

June 13, 2019
Agenda Item IV.A.

MEMORANDUM

To: KIRC Commissioners

From: Michael Nahoopii, Executive Director

Subject: Approval of the Revised Palapala ‘Aelike Kahu‘āina Stewardship Agreement with the Protect Kaho‘olawe ‘Ohana through its non-profit corporation and fiscal agent Kohemalamalama O Kanaloa from June 13, 2019 through June 13, 2024

RECOMMENDED MOTION

To approve the Revised Palapala ‘Aelike Kahu‘āina Stewardship Agreement (Agreement) with the Protect Kaho‘olawe ‘Ohana (PKO) through its non-profit corporation and fiscal agent Kohemalamalama O Kanaloa from June 13, 2019 through June 13, 2024, as amended.

BACKGROUND

On April 7, 2009, the KIRC and the Protect Kaho‘olawe ‘Ohana through its non-profit corporation and fiscal agent Kohemalamalama O Kanaloa (‘Ohana) entered into the Palapala ‘Aelike Kahu‘āina Stewardship Agreement Pertaining to the Kaho‘olawe Island Reserve between the Kaho‘olawe Island Reserve Commission and the Protect Kaho‘olawe ‘Ohana through its non-profit corporation and fiscal agent Kohemalamalama O Kanaloa/Protect Kaho‘olawe Fund (Palapala ‘Aelike Kahu‘āina) for a period of five (5) years, subject to amendment or renewal for an additional five (5) years.

On April 14, 2014, the KIRC approved a revision to the Agreement and renewed the Agreement to extend to April 14, 2019.

At the annual Palapala ‘Aelike meeting held on October 30, 2018, the parties to the Agreement discussed its renewal and agreed to submit changes for review. A request by the PKO to modify the Agreement was received and after review and consideration by the Deputy Attorney General and the members of the PKO, the following change was made:

Section 8. Volunteers

Change last sentence from; “Persons conducting religious and spiritual activities, including but not limited to those listed in Section 6 of this agreement, will not be deemed volunteers for the purposes of Chapter 90, HRS.” to:

“Persons conducting only religious and spiritual activities, including but not limited to those listed in Section 6 of this agreement, might not be deemed volunteers for the

purposes of Chapter 90, HRS, as each determination will be made on a case by case basis.”

DISCUSSION:

During an access designated by the PKO as a spiritual or religious access, there are times when participants are not conducting spiritual or religious activities such as when they are maintaining the facilities and surrounding grounds located in Hakioawa or when participating in other KIRC sponsored and approved activities. Under the current language of the Agreement, all persons conducting any activities during accesses designated as spiritual or religious would not be regarded as volunteers.

This modification was requested by the PKO to allow for those periods while persons are not conducting a religious or spiritual activity, during an access designated and under the control of the PKO, might still be regarded as volunteers under Chapter 90, HRS when participating in a KIRC sponsored and approved activity.

RECOMMENDATION:

KIRC Staff recommends the KIRC pursuant to its authority under HRS 6K-6(5), approve the Palapala ‘Aelike Kahu‘āina Stewardship Agreement with the Protect Kaho‘olawe ‘Ohana through its non-profit corporation and fiscal agent Kohemalamalama O Kanaloa from June 13, 2019 through June 13, 2024 as amended.



Palapala ‘Aelike Kahu‘āina
Stewardship Agreement Pertaining To The Kaho‘olawe Island Reserve
Between The Kaho‘olawe Island Reserve Commission and the
Protect Kaho'olawe ‘Ohana through its non-profit corporation and fiscal agent
Kohemalamalama O Kanaloa/Protect Kaho‘olawe Fund

THIS AGREEMENT, executed on the respective dates indicated below, is effective June 13, 2019 through June 12, 2024, between the Kaho‘olawe Island Reserve Commission (KIRC), by its Commission members, and the Protect Kaho‘olawe ‘Ohana through its non-profit corporation and fiscal agent, Kohemalamalama O Kanaloa /Protect Kaho‘olawe Fund (‘Ohana), by its officers,

1. Purpose of Agreement

Pursuant to Hawai‘i Revised Statutes (HRS) 6K-6(5), the KIRC may enter into curator or stewardship agreements with appropriate Hawaiian organizations for the preservation and perpetuation of Native Hawaiian cultural, religious and subsistence customs, beliefs, and practices; the preservation and protection of its archaeological, historical and environmental resources; the rehabilitation, revegetation, habitat restoration, and preservation; and education. The ‘Ohana enters into this stewardship agreement to fulfill these spiritual and cultural responsibilities as an ‘ohana for Kanaloa; to care for the cultural and natural resources of the island; to help accomplish the mission of the KIRC; to realize the mandate of KIRC under Hawai‘i Revised Statutes Chapter 6-K (HRS 6-K); and to abide by the KIRC's operating procedures in the Access and Risk Management Plan (ARMP).

