

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

July 25, 2008

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

**Permission to Obtain a Revocable Right of Entry (ROE) from the Office of Hawaiian Affairs (OHA) for the Plugging and Abandonment of Geothermal Well KA1-1**

The Department of Land and Natural Resources has opened bids for the Plugging and Abandonment of Geothermal Well KA1-1 located at Wao Kele O Puna on land owned by the Office of Hawaiian Affairs (OHA). OHA has been advised by their legal counsel to enter into a Right of Entry (ROE) agreement with DLNR before any work to plug and abandon Geothermal Well KA1-1 can proceed. A copy of the draft ROE is attached.

**RECOMMENDATION:**

That the Board of Land and Natural Resources authorize the Chairperson to enter into a ROE agreement with OHA for this project and sign the necessary documents pertaining to the project, subject to review and approval as to form by the Attorney General's office.

Attachment

Respectfully submitted,

  
ERIC T. HIRANO  
Chief Engineer

APPROVED FOR SUBMITTAL:

  
LAURA H. THIELEN, Chairperson

c: DOFAW (Paul Conry)

**ITEM L-5**

**REVOCABLE RIGHT OF ENTRY FOR PLUGGING AND ABANDONMENT OF  
GEOHERMAL WELL KA1-1**

This REVOCABLE RIGHT OF ENTRY AGREEMENT (the "ROE"), dated May \_\_\_\_, 2008, is by and between the OFFICE OF HAWAIIAN AFFAIRS, whose address is 711 Kapi'olani Boulevard, 5th Floor, Honolulu, Hawai'i 96813 ("OHA"), and the DEPARTMENT OF LAND AND NATURAL RESOURCES OF THE STATE OF HAWAII, whose address is Kalanimoku Building, 1151 Punchbowl Street, Honolulu, Hawai'i 96813, ("DLNR").

I. **RECITALS**

A. OHA is the owner of land in Puna, Island and County of Hawai'i, State of Hawai'i, TMK Nos. (3) 1-2-010-002 and (3) 1-2-010-003 commonly referred to as Wao Kele o Puna (the "Property").

B. OHA and DLNR agreed to work together to complete the plugging and abandonment of the existing geothermal well on the Property in its Memorandum of Agreement ("MOA") dated June 27, 2006.

C. DLNR intends to undertake activities for the purpose of plugging and abandonment of the existing geothermal well KA1-1 including, but not limited to, site visits and inspection, site preparation, mobilization, demobilization, demolition, and site restoration including filling the reservoir at KA1-1 as described in the Contract Specifications and Plans for Job No. J38CH20A (the "Project") (see Exhibit A), and has requested that OHA permit it a right of entry in order to execute and complete the Project.

D. OHA is willing to grant DLNR a revocable right of entry onto the Property for said purpose subject to the terms and conditions set forth herein, and DLNR is agreeable to said terms and conditions.

II. **AGREEMENT**

Now, therefore, in consideration of the representations, warranties, covenants, conditions and other terms stated below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

A. **Right of Entry.** OHA grants to DLNR permission to enter, and DLNR hereby accepts such permission to enter, the Property for the sole purpose of DLNR's execution of the Project as described more fully in the Exhibit A, subject to the provisions, terms and conditions of this ROE.

B. **Term.** This ROE shall be effective for a period of two (2) years from the date shown above, or upon the completion of the Project whichever is sooner, unless sooner terminated by OHA. The term of this ROE may be extended by the parties in writing on such terms as may be agreed at the time of extension.

C. **Permitted Persons and Vehicles.** DLNR shall allow only its employees, agents, consultants or contractors ("DLNR Invitees") necessary for the Project to enter the Property. DLNR shall employ all necessary and appropriate measures to protect the health and safety of DLNR Invitees and shall be solely responsible for loss, injury or death caused to said persons and/or their property or any property belonging to DLNR arising from or related to DLNR's activities hereunder and/or entry onto the Property. DLNR shall provide OHA a list of vehicles and persons that will be entering the Property pursuant to this ROE at

least 48 hours before any Project work commences.

