

Kawaihapai Airfield Questions and Answers

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PART A: Ownership and Control

1. Does the Department of Transportation Airports Division (DOTA) own Kawaihapai Airfield?

No. Kawaihapai Airfield (also referred to as Dillingham Airfield) has never been owned by the State. The Airfield is owned by the United States government. The site has been operated as a military installation since the 1920s when the Kawaihapai Military Reservation was first established. It was redesignated as Mokuleia Airfield and used as an Air Force installation after the outbreak of World War II. In 1948, the Airfield was inactivated and renamed Dillingham Air Force Base in memory of Captain Henry Gaylord Dillingham.

Source:

- State of Hawaii, Archive of Historical Photos and Facts:
<https://aviation.hawaii.gov/airfields-airports/oahu/dillingham-field/>

2. What rights does DOTA have at the Airfield?

DOTA currently operates the Airfield under the authority of a short-term lease issued by the U.S. Army. The lease includes several prescriptive terms that limit DOTA's rights to use and operate the Airfield. The lease specifies that the priorities for use of the Airfield are (in order of priority): (1) military flight operations; (2) civil aviation and sport parachute operations; and (3) military ground maneuvers. The lease also specifies that military ground units will be permitted access to the leased area when engaged in air mobile/aviation missions, and it acknowledges that these military operations may be inconsistent with, or create a hazard to, civil aircraft operations. The lease is revocable at will by the U.S. Army during a national emergency declared by the President or the Congress of the United States or in the event DOTA violates any terms and conditions of the lease. (The lease does not limit the power to revoke to just emergencies related to use of the Airfield. Since the United States is now under a presidential declaration of emergency because of the COVID-19 pandemic, the U.S. Army could terminate the lease at any time, though we have no indication that the U.S. Army has even considered such an option.)

The combined effect of these lease provisions is that the State has no certainty about how long the Airfield will continue to be available for public use – since the U.S. Army has the authority to terminate the State's right to operate the Airfield for civilian use *at any time*. That level of uncertainty makes it enormously difficult to operate the Airfield and to make important investment decisions for the Airfield.

Source:

- Department of the Army Lease No. DACA84-1-09-135 (July 6, 2009)

3. How long has DOTA operated the Airfield?

The State of Hawaii first leased the Airfield from the U.S. Air Force in 1962 for general aviation purposes.

Source:

- Oahu Airports District, Hawaii Department of Transportation, Airports Division, *Development Plan, Dillingham Airfield, Oahu, Hawaii* (Oct. 2007)

4. What is the history of DOTA leases with the United States?

The State of Hawaii first leased the Airfield from the U.S. Air Force in 1962 for general aviation purposes.

In 1974, the Air Force transferred the base to the U.S. Army and the Army issued a lease to the State in 1976. The 1976 Lease authorized the lease of an area of 133.98 acres (“more or less”) to the Hawaii Board of Land and Natural Resources (now the Department of Land and Natural Resources (DLNR)) for the use, and under the control and management, of DOTA. The 1976 Lease extended for five years (January 3, 1976 – January 2, 1981) and authorized use for “light aircraft and airfield support purposes.”

DOTA and the Army began negotiating a second lease in 1981 and ultimately executed it in 1983. The 1983 Lease authorized the lease of “a portion of Dillingham Military Reservation” to DLNR for the use, and under the control and management, of DOTA for a period of twenty-five years “for use as a joint Department of Defense/Civil Airport.”

In 2009, DOTA and the Army entered into a new lease. The initial 2009 Lease authorized the lease to DOTA for a period of twenty-five years (2009 – 2034) for the purpose of “operating an airfield, parallel runways, taxiways, parking areas and various building and improvements for use as a joint Department of Defense/Civil Airport.” The lease included pertinent aviation facilities “including the entire water system.”

In 2012, the Army determined that it had never received authority to execute a 25 year lease. As a result, in 2012, DOTA and the Army executed a Supplemental Agreement to allow the time to determine whether a longer lease could be negotiated. Supplemental Agreement 1 modified the term of the 2009 Lease to five years (July 6, 2009 – July 5, 2014).

In 2014, DOTA requested an additional year extension, and the parties executed a second supplemental agreement, which extended the 2009 Lease for an additional one-year term (*i.e.*, through July 5, 2015).

In August 2017, DOTA and the Army agreed to a third supplemental agreement. Supplemental Agreement 3 created a holdover tenancy (dating back to the expiration of Supplemental

Agreement 2) and extended the 2009 Lease for an additional four-year term (*i.e.*, through July 5, 2019).

In 2019, the Army requested a fourth supplemental agreement to provide additional time to try to secure the necessary authority to approve a longer-term lease. In April 2019, the parties executed the new supplemental agreement. Supplemental Agreement 4 extended the 2009 Lease for an additional five-year term (*i.e.*, through July 5, 2024). This agreement, which is still in effect, is revocable by both the Army and DOTA, but also states that “neither party is obligated under the terms of the Lease beyond July 5, 2024.”

Sources:

- Oahu Airports District, Hawaii Department of Transportation, Airports Division, *Development Plan, Dillingham Airfield, Oahu, Hawaii* (Oct. 2007)
- Memorandum for the Secretary of the Army re: Transfer of Dillingham Air Force Base, Hawaii, to Department of the Army (Dec. 5, 1974)
- U.S. Army, Contract No. DACA84-1-76-153 (Jan. 3, 1976)
- U.S. Army, Contract No. DACA84-1-81-27 (May 11, 1983)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

5. DOTA has received longer-term leases from the U.S. Army in the past. Why can't it secure a longer-term lease now?

Although the U.S. Army issued twenty-five year leases for the Airfield in 1983 and again in 2009, these terms were issued in error by the U.S. Army because a lease of that length is not consistent with U.S. Army regulations. By way of background, the United States Department of Defense (DOD) has statutory authority to lease non-excess property, but leases may not exceed five years unless the Secretary determines that a lease for a longer period will promote the national defense or be in the public interest.

In 2012, the Army determined that it had never received authority to execute a 25-year lease and amended the 2009 lease accordingly.

In 2016, the U.S. Army updated its regulations governing joint use airfields. The new regulations also provided that the tenant (in this case, DOTA) must agree to hold the Army harmless. The

regulations are strict on this point and lessees may only use the DOD-approved form of hold harmless agreement. These new regulations made it increasingly difficult for DOTA to enter into a long-term lease. In particular, Hawaii law provides that a State agency may indemnify a federal agency (in order to receive federal aid, assistance, support, benefits, services and interests in or rights to use federal property) – but *only* if all of the following conditions are satisfied: (1) federal law expressly or by clear implication requires the indemnity provision; (2) the Governor, following a favorable review by the department of the attorney general, approves the State's proposed indemnification; and (3) the comptroller has obtained an insurance policy or policies in an amount sufficient to cover the liability of the State that reasonably may be anticipated to arise under the indemnity provision or has determined that it is not in the best interest of the State to obtain insurance.

