

State of Hawai'i
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawai'i 96813

February 26, 2016

Chairperson and Members
Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

Land Board Members:

SUBJECT: REQUEST APPROVAL FOR THE DEPARTMENT TO ENTER INTO A RIGHT-OF-ENTRY OF AGREEMENT WITH THE TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP FOR MANAGEMENT ACCESS TO STATE LANDS, MANOWAI'ŌPAE, NORTH HILO, HAWAI'I, TMKs: (3) 3-6-006:047 (POR.), :050 (POR.), :066 (POR.), :092 (POR.), AND :093 (POR.); AND TO AUTHORIZE THE CHAIRPERSON TO FINALIZE TERMS AND SIGN THE AGREEMENT;

AND

REQUEST APPROVAL OF DECLARATION OF EXEMPTION FROM CHAPTER 343, HAWAI'I REVISED STATUTES, ENVIRONMENTAL ASSESSMENT REQUIREMENT FOR THE RIGHT-OF-ENTRY OF AGREEMENT.

SUMMARY:

The Division of Forestry and Wildlife (DOFAW) requests that the Board of Land and Natural Resources (BLNR) approve a five-year Right-of-Entry Agreement (ROE) between the Department (DLNR) and The Trustees of the Estate of Bernice Pauahi Bishop, aka Kamehameha Schools (KS) that will allow DLNR to cross through KS property in order to reach state lands under DLNR jurisdiction for management purposes, at a cost of \$3,000 per year.

BACKGROUND:

KS roads provide the only feasible access to a parcel of state land (TMK: (3) 3-6-006:046) that provides access to Hilo Forest Reserve (Laupāhoehoe Section) and Laupāhoehoe Natural Area Reserve (Laupāhoehoe, TMK: (3) 3-7-001:012), via Blair Road. The state land is encumbered by a lease from Land Division to a private entity through June 29, 2028 (GL S-5320), and the lease area will be added to the Laupāhoehoe Section of Hilo Forest Reserve when this lease ends (EO 4357).

ITEM C-3

On September 10, 2012, DOFAW and KS entered into a ROE that provides DOFAW with road access through KS lands to the encumbered state land (ROE No. 336-14/99998034). KS extended the initial two-year ROE through October 31, 2015. Thereafter, KS issued monthly holdover letters to extend the ROE while KS and DOFAW negotiated the terms of a new ROE (Attachment 1, Draft ROE).

DISCUSSION:

In order to secure permanent access to Laupāhoehoe, in April 2015 DOFAW requested a perpetual, non-exclusive easement over KS roads that provide access to the area. In furtherance of BLNR's Cooperative Agreement with the U.S. Forest Service (USFS) for the Hawai'i Experimental Tropical Forest initiative, DOFAW's pending request for a perpetual easement through KS lands includes access for USFS for the duration of USFS's pending lease from Land Division for a three-acre parcel that BLNR withdrew from state land—encumbered under GL S-5320—on October 12, 2012 (Item D-4). The USFS intends to contribute significant funding for renovation, repair, and maintenance of the KS roads, and the analysis and structuring of this federal funding contribution is delaying KS's processing of DOFAW's easement request.

Therefore, if DLNR does not reach an agreement with KS for short-term access via KS roads at Manowai'ōpae, then DOFAW, DOCARE, Land Division, and other DLNR units will not be able to fulfill DLNR's mandate for management of its lands in the area, including the encumbered lease area, the Hilo Forest Reserve, and the Laupāhoehoe Natural Area Reserve.

To secure the proposed ROD agreement with KS, DOFAW would budget \$3,000 annually for a permit fee for use of the KS roads, which KS will hold and use for needed road repair.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

DLNR proposes using state funds to secure DLNR access over private roads for management purposes. On September 2, 2011, Land Division determined that a USFS proposed action, the Hawai'i Experimental Tropical Forest Laupāhoehoe Construction Project, which includes USFS access over the same private roads, will not have a significant environmental effect, and thus issued a Finding of No Significant Impact determination based on the Project's Final Environmental Assessment.

