

DAVID Y. IGE
GOVERNOR



JADE T. BUTAY
INTERIM DIRECTOR

Deputy Directors
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

DEPT. COMM. NO. 51

IN REPLY REFER TO:

December 1, 2017

The Honorable Ronald D. Kouchi,
President and Members of the Senate
Twenty-Ninth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki
Speaker and Members of the House of
Representatives
Twenty-Ninth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kouchi, Speaker Saiki and Members of the Legislature:

For your information and consideration, I am transmitting a copy of the Albizia Eradication Report as requested in ACT 119 (15).

In accordance with HRS 93-16, I am also informing you that the report may be viewed electronically at: <http://hidot.hawaii.gov/library/reports/reports-to-the-legislature/>

Sincerely,

A handwritten signature in black ink, appearing to read "J.T. Butay".

JADE T. BUTAY
Interim Director of Transportation

c: Legislative Reference Bureau

Section 10 Expenditure of Funds for Albizia Eradication

DEPARTMENT OF TRANSPORTATION - HIGHWAYS DIVISION

| Fiscal Year | Program | Act | MOF | Amount | Non-State Matching | |
|-------------|------------|---------------|-----|-----------|--------------------|-----------|
| | | | | | Entity | Amount |
| 2016-2017 | TRN 595/AB | 119/SLH 2015 | B | 1,500,000 | HELCO | 1,500,000 |
| | | as amended by | | | MECO | 100,000 |
| | | 124/SLH 2016 | | | HECO | 600,000 |

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (the "MOU") is made this 23rd day of June, 2016 (the "Effective Date"), by and between the **STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION ("DOT")**, and **HAWAII ELECTRIC LIGHT COMPANY, INC.**, a Hawaii corporation ("**HELCO**").

WHEREAS, Act 119 (2015), which took effect on July 1, 2015 (the "**Act**"), appropriated state highway funds for highways administration in the amount of \$1,500,000 or so much thereof as may be necessary for fiscal year 2015-2016 (July 1, 2015 through June 30, 2016) ("**FY 2015-16**"), and \$1,500,000 or so much thereof as may be necessary for fiscal year 2016-2017 (July 1, 2016 through June 30, 2017) ("**FY 2016-17**"), for albizia eradication and control along public highways (the "**Appropriated Funds**"); and

WHEREAS, there has been an expenditure of \$1,500,000 non-state funds in FY 2015-16; and

WHEREAS, the Act restricts expenditure of the Appropriated Funds unless matched by at least an equal expenditure of non-state funds (the "**Matching Funds**"); and

WHEREAS, HELCO has a mutual desire to eradicate albizia trees that are detrimental to its electrical transmission and distribution lines, poles and other facilities on Hawaii Island; and

WHEREAS, DOT seeks HELCO's assistance to manage the expenditure of the Appropriated Funds in areas and locations where the presence of albizia trees on Hawaii Island are of mutual concern to DOT and HELCO; and

WHEREAS, the parties now wish to enter into this MOU to set forth the principal business terms and conditions of HELCO's matching of the Appropriated Funds and the use of the matching and Appropriated Funds by HELCO to eradicate and control albizia trees on Hawaii Island, all as set forth in this MOU.

NOW, THEREFORE, upon the foregoing facts recited and in consideration of the covenants and terms hereinafter contained, the parties hereto agree as follows:

1. Issuance of Purchase Orders and Use of Appropriated Funds. No later than June 30, 2016, DOT shall issue to HELCO a purchase order engaging HELCO to perform the mitigation and eradication of albizia trees on Hawaii Island, including, but not limited to, treating with herbicide and cutting of said albizia trees bordering highways under the jurisdiction of the DOT Highways Division, for an amount not to exceed \$1,500,000, inclusive of any applicable taxes.

Areas and locations on Hawaii Island where HELCO will utilize Appropriated Funds for mitigation and eradication of albizia trees will be agreed upon between DOT's District Engineer, Hawaii District, State Highways Division or his designee and HELCO's System Forester or his designee prior to expenditure of the Appropriated Funds.

2. State Highway Permit. HELCO and/or its subcontractor shall obtain a Permit to Perform Work Upon State Highways from the DOT Highway's Division, Hawaii District Office at least 2 weeks prior to the start of work. The DOT shall waive the permit fee, but not the insurance or bond requirements.

3. Payment of Appropriated Funds. HELCO shall invoice DOT monthly for reimbursement of costs incurred and for services performed by HELCO under this MOU. With each such invoice, HELCO shall submit documentation showing where and when the work was performed, including the names, dates and times of the HELCO employees and/or contractors.

Subject to the foregoing, DOT shall pay to HELCO the amount of Appropriated Funds set forth in each applicable invoice within thirty (30) days of receipt of the invoice.

In the event DOT fails to timely reimburse HELCO for costs incurred for services performed pursuant to this MOU, HELCO shall be entitled to suspend or stop performance of any services or obligations hereunder until payment is made and all amounts due brought current. In the event of any dispute in the amount owed, the parties shall use commercially good faith efforts to resolve the dispute in a timely manner and to the reasonable satisfaction of the parties and any partial amounts not in dispute shall be timely paid as provided herein.

4. Independent Contractor. As between DOT and HELCO, nothing in this MOU shall be deemed to constitute HELCO as an agent or representative of the DOT or create any fiduciary relationships between the parties. HELCO shall be allowed to subcontract the services and obligations hereunder without consent of the DOT, provided that the subcontractor agrees to defend and hold harmless the State of Hawaii and includes the State of Hawaii as an additional insured on their insurance policy. The parties agree that such procurement is not subject to the Hawaii Public Procurement Code, HRS Chapter 103D.

