

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

July 27, 2007

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

PSF No.:99OD-011

OAHU

Amend Prior Board Action of July 14, 2006, Under Agenda Item D-9, Acquisition of Lands and Set Aside to the Department of Land and Natural Resources, Division of Forestry and Wildlife for Habitat Restoration and Marsh Wildlife Sanctuary Purposes, Kawainui Marsh, Kailua, Oahu, Tax Map Keys: (1) 4-2-13:22; 4-2-16:portion 1, 5, and portion 6; and

Ratification of the Subagreement and Acknowledgment of Local Cooperation Agreement between the State of Hawaii, Department of Land and Natural Resources and the City and County of Honolulu

APPLICANT:

Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW)

In addition, the City & County of Honolulu (City) has requested that the property be transferred from the City to the State.

LANDOWNER:

City & County of Honolulu (City)

LEGAL REFERENCE:

Sections 171-11, -30, -95 HRS, and other applicable sections; Act 235, SLH 2007.

LOCATION:

City-owned lands of Kawainui situated at Kailua, Oahu, identified by Tax Map Keys: (1) 4-2-13:22; 4-2-16: portion 1, 5, and portion 6, as shown on the attached maps labeled Exhibit A.

AREA:

693.155 acres, more or less.

ZONING:

State Land Use District: Agriculture/Conservation
City & County of Honolulu CZO: Preservation

TRUST LAND STATUS:

Not applicable; subject lands were acquired by the City from private-ownership in 1964.

CURRENT USE STATUS:

Vacant and unencumbered.

CONSIDERATION:

No consideration will be paid for the conveyance of the subject lands.

PURPOSE:

Compliance with Act 235, SLH 2007; and

Set aside to Department of Land and Natural Resources, Division of Forestry and Wildlife for habitat restoration and marsh wildlife sanctuary purposes.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

This action before the Board involves the transfer of ownership of land that does not require the use of State funds to acquire land. Therefore, this action is exempt from the provisions of Chapter 343, HRS, relating to environmental impact statements.

Inasmuch as Chapter 343 environmental requirements apply to Applicant's use of the lands, the Department submitted a Management Plan dated 1994 for Kawainui Marsh as a draft Environmental Assessment. A Finding of No Significant Impact was issued and published in OEQC's Environmental Notice on April 23, 2000.

The Land Board at its meeting of January 25, 2002, under agenda item D-9, approved and amended the Department's conservation district use application for Kawainui Marsh Improvements (CDUA #OA-3068B).

CITY & COUNTY OF HONOLULU'S REQUIREMENTS:

City & County of Honolulu shall be required to:

- 1) Process and obtain subdivision at no cost to the State;
- 2) Provide survey maps and descriptions according to State DAGS standards including any easements for roadway, drainage, etc. in favor of the City and/or others and at no cost to the State;

- 3) Obtain a title report for the City-owned property at no cost to the State and subject to review and approval by the Department of Land and Natural Resources (DLNR) and the Department of the Attorney General (DAG); and
- 4) Pay for and conduct a Phase I environmental site assessment and, if this Phase I identifies the potential for hazardous materials release or the presence of hazardous materials, conduct a Phase II environmental sampling and analysis plan and perform any and all remediation, abatement and disposal as may be warranted and as satisfactory to the standards required by the Federal Environmental Protection Agency and/or the State Department of Health, all at no cost to the State and to the satisfaction of the Department.