The private roads that DLNR would access under the proposed ROE are not in a particularly sensitive environment, and the cumulative impact of access over these roads, over time, would not be significant. Therefore, under the exemption list for the Department that was reviewed and concurred on by the Environmental Council on June 5, 2015, the applicable exemptions from the Chapter 343 requirement to prepare an environmental assessment include Exemption Classes 1.42 (Actions that are intended to maintain or support the sustainability of those natural resources under the jurisdiction of the Department, including law enforcement, regulation compliance, resources and environmental monitoring, debris or property removal, and other administrative and management measures) and 1.45 (Acquisition of land or interests in land).

RECOMMENDATIONS:

That the Board:

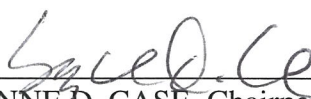
1. Approve the Department entering into a Right-of-Entry Agreement with The Trustees of the Estate of Bernice Pauahi Bishop for road access through the Estate's lands at Manowai'ōpae, North Hilo, Hawai'i, TMKs: (3) 3-6-006:047 (por.), :050 (por.), :066 (por.), :092 (por.), AND :093 (por.).
2. Delegate authority to the Chairperson to:
 - (a) finalize the terms of the Right-of-Entry Agreement, and
 - (b) sign the final Right-of-Entry Agreement subject to approval as to form by the Department of the Attorney General.
3. Declare that, after considering the potential effects of the proposed Right-of-Entry Agreement as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this Right-of-Entry Agreement will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

Respectfully submitted,



Sheri Mann, Acting Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachments:

1. Draft Right-of-Entry Agreement

ATTACHMENT 1

ROE No.: _____

REVOCABLE RIGHT OF ENTRY AGREEMENT

This REVOCABLE RIGHT OF ENTRY AGREEMENT (the "**Agreement**"), dated _____, 2016 is by and between the TRUSTEES OF THE ESTATE OF BERNICE PAUAAHI BISHOP, whose address is 567 South King Street, Suite 200, Honolulu, Hawaii 96813 ("**Owner**"), and STATE OF HAWAI'I, DEPARTMENT OF LAND AND NATURAL RESOURCES, whose address is 1151 Punchbowl Street, Honolulu, Hawai'i 96813 ("**Permittee**").

Owner hereby grants to Permittee permission to enter, and Permittee hereby accepts such permission to enter, the Property defined in this Agreement, subject to the terms and conditions of this Agreement.

AGREEMENT

A. Specific Provisions. The following constitute the "**Specific Provisions**" of this Agreement and are referred to elsewhere in this Agreement. (References in these Specific Provisions to "**Section**" refer to the section number of the General Provisions of this Agreement, which are attached as Exhibit B. All capitalized terms in these Specific Provisions, unless otherwise defined herein, have the meanings given to them in the General Provisions.)

1. Property: The Property described in Exhibit A, situated in
(Section 1) Manowaiopae, North Hilo, Hawai'i.
Tax Map Key No.: (3) 3-6-006-047, -050, -066, -092 and -093 (all portions of).

2. Term: Five (5) years, commencing on _____, 2016
(Section 2) and ending on _____, 2020, unless sooner terminated as provided in this Agreement.

3. Purpose(s) for Entry: Entry shall be solely for the following
(Section 3) purpose(s):

(1) Road access through KS lands to access Permittee's TMK No. (3) 3-6-006-046 and (3) 3-7-001-012.

