

ISAAC HALL #2238  
2087 Wells Street  
Wailuku, Maui, Hawaii 96793  
Telephone: (808) 244-9017

RECEIVED  
CORPORATION COUNCIL

2003 DEC 24 PM 1:31

2003 DEC 22 PM 1:38

D. KEYES, CLERK  
SECOND JUDICIAL CIRCUIT  
STATE OF HAWAII

Attorney for Plaintiffs  
The Coalition to Protect East Maui  
Water Resources, Hui Alanui o Makena,  
The Sierra Club, Mark Sheehan

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

THE COALITION TO PROTECT EAST  
MAUI WATER RESOURCES, an  
unincorporated association; HUI  
ALANUI O MAKENA, a Hawaii non-  
profit corporation; THE SIERRA CLUB,  
a California non-profit corporation  
registered to do business in the State of  
Hawaii; MARK SHEEHAN;

Plaintiffs,

vs.

THE BOARD OF WATER SUPPLY,  
COUNTY OF MAUI; DEPARTMENT OF  
WATER SUPPLY, COUNTY OF MAUI;  
COUNTY OF MAUI; GEORGE TENGAN,  
in his capacity as Director of the Water  
Department, County of Maui; and  
JOHN DOES 1-100;

Defendants.

Civil No. 03-1-0008(3)  
(Declaratory Judgment and  
Other Civil Action)

CONSENT DECREE; ORDER;  
EXHIBITS "A" AND "B"

emc/consentdecreefinal

CONSENT DECREE

RECITALS

WHEREAS, the Maui County Department of Water Supply has prepared  
a Final Supplemental Environmental Impact Statement ("FSEIS") for the East

Maui Water Development Plan ("EM Plan"), required by Court Orders entered in The Coalition to Protect East Maui Water Resources, et al. v. The Board of Water Supply, et al., Civil No. 93-0734(3), in the Second Circuit Court of the State of Hawaii;

WHEREAS, the FSEIS was accepted by the Board of Water Supply on October 15, 2002 and notice of this acceptance was published in the November 8, 2002 issue of *The Environmental Notice*;

WHEREAS, Plaintiffs the Coalition to Protect East Maui Water Resources, an unincorporated association; Hui Alanui o Makena, a Hawaii non-profit corporation; The Sierra Club, a California non-profit corporation registered to do business in the State of Hawaii; and Mark Sheehan, as Plaintiffs (hereafter collectively "Plaintiffs") filed a Complaint, on January 6, 2003 and an Amended Complaint, on January 7, 2003, for Declaratory and Injunctive Relief, to Enforce Court Orders and For Other Relief against Defendants the Board of Water Supply, County of Maui; the Department of Water Supply, County of Maui; County of Maui; and George Tengan, in his capacity as Director of the Water Department, County of Maui (hereafter collectively the "County Defendants") challenging, *inter alia*, the preparation of the SEIS and the acceptance of the FSEIS, the construction and implementation of the test program for the test well, the alleged failure to modify minimum stream flow standards prior to implementing the project, the alleged failure to establish correlative water rights prior to transferring groundwater out of the area and the alleged breach of the Public Trust Doctrine, among other claims;

WHEREAS, the County Defendants have denied the foregoing allegations in their pleadings;

WHEREAS, to avoid the expense, uncertainty and acrimony of further litigation, Plaintiffs and the County Defendants have determined that it is in the best interest of all concerned to resolve their differences amicably on the terms and conditions to follow:

NOW, THEREFORE, in consideration of the mutual promises, agreement and obligations hereinafter set forth, Plaintiffs and the County Defendants agree to the terms and conditions set forth in this Consent Decree, as follows:

TERMS AND CONDITIONS

1. Acceptance of the SEIS Limited to Phase I of the EM Plan

1.1 The acceptance of the SEIS for the EM Plan shall be valid for Phase I only of the EM Plan. "Phase I" of the EM Plan means Hamakuapoko Well No. 1 (State Well No. 5420-02) and Hamakuapoko Well No. 2 (State Well No. 5320-01), with an approximate installed capacity of 2 million gallons per day ("mgd") located in the Hamakuapoko region of the Paia Aquifer System, together with associated treatment facilities and transmission line extended to Paia, to carry the groundwater produced by these two wells, as safe drinking water, as part of the County water system.