D. Times of Access/Coordination/Non-Disturbance/Monitoring. DLNR shall provide OHA a copy of its work schedule before work commences, and will provide OHA with notice of changes to the schedule before commencing work under the changed schedule. DLNR and DLNR Invitees may access the Property, for the sole purpose of completing the Project, Monday through Friday, between 6:00 a.m. and 6:00 p.m. Administrative activities which do not impact users of the Property, including but not limited to planning, coordination, and site area visits, may take place between the hours of 6:00 a.m. and 6:00 p.m. Monday through Friday. Physical activity may take place between 7:00 a.m. and 5:00 p.m. Monday through Friday. DLNR shall obtain OHA's written approval for any work that cannot be completed during normal working hours. Work that may disturb other users of the Property, employees, agents or other invitees of OHA, surrounding residents and landowners shall not be permitted outside of the normal work hours. Exceptions may be made for emergency work to prevent or correct work site conditions impacting safety or environmental protection, upon advance consultation with OHA. In order to avoid or minimize to the greatest extent possible injury, harm or disruption to, disturbance of or interference with employees and other OHA invitees, activities of OHA on the Property, and surrounding residents and landowners, DLNR shall coordinate its schedule and activities with OHA on a regular and recurring basis, and coordinate and employ, at its expense, all appropriate measures, including appropriate warning signs and barricades in the areas of the Project.

E. OHA's Right to Monitor. OHA shall have the right at all times to monitor and/or observe the work being done on the Project and to monitor DLNR's compliance with this ROE. OHA shall direct all comments and concerns to DLNR, who shall be responsible for insuring that its contractors are in compliance with this ROE. DLNR shall have a Project Engineer on the Project site at all times during construction work and activities who will be accessible in person or by cellular phone for all inquiries and emergencies.

F. Equipment/Property. DLNR and DLNR Invitees, at its expense and risk, may store tools, equipment, materials or other property on the Property. All tools, equipment, and other property taken upon or placed upon the Property by DLNR and DLNR Invitees shall remain the property of DLNR and DLNR Invitee, and DLNR and DLNR Invitees shall be responsible for the removal of all tools, equipment, materials, other property, waste, rubbish, and debris brought onto or created on the Property, and shall restore the Property to the condition it was in prior to the commencing of the Project, leaving the Property in as clean and natural a condition as possible; provided however, that DLNR shall not have the right to remove any improvements made to the Property.

G. Risk of Loss. DLNR, on behalf of itself and DLNR Invitees and any others acting for or on DLNR's behalf, acknowledges and agrees that (1) the Property is unimproved land; (2) DLNR, DLNR Invitees and any others acting on DLNR's behalf are entering such lands knowledgeable of these facts and at their own risk, and assume the risk of injury, death, damage and loss in so doing, (3) DLNR and DLNR Invitees hereby releases, and shall cause its contractors, consultants and any others acting on its behalf to indemnify, OHA, its Trustees, employees, agents and representatives, from and against all claims relating to any injury, death, damage or loss that may occur in the areas used by DLNR and DLNR Invitees hereunder for whatever reason or cause, subject to the limitation on indemnities provided in Paragraph II.P below.

H. Compliance with Laws. DLNR, DLNR Invitees and any others acting for or on DLNR's behalf shall comply with all laws, statutes, ordinances, rules and regulations of the federal, state and county governments relating to the Property, the Project and its execution, DLNR's exercise of rights under this ROE and the use of the Property pursuant to this ROE by DLNR, DLNR Invitees and/or any others acting for or on DLNR's behalf.

I. Vegetation. The removal, trimming, cutting or trampling of vegetation is strictly prohibited without the prior written approval of OHA.

