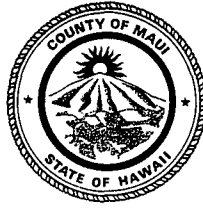


ALAN M. ARAKAWA  
MAYOR



KEITH A. REGAN  
MANAGING DIRECTOR

**OFFICE OF THE MAYOR**

Ke'ena O Ka Meia  
COUNTY OF MAUI - Kalana O Maui

June 1, 2017

OFFICE OF THE  
COUNTY COUNCIL

2017 JUN -5 PM 3:16

RECEIVED

Honorable Riki Hokama, Chair  
Budget & Finance Committee  
200 South High Street  
Wailuku, Hawaii 96793

Dear Chair Hokama:

**SUBJECT: AMENDING FISCAL YEAR 2017 BUDGET: DEPARTMENT OF WATER SUPPLY (WAILUKU WATER COMPANY ACQUISITION) (BF-21)**

Please find below our responses to your various requests for information:

1. Profit and loss statements from Wailuku Water Company LLC for the past ten years.

**Wailuku Water Company LLC would be open to providing such documentation as part of the County's due diligence upon a confidentiality agreement being executed by the County of Maui. Please advise if your committee would like the administration to move forward with such a confidentiality agreement.**

2. A current business operation analysis on the viability of Wailuku Water Company, LLC.

**The information requested presently does not exist and is not obtainable from Wailuku Water Company LLC.**

3. A report on the condition of the Surface Water Conveyance System and all improvements, including projections or estimates for costs of future maintenance, repair, and improvement of the water system both short and long-term.

**The information requested presently does not exist and is not obtainable from Wailuku Water Company LLC.**

4. A report summarizing and evaluating the sufficiency of the maintenance, including a maintenance schedule, equipment replacement schedule, and manpower requirements of the Surface Water Conveyance System.

**The information requested presently does not exist and is not obtainable from Wailuku Water Company LLC.**

5. A report concluding whether or not acquisition will result in the County of Maui having more water for distribution.

**Wailuku Water Company LLC would be open to providing such documentation as part of the County's due diligence upon a confidentiality agreement being executed by the County of Maui.**

6. A current hydrology report.

**The information requested presently does not exist and is not obtainable from Wailuku Water Company LLC.**

7. Copies of all water service agreements, supply agreements, or other water delivery agreements, wherein Wailuku Water Company, LLC is obligated to supply water to third parties or end users, including the total gallons of water per day the company is obligated to provide under these agreements.

**Such information is a public record and is available at:**

**<https://dms.puc.hawaii.gov/dms/DocketSearch>**

**In the top left hand corner, below “Docket Quick Link,” type “2008-0025” to access all of the pertinent documents.**

8. Copies of any other contracts, agreements, or obligations that the County will be assuming as a result of the proposed purchase of the Wailuku Water Company, LLC’s water system.

**Such information is a public record and is available at:**

**<https://dms.puc.hawaii.gov/dms/DocketSearch>**

**In the top left hand corner, below “Docket Quick Link,” type “2008-0025” to access all of the pertinent documents.**

9. A report on Wailuku Water Company, LLC’s status as a public utility, investigations by the Public Utility Commission, and whether the company has applied for and received a Certificate of Public Convenience and Necessity.

**Such information is a public record and is available for the County. I have attached the copies per your request.**

10. Copies of any studies, memoranda, reports, or documents showing the Wailuku Water Company LLC’s capacity to supply water and projections of future water availability.

**Wailuku Water Company LLC would be open to providing such documentation as part of the County’s due diligence upon a confidentiality agreement being executed by the County of Maui.**

11. Copy of the current water supply agreement between the Wailuku Water Company LLC and the County.

**Such information is a public record and is available for the County. I have attached the copies per your request.**

12. Identification of the regulatory or other legal requirements that apply to the operation of the Wailuku Water Company LLC.

**Such information is a public record and is available for the County. I have attached the copies per your request.**

13. A report on the status of Wailuku Water Company, LLC's involvement in the Na Wai Eha litigation, including, but not limited to, the company's obligations, liabilities, agreements, or other risks associated with the case. Include how the County will be protected against liability in making the purchase and identify what legal obligations, if any, the County will assume from the proposed purchase.

**Wailuku Water Company LLC would be open to providing such documentation as part of the County's due diligence upon a confidentiality agreement being executed by the County of Maui.**

14. Explain, or provide a report that addresses how the designation of the Iao as a groundwater management area by the State Commission on Water Resources Management affects Wailuku Water Company, LLC's rights and ability to deliver water and what duties, liabilities, and obligations the County can expect if it acquires property and infrastructure from Wailuku Water Company, LLC.

**Wailuku Water Company LLC would be open to providing such documentation as part of the County's due diligence upon a confidentiality agreement being executed by the County of Maui.**

15. Copies of any reports, memoranda, correspondence or other documents between the Wailuku Water Company, LLC, its predecessors, or principals, and the County relating to the offer to purchase Wailuku Agribusiness's 13,167 acres of watershed on or about the year 2000 and the decision by the County not to proceed with the purchase.

**Such information is a public record and is available for the County. I have attached the copies per your request.**

16. Please provide an explanation of how the decision was made to purchase only part of the water system, what facts were considered, the pros and cons of purchasing the entire system, and associated opportunities, advantages, disadvantages, and liabilities.

**There was a land sales contract in place and in escrow for a portion of the fee simple land when the County expressed an interest in the watershed property and the conveyance system. Thus, such property was not available at the time the County advanced its interest in the property. The land sales contract does not include the water delivery system and, under the proposal, the County would obtain the delivery system within such property.**

Thank you for your attention to this matter. Should you have any questions, please feel free to contact me at Ext. 7855.

Sincerely,



ALAN M. ARAKAWA  
Mayor

cc: Danilo Agsalog, Director of Finance  
Lynn Araki-Regan, Budget Director  
Kaala Buenconsejo, Director of Parks and Recreation  
David Goode, Director of Public Works  
Stewart Stant, Director of Environmental Management  
David Taylor, Director of Water Supply  
Jeffrey Ueoka, Deputy Corporation Counsel

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
 )  
WAILUKU WATER DISTRIBUTION COMPANY, )  
LLC, and WAILUKU WATER COMPANY, LLC )  
 )  
For a Certificate of Public )  
Convenience and Necessity to )  
Provide Non-Potable Water )  
Distribution Service in the Waihee, )  
Waiehu, Puuhala, Wailuku, and )  
Waikapu Areas and for Approval of )  
Rules and Regulations Pursuant to )  
Section 269-7.5, Hawaii Revised )  
Statutes; Approval of Rates and )  
Contracts Pursuant to Section )  
269-16, Hawaii Revised Statutes; )  
Approval of Waivers Pursuant to )  
Section 6-61-92, Hawaii )  
Administrative Rules; and Approval )  
Of Affiliate Transactions Pursuant )  
To Sections 269-19 and 269-19.5, )  
Hawaii Revised Statutes. )  
 )

DOCKET NO. 2008-0025

ORDER SUSPENDING DOCKET  
AND DISMISSING AS MOOT REQUEST FOR LEAVE TO FILE REPLY

**FILED**  
2009 JAN -9 P 12:14  
PUBLIC UTILITIES  
COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
)  
WAILUKU WATER DISTRIBUTION COMPANY,) )  
LLC, and WAILUKU WATER COMPANY, LLC) )  
)  
For a Certificate of Public )  
Convenience and Necessity to )  
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Waiehu, Puuhala, Wailuku, and )  
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Administrative Rules; and Approval )  
Of Affiliate Transactions Pursuant )  
To Sections 269-19 and 269-19.5, )  
Hawaii Revised Statutes. )  
\_\_\_\_\_)

Docket No. 2008-0025

ORDER SUSPENDING DOCKET  
AND DISMISSING AS MOOT REQUEST FOR LEAVE TO FILE REPLY

By this Order, the commission suspends this docket pending a decision by the Commission on Water Resource Management ("CWRM") on interim instream flow standards in Case No. CCH-MA06-01 for `Iao, Waihee, Waiehu, and Waikapu Streams (collectively, "Na Wai `Eha"), which Applicants WAILUKU WATER DISTRIBUTION COMPANY, LLC ("WWDC") and WAILUKU WATER COMPANY, LLC ("WWC") (jointly, "Applicants")<sup>1</sup> have

<sup>1</sup>Applicants and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party pursuant to Hawaii Revised Statutes ("HRS")

identified as the sources of water to be provided to customers; and on water use permits affecting Na Wai `Eha, which was designated by CWRM as a surface water management area ("SWMA"), unless otherwise ordered by the commission. During the period of suspension, the commission places certain conditions and requirements on Applicants, described below. In addition, the commission dismisses as moot the Request for Leave to Reply to Applicants' Response Filed on November 26, 2008, which was filed by HAWAIIAN COMMERCIAL & SUGAR COMPANY, A DIVISION OF ALEXANDER & BALDWIN, INC. ("HC&S") on December 15, 2008 ("Request for Leave").

I.

Background

On February 8, 2008, Applicants filed an application ("Application"), requesting, among other things approval of: (1) a Certificate of Public Convenience and Necessity ("CPCN") to provide non-potable water distribution service in certain areas of Waihee, Waiehu, Puuhala, Wailuku, and Waikapu on the island of Maui, Hawaii; (2) approval of initial rates for the non-potable water distribution service; (3) a transfer of assets from WWC to WWDC and approval of affiliated transactions, including a lease from WWC to WWDC ("Proposed Lease"); and (4) a sale of property, plant and equipment from WWC to

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§ 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62, are jointly referred to herein as the "Parties."

MICHAEL W. ATHERTON DEVELOPMENT, INC., WILLIAM S. FILIOS, TRUSTEE, BOYCE HOLDINGS, INC. (collectively, "Purchasers") under HRS § 269-19 ("Proposed Land Sale").

On February 20, 2008, Applicants filed an "Errata Sheet" with attached replacement pages for the Application; and on March 17, 2008, Applicants filed a "Supplement and Errata," with Supplement Exhibits A to E, for the Application.

On March 6, 2008, the commission issued Order No. 24079, which determined that HAR § 6-61-57(1), and not HAR § 6-61-57(2), shall govern the deadline for intervention in this docket. Thus, the commission ruled that the deadline for intervention in this docket would be ten days after the last public hearing held on the Application.

On May 14, 2008, the commission held a public hearing on the Application at Maui Waena Intermediate School in Kahului, Maui, Hawaii. Accordingly, the deadline for intervention was May 27, 2008.

