State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii 96813

August 22, 2008

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

Land Board Members:

SUBJECT: REQUEST FOR APPROVAL TO ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE NATURAL RESOURCE CONSERVATION SERVICE PERTAINING TO MINERAL RIGHTS AND CONSERVATION EASEMENTS

SUMMARY:

The Division seeks Board approval to enter into a Memorandum of Understanding (MOU) (Exhibit A) between the U.S. Department of Agriculture Natural Resource Conservation Service (NRCS) and the State of Hawaii which addresses concerns related to mineral rights and conservation easements. The MOU was drafted by Federal legal representatives and the State Department of the Attorney General.

BACKGROUND:

NRCS administers an array of conservation easement programs that focus on the protection of important soils from being converted to non-agricultural uses and restoring and protecting wetland function and values through restoration practices. To date, NRCS has obligated approximately $6,500,000 protecting 985 acres from development in Hawaii through the use of conservation easements.

As part of the United States' legal requirement under 40 U.S.C. § 3111 to acquire legally sufficient title to the conservation easements it purchases, NRCS must ensure any outstanding rights will not adversely impact the conservation values (e.g., soil, water, wildlife resources) being protected. This includes considering whether it is likely the outstanding mineral rights will be exercised given the likely adverse impact the exercise of such rights would have on the conservation values the United States is seeking to protect.

The State of Hawaii owns the mineral subsurface rights in all lands in Hawaii and also has the authority to exercise those rights pursuant to HRS §182-2(a).

DISCUSSION:

The Parties have a mutual interest in protecting natural resources and agricultural lands and wish to facilitate the protection of natural resources and agricultural lands by the United States through NRCS' purchase of conservation easements in Hawaii. This MOU describes a process by which the State may consider and potentially subordinate its mineral rights to the United States on individual conservation easement projects. Such subordinations will ensure that the subsurface mineral rights will not be accessed from the surface estate subject to the conservation easement, thereby ensuring the protection of the conservation values. It is the mutual intent of both parties that by working collaboratively mineral right subordinations on conservation easement acquisitions will be facilitated.

RECOMMENDATION:

That the Board:

1) Approve the subject MOU to establish a process by which the State may consider and subordinate its mineral rights to the United States an individual conservation easement projects to facilitate the protection of important natural resources in the State.
2) Authorize the Chairperson to finalize and execute the MOU subject to review and approval of the Department of the Attorney General.

Respectfully submitted,

PAUL J. CONRY, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:

LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

ATTACHMENT:

Attachement 1

MEMORANDUM OF UNDERSTANDING BETWEEN THE NATURAL RESOURCES CONSERVATION SERVICE AND THE STATE OF HAWAII

I. PARTIES

This Memorandum of Understanding (MOU) is entered into between the Natural Resources Conservation Service (NRCS) and the Board of Land and Natural Resources, State of Hawaii (Hawaii or State), collectively referred to as "the Parties", for the purpose set forth below.

II. PURPOSE

A. Background

NRCS administers an array of conservation easement programs. Several of these programs, including the Farm and Ranch Lands Protection Program (FRPP), 16 U.S.C. §§ 3838h and i, and the Wetlands Reserve Program (WRP), 16 U.S.C. § 3837, are currently implemented in Hawaii. The purpose of FRPP is to protect prime, unique, or important soils from being converted to non-agricultural uses through the purchase by the United States of conservation easements. The purpose of WRP is to restore and protect wetlands function and values through the use of restoration cost share agreements and the purchase of conservation easements by the United States on restored properties. To date, NRCS has obligated approximately $6,500,000 which will protect 985 acres from development in Hawaii.

As part of the United States' legal requirement under 40 U.S.C. § 3111 to acquire legally sufficient title to the conservation easements it purchases, NRCS must ensure any outstanding rights will not adversely impact the conservation values (e.g., soil, water, wildlife resources) being protected. This includes considering whether it is likely the outstanding mineral rights will be exercised given the likely adverse impact the exercise of such rights would have on the conservation values the United States is seeking to protect.

The State of Hawaii owns the mineral subsurface rights in all lands in Hawaii and has the authority to exercise those rights. HRS §182-2(a).

The Parties agree that the protection of the conservation values by these federally funded easements is of great benefit to the people of the State of Hawaii as well as to people of the United States generally.

Such protection is consistent with Hawaii's public policy to protect and preserve lands having natural resource values and agricultural lands. This policy can be seen in the enactment of the State's Legacy Lands Conservation laws which provides for the acquisition and management of lands which have natural, environmental, recreational, scenic, cultural, agricultural production, or historic value. Chap. 173A, Hawaii Revised Statutes (HRS).

B. Purpose

The Parties have a mutual interest in protecting natural resources and agricultural lands in the State of Hawaii. Consequently, the Parties wish to facilitate the protection of natural resources and agricultural lands by the United States through NRCS' purchase of conservation easements in Hawaii by agreeing to a process by which the State may consider and subordinate its mineral rights to the United States on individual conservation easement projects. Such subordinations will ensure that the subsurface mineral rights will not be accessed from the surface estate subject to the conservation easement, thereby ensuring the protection of the conservation values.