DOTA is continuing to coordinate with the U.S. Army to secure a long-term lease, but there is currently no guarantee that this process will be successful.

Sources:

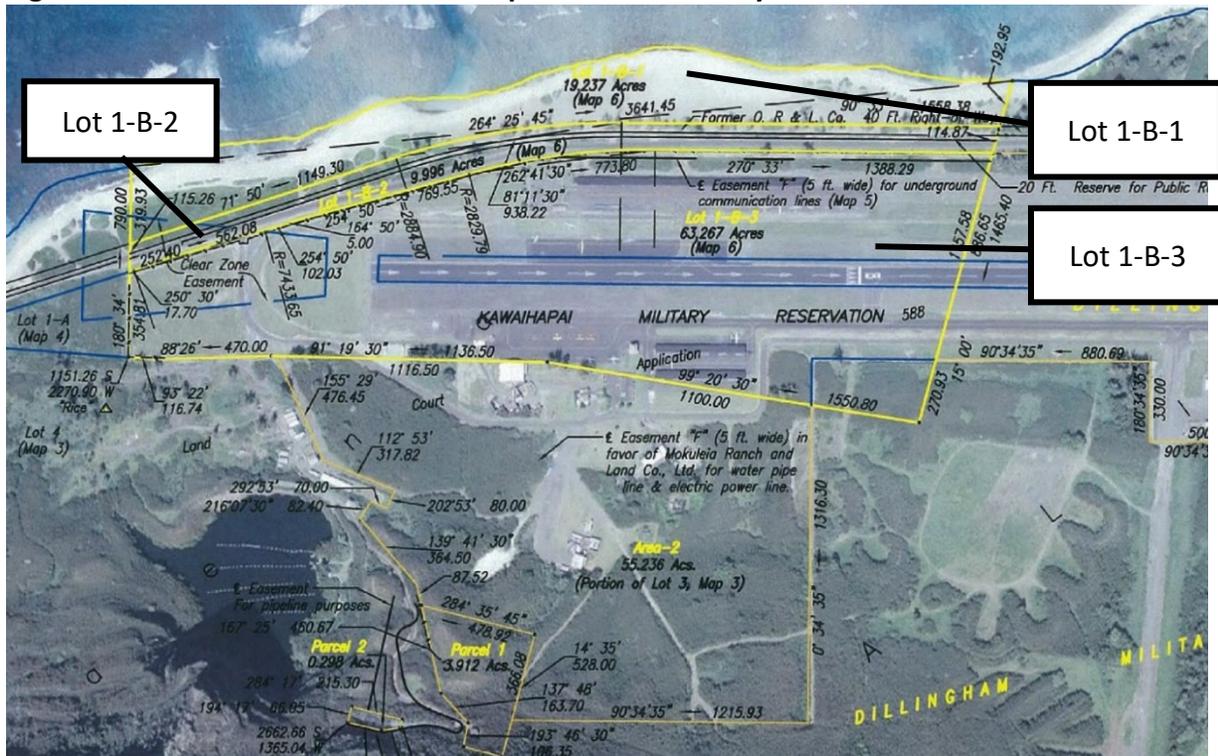
- 10 U.S.C. 2667 (b)(1) (U.S. Army leasing authority)
- U.S. Army Regulation 405-80, *Management of Title and Granting Use of Real Property* (1997), available at:
https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r405_80.pdf
- U.S. Army Regulation 95-2, Air Traffic Control, Airfield/Heliport and Airspace Operations (March 31, 2016), available at:
https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r95_2.pdf.
- Hawaii Rev. Stat. § 29-15.5

PART B: Federal Land Transfer Act

6. Does the State have the right to reclaim title to the Airfield?

No. Under the National Defense Authorization Act for Fiscal Year 1991, Congress directed the Secretary of the Army to convey to the State of Hawaii approximately 87 acres of the Dillingham Military Reservation that had been previously ceded to the United States – but Congress conditioned the conveyance on the execution of an agreement “acceptable to the Secretary of the Army” providing for joint civilian and military use of the property as an airfield by the State and the United States Army. As depicted in Figure 1, the lands identified for potential conveyance back to the State include part of, but not the entire, Airfield. Therefore, even if the State and the U.S. Army could reach agreement that would permit the return of 87 acres to the State, the DOTA would still need a lease for the remaining portion of the Airfield.

Figure 1: Detailed View of Parcels Proposed to be Conveyed Under Public Law 101-510



Source: DOTA (2020)

Source:

- Pub. L. 101-510, Section 2831 (104 Stat. 1795)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)

7. What was the purpose of the directive in National Defense Authorization Act for Fiscal Year 1991 regarding Kawaihapai Airfield?

The National Defense Authorization Act for Fiscal Year 1991 is now almost thirty years old, but some details about the legislative intent regarding the Kawaihapai provision can be gleaned from the legislative history. For example, in a set of U.S. Congressional hearings regarding the administration of Native Hawaiian homelands held in Lihue, Kauai in August 1989, Edward Hirata, who was the Director of DOT at the time, testified about the extent to which public airports in Hawaii are located on lands originally ceded to the United States. At those hearings, Senator Daniel Inouye specifically asked about the terms under which the State leased back those ceded lands at Kawaihapai Airfield and commented that if the Army had no more use for the lands, the United States should return the lands to the State. Several months later, Director Hirata testified that the U.S. Army had confirmed that Dillingham Airfield was still a necessary facility in the U.S. Command, that “the [U.S.] General Services Administration had recommended that the facility be transferred to the State for airport purposes,” and that “recent informal conversations with Army personnel indicate that the Army, with congressional support, may be willing to consider a no cost transfer to the State.”

The ultimate language that was adopted in the National Defense Authorization Act for Fiscal Year 1991 directed the Secretary of the Army to convey to the State of Hawaii approximately 87 acres of the Dillingham Military Reservation that had been previously ceded to the United States – but only upon the execution of an agreement “acceptable to the Secretary of the Army” providing for joint civilian and military use of the property as an airfield by the State and the United States Army.

Sources:

- S. Hrg. 101-555 Pt. 2 (1989)
- Remarks of Dir. Hirata regarding the Oversight Hearings on the Hawaiian Homes Commission Act of 1920 before the U.S. Senate Select Committee on Indian Affairs and the U.S. House Committee on Interior and Insular Affairs (Sept. 15, 1989)
- Pub. L. 101-510, Section 2831 (104 Stat. 1795)

8. What is the status of the directive in National Defense Authorization Act for Fiscal Year 1991 regarding Kawaihapai Airfield? Why was the property never transferred?