By May 27, 2008, the following parties timely filed motions to intervene and/or participate in this proceeding:

- (1) COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("DWS");
- (2) MMK MAUI L.P. ("MMK"); (3) HUI O NA WAI `EHA and MAUI TOMORROW FOUNDATION, INC. (jointly, "Community Groups");
- (4) OFFICE OF HAWAIIAN AFFAIRS ("OHA"); (5) Purchasers, MTP OPERATING COMPANY, LLC, MAALAEA PROPERTIES, LLC, and WAIKAPU PROPERTIES, LLC (collectively, "Atherton Parties");

(6) HC&S; and (7) WAILUKU COUNTRY ESTATES IRRIGATION COMPANY and WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION, INC. (jointly, "WCE").

By Order issued on October 28, 2008, the commission, among other things, granted participation status in this proceeding to: (1) DWS; (2) MMK; (3) the Community Groups; (4) OHA; (5) the Atherton Parties; (6) HC&S; and (7) WCE (collectively, "Participants"). The commission also directed the Parties and Participants to submit statements of position as to whether the Application, as supplemented, is complete and properly filed under HRS § 269-16(f) and HAR § 6-61-88. In addition, the commission instructed the Parties and Participants to file a stipulated procedural schedule that, absent a waiver by the Parties and Participants, complies with the time requirements of HRS § 269-16(f)(3), within forty-five days from the date of the Order, for the commission's review and approval.<sup>2</sup>

## II.

### Suspension

By letter dated November 3, 2008, the commission asked the Parties and Participants for their respective positions on whether the commission should or should not suspend this docket

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<sup>2</sup>By letter dated December 18, 2008, the commission approved a request filed by Applicants for an extension of time for the Parties and Participants to file a stipulated procedural schedule in this docket.



pending a decision by the CWRM in Case No. CCH-MA06-01.<sup>3</sup> The Parties and Participants subsequently submitted their position statements on suspension pursuant to that letter.<sup>4</sup> In sum, the Consumer Advocate, OHA, MMK, and HC&S were in favor of suspension; Applicants, DWS, the Atherton Parties, and WCE objected to suspension. While the Community Groups asserted that the Application was incomplete, they deferred to the commission to decide whether or not to suspend this docket.<sup>5</sup> Several Parties and Participants, regardless of whether they supported or objected to suspension, expressed concerns that, should the commission suspend the docket, it should maintain the status quo and place conditions on Applicants during the suspension period so that Applicants are not allowed to continue "business as usual" and avoid commission oversight during the suspension period.

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<sup>3</sup>The commission's November 3, 2008 letter was prompted by the CWRM's decision in September 2008 to restore approximately 12 million gallons of water a day to several East Maui streams that were historically diverted by East Maui Irrigation Company for irrigation use by HC&S.

<sup>4</sup>The Parties and Participants also submitted their position statements on completeness of the Application pursuant to the commission's Order issued on October 28, 2008. On November 17, 2008, HC&S filed a statement addressing HC&S' positions on both the completeness and suspension issues ("HC&S' Statement"). On November 26, 2008, Applicants filed a response to HC&S' Statement ("Applicants' Response"). HC&S' Request for Leave, filed on December 15, 2008, requests leave to respond to Applicants' Response.

<sup>5</sup>See Community Groups' Statement of Position re. Suspension of Docket, filed on November 13, 2008 ("Community Groups' Suspension SOP"), at 2 ("The Community Groups defer to the PUC regarding how best to pursue necessary regulation of WWC's operations without working at cross-purposes with the CWRM.").

Some of the position statements -- in particular, HC&S' Statement -- provided relevant background information as to pending proceedings before the CWRM that affect Na Wai `Eha. According to these filings, there are two such proceedings before the CWRM. The first proceeding, Case No. CCH MA06-01, arose out of a Petition to Amend the Instream Flow Standards for Na Wai `Eha, dated June 25, 2004 ("IFS Proceeding").<sup>6</sup> As explained by HC&S:

Instream flow standards ("IFS") determine the quantity of water that must be left in the streams for, among other things, the protection of stream biota and traditional and customary native Hawaiian rights. HRS §§ 174C-3, 174C-71. The establishment of IFS thereby determines the amount of water that may be diverted for offstream uses, such as irrigation. In addition to water quantities, the IFS may establish at what points along the stream water may be diverted for offstream uses.<sup>7</sup>

The IFS Proceeding is in a contested case and is still ongoing.<sup>8</sup> When the commission held its public hearing in this docket in May 2008, the contested case hearing in the IFS Proceeding had closed in March 2008, and the parties to the IFS Proceeding were anticipating a proposed decision from the CWRM Hearings Officer to be issued in the Fall of 2008.<sup>9</sup>

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<sup>6</sup>See Letter filed on November 13, 2008, from Applicants to the commission, at 1 ("Applicants' Suspension SOP"). According to WWC, the parties to the IFS Proceeding are: WWC, DWS, the Community Groups, OHA, and HC&S. See Letter dated and filed on December 31, 2007, from WWC to the Commission, at 1 n.1.

<sup>7</sup>HC&S Statement, at 4-5 (footnote and citation omitted).

<sup>8</sup>See Community Groups' Suspension SOP, at 3.

<sup>9</sup>See id.

However, CWRM granted a request by HC&S to re-open the hearing, which postponed the filing of closing briefs until December 2008 and any proposed decision until sometime after that.<sup>10</sup> Applicants estimate that the CWRM may issue a Decision and Order in the IFS Proceeding between May to August 2009.<sup>11</sup> The parties to the IFS Proceeding thereafter have the opportunity to appeal any final decision to the Intermediate Court of Appeals, and then to the Supreme Court.<sup>12</sup>

The second proceeding arose out of the CWRM's designation of Na Wai `Eha as a SWMA in April 2008 ("SWMA Proceeding"). HC&S describes this designation as follows:

As a result of this designation, "no person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the [Water Commission]." HRS § 174C-48(a).

Water use permits specify the specific identity of the authorized user, the purpose of use, the amount of water authorized for such use, and the location of use. Declaration of Ken C. Kawahara attached; see also Exhibit 4, attached hereto as an example of a water use permit. Although water use permits are transferable (i.e., the identity of the user may change) upon notification to the Water Commission under HRS § 174C-59,

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<sup>10</sup>See id.

<sup>11</sup>See Applicants' Suspension SOP, at 2. See also OHA's Statement of Position re. Suspension of Docket Pending Decision by CWRM in CCH-MA06-01, filed on November 13, 2008 ("OHA's Suspension SOP"), at 2 (estimating issuance of a Decision and Order from CWRM "before mid-2009, at the earliest.").

<sup>12</sup>See Applicants' Suspension SOP, at 2-3. See also Community Groups' Suspension SOP, at 3. To illustrate how long it may take the IFS Proceeding to be fully resolved on appeal, Applicants and the Community Groups mention the Waiahole water case on O`ahu that is still continuing on its third appeal after fifteen years.

the purpose, amount, and location of use may not be modified without a new permit being issued by the Water Commission. HRS § 174C-57(b). Declaration of Ken C. Kawahara, attached.

Once an area is designated as a SWMA, as Na Wai Eha was in April 2008, even those who are currently using water in that area (e.g., HC&S and Applicant in this case) must apply for water use permits, and there is no guarantee that all current uses and amounts will be approved. *Waiahole I*, 94 Haw. at 149, 9 P.3d at 461. Applications requesting permits to continue existing uses of Na Wai Eha water are still being accepted until April 30, 2009. Declaration of Ken C. Kawahara; Public Notice (Exhibit 3).<sup>13</sup>

In addition, OHA explains that existing and future users of water will have to prove in the SWMA Proceeding that their uses are "reasonable-beneficial" and consistent with the public trust in order to obtain water use permits from the CWRM to use water diverted from Na Wai `Eha streams.<sup>14</sup> The SWMA Proceeding is also subject to the contested case process.<sup>15</sup>

Furthermore, regarding the CWRM's jurisdiction, HC&S maintains:

The Water Commission has "exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code." HRS § 174C-7(a); see also, *Ko'olau Agr. Co., Ltd. v. Commission on Water Resource Management*, 83 Hawai'i 484, 489-90, 927 P.2d 1367, 1372-73 (1996) (stating that "The Code established the Commission on Water Resource Management (aka, CWRM) and bestowed upon it 'exclusive jurisdiction and final authority in all matters relating to implementation and

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<sup>13</sup>HC&S' Statement, at 5-6 (footnote omitted).

<sup>14</sup>See OHA's Suspension SOP, at 2.

<sup>15</sup>See Community Groups' Suspension SOP, at 3.

administration of the state water code, except as specifically provided in this chapter.'"). "No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of [the State Water Code]... inconsistent with the provisions [therein]." HRS § 174C-4(b).<sup>16</sup>

The commission has thoroughly reviewed the Parties' and Participants' filings on suspension. Against the backdrop provided therein related to the CWRM proceedings, and based on a review of the entire record herein, the commission finds it appropriate to suspend this docket pending a decision by CWRM in the IFS Proceeding and the SWMA Proceeding for the reasons discussed below.

As noted above, Applicants have requested, among other things, a CPCN in their Application. The commission's statute governing CPCNs, HRS § 269-7.5, provides, in relevant part:

(a) No public utility, as defined in section 269-1, shall commence its business without first having obtained from the commission a certificate of public convenience and necessity. Applications for certificates shall be made in writing to the commission and shall comply with the requirements prescribed in the commission's rules. The application shall include the type of service to be performed, the geographical scope of the operation, the type of equipment to be employed in the service, the name of competing utilities for the proposed service, a statement of its financial ability to render the proposed service, a current financial statement of the applicant, and the rates or charges proposed to be charged including the rules governing the proposed service.

.....

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<sup>16</sup>See HC&S' Statement, at 4.

(c) A certificate shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the terms, conditions, and rules adopted by the commission, and that the proposed service is, or will be, required by the present or future public convenience and necessity; otherwise the application shall be denied.<sup>17</sup>

The commission finds suspension reasonable and necessary in this instance because, until the CWRM allocates water to Applicants and approves of Applicants' usage, the commission will be unable to determine whether Applicants are fit, willing, and able to provide the proposed non-potable water distribution service. As explained by the Consumer Advocate:

The criteria for determining fitness and ability consider the following. First, one considers whether Applicant has sufficient financial resources to sustain operations, particularly during the initial year(s) of operation when the customer base is developing. Second, one must ascertain whether Applicant possesses the requisite technical knowledge to operate the plant facilities and ensure the reliable provision of the proposed regulated service in accordance with the Department of Health and Commission requirements. Third, one must determine whether Applicant has adequate plant facilities to handle the demands of the potential customers. Last, especially in the case of water utilities, one must determine whether the Applicant is authorized to use the water that is needed to provide the proposed service.

