

**STATE OF HAWAI'I  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Forestry and Wildlife  
Honolulu, Hawai'i 96813**

**August 12, 2011**

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

**Land Board Members:**

**SUBJECT: WITHDRAWAL OF GEOTHERMAL RESOURCE SUBZONE DESIGNATION PURSUANT TO HAWAI'I REVISED STATUTES (HRS) § 205-5.1, 5.2 AND HAWAI'I ADMINISTRATIVE RULES (HAR) § 13-184-10 FROM WAO KELE O PUNA FOREST RESERVE (TMK (3) 1-2-010:002 & 003) AT WAIAKAHIULA AND KA'OHE, PUNA, HAWAI'I.**

**BACKGROUND**

In 2006, the State of Hawai'i Department of Land and Natural Resources (DLNR) and the Office of Hawaiian Affairs (OHA) received \$3.4 million dollars from the Federal Forest Legacy Program (FLP) to assist in OHA's fee acquisition of Wao Kele O Puna Forest Reserve (WKOP-FR) (Tax Map Keys: 1-2-10-2 and 1-2-10-3) consisting of approximately 25,855.891 acres situated in Puna, Island and County of Hawai'i, State of Hawai'i (WKOP or the Property), more particularly described in Exhibit A attached hereto.

The FLP has specific eligibility criteria for establishing forest legacy areas, including protecting environmentally important forest areas like WKOP. In 2008, after completing public hearings, WKOP was re-instated into the State's Forest Reserve System by Executive Order (EO 4218), and in late 2009, DLNR and OHA permanently filled the only two geothermal wells found on the subject parcels.

Any further geothermal exploration within WKOP-FR would be inconsistent with the terms of the FLP-funded fee acquisition and the State's updated FLP Assessment of Needs – a document that guides FLP implementation in Hawai'i. Neither DLNR nor OHA intend to actively explore geothermal production of any kind within WKOP-FR. DLNR and OHA want to remove the geothermal designation status from the subject parcels as part of the overall conservation and forest protection objectives for WKOP-FR and pursuant to the terms of the Memorandum of Agreement (Agreement) between DLNR and OHA (signed June 27, 2006) requiring DLNR and OHA to work together to remove the Geothermal Resource Subzone designation (described in Exhibit B attached hereto). In addition, under the agreement, OHA and DLNR share responsibility for the management and maintenance of the property. The governor executive

ordered WKOP into the State Forest Reserve System in order to fall under the guidelines and protections of HRS chapter 183 and HAR chapter 104.

## DISCUSSION

The Agreement, under section II – Terms, line 16, expressly states that both OHA and DLNR will work together to remove the Geothermal Resource Subzone designation from the Property as specified under HRS section 205-5.1 and 5.2.

HRS section 205-5.2(e) states:

The designation of any geothermal resource subzone may be withdrawn by the board of land and natural resources after proceedings conducted pursuant to chapter 91. The board shall withdraw a designation only upon finding by a preponderance of the evidence that the area is no longer suited for designation; provided that the designation shall not be withdrawn for areas in which active exploration, development, production or distribution of electrical energy from geothermal sources or direct use applications of geothermal resources are taking place.

Consistent with HRS § 205-5.2(e), no active exploration, development, production or distribution of electrical energy from geothermal resources or other direct use applications are currently taking place on the property or within the geothermal subzone hereto identified as the “Upper Kilauea Middle East Rift Subzone” (attached as Exhibit C), nor is any active geothermal activity taking place in the “Kamaili” subzone located just below WKOP-FR. Current geothermal activities are restricted to the “Kapoho” subzone, operated by Puna Geothermal Venture (PGV)/Ormat Technologies. However, this site is located some 15-miles ENE of WKOP-FR. The removal of WKOP-FR from the subzone will have no affect on current mining operations at PGV, or any other geothermal subzone existing or proposed.

DLNR has had discussions with members of the Geothermal Task Force, originally set up during Governor Linda Lingle’s administration, to assure them that subzone removal request of WKOP-FR would have no bearing on actions currently underway by the task force to potentially increase geothermal subzones State wide.

In addition, HAR section 13-184-10 states:

Modification of the boundaries or the withdrawal of an existing designated geothermal resource subzone may be initiated by the board or by any property owner, State mining lease applicant, geothermal mining lessee, or person with an interest in real property that is within the designated subzone. The procedure for modifying the boundaries or withdrawal of an existing designated geothermal resource subzone shall be conducted pursuant to the provisions of chapter 91, Hawaii Revised Statutes. The board shall withdraw a designation only upon finding by a preponderance of the evidence that the area is no longer suited for designation; provided, however, that within an existing subzone with active geothermal development activities, the area may not be modified or withdrawn. An environmental impact statement as defined under chapter 343, Hawaii

Revised Statutes, shall not be required in assessing any modification of the boundaries or withdrawal of subzones.

The Attorney General has advised that the above stated provisions require withdrawal from the Geothermal Resource Subzone designation to be preceded by a contested case hearing. Based on an AG opinion dated July 31, 1996 (hereto attached as Exhibit D), sent to then BLNR-Chair Michael D. Wilson, proceedings in Chapter 91 within the context of geothermal subzone removal “must mean a contested case proceedings”. In his closing statement, then Deputy Attorney General William Tam concluded that the language in HRS section 205-5.2(e) **“requires the board to hold contested cases on applications to withdraw property from geothermal resource subzones”**.

## RECOMMENDATIONS

That the Board:

- 1) Authorize the removal of the geothermal resource subzone designation from Wao Kele O Puna Forest Reserve (TMK (3) 1-2-010:002 & 003) at Waiakahiula and Ka'ohē, Puna, Hawai'i. These properties fall within the Kilauea Middle East Rift Subzone.
- 2) Authorize a contested case in accordance with HRS section 205-5.1 and 5.2(e) and HRS chapter 91.
- 3) Authorize appointment of a hearing officer to conduct relevant hearings pursuant to law.
- 4) Delegate authority for selection of the hearing officer to the Chairperson.