The parties enter into this agreement to allow the ‘Ohana to access the Kaho‘olawe Island Reserve (Reserve) to provide mutual support for KIRC sponsored and approved activities as discussed in as needed meetings.

2. Site

Kaho‘olawe is nestled between the islands of Lāna‘i, Moloka‘i, and Maui, approximately seven miles offshore from Maui. Kaho‘olawe is 11 miles long and seven miles wide with a total area of about 45 square miles or about 28,800 acres. Pu‘u Moa‘ulanui is the highest point on Kaho‘olawe with an elevation of 1,477 feet. The island includes several smaller pu‘u and lua. The eastern and southern coasts are characterized by steep sea cliffs, which dramatically drop into deep nearshore waters. The north and west coasts are formed by sloping ridges and valleys that open into inland bays and are fringed by reefs.

The Reserve includes the island of Kaho‘olawe and the submerged lands and waters extending seaward two miles from its shoreline and encompasses an area of approximately 78 square miles. The Reserve is of significant cultural and historical importance and by law is to be used solely and exclusively for the preservation and practice of all rights customarily and traditionally exercised by Native Hawaiians for



cultural, spiritual, and subsistence purposes; preservation and protection of its archaeological, historical, and environmental resources; rehabilitation, revegetation, habitat restoration, and preservation; and education. Commercial uses are prohibited.

On March 18, 1981, the entire island of Kaho'olawe was placed on the National Register of Historic Places and designated as the Kaho'olawe Archaeological District (District). The District contains several thousand recorded archaeological features as well as unrecorded features associated with traditional and historic Hawaiian land use, ranching, and military activities. Archaeological site protection plans provide for mitigation and guides use of these sites and features and the 'Aha Pāwalu describes ceremonies and provides guidance for protocol relating to Kaho'olawe and its historical, cultural, and religious sites or artifacts.

Collection and consumption of marine resources, flora and fauna is restricted, except for subsistence, cultural, religious and restoration purposes consistent with traditional and customary Native Hawaiian uses. Kaho'olawe is the unique habitat for a variety of endangered and protected species that include the Blackburn Sphinx Moth and Ka Palupalu a Kanaloa.

The Reserve with its combined 123 square miles of land and water contains a wide range of hazards, some natural geographical and environmental conditions, and others man-made as the result of use as a live-fire training area.

The island of Kaho'olawe was used for over fifty years by the United States military as a live impact range for the full spectrum of conventional ordnance. As a result of the military use of Kaho'olawe, numerous unexploded ordnance (UXO) were left on the island. The different types of UXO found on Kaho'olawe range from small arms and submunitions to rockets, projectiles and large bombs. UXO are hazardous and areas uncleared of UXO are dangerous. To mitigate the risk to future users of the island, the United States Navy, from 1998 to 2003, executed a large-scale but limited removal of UXO and other environmental hazards from Kaho'olawe. Since the UXO removal process did not completely remove all the hazardous and dangerous material from the island, a residual level of danger remains. Therefore all who enter the Reserve will be exposed to these residual UXO hazards and risk severe injury or death if they encounter such hazards. The KIRC developed the ARMP as a guidance document to manage the residual risk to reserve users and to institute a safety program. The ARMP provides for the establishment and recognition of stewardship organizations that work in conjunction with the KIRC to fulfill its mandate.

Kaho'olawe is geographically isolated from any other populated island. Access to Kaho'olawe is only by sea or by air. At present, the Reserve has no constructed harborage or landing field for fixed-wing aircraft, although there are specific fixed mooring sites and several helicopter landing zones. There are no emergency medical services available on Kaho'olawe. Emergency equipment available on Kaho'olawe is



limited. Emergency medical services and medical evacuation are based on Maui and requires a long transit time to reach Kaho'olawe.

The steep and uneven terrain of gulches and gullies, the arid landscape and the rough ocean conditions expose all persons entering the Reserve to a number of hazards that can cause severe injury or death. The remote geography, the lack of immediate medical response, and the lack of infrastructure; are all critical factors that may come into play after any accident in the Reserve.

Kaho'olawe is periodically infested with various nuisance pests including rodents, feral cats, bees, spiders, centipedes, scorpions and other insects. Pest control is limited.