2. Withdrawal of the Acceptance of the SEIS for the Remainder of the EM Plan

2.1 The acceptance of the SEIS for the remainder of the EM Plan (all Phases beyond Phase I, namely Phases II through VI) is hereby withdrawn and shall have no legal force or effect. The County shall publish in *The Environmental Notice* the withdrawal of any acceptance of the FEIS or FSEIS for the remainder (all phases beyond Phase I, namely Phases II through VI) of the EM Plan.

3. Phase I is Redefined as the EM Plan and the Remainder of the EM Plan is Withdrawn

---

3.1 Phase I of the EM Plan shall be redefined as the EM Plan in its totality or entirety. The County agrees to withdraw as a plan, project or program what are now known as the remaining Phases of the EM Plan, namely Phases II through VI.

4. Studies to be Conducted Before Any Further Effort is Made to Develop Groundwater Resources in the Agreed-Upon Portion of the East Maui Region

---

4.1 Any further efforts by the County Defendants to develop groundwater resources in the agreed-upon portion of the East Maui Region (described in Exhibit "A" attached hereto, which is a map delineating clearly the area referenced, hereafter, the "agreed-upon portion of the East Maui Region") will be treated as a completely new County project, commenced with a new planning process, new plans and, at the appropriate time, with the preparation of a new Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") pursuant to Chapter 343, HRS. The parties expressly agree that neither this provision, nor any other part of this Consent Decree, refers or relates to the Haiku Well (State Well No. 5419-01), the Kulamalu Well (State Well No. 5317-01) or the Pookela Well (State Well No. 5118-02).

4.2 Before any new project is planned by the County of Maui to develop groundwater in the agreed-upon portion of the East Maui Region, the County will undertake a Cost/Benefit Study of the surface and groundwater resources available in the Central Maui Region, Upcountry Maui Region and East Maui Region and conduct a rigorous Cost/Benefit analysis, including the evaluation of economic and environmental factors, of developing and

transmitting these water resources. This Study shall address planning for stream restoration in the agreed-upon portion of the East Maui Region.

4.3 Before any new project is planned by the County of Maui to develop groundwater in the agreed-upon portion of the East Maui Region, the County will vigorously investigate and pursue the availability of surface water from the Waikapu (60101), Iao (60102) and/or Waihee (60103) hydrologic units for public use by preparing a report which shall include a rigorous analysis of the costs and benefits of making these water resources part of Maui's public water system.

4.4 If the report on the availability of surface waters in West Maui, referenced in § 4.3 above, does not result in a determination that a sufficient supply of water can be made available from these sources to meet the needs of County residents who can be served by these waters and should the Cost/Benefit Studies, referenced in §§ 4.2 and 4.3 above, not result in a determination that it would be more cost/beneficial to develop water resources outside the agreed-upon portion of the East Maui Region, then the County may re-commence planning for a project to develop groundwater resources within the agreed-upon portion of the East Maui Region.

4.5 Any new project planned by the County of Maui to develop groundwater in the agreed-upon portion of the East Maui Region shall be consistent with the Water Use and Development Plan for the Island of Maui and the State Water Code.

4.6 Copies of the reports, studies and analyses referenced in §§ 4.2, 4.3 and 4.4 above shall be provided to Plaintiffs upon their completion.

5. Consultation With East Maui Coalition and Other Plaintiffs

5.1 The County agrees to consult with representatives or designees of Plaintiffs with respect to any future plan to develop water resources in the agreed-upon portion of the East Maui Region, including but not limited to on the studies, reports, analyses referenced above, any new plan to develop groundwater in the agreed-upon portion of the East Maui Region and any new EA or EIS for this new plan. To facilitate this consultation, Plaintiffs agree to provide the Director of the Department of Water Supply with the name, current address and telephone number of one person through whom all of Plaintiffs may be deemed to have been contacted for the purposes of initiating this consultation.

