

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

October 12, 2012

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

PSF No.: 08HD-071

Hawaii

Resubmittal: Approve the Withdrawal of Approximately 3 Acres from General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees; Authorize Amendment of General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees, to Reflect the Withdrawal, Decrease the Acreage of the Premises, Reduce the Rent, and Clarify that There is No Improved Legal Access to the Lease Premises from a Public Highway; Laupahoehoe, Hawaii, TMK: 3rd/ 3-6-6: portion of 46

APPLICANT:

United States of America, Department of Agriculture (USDA)

LEGAL REFERENCE:

Sections 171-11 and 37, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands of Laupahoehoe, Hawaii, identified by Tax Map Key: 3rd/ 3-6-6: portion of 46, as shown on the attached map labeled Exhibit A.

AREA:

Original lease area –	110 acres, more or less
Area of USDA's requested withdrawal –	3 acres, more or less

ZONING:

State Land Use District:	Agriculture
County of Hawaii CZO:	A-20a

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Encumbered by General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees, for pasture purposes. Lease to expire on June 29, 2028. Also encumbered by Governor's Executive Order No. 4357 for forest reserve purposes.

LEASE ANNUAL RENTAL:

Current rent is \$1,600 per annum, due in semi-annual installments of \$800 on June 30 and December 30 of each year.

RENTAL REOPENINGS:

Reopenings are at the end of the 10th, 20th and 30th years of the term. The first rental reopening occurred on June 30, 2003, and the second reopening is scheduled for June 30, 2013.

PURPOSE OF WITHDRAWAL:

To issue a direct lease to USDA for research and educational purposes covering the withdrawn area of 3 acres pursuant to the Board's prior approvals.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The Final Environmental Assessment for USDA's Hawaii Experimental Tropical Forest project at Laupahoehoe, Hawaii was published in the OEQC's Environmental Notice on September 23, 2011 with a finding of no significant impact (FONSI).

DCCA VERIFICATION:

Not applicable. As natural persons, Peter H. Jose and Richard A.J. Jose are not required to register with the DCCA. As a government agency, USDA is not required to register with the DCCA.

APPLICANT REQUIREMENTS:

1. USDA shall install stock-proof fencing on the west, north and east sides of the

withdrawal area at its own expense to prevent livestock on the premises of General Lease No. S-5320 from escaping the premises, prior to any breach of existing fencing but no later than one year from commencement date of lease.

2. USDA shall reimburse Peter H. Jose and Richard A.J. Jose in the amount of \$1,560.00 for their costs in clearing the 3-acre withdrawal area of guava trees in the 1990s and planting it in pasture grass. Reimbursement shall be made within 90 days after both USDA and the State have signed the lease.

REMARKS:

General Lease No. S-5320 was issued to Richard H. Jose under Act 237, Session Laws of Hawaii 1988. The Act gave the Board of Land and Natural Resources authority to convert month-to-month agricultural revocable permits to long-term leases, subject to the imposition of a 25% rent premium for as many years as the permittee held its permit.¹

At its meeting of February 10, 1995, under agenda Item F-1-d, the Board consented to the assignment of General Lease No. S-5320 from Richard H. Jose to Peter H. Jose and Richard A.J. Jose.

The Board at its meeting of March 28, 2008, under agenda Item D-6, approved to recommend to the Governor a set-aside covering the 110 acres under General Lease No. S-5320 to the Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW) for addition to the Hilo Forest Reserve. By Executive Order No. 4357 dated February 8, 2011, the land was set aside to DOFAW. However, the executive order provides that the lease premises shall not become a part of the forest reserve until the expiration or earlier termination of General Lease No. S-5320.

At its meeting of January 27, 2012, Item D-2, the Board approved the issuance of a 65-year term lease to USDA over a portion of the premises of General Lease No. S-5320, subject to USDA securing final subdivision approval for the area, and further subject to the withdrawal of such land from General Lease No. S-5320. USDA will use the parcel as part of its Hawaii Experimental Tropical Forest project at Laupahoehoe, which is consistent with the forest reserve purposes of Executive Order No. 4357.