The Consumer Advocate notes that the CWRM has jurisdiction over who is authorized to use the available water resources within the State of Hawaii. Furthermore, Applicant is

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<sup>17</sup>HRS §§ 269-7.5(a), 269-7.5(c) (emphasis added).

presently awaiting a decision by the CWRM on its request for authorization to use the non-potable water that is needed by Applicant to provide the proposed service.

. . . . .  
Based on the above, the resolution of Case No. CCH-MA06-01 is critical to making a determination as to whether Applicant will be allowed to draw the non-potable water that is needed for the provision of the proposed service. Until a favorable ruling is received from the CWRM, Applicant cannot be found fit and able to provide the proposed non-potable water service.<sup>18</sup>

Moreover, until the CWRM issues water permits to Applicants, Applicants cannot reasonably ascertain its service territory, as required by HRS § 269-7.5(a). HC&S expands on this point as follows:

Because the Water Commission, through the water use permit process described above, will determine the specific locations where Na Wai Eha water may be used, Applicant cannot credibly describe, and this Commission cannot reasonably determine, the service territory until water use permits are issued. By describing a large service territory encompassing all areas within the potential reach of their transmission infrastructure, Applicant misleads the public and this Commission into believing that Applicant can, and will be obligated to, serve anyone within the geographic area. In reality, Applicant will be able to legally provide water only to those specific areas yet to be approved by the Water Commission.<sup>19</sup>

Furthermore, without adequate information about Applicants' projected customer base and the amounts of water that Applicants will be allowed to divert from the streams,

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<sup>18</sup>Letter filed on November 13, 2008, from the Consumer Advocate to the commission, at 2.

<sup>19</sup>HC&S' Statement, at 7.

the commission will not have sufficient information to make a determination on Applicants' proposed rates and charges in the Application.

Compelling policy reasons also support suspension of this docket. Under HAR § 6-61-1, the commission is obligated "to secure the just, speedy, and inexpensive determination of every proceeding." To ensure a just and speedy resolution of the docket and an efficient use of the commission's and the Parties' and Participants' resources, it is essential that the commission suspend, rather than proceed, only to later have to reprocess this or a new or amended application after the CWRM issues decisions on Applicants' ability to divert water.

The commission, however, does not intend for a suspension period to continue indefinitely -- i.e., until all appeals are exhausted in the IFS Proceeding and the SWMA Proceeding. The suspension period will last until the CWRM issues a decision in the IFS Proceeding and Applicants obtain the necessary water use permits in the SWMA Proceeding. The commission acknowledges that subsequent appeals of the CWRM decisions may take many years, but at least the commission will have some pronouncement from the CWRM on Applicants' right to divert water for the commission to proceed with its own docket while any appeals of the CWRM decisions are pending. The commission finds this time period reasonable because, as mentioned above, initial decisions are expected from the CWRM in mid-2009. Also, as maintained by HC&S, "decisions by administrative agencies are given force and



effect pending appeal. Each of the Water Commission's three decisions in the Waiahole Ditch case remained in effect and have been implemented and enforced during the pendency of the appeals."<sup>20</sup> Moreover, as discussed further below, if for any reason, decisions from the CWRM are delayed, the commission may, in its discretion, reassess the circumstances and lift the suspension.

Notwithstanding the suspension, the commission will continue to have oversight over Applicants. The following conditions and requirements shall apply during the suspension period:

(a) The status quo shall be maintained during the suspension period. Accordingly, Applicants and their affiliates: (i) shall maintain current rates and the current supply of water to customers; (ii) are prohibited from adding any new customers; and (iii) are prohibited from selling or transferring any of their assets. Thus, Applicants shall not proceed with the Proposed Lease and the Proposed Land Sale, as requested in the Application.

(b) Applicants shall be required to file semi-annual financial statements, which shall include a balance sheet and income statement. The first report shall be due thirty days after the reporting period covering January 1, 2009 to June 30, 2009.

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<sup>20</sup>HC&S' Statement, at 12 n.8.

(c) Applicants shall file a new or amended application immediately after the necessary water use permits have been obtained from the CWRM.

(d) Applicants shall file status reports every three months addressing the status of the IFS Proceeding and the SWMA Proceeding.

(e) The commission, at any time, may impose additional requirements on Applicants, and lift or extend the suspension if, in its discretion, it is reasonable and necessary to do so.

(f) The failure to adhere to the foregoing requirements may result in further regulatory action as authorized by law.

Because the commission decides herein to suspend this docket, Applicants' Request for Leave is dismissed as moot. The commission will also reserve ruling on the completeness of the Application and Applicants' waiver requests in the Application. Likewise, it is not necessary for the commission to set a deadline for the Parties and Participants to file a Stipulated Procedural Order for the docket.<sup>21</sup>

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<sup>21</sup>Some Parties and Participants addressed in their filings the issue of whether HRS § 269-16(f) should only apply to rate increase requests and not to proceedings requesting a CPCN. The commission did not ask the Parties and Participants to brief this issue and it is not properly before the commission now. The commission therefore declines to discuss the issue herein.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. This docket is suspended until the CWRM issues a decision in the IFS Proceeding and Applicants obtain the necessary water use permits in the SWMA Proceeding, unless otherwise ordered by the commission.

2. During the suspension period, the following conditions and requirements shall apply:

(a) The status quo shall be maintained. Accordingly, Applicants and their affiliates: (i) shall maintain current rates and the current supply of water to customers; (ii) are prohibited from adding any new customers; and (iii) are prohibited from selling or transferring any of their assets. Thus, Applicants shall not proceed with the Proposed Lease and the Proposed Land Sale, as requested in the Application.

(b) Applicants shall be required to file semi-annual financial statements, which shall include a balance sheet and income statement. The first report shall be due thirty days after the reporting period covering January 1, 2009 to June 30, 2009.

(c) Applicants shall file a new or amended application immediately after the necessary water use permits have been obtained from the CWRM.

(d) Applicants shall file status reports every three months addressing the status of the IFS Proceeding and the SWMA Proceeding.

(e) The commission, at any time, may impose additional requirements on Applicants, and lift or extend the suspension if, in its discretion, it is reasonable and necessary to do so.

(f) The failure to adhere to the foregoing requirements may result in further regulatory action as authorized by law.

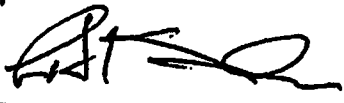
3. HC&S' Request for Leave is dismissed as moot.

DONE at Honolulu, Hawaii JAN - 9 2009.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
John E. Cole, Commissioner

By   
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

  
Kaiulani Kidani Shinsato  
Commission Counsel

2008-0025.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

CATHERINE P. AWAKUNI  
EXECUTIVE DIRECTOR  
DIVISION OF CONSUMER ADVOCACY  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
P. O. Box 541  
Honolulu, HI 96809

CRAIG I. NAKANISHI, ESQ.  
SHAH J. BENTO, ESQ.  
RUSH MOORE LLP  
737 Bishop Street, Suite 2400  
Honolulu, HI 96813

Counsel for Applicants WAILUKU WATER DISTRIBUTION  
COMPANY, LLC and WAILUKU WATER COMPANY, LLC

AVERY B. CHUMBLEY  
PRESIDENT AND CHIEF OPERATING OFFIER  
WAILUKU WATER DISTRIBUTION COMPANY, LLC  
255 East Waiko Road  
Wailuku, HI 96893

BRIAN T. MOTO, ESQ.  
CORPORATION COUNSEL  
JANE E. LOVELL, ESQ.  
DEPUTY CORPORATION COUNSEL  
COUNTY OF MAUI  
200 South High Street  
Wailuku, Maui, HI 96793

Counsel for COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY

DEAN T. YAMAMOTO, ESQ.  
JODI S. YAMAMOTO, ESQ.  
ALISON H.C. KUNISHIGE, ESQ.  
YAMAMOTO & SETTLE LLLC  
700 Bishop Street, Suite 200  
Honolulu, HI 96813

Counsel for MMK MAUI L.P.

Certificate of Service

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ISAAC H. MORIWAKE, ESQ.  
D. KAPUA`ALA SPROAT, ESQ.  
KOALANI L. KAULUKUKUI, ESQ.  
EARTHJUSTICE  
223 South King Street, Suite 400  
Honolulu, HI 96813

Counsel for HUI O NA WAI `EHA and  
MAUI TOMORROW FOUNDATION, INC.

PAMELA W. BUNN, ESQ.  
LINDSEY KASPEROWICZ, ESQ.  
PAUL JOHNSON PARK & NILES  
1001 Bishop Street  
Suite 1300, ASB Tower  
Honolulu, HI 96813

Counsel for OFFICE OF HAWAIIAN AFFAIRS

MICHAEL W. ATHERTON DEVELOPMENT, INC.  
WILLIAM S. FILIOS, Trustee of the William Filios Separate  
Property Trust  
BOYCE HOLDINGS, INC.  
MTP OPERATING COMPANY, LLC  
MAALAEA PROPERTIES, LLC  
WAIKAPU PROPERTIES, LLC  
C/O MICHAEL W. ATHERTON  
MAUI TROPICAL PLANTATION  
1670 Honoapiilani Highway  
Wailuku, HI 96793

J. DOUGLAS ING, ESQ.  
PAMELA J. LARSON, ESQ.  
LISA S. HIRAHARA, ESQ.  
WATANABE ING & KOMEIJI LLP  
999 Bishop Street, 23<sup>rd</sup> Floor  
First Hawaiian Center  
Honolulu, HI 96813

Counsel for MICHAEL W. ATHERTON DEVELOPMENT, INC.,  
WILLIAM S. FILIOS, TRUSTEE, BOYCE HOLDINGS, INC.,  
MTP OPERATING COMPANY, LLC, MAALAEA PROPERTIES, LLC, AND  
WAIKAPU PROPERTIES, LLC

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FARROKH A. IRANI  
PRESIDENT, BOARD OF DIRECTORS  
WAILUKU COUNTRY ESTATES IRRIGATION CO.  
WAILUKU COUNTRY ESTATES COMMUNITY ASSOC., INC.  
P.O. Box 491  
Wailuku, HI 96793