3. Background on Parties

The resources and waters of Kaho'olawe shall be held by the State of Hawai'i (State), in trust as part of the public land trust. The general administration of the Reserve rests with the KIRC. However, the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State.

On May 7, 1994, Kaho'olawe was returned to the State by "Quitclaim Deed From the United States of America To The State of Hawai'i For the Island of Kaho'olawe, Hawai'i," pursuant to Title X of Public Law 103-139, 107 Stat. 1418, 1479-1484.

Act 340 of the Session Laws of Hawai'i, 1993 established HRS Chapter 6K, which created and defined the Reserve and the KIRC. Pursuant to HRS 6K-6(5) the KIRC may enter into stewardship agreements with appropriate Hawaiian cultural and spiritual community organizations for the perpetuation of Native Hawaiian cultural, religious, and subsistence customs, beliefs, and practices for the purposes stated in HRS 6K-3.

In the process of managing the Reserve in its first ten years, the KIRC created several guiding plans and documents to assist in the restoration of the Reserve and in keeping and in compliance with the guiding principles and purposes stated in HRS Chapter 6K. Those guiding documents include:

- Palapala Ho'onohonoho Moku'Āina O Kaho'olawe, Kaho'olawe Use Plan (December 1995) (KIRC Use Plan)
- Draft Cultural Use Plan (August 1995)
- Ho'ola Hou I Ke Kino O Kanaloa, Kaho'olawe Environmental Restoration Plan (May 1998)
- Ola I Ke Kai O Kanaloa, Kaho'olawe Ocean Management Plan (July 1997).
- 'Aha Pāwalu (August 1995)



Due to the inherent dangers found in the Reserve, the KIRC created the ARMP, a key document that describes policy and program plans to allow for maximum safe and meaningful use and access and for the protection of humans and resources while carrying out the duties of the KIRC. The "Procedural Agreement Regarding the Means for Regular Interval Clearance and Removal of Newly Discovered and Previously Undetected Ordnance of 2004," provides for the continual disposal of UXO beyond the Navy's ten-year cleanup and states that the United States government will be responsible for the disposal of ordnance items found after the Navy's departure from the island in 2004.

The Protect Kaho'olawe 'Ohana (PKO) formed in 1976 to stop the bombing of Kaho'olawe and restore the cultural and natural resources of the island. At the same time, the PKO incorporated the Kohe Malamalama O Kanaloa/Protect Kaho'olawe Fund (KOK/PKF) as a charitable non-profit entity through which business would be conducted for charitable, educational, cultural, religious and scientific purposes. The PKO and the Navy entered into a Consent Decree in 1980, which was entered as a final judgment in Aluli v. Brown, Civil No. 76-0380 (U.S.D. Hawaii 1980) (Consent Decree). Under the Consent Decree, the PKO was recognized as stewards for Kaho'olawe. Continuing from 1980, the PKO fulfilled the responsibilities of *hoa'āina* (tenants) and *kahu'āina* (cultural stewards) for the island of Kaho'olawe and exercised customary and traditional Native Hawaiian rights. For more than 23 years, from 1980 through 2003, under the Consent Decree, the 'Ohana planned, coordinated, and safely implemented public access for more than 13,000 persons of various ages and diverse ethnic backgrounds to Kaho'olawe for cultural, religious, revegetation, subsistence, and educational purposes; and these accesses have been without major injury or fatalities due to UXO.

The 'Ohana has cared for the *kūpuna* of Kaho'olawe and their related burials, remains, and *moepū*; including re-interment.

Section 6K-6(5) HRS, states that the KIRC may enter into curator or stewardship agreements with appropriate Hawaiian organizations such as the 'Ohana. On February 16, 1995, the KIRC and the PKO signed a Letter of Understanding (LOU) which recognized the ongoing role of the PKO as *Ke Kahu O Ka 'Āina* for the Reserve. On October 14, 2003, the KIRC and the KOK/PKF, on behalf of the PKO, signed a Letter of Understanding which mutually recognized and reaffirmed the ongoing role of the 'Ohana as *hoa'āina* and *kahu'āina* for the Reserve. This LOU is attached and incorporated as part of this agreement.

On March 21, 2006, the KIRC and the 'Ohana executed the first Palapala 'Aelike Kahu'āina Stewardship Agreement pertaining to the Reserve for a period of two (2) years. On December 12, 2007, the Palapala 'Aelike Kahu'āina was extended for an additional six (6) month period, to September 21, 2008. On September 24, 2008, the KIRC extended the agreement until November 5, 2008. On November 5, 2008 the



Palapala ‘Aelike Kahu‘āina was executed for a period of five (5) years, through November 5, 2013. On April 7, 2009 the agreement was modified to include a section on conditions for modifications. The modified agreement was executed for the period April 7, 2009 through April 7, 2014.