4. Insurance: Minimum Coverage Limits:
(Section 7) Self insured.

5. Special Terms: The following items (if any) are "**Special Terms**" to this Agreement. To the extent there is any conflict between these Special Terms and any other terms of this Agreement, these Special Terms shall control:

(1) Permittee shall conduct only those activities listed in section 3 above and

ATTACHMENT 1

- no other activities.
- (2) Permittee shall not interfere with or disrupt any of Owner's or Owner's lessees or tenants' on the Property.
 - (3) Permittee shall exercise due care of public and private safety on the Property and shall comply with all laws, ordinances, and rules and regulations of governmental agencies.
 - (4) Permittee shall pay Owner a \$3,000 annual permit fee for use of the road, which Owner shall hold and use for any related improvements, general maintenance and cleaning of the Property.
 - (5) Permittee shall be responsible for all costs related to any repairs or replacement for a lost, stolen, or damaged lock, key, gate or gate fixtures caused by Permittee's misuse or neglect, contingent upon the availability and allotment of public funds to the Department of Land and Natural Resources to make such payment .
 - (6) Permittee shall inform Owner of any identified hazard, potential hazard and unlawful activities including trespassers on Property.
 - (7) Permittee understands that Permittee shall not have the exclusive right to use the roadway. Permittee further understands that Owner may, from time to time, permit others to use the roadway.
 - (8) Permittee shall close all gates upon entry onto and exit from the Property.
 - (9) Permittee is aware that cattle roam freely throughout the Property and that the access roadway is not fenced, or otherwise enclosed, to prevent the cattle from entering the roadway. Permittee shall exercise extreme caution when using the Property.
 - (10) Permittee agrees that Permittee's use of the Property shall be at Permittee's own risk, and Permittee and all persons claiming under, by or through Permittee, releases Owner from all claims and demands of any kind resulting from any accident, damage or injury occurring on the Property.
 - (11) Delete Paragraph 4(b) of the General Provisions (Exhibit B) and replace it with the following: **Prior Notice of Entry.** Permittee shall provide Owner with a list

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of authorized fleet vehicles (license plate numbers, make and model) as well as authorized staff members (i.e. field crew) upon returning the acceptance of this offer of Right of Entry. Should either list change, the Permittee is required to provide a revised list to the Owner within seven (7) days of the change. Permittee will also provide Owner with copies of all permits for visiting researchers, other users and contractors. Permits should include the names of the Authorized Persons who will be entering the Property, the specific purpose for the entry, and an estimate of the anticipated duration of the entry. Actual entry onto the Property shall thereafter conform with the specific terms of the corresponding prior written notice. By mutual agreement of the Owner and Permittee, the notice may cover multiple entries by multiple parties for an agreed upon period. The intent of this provision is to afford the Owner reasonable prior notice of the use being made of the road and by whom.

- (12) Replace General Provisions 4d. Damages; Liens.** All damage or injury to the property or any improvements or property thereon by Permittee or any Authorized Persons shall be promptly repaired by Permittee at its own cost and expense, contingent upon the availability and allotment of public funds to the Department of Land and Natural Resources to make such payment. Permittee shall promptly discharge any such lien or encumbrance by paying the amount owed, contingent upon the availability and allotment of public funds to the Department of Land and Natural Resources to make such payment. Permittee shall not leave any equipment or other items on or about the Property without Owner's prior written consent.
- (13) Replace General Provision 6., Risk of Damage to Person or Property; Indemnity.** Permittee shall be liable to the extent allowed by law, including the State Tort Liability Act (Hawaii Revised Statutes Chapter 662), for claims for personal injury, including death, or for property damage, resulting from the

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negligent of wrongful act or omission of any employees of the Permittee while acting within the scope of his or her employment, arising out of the Agreement.
(14) Permittee shall complete and deliver to Owner a key agreement for each key.
Information received see below:

<u>Date</u>	<u>Key Agreement No.</u>	<u>Issued To</u>
	N/A	

B. General Provisions. The terms and conditions of the "**General Provisions**" of this Agreement, which are attached to this Agreement as Exhibit B, incorporated in this Agreement by reference and made a part of this Agreement for all purposes; provided, however, that in the event of a conflict or any inconsistency between the terms and conditions of the Specific Provisions and the General Provisions, the Specific Provisions shall prevail. The terms and conditions of the General Provisions are in a separate exhibit for convenience of reference only.