The 87 acres identified in the National Defense Authorization Act for Fiscal Year 1991 have not been conveyed to the State. Congress’ directive the U.S. Army to convey portions of the Airfield to the State is still outstanding, pending “the execution of an agreement acceptable to the Secretary of the Army providing for joint civilian and military use of the property as an airfield by the State and the United States Army.” The State and the U.S. Army have not been able to reach an agreement that satisfies this provision.

Even if the State and U.S. Army could agree on the terms of a land transfer, however, the congressional directive would not resolve the issues that have led DOTA to determine that termination of the lease is the most appropriate course of action. First, even with the proposed land conveyance, the Airfield would continue to be operated as a joint use facility, leaving DOTA in the tenuous position of not being able to exercise the full suite of rights and powers required for an airport sponsor under FAA requirements. Second, because the roughly 87 acres proposed for conveyance does not include the entire airfield, DOTA would be placed in an even more complex position than today: instead of controlling the whole Airfield under a single lease, DOTA would need to share control over the Airfield with the U.S. Army with half under State control and half under a short-term lease. That would still leave long term capital investments practically untenable. Third, and related, the congressional directive does not address the fundamental defect in the lease that has led DOTA to its present course of action: the Army has not been able to enter into a lease of sufficient length that DOTA could qualify for federal grants or could reasonably finance capital investments necessary for the continued safe operation and maintenance of the airfield. Even if the conveyance occurred, DOTA would still need to secure a lease for the remainder of the Airfield, and it would be in no better position to obtain a lease of sufficient duration to support essential capital investment.

Source:

- Pub. L. 101-510, Section 2831 (104 Stat. 1795)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)

9. Why would the State of Hawaii not want to secure control of the land identified in the National Defense Authorization Act of Fiscal Year 1991?

It is crucial to understand that the proposed 87-acre transfer would not encompass all, or even most of the Airfield. As a result, even were this transfer to occur, the State would remain subject to Army policies concerning short-term leases and to the U.S. Army's ability to prioritize the use of the Airfield for military purposes. A hybrid arrangement in which different parts of the Airfield come with different rights would make operation of, and investment in, the Airfield even more complex.

Source:

- Pub. L. 101-510, Section 2831 (104 Stat. 1795)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)

10. What has to happen to resolve the directive in National Defense Authorization Act for Fiscal Year 1991 regarding Kawaihapai Airfield, one way or the other?

By way of background, it is important to distinguish the statutory language regarding proposed land transfer of 87 acres of land at Kawaihapai Airfield and the intractable problems with the short-term lease with the U.S. Army. Simply put, the federal legislation does not affect DOTA's analysis on the challenges with the U.S. Army restrictions on lease terms.

As to the proposed land transfer, the law directing to the U.S. Army to convey portions of the Airfield to the state is still pending “the execution of an agreement acceptable to the Secretary of the Army providing for joint civilian and military use of the property as an airfield by the State and the United States Army.” DOTA and the U.S. Army have been unable, to date, to reach consensus on an acceptable agreement for providing joint civilian and military use of the property as an airfield. The State does not believe that such an agreement is practical given the statutory limitations on the property size and the regulatory limitations on the lease of the remainder of the Airfield.

Source:

- Pub. L. 101-510, Section 2831 (104 Stat. 1795)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)

PART C: Decision to Terminate Kawaihapai Lease

11. Why does DOTA want to close the Airfield?

To be clear, DOTA does not have authority to close Kawaihapai Airfield because DOTA does not own the Airfield. And in fact, DOTA does not expect that the Airfield will close. It is DOTA's understanding that the U.S. Army will continue to operate the Airfield as a military airport after DOTA's lease expires. Whether or not the U.S. Army elects to allow public use in the future, however, will be a decision by the U.S. Army and is not within DOTA's control. DOTA, of course, has no objection if other entities want to work with the U.S. Army to work out terms to keep the Airfield open for public use.

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

12. Even if DOTA cannot control the Airfield forever, shouldn't the State maintain its lease as long as possible? Why is DOTA trying to terminate its lease early?

DOTA currently operates Kawaihapai Airfield under a short-term lease with terms that are not only disadvantageous to the State but also do not meet FAA's legal requirements.

First and foremost, FAA has advised DOTA that the U.S. Army's lease terms mean that DOTA likely does not have the sufficient rights and powers needed for the state to comply with required federal law. This means that the State cannot receive critical federal grants for capital projects needed for the Airfield.

Second, the U.S. Army's lease terms are not in the best interests of the aviation community. Operating the Airfield is expensive: DOTA's expenses for just maintaining and operating Kawaihapai are almost double the revenue that DOTA receives. That means that users of other airports must subsidize the users of this Airfield. And those costs do not even include needed capital improvements which cannot be funded so long as the State has a five-year lease.

Third, the lease requires that DOTA maintain not only the Airfield, but also an entire public water system that benefits civilian users and the military reservation. That lease requirement violates other federal laws with which DOTA must comply.

Finally, the U.S. Army has been unable – despite a decade of negotiations – to offer more than short-term leases. With only a short-term lease, DOTA is not eligible for federal grant funding to support capital and maintenance costs as it can at all other state airports. DOTA cannot raise airport rates and charges to a level that can reasonably be expected to cover the operating and capital costs of the Airfield (particularly given the costs driven by the operation of the water system).

The DOTA’s operation and maintenance of Kawaihapai under the current U.S. Army-mandated lease conditions drains resources away from the State’s entire airport system. While there are several loyal and active users of the Airfield, there are just not enough users to justify the huge cost of keeping the Airfield open and safe.

To be clear, DOTA is continuing to negotiate with the U.S. Army in an attempt to find solutions to the deficiencies with the current short-term lease. However, absent measurable progress on resolving these issues, DOTA will need to proceed with orderly closure of Kawaihapai.

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

13. Why is DOTA rushing the termination of its lease at Kawaihapai Airfield?

DOTA is certainly not rushing to a decision. And, to be clear, DOTA is still negotiating with the U.S. Army in an attempt to find solutions to the deficiencies with the current short-term lease. However, absent measurable progress on resolving these issues, DOTA will need to proceed with orderly closure of Kawaihapai.