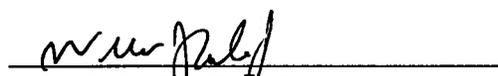
Respectfully submitted,



PAUL CONRY,  
Administrator

Attachments

APPROVED FOR SUBMITTAL



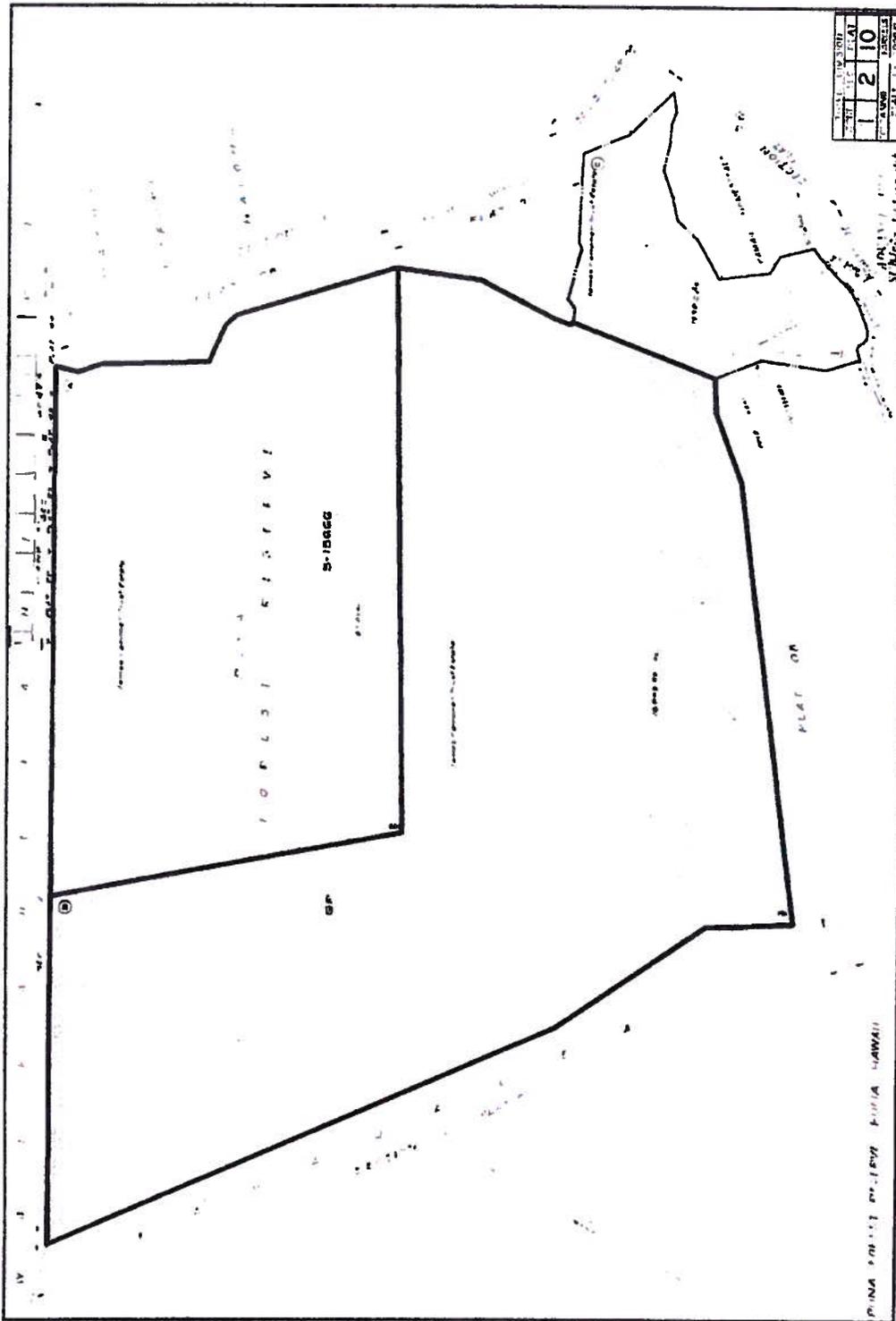
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WILLIAM J. AILA, JR.  
Board of Land and Natural Resources