JUDITH NEUSTADTER NAONE, ESQ.  
P.O. BOX 1401  
Wailuku, HI 96793

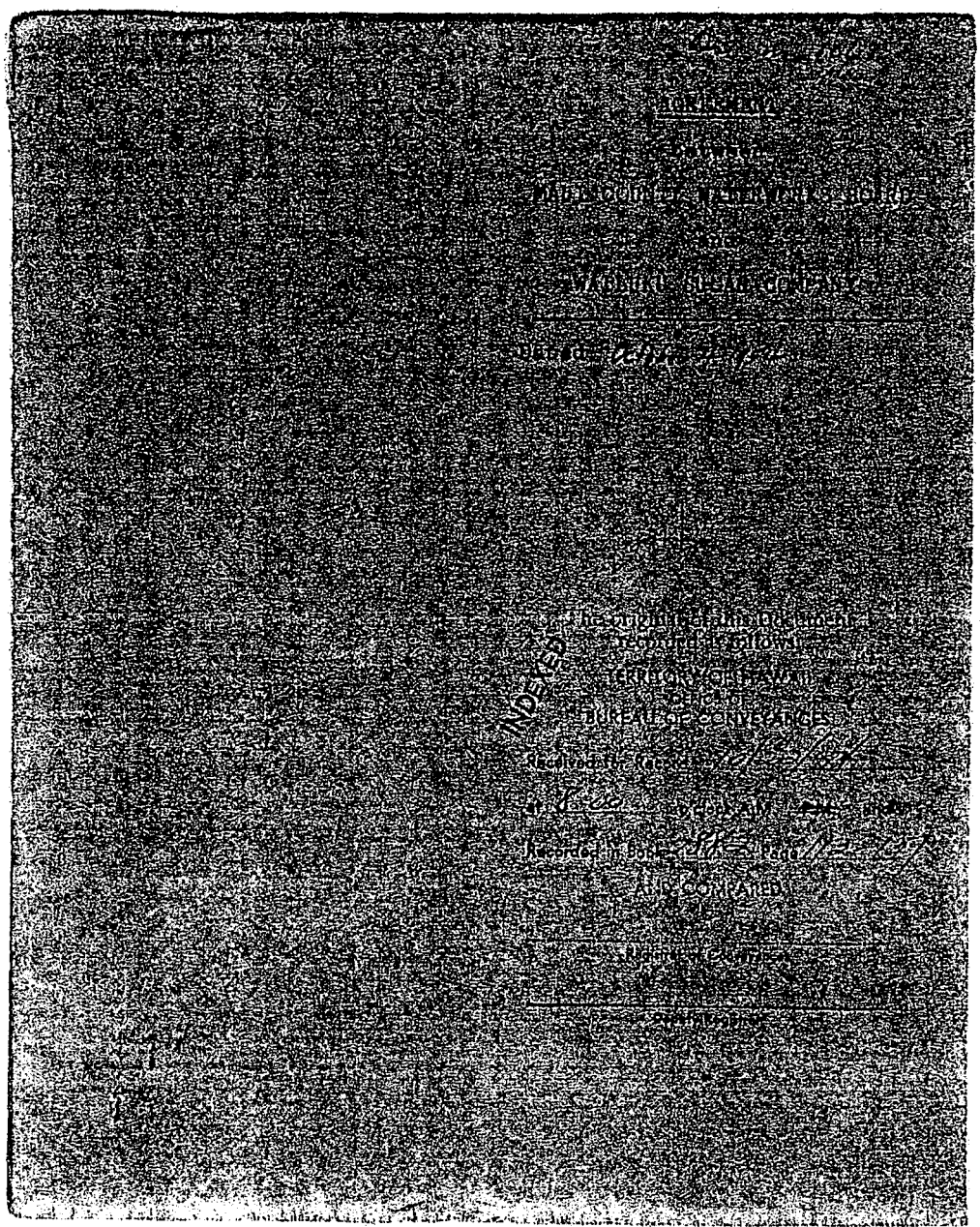
Counsel for WAILUKU COUNTRY ESTATES IRRIGATION COMPANY  
And WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION, INC.

NELSON CHUN, ESQ.  
HAWAIIAN COMMERCIAL & SUGAR COMPANY,  
A DIVISION OF ALEXANDER & BALDWIN, INC.  
822 Bishop Street  
Honolulu, HI 96813

KENT D. MORIHARA, ESQ.  
YVONNE Y. IZU, ESQ.  
MORIHARA LAU & FONG LLP  
Davies Pacific Center  
841 Bishop Street, Suite 400  
Honolulu, HI 96813

Counsel for HAWAIIAN COMMERCIAL & SUGAR COMPANY,  
A DIVISION OF ALEXANDER & BALDWIN, INC.

WA 61068





1068

THIS AGREEMENT, made and entered into this 4th  
day of October, 1954, but effective as of  
November 1, 1954, by and between the MAUI COUNTY WATERWORKS  
BOARD, acting for and on behalf of the County of Maui, party  
of the first part, and WAILUKU SUGAR COMPANY, a Hawaii corpora-  
tion, hereinafter referred to as the "Plantation", party of  
the second part,

**W I T N E S S E T H**

WHEREAS, the Territory of Hawaii, hereinafter re-  
ferred to as the "Territory", the County of Maui, hereinafter  
referred to as the "County", and the Plantation are parties  
to certain agreements which, among other matters, establish  
or delineate the rights of the parties to the waters of Iao  
Valley, Island of Maui, provide for the sale of water by the  
Plantation to the County, and provide that the Plantation  
will extend on its own lands a certain tunnel, hereinafter  
referred to as the "Iao Tunnel", constructed on certain lands  
belonging to the Territory in Iao Valley for the purpose of  
developing a potable water supply; and

WHEREAS, the Plantation has extended Iao Tunnel as  
agreed but the Tunnel has failed to develop sufficient water  
for the use of the County in its public waterworks system  
and, therefore, further extension of the Tunnel has been dis-  
continued and the County has acquired or will acquire from the

Plantation other lands at Mokuhau Road, Wailuku, upon which it is developing additional water by boring wells to pump water from the basal waters in and under the West Maui Mountains; and

WHEREAS, it will be desirable for the County to supplement such well supply with waters from Iao Valley for the purpose of serving the high-level areas of Wailuku; and

WHEREAS, the Plantation desires to supplement its ditch flow for the purpose of supplying water to its mill; and

WHEREAS, pursuant to Act 289, Series B-194, Session Laws of the Territory of Hawaii, 1949 (Regular Session), the Maui County Waterworks Board, hereinafter referred to as the "Board", has been granted the power to enter into contracts for the purchase of water, and to develop and acquire property for the purpose of developing water resources, and to enter into arrangements and agreements as it shall deem proper for the joint use, with any other person owning or having jurisdiction of the same, of conduits and aqueducts, and to manage, control and operate the water systems and properties of the County and all powers and functions of the Board of Supervisors of the County in connection therewith have devolved upon the Board and the Board has full power and authority to execute this agreement for and on behalf of the County; and

WHEREAS, the Board, on behalf of the County, and the Plantation desire to enter into a new agreement which meets

the requirements of the parties; and

WHEREAS, the Territory does not desire to become a party to the new agreement, and therefore the new agreement must remain subject to the provisions of the other agreements which still remain in effect and provision must be made whereby the Plantation can cancel the new agreement if the Territory asserts rights inconsistent therewith;

NOW, THEREFORE, in consideration of the mutual promises hereinafter contained, it is hereby covenanted and agreed by the parties hereto as follows:

1. Neither party hereto shall have any further obligation to complete or extend Iao Tunnel, although the Plantation reserves the right to extend the Tunnel on and/or under its own land at any time or times it desires to do so. The County agrees in perpetuity not to extend Iao Tunnel on or under the land deeded to the Territory by the Plantation on April 3, 1937 (deed recorded in Liber 1373, pages 66--71) or otherwise to develop or take additional underground or surface water on or from such land or in any manner to interfere with the flow of surface water from such land into Iao Stream or to use such land for any purpose other than its present use.

2. The parties agree as follows with respect to the division of the water from Iao Tunnel and Iao Stream, said agreements except as contained in (a), below, to be in perpetuity:

(a) that to and including December 31, 1960 the

County may take from Iao Tunnel up to 1.5 million gallons of water per day (24 hours), to the extent such water is available, subject, however, to the obligation during such period to furnish to the Plantation through the County's distribution system .5 million gallons per day, at the price of \$20 per million gallons, for domestic use in the camps and dwellings of the Plantation which are accessible to such distribution system;

(b) that on and after January 1, 1961 the County may take from Iao Tunnel up to 1 million gallons per day, to the extent such water is available, without obligation to furnish any thereof to the Plantation as aforesaid;

(c) that the County is also entitled to 73,900 gallons of water per day on account of land now owned by it in the Town of Wailuku and shall have the right to take the same from Iao Tunnel or from Iao Stream at the present Kinihapai Intake or at another mutually agreeable point on Iao Stream to the extent that such water is available at a rate not in excess of 73,900 gallons per day; provided, however, that if the County transfers any of its presently owned water rights to the Plantation as provided in paragraph 3, below, a reduction in the amount of water to which the County is entitled under this paragraph shall be made at the rate of 30,000 gallons per day per acre;

(d) that the Plantation is entitled to all water from Iao Tunnel and from Iao Stream in excess of the amounts stated above and may take such water from Iao Tunnel and Iao Stream at any point; and

(e) that if the County does not take all of the water from Iao Tunnel or from Iao Stream to which it is entitled under subparagraphs (a), (b) or (c) above, the Plantation may take all such water not taken by the County without charge to the plantation.

3. The County will not acquire any further rights to water from Iao Valley or transfer any of its existing rights to water from Iao Valley to any party other than the Plantation; provided, however, that if the County acquires for public use any land in Iao Valley having water rights appurtenant thereto, such water rights will be transferred to the Plantation. If the parties are unable to agree on the value of water rights transferred to the Plantation hereunder, the value thereof shall be fixed by appraisal. In such event, either party may give to the other party written notice of its desire for an appraisal and shall appoint one appraiser in such notice, whereupon the other party shall, within twenty days of the receipt of such notice, appoint a second appraiser, and, in the case of the failure so to do, the party which has appointed the first appraiser may request the person then holding the position of Judge of the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii (or if that position is vacant, the position of Senior Judge in years of service of the Circuit Court of the First Judicial Circuit) to appoint such second appraiser, and the two appraisers so appointed (in either manner) shall select and appoint a third appraiser; in the event that the two appraisers so appointed

shall fail to select and appoint a third appraiser within ten days after the appointment of the second appraiser, either party may request the appointment of such third appraiser by the person then holding the position of such judge; the three appraisers so appointed shall thereupon proceed to determine the matter in dispute and the decision of any two shall be final, conclusive and binding upon both parties.

4. Although the Territory is not a party to this Agreement it is a basic assumption hereof that the Territory will not, by virtue of its rights under other agreements or otherwise, take any action which is inconsistent with the County's agreements herein. Therefore, if the Territory takes any action which the County agrees not to take under paragraph 1, above, or takes any water from Iao Tunnel or Iao Stream (except in so far as it shares water the County is entitled to take under paragraph 2, above) or acquires or transfers water rights in Iao Valley in a manner prohibited to the County under paragraph 3, the Plantation may cancel this Agreement upon notice in writing to the County, and all of the provisions hereof shall thenceforth be of no force and effect.