REMARKS:

At its meeting of July 14, 2006 under agenda item D-9, the Board of Land and Natural Resources (BLNR) approved the acceptance of approximately 693.155 acres of land from the City & County of Honolulu (City). The subject land is located at Kailua, Oahu and is commonly referred to as Kawainui Marsh, as generally depicted in Exhibits A and B, attached. However, the acceptance of the transfer from the City to the State was conditioned on the City providing the following, at no cost to the State:

1. Subdivision approval;
2. Survey maps and descriptions according to State DAGS standards;
3. Title report, subject to review and approval by the DLNR and the DAG;
4. Phase I environmental site assessment and, if this Phase I identifies the potential for hazardous materials release or the presence of hazardous materials, conduct a Phase II environmental sampling and analysis plan and perform any and all remediation, abatement and disposal as may be warranted and as satisfactory to the standards required by the Federal Environmental Agency and/or the State Department of Health;

Whereas the City received a warranty deed when the subject property was acquired, BLNR required any conveyance to the State be via warranty deed instrument, subject to the review and approval of the DLNR and DAG.

Moreover, because the City subsequently entered into a Local Cooperation Agreement (LCA) with the U.S. Department of Army, BLNR further required the warranty deed document to also contain the following covenant and provision:

1. A covenant regarding responsibility and liability associated with Kawainui Marsh flood control measures, including but not limited to operating, maintaining, repairing, replacing, or rehabilitating flood control facilities, in favor of the C&CH in perpetuity; and
2. An indemnification provision in which the City assumes sole responsibility for maintenance, operation and repair of all

flood control measures associated with Kawainui Marsh, and the City agrees to indemnify, defend, and hold harmless the State for any incident, damage and loss to individuals and/or property resulting from any and all flooding of Kawainui Marsh.

Notwithstanding the two deed conditions cited above, the Department of Land and Natural Resources entered into a Subagreement and Acknowledgement of Local Cooperation Agreement (Subagreement) with the City, a copy of which is attached as Exhibit C.

Pursuant to Act 235, SLH 2007 (Exhibit D), the legislature directed the State to enter into a sub-agreement with the City accepting maintenance responsibility for the levee system. The Subagreement is consistent with Act 235, SLH 2007.

Accordingly, this request before the BLNR is to amend its action of July 14, 2006, under agenda item D-9, by eliminating the deed covenant and provision requirement described above, consistent with Act 235, SLH 2007.

RECOMMENDATION: The Department requests that the Board:

1. Amend its action of July 14, 2006, under agenda item D-9, by deleting the following requirements from the warranty deed document form:
 - A. A covenant regarding responsibility and liability associated with Kawainui Marsh flood control measures, including but not limited to operating, maintaining, repairing, replacing, or rehabilitating flood control facilities, in favor of the City and County of Honolulu in perpetuity; and
 - B. An indemnification provision in which the City assumes sole responsibility for maintenance, operation and repair of all flood control measures associated with Kawainui Marsh, and the City agrees to indemnify, defend, and hold harmless the State for any incident, damage and loss to individuals and/or property resulting from any and all flooding of Kawainui Marsh.
2. Ratify the Subagreement and Acknowledgement of Local Cooperation Agreement, dated April 5, 2007;
3. Authorize the issuance of a management right-of-entry permit to the Division of Forestry and Wildlife covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time;

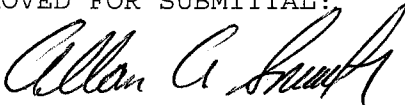
- B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
4. Delegate to the Chairperson the authority to negotiate and approve such other terms and conditions as may be prescribed to best serve the interests of the State.