Exhibit A

Wao Kele O Puna Property

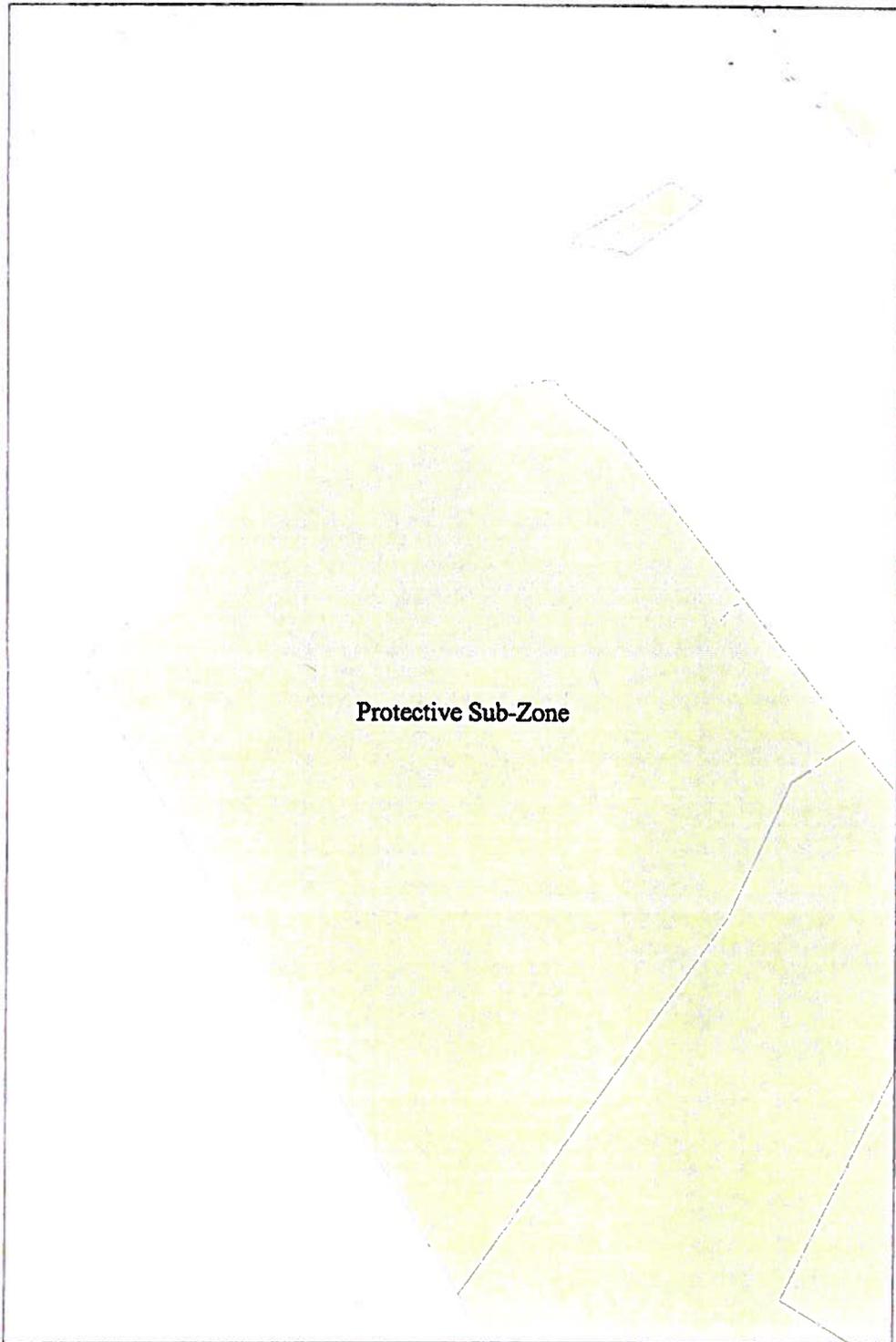
TAX MAP KEYS 1-2-10:02 AND 03 OF THE THIRD TAXATION DIVISION



Source: Title Guaranty of Hawaii, Title Guaranty Express.

**IDENTIFICATION OF THE CONSERVATION DISTRICT SUBZONE**

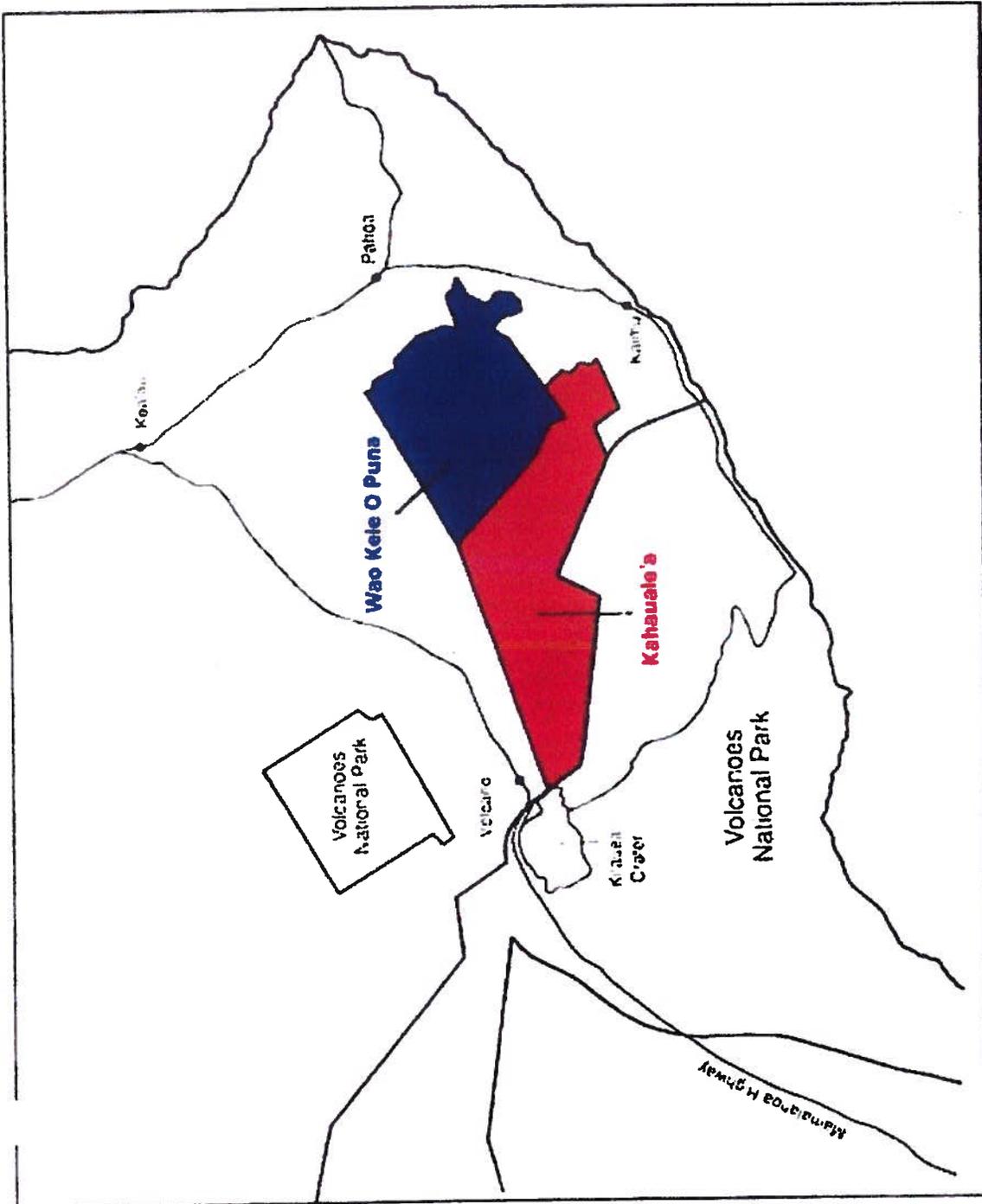
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Source: State of Hawaii, GIS Data Set.