This MOU sets forth this subordination process, including the roles and responsibilities of the Parties. It is the mutual intent of the Parties that by working collaboratively as set forth below subordinations on conservation easement acquisitions will be facilitated.

III. RESPONSIBILITIES

A. NRCS will:

1. Utilize the State Technical Committee (STC) in developing ranking criteria and take under advisement all comments from the STC during the ranking process for conservation easement funding.

2. Initiate a meeting with a designated State official to discuss proposed conservation easements and the State's subordination of its subsurface mineral rights for each proposed conservation easement application during the ranking process.

3. As soon as practicable after the Director of the Pacific Islands Area selects projects for potential funding based on ranking criteria, submit proposed project packages to the designated State official for evaluation and approval for mineral subordination and presentation to the Board of Land and Natural Resources. Packages will include NRCS's assessment of the likelihood that the outstanding mineral rights will be exercised, draft easement, title report, project description and location, subordination form, and any other relevant material.

4. For potentially funded conservation easement projects submitted by NRCS to the State in which one of the State's executive agencies is not the intended grantee of

the easement or for which the State is not providing any funding, NRCS will assist the State in obtaining administrative fees necessary to cover the State's costs associated with required public notices and public hearings if such fees are legally applicable at the time of processing.

B. State will:

1. Participate in the State Technical Committee process for recommending conservation easement ranking criteria.

2. Meet with NRCS to provide an initial assessment of the likelihood of the State subordinating subsurface rights for each project being considered by NRCS for funding under the conservation easement programs. Obtain any additional information it needs to make such a preliminary assessment at this stage of the process to the greatest extent practicable. Any assessment will be subject to approval by the Board of Land and Natural Resources.

3. For potentially funded conservation easement projects submitted by NRCS to the State in which one of the State's executive agencies is involved in the project either as a grantee of the easement or as a funder of the acquisition, make a determination whether to subordinate mineral rights for specific easement acquisition projects within 60 calendar days of receipt of NRCS' request.

4. For other potentially funded conservation easement projects submitted by NRCS to the State in which the one of the State's executive agencies is not the intended grantee of the easement or for which the State is not providing any funding, the State will evaluate and make a determination on whether to subordinate its mineral rights pursuant to the requirements of §182-4, HRS. The determination whether to subordinate mineral rights for the specific easement acquisition projects under this section should be made within 90 calendar days of receipt of NRCS' request.

5. Upon its determination whether to subordinate, the State shall either subordinate its mineral rights by executing and transmitting the subordination documents to NRCS, or decline to subordinate its mineral rights by notifying NRCS of such decision, in writing, including the reason(s) for the decision. In making its determination, the State will consider the relative value of the mineral rights at issue as compared to the benefit to the State and the public of protecting the land and its related conservation values through a conservation easement. A finding that the particular mineral rights at stake have little value as compared with the benefits of land conservation will weigh in favor of subordination of those mineral rights.

C. Both Parties will:
Agree to meet as necessary to review the subordination process and make refinements as needed.

IV. GENERAL PROVISIONS

A. This MOU takes effect upon the signature of NRCS and the State and shall remain in effect for five years from the date of execution. This MOU may be amended or extended upon written request of either NRCS or the State and the subsequent written concurrence of the other party. Either NRCS or the State may terminate this MOU with a 30 day written notice to the other party.

B. This MOU is not intended to, nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any party against the Parties, its respective agencies, officers, or any person.

C. NRCS and the State and their respective offices will carry out their own activities and utilize their own resources, including the expenditures of their own funds in pursuing the purposes of this MOU. Each party will carry out its separate activities in a coordinated and mutually beneficial manner.

D. Nothing in this MOU shall obligate or transfer any funds. Specific work projects or activities that involve the transfer of funds, services, or property between NRCS and the State will require execution of separate agreements and be contingent upon the availability of appropriated funds. Such activities must be independently authorized by appropriate statutory authority. Negotiation, execution, and administration of any such agreement must comply with all applicable statutes and regulations.

V. ADMINISTRATIVE CONTACTS

The administrative contact for NRCS for this MOU is:

Dennis G. Kimberlin
Assistant Director for Programs
Pacific Islands Area
Natural Resources Conservation Service

The administrative contact for the State for this MOU is:

Paul J. Conry
Administrator
Division of Forestry and Wildlife
Department of Land and Natural Resources

VI. AUTHORITY

NRCS enters into this MOU under the authority of its various conservation easement programs, including the Farm and Ranch Lands Protection Program, 16 U.S.C. §§ 3838h and i, and the Wetlands Reserve Program, 16 U.S.C. § 3837.

VII. APPROVAL

The undersigned Parties hereby agree to the terms and conditions set forth above.

Name _____ Date_____
Director
Pacific Islands Area
Natural Resources Conservation Service

Name _____ Date_____
Chairperson
Board of Land and Natural Resources
State of Hawaii

Approved by the Board of Land and Natural Resources
at its meeting(s) held on _____.

APPROVED AS TO FORM:

_____
Deputy Attorney General