On April 27, 2012, USDA received final subdivision approval for a 3-acre portion of the lease premises from the County of Hawaii Planning Department, leaving the withdrawal of new 3-acre parcel from General Lease No. S-5320 as the only remaining requirement

¹ In the case of Richard H. Jose, that meant the premium would have been paid for 18 years. But the Act was subsequently amended to require the payment of the rent premium for a period not to exceed four years. At its meeting of August 26, 1994, under agenda Item F-8, the Board approved the charging of the rent premium for these leases for four years, which required an amendment of General Lease S-5320 and similar leases.

for the issuance of a lease to USDA for the parcel. A copy of the subdivision map is attached as Exhibit B.

Lessees Peter H. Jose and Richard A.J. Jose are compliant with the terms and conditions of the lease with regards to rent, insurance and performance bond.

USDA has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

The last rental reopening occurred on June 30, 2003. The next rental reopening is scheduled for June 30, 2013. There are no outstanding rental reopening issues.

No comments were solicited as the project has already been through the environmental assessment process under HRS Chapter 343 and received a FONSI.

Staff is recommending that the requested withdrawal be granted. Under HRS 171-37, the withdrawal of land from a lease requires a rent reduction. The statute provides in relevant part as follows:

upon the taking which causes any portion of the land originally demised to become unusable for the specific use or uses for which it was demised, the rent shall be reduced in proportion to the value of the land withdrawn or made unusable, and if any permanent improvement constructed upon the land by the lessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value thereof shall be paid based upon the unexpired term of the lease; . . . and provided further that upon withdrawal any person with a long-term lease shall be compensated for the present value of all permanent improvements in place at the time of withdrawal that were legally constructed upon the land by the lessee to the leased land being withdrawn. . . .²

The withdrawal of the 3 acres from the premises will require General Lease No. S-5320 to be amended to reflect the decreased acreage of the premises and to reduce the rent. Because a rental reopening will be occurring under the lease in less than one year, staff is recommending that in the interim the lease rent be reduced on a straight pro rata basis calculated as follows:

$3 \text{ acres} / 110 \text{ acres} = .027$, rounded to .03 or 3%
Current annual lease rent = \$1,600 x .03 = \$48
 $\$1,600 - \$48 = \$1,552$ adjusted annual rent

² Section 43 of General Lease No. S-5320 contains a similar provision regarding withdrawal.

Accordingly, staff is including a recommendation below that the lease be amended to provide that the annual rent for the period from the date of the Board approval of the withdrawal through June 29, 2013 shall be \$1,552 (pro-rated for the number of months remaining in the year).

Also under HRS Section 171-37, when the State withdraws lands from a lease, the State is required to compensate the lessee for any improvements taken as a result of the withdrawal. In this case, the only improvements taken are a section of stock-proof fencing on the southern boundary of the withdrawal parcel. Staff is including an applicant requirement above that USDA install stock-proof fencing on the west, north and south boundaries of the withdrawn parcel at its expense before USDA breaches any existing fencing, but no later than one year from the commencement of the USDA lease.

Staff has inquired of lessees Peter and Richard Jose whether they are asserting a claim for the taking of any improvements on the withdrawn parcel, and their response was that they would not be submitting a claim for the section of fencing taken as part of the withdrawal. Lessees asked whether they could be reimbursed for costs they incurred in clearing the 3-acre withdrawal area of guava trees in the late 1990s and planting the area with pasture grass, which lessees calculate at \$1,560.00.³ While the statute does not require compensation for such expenses, staff understands that the Board has authority to impose additional requirements on an applicant seeking to have lands withdrawn from an existing lease. Staff believes that it is not unreasonable for USDA to reimburse the Joses for their costs incurred in making the land useable for pasture, and have included an applicant requirement to this effect above.

Finally, in processing the withdrawal, staff noted that there is no improved legal access from a public highway to the Jose lease premises under General Lease No. S-5320. The tax maps and CSF map show a government road connecting to the southeastern boundary of the Jose lease parcel. See Exhibit C attached. But the road does not appear to exist on the ground. For the sake of clarity, staff is including a recommendation below that the lease be amended to include an acknowledgment and agreement by the Joses that there is no improved legal access to the lease premises from a public highway, and that the Joses shall be solely responsible for establishing and maintaining any required access over private lands or over any other lands not under the Board's jurisdiction at their sole cost and expense.

RECOMMENDATION:

That the Board, subject to the Applicant fulfilling the Applicant requirements listed above:

³ The Joses calculated the \$1,560.00 as follows: 12 hours of tractor clearing at \$80/hour (= \$960.00) plus grass planting on three acres at \$200/acre (= \$600.00), for a total of \$1,560.00.

