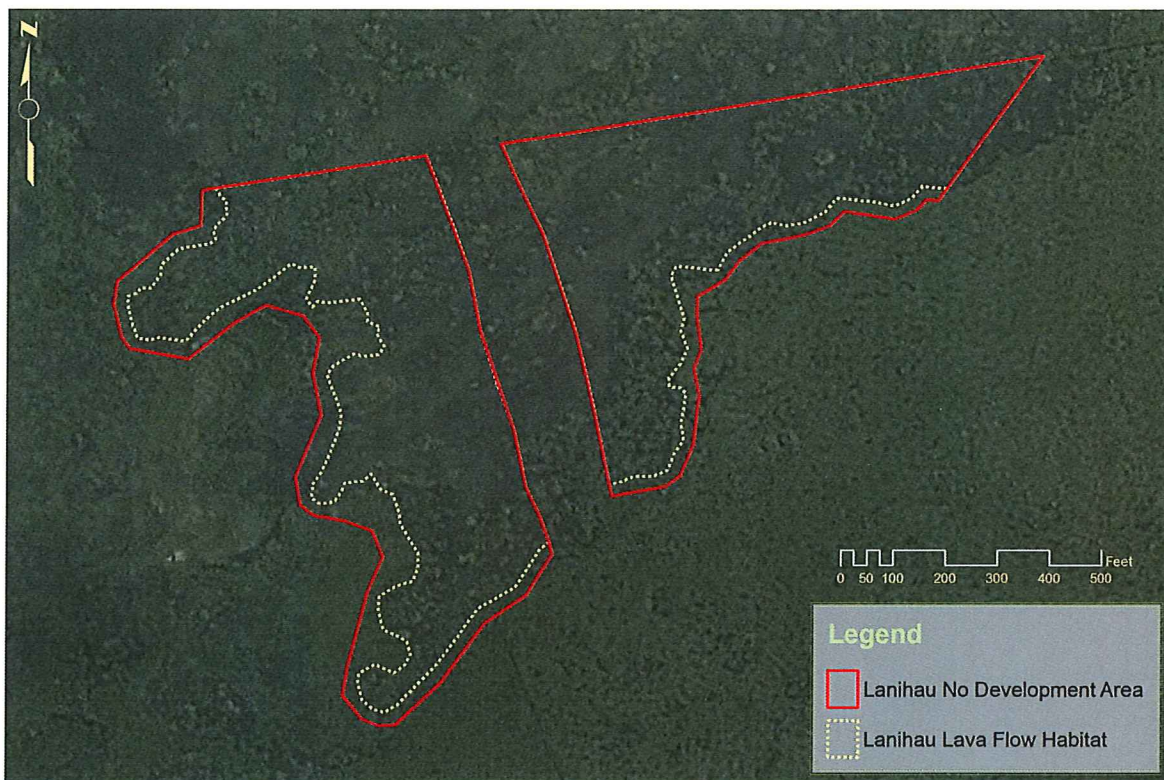
Area #1. The County of Hawai'i's No Development Area of 22.0 acres (labeled "New County Set Aside 22 Acres" in figure above) is located within the proposed Kealakehe Regional Park in portions of Tax Map Key [TMK] (3) 7-4-020: 007. This area is located adjacent to the 2.9 acres and 1.3 acres of State of Hawai'i, Hawai'i Housing Finance and Development Corporation ("HHFDC") land (TMK (3) 7-4 020: 004) and 21.7 acres of State of Hawai'i, Department of Hawaiian Home Lands ("DHHL") land (TMK (3) 7-4-020: 005). These parcels combined with the 22.0 acres proposed for the Kealakehe Regional Park and lands belonging to HHFDC and DHHL, comprise a total preserve area of 47.96.6 acres. The 22.0 acres set aside by the County and 4.22.9 acres of HHFDC lands, totaling 26.24.9 acres, will be referred to within this MOU as "Area #1".

