

**Act 90 Working Group
DLNR Narrative**

The Legislature in 2003 found that certain public lands classified for agricultural use by the Department of Land and Natural Resources (DLNR) should be transferred to and managed by the Department of Agriculture (DOA) for the development of farms on a widespread of a basis as possible, consistent with Article XI, Section 10 of the State Constitution. This resulted in the passage of Act 90 Session Laws of Hawaii 2003 (Act 90).

Act 90 provides that lands may be transferred from DLNR to DOA upon the mutual agreement of the Board of Agriculture (BOA) and the Board of Land and Natural Resources (BLNR).

Shortly after the act became law, DLNR and DOA began to coordinate on the transfer of lands. DOA took the position that Act 90 precluded the transfer of any lease or permit when: (i) the lessee permittee was not in full compliance with the terms and conditions of the lease or permit; (ii) the lessee or permittee was in arrears in the payment of rent or taxes or other obligations owed to the State or any county; and (iii) the lessee's or permittee's operation was not economically viable as determined by DOA. DLNR and DOA agreed to generally prioritize the transfer of encumbered lands (i.e., those subject to a lease or revocable permit) over unencumbered lands. However, some unencumbered lands have also been transferred to DOA at its request. In the early years of assessing lands for transfer (2005-2007), lands under lease or revocable permit for pasture or piggery use were not identified for transfer because DOA was focused on crop lands near DOA agricultural parks or other consolidation of farming lands at the time.

Later, Act 235 Session Laws of Hawaii 2005 established the non-agricultural park lands special fund at DOA for the collection of lease rents, fees, penalties, and any other revenues or funds collected from lands to be transferred pursuant to Act 90. The establishment of the special fund was a prerequisite to the transfer of leases and revocable permits to DOA.

At its meeting of December 9, 2005, agenda Item D-1, the BLNR approved the transfer of approximately 129 leases and revocable permits and 7 vacant (unencumbered) parcels statewide to DOA. At its meetings of June 13 and July 25, 2006, BOA agreed to accept 143 leases and permits statewide. There were subsequent BLNR and BOA approvals over the years as well. To date, approximately 19,104 acres have been transferred from DLNR to DOA covering 155 leases and revocable permits as well as vacant (unencumbered) parcels.

We have included an Excel spreadsheet titled "**Act90-completed cases-2021-03-19**" that lists the lands transferred to date. Column A of the spreadsheet contains the general lease or revocable permit number, if applicable. Column B shows the lessee or permittee name, if applicable. Column C lists the tax map key number. Column D shows the trust land status (i.e., whether the land is ceded). Column E shows the lease or revocable permit commencement date, and Column F shows the expiration date (for leases only). Column G indicates whether the lease or permit was issued through public

auction or direct negotiation. Column H shows the character of use for leases and revocable permits. Column I shows the area of the parcel listed. Column T indicates the number of the executive order that transferred the land. Column V shows the date the BLNR approved the transfer of the land to DOA.

The agricultural lands that have not been transferred to DOA fall into three main categories: (1) lands that DOA has not identified for transfer or has affirmatively rejected for transfer; (2) lands that are still under consideration by DOA but for which there are outstanding conditions for transfer such as completion of due diligence review by DOA, processing of subdivision approval, or preparation of survey maps; and (3) lands that DLNR intends to retain due to their natural resource or public recreational value or because the lands have development potential for affordable homes, schools, transit-oriented development projects, renewable energy projects or other public projects. DLNR continues to meet and confer with DOA on the transfer of additional lands in the first category that remain candidates for potential transfer. We are including a slide presentation reporting on the status of the transfer of lands under Act 90. See the document, "**Sen WTL AEN Act 90 Info Briefing 12-9-2020 DLNR SCase.**"

We are also including for reference an Excel spreadsheet titled, "**DOFAW's Master Lease RP List - Ag-Pasture.01_05_2021.**" This spreadsheet lists agricultural lands that remain under DLNR's management. Rows highlighted in blue indicate lands that DOA has identified for possible transfer pursuant to Act 90. This spreadsheet contains column headings similar to those described above for the "Act90-completed cases-2021-03-19" list, but also has a Column C indicating the county where the land is located, a Column K for the annual rent payable under the lease or revocable permit, if applicable, a Column L with recommendations of the Division of Forestry and Wildlife (DOFAW) on whether the land should be transferred or retained, a Column M for DOFAW Notes and a Column N for Land Division notes.