Respectfully Submitted,



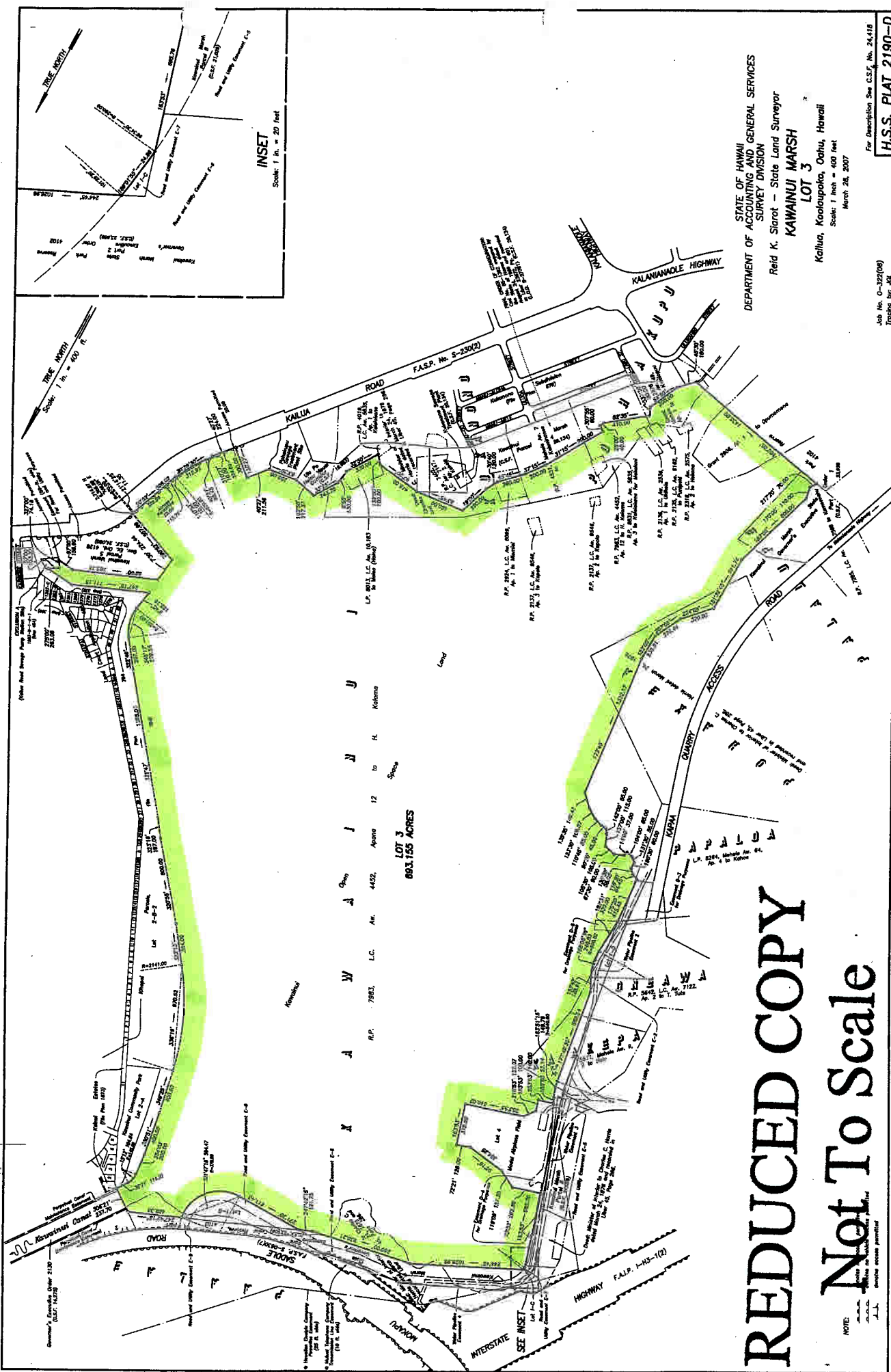
Gavin Chun
Project Development Specialist

APPROVED FOR SUBMITTAL:



ALLAN A. SMITH, Interim Chairperson





LOT 3
883.155 ACRES

STATE OF HAWAII
 DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
 SURVEY DIVISION
 Reid K. Starot - State Land Surveyor
KAWANUI MARSH
LOT 3
 Kailua, Koolauapoko, Oahu, Hawaii
 Scale: 1 inch = 400 feet
 March 28, 2007

For Description See C.S.F. No. 24,418
H.S.S. PLAT 2190-D
3" x 12" - 407 ft.