For over a decade, DOTA has sought to eliminate draconian lease terms – terms that are not only disadvantageous to the State but also do not meet FAA’s basic legal requirements. One of these terms – required by the U.S. Army – is that the Army retains the authority to terminate the State’s right to operate the Airfield for civilian use *at any time*. As a result, the State has no certainty that the Airfield will continue to be available for public use through 2024 or even tomorrow. Despite years of negotiations, DOTA has been unable to secure more favorable lease terms. Operating the Airfield for several more years would not solve the present problem that the State cannot make capital investments or qualify for federal grants for essential capital maintenance and improvements to keep the Airfield safe and operational. The only practical effect of waiting

until the current lease expires in 2024 would be to increase the financial losses from operations of the Airfield by at least an additional \$3 million.

The State was originally planning to terminate the lease in June 2020 but decided to keep the Airfield open for an additional year due to the COVID-19 crisis. And, as noted above, DOTA continues to work with the U.S. Army to try to find acceptable solutions to the current lease terms. To that end, DOTA has further extended the termination date until December 31, 2021. However, to reiterate, absent demonstrable progress on the existing legal concerns, DOTA will need to proceed with the orderly closure of Kawaihapai.

In the event that DOTA does terminate the lease, the tenants and users will have had more than adequate time to find alternate accommodations. DOTA provided initial advance notice of its intent to terminate to all permittees on February 10, 2020. On April 8, 2020, DOTA provided subsequent notice to all permittees, advising that DOTA's goal was to terminate the Current Lease by June 30, 2021. In September 2020, DOTA provided information regarding relocation options within the State airport system, as well as the name and contact information for DOTA staff who could answer questions regarding the planned lease termination. And in April 2021, DOTA advised permittees that the termination date was being extended by an additional six months. As a result, HDH permittees will have had almost 23 months of notice that their month-to-month leases may terminate by December 31, 2021. Indeed, in its April 2020 letters, DOTA expressly recommended that permittees "use this additional time to make alternative arrangements."

Sources:

- DOTA Letters of Termination and Notice to Vacate (Feb. 10, 2020)
- DOTA Letters to Airfield Permittees (April 8, 2020)
- DOTA Letters to Airfield Tenants (Sept. 8, 2020)
- DOTA letter to U.S. Army (April 27, 2021)
- DOTA Letters to Airfield Permittees (April 29, 2021)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

14. Why can't DOTA keep the Airfield open until 2024, when the current Lease ends?

DOTA has notified the U.S. Army that, absent measurable progress in the ongoing negotiations regarding the lease terms, DOTA will terminate the lease effective December 31, 2021. This is a

compromise date that permits current users sufficient time to find alternate accommodations, while also limiting the financial losses and legal risks implicated by the existing lease with the U.S. Army. DOTA originally planned to terminate the lease in June 2020 but extended that date by a year in light of the COVID-pandemic, and subsequently extended that date by another six months to permit additional time for negotiations with the U.S. Army. These extensions afford existing Airfield users plenty of time to make arrangements.

Sources:

- Letter to G. Wong (FAA) from R. Higashi (Dec. 5, 2019)
- Letter to Col. T. Barrett (U.S. Army) from J. Butay (Jan. 6, 2020)
- DOTA Letters of Termination and Notice to Vacate (Feb. 10, 2020)
- Letter to G. Wong (FAA) from R. Higashi (April 3, 2020)
- Letter to Col. T. Barrett (U.S. Army) from J. Butay (April 6, 2020)
- DOTA Letters to Airfield Permittees (April 8, 2020)
- Letter to G. Wong (FAA) from R. Higashi (May 8, 2020)
- DOTA Letters to Airfield Tenants (Sept. 8, 2020)
- DOTA letter to U.S. Army (April 27, 2021)
- DOTA Letters to Airfield Permittees (April 29, 2021)

15. Who made the decision to terminate the lease early?

There isn't any one individual who has driven this decision. Rather, DOTA's course of action is the inevitable outcome of a decades-long process leading to the uniform understanding that DOTA is unable to operate the Airfield under the terms offered by the U.S. Army in a manner consistent with its grant assurance obligations to FAA and its need to be financially prudent with its expenditures. DOTA engaged in a careful deliberative process before reaching the decision.

PART D: Alternatives

16. Why doesn't DOTA just let a private company manage the Airfield?

DOTA does not have that authority. As a preliminary matter, it is important to understand that DOTA does not own the Airfield and has only limited rights under its lease. In particular, the lease expressly prohibits the transfer or assignment without the consent of the U.S. Army and the U.S. Army is allowed to terminate the lease immediately if the State enters into a sublease or public-private partnership with a private entity to operate the Airfield.

As to the option for a management company, DOTA recognizes that airports in the United States can be successfully managed by private companies under contract to the proprietor-local government. This occurs at some of the largest airports in the world and also at much smaller general aviation airports. There is a constant in these arrangements that is not present at Kawaihapai Airfield: all of the airports that are successfully managed by third parties generate enough revenue that the airport owner can afford to hire a management company and pay it to manage the airport. By contrast, Kawaihapai Airfield consistently loses money. Those annual losses are one of the principal reasons that DOTA needs to terminate the lease. Hiring a management company would not solve the problem; it would only increase, not decrease the costs of operating the Airfield. If DOTA were to raise fees and charges at the Airfield sufficient to cover both these annual losses plus the cost of a management company, those fees would become prohibitively expensive for users.

Even though DOTA does not have the authority (or the funding) to hire a private management company, any private party is welcome to work with the U.S. Army if they think that they can convince the U.S. Army to change its regulations and policies to allow a lease directly to a private sector entity.

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

17. Why isn't DOTA investigating whether a private company can make Kawaihapai Airfield profitable?

Under the current lease terms, there are intractable obstacles to the effective and efficient operation of Kawaihapai Airfield that apply regardless of the managing entity, be it DOTA or a private entity.

First and foremost, the costs of operating the Airfield have, for years, far exceeded the Airfield's revenue. In fiscal year 2019, Kawaihapai operated at a deficit of almost \$1 million – *a deficit that is more than double the amount of the total revenue for the year*. To cover even these operating costs, DOTA would have to triple its revenues. That is patently unachievable – particularly during the COVID pandemic when users and tenants are already struggling financially. On top of the Airfield operating costs, deferred capital needs (which must be funded as current year costs given the short-term lease and the absence of FAA capital grants) loom as another potential cost for which user fees are simply insufficient. The result is that the users of other airports in the state airport system have had to significantly subsidize users at the Airfield – and that subsidy will only increase over time. It is not reasonable to assume that private management would in any manner eliminate, or even reduce the annual operating deficit.

A related financial burden is the obligation under the current lease to operate the Dillingham Water System. Not only does the water system benefit primarily off-airport and nonaeronautical users, but also costs for the system cannot lawfully be recovered from Airfield users, necessitating an outside revenue source that the State has, to date, been unable to secure. This would be yet another burden for a private management company and poses another hurdle that makes private management impractical.