4. Shared Vision:

The parties share the following Vision for the Reserve as a cultural treasure:

"The kino of Kanaloa is restored. Forests and shrublands of native plants and other biota clothe its slopes and valleys. Pristine ocean waters and healthy reef ecosystems are the foundation that supports and surrounds the island.

Nā po‘e Hawai‘i care for the land in a manner, which recognizes the island and ocean of Kanaloa as a living spiritual entity. Kanaloa is a pu‘uhonua and wahi pana where Native Hawaiian cultural practices flourish.

The piko of Kanaloa is the crossroads of past and future generations from which the Native Hawaiian lifestyle is spread throughout the islands."

The parties support the perpetuation of aloha ‘āina through cultural, religious and healing experiences.

Consistent with the KIRC Use Plan, the parties will work toward the goal of resettlement in areas that are reasonably safe for human habitation.

The ‘Ohana, will continue to fulfill its unique role as hoa‘āina and kahu‘āina of the Reserve in preparation for the eventual transfer of the Reserve to the sovereign Native Hawaiian entity.

The KIRC, on behalf of the State of Hawai‘i, holds the Reserve in trust for eventual transfer to the recognized sovereign Native Hawaiian entity upon recognition by the United States and by the State.

5. Programs and Projects

The parties will coordinate the programs and projects to meet the KIRC’s statutory responsibilities regarding access and management of areas of the Reserve, for the preservation and practice of all rights customarily and traditionally exercised by Native Hawaiians for cultural, spiritual and subsistence purposes. Programs and projects shall promote the preservation and protection of archaeological, historical, and environmental resources; rehabilitation, revegetation, habitat restoration and education.



The parties agree to meet at the request of either party's point of contact to coordinate the initiation, implementation, supervision, evaluation and funding of joint and independent programs and projects.

6. Spiritual and Religious Activities

The PKO has conducted and will continue to conduct spiritual and religious activities and ceremonies on Kaho'olawe, including the annual Makahiki, rededication of ancestral shrines and heiau, dedication of new spiritual and religious sites that honor Native Hawaiian deities and ancestors for the protection, restoration, and perpetuation of the island and its cultural, spiritual and natural resources. The KIRC will continue to provide support for safe and meaningful access during these activities, pursuant to HRS Chapter 6K. Religious Practitioners of the PKO will meet with the KIRC regarding PKO religious programs, projects, and activities and burial treatment plans.

7. Roles and Responsibilities

The parties of this agreement share and shall collaborate on the following Joint Roles and Responsibilities:

- Complement, participate in and facilitate one another's programs, particularly on-island.
- Coordinate in providing safe and meaningful access to the Reserve for cultural, subsistence, scientific, and educational purposes.
- Implement burial stabilization and protection program and treatment plans, in accordance with the "KIRC Policy and Standard Operating Procedure Relating to Burials".
- Coordinate the protection, stabilization, dedication, re-dedication and use of cultural, religious and historic sites.
- Coordinate revegetation and habitat restoration programs, projects and activities.
- Coordinate the protection and use of marine resources for religious, cultural and subsistence purposes.
- Complement education and outreach efforts.
- Develop a significant volunteer base for the purposes of cultural, natural and marine resource maintenance and restoration.
- Coordinate support for voyaging canoes and traditional navigation.
- Maintain a significant on-island presence for the purposes of managing and protecting the Reserve.
- Observe, improve and implement the ARMP as a living document.



- Support the implementation of the "Procedural Agreement Regarding the Means for Regular Interval Clearance and Removal of Newly Discovered and Previously Undetected Ordnance" and ongoing and future cleanup of the island and its surrounding waters.
- Coordinate communication, transportation and logistical support in order to safely carry out services, programs and projects.
- Coordinate the design, construction, maintenance and use of structures and infrastructure.
- Coordinate the storage, maintenance and use of equipment and supplies.
- Coordinate training programs including but not limited to first responder training.
- Coordinate efforts to protect the air space above the Reserve.