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Wao Kele O Puna Property  
**EXCHANGE PROPERTIES**



Source: Presentation Made by Oswald Stender of The Estate to the Mayor's Advisory Committee,  
County of Hawaii, January 8, 1990.

Wao Kele O Puna Property

**APPROXIMATE LOCATION OF THE WAO KELE O PUNA PROPERTY**



Source: State of Hawaii, GIS Server – Landsat Photograph.

**MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF LAND  
AND NATURAL RESOURCES, STATE OF HAWAI'I AND THE OFFICE OF  
HAWAIIAN AFFAIRS**

**I. INTRODUCTION**

This Memorandum of Agreement ("Agreement") is entered into by and between the Department of Land and Natural Resources of the State of Hawai'i (the "Department"), by and through the Board of Land and Natural Resources (the "Board"), and the Office of Hawaiian Affairs ("OHA"). The term "DLNR" shall mean the Department, the Board, or both as the context requires. DLNR and OHA are collectively referred to as the Parties.

This Agreement is designed to promote increased understanding, cooperation, interaction, and to provide basic principles and guidelines for further negotiations on issues of mutual concern.

OHA has entered into an Agreement of Sale with The Trust for Public Lands ("TPL"), a California nonprofit public benefit corporation to purchase that certain real property known as Wao Kele O Puna, (Tax Map Keys: 1-2-10-2 and 1-2-10-3, respectively), consisting of approximately 25,855.891 acres, situated in Puna, Island and County of Hawai'i, State of Hawai'i (the Property), more particularly described in Exhibit "A" attached hereto.

The Parties wish to work together to provide proper management of the Property and to develop OHA's own capacity to manage lands independently from DLNR. The Parties further wish to preserve the Property's natural and cultural resources and maintain traditional and customary practices on the Property through appropriate resource management.

As discussed herein, DLNR will bear initial management responsibility as soon as the Property is designated as a forest reserve. However, management responsibility will be turned over to OHA as OHA acquires capacity, experience and expertise in land management.

## II. TERMS

Subject to the conditions identified in part III below, the Parties agree as follows:

1. **Purchase of the Property.** OHA will purchase the Property with funding from the USDA Forest Service Forest Legacy Program and OHA. The exact funding levels are not known at this time but are expected to be approximately \$3.4 million from the Forest Legacy Program with the balance to be paid by OHA. No DLNR funds will be used for the purchase.
2. **Title.** Title to the Property will be held in fee by OHA pursuant to authority created by Article XII of the State Constitution and Haw. Rev. Stat. § 10-4 (Cum. Supp. 2004) and Haw. Rev. Stat. § 10-5 (Cum. Supp. 2004).
3. **Forest Reserve Designation.** The Parties will cooperate in designating the Property as a forest reserve pursuant to Haw. Rev. Stat. chapter 183. The designation process shall commence as soon as possible and shall proceed as expeditiously as is possible under applicable law. Notwithstanding any other provision herein, DLNR or OHA may develop and improve the Property through plantings and erosion control and may construct such improvements as may be agreed herein or otherwise.
4. **Compliance with Federal Grant Requirements.** Management, use, and future disposition of the Property shall comply with all applicable U.S.D.A. Forest Legacy Federal Grant requirements and with applicable United States Department of Agriculture ("USDA") Forest Service Forest Legacy Program Guidelines (the "Guidelines"), until such time as the grant requirements and/or the Guidelines no longer apply or OHA is released of its federal grant obligations by the Forest Service/ Forest Legacy Program, other federal governing agency, or through an Act of the U.S. Congress. A copy of the Guidelines is attached as Exhibit "B".

5. Compliance with State Forest Reserve Requirements. Management, use, and future disposition of the Property shall comply with all applicable State of Hawai'i laws, rules, and regulations governing and relating to forest reserves as described in Haw. Rev. Stat. chapter 183 until such time as the Property is no longer held or designated as forest reserve property. In the event of conflict between requirements of federal and state law, federal law shall govern pursuant to Haw. Rev. Stat. § 29-15 (1993).

Use of the Property will also comply with the Findings of Fact and Conclusions of Law and Final Declaratory Judgment/Injunction issued on August 26, 2002 in *Pele Defense Fund vs. The Estate of James Campbell, Deceased et. al*, Civil No. 89-089, (the "PDF Final Judgment"), a true and correct copy of which is attached as Exhibit "C," except that no other statement herein, in the Plan, or in the PDF Final Judgment shall override or supercede the requirements of federal or state law, (including case law and regulations) relating to undeveloped real property.

6. Management Responsibility. As more fully described below, the Parties intend to develop a Comprehensive Management Plan (the "Plan") based upon the terms of this Agreement. All management and maintenance responsibilities and practices will conform with mutually agreed upon requirements set forth in therein.