Added to these financial hurdles are insurmountable legal constraints. The United States Department of Defense (DOD) has statutory authority to lease non-excess property, but DOD regulations limit such leases to five years. While DOD has procedures that theoretically allow for discretionary, Secretarial exemption to the five-year ceiling on lease term (and the U.S. Army Garrison Hawaii has generously offered to assist in seeking such authorization), the regulatory and legal hurdles to this process are significant, lengthy, and highly uncertain. To date – and despite a decade of effort -- DOTA has been unable to secure a Secretarial exemption permitting a longer-term lease.

The inability to secure more than sequential five-year leases has prevented DOTA from qualifying for FAA grants for capital needs and from expending state capital funds on Airfield capital improvements and repairs with a lifespan of more than several years. Added to this uncertainty is the fact that (as also required by the U.S. Army procedures) the U.S. Army not only has priority for use of the Airfield, but also that it retains the authority to terminate civilian use of Kawaihapai Airfield *at any time*.

In addition, each and every improvement (by either DOTA or any permittees) and each and every contract (including subleases or revocable permits) at Kawaihapai must be reviewed and

approved by the U.S. Army. Importantly, that approval is discretionary. The Army can (and does) withhold approval, including on projects as important as construction of a secure perimeter fence. Without unilateral authority to enter into contracts, permits and subleases necessary for Airfield operations, the State cannot comply with FAA requirements and regulations and cannot operate this Airfield in accord with best industry practices.

In the end, the limitations arising under the current lease terms (i.e., the recurring deficits, the inability to secure capital funding, and the need to operate the water system) all conspire to make the Airfield financially unsustainable, even for the most innovative private sector operator.

To be clear, DOTA continues to negotiate with the U.S. Army to try to resolve the problems with the current lease terms. However, even if these issues are resolved, management by a private company would not make sense. While we cannot speak for the U.S. Army, we understand that due to Army regulations, even if the Army authorized a sublease to a management company, DOTA would have to remain the named lessee of the airfield and therefore, the entity ultimately responsible for the Airfield. So, a management company would neither eliminate nor would it even reduce the operational complexities and liabilities for DOTA.

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)
- 10 U.S.C. 2667 (b)(1) (U.S. Army leasing authority)
- U.S. Army Regulation 405-80, *Management of Title and Granting Use of Real Property* (1997), available at:
https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r405_80.pdf
- U.S. Army Regulation 95-2, *Air Traffic Control, Airfield/Heliport and Airspace Operations* (March 31, 2016), available at:
https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r95_2.pdf.

18. Wouldn't assignment to a private management company reduce DOTA's liability(ies)?

No. While we cannot speak for the U.S. Army, we understand that the U.S. Army may only lease the Airfield to a government entity. Therefore, even if the Army authorized a sublease to a management company, DOTA would have to remain the lessee of the airfield and, from the Army's perspective, have to remain the entity responsible for the Airfield. So, a management

company would neither eliminate nor would it even reduce the operational complexities and liabilities. While DOTA is liable under its current position as lessee, DOTA at least retains control over Airfield operations, which permits it to manage liabilities. Relinquishing the control to a management company while retaining the liability is unacceptable.

19. I heard that DOTA has rejected letters from companies expressing interest in managing Kawaihapai Airfield. Why is this happening?

DOTA has received a few informal inquiries from private companies expressing their interest in managing Kawaihapai Airfield on behalf of the State. However, these were just informal inquiries and were not detailed plans for successful management of the Airfield. DOTA has explained to these companies the significant practical, financial and legal hurdles that would make private management infeasible. DOTA has not rejected any formal proposal and would consider any reasonable proposal but, for the same reasons that DOTA cannot responsibly keep the Airfield operational, we doubt that any private company could make operation of the Airfield financially sustainable.

DOTA has provided, and will continue to provide, detailed responses to potentially-interested companies to explain the obstacles to the effective and efficient operation of the Airfield.

20. Would DOTA oppose a direct lease to a third party for management of Kawaihapai Airfield?

No. While we cannot speak for the U.S. Army, we understand that a private entity is not authorized under applicable U.S. Army regulations because the U.S. Army may only lease the Airfield to a local government. However, if a private party does secure a direct lease without State involvement, DOTA would have no objection. We cannot speak to the hurdles that a private Airfield would face and have not evaluated all of the legal and regulatory constraints.

21. Will the U.S. Army keep the Airfield open, and if so, why can't civilian operations continue?

Whether or not civilian use could continue at Kawaihapai Airfield is a function of Army regulations over which the State has neither influence nor control. However, it is our understanding that civilian use of military airfields is rare and subject to complex Department of Defense regulations.

PART E: Process for Termination

22. Why has there been no public process for such an important action?

DOTA is already engaged in, and is committed to continue a highly transparent public process. DOTA has been communicating directly with permittees at Kawaihapai Airfield in order to provide these affected parties sufficient time to prepare for the upcoming termination of the lease. DOTA has briefed the U.S. Army, the FAA, members of the State Legislature and other state leaders. DOTA is happy to brief any other stakeholders virtually because of the pandemic.

In its letters to permittees, DOTA has provided information regarding relocation options within the State airport system, as well as the name and contact information for DOTA staff who could answer questions regarding the planned lease termination. We know that a few permittees have started the process for relocating their aircraft to another State facility.

DOTA is in the process of finalizing a formal plan to the FAA regarding the proposed closure. The Army has agreed to cooperate with the State and the FAA in ensuring that there will be ample opportunity for all the stakeholders to provide input.

Sources:

- DOTA Letters of Termination and Notice to Vacate (Feb. 10, 2020)
- Letter to G. Wong (FAA) from R. Higashi (April 3, 2020)
- Letter to Col. T. Barrett (U.S. Army) from J. Butay (April 6, 2020)
- DOTA Letters to Airfield Permittees (April 8, 2020)
- Letter to G. Wong (FAA) from R. Higashi (May 8, 2020)
- DOTA Letters to Airfield Tenants (Sept. 8, 2020)
- DOTA letter to U.S. Army (April 27, 2021)
- DOTA Letters to Airfield Permittees (April 29, 2021)

23. What are DOTA's obligations when it wants to terminate the lease with the U.S. Army?

First, the lease permits DOTA to terminate "at any time" by giving at least 30 days' notice in writing to the U.S. Army. DOTA provided formal written notice on January 6, 2020, in which DOTA indicated its intent to terminate the lease as early as June 30, 2020. In April 2020, DOTA notified the Army of its intent to extend the termination date until June 30, 2021. Subsequently, in April 2021, DOTA extended the notice of termination until December 31, 2021.