C. Exhibits. The following are attached as Exhibits and by this reference made a part of this Agreement:

Exhibit A Description of the Property
Exhibit B General Provisions

D. Trustees Not Personally Liable. This instrument has been executed by or on behalf of the Trustees of the Estate of Bernice Pauahi Bishop in their fiduciary capacities as said Trustees, and not in their individual capacities. No personal liability or obligation under this instrument shall be imposed or assessed against said Trustees in their individual capacities.

E. Entire Agreement; Counterparts. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof. This Agreement may be executed in multiple counterparts, each of which shall be deemed a duplicate original, but all of which taken together shall constitute one and the same instrument.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

TRUSTEES OF THE ESTATE OF BERNICE
PAUHI BISHOP

By:

Marissa Harman -Senior Asset Manager,
Hawai'i Island

"Owner"

STATE OF HAWAI'I, DEPARTMENT OF LAND AND
NATURAL RESOURCES

By:

Its Chairperson:

"Permittee"

ATTACHMENT 1

CONSENT

(Revocable Right of Entry Agreement)

THIS CONSENT is attached and made part of that certain Revocable Right of Entry Agreement (the "Agreement") by and between THE TRUSTEES OF THE ESTATE OF BERNICE PAUHI BISHOP, as Owner, and STATE OF HAWAI'I, DEPARTMENT OF LAND AND NATURAL RESOURCES as Permittee, and is executed this _____ day of _____, 2016, by LHF LOPIWA LLC, A Delaware Limited Liability Company (the "undersigned").

The undersigned hereby consents to the Agreement, provided that such consent will not create any liabilities or obligations on the part of the undersigned in connection with the Property. All capitalized terms not defined in this Consent shall have the same meaning as those same capitalized terms defined in the Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Consent on the day and year first above written.

LHF Lopiwa LLC,
A Delaware Limited Liability Company

By: LHF Sunbear, Inc.
Its Manager

By: _____
Name: Terry Oliver
Title: Hawai'i Operations and Marketing
Manager, GMO Renewable Resources, LLC

"Lessee"

ATTACHMENT 1

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(Revocable Right of Entry Agreement)

THIS CONSENT is attached and made part of that certain Revocable Right of Entry Agreement (the "Agreement") by and between THE TRUSTEES OF THE ESTATE OF BERNICE PAUHI BISHOP, as Owner, and STATE OF HAWAI'I, DEPARTMENT OF LAND AND NATURAL RESOURCES as Permittee, and is executed this _____ day of _____, 2016, by KELLY JOSE (the "undersigned").

The undersigned hereby consents to the Agreement, provided that such consent will not create any liabilities or obligations on the part of the undersigned in connection with the Property. All capitalized terms not defined in this Consent shall have the same meaning as those same capitalized terms defined in the Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Consent on the day and year first above written.