All provisions of the Plan will be subject to the availability of funding.

Once the Property is designated as forest reserve (but not before), DLNR shall bear the primary responsibility for the management and maintenance of the Property for up to ten years after the signing of this Agreement or until such time as the Parties determine and agree that OHA is capable of assuming management responsibilities required by the Plan, whichever time is shorter.

7. **Timeline.** The Parties will make a good faith effort to complete the following in three (3) years: (a) develop the Plan, (b) plug and abandon the geothermal well located on the Property, (c) seek funding from other sources to assist with the management costs of the Property, and (d) remove the Geothermal Resource Subzone designation as discussed below in paragraph 16. Status reports concerning management issues, transfer of expertise, and property maintenance will be presented to and considered by the OHA board and the Board at least annually. Appropriate changes to the assignment of duties (primarily from DLNR to OHA), funding levels, management, and enforcement of regulations related to the Property may be made upon mutual agreement between the Parties.

8. **Assumption of Management Responsibilities/Transfer of Knowledge.** Transfer of management responsibility shall follow the Plan guidelines. The Plan shall define how over time the Parties will share responsibility for management of the Property, provided that full management responsibilities of the Plan shall be relinquished by DLNR and transferred to OHA within ten years of the signing of this Agreement.

OHA and DLNR shall each designate a person to act as liaison for transition of enforcement responsibilities and begin work on transition of responsibilities. The duties of each such person will include, but not be limited to, responsibility for general coordination of all Property activities, development of the Plan, seeking funding from the State Legislature and/or from external sources, seeking the support of the County of Hawai'i, implementing management activities, facilitating the transfer of knowledge from DLNR to OHA pertaining to land ownership and management, undertaking the necessary duties to change the Property designation to a forest reserve, and supervising public hearings and meetings. Additionally, OHA and DLNR shall each designate a person to act as liaison for transition of enforcement

responsibilities, development and implementation of transition plan and coordinating enforcement of applicable regulations.

9. Revocation. Upon agreement by the parties, DLNR shall cooperate with OHA to seek a revocation or suspension of designation as a forest reserve in the manner provided by law.

10. Interim Plan. Prior to closing of OHA's purchase of the Property, the Parties shall develop an interim management plan for submission to the Forest Legacy Program. The interim plan shall provide guidelines for the management and protection of the property by the Parties, as funds and capacity permit, until such time as the property is designated a forest reserve and until such time as the Comprehensive Management Plan can be implemented.

11. Comprehensive Management Plan. Upon execution of this Agreement, the Parties agree to develop the Plan for the Property. The Parties shall form an advisory council for the development of the management plan consisting of the Pele Defense Fund and other interested community members mutually selected by DLNR and OHA. The cost of developing the Plan shall be funded as provided in paragraph 15 below.

The Plan shall be developed according to the following conditions and may contain such other terms and conditions agreed to by the Parties:

a. *Assessment.* The Plan shall include an inventory and assessment of natural and cultural resources, historic sites, risks, threats to resources, interpretive values, and economic development potential. The section on economic development potential shall identify those uses consistent with: status as a forest reserve, the protection of traditional and customary uses of the site, sustainable use and protection of the resources of the site, and the terms of the Forest Legacy Program funding.

b. *Existing Improvements.* Subject to the availability of funding and identification as a priority action under the Plan, management of the Property shall include maintenance and repair of existing roads and historical sites on the Property.

c. *Allowable Uses of Property.* Subject to requirements of state law applicable to forest reserves, to any other applicable state law, to any applicable requirements of the Forest Legacy Program, and to future revision by the Parties, allowable uses of the Property shall include but are not limited to the following:

(1) **Public Access.** Public Access shall be allowed to the extent required by federal and state law and the Guidelines. Public access beyond that required by law and the Guidelines will be determined by the Parties based on a comprehensive inventory of the Property, which will identify and assess the access points, the natural and cultural resources, the historic sites, the risks, the threats to resources, and the interpretive values.

(2) **Cultural, natural resources, open space and recreational use.** The general use of the Property shall be for cultural, natural resource, and open space purposes. Passive recreational or educational purposes that require neither surface alteration subject to the local grading ordinance nor other development of the land may be permitted unless specifically excluded by the Plan. The Plan may, but need not, allow development of recreational use infrastructure and facilities such as trails, access roads, parking, fencing, cultural and environmental education facilities (e.g. kiosks).

(3) **Preservation of Plant and Wildlife Habitat.** The Parties will protect and enhance native plant and wildlife habitat, the natural, scenic and open-space nature of the Property.

(4) **Traditional Hunting and Gathering Practices.** Wildlife hunting not

prohibited by applicable laws or regulations may be permitted, if it is conducted in a manner that does not significantly deplete native wildlife resources or damage the ecology of the Property. Traditional hunting and gathering practices shall be governed in accordance with federal and state law, the Guidelines, and the PDF Final Judgment.

(5) Water. Subject to written approval from OHA and DLNR, exploration or extraction of water resources and any activity associated therewith, with the exception of water needed for management practices agreed upon in the management plan may be permitted as long as there is no damage to natural resources, existing forests, or soils.

d. *Prohibited Uses.* The following “non-forest uses” as defined by the Forest Legacy Program are uses of the land inconsistent with maintaining forest cover and shall be prohibited on the Property.

(1) Mineral Extraction. Any exploration or extraction of oil, gas, minerals, steam, hydrocarbons, soil, sands, gravel or other material on or beneath the Property for the purpose of exporting these materials/resources off the Property shall be prohibited.

(2) Grading and Excavation. Alteration of landforms by grading or excavation of topsoil, earth, or rock, inconsistent with Forest Legacy Program guidelines shall be prohibited. Alteration of landforms necessary or appropriate for appropriate public access, cultural restoration or wildlife or forest management, or emergency purposes (such as fire fighting) and in keeping with good natural resource management practices shall not be prohibited.