Second, on or before the termination of its lease with the U.S. Army, DOTA must remove any of its property and restore the premises to a condition satisfactory to the Army. This means that DOTA must ensure that both the State's and the permittees' improvements are removed.

Third, DOTA is required to prepare an updated inventory and condition report that will be compared to the comparable report prepared upon initial execution of the 2009 Lease. The new inventory report will provide the basis for settlement with the Army for any property damaged or destroyed since 2009.

Fourth, DOTA must prepare a Phase I Environmental Baseline Study documenting the environmental condition of the property at the time of the termination of the lease. The Army will use this new report to determine DOTA's environmental restoration requirements.

Finally, because DOTA is required to operate the Dillingham Airfield Water System, and Airfield-related utilities, DOTA will have to transfer all related utilities back to the Army. These include fuel storage facilities (both above- and underground-storage tanks; water system facilities (including the water pump building and the water supply treatment/chlorinator facility); wastewater facilities (including septic tanks); stormwater facilities (including underground injection control drainage wells/structures).

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

24. When does DOTA anticipate completion of negotiations with the U.S. Army regarding the lease?

DOTA is continuing to negotiate with the U.S. Army to try to resolve the problems with the current lease terms. However, absent measurable progress on resolving these issues, DOTA will need to proceed with orderly closure of Kawaihapai.

At this point, it is too soon to tell when these negotiations will be complete. We are working cooperatively with the Garrison commander and his staff through a long list of topics. The Garrison staff has been helpful and cooperative in this process.

Sources:

- Letter to Col. T. Barrett (U.S. Army) from J. Butay (Jan. 6, 2020)
- Letter to Col. T. Barrett (U.S. Army) from J. Butay (April 6, 2020)
- DOTA letter to U.S. Army (April 27, 2021)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)

- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

25. If the lease is terminated, what infrastructure does DOTA expect to repair, build, raze, or alter to complete the return of premises to the US Army?

This will be decided by the U.S. Army. DOTA is required to restore the Airfield to a condition satisfactory to the Army. The Army is working with DOTA to determine what facilities must be removed and what facilities can remain.

26. Will DOTA complete every step needed to terminate the lease by December 31, 2021? If not, what is the estimated date?

The lease contains no special terms and conditions for “early termination.” There are only conditions that apply at any termination of the lease. DOTA has notified the U.S. Army that it will terminate the lease on December 31, 2021. In DOTA’s negotiations with the Army, we will resolve whether there will be any residual obligations to clean up the property.

Sources:

- Letter to Col. T. Barrett (U.S. Army) from J. Butay (Jan. 6, 2020)
- Letter to Col. T. Barrett (U.S. Army) from J. Butay (April 6, 2020)
- DOTA letter to U.S. Army (April 27, 2021)
- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

PART F: FAA Oversight

27. What is FAA's position regarding termination of the lease?

FAA has acknowledged that the “unconventional joint-use agreement” with the Army may deprive DOTA of sufficient rights and powers needed to comply with federal law and FAA requirements. FAA has asked DOTA to provide a plan for closure of the Airfield to civilian traffic. FAA has a detailed process for considering and approving the closure of a civilian Airfield and DOTA is working through that process in close coordination with the FAA. FAA will not take a position until it has completed its review of DOTA's plan for terminating the lease.

28. Won't early termination of the lease violate DOTA's federal grant assurances?

No. By way of background, DOTA has received a total of three Airfield Improvement Program (AIP) grants from the FAA to support Kawaihapai: in 1988, 2003 and 2005. Each grant carries grant obligations in which the State promises to take a wide range of operational and maintenance actions for 20 years from the date of the grant. The most recent grant, which was issued under the prior (1983) lease, was issued in 2005, which means that all of the State's remaining obligations at Kawaihapai will expire in 2025.

Termination of the lease will not violate DOTA's grant commitments. Indeed, one of the principal reasons that DOTA is seeking to terminate the current lease is because DOTA cannot operate and maintain the Airfield in a manner that is consistent with its obligations to the FAA.

DOTA is the operator of a multi-airport system, and therefore is obligated to meet the needs of the aviation community throughout the entire State without giving preference to one community over another. As a result, DOTA must make decisions based on what is best for the full range of aviation users in Hawaii. Under the current lease, DOTA cannot operate the Airfield in compliance with federal law and FAA obligations. Kawaihapai Airfield incurs a significant deficit every year. In fiscal year 2019, the Airfield ran a deficit that was more than *double* the amount of total revenue for the year. DOTA cannot raise Airfield rates and charges to a level that could reasonably be expected to cover the operating and capital costs of the Airfield. In addition, it has not been possible for DOTA to secure federal grants for the Airfield because the short-term prevents DOTA from complying with FAA requirements for receiving grants. The combination of the deficits and the inability to qualify for FAA grants means that the users of other airports in the state airport system have been subsidizing users at Kawaihapai for many years. The amount of that subsidy will increase over time. Unless DOTA and the U.S. Army can agree on new lease terms that eliminate the liabilities that exist under the current lease, the termination of the short-term lease with the U.S. Army is will be in the best interest of the state airport system as a whole.

PART G: Accommodations for Current Users

29. I've heard that Kawaihapai Airfield is unique, and the current users and tenants cannot be accommodated anywhere else.

That's not true. All aeronautical activity at the Airfield can safely be accommodated at one or more of the 14 DOTA-owned airports within the State of Hawaii. DOTA has offered to work with each permittee at Kawaihapai to assist in relocation to one of these facilities. DOTA expects that all eligible businesses who wish to relocate will be able to continue operating at another airport.

Source:

- DOTA Letters to Airfield Tenants (Sept. 8, 2020)
- DOTA Letters to Airfield Permittees (April 29, 2021)

30. Where and how can skydiving and soaring operations successfully relocate?

All aeronautical activity at Kawaihapai can safely be accommodated at one or more of the DOTA-owned airports within the State of Hawaii. DOTA is committed to working with all Airfield users to find suitable relocation sites within the DOTA system of airports. However, in the event that an existing Kawaihapai permittee is unwilling or unable to comply with its obligations with respect to its existing permit for use of the Airfield (including any obligations to restore and remediate its permitted premises) and DOTA must terminate its permit because of default, that permittee will not be allowed to enter into any other lease, permit or other contract offered by the State of Hawaii for a period of five (5) years following the date of termination.

Skydiving

DOTA can accommodate skydiving at Hana Airport (HNM) and Port Allen Airport (PAK). DOTA may also be able to accommodate skydiving at Upolu Airport (UPP) or Waimea-Kohala Airport (MUE), subject to further approvals. If any current user at Kawaihapai wants to operate a skydiving business at one of these airports, that operator must first file an application as directed by the state regulations.