5. Effective immediately the County is relieved of its obligation to pay the Plantation not less than \$9,000 per year for water taken into its system, as provided in paragraph 8 of the Agreement between the County, the Plantation and the Territory, executed August 17, September 6 and September 25, 1940 and recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1603, pages 14-27 (hereinafter called the "1940 Agreement"). Any other provision of

the 1940 Agreement inconsistent with the provisions of this Agreement shall be deemed to be superseded hereby and it is agreed that the 1940 Agreement will not be extended beyond December 31, 1960; provided, however, that nothing herein shall be deemed a waiver by the Plantation of any right which it may have under the 1940 Agreement or otherwise to the delivery of .5 million gallons per day at the rate of \$20 per million gallons for so long as the Territory and the County assert any right to 1.5 million gallons per day as provided in the 1940 Agreement.

6. The County hereby approves, in perpetuity, the location of the perpetual and permanent easement granted to the Plantation by the Territory by exchange deed dated December 23, 1940, recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 1510, pages 274-280, at the location of the existing Iao Tunnel, the location of said tunnel being more particularly described as follows:

"Being a portion of Grant 3343 to Claus Spreckels in Iao Valley, District of Wailuku, Island and County of Maui, Territory of Hawaii, the approximate centerline of the tunnel being described as follows:

"Beginning at a point on the Southerly boundary of the parcel of land deeded to the Territory by the Plantation on April 3, 1937 (Liber 1373, pages 66-71), the coordinates of which point of beginning referred to U.S.G. & G.S. Station 'Luke' being 862.00 feet North and 14,612.96 feet West and running by azimuths measured clockwise from the true South:

|    |      |     |   |
|----|------|-----|---|
| 1. | 155° | 07' | 5.49 feet; thence   |
| 2. | 156° | 00' | 601.72 feet; thence   |
| 3. | 132° | 09' | 99.85 feet; thence  |
| 4. | 126° | 05' | 82.65 feet; thence  |
| 5. | 130° | 40' | 123.37 feet; thence   |
| 6. | 123° | 51' | 438.75 feet; thence   |
| 7. | 124° | 09' | 499.75 feet; thence   |
| 8. | 124° | 31' | 534.95 feet; thence   |
| 9. | 121° | 40' | 48.00 feet to the Westerly boundary of said parcel of land deeded to the Territory by said deed." |

7. The County agrees to maintain that portion of the Iao Tunnel located on land of the Territory in good operating condition and repair, reasonable wear and tear excepted, and the Plantation agrees to maintain that portion of the Iao Tunnel located on its land in good operating condition and repair, reasonable wear and tear excepted.

8. The Plantation hereby grants to the County the following easements, 10 feet in width, to maintain, operate, replace and repair pipe lines, across or under certain of the lands of the Plantation located at Wailuku

(i) Easements 1, 2, 3, and 4, marked and described on the map attached hereto, made a part hereof, and marked Exhibit 1.

(ii) Five easements described in Exhibit 2, attached hereto and made a part hereof.

In connection with said pipe-line easements, the parties hereby agree as follows:

(a) The County will furnish, at its own expense, a metes and bounds description of the easements referred to on Exhibit 1 within six months from the time that said description is requested by the Plantation. The Plantation reserves the right to locate said easements by reference to a metes and bounds description and the County agrees to join with the Plantation in the execution of a supplemental instrument in proper form for recording and/or filing for the purpose of the location of said easements and/or for the purpose of more definitely locating the rights granted the County under subparagraph (g) hereof to enter the Plantation's lands.

(b) Said easements may be used by the County to convey water for use in its public waterworks system.



(c) The Plantation shall have the right at its own expense, at any time or from time to time, to relocate any or all of the pipe lines located within said easements, provided that substitute easements to take the place of the original easements are granted for said pipe lines in locations agreeable to the County.

(d) The easements granted hereby shall be perpetual, provided that if for any reason the perpetual agreements specified in paragraphs 1 and 2 hereof cease to be operative, said easements shall terminate at the same time and provided, further, that said easements shall terminate if the County shall not fulfill its obligations with respect thereto as provided in this paragraph 8 after reasonable notice of default from the Plantation. Upon termination by reason of default of the County as aforesaid, the pipe lines located within said easements shall become the property of the Plantation. Upon termination for any other reason the County shall remove its pipe lines from the property of the Plantation and restore the surface of the ground to its previous condition.

(e) In so far as said easements extend over or under public highways, the grant by the Plantation to the County of the same is and shall be limited to the power, if any, of the Plantation to make the grant. Said easements shall also be subject to rights to cross the same heretofore or hereafter granted by the Plantation to others.

(f) The County will at its own expense maintain said pipe lines in good and safe condition and repair.

(g) The Plantation hereby grants to the County the right from time to time to enter and cross its lands in the vicinity of said easements to such extent as may be necessary for the sole purpose of enabling the County to operate, maintain and repair said pipe lines.

(h) The County agrees to exercise all of its rights hereunder in such manner as to occasion the least possible interference with the use and enjoyment by the Plantation and its tenants of the lands of the Plantation. Upon the completion of any installation of or repairs to any of said pipe lines, the surface of the ground above the same shall be restored to its previous condition.

(i) In case the exercise by the County of the rights hereby granted, or in case the maintenance and repair of said pipe lines or the failure to maintain and repair the same, shall result in damages to any of the land, crops, buildings, roads or other improvements belonging to the Plantation or to any of its tenants, the County will reimburse the Plantation and/or the affected tenants of the Plantation therefor.

(j) The County agrees to indemnify and hold harmless the Plantation and its tenants from and against all claims, demands and suits by whomsoever made or brought, on account of injury or damage to persons or property resulting

from any acts or omissions on the part of the County in the exercise by the County of the rights hereby granted to it, or from the installation, construction, use, maintenance, replacement or repair by the County of said pipe lines, or from its failure to maintain and repair the same.

(k) The portions of the pipe lines located within said easements which are now beneath the surface of the ground shall be maintained by the County as subsurface pipe lines with top of pipe line at least 4 feet below the surface. The County shall locate all new pipe lines within said easements at a depth of not less than 4 feet below the surface unless the Plantation consents to a lesser depth. The Plantation and its tenants shall at all times have the right to use the surface above all subsurface pipe lines and to cultivate the soil.

(l) Neither the Plantation nor any tenant of the Plantation shall be held liable for any breakage in or damage to any of said pipe lines, however caused, except for intentional breakage or damage, or for any consequential damages on account of failure of water supply resulting from such breakage or damage, and the County agrees to hold harmless the Plantation and its tenants from and against any claims, demands, and suits by whomsoever made and brought, arising on account of any such consequential damage.

(m) The County will pay, when and as the same become due and payable, all taxes, rates, assessments, impositions, duties, charges and other outgoings of every description which may be levied on or with respect to said pipe lines, so long as and to the extent that said easements

shall continue in existence.

(n) If at any time any portion of the lands of the Plantation subject to said easements shall be condemned or taken by any governmental authority or public service company, the County shall surrender to the Plantation the part or parts of the easements so condemned and the easements shall terminate as to the part or parts condemned, and all compensation and/or damages payable by reason of such condemnation, including any damages for the County's interest in the premises condemned, shall be payable to the Plantation, except that the County shall have the right to claim and recover from the condemning authority, but not from the Plantation, any of such compensation which is payable for the pipe lines and appurtenances.

9. The Plantation agrees to sell to the County for use in its public waterworks system (and not for resale or distribution for irrigation purposes) such daily supply of water from Lao Tunnel or from Lao Stream as may be required by the County and as may be available in the tunnel or at the Kinihapai Intake or other mutually agreeable point on Lao Stream; provided, however, that the total amount from both Lao Tunnel and Lao Stream to be sold to the County hereunder shall not exceed 1.2661 million gallons per day. If the County ever becomes entitled to less than .0739 million gallons per day under paragraph 2(c) hereof because of transfer of water rights to the Plantation, said figure of 1.2661 million gallons per day shall be increased by the amount of the reduction in said .0739 million gallons per day. The

County shall pay the cost of bringing its water mains to the points at which it takes delivery of such water from the Tunnel or Stream and the cost of any connections with or intakes from the Tunnel or Stream. The basic charge for water sold by the Plantation to the County under the provisions of this paragraph shall be \$55.00 per million gallons, such charge to be subject to adjustment as follows: For each 1¢ by which the tanker price per barrel of P. S. 400 fuel oil (or its equivalent), as posted by Kahului Railroad Company or by Standard Oil Company of California for delivery into storage tanks at Kahului, Maui, shall be above or below \$2.98 per 42 gallon barrel, there shall be an increase or decrease of 5¢ per million gallons above or below \$55.00 per million gallons. Each change in the basic charge for water pursuant to the foregoing provisions shall be effective at the commencement of the first monthly period which follows the effective date of each change in said posted price.

10. The County agrees to sell to the Plantation all water from wells of the County now or hereafter located on the land acquired or to be acquired from the Plantation at Mokuhan Road which can be delivered by pump capacity installed at any time and which is in excess of the amount of water required by the County to meet its domestic demand. The delivery of water so purchased shall be made from the County's 18 inch main at the intersection of Mokuhan Road and Market Street, Wailuku. If said main shall have insufficient capacity to carry this additional water without interfering

with the County's delivery of domestic water, delivery shall be made at the Hokuhan Road well site. The Plantation shall pay the cost of bringing its water pipes or conveyors to the aforesaid delivery points and the cost of any connection made to the County's main or well for the delivery of well water to it. The charge to the Plantation for well water shall be at the rate of \$50.00 per million gallons for that quantity of water purchased by the Plantation up to the amount per year that the County is allowed to purchase from the Plantation under paragraph 9 hereof (that is, 462,126,500 gallons per year, unless the County is allowed to purchase more because of reduction in its Ino Valley water rights). The foregoing basic charge of \$50.00 per million gallons shall be subject to adjustment as follows: For each 1¢ by which the tanker price per barrel of P.S. 400 fuel oil (or its equivalent), as posted by Standard Oil Company of California for delivery into storage tanks at Kahului, Maui, shall be above or below \$2.98 per 42 gallon barrel, there shall be an increase or decrease of 5¢ per million gallons above or below \$50.00 per million gallons. Each change in the basic charge for water pursuant to the foregoing provisions shall be effective at the commencement of the first monthly period which follows the effective date of each change in said posted price. For all well water purchased by the Plantation in excess of the amount which the Plantation is entitled to purchase for \$50.00 per

million gallons (subject to adjustment as above provided), hereinafter called excess well water, the rate per million gallons shall be the County's actual pumping cost which shall be the sum of sub-paragraphs (a) and (b) below:

(a) the sum of the annual fixed charges (that is, interest on bonds, insurance and depreciation) properly allocable to the entire Mokuauia Road pumping station (that is, wells, casings, pumps, transformers, storage tank and all appurtenances within the well and reservoir lot) and the annual cost of maintenance and supervision properly allocable to said station, all divided by the total gallons pumped at this station for all purposes during the year.