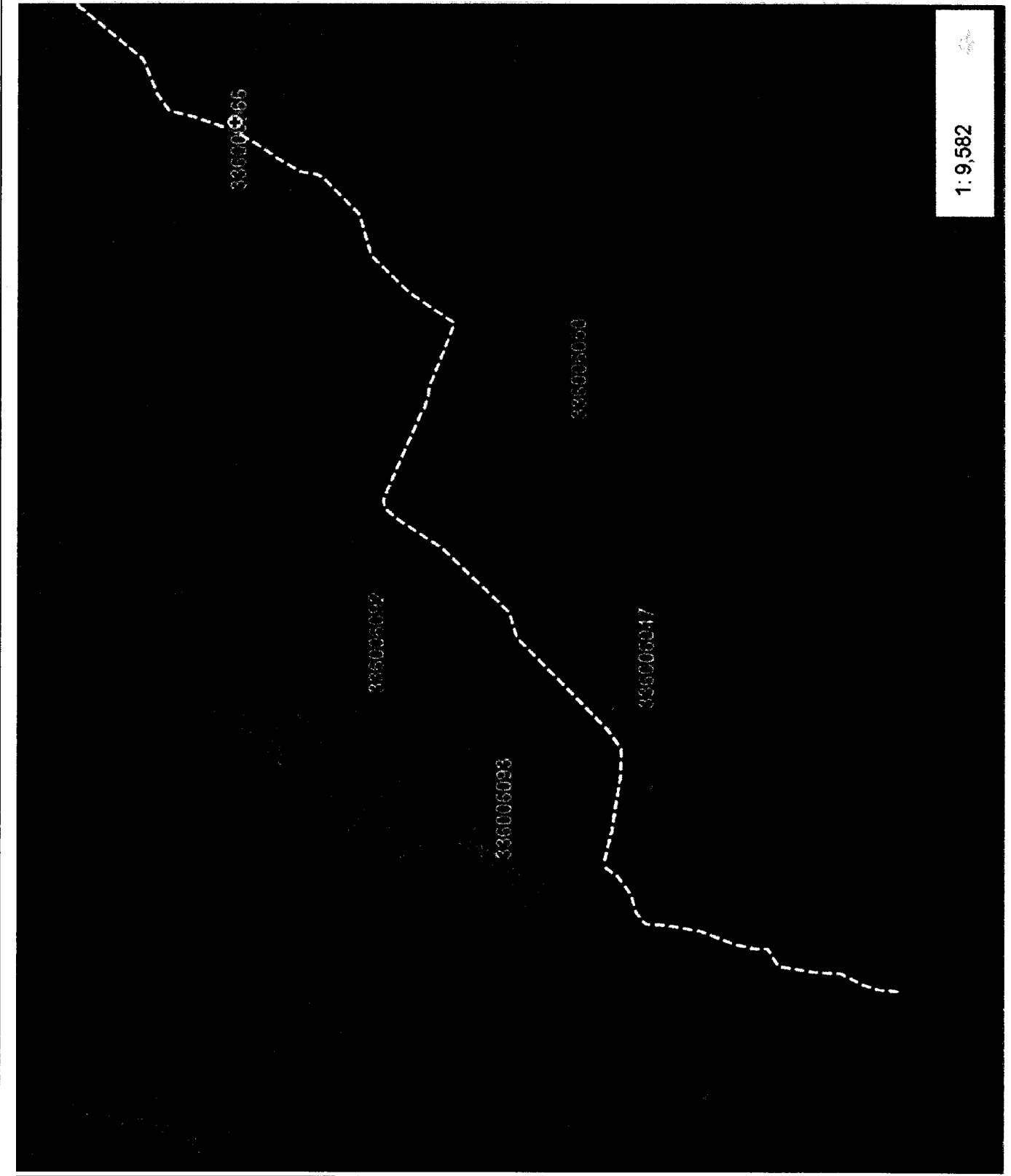
KELLY JOSE

Signature:

"Lessee"

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EXHIBIT A
DESCRIPTION OF THE PROPERTY
ATTACHED



ATTACHMENT 1

EXHIBIT B
GENERAL PROVISIONS

1. **Grant of Right of Entry.** Owner hereby grants Permittee permission to enter the Property identified in the Specific Provisions and described in Exhibit A attached to this Agreement (the "**Property**") during the Term (as defined below) solely for the purposes stated below, subject to the terms and conditions of this Agreement. Permittee hereby accepts such permission to enter and agrees to comply with all of the terms and conditions of this Agreement.

2. **Term.** The term of this Agreement shall be for the period set forth in the Specific Provisions, beginning and ending on the dates set forth in the Specific Provisions (the "**Term**"); provided, however, that notwithstanding anything in this Agreement to the contrary, Owner may revoke and terminate this Agreement at any time, in Owner's sole discretion, for any or no reason, upon 24 hours prior written notice to Permittee.

3. **Purpose for Entry.** Permittee's entry onto the Property shall be only for the purpose or purposes expressly set forth in the Specific Provisions and for no other purpose or purposes.