Job No. G-192(06)
 Tracing by: JAL

REDUCED COPY
Not To Scale

NOTE:
 - - - - - Easement
 --- --- --- Easement
 --- --- --- Easement
 --- --- --- Easement

See Map Nos. 4-2-13 and 4-2-16

EXHIBIT "B"

RECEIVED
LAND DIVISION
2007 MAY 23 A 8 25

**SUBAGREEMENT AND ACKNOWLEDGMENT
OF LOCAL COOPERATION AGREEMENT**

THIS SUBAGREEMENT AND ACKNOWLEDGEMENT is made this 5th day of April, 2007, by and between the STATE OF HAWAII, acting through the Chairperson of the Department of Land and Natural Resources (the "State"), and the CITY AND COUNTY OF HONOLULU (the "City"), acting through the Chief Engineer (collectively the "Parties").

WHEREAS, the City desires to transfer to the State, and the State desires to accept, Kawainui Marsh defined as Lot 3, as shown on land division parcel map file no. 18-3-3-13 (the "Kawainui Marsh Parcel") which is located mauka of Kawainui Stream; and

WHEREAS, included in the Kawainui Marsh Parcel is a section of levee beginning at Kailua Road, progressing northwest, skirting Kawainui Marsh, and ending at Oneawa Channel, together with a concrete flood wall that is located atop the levee (the "Levee"); and

WHEREAS, the Levee is the subject of a Local Cooperation Agreement Between the U.S. Department of the Army and the City and County of Honolulu For Construction of The Kawainui Marsh Flood Control Project, dated October 3, 1993, as amended by Amendment #1 dated March 10, 1994 (the "LCA"); and

WHEREAS, the Levee is also the subject of an Operations and Maintenance Manual for Kawainui Marsh Flood Control Project, Kailua, Oahu, Hawaii, prepared by the U.S. Army Corps of Engineers and dated March 1998 (the "Manual"); and

WHEREAS, both the LCA and the Manual contain covenants and restrictions, and impose obligations, that must be observed in connection with the Levee; and

WHEREAS, while the City is the local sponsor of the LCA and responsible for the requirements thereunder, and the City and the State agree that the State shall not be required to become a party to the LCA, or to enter into a separate agreement with the U.S. Department of the Army in order to accept ownership of the Levee, the State agrees to perform, and comply with the LCA and the Manual, as further specified herein; and

NOW, THEREFORE, for and in consideration of the premises and the covenants set forth herein, the Parties hereby agree to the following:

1. Prior to acceptance by the State of the Kawainui Marsh Parcel, the Parties agree to the following:

a. A joint inspection between the City, State, and the U.S. Department of the Army will be held of the Levee for the purpose of ascertaining

EXHIBIT "C"

whether the condition of the Levee is in compliance with the requirements of the LCA and the Manual, as determined by a representative of the U.S. Department of the Army. Any deficiencies related to the Levee identified by the U.S. Department of the Army's representative shall be corrected by the City to be acceptable to the U.S. Department of the Army.

b. The City shall affirm that it has completed all actions required by the U.S. Department of the Army with regards to the Levee.

c. The parties will have commenced work on a joint emergency action plan and emergency notification plan for both the Levee and Oneawa Channel.