Follow-up Questions from Chair Tarnas (black bold) and responses from DLNR (blue).

- **DOFAW Master Lease spreadsheet:**
 - **Does the DOFAW Master Lease spreadsheet contain all the parcels which DLNR has considered for possible transfer to HDOA?** The DOFAW Master Lease spreadsheet is a list of all DLNR encumbered lands in pasture or agricultural use. After the list was initially generated, some of the leases or permits on the lands expired, resulting in the lands formerly under such dispositions becoming unencumbered. However, we kept those lands on the list since they had recently been in pasture or agricultural use under a lease or permit.
 - **What were DLNR's criteria for including a parcel on that list? What kinds of parcels are not included on that list?** Every pasture and agricultural lease or permit under DLNR management was included in the list when it was initially generated. The list does not include the universe of unencumbered lands in the agriculture land use district (or other land use districts) that DLNR manages.

- **In particular, does DLNR consider transfer of unencumbered parcels? How?** DLNR considers the transfer of some unencumbered lands. As noted above, some of the parcels on the DOFAW Master Lease spreadsheet became unencumbered after inclusion on the list. However, DLNR does not proactively search out unencumbered lands in its inventory for transfer to DOA. In the years following the passage of Act 90 in 2003, DLNR did provide a comprehensive inventory of its agricultural lands to DOA who then identified specific parcels it was interested in taking.
 - **Could you please explain the yellow shading of some rows in the DOFAW Master Lease spreadsheet (some transferred parcels, some not)?** Checking on this. **This list appears not to include all parcels which have already been transferred; would you be able to also provide those in a similar format?** Attached is the list of completed transfers.
 - **Could you please explain the Land Division designation of parcels as "not multi-use" vs. "MULTI-USE" and its significance for the land management and potential transfer?** The designation "multi-use" means the DLNR believes the lands have value for pasture/agricultural use as well as for natural resource protection and/or public recreational use.
 - **What determines the order in which transfers / potential transfers are worked on?** Generally, DLNR works on the transfers based on the priority assigned by DOA in requesting lands, provided that DLNR has not identified the lands for retention due to their natural resource value. **Understanding transfer proposals and processing may be getting done in batches to manage DLNR/DOA staff processing capacity (is that true?), among the parcels identified in DOFAW's Master Lease spreadsheet as potential for transfer, what determines their order in the work queue?** DLNR and DOA meet to review lands on the "Act 90 Trf DOA Master Baseline Request - Statewide 01.05.21.v2" (copy attached). These are parcels that DOA has tentatively identified for transfer, though in many cases much due diligence remains to be done by DOA staff to determine whether to recommend to the Board of Agriculture (BOA) that it accept transfer of the lands.

The "Act 90 Trf DOA Master Baseline Request - Statewide 01.05.21.v2" spreadsheet includes many of the same column headings discussed previously for other spreadsheets. Column K of the spreadsheet includes Land Division comments for some dispositions.

- **Storymap:**
 - **In the storymap tab "DLNR Retain Multiple-Use Areas" – there are four examples of "multiple-use areas" which DLNR seeks to retain in whole or in part.** There are 39 parcels designed as multi-use on the DOA Master Baseline Request List. **How many such areas are there, in total? (This question is also relevant to the spreadsheet explanation questions above.)** Checking on this.