(b) the annual electric demand and energy charges paid by the County over and above the charges it would have paid if the excess well water had not been furnished to the Plantation, divided by the number of gallons of said excess well water furnished the Plantation during the year.

All figures used shall be those of the calendar year in which the delivery was actually made to the Plantation. The County shall estimate its actual pumping cost from time to time and so advise the Plantation, which shall make any payments due on the basis of such estimates. The County shall determine its actual pumping cost for the year as soon as possible after the end of the year and advise the Plantation and at that time appropriate adjustments in the payments made on the basis of the estimated pumping cost for the year shall be made

by the Plantation or the County, as the case may be. The Plantation shall have the right at all reasonable times to inspect the books and records of the County to check the accuracy of the County's estimates or determination of its pumping cost and the propriety of allocation of costs to the Mokuhaea Road station.

11. The County shall at its own expense install and maintain in reasonably accurate operating condition suitable Venturi meters which will assure to the satisfaction of the Plantation an accurate measurement of all water (including free water) taken into the County's system from Leo Tunnel and from Leo Stream. Such meters shall be installed at the points at which the County takes water from Leo Tunnel and from Leo Stream. Readings of the Venturi meters shall be taken and signed jointly by a representative of the Plantation and a representative of the County each week when the weekly record chart is changed, and payments for water hereunder shall be based on such readings. A continuous record of the water used by the County and a copy of said weekly record chart shall be furnished every Monday morning to the Plantation.

12. The Plantation shall at its own expense install and maintain in reasonably accurate operating condition a suitable measuring device which will assure to the satisfaction of the County an accurate measurement of all water taken by the Plantation from said County water main at the intersection of Mokuhaea Road and Market Street or from the



Mokuhau Road well sites. Such measuring device shall be installed at the point at which the Plantation takes delivery of well water from the County. Readings of such measuring device shall be taken and signed jointly by a representative of the Plantation and a representative of the County weekly, and payments for water hereunder shall be based on such readings. A continuous record of all water taken by the Plantation and a copy of said weekly record chart shall be furnished every Monday morning to the County.

13. Payments for water purchased by either party in accordance with the terms hereof shall be calculated and paid within 30 days following the end of each calendar month.

14. This agreement shall become effective as of November 1, 1954, and with the exception of the provisions specifically stated to be perpetual shall expire on December 31, 1960.

IN WITNESS WHEREOF, the MAUI COUNTY WATERWORKS BOARD, acting for and on behalf of the County of Maui pursuant to authority granted by law, and WALLUKU SUGAR COMPANY, by its proper officers thereunto duly authorized have executed this agreement in triplicate the day and year first above written.

MAUI COUNTY WATERWORKS BOARD

WALLUKU SUGAR COMPANY

By (Sgd.) E. YASUI  
Its President

By (Sgd.) ALAN S. DAVIS (CORPORATE)  
Its President (SEAL)

(S E A L)

By (Sgd.) LOUIS M. FERNANDEZ  
Its

By (Sgd.) E. G. A. CROME  
Its Treasurer

Party of the First Part

Party of the Second Part

Approved as to form:  
(Sgd) WENDELL F. CROCKETT  
Attorney, Maui County Water Board

\*17\*

TERRITORY OF HAWAII |  
COUNTY OF MAUI | ss.

On this 20th day of October, 1954,  
before me appeared R. YASUI and  
LOUIS M. FERNANDEZ, to me personally known,  
who, being by me duly sworn did say, that they are  
PRESIDENT and SECRETARY,  
respectively, of the MAUI COUNTY WATERWORKS BOARD, a  
municipal corporation; that the seal affixed to the  
foregoing instrument is the corporate seal of said  
Board; that said instrument was signed and sealed in  
the name of and on behalf of said Board by authority  
of its members; and said R. YASUI  
and LOUIS M. FERNANDEZ acknowledged that they  
executed the same as the free act and deed of said Board.

(NOTARIAL SEAL)

(Sgd.) E. H. MIYAJIMA  
Notary Public, Second Circuit,  
Territory of Hawaii

My Commission expires June 30, 1957

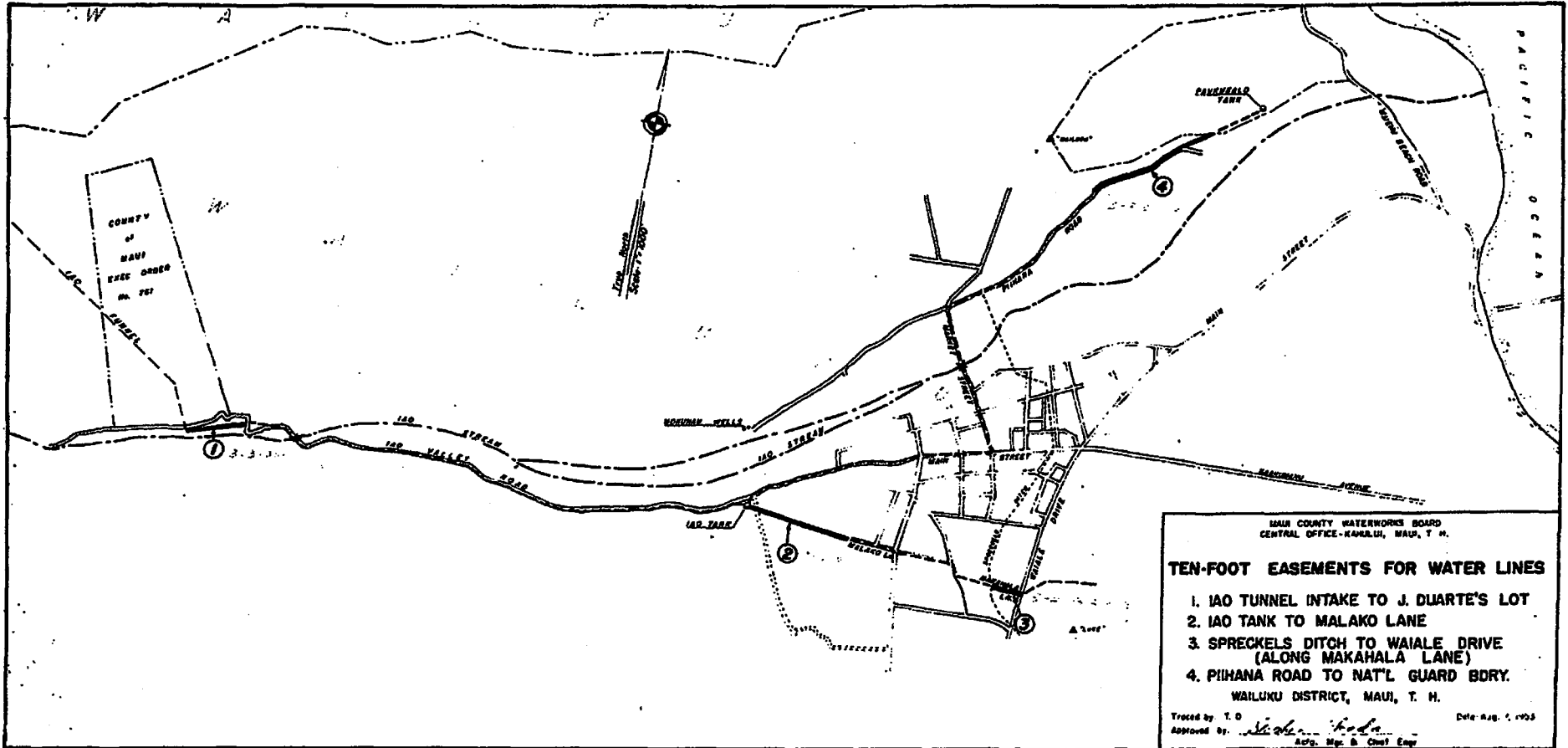
TERRITORY OF HAWAII  
CITY AND COUNTY OF HONOLULU } ss.

On this 18th day of October, 1954,  
before me appeared ALAN S. DAVIS and  
R. G. A. CROWE, to me personally known,  
who, being by me duly sworn did say, that they are  
PRESIDENT and TREASURER,  
respectively, of WAIKUKU SUGAR COMPANY, a Hawaii corporation;  
that the seal affixed to the foregoing instrument is the  
corporate seal of said corporation; that said instrument was  
signed and sealed in behalf of said corporation by authority  
of its Board of Directors; and said ALAN S. DAVIS  
and R. G. A. CROWE acknowledged that they  
executed the same as the free act and deed of said corporation.

(NOTARIAL SEAL)

(Sgd.) ALBERT K. AKANA  
Notary Public, First Judicial  
Circuit, Territory of Hawaii

My Commission expires June 30, 1957



MAUI COUNTY WATERWORKS BOARD  
 CENTRAL OFFICE - KAHALU, MAUI, T. H.

**TEN-FOOT EASEMENTS FOR WATER LINES**

1. IAO TUNNEL INTAKE TO J. DUARTE'S LOT
2. IAO TANK TO MALAKO LANE
3. SPRECKELS DITCH TO WAIALE DRIVE  
(ALONG MAKAHALA LANE)
4. PIUHANA ROAD TO NAT'L GUARD BDY.

WAILUKU DISTRICT, MAUI, T. H.

Traced by T. O.  
 Approved by: *S. H. Koda*  
 Chief Eng.

Date: Aug. 1, 1903

EXHIBIT 2

EXHIBIT 2

Description of Pipe Line Easements

I

A Ten (10) Foot wide Easement on Portions of L. C. AM. 4452 and L. C. AM. 3530, situate at Wailuku, Maui, T.H., the center line of said easement being as follows:

Beginning at a point at the intersection of this easement and the southern boundary of lot owned by the County of Maui (Exc. Order No. 751), the coordinates of said point referred to U.S.G. and G.S. Triangulation Station "LHHE" being 53,02 feet North and 14,611.51 feet West and running thence by azimuths measured from true south:

1. 335°52' 51.47 feet along the land owned by W.S.Co. to a point, thence
2. 340°06' 14.58 feet along same and near entrance of tunnel to a point, thence
3. 249°36' 62.57 feet along same to a point; thence
4. 230°11' 50.52 feet along same to a point; thence
5. 254°48' 133.32 feet along same to a point; thence
6. 256°38' 140.91 feet along same to a point; thence
7. 262°40' 124.78 feet along same to a point; thence
8. 256°34' 71.88 feet along same to a point; thence
9. 318°32' 50.87 feet along same to a point; thence
10. 269°15' 110.71 feet along same to a point; thence
11. 276°46' 183.40 feet along same to a point; thence
12. 231°23' 22.91 feet to a point intersecting the southern boundary of lot owned by

Exhibit 2

EXHIBIT 2

John G. Duarte the coordinates being 894.67 feet north, 13,679.48 feet west referred to sta. "LUKE"

13. 231°23' 5.22 feet to a point on Iao Road Right-of-Way the coordinates being 879.72 feet north and 13,675.42 feet west referred to Triangulation Station "LUKE."