2. After the transfer of the Kawainui Marsh parcel to the State, the Parties agree as follows:

- a. The State shall comply with and faithfully observe, and perform, all terms, requirements, covenants, and conditions of, and maintain the Levee in compliance with, the LCA and the Manual, insofar as they apply or may be interpreted to apply to the Levee.
- b. Without limiting the generality of any other provision contained herein, the State accepts full responsibility for performing the following activities related to the Levee in accordance with the LCA and Manual: (a) maintain, operate, inspect, and patrol the Levee; (b) take immediate steps to correct any condition that may endanger any part of the Levee; (c) emergency planning and preparation relating to the Levee; (d) prepare reports for submission by the City to the U.S. Army Corps of Engineers regarding the Levee; (e) maintain and retain records relating to the Levee; and (f) provide access to records and the Kawainui Marsh Parcel.
- c. The City and State will set up an initial meeting within 30 days of the signing of this agreement and at least annually thereafter for the purpose of consultation and agreement by the parties regarding maintenance schedules and emergency planning and preparation relating to the Levee and other parts of the Kailua watershed and floodplain. These annual meetings may be held in conjunction with the annual inspection required by the LCA.
- d. The State agrees to be responsible for the ongoing maintenance and repair of the Levee. Any repairs or changes to the Levee that the U.S. Department of the Army determines is required as a result of defects or errors with the construction or design of the Levee, as indicated in the LCA, that exist on the date of transfer of ownership, will be the responsibility of the City to undertake and

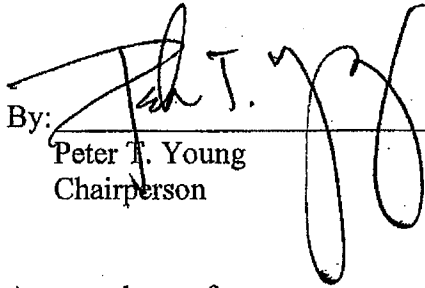
fund. The State will cooperate with the City in any planning or requests for funding as it may be necessary to address any problems with the construction and design of the Levee as referenced above.

- e. If, after the date of transfer, the U.S. Department of the Army identifies an additional outstanding deficiency that existed as a deficiency with regards to the Levee prior to the date of transfer, the City agrees to correct such deficiency to be acceptable to the U.S. Department of the Army.
- f. With respect to the Levee, the State shall be responsible for any damages, losses, or injuries to the extent that the State's liability for such damage, loss or injury has been determined by a court or otherwise agreed to by the State. The State shall pay for such damages and injury to the extent that funds have been authorized and appropriated by the Legislature for such purpose.
- g. The State shall provide access to the Kawainui Marsh Parcel to the City or the U.S. Department of the Army on request in connection with flood control matters.
- h. For so long as Oneawa Channel is set aside to the City by Executive Order, the City shall be responsible for Oneawa Channel under the LCA and the Manual.
- i. The agreement of the State is conditioned upon the 2007 Hawaii State Legislature funding State DLNR for levee and marsh habitat maintenance cost and crew to maintain marsh as part of DLNR operating funds budget out of general funds (without reduction of other parts of DLNR general funds operating budget amounts) in the amount of \$500,000 for year 1 of the biennium budget (7/1/07-6/30/08) and \$420,000 as part of its base budget.

This Agreement may only be modified or terminated by written agreement of both parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Subagreement and Acknowledgment of Local Cooperation Agreement as of the date written above.

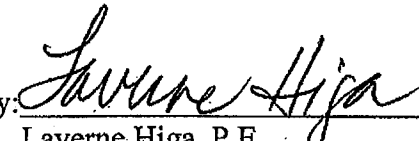
**STATE OF HAWAII
BOARD OF LAND AND NATURAL
RESOURCES**

By: 
Peter T. Young
Chairperson

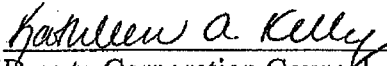
Approved as to form:


Deputy Attorney General

**CITY AND COUNTY OF
HONOLULU
DEPARTMENT OF FACILITY
MAINTENANCE**

By: 
Laverne Higa, P.E.
Director and Chief Engineer

Approved as to legality and form:


Deputy Corporation Counsel



GOV. MSG. NO. 1006

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

June 30, 2007

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fourth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

This is to inform you that on June 30, 2007, the following bill was signed into law:

HB1899 HD2 SD2 CD1

A BILL FOR AN ACT RELATING TO KAWAI NUI
MARSH.
(ACT 235)

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Lingle".