It is important to DOTA – and to any skydiving operator – that operations can be conducted safely. Therefore, if DOTA receives an application for new skydiving operations at any DOTA airport that does not already accommodate skydiving, DOTA will coordinate with FAA to conduct a safety study that will analyze appropriate factors, including:

- (1) Will this activity present or create a safety hazard to the normal operations of aircraft arriving or departing from the airport?
- (2) Can skydiving operations be safely accommodated at the airport?
- (3) Can a drop zone be safely established within the boundaries of the airport?

- (4) What reasonable time periods can be designated for jumping in a manner consistent with Part 105?
- (5) What is a reasonable fee that the jumpers and/or their organizations can pay for the privilege of using airport property?
- (6) Has the relevant air traffic control facility been advised of the proposed parachute operation?
- (7) Does the air traffic control facility have concerns about the efficiency and utility of the airport and its related instrument procedures?

If FAA concludes that skydiving operations can be safely accommodated, DOTA will adopt appropriate operating procedures. DOTA is committed to working with the two skydiving operators at Kawaihapai to facilitate their relocation to an appropriate airport within the state system.

Sailplane Operations

Two other DOTA facilities can accommodate sailplane operations – Hana Airport (HNM) and Port Allen Airport (PAK). In addition, while it does not currently have such operations, the Molokai Airport (MKK) may also be able to accommodate sailplanes, subject to appropriate safety reviews. While no hangars exist at any of these facilities, each of these airports currently has vacant tie-down spaces that could accommodate the relocated Kawaihapai users.

State regulations provide that motorless aircraft such as sailplanes may not land or takeoff at a public airport without first obtaining permission from DOTA. When considering requests from relocated permittees to accommodate sailplane operations at DOTA facilities that do not already accommodate such operations, DOTA will use a procedure similar to that for accommodating skydiving operations. DOTA will first coordinate with FAA to conduct a study to determine whether sailplane operations can be safely conducted at that facility. If FAA concludes that sailplanes can safely operate, DOTA will implement appropriate permit requirements to ensure safety. As with skydiving operators, DOTA is committed to working with sailplane operators to find a suitable DOTA facility to accommodate their operations and to negotiate an appropriate permit or lease for their continued operations.

Sources:

- Hawaii Rev. Statutes § 171-13
- Hawaii Administrative Rules § 19-13-8
- FAA Advisory Circular 5190-7, *Minimum Standards for Commercial Aeronautical Activities* (2006) at ¶ 2.1(f)

PART H: Economic Impacts

31. Won't termination of the lease at Kawaihapai hurt the local economy?

No. It's important to understand that Kawaihapai operates at a significant financial loss. In fiscal year 2019, the operating deficit for Kawaihapai was twice the revenue that was generated, and revenues have dropped significantly during the ongoing pandemic. Raising rents at the Airfield to create a sustainable bottom line would seriously hurt local businesses and undoubtedly would lead to voluntary relocations to other Airfields where charges are more affordable. The effect would be a waterfall of fewer permittees and therefore less revenue, neither of which would help the local economy.

If negotiations with the U.S. Army are unsuccessful, DOTA is committed to assisting all current Kawaihapai permittees relocate to another DOTA airport. In addition, by escaping the onerous terms of the current Army lease, DOTA will save money that it can use to maintain – and provide future economic opportunities – at its 14 other airports across the State.

Source:

- DOTA Letters to Airfield Tenants (Sept. 8, 2020)
- DOTA Letters to Airfield Permittees (April 29, 2021)

32. How much money would early termination of the lease cost the State of Hawaii?

To be clear, DOTA is required to restore and clean up the Airfield regardless of whether DOTA terminates the lease in 2021 or in 2024. There is no additional cost for terminating in 2021 instead of 2024. In fact, if there is environmental contamination on the Airfield, beginning any required clean up earlier may save DOTA some expense. Additionally, operation of the airfield loses about \$1 million annually. Terminating the lease in 2021 instead of 2024 will save users of the 14 other DOTA airports about \$3 million.

As to the precise costs, there are several elements of the termination process for which DOTA cannot yet provide a concrete estimate. What we do know is that DOTA has already commissioned an environmental baseline study. The estimated cost of preparing the baseline study was \$69,000. DOTA has already conducted site inspections of the entire Airfield, including the current permittees' premises, in coordination with the U.S. Army. There was no separate cost of conducting these site inspections since the inspections were conducted by DOTA staff and were paid for out of the current operating budget.

Other costs are less certain at this time, including ongoing staff time and outside counsel. Perhaps the most significant cost that DOTA cannot yet estimate is the cost of any environmental cleanup or remediation. That information will not be known until DOTA conducts further discussions with the Army on DOTA's clean up obligations under the lease.

Source:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)

- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

33. Will DOTA be responsible for all the termination costs incurred by the state?

No, not all of the costs. Some Kawaihapai permittees are required, at their “sole expense and cost” to comply with all environmental laws, including removing of hazardous wastes for disposal. DOTA has the right to do such remediation and then seek reimbursement from the affected permittee(s) for those costs.

34. Will any cost or responsibility be placed on any other state departments or agencies, or any federal agencies?

No.

35. If DOTA’s concerns about managing the Kawaihapai Airfield could be resolved, then why would DOTA refuse to consider anything but closure of the airfield?

DOTA has spent the last decade trying to resolve its concerns about the viability of this leased Airfield, . DOTA’s concerns are financial, legal and operational. The Army has only extended the lease in five-year increments, which has prevented DOTA from qualifying for federal grants. While the local U.S. Army staff has been cooperative and stated its willingness to try to secure a longer-term lease, the enormously restrictive Army regulations make it highly unlikely that DOTA could get the necessary approval from the most senior federal officials in Washington. In addition, the Army has been unwilling to remove the lease provisions requiring DOTA to operate the public water system, which raises grave concerns that could violate the State’s obligations under federal law. Further, since the lease prohibits DOTA from turning the Airfield over to a third-party without Army consent, any transfer is not feasible.

DOTA has carefully considered a wide range of options to address each of the financial, legal and operational concerns. DOTA has consulted with experts to assist in that evaluation. The conclusion to terminate the lease was the result of thoughtful and deliberate decision making in which all levels of DOTA were actively engaged. To be clear, DOTA is still working with the U.S. Army to find solutions to the problematic lease terms, but absent measurable progress in the near future, DOTA will need to work toward the orderly closure of the Airfield.

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)

- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

36. How can DOTA remain indifferent to the loss of jobs and the financial hardship this action would cause so many people?