4. **Rules and Conditions For Entry.**

a. **Authorized Persons.** Only Permittee and its respective agents, employees, contractors, and representatives (collectively, the "**Authorized Persons**") shall be allowed to enter the Property under this Agreement.

b. **Prior Notice of Each Entry.** Permittee shall provide Owner not less than 48 hours prior written notice of each entry onto the Property, together with a list of the names of the Authorized Persons who will be entering the Property, the specific purpose for the entry, and an estimate of the anticipated duration of the entry. Actual entry onto the Property shall thereafter conform with the specific terms of the corresponding prior written notice.

c. **Performance of Work.** All work must be conducted in accordance with applicable laws and in a safe and workmanlike manner. Permittee and the Authorized Persons shall not unreasonably interfere with any other activities on the Property and shall take all reasonable measures for the prevention of dust, noise and other nuisances originating from the work.

d. **Damages; Liens.** All damage or injury to the Property or any improvements or property thereon by Permittee or any Authorized Persons shall be promptly repaired by Permittee at its own cost and expense. Permittee and the Authorized Persons shall not commit any act or neglect that may subject the Property to any lien or encumbrance. Permittee shall promptly discharge any such lien or encumbrance by paying the amount claimed. Permittee shall not leave any equipment or other items on or about the Property without Owner's prior written consent.

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e. **Compliance with Laws.** Permittee shall comply with all laws, ordinances, and governmental rules and regulations which apply to the Property, the use of the Property, or the work to be performed by Permittee or any Authorized Persons on or with respect to the Property. Without limiting the foregoing, Permittee shall not cause or permit the Property to be in violation of any federal, state or local laws, ordinances or regulations, now or hereafter in effect, relating to environmental conditions, industrial hygiene or hazardous materials ("**Hazardous Materials Laws**"). Permittee shall immediately advise Owner in writing of the discovery by Permittee or any Authorized Persons of any occurrence or condition on the Property or adjoining properties relating to Hazardous Materials Laws. Permittee shall not permit or cause, or allow the Authorized Persons to permit or cause, any hazardous materials to exist on, under or about the Property.

f. **Preservation of Historic and Archaeological Sites.** Permittee shall take every reasonable precaution to preserve and leave unaltered all places, if any, of historic and/or archaeological interest, including without limitation, structures and sites listed on the Hawaii State Register of Historic Places and/or the National Register of Historic Places, ponds, reservoirs, heiau, altars, agricultural terraces, lo'i, walls, auwai, house platforms, imu, petroglyph sites, cemeteries; and all objects, if any, of historic and/or archaeological interest, including, without limitation, antiquities and specimens of Hawaiian or other ancient art or handicraft which may be found in or on the Property. Upon the discovery of such objects or of any human remains in or on the Property, Permittee shall leave the same untouched and shall immediately notify Owner of the type and location of such discovery.

g. **Other Rules and Conditions for Entry.** Permittee shall comply with all other reasonable rules and conditions for entry that Owner may from time to time make and provide in writing to Permittee.

5. **Right of Entry is Non-Exclusive.** The right of entry given to Permittee by this Agreement is non-exclusive. This Agreement is not a lease or a grant of an easement or of any other interest in the Property, and Permittee agrees not to claim any interest in the Property under this Agreement.

6. **Risk of Damage to Person or Property; Indemnity.** As a material part of the consideration to Owner for this Agreement, Permittee assumes all risk of damage to property and bodily injury or death to persons incurred in, on or about the Property during, or directly or indirectly arising out of, the entry onto the Property by Permittee or any Authorized Persons, regardless of what causes any such damage or injury. Permittee hereby waives all claims which Permittee may have, now or later, against Owner and its trustees, executives, officers, employees, agents, contractors and invitees (collectively, "**Owner and its Agents and Invitees**"), for any such damage, injury or death. Further, Permittee agrees to indemnify, defend and hold harmless Owner and its Agents and Invitees from and against any and all claims, liabilities, damages, losses, costs and expenses (including reasonable