5. Exemption from Public Procurement Regulations. This MOU is subject to DOT obtaining an exemption from the Hawaii Public Procurement Code, HRS Chapter 103D, on the work to be performed by HELCO under this MOU.

6. Indemnification and Defense. HELCO shall defend, indemnify and hold harmless the State of Hawaii, the contracting agency and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorney's fees, and all claims, suits and demands therefore, arising out of or resulting from the acts or omissions of HELCO or HELCO's employees, officers, agents or subcontractors under or in connection with this MOU. The DOT shall be responsible, to the extent permitted by law, for the damage or injury caused by the DOT's officers and employees in the scope of their employment provided that the DOT's liability for such damage or injury has been determined by a court or agreed to by the DOT. The DOT shall pay for such damage and injury provided that funds are appropriated and allotted for that purpose.

7. Compliance with Laws. Each party, at its own expense, shall comply with all applicable laws, rules and regulations governing their respective obligations under this MOU.

8. Termination. If either party breaches any of its material obligations under this MOU, the other party shall have the right to terminate this MOU by giving the breaching party a notice of intention to terminate. Termination shall become effective immediately and without further notice unless the breaching party completely cures the breach to the reasonable satisfaction of non-breaching party within fifteen (15) days after the giving of such notice; provided, however, that if such breach is incapable of being cured within such fifteen (15) day period, and the breaching party commences to cure such breach during such period and thereafter prosecutes such cure to completion with due diligence, then no breach shall exist.

9. Other Agreements. At the request of either party, the parties shall negotiate in good faith and enter into such other agreements as may be reasonably necessary to set forth such other terms and conditions relating to the matters described in this MOU that are not otherwise provided herein; provided that such other terms and conditions shall not be inconsistent with the terms and conditions set forth in this MOU.

10. Miscellaneous Provisions.

(a) Binding Effect. Upon full execution by the parties hereto, this MOU shall be binding upon and inure to the benefit of the respective parties and each of their respective successors and assigns.

(b) Attorneys' Fees. As provided by applicable law.

(c) No Waiver. No waiver of one breach may be construed as a waiver of the rights or remedies with respect to any previous or subsequent breach.

(d) Headings: Severability. Captions and section headings used herein are for convenience only and shall not be used in construing it. If any term, covenant, or agreement in this MOU or any application thereof shall be held to be invalid or unenforceable, the remainder of this MOU and any other application of such term, covenant, or agreement shall not be affected thereby.

(e) Neither Party Deemed Drafter. The parties acknowledge and agree that no party shall be deemed to be the drafter of this MOU and each party has been represented by counsel or had an opportunity to be represented by counsel.

(f) Notices. All notices, demands and requests that may be or are required or permitted to be given pursuant to this MOU shall be in writing and shall be (a) personally delivered, or (b) sent by registered or certified mail, return receipt requested, postage prepaid, addressed as set forth below, or (c) sent by facsimile transmission (or other electronic transmission, *i.e.*, e-mail) to the fax number or e-mail address, if any, to a party hereto as set forth below. Notices, demands and requests shall be deemed served or given for all purposes hereunder at the time such notice, demand or notice shall be personally delivered, the fax or e-mail thereof is received, or within three (3) days of mailing. Any refusal to accept delivery of a written notice delivered or mailed to the address set forth below shall be deemed to be receipt of such notice for the purposes of this section. Any party may change its address or fax number for notice, fax or e-mail purposes by delivering written notice in the manner set forth herein and thereafter such party's notice address or fax number shall be the new address or fax number.

If to DOT: State of Hawaii
Department of Transportation
Highways Division
869 Punchbowl Street
Honolulu, Hawaii 96813
Attn: Jamie H. Ho
Email: Jamie.ho@hawaii.gov

If to HELCO: Hawaii Electric Light Company, Inc.
P.O. Box 1027
Hilo, Hawaii 96721
Attn: President
Email: jay.ignacio@hawaiielectriclight.com

With a copy to:

Hawaiian Electric Company, Inc.
PO Box 2750
Honolulu, Hawaii 96840
Attention: Legal Department
Email: legalnotices@hawaiianelectric.com

(g) Governing Law; Venue. This MOU shall be construed in accordance with the laws of the State of Hawaii. The venue for any action with respect to this MOU shall be Honolulu, Hawaii.

(h) Entire Agreement; No Amendment. This MOU supersedes all prior agreements between the parties, written or otherwise, and any modifications, changes or alterations shall not be effective unless in writing and signed by both parties.

(i) No Violation. Each party represents and warrants to the other party that neither this MOU nor the transactions contemplated herein violates or shall violate any written or oral contract, agreement or instrument to which the party is a party.

(j) Time of the Essence. Time is of the essence in the performance of this MOU by the parties.

(k) Counterparts; Facsimile Signatures. This MOU may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. Furthermore, signatures by facsimile or other electronic transmission (e.g., emailed pdf files) will be effective as delivery of an originally signed counterpart of this MOU without the need to deliver the originally signed counterpart.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this MOU as of the day and year first above written.

Approved as to form:



Deputy Attorney General

Date: June 27, 2016

**STATE OF HAWAII, DEPARTMENT OF
TRANSPORTATION**

By: 
Name: FORD N. FUCHIGAMI
Its: DIRECTOR OF TRANSPORTATION

HAWAII ELECTRIC LIGHT COMPANY, INC.,
a Hawaii corporation

By: 
Name: Jay Ignacio
Its: President