(3) Subdividing Land. The division, subdivision, partition, or de facto subdivision of the Property inconsistent with the Forest Legacy Program guidelines shall be prohibited. However, this paragraph does not prohibit the lease, license, or other temporary

disposition of a portion of the Property or a voluntary conveyance to a governmental or nonprofit entity for conservation or public access purposes.

(4) Commercial and Industrial Uses. The establishment of any commercial or industrial uses inconsistent with the Forest Legacy Program Guidelines shall be prohibited.

(5) Signage. The construction, placement, or erection of any sign or billboards, excepting signs necessary for management purposes or to control unauthorized or dangerous activities, or signs, appropriately placed, that acknowledge the financial support of donors in the purchase of the Property shall be prohibited.

A preliminary investigation of potential access and trail routes will be conducted to consider exposure to specific dangerous natural conditions. It is the intent of the Parties to examine using the warning sign design and placement process pursuant to Act 82 SLH 2003, and the ancillary Title 13, Chapter 8 Hawai'i Administrative Rules as appropriate.

(6) Storage of Waste. The storage, dumping or accumulation of trash, garbage, or waste on the Property shall be prohibited.

(7) Exotic Plants or Animals. The introduction of invasive exotic animals or plants that would alter or impair the conservation values of the Property shall be prohibited.

12. License Agreement. On September 9, 1996, the Campbell Estate entered into a well monitoring license agreement with the DLNR, which license covers and affects the property. Unless otherwise agreed, all rights and obligations that exist pursuant to the License Agreement (as amended) shall remain unaffected by this Agreement.

13. Plugging and Abandonment. The Parties shall work together to secure funding for plugging and abandonment of the existing geothermal well shaft on the Property. The

Parties shall make reasonable and diligent efforts to plug and abandon the existing geothermal well site on the Property within three years after acquisition of the Property by OHA. To facilitate the plugging of the well in an expedient manner, the Parties agree to the following:

a. *Legislative Funding.* The Parties shall work cooperatively to secure funding from the State Legislature during the 2006 legislative session for the DLNR to plug, and abandon the well. DLNR agrees to seek funding in subsequent legislative sessions as necessary

b. The Parties shall work cooperatively to seek appropriate federal funding for plugging and abandonment of the well. The Parties realize and acknowledge, however, that such funds are not presently available.

c. *Alternative Funding Agreement.* If parts a. and b. immediately above do not adequately cover the costs of plugging and abandonment, OHA agrees to seek OHA board approval to cost-share up to TWENTY PERCENT (20%) of the total project costs of plugging and abandonment of the well. The Parties shall encourage the County of Hawai'i to partner in the effort to plug and abandon the well and to cost-share up to THIRTY PERCENT (30%) of the total project costs.

14. **Additional Resource-Management Funding.** The Parties shall work cooperatively and in good faith to secure specific funding for natural and cultural resource management and enforcement on the property.

15. **Management Funding.** For each year during which DLNR continues to manage the Property (that is, until management responsibility is turned over to OHA as contemplated herein), OHA shall transfer to DLNR up to TWO HUNDRED TWENTY EIGHT THOUSAND AND NO/100 DOLLARS (\$228,000.00) for the development of the Plan, management of the Property, and for protection and enforcement actions on the Property. By

April 1 of each year during which DLNR continues to manage the property, OHA will make a good faith effort to determine the amount of funding to be transferred to DLNR for its use during the next fiscal year. The amount of funds transferred will determine the level of management and protection that is implemented. The said amount is to be expended as agreed by the Parties. Subject to appropriation and allotment, DLNR will contribute up to ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) annually either in appropriated funds (obtained from various sources) or through in-kind expenditures from existing resources, volunteer efforts, and/or budgets for the development of the Plan and management of the property, by providing the liaison person described above, or by providing on site management capacity, transfer of knowledge and active management practices. An estimated budget for illustration purposes only is shown in Exhibit "D."

At least quarterly, DLNR shall provide to OHA an expenditure report, which provides a description of expenditures made during the prior quarter as well as a summation of quarterly expenditures and cumulative expenditures to date. The report should provide a description of each expenditure, identify the amount expended and identify whether the expenditure was an in-kind expenditure or from appropriated OHA or DLNR funds. DLNR shall also report to OHA the assigned DAGS number for all assets including property, plant and equipment that are acquired with OHA funds. Upon complete transfer of the management duties to OHA as contemplated herein, DLNR shall transfer assets purchased with OHA funds to OHA.

16. Geothermal Subzone Designation Removal. The Parties shall work together to remove the Geothermal Resource Subzone designation specified under Haw. Rev. Stat. § 205-5.1 (2001) and Haw. Rev. Stat. § 205-5.2 (2001), from the Property.

17. If any of the terms identified above are deemed unachievable, unfeasible, impractical, or not viable for any reason, the Parties agree in good faith to cooperate and work together to find alternate feasible and acceptable terms that will facilitate the intended goals.

18. The Parties agree in good faith to cooperate with each other to accomplish the intended goals identified above. Cooperation includes, but is not limited to, providing copies or access to documents referenced in this Agreement, providing copies of or access to other relevant documents, and providing information that may facilitate the intended management transfer.

### III. CONDITIONS

1. **Governing Law.** This Agreement shall be governed by the laws of the State of Hawai'i.

2. **Amendments.** This Agreement may be amended only by the written agreement of the parties hereto.

3. **Costs.** Except as otherwise provided or agreed, each party shall bear its own costs and expenses relating to this Agreement and the Property.