6. Use of 36" Diameter Transmission Line

6.1 The County has represented that the 36" in diameter transmission line between Paia and the two Hamakuapoko Wells has been selected because of a prior contractual commitment to purchase the 36" pipes. The County, therefore, agrees as follows:

(a) the use of the 36" transmission line is not to be considered as a commitment to develop or transmit water resources more than can be produced by the two Hamakuapoko Wells in the agreed-upon portion of the East Maui Region;

(b) the 36" transmission line shall be used solely in connection with Phase I of the project, as described in § 1.1 above. Any other use of this Hamakuapoko to Paia 36" transmission line to transmit water shall require a new EA or EIS;



(c) for the first 200 yards of the transmission line after both of the Hamakuapoko Wells, in the Paia direction, 24" in diameter pipes shall be used in constructing the transmission line instead of pipes 36" in diameter, as a means of assuring that the capacity of the transmission line is limited to the approximate amount intended by Phase I of the EM Plan.

7. Future Use of EIS and SEIS for EM Plan

7.1 Should the County, at some time in the future decide to develop additional groundwater resources in the agreed-upon portion of the East Maui Region, the County shall not resubmit or incorporate by reference the EIS or the SEIS prepared for the former EM Plan. The County shall, at the appropriate time, prepare a new EIS for any new plan to develop groundwater resources within the agreed-upon portion of the East Maui Region. In any EIS prepared by the County, the County shall comply with Chapter 343 and the regulations promulgated thereto. The County shall not, without considerable pre-examination and comparison, use the EIS or SEIS prepared for the former EM Plan, or the studies or analysis prepared for these documents, in any new EA or EIS. Among the studies within the FSEIS which the County Defendants may reference in any further EA or EIS are (a) laboratory report test results for contaminants from former SEIS test well (State Well No. 5418-08); and (b) USGS studies and reports. Among the studies and research conclusions within the FSEIS which shall not be relied upon or used in any further EA or EIS are (a) the test results from the testing of the former SEIS test well (State Well No. 5418-08) with respect to the impacts of groundwater pumping on stream flows in the agreed-upon region; (b) the study of alternatives and the

costs and benefits of developing alternative water resources; (c) the costs and benefits of relocating the proposed EM Plan wellfield further mauka; (d) the study of the impact of the EM Plan on marine resources throughout the region; (e) the study of the impact of groundwater pumping on streams and existing wells; and (f) the study of the impact of agricultural contaminants on groundwater quality. The County shall consider factors such as: existing aquifers, groundwater resources, streams, diversions, wells, private and public water systems, location of cesspools, socio-economic impacts, the impact of groundwater pumping on marine resources throughout the region, and plans for stream restoration.

8. Use of the Test Well, the Test Well Data and Further Testing

8.1 The County Defendants and Plaintiffs have disagreed, with respect to the former SEIS test well (State Well No. 5418-01) located on Hogback Road in Haiku, about its construction, drilling and testing.

8.2 The County will work with the USGS and a representative of Plaintiffs to develop an additional test well in the agreed-upon portion of the East Maui Region to investigate whether developing additional wells in the agreed-upon portion of the East Maui Region and placing State Well No. 5418-01 into production may adversely impact stream flows in streams, in the agreed-upon portion of the East Maui Region. The County is authorized to construct an additional well in the agreed-upon portion of the East Maui Region, within one of the crosshatched areas shown on the maps attached hereto as Exhibit "B". This additional well shall only be used for the test purposes of gathering data and information. During the drilling of this well, a test protocol, agreed to by the parties hereto and the USGS, shall be



implemented, the purpose of which shall be to determine whether or not pumping groundwater by wells located in the agreed-upon portion of the East Maui Region may have an impact upon streamflow in streams in the agreed-upon portion of the East Maui Region. Thereafter, this test well shall be dedicated for use by the County Defendants as a monitoring or observation well to monitor or observe the performance of the aquifer in the agreed-upon portion of the East Maui Region. This additional well shall not be used for production purposes.

8.3 The former SEIS test well located on Hogback Road (State Well No. 5418-01) shall not be used for production purposes or for anything other than testing, monitoring or observation purposes unless and until the additional test well, referenced in § 8.2 above, has been drilled, a test protocol agreed upon by the parties hereto has been implemented, the results of this testing demonstrate that pumping of State Well No. 5418-01 will not have an adverse impact upon stream flow in streams in the region and the additional test well is dedicated for monitoring and observation of the performance of the aquifer in the agreed-upon portion of the East Maui Region.