J. Fire. No open fire or burning of any kind shall be permitted on the Property.

K. Protection of Resources. Without limiting the foregoing, DLNR shall employ all measures necessary to prevent or, if necessary, minimize and mitigate adverse impacts from all activities undertaken pursuant to this ROE on the Property and the environment. DLNR shall comply and require DLNR Invitees and any others acting for or on DLNR's behalf to comply with all federal, state and local laws, regulations, rules and guidelines ("Laws") protecting all aspects of the Property and the environment affected by the Project under this ROE including, without limitation, all Laws relating to the protection of water resources, air resources, fish and wildlife resources, historical, archaeological and cultural resources, the disposal of waste, and sound intrusion. DLNR shall be solely responsible for controlling any dust or erosion, or other adverse conditions caused solely by DLNR's entry upon and use of the Property under this ROE.

DLNR and DLNR Invitees shall also, during the term of this ROE and thereafter, take all reasonable steps necessary to prevent the spillage of oil and other petroleum based products from vehicles entering the Property and, where such spillage occurs, DLNR and DLNR Invitees shall take all steps necessary to remediate any such spillage.

L. Archaeological and Cultural Resources. In performing its activities hereunder, DLNR and DLNR Invitees shall not cause any damage to and shall otherwise take all steps necessary to prevent impacts on known archaeological and cultural sites or remains such as bone or charcoal deposits, human burials or remains, rock or coral alignments, pavings or walls, burial shelters and caves, prehistoric artifacts and agricultural sites (collectively, "Archaeological and Cultural Resources"). If, any Archaeological and Cultural Resources are encountered or their presence is suspected, DLNR, DLNR Invitees and any others acting for or on behalf of DLNR shall immediately stop work and report such encounters to the State Historic Preservation Division and OHA, and shall not resume work in the area until and unless permitted to do so by law.

M. Mitigation of Traffic Impacts/Duty to Inform Community. To the extent the Project will adversely impact traffic flow and patterns in the area of the Property, DLNR shall take all steps reasonably necessary to mitigate those adverse impacts, including coordination with the appropriate governmental departments or agencies and the provision of personnel to monitor and manage said impacts. DLNR shall be responsible for informing the public of its traffic impacts entering and exiting the haul routes and for satisfactorily addressing concerns raised by the public. DLNR shall employ whatever means it finds necessary to fully communicate its construction plans, Project timeline and traffic impacts to the general public, the landowners and residents of the area, including, but not limited to, monthly attendance at the community association meetings surrounding the Property and/or hosting monthly community meetings. DLNR's Project updates shall be coordinated with OHA prior to attending or hosting any monthly meetings.

N. Dust Control/Noise. All activities, equipment, processes and work operated or performed by DLNR and DLNR Invitees shall be in strict accordance with State of Hawai'i Department of Health Administrative Rules, Title 11, Chapters 59 and 60.1, and all Federal emission and performance laws and standards, and shall otherwise implement dust control measures, such as twice daily watering, necessary to minimize dust emissions to the extent reasonably possible. Noise shall be kept within acceptable levels at all times in accordance with State of Hawai'i Department of Health Administrative Rules, Title 11, Chapter 46. DLNR and DLNR Invitees will similarly employ the use of muffled equipment, construction

barriers and other measures necessary to minimize construction noise to the extent reasonably possible.

O. Release. DLNR, for itself and DLNR Invitees and any other persons acting for or on behalf of DLNR, hereby releases the Office of Hawaiian Affairs, its Trustees, employees, agents, representatives and insurers, from all claims or liability for any loss that might arise directly or indirectly from DLNR's exercise of rights under this ROE, the use of the Property pursuant to this ROE, or any action or omission of DLNR, DLNR Invitees or anyone else acting on DLNR's behalf, including, without limitation, personal injury, death and damage to real or personal property.