4. **Binding Effect.** Upon execution of this Agreement by both Parties, the Parties shall cooperate and negotiate in good faith conditions and terms to complete and execute the definitive documents and instruments necessary to accomplish the intended goals. Terms and conditions of any future agreement shall be consistent with this Agreement and upon such other terms as the Parties shall agree.

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The foregoing accurately reflects the Agreement between the Parties. We indicate our acceptance of this document and the agreement herein by executing this Agreement.

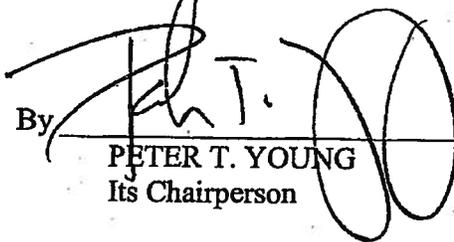
OFFICE OF HAWAIIAN AFFAIRS

Date 6-27-06.

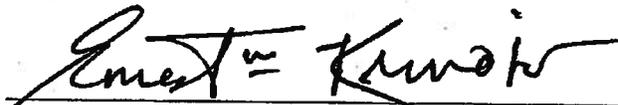
By   
CLYDE W. NĀMU'O  
Its Administrator

BOARD OF LAND AND NATURAL  
RESOURCES

Date 6-27-06

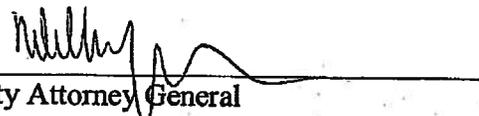
By   
PETER T. YOUNG  
Its Chairperson

APPROVED AS TO FORM:

  
Ernest M. Kimoto, Senior Staff Attorney  
Office of Hawaiian Affairs

Date: June 27, 2006

APPROVED AS TO FORM:

  
Deputy Attorney General

Date: 6/27/06

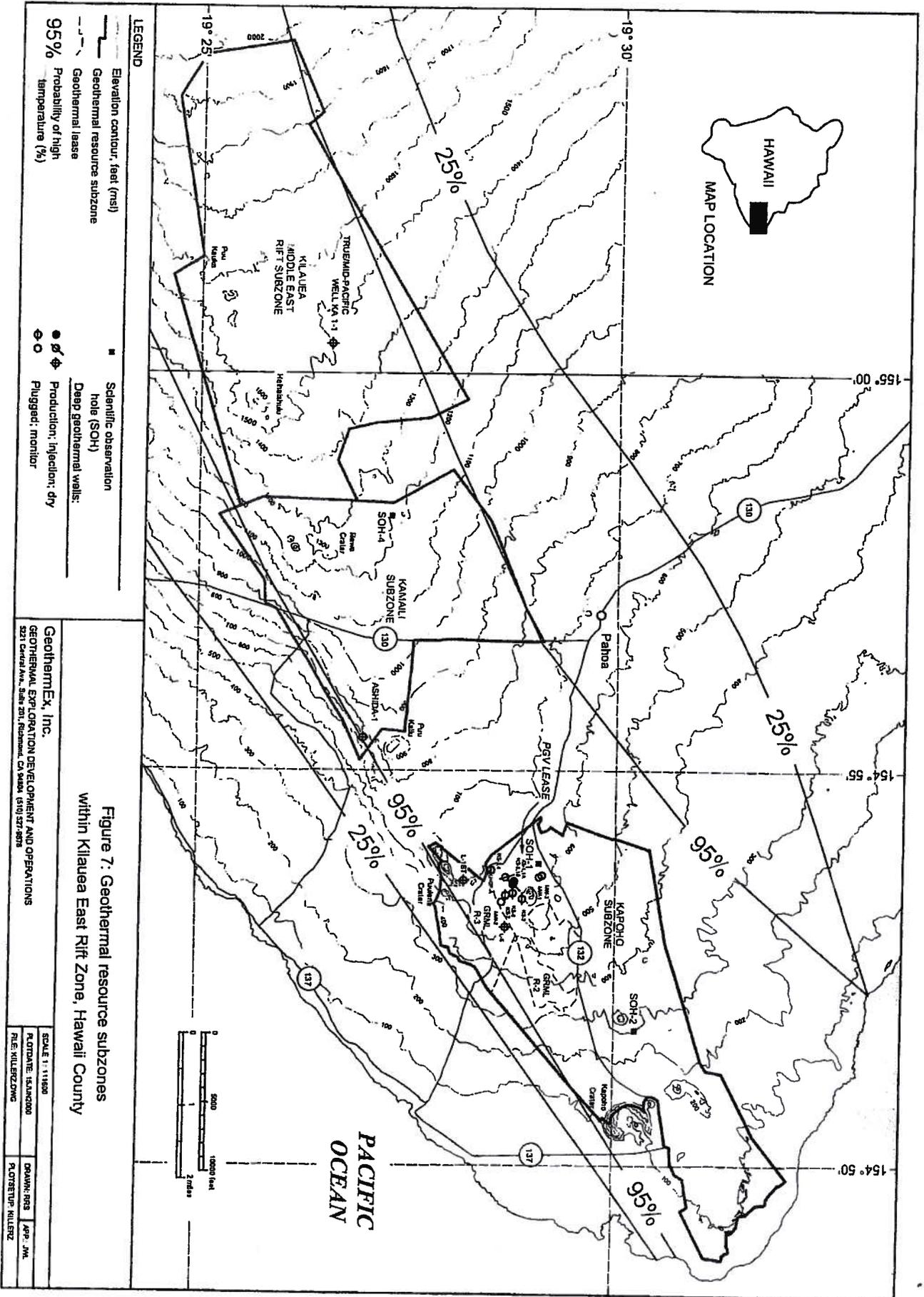


Exhibit D.