LINDA LINGLE

EXHIBIT "D"

Approved by the Governor

on JUN 30 2007

ACT 235

HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE, 2007
STATE OF HAWAII

H.B. NO. 1899
H.D. 2
S.D. 2
C.D. 1

A BILL FOR AN ACT

RELATING TO KAWAI NUI MARSH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Kawai Nui marsh, encompassing approximately
2 eight hundred thirty acres of land in Kailua, Oahu, is one of
3 the state's largest remaining wetlands and an ecological
4 treasure. It has been identified by the United States Fish and
5 Wildlife Service as a primary habitat for endemic and endangered
6 native Hawaiian birds. In 2005, the Ramsar Convention on
7 Wetlands designated Kawai Nui marsh a wetland of international
8 importance.

9 Act 314, Session Laws of Hawaii 1990 (Act 314), directed
10 the transfer to the State of the parcel owned by the city and
11 county of Honolulu and bearing tax map key number 4-2-16:1,
12 which encompasses the bulk of Kawai Nui marsh. Both the State
13 and city and county of Honolulu own other parcels that are part
14 of the wetlands ecosystem of Kawai Nui marsh.

15 Since the passage of Act 314, the State and city and county
16 of Honolulu have disputed their respective management
17 responsibilities of Kawai Nui marsh. This dispute has delayed
18 restoration and rehabilitation of the marsh to the point where

HB1899 CD1 HMS 2007-4158



1 the ability of the marsh to support its native wildlife
2 population is critically impaired. It is in the public interest
3 that the State immediately take primary responsibility for the
4 economic, ecological, and cultural resources of Kawai Nui marsh.
5 Federal funding is available to the State to carry out this
6 responsibility, and the funding opportunities could be lost if
7 the dispute between the State and city and county of Honolulu is
8 not resolved.

9 The purpose of this Act is to transfer lot 3, as shown on
10 land division parcel map file no. 18-3-3-13, from the city and
11 county of Honolulu to the State, to enable the State to meet its
12 responsibilities to preserve this important wetland.

13 SECTION 2. The estate, right, title, and interest, and any
14 appurtenance thereto, of the city and county of Honolulu
15 relating to Kawai Nui marsh, lot 3, as shown on land division
16 parcel map file no. 18-3-3-13 and the levee system that runs
17 from Kailua road to the Oneawa canal, shall be vested in the
18 State in fee simple. At the time of the transfer of Kawai Nui
19 marsh to the State, the State shall enter into a sub-agreement
20 with the city and county of Honolulu whereby the State shall
21 assume responsibility for the performance of and compliance with
22 the local cooperation agreement between the United States



1 Department of the Army and the city and county of Honolulu for
2 construction of the Kawai Nui marsh flood control project, dated
3 October 3, 1993, as amended by Amendment #1 dated March 10,
4 2004, and the operation and maintenance manual for Kawainui
5 Swamp flood protection works, prepared by the United States Army
6 Corps of Engineers, only as and to the extent that the aforesaid
7 local cooperation agreement and the operation and maintenance
8 manual for Kawainui Swamp flood protection works pertain to the
9 levee system; provided that the city and county of Honolulu and
10 the State agree that the State shall not be required to become a
11 party to the local cooperation agreement or enter into a
12 separate agreement with the United States Department of the Army
13 to assume ownership of the levee system.

14 SECTION 3. Act 314, Session Laws of Hawaii 1990, as
15 amended by Act 47, Session Laws of Hawaii 1998, is repealed.

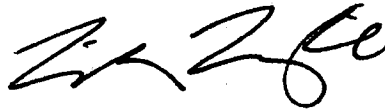
16 SECTION 4. All land transfers shall be completed no later
17 than September 1, 2007.

18 SECTION 5. This Act shall take effect on July 1, 2007.



H.B. NO. 1899
H.D. 2
S.D. 2
C.D. 1

APPROVED this 30 day of JUN , 2007



GOVERNOR OF THE STATE OF HAWAII