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attorneys' fees and costs) (collectively, the "**Claims**") for which Owner and its Agents and Invitees may become liable, including, without limitation, Claims made by any Authorized Persons or any person (including insurance companies and employees) claiming under, or reporting to, or under the supervision or control of Permittee or any Authorized Persons, which Claims, directly or indirectly, arise out of, are caused or occasioned by, or result from: (a) the entry by Permittee or any Authorized Persons onto the Property, (b) the performance by Permittee or any Authorized Persons of work at or about the Property, (c) a breach of this Agreement by Permittee, or (d) acts or omissions of Permittee or any Authorized Persons. Permittee further agrees that in case of any Claim, threatened or actual, against Owner or Owner's Agents or Invitees, upon written request of Owner or Owner's Agents or Invitees, Permittee shall defend the same at Permittee's expense by counsel satisfactory to the person requesting the same. If no request is made for such defense or if Permittee does not provide such defense, then Permittee shall reimburse Owner and its Agents and Invitees for the cost of such defense, and agrees to cooperate with Owner and its Agents and Invitees in such defense, including, but not limited to, the providing of affidavits and testimony upon request of Owner and its Agents and Invitees. The provisions of this section shall survive termination of this Agreement.

7. **Insurance.** Permittee shall procure and maintain at Permittee's expense during the Term (and shall cause the Authorized Persons to procure and maintain during the Term), the insurance policies and coverages, with the minimum limits, set forth in the Specific Provisions, and upon such terms and conditions as are customarily included in such lines of insurance written for responsible companies in the same type of businesses as the Authorized Persons. Owner shall be an additional insured on all insurance policies required under this Agreement. Copies of such policies or certificates showing the existence of such policies shall be given to Owner upon execution of this Agreement.

8. **Remedies.** If either party breaches its agreements or obligations under this Agreement, the other party may seek specific performance, damages, and/or any other remedy available at law or in equity. Further, if Permittee breaches any of its agreements or representations, Owner shall have, in addition to all other rights and remedies available at law or in equity, the right to immediately terminate this Agreement upon written notice to Permittee.

9. **Reports; Confidentiality.** Permittee shall promptly furnish to Owner, free of charge and free of limitations on use, copies of all reports, studies, tests and other information relating to the condition of the Property that result from Permittee's entry onto the Property, and, except as otherwise required by law, Permittee shall not disclose such reports, studies, tests and other information to any person or entity, without Owner's prior written consent. This section shall survive termination of this Agreement.

10. **Miscellaneous Provisions.**

a. **Time of the Essence.** Time is of the essence in respect of all provisions of this Agreement in which a definite time for performance is specified.

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b. Legal Action. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of Hawai'i. If legal action, declaratory or otherwise, is brought by either party for the determination of any controversy arising hereunder, the recovery of any payment due hereunder or because of the breach or threatened breach of any term, covenant, or provision hereof, the party prevailing in that action shall be entitled to recover from the party not prevailing, the costs of suit and reasonable attorneys' fees.

c. Invalid Provisions. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision(s) were omitted. If a provision hereof is only partially enforceable, it shall be enforced to the fullest extent permissible. The section and/or paragraph headings in this Agreement are inserted only as a matter of convenience and in no way define, limit, or describe the scope or intent of this Agreement or any provisions hereof or in any way affect this Agreement.

d. Waiver or Modification. Neither this Agreement nor any provision hereof may be waived, terminated, or rescinded except by a written instrument signed by the party charged with the alleged waiver, termination or rescission. Further, neither this Agreement nor any provision hereof may be amended or otherwise modified except by a written instrument signed by the parties to this Agreement.

e. No Assignment. Permittee shall not assign, delegate or transfer any right or obligation under this Agreement.

f. Trustees Not Personally Liable. This instrument has been executed by or on behalf of the Trustees of the Estate of Bernice Pauahi Bishop in their fiduciary capacities as said Trustees, and not in their individual capacities. No personal liability or obligation under this instrument shall be imposed or assessed against said Trustees in their individual capacities.

g. Binding Effect. This Agreement shall inure to the benefit of, and shall be binding upon, the parties hereto and their respective successors and permitted assigns.

[END OF EXHIBIT B]