P. Damage to Property/Personal Injury. As between OHA and DLNR, DLNR shall be solely responsible for all damages, losses, liabilities, expenses, claims or actions of any kind arising directly or indirectly from DLNR's exercise of rights under this ROE, the use of the Property pursuant to this ROE by DLNR and/or DLNR Invitees, or any action or omission of DLNR, DLNR Invitees or anyone else acting on DLNR's behalf, including, without limitation, personal injury, death and damage to real or personal property, including the Property. DLNR shall promptly restore property disturbed or damaged by DLNR and/or DLNR Invitees or anyone else acting on DLNR's behalf to its original condition prior to damage or loss where reasonably possible, at its sole expense, and DLNR hereby agrees to cause DLNR Invitees and anyone else acting on DLNR's behalf to indemnify and hold OHA harmless from all such claims, losses, damages and expenses caused by said Invitee(s), to the extent permitted by law. To the extent DLNR's ability to perform the foregoing covenant is limited by appropriations available for payment, DLNR acknowledges that OHA does not waive or assume DLNR's or DLNR Invitees' liability for the balance. The provisions of this paragraph are without prejudice to any rights OHA or the owner of any property may have to make a claim under applicable laws for indemnification, contribution and any damages other than those provided herein. The provisions of this paragraph shall survive the expiration or earlier termination of this ROE.

Q. Insurance. DLNR shall require that all of its third-party contractors, consultants and/or persons acting for or on behalf of DLNR entering the Property pursuant to this ROE shall maintain the following, all from an insurance company or companies licensed to do business in the State of Hawai'i: (1) worker's compensation insurance complying with the laws of the State of Hawai'i; (2) employer's liability insurance, in the amount of not less than \$2,000,000.00 per loss and in the aggregate; (3) comprehensive general liability insurance, including contractual liability insurance in the combined single limit of not less than \$2,000,000.00 per loss and in the aggregate, which, without limitation, shall cover the Property and all improvements thereon; and (4) automobile liability insurance in the amount of not less than \$1,000,000.00 per loss and in the aggregate for bodily injury and property damage combined. With regard to the coverages listed in subsections (2), (3) and (4) above, Office of Hawaiian Affairs, its Trustees, employees, representatives, and agents shall be named as additional insureds and loss payees by endorsement on the coverages, the policies shall be written on an "occurrence" form of policy and provide that the insurance provided thereunder shall be primary with respect to all insureds for claims arising out of DLNR's acts, omissions or misconduct, and that any insurance held or carried by OHA shall be excess and non-contributing. Prior to first entry onto the Property, DLNR Invitees shall provide insurance certificates to show compliance with this provision.

R. Hazardous Materials. DLNR shall not cause or permit the storage, use, escape, disposal or release of any hazardous materials on the Property except as permitted by law, nor shall DLNR use or store, or permit the use or storage, of any such material on the Property unless DLNR first delivers written notice to OHA as far in advance as reasonably possible of the identity and quantity of such materials and OHA consents to the use and storage thereof, which consent may be withheld in OHA's sole and absolute discretion. DLNR shall be solely responsible for all claims, injuries, losses, damages and expenses (including any fines or assessments) caused by or resulting from the use, storage, escape, disposal or discharge of hazardous materials by DLNR and/or DLNR Invitees or

anyone else acting for or on DLNR's behalf, and hereby agrees to cause its contractors, consultants, and anyone else acting on its behalf to indemnify and hold the OHA harmless from any such claims, injuries, losses, damages and expenses, to the extent permitted by law. For purposes of this ROE, "hazardous materials" shall mean any flammable explosives, radioactive materials, petroleum by-products, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, toxic substances, hazardous substances and other substances defined as such or as "hazardous wastes", "hazardous substances" or "toxic substances" under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.*, Federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, Federal Clean Air Act, 42 U.S.C. § 7401, *et seq.*, Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.*, Toxic Substances Control Act, 15 U.S.C. 2601, *et seq.*, Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j, Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1317, Haw. Rev. Stat. Chs. 340A through 342P, all as the same may be amended, and any other applicable statute, law, rule or regulation to the extent the same are not inconsistent with Federal law and the Supremacy Clause of the United States Constitution. The provisions of this paragraph shall survive the expiration or earlier termination of this ROE.