9. Use of Data From Pumping of Two Hamakuapoko Wells

9.1 Actual data obtained from the pumping of the two Hamakuapoko Wells shall be employed in preparing the Cost/Benefit analysis referenced above and in deciding whether to begin planning any further project to develop groundwater resources in the agreed-upon portion of the East Maui Region.

10. Stream Restoration Shall Be a Component of any East Maui Water Development Plan

10.1 The County agrees that as long term agricultural water needs are reduced, a stream restoration program will be studied, developed and initiated by the County. As such, the County agrees that one component of any plan or program to develop further water resources in the agreed-upon portion of the East Maui Region must include the study, development and initiation, as may be applicable, of a stream restoration program in the agreed-upon portion of the East Maui Region.

11. Effect of This Consent Decree

11.1 This Consent Decree is entered into by the parties in order to resolve genuinely disputed issues. It is not intended to, and shall not, preclude any party from taking any position in the future, with respect to any legal or factual issues, claims, or defenses raised in the course of this litigation, including, but not limited to, the following issues: the adequacy of the EIS or SEIS for the former EM Plan, correlative water rights, stream flow, in-stream resources, ocean or marine resources, or out-of-aquifer transfer of groundwater from a non-designated management area.

11.2 This Consent Decree shall not be deemed as an admission of wrongdoing by any party. Neither the construction of the transmission line between the two Hamakuapoko Wells and Baldwin Park nor the transmission of water in this transmission line shall be deemed a waiver of Plaintiffs' or Defendants' claims or an admission, with respect to any future water developed by the County in the agreed-upon portion of the East Maui Region. Instead, the Consent Decree is the result of settlement negotiations, entered into in

good faith by all parties, for the purpose of ending the litigation and securing peace.

12. Dismissal of All Actions

12.1 Within ten (10) days of the entry of this Consent Decree by the Court, the Plaintiffs agree to dismiss, with prejudice, Civil Action No. 03-1-0008(3) and Civil Action No. 93-0734(3) subject to the Terms and Conditions of this Consent Decree and the preservation of the ability of any party to this Consent Decree to seek the enforcement of these Terms and Conditions in this Court.

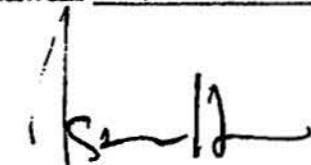
12.2 All parties shall bear their own costs and attorneys' fees.

13. Press Release

The parties agree that they will work together on a joint press release to announce the conclusion of the litigation and the re-configuration of the EM Plan. The Sierra Club may issue its own press release if it so desires.

DATED: Wailuku, Maui, Hawaii

12.2.03



Isaac Hall, Esq.  
Attorney for Plaintiffs  
The Coalition to Protect East Maui  
Water Resources, Hui Alanui o Makena,  
and Mark Sheehan

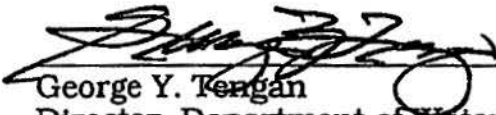


Isaac Hall, Esq.  
Attorney for Plaintiff  
The Sierra Club

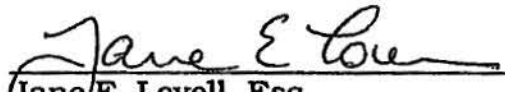
THE COUNTY OF MAUI

By:   
ALAN M. ARAKAWA  
Its Mayor

APPROVAL RECOMMENDED:

  
George Y. Tengan  
Director, Department of Water  
Supply

APPROVED AS TO FORM AND LEGALITY:

  
Jane E. Lovell, Esq.  
Deputy Corporation Counsel  
Attorney for Defendants  
The Board of Water Supply;  
Department of Water Supply, County  
of Maui; County of Maui; George  
Tengan, in his capacity as Director  
of the Water Department, County of Maui

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF MAUI                 )

On this 3rd day of November, 2003, before me personally appeared ALAN M. ARAKAWA, to me personally known, who being by me duly sworn, did say that he is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the instrument was signed and sealed on behalf of said County of Maui pursuant to Section 7-5.11 and Section 9-18 of the Charter of the County of Maui, and the said ALAN M. ARAKAWA acknowledged the said instrument to be the free act and deed of said County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