The KIRC shall fulfill the following responsibilities:

- Pursuant to HRS Chapter 6K-6:
 - Establish criteria, policies, and controls for permissible uses within the Reserve.
 - Approve all contracts for services and rules pertaining to the Reserve.
 - Carry out those powers and duties concerning the Reserve otherwise conferred upon the island burial councils with regard to proper treatment of burial sites and human skeletal remains found in the Reserve in accordance with KIRC Policy and Standard Operating Procedure Relating to Burials.
- Pursuant to Hawai'i Administrative Rules (HAR) Section 13-261-13:
 - Allow activities for the preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural and subsistence purposes.
 - Allow activities for the protection, preservation or restoration of the natural or cultural resources of the Reserve.
 - Allow activities for rehabilitation, revegetation and habitat restoration and preservation.
 - Allow activities which are educational, and which relate to native Hawaiian cultural practices or to the natural or cultural resources of the Reserve.



- Allow fishing activities which are consistent with the Hawaii Administrative Rules (HAR) (e.g. seasonal and gear restrictions, minimum size requirements and bag limits)
- Provide electronic and hard copy catch reports upon request.
- Facilitate and process for approval in a timely manner requests made by the ‘Ohana for the maintenance of facilities, transportation provisions, logistical support and equipment as necessary and appropriate.
- Provide and implement health and sanitation measures, including but not limited to vector and insect monitoring and control.
- Supervise the handling of hazardous materials.
- Review and provide written notification that the ‘Ohana’s “Access Safety and Logistics Plan” (Access Manual) satisfies KIRC safety and logistics requirements for access.
- Share updates on policies and procedures and activities with the ‘Ohana.
- Provide UXO and access guide training.

The ‘Ohana shall fulfill the following responsibilities:

- Continue to serve as kahu‘āina for Kaho‘olawe and its surrounding waters.
- Provide education for our keiki o ka ‘āina along with their ‘ohana and kaiāulu.
- Submit the ‘Ohana Access Safety and Logistics Plan to satisfy KIRC safety and logistics requirements for access.
- Submit timely requests for maintenance of facilities, transportation provisions, logistical support, and health and sanitation requirements as necessary and appropriate.
- Provide trained personnel to fulfill the requirements of the ARMP.
- Inform the KIRC of the possession of hazardous material, as soon as the volume requirement has been met.
- Submit KIRC catch report forms for any marine take that occurs.



8. Volunteers

It is the intent of this agreement that persons accessing the Reserve under the control of the 'Ohana be deemed to be volunteers to the fullest extent of the law when participating in KIRC sponsored and approved activities. As such, volunteers acting in a KIRC approved capacity may be regarded as volunteers under chapter 90 HRS. The Department of the Attorney General has the sole authority to determine whether volunteers will receive representation from the Department of the Attorney General for purposes of chapter 662 HRS. Persons conducting only religious and spiritual activities, including but not limited to those listed in Section 6 of this agreement, might not be deemed volunteers for the purposes of Chapter 90, HRS, as each determination will be made on a case by case basis.

9. Reports and Review

The parties agree to meet in December of each year to review and evaluate the prior year's activities and accomplishments under the joint agreement. A list of these activities and accomplishments as well as access dates and list of activities for the upcoming year shall be submitted prior to the December meeting. If a dispute arises, the parties shall work in good faith to resolve it.

10. Point of Contact

The points of contact for the parties will be the Executive Director or designated assignee of the KIRC and a designated officer of the 'Ohana. Contact information will be provided at each review meeting in addition to changes in contact information as they occur.

11. Modifications

This agreement may only be modified or amended by written agreement, signed by all parties. The terms and conditions of this agreement will remain in full force and effect unless terminated according to the provisions in Section 12 of this agreement.

12. Term

It is understood that the duration of this agreement is for a period of five (5) years. Following a review and evaluation of the agreement within the fourth year, it may be amended and/or renewed for an additional five (5) years, subject to approval by both parties. If either party wishes to terminate the agreement, six (6) months advance written notice shall be given to the other party.



Approved by the Board of Directors of the Kohemalamalama O Kanaloa/Protect Kaho'olawe Fund on June 13, 2019.

Approved by the Kaho'olawe Island Reserve Commission at its publicly noticed and scheduled meeting on June 13, 2019.

Kaho'olawe Island Reserve Commission:

**Kohemalamalama Kanaloa/
Protect Kaho'olawe Fund:**

Michele McLean, Chairperson

Noa Emmett Aluli, President

Joshua Ka'akua, Vice Chair

Robert Lopaka 'Aiwohi, Vice-President

Christopher Kaliko Baker, PhD

Davianna Pōmaika'i McGregor,
Secretary-Treasurer

Suzanne Case

Kim Ku'ulei Birnie, Director

Jonathan Ching, D.Arch.

Hardy Spoehr, Director

Hōkūlani Holt

Carmen Hulu Lindsey

APPROVED AS TO FORM

Deputy Attorney General