In fiscal year 2019, the operating deficit for Kawaihapai was twice the revenue that was generated. This is neither small nor insignificant. Moreover, revenues have dropped significantly during the ongoing pandemic. Raising rents at the Airfield to create a better bottom line is not a realistic option: this would seriously hurt local businesses and undoubtedly would lead to voluntary relocations to other Airfields where charges are more affordable. The effect would be a waterfall of fewer permittees and therefore less revenue. Moreover, the lease requires that DOTA to operate and maintain the Dillingham Public Water System, which is costly and burdensome. Finally, it is critical to understand that as a lessee, DOTA does not have full rights and powers to implement proper vision. Put simply, DOTA can take no action at the Airfield without explicit U.S Army approval. Together, these factors have prevented DOTA from meeting its legal obligations at the Airfield.

Ultimately, the losses at Kawaihapai are being subsidized by the state Airfield system. In the end, DOTA has made the tough, but necessary decision, that, unless the U.S. Army can show demonstrable progress in the very near future on resolving the existing legal problems with the Kawaihapai lease, the entire aviation community – including users at Kawaihapai – will be better served if DOTA can escape the onerous lease terms at the Airfield and instead spend the revenue throughout the state airport system to benefit all users.

Sources:

- U.S. Army, Contract No. DACA84-1-09-135 (July 6, 2009)
- U.S. Army, Supplemental Agreement No. 1 to Lease, Contract No. DACA84-1-09-135 (November 28, 2012)
- U.S. Army, Supplemental Agreement No. 2 to Lease, Contract No. DACA84-1-09-135 (August 15, 2014)
- U.S. Army, Supplemental Agreement No. 3 to Lease, Contract No. DACA84-1-09-135 (July 19, 2017)
- U.S. Army, Supplemental Agreement No. 4 to Lease, Contract No. DACA84-1-09-135 (April 23, 2019)

PART I: Hawaii Environmental Policy Act

37. What steps is DOTA taking to satisfy Hawaii Rev. Stat. Chapter 343 and other state and county environmental laws?

DOTA has reviewed the statute and regulations and has concluded that its obligations under the lease to restore and clean up the Airfield upon termination do not trigger any obligations under the Hawaii Environmental Policy Act (HEPA). The activities contemplated (repairs and modifications to existing structures; repairs and modifications to sewage and water pumping stations; demolition of existing structures under Hawaii Department of Transportation jurisdiction) are expressly exempted by the State law.

DOTA has also confirmed that there would be no Special Management Area (SMA) permit obligation under Chapter 205A, the Coastal Zone Management law, because the action at issue (lease termination) is “administrative” and is “not a minor or major construction development.”

Sources:

- Hawaii Rev. Statutes Chapter 343
- Hawaii Rev. Statutes Chapter 205A
- Comprehensive Exemption List for the State of Hawaii Department of Transportation (2000)

38. How does DOTA’s proposed action compare to the No Action Alternative and other reasonable alternatives?

Because this action is exempt from H.R.S. Chapter 343, there is no obligation to conduct an alternatives analysis. While DOTA is not required to examine alternatives, DOTA did examine options before concluding that termination of the lease is the only reasonable alternative for DOTA.

Sources:

- Hawaii Rev. Statutes Chapter 343
- Comprehensive Exemption List for the State of Hawaii Department of Transportation (2000)

Part J: Safety Considerations

39. Are you closing the Airfield because it is unsafe?

No. DOTA reached the decision to terminate its lease only after years of unsuccessful negotiations with the U.S. Army seeking to eliminate draconian lease terms – terms that are not only disadvantageous to the State but also do not meet FAA’s basic legal requirements. However, the lease and legal arrangements at Kawaihapai do not have any effect on the safety of the Airfield.

Nevertheless, DOTA is concerned about the number of incidents in recent years at the Airfield. We continue to be committed to operating the state airport system not only in compliance with federal requirements, but also consistent with the industry’s best safety practices.

40. Can the current civilian operations at Kawaihapai be safely accommodated elsewhere?

Yes. All current aeronautical activity at Kawaihapai can safely be accommodated at one or more other DOTA airports within the State of Hawaii.

Skydiving

DOTA can accommodate skydiving at Hana Airport (HNM) and Port Allen Airport (PAK). DOTA may also be able to accommodate skydiving at Upolu Airport (UPP) or Waimea-Kohala Airport (MUE), subject to further approvals. If any current user at Kawaihapai wants to operate a skydiving business at one of these airports, that operator must first file an application as directed by the state regulations.

It is important to DOTA – and to any skydiving operator – that operations can be conducted safely. Therefore, if DOTA receives an application for new skydiving operations at any DOTA airport that does not already accommodate skydiving, DOTA will coordinate with FAA to conduct a safety study that will analyze appropriate factors, including:

1. Will this activity present or create a safety hazard to the normal operations of aircraft arriving or departing from the airport?
2. Can skydiving operations be safely accommodated at the airport?
3. Can a drop zone be safely established within the boundaries of the airport?
4. What reasonable time periods can be designated for jumping in a manner consistent with Part 105?
5. What is a reasonable fee that the jumpers and/or their organizations can pay for the privilege of using airport property?
6. Has the relevant air traffic control facility been advised of the proposed parachute operation?

7. Does the air traffic control facility have concerns about the efficiency and utility of the airport and its related instrument procedures?

If FAA concludes that skydiving operations can be safely accommodated, DOTA will adopt appropriate operating procedures. DOTA is committed to working with the two skydiving operators at Kawaihapai to facilitate their relocation to an appropriate airport within the state system.

Sailplane Operations

Two other DOTA facilities can accommodate sailplane operations – Hana Airport (HNM) and Port Allen Airport (PAK). In addition, while it does not currently have such operations, the Molokai Airport (MKK) may also be able to accommodate sailplanes, subject to appropriate safety reviews. While no hangars exist at any of these facilities, each of these airports currently has vacant tie-down spaces that could accommodate the relocated Kawaihapai users.

State regulations provide that motorless aircraft such as sailplanes may not land or takeoff at a public airport without first obtaining permission from DOTA. When considering requests from relocated permittees to accommodate sailplane operations at DOTA facilities that do not already accommodate such operations, DOTA will use a procedure similar to that for accommodating skydiving operations. DOTA will first coordinate with FAA to conduct a study to determine whether sailplane operations can be safely conducted at that facility. If FAA concludes that sailplanes can safely operate, DOTA will implement appropriate permit requirements to ensure safety. As with skydiving operators, DOTA is committed to working with sailplane operators to find a suitable DOTA facility to accommodate their operations and to negotiate an appropriate permit or lease for their continued operations.

Sources:

- Hawaii Rev. Statutes § 171-13
- Hawaii Administrative Rules § 19-13-8
- FAA Advisory Circular 5190-7, *Minimum Standards for Commercial Aeronautical Activities* (2006) at ¶ 2.1(f)