S. Termination and Remedies. This ROE may be terminated in writing by OHA for any or no reason upon ten (10) days written notice delivered to DLNR. In addition, if DLNR materially defaults under any term or provision of this ROE and fails to completely cure said material default within five (5) calendar days of written notice delivered by OHA, OHA shall have the right to terminate this ROE and to recover from DLNR all damages and losses resulting from said material default, including OHA's attorneys' fees and costs, and related relief, to the extent permitted by law. In the event of termination of this ROE, DLNR shall immediately cease further entry upon or use of the Property, except to the extent necessary to comply with any of its obligations hereunder. OHA shall have no further obligation to DLNR under this ROE.

T. Access Through Other Properties. DLNR acknowledges and agrees that this ROE does not confer any rights in DLNR to cross lands not owned by OHA, and that DLNR shall obtain, at its expense, a right of entry onto property owned by third persons in order to reach the Property.

U. Use of Aircraft. If aircraft flights over the Property, or entry upon the Property by means of helicopter or other type aircraft, are necessary in order to execute Project construction, then DLNR shall inform OHA, in as far advance as reasonably possible, of each such flight or entry.

V. Notices. Any notice provided for or permitted by this ROE may be given sufficiently for all purposes in writing and (1) mailed as registered or certified U.S. mail, return receipt requested, postage prepaid, addressed to such party at its post office address herein specified or the last such address designated by such party in writing to the other, (2) delivered personally at the address provided below (or to such other address as may be provided from time to time as provided herein), or (3) sent by facsimile transmission to the fax number, if any, of such party as specified herein or such other fax number designated by such party in writing to the other.