1. Approve the withdrawal of approximately 3 acres from General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees, subject to the following:
 - a. The standard terms and conditions of the most current withdrawal from 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 conditions as may be prescribed by the Chairperson which are in the best interests of the State.

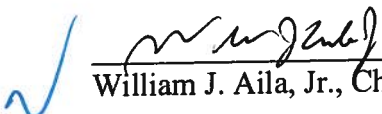
2. Authorize the amendment of General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees, to (i) reflect the withdrawal, (ii) decrease the acreage of the lease premises, (iii) reduce the rent to \$1,552 per annum for the period from the date of the Board's approval of the withdrawal through June 29, 2013 (pro-rated for the number of months remaining in the year), and (iv) include an acknowledgment and agreement by Lessees Peter H. Jose and Richard A.J. Jose that there is no improved legal access to the lease premises from a public highway, and that Lessees Peter H. Jose and Richard A.J. Jose shall be solely responsible for establishing and maintaining any required access over private lands or over any other lands not under the Board's jurisdiction at their sole cost and expense, subject to the following:
 - a. The standard terms and conditions of the most current amendment 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 conditions as may be prescribed by the Chairperson which are in the best interests of the State.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:


William J. Aila, Jr., Chairperson

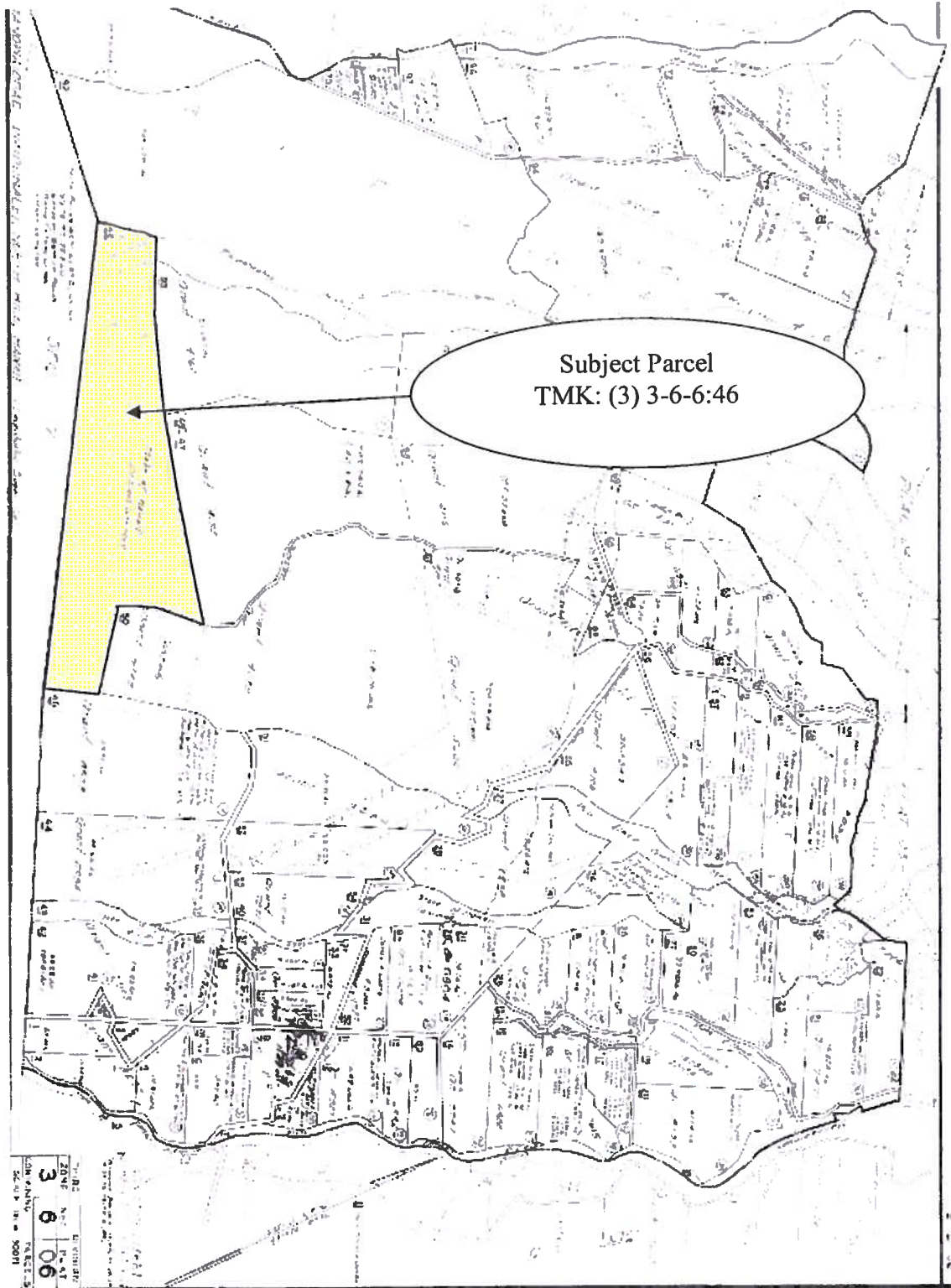


EXHIBIT A

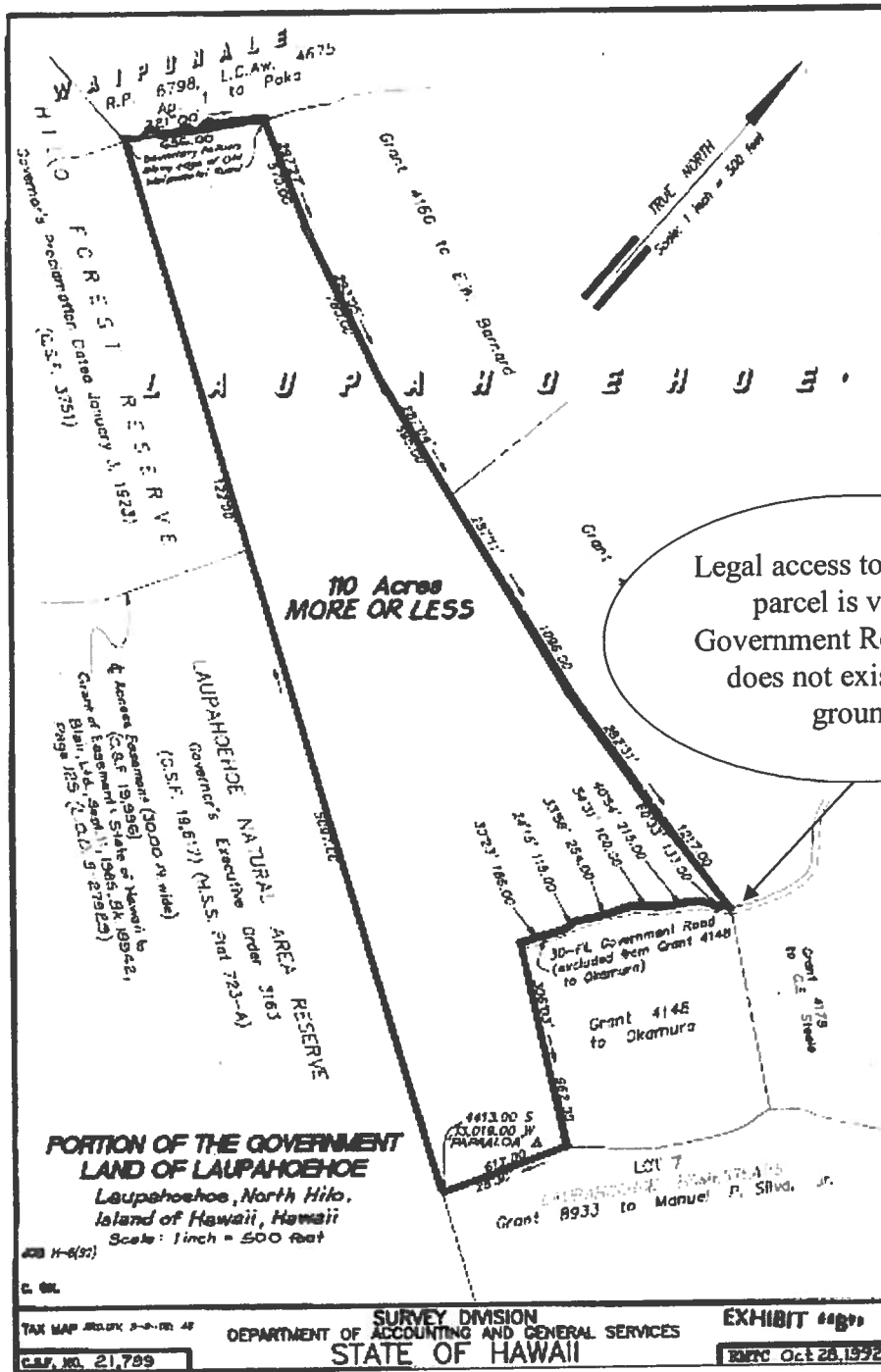
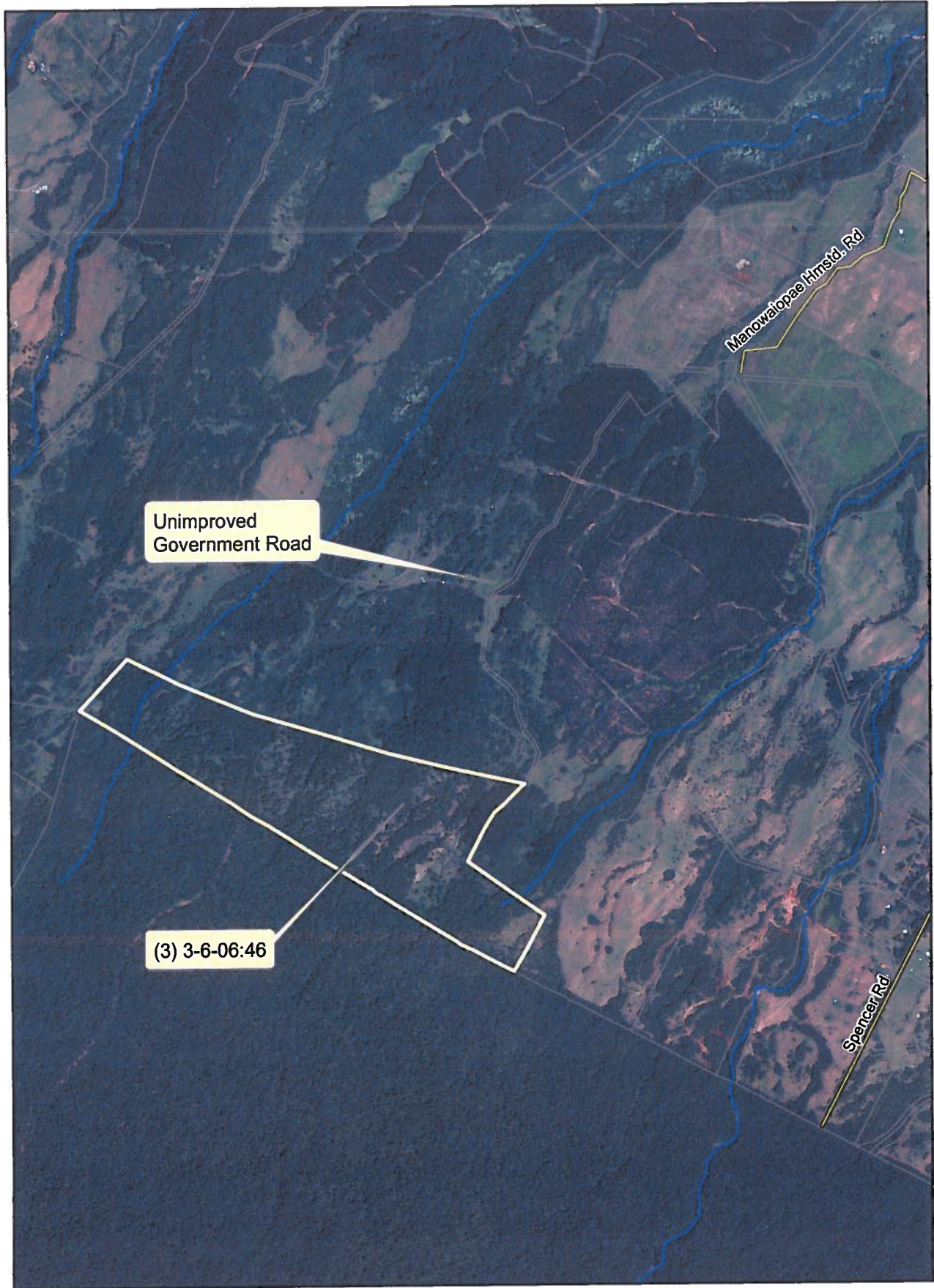


EXHIBIT C

Manowaiopae Mauka



Unimproved
Government Road

Manowaiopae Hmsta. Rd

(3) 3-6-06:46

Spencer Rd