Notary Public, State of Hawaii

Second Judicial Circuit

Print/Type name: **LINDA K. TAMASHIRO**

My commission expires: 10/19/06

15

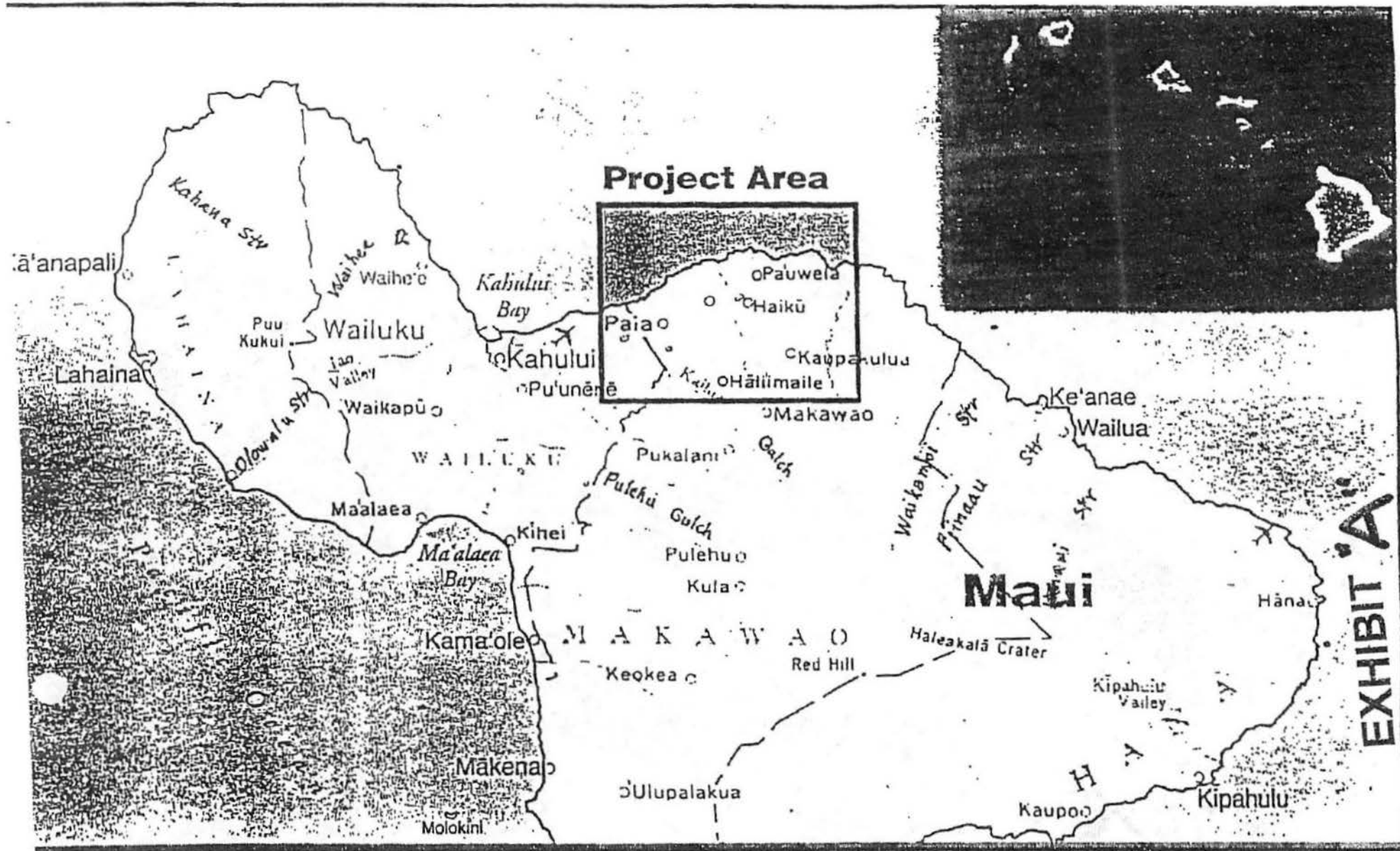
APPROVED AND SO ORDERED:

/s/ JOSEPH E. CARDOZA (SEAL)