EXHIBIT C – Map of No Development Area, Area #2



Area #2. The County of Hawai‘i’s No Development Area of 8.0 acres (labeled “New County Set Aside 8.0 Acres” in the figure above) is located within the County’s proposed Kealakehe Regional Park and is adjacent to DHHL’s land comprising of the Lesser Aupaka Preserve (Tax Map Key (3) 7-4-020: 006). This No Development Area of 8.0 acres will be referred to within this MOU as “Area #2”.

EXHIBIT D – Map of No Development Area, Area #3



Area #3. Lanihau Properties, LLC (“**Lanihau**”) entered into a 20-year Memorandum of Understanding (MOU) effective May 20, 2014, with the U.S. Fish and Wildlife Service that will prohibit Lanihau to construct or permit the construction of buildings or other improvements, or undertake or permit any other land disturbance activities, on its high quality native dry forest habitat in portions of Tax Map Keys (3) 7-4-008: 005 and 081 in Kailua-Kona, Hawai‘i. Lanihau’s No Development Area totals 15.863 acres and is separated into two sections by the Ane Keohokalole Highway, the makai section is 7.012 acres and the mauka section is 8.851 acres. These sections will be collectively referred to within this MOU as “**Area #3**”. Access to Area #3 is restricted from the Ane Keohokalole Highway, which has been granted by Lanihau per their MOU with the Service.