- **The storymap notes 15 GLS and RPS "could be transferred to HDOA but need access easement (6,700 acres)." What do we need to do to get that done? (This question is also referenced below.)** A survey would need to be done to establish the metes and bounds of description and map of the easement area. The easement could then be reserved to DLNR in the executive order transferring the lands to DOA. However, DLNR would want confirmation from DOA first that the BOA had agreed to the transfer of the lands prior to DLNR expending resources on the survey of the easement corridors.
- **Lease management activities - initial questions:**
 - **Lessees' previous comments/testimony indicate that HDOA is a better landlord for agriculturalists than DLNR. It will help the Working Group to understand why, so that the Legislature can consider the potential statutory adjustments which would allow DLNR to better serve multi-use leases.** DOA has greater flexibility under chapter 166E, Hawaii Revised Statutes, and Chapter 4-158, Hawaii Administrative Rules, to amend, extend, and issue new leases by negotiation. Some DLNR lessees believe that if DOA assumed management of their leases, the lessees could secure extensions by direct negotiation and at rents less than fair market value under DOA's statute and rules.
 - **HDOA's management structure for non-agricultural park lands was set up in accordance with Act 90, so Act 90 was not just about mandating the transfer; it was also about setting up the framework at HDOA which would receive the lands. Thus, another thing which could be considered as further action on Act 90 is an adjustment of the management framework options available for HDOA for these non-agricultural park lands so that DLNR would be more comfortable transferring certain lands to a structure that is better equipped to jointly manage for DLNR/HDOA mutual goals.** DOA's mission and expertise is not about natural resource protection (apart from soil and water conservation), preventing deforestation, protecting remnant forests, reforesting formerly forested lands, or protection of public access and recreational use. As such, DOA is not familiar with these issues, doesn't have the expertise to watch for and address them. In addition, any agreement between DLNR and HDOA could be modified by the BOA at any time and all such benefits rendered moot.
 - **Additional details which may be related to this:**
 - **What are DLNR's lease terms for agricultural tenants? (Including length, policy on lease improvements, policy on rental adjustments? Could DLNR provide the WG with a sample/typical lease term document?)** Lease terms for intensive agricultural and pasture use cannot be less than 15 years nor more than 35 years, with some exceptions noted under Section 171-37, HRS. At the end of the lease, the DLNR has the option of accepting ownership of any improvements made by lessee or can require lessee to remove them at its cost. Attached is an example of a pasture lease issued in recent years (General Lease No. S-6103).
 - **How does DLNR determine lease rent for tenants?** For leases, all rents are set at fair market value as required by Section 171-17, HRS. The

Board of Land and Natural Resources (BLNR) has more discretion in setting revocable permit rents under Section 171-55, HRS (rent must serve the best interests of the State).

- **How does DLNR handle a lease ending when a lessee seeks to continue leasing that parcel? What options does DLNR have? What options does the tenant have?** The maximum lease term for any lease issued by DLNR is currently 65 years. If the lessee was issued a lease for a term shorter than 65-years, it can request BLNR approval for an extension of the lease up to 65 years pursuant to Section 171-36(b) if it can show the extension is needed to amortize a mortgage loan or the cost of self-financed improvements.
- **Relatedly, when leases end or are extended or renewed, what is DLNR's policy regarding any improvements the lessee has made to the parcel?** The current DLNR lease form provides that lessees own any improvements they make to the premises during the term of the lease. At lease expiration, DLNR has the option of allowing the improvements to become State property or requiring lessee to remove them at its cost.
- **Are there any other considerations DLNR would suggest?** The lands DLNR is interested in have multiple resource values, and DLNR feels those values should be weighed when considering use of the land.
- **What is the process for designating access easements (i.e. for shoreline, public forest, or public hunting area) when necessary prior to parcel transfer? DLNR needs to identify the location of the easement by survey, which normally requires the procurement of a professional land surveyor who prepares a map and metes and bounds description of the easement corridor. When a parcel is planned for transfer from DLNR to HDOA but an access easement is required, how is this handled by DLNR? When DLNR goes to the BLNR to request approval to transfer the land to DOA, DLNR additionally requests the reservation of an easement in the executive order setting aside the land. Are there challenges with this process from DLNR's perspective? The challenge is in the cost of procuring a surveyor to map the easement. Have there been challenges with the outcome (maintaining the access easement, etc)?** Not that we are aware of. DLNR works with lessees to manage easements so as to minimize disruption or impact to lessee operations.