II

A ten (10) feet pipeline right-of-way, over, through, across and under portions of the lands of Pehakuhi and Pehakuokanhi referred to and described in S.P. 1937, L. C. Aw. 387 and Grant 172 to E. Bailey, situate in Wailuku, Maui, T. H., the center line of said right-of-way being as follows:

Beginning at a point, at the intersection of this right-of-way and the boundary of the Iao Reservoir Lot, the coordinates of said point of beginning referred to the U. S. C. and G. S. Triangulation Station "LUKE" being 1038.17 feet North and 5564.98 feet West, and running thence by azimuths measured clockwise from true South:

1. 274°49' 31.78 feet to a point; thence
2. 11°35' 6.26 feet to a point; thence
3. 274°22' 1801.16 feet to a point on the western boundary of the Malaka Lane right-of-way, the coordinates of said point of ending being 892.15 feet North and 3736.19 feet West.

EXHIBIT 2

EXHIBIT 2

III

A Ten (10) Foot Wide Pipeline Easement over, through, across and under Portions of the Lands of L. C. Aw. 3234, Apana 1, to KINIYAKAKUA, L. C. Aw. 7713, Apana 23, and L. C. Aw. 3234, Apana 2, to KINIYAKAKUA situate in Kalua, Wailuku, Maui, T. H., the Center Line of said easement being as follows:

Beginning at a point on the makai boundary of Lot 2 of the Spreckels Ditch Right-of-Way, the coordinates of said point of beginning referred to the U. S. G. and G. S. Triangulation Station "DUKE" being 548.73 feet North and 1,498.92 feet West, and running thence by azimuths measured clockwise from true north:

1.  $289^{\circ} 02'$  15.73 feet along Makahala Lane to a point; thence
2.  $276^{\circ} 45'$  608.50 feet along Makahala Lane to a point on the west boundary of Waiale Road right-of-way. The coordinates of said point of ending being 472.72 feet North and 894.23 feet West.

IV

A Ten (10) Foot Wide Pipeline Easement over, through, across and under Portions of the Wailuku Sugar Company 30 foot road right-of-way, situate in Kalua, Wailuku, Maui, T. H., the Center Line of said easement being as follows:

Beginning at a point on the west boundary of the Wailuku Sugar Company 30 foot right-of-way, the coordinates of said point of beginning referred to the U. S. G. and G. S.

EXHIBIT 2

Triangulation Station "LUKE" being 113.02 feet North and 862.71 feet West, and running thence by azimuths measured clockwise from true South:

1.  $278^{\circ}53'36''$  112.58 feet across road to a point on the compromise boundary of Mailuku Sugar Company and H. C. & S. Co., the coordinates of said point of ending being 112.58 feet North and 832.69 feet West.

V

A Ten (10) Foot wide Pipeline Easement over, through, across and under Portion of the land of GRANT 3343 situate in Paukukalo, Mailuku, Maui, T. H., the Center line of said easement being as follows:

Beginning at a point on the North side of the Pihana Road, the coordinates of said point of beginning referred to the U. S. G. and G. S. Triangulation Station "LUKE" being 7,222.36 feet North and 923.35 feet West and running thence by azimuths measured clockwise from true South:

1.  $234^{\circ}22'$  358.36 feet along the north side of Pihana Road to a point; thence
2.  $241^{\circ}12'$  238.25 feet along Pihana Road to a point on south side of the Road; thence;

Exhibit 2



EXHIBIT 2

- |     |         |        |                                       |
|-----|---------|--------|---------------------------------------|
| 19. | 231°19' | 77.59  | feet along same to a point; thence    |
| 20. | 237°09' | 116.59 | feet along same to a point; thence    |
| 21. | 230°30' | 136.03 | feet along same to a point; thence    |
| 22. | 223°13' | 53.09  | feet along same to a point; thence    |
| 23. | 213°21' | 46.23  | feet along same to a point intersect- |
- ing the ~~Fairbanks~~ National Guard  
Camp Site boundary, the coordi-  
nates being 6,811.55 feet North  
and 1,464.55 feet East referred  
to triangulation station "Luke."

Exhibit 2

CONSENT

HAWAIIAN COMMERCIAL AND SUGAR COMPANY, LIMITED, a  
Hawaii corporation, having entered into a Deed of Exchange with  
WAILUKU SUGAR COMPANY, a like corporation, dated June 23, 1924,  
recorded in the Bureau of Conveyances of the Territory of  
Hawaii in Liber 740 at Page 134, wherein Hawaiian Commercial  
and Sugar Company, Limited reserved to itself certain  
water power rights, and wherein Wailuku Sugar Company quit-  
claimed unto Hawaiian Commercial and Sugar Company, Limited,  
certain rights to surplus water, does hereby consent to the  
foregoing agreement effective as of November 1, 1934 between  
Wailuku Sugar Company and the Maui County Waterworks Board and  
to the taking of water by the County as provided for therein,  
to the extent that said consent may be required by virtue of  
the reservation of the water power rights and the acquisition of  
certain rights to surplus water in the Exchange Deed with Wailuku  
Sugar Company referred to above; PROVIDED, HOWEVER, that this  
consent shall not be deemed to alter said Exchange Deed between  
Hawaiian Commercial and Sugar Company, Limited and Wailuku Sugar  
Company, or the relative rights of said Hawaiian Commercial and  
Sugar Company, Limited and Wailuku Sugar Company thereunder,  
except that the taking of water by the County under the terms of  
the foregoing water agreement shall not be considered a violation  
by Wailuku Sugar Company of any of the provisions of said Exchange  
Deed.

DATED at Honolulu, Territory of Hawaii, this 15th  
day of October, 1954.

(CORPORATE SEAL)

HAWAIIAN COMMERCIAL AND SUGAR  
COMPANY, LIMITED

By (Sgd.) C. B. WIGHTMAN  
Vice Pres.

By (Sgd.) JAS. P. MORGAN  
Treas.

EXHIBIT 2

3. 233°59' 449.70 feet along same to a point on the north side of the Road; thence
4. 229°15' 207.85 feet along same to a point on the south side of the Road; thence
5. 233°19' 124.80 feet along same to a point on the north side of the Road; thence
6. 238°16' 154.22 feet along north side of Pihana Road to a point; thence
7. 247°00' 47.00 feet along same to a point; thence
8. 257°02' 43.00 feet along same to a point; thence
9. 266°46' 54.35 feet along same to a point; thence
10. 275°38' 135.10 feet along same to a point; thence
11. 269°54' 138.55 feet along same to a point; thence
12. 225°41' 146.40 feet along land owned by W.S.Co. to a point; thence
13. 222°44' 110.70 feet along land owned by W.S.Co. to a point; thence
14. 210°48' 43.00 feet along land owned by W.S.Co. to a point; thence
15. 201°08' 91.00 feet along land owned by W.S.Co. to a point; thence
16. 241°24' 44.00 feet along land owned by W.S.Co. to a point; thence
17. 236°09' 62.15 feet along land owned by W.S.Co. to a point; thence
18. 228°08' 113.45 feet along south side of dirt road to a point; thence

Exhibit 2

**COPY**

ABC Working  
copy

County of Maui  
D.W.S  
Ditch water.

**AGREEMENT CONCERNING WITHDRAWAL FROM THE IAO/WAIKAPU DITCH**

Effective 12/1/04 to 11/30/07

WAILUKU AGRIBUSINESS CO., INC.  
October 27, 2004

To: George Tengan, Director, Department of Water Supply, Via Fax: 270-7951  
From: Clayton Suzuki

Subject: Agreement concerning withdrawal from Iao-Waikapu Ditch

Effective December 1, 2004 please send data of water used from the Iao-Waikapu Ditch per item #3 of the Iao-Waikapu Ditch agreement dated June 9, 2004.

Wailuku Agribusiness Co.

Attention: Fred Tacla, fax: 242-7068/phone: 244-7051

255 East Waiko Road

Wailuku, Hawaii 96793

Please call me should there be questions at 244-2208.

CC: Fred Tacla, WACI

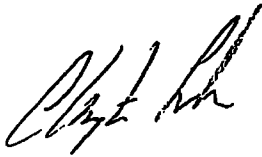


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AGREEMENT CONCERNING WITHDRAWAL FROM THE IAO/WAIKAPU DITCH

THIS AGREEMENT, made and entered into this 9th day of June, 2004, by and among WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose mailing address is 255 East Waiko Road, Wailuku, Hawaii 96793, referred to as "Wailuku", and the COUNTY OF MAUI, through its DEPARTMENT OF WATER SUPPLY, whose principal place of business and mailing address is 200 South High Street, Wailuku, Hawaii 96793, referred to as "DWS".

WITNESSETH:

WHEREAS, on December 1, 2002, the Board of Water Supply of the County of Maui entered into an agreement with Alexander & Baldwin, Inc., Hawaii Commercial and Sugar Company, Inc., Wailuku Agribusiness Co., Inc., pursuant to which the Department of Water Supply has had the ability to withdraw from the Iao/Waikapu Ditch up to 1,500,000 gallons of water per 24 hour period;

WHEREAS, the December 1, 2002 Agreement between Board of Water Supply and the referenced parties will terminate on November 30, 2004;

WHEREAS, DWS has requested Wailuku to permit DWS to continue to withdraw surface water from the Iao/Waikapu Ditch for the purpose of easing the demand on the Iao Aquifer ground water resources; and

WHEREAS, such water currently is being used by Wailuku; and

WHEREAS, Wailuku is willing to provide such water in order to accommodate DWS;

NOW, THEREFORE, IN CONSIDERATION of mutual promises and agreements of the parties, the parties hereto agree as follows:

- 1. Term. The term of this Agreement shall be three years, beginning December 1, 2004 and ending November 30, 2007.
2. Water. From the water collected by Wailuku in the Iao/Waikapu Ditch system. Wailuku shall make available to DWS, at the location along the Iao/Waikapu Ditch, as identified in Exhibit "A", attached hereto and incorporated herein by reference (the "Delivery Point"), which location is downstream (but not within 25 feet) of the existing Iao/Waikapu Ditch gauging station, up to Three Million Two Hundred Thousand (3,200,000) gallons of water per twenty-four hour period; provided, however, that, as soon as possible upon notice from Wailuku or its authorized representative that the flow in Iao Stream is below 11.5 million gallons of water for the immediately-prior twenty-four hour period, as measured by the U. S.