EXHIBIT B

EXHIBIT E – SCHEDULE AND ESTIMATED BUDGET FOR CONSERVATION ACTIVITIES

Start date	Year	Bounds and Metes Survey for Driving Range and Lesser Aupaka (County) fences	Section 106 surveys and consultations for all 4 fences	FENCING								WEEDING				OUT-PLANTING				Total per year (Service brother entities)			
				Driving Range fence (only around County and HHFDC edges), with bulldozer	Driving Range fence maintenance (County and HHFDC edges)	Lesser Aupaka fence (only around County edges), with bulldozer	Lesser Aupaka fence maintenance (County edges)	Lanihau fence (makai), with bulldozer	Lanihau fence (makai) maintenance	Lanihau fence (mauka), with bulldozer	Lanihau fence (mauka) maintenance	# of acres (Initial weeding and prep work)	Clearing and preparation costs	Clearing (or Maintenance) Supplies and Equipment	Maintenance	Contractor for plant propagation and outplanting	Plants: 184/acre	Supplies and Equipment	Irrigation water bill for out-plants		Infrastructure for out-plants: main irrigation lines, bulldozer access trails, branching irrigation lines to out-plants, etc.	Total per year (County)	
7/1/2015	1	\$ 5,000	\$ 10,000	\$109,375	\$ 1,500	\$ 74,250	\$ 1,000	\$ 70,089	\$ 750	\$ 63,014	\$ 750	10	\$ 167,000	\$ 8,000	\$ 9,180	\$ 44,941	\$ 3,543	\$ 3,060	\$ 184	\$ 32,538	\$ 191,954	\$ 89,082	
	2				\$ 1,530		\$ 1,020	\$ 765	\$ 765	\$ 765	10	\$ 170,340	\$ 8,160	\$ 9,180	\$ 44,941	\$ 3,543	\$ 3,060	\$ 184	\$ 32,538	\$ 191,954	\$ 89,082		
	3				\$ 1,561		\$ 1,040	\$ 780	\$ 780	\$ 780	10	\$ 173,747	\$ 8,323	\$ 18,727	\$ 45,840	\$ 3,713	\$ 3,121	\$ 187	\$ 33,189	\$ 205,156	\$ 90,863		
	4				\$ 1,592		\$ 1,061	\$ 796	\$ 796	\$ 796	10	\$ 177,222	\$ 8,490	\$ 28,653	\$ 46,757	\$ 3,888	\$ 3,184	\$ 191	\$ 33,853	\$ 218,810	\$ 92,681		
	5				\$ 1,624		\$ 1,082	\$ 812	\$ 812	\$ 812	9	\$ 162,690	\$ 7,794	\$ 29,226	\$ 42,523	\$ 3,065	\$ 3,247	\$ 185	\$ 31,077	\$ 204,233	\$ 86,312		
	6				\$ 1,656		\$ 1,104	\$ 828	\$ 828	\$ 828				\$ 28,817			\$ 3,312	\$ 89		\$ 4,506	\$ 32,129		
	7				\$ 1,689		\$ 1,126	\$ 845	\$ 845	\$ 845				\$ 19,257	\$ 4,000	\$ 5,000	\$ 2,213	\$ 101		\$ 4,606	\$ 30,471		
	8				\$ 1,723		\$ 1,149	\$ 862	\$ 862	\$ 862				\$ 9,304	\$ 1,000		\$ 1,069	\$ 103		\$ 4,698	\$ 13,374		
	9				\$ 1,757		\$ 1,172	\$ 879	\$ 879	\$ 879										\$ 4,687	\$ -		
	10				\$ 1,793		\$ 1,195	\$ 896	\$ 896	\$ 896			\$ 5,975	\$ 52,704	\$ 4,000	\$ 5,000	\$ 2,500	\$ 108		\$ 63,567	\$ 12,500		
	11				\$ 1,828		\$ 1,219	\$ 914	\$ 914	\$ 914					\$ 1,000				\$ 110		\$ 4,986	\$ 1,000	
	12				\$ 1,865		\$ 1,243	\$ 933	\$ 933	\$ 933										\$ 4,973	\$ -		
	13				\$ 1,902		\$ 1,268	\$ 951	\$ 951	\$ 951					\$ 4,000	\$ 5,000	\$ 2,500	\$ 114		\$ 5,187	\$ 14,500		
	14				\$ 1,940		\$ 1,294	\$ 970	\$ 970	\$ 970					\$ 1,000				\$ 116		\$ 5,291	\$ 1,000	
	15				\$ 1,979		\$ 1,319	\$ 990	\$ 990	\$ 990			\$ 6,597	\$ 58,189							\$ 70,064	\$ -	
	16				\$ 2,019		\$ 1,346	\$ 1,009	\$ 1,009	\$ 1,009					\$ 4,000	\$ 5,000	\$ 2,500	\$ 121		\$ 5,505	\$ 12,500		
	17				\$ 2,059		\$ 1,373	\$ 1,030	\$ 1,030	\$ 1,030					\$ 1,000				\$ 124		\$ 5,615	\$ 1,000	
	18				\$ 2,100		\$ 1,400	\$ 1,050	\$ 1,050	\$ 1,050											\$ 5,601	\$ -	
	19				\$ 2,142		\$ 1,428	\$ 1,071	\$ 1,071	\$ 1,071					\$ 4,000	\$ 5,000	\$ 2,500	\$ 129		\$ 5,842	\$ 10,500		
	20				\$ 2,185		\$ 1,457	\$ 1,093	\$ 1,093	\$ 1,093			\$ 7,284	\$ 64,245	\$ 1,000				\$ 131		\$ 77,488	\$ 1,000	
	TOTALS			\$109,375	\$36,446	\$ 74,250	\$ 24,297	\$ 70,089	\$18,223	\$ 63,014	\$ 18,223	49	\$ 850,998	\$ 60,623	\$318,302	\$249,521	\$ 68,584	\$ 32,207	\$ 2,083	\$ 199,492	\$ 1,460,492	\$ 750,384	
																					5% Contingency	\$ 73,025	\$ 37,514
																					Total	\$ 1,533,516	\$ 787,799
																					TOTAL TOTAL	\$ 2,321,315	\$ -
																					% of project	66%	34%
																					Lanihau	16	Less than half the work to weed these acres, as they are high quality
																					Total	49	Comparable total of less than 40 acres of weeding, plus an "A" pearl with better "net" benefit plant production potential