\_\_\_\_\_  
Judge of the above-entitled court

\_\_\_\_\_  
Coalition to Protect East Maui Water Resources, et al. v. Board of Water  
Supply, et al., Civil No. 03-1-0008(3); Consent Decree; Order; Exhibits "A" and  
"B"





Scale in Miles

FIGURE 1:  
Location Map

Supplemental EIS: East Maui Water  
Development Plan

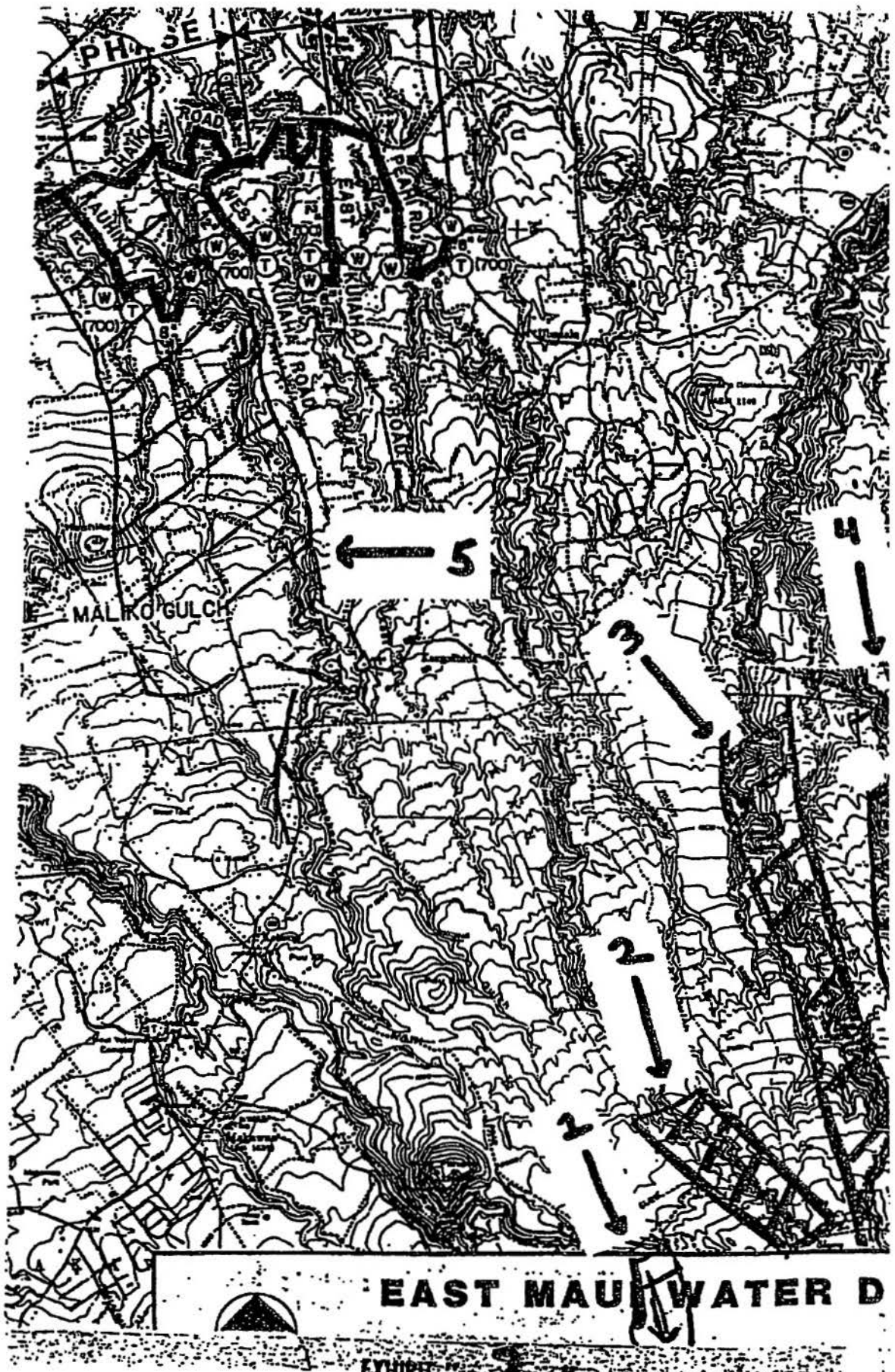


EXHIBIT "B"