BENJAMIN J. CAYETANO  
GOVERNOR



**COPY**

*L. T. Francis*

MARGERY S. BRONSTER  
ATTORNEY GENERAL

JOHN W. ANDERSON  
~~XXXXXXXXXXXX~~  
FIRST DEPUTY ATTORNEY GENERAL

**STATE OF HAWAII**

DEPARTMENT OF THE ATTORNEY GENERAL  
425 QUEEN STREET  
HONOLULU, HAWAII 96813  
(808) 586-1500

July 31, 1996

The Honorable Michael D. Wilson  
Chairperson, Board of Land and  
Natural Resources  
State of Hawaii  
1151 Punchbowl Street  
Honolulu, Hawaii 96813

Aug 6 2 54 PM '96  
LAND/TRANS. DIV.  
DEPARTMENT OF  
ATTORNEY GENERAL

Dear Mr. Wilson:

Re: Applications to Withdraw Properties  
From Geothermal Resource Subzones

We are writing in response to former Chairperson Paty's July 10, 1990 request for advice regarding the standards and process that apply to applications by property owners to withdraw their land from geothermal resource subzones (GRS) previously designated by the Board of Land and Natural Resources.

In particular, Delan Perry (TMK 3-1-4-1:61) and 60 other property owners with 75 parcels totaling approximately 779 acres within the Kapoho and Kamaili geothermal resource subzones filed applications on May 19, 1989 (subsequently revised on January 9, 1990) asking to have their parcels withdrawn from the subzones. They also asked for clarification as to the process which the Board will follow in considering their petition for withdrawal. The applicants request a 2.5 kilometer buffer zone around each parcel. The applications also raise a subsidiary question of what constitutes "active exploration" under Hawaii Revised Statutes (Haw. Rev. Stat.) § 205-5.2(e) which provides in part, "that the designation shall not be withdrawn for areas in which active exploration, development, production or distribution of electrical energy from geothermal sources is taking place."

FACTS

According to the information that your office provided, the following permits were issued in the Kapoho and Kamaili

The Honorable Michael D. Wilson  
July 31, 1996  
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Geothermal Resource Subzones: (1) GRS 89-1 issued August 15, 1989, by the Hawaii Planning Commission; and (2) Geothermal Well Drilling Permits for Scientific Observation Holes (SOH), SOH 1, 2, and 4 issued by the DLNR on May 30, 1989. SOH-4 in the Kamaili GRS is still being used for scientific monitoring. Ground clearing for SOH-1 located within Geothermal Resource Mining Lease (GRML) R-3 area, "grandfathered" by the 1984 Legislature, has been completed.

According to DLNR's research, 28 of the 75 parcels (covering 261 acres) which are the subject of the withdrawal applications in the Puna region are outside of any geothermal resource subzone and therefore present no issue. Thirty-six of the parcels (covering 329 acres) which are the subject of the withdrawal application are in the Kapoho GRS. Seven parcels covering 184 acres are in the Kamaili GRS. Four parcels covering 4 acres are located within the area under GRML R-3.

#### DISCUSSION

Haw. Rev. Stat. § 205-5.2(e) (1983) provides:

The designation of any geothermal resource subzone may be withdrawn by the board of land and natural resources after proceedings conducted pursuant to chapter 91. The board shall withdraw a designation only upon finding by a preponderance of the evidence that the area is no longer suited for designation; provided that the designation shall not be withdrawn for areas in which active exploration, development, production or distribution of electrical energy from geothermal sources or direct use application of geothermal resources are taking place.

Pursuant to Haw. Rev. Stat. § 205-5.2(e), withdrawing land from a geothermal subzone may be approved by the BLNR "after proceedings conducted pursuant to [Haw. Rev. Stat.] chapter 91." Haw. Rev. Stat. chapter 91 provides for contested case hearings and rule making. Subsection (e) also establishes a requirement that the withdrawal decision be made only upon a finding based upon "a preponderance of the evidence." Rule making is not based upon such an evidentiary standard. Accordingly, chapter 91 proceedings in this context must mean a contested case proceedings. In re Hawaiian Electric, Haw. Sup. Ct. No. 18156, June 18, 1996, Slip Op. at 11-20 (Ramil, J.).

Second, land may not be withdrawn from a geothermal subzone if it is subject to "active geothermal development

The Honorable Michael D. Wilson  
July 31, 1996  
Page 3

activities." Haw. Rev. Stat. §§ 205-5.2(e) and (f) (1993); Hawaii Administrative Rules § 13-184-9. "Active geothermal development activities" is not separately defined in the statute and the legislative history provides no specific guidance. The Board will need to judge each particular situation on a case by case basis at the contested case hearing. However, where the State has issued a geothermal resource mining lease for that parcel of land, and the lessee is in compliance with the lease (which has "mining operations" requirements), the department's rules define what a lessee is required to do to remain active. H.A.R. §§ 13-183-26 ("Revocation of mining lease") and 13-183-29 ("Term of mining leases"). Compliance with the lease requirements may weigh favorably in deciding whether an area should be considered undergoing active geothermal development activities. Conversely, where no geothermal mining lease has been issued or where the lessee is not in compliance with the lease terms, the evidence may weigh in the opposite direction.

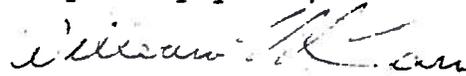
Third, there is no legal requirement to provide any buffer zones in the case of withdrawal. Any such decision is in the discretion of the Board.

#### CONCLUSION

For the forgoing reasons, we conclude that the language in Haw. Rev. Stat. § 205-5.2(e) requires the board to hold contested cases on applications to withdraw property from geothermal resource subzones.

Therefore, we conclude that a contested case hearing is required on applications to withdraw a subzone designation.

Very truly yours,



William M. Tam  
Deputy Attorney General

APPROVED:



Margery S. Bronster  
Attorney General

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