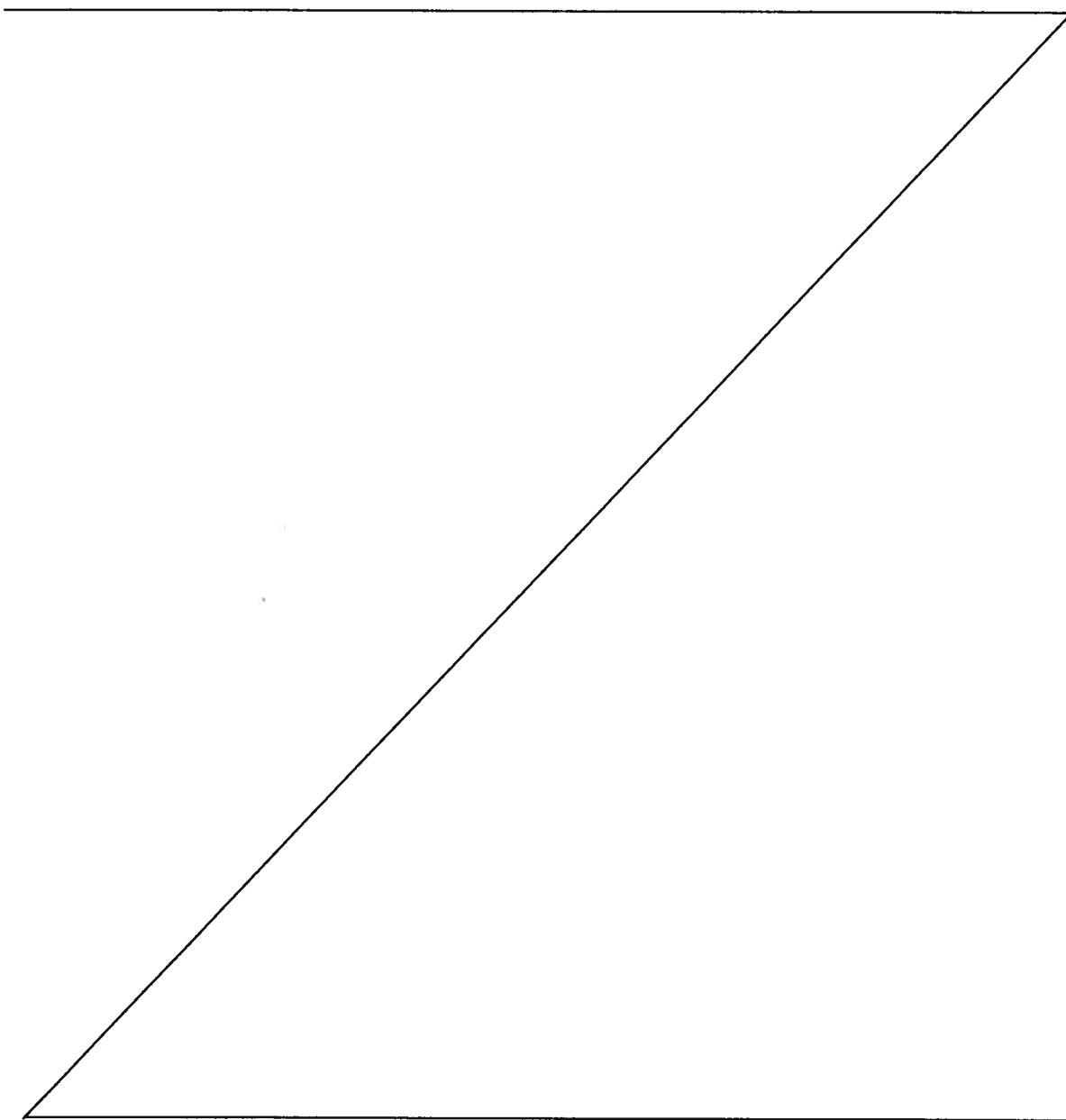
W. Trustees Not Personally Liable. This ROE does not and is not intended to create any personal liability or obligation on the part of the Trustees of OHA, and said Trustees shall not be individually liable for any matter relating to this ROE.

X. Assignment. This ROE may not be assigned by DLNR without the prior written consent of OHA, which consent may be withheld for any or no reason.

Y. Amendment. This ROE may not be modified except in writing signed by the parties hereto.

Z. Costs. DLNR and DLNR Invitees shall bear their own costs and expenses relating to its entry on and use of the Property.

AA. Complete Agreement/Counterparts. This ROE constitutes the entire agreement of the parties with respect to the subject matter hereof. This ROE 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. In addition, the receipt of a signature page of this ROE bearing the signature of a duly authorized representative of a party that is transmitted via facsimile or electronic transmission shall be sufficient to bind such party to this ROE to the extent of said signature. The party so transmitting shall deliver the original signature page to the other as soon as reasonably possible.



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

OFFICE OF HAWAIIAN AFFAIRS

Date: \_\_\_\_\_

By \_\_\_\_\_  
Clyde W. Nāmu`o  
Administrator

DEPARTMENT OF LAND AND NATURAL  
RESOURCES, STATE OF HAWAII

Date: \_\_\_\_\_

By \_\_\_\_\_  
Laura H. Thielen  
Chairperson

APPROVED AS TO CONTENT

\_\_\_\_\_  
Jonathan Likeke Scheuer  
Director of Land Management

Date: \_\_\_\_\_

APPROVED AS TO FORM

\_\_\_\_\_  
Ernest M. Kimoto  
Senior Counsel to the Administrator

Date: \_\_\_\_\_

APPROVED AS TO FORM

\_\_\_\_\_  
DLNR Deputy Attorney General

Date: \_\_\_\_\_

**EXHIBIT A**

**CONTRACT SPECIFICATIONS AND PLANS,  
JOB NO. J38CH20A**