Geological Survey gauging station located at Iao Stream at Kepaniwai Park near Wailuku, DWS shall cease all withdrawal hereunder from Iao/Waikapu Ditch for so long as the Iao Stream flow remains below 11.5 million gallons of water per twenty-four hour period. As soon as possible, Wailuku will provide written notice to DWS when the flow in Iao Stream exceeds 11.5 million gallons for a 24 hour period, such that DWS may then continue its withdrawal of water, as authorized hereunder.

The net amount of water withdrawn from the Iao/Waikapu Ditch shall be calculated by DWS from the three meters<sup>1</sup> installed and maintained by DWS, at its sole expense; said meters are located immediately after DWS' intake from the Iao/Waikapu Ditch immediately before DWS' micro-filtration unit, between the micro-filtration unit and the DWS storage tank. DWS shall provide continuous access to Wailuku to the three DWS meters in order for Wailuku to verify the meter readings. DWS shall maintain the meters within two percent (2%) accuracy and test them on a reasonable periodic basis (at least quarterly) and provide such testing results to Wailuku immediately after obtaining such testing results.

3. Charges. In return for the access granted by Wailuku to DWS to Wailuku's water system and for providing the withdrawal of up to 3,200,000 gallons of water available to DWS, for said 24 hour period, DWS shall pay to Wailuku a fixed transportation fee of \$0.48 per thousand gallons delivered. The gallons delivered shall not include water used for back washing, as long as such back washing water is placed back into Wailuku's water system. DWS shall pay the fee, plus the applicable general excise tax on the same. It is the intent of Wailuku and DWS that DWS shall pay for the actual net amount of water withdrawn from the Iao Waikapu Ditch (excluding water used for back washing filters and returned to the Iao/Waikapu Ditch and/or the Waihee Ditch).

Commencing on December 1, 2004, or earlier, as otherwise agreed to by the parties in writing, DWS shall pay the foregoing fees to Wailuku on a monthly basis. The payment shall be made by DWS to Wailuku on or before the 10th day of the month following the month in which the water is withdrawn. Payment of the foregoing fees to Wailuku shall fully and completely satisfy the obligation of DWS for the payment of fees required under this section. Interest rate at 1% per month shall be applied to any late payments. Concurrent with the payment of the fees described in this

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<sup>1</sup> The three meters installed and maintained by DWS include Meter 1 which is the meter from the ditch to the intake; Meter 2 which is the meter from the intake to the filter system; and Meter 3 is the meter from the filter to DWS' tank. The back wash which DWS will not be charged is the volume under Meter 1 (ditch to the intake) minus the volume under Meter 3 (the gallonage from the filter system to the distribution tank). The back wash shall not be charged to DWS as long as DWS places the back wash water to the Iao/Waikapu Ditch system and/or the Waihee Ditch system.

section. DWS shall provide Wailuku with a report disclosing its daily meter readings, from each of the DWS three meters for the month in question, as well as the computation of fees. DWS may avoid transportation fees with regard to water it withdraws from the Iao Waikapu Ditch during testing by returning such water (other than samples taken for testing) to the Iao/Waikapu Ditch or the Waihee Ditch. DWS shall document the taking of the water by testing and the return of the water to either the Iao Waikapu Ditch or the Waihee Ditch. Copies of all test reports shall be provided to Wailuku.

4. License by Wailuku to DWS. Wailuku hereby grants to DWS a license to enter into Wailuku lands identified on Exhibit "A" for the purposes of carrying out DWS' rights to withdraw water from the Iao/Waikapu Ditch under this Agreement. This license shall be coterminous with this Agreement and shall end on November 30, 2007, unless earlier terminated by Wailuku, as provided herein, including any breach by DWS.
5. No Third Party Beneficiaries. Nothing in this Agreement shall be construed as giving any person or entity, other than the parties hereto and their successors and assigns, any right, remedy or claim under or in respect to this Agreement or any provision hereof.
6. Operation of the Micro-Filtration Unit. DWS shall be solely responsible for the operation of its micro-filtration unit, as well as for the repair and maintenance of the unit and the electrical and other costs to operate the unit.
7. Indemnification With Respect to the Use and Quality/Quantity Water. To the extent permitted by law, DWS shall defend, indemnify and hold harmless Wailuku, its subsidiaries and affiliates, including its directors, officers, employees, agents, and representatives from and against any claim, damages or liability, suit or action brought against it (including all costs and expenses resulting therefrom, including reasonable attorney's fees) arising out of or in connection with the use and/or quality and/or quantity of water withdrawn by DWS from the Iao Waikapu Ditch pursuant to this Agreement, including without limitation, any claim for personal injury (or death) or loss of property based upon the use, quality or the quantity of such water withdrawn by DWS.
8. Indemnification With Respect to Use of Premises. To the extent permitted by law, DWS shall defend, indemnify and hold harmless Wailuku against any claim, suit or action, liability, damages incurred or suffered by Wailuku, including all costs and expenses resulting therefrom including reasonable attorney's fees, including without limitation a claim for personal injury or death, or loss of property arising out of or in connection with or based upon use by DWS of the property of Wailuku under this Agreement, including the occupancy by DWS, its employees, agents, contractors, licensees, assignees

of any of Wailuku's lands, whether leased or owned in fee by Wailuku, including but not limited to, roads, trails, the Delivery Point, or the Iao/Waikapu Ditch. To the extent permitted by law, DWS shall reimburse Wailuku for all of its costs and expenses, including reasonable attorneys' fees, incurred in connection with the defense of any such claims, suits or actions.

9. Acceptance of Water Delivered. DWS hereby represents that it accepts the delivery of water from Wailuku at the Delivery Point and the Iao/Waikapu Ditch in its "AS IS" condition.
10. Action by State of Hawaii Commission on Water Resource Management. If during the term of this Agreement the State of Hawaii Commission on Water Resource Management shall by the designation of the Iao/Waikapu Ditch, and/or by the adoption of an instream restoration plan, or other action, reduce the water available to Wailuku, then Wailuku shall have the option at its election, in its sole discretion by written notice to DWS, to terminate this Agreement or to reduce the water available to DWS under this Agreement.
11. Risk of Loss. DWS shall hold all equipment, machinery and other property whatsoever at the micro-filtration unit site and or upon any Wailuku property in connection with this Agreement at its sole risk, and shall save Wailuku harmless from any loss or damage thereto from any cause whatsoever.
12. Public Utility. Neither party shall attempt to have the Public Utilities Commission of the State of Hawaii (PUC) nor any other regulatory agency exercise any regulatory authority over any matter set forth in the Agreement. If the PUC or any other governmental regulatory agency should, exercise any regulatory authority over any matter set out in the Agreement, or seek to obtain regulatory authority over Wailuku, or the Iao/Waikapu Ditch (or any portion thereof) as a result of any matter set forth in the Agreement, or use this Agreement in any manner in support of its attempt so to obtain such regulatory authority, Wailuku may, in its sole discretion, by written notice to DWS, terminate immediately the Agreement, and shall be entitled to enforce such termination through any and all legal means available.
13. Assignment. DWS shall not, without the prior written consent of Wailuku, which consent shall be exercised in their absolute discretion, transfer, assign, mortgage, sublease, sublicense, or otherwise encumber, this Agreement or any portion thereof. No permitted assignment or other transfer of this Agreement or any portion thereof shall relieve DWS of any of its duties or obligations hereunder.

14. Permits. DWS shall obtain all governmental permits, approvals or the like at its sole expense, required for the uses, activities and operations, which are contemplated by this Agreement.
15. Government Regulations. DWS shall observe, perform and comply with all applicable government laws, ordinances, rules and regulations applicable to any of the matters set out in this Agreement. DWS shall observe and perform the terms and conditions of any government permit that it obtains under this Agreement.
16. Condemnation. If at any time any of the property utilized and enjoyed under this Agreement by DWS, including but not limited to, lands owned or controlled by Wailuku in fee or lease, roads and the Iao/Waikapu Ditch, or any portion thereof, are taken or condemned by any authority having the power of eminent domain, then and in every such case, all compensation and damages payable for or on account of any such property shall be paid to and be the property of Wailuku, as appropriate, without any apportionment thereof to DWS, provided that DWS shall be entitled to recover only from the condemning authority compensation and damages payable only for or on account of any improvements erected by DWS on such property and for any and all damage to DWS's business by reason of any condemnation as may be separately awarded. It is hereby expressly agreed that DWS has no estate or interest of any kind or nature whatsoever in such lands which are covered by this Agreement or in the Iao/Waikapu Ditch System. In the event that the condemning authority takes any such land or the Iao/Waikapu Ditch, or any portion thereof, so as to render the purpose of this Agreement impractical, in Wailuku's sole discretion, this Agreement shall terminate, and Wailuku, as applicable, shall be entitled to enforce such termination and condemnation recovery as provided for herein through any and all legal means available.
17. Condition of Premises/Assumption of Risk. DWS hereby agrees and acknowledges that Wailuku has not made or will not make any representations or warranties, implied or otherwise, with respect to the condition of the water and/or lands referred to in Section 2 of this Agreement or of the Iao/Waikapu Ditch, including but not limited to the Delivery Point, including any dangerous or defective conditions existing upon or with respect to such lands and/or to the Iao/Waikapu Ditch, whether or not such conditions are known to Wailuku or reasonably discoverable by DWS. DWS accepts each entry upon such lands and use of the Iao/Waikapu Ditch with full assumption of the risks and consequences of said conditions.
18. No Liens. DWS shall not commit or suffer any act or neglect whereby the land referred to in Section 2 of this Agreement, or the Iao/Waikapu Ditch, including any improvements thereon, or DWS's interest in the same at any time during the term of this Agreement, shall become subject to any attachment, lien, charge or encumbrance whatsoever, and, to the extent

permitted by law, shall indemnify and hold harmless Wailuku against all liens, charges and encumbrances and all expenses resulting therefrom, including reasonable attorney's fees.

19. Hazardous Substances. As used herein, the term "Hazardous Material" means any hazardous, infectious or toxic substances, material or waste so designated or described, presently or in the future, by any environmental law of the United States, the State of Hawaii, or the County of Maui, or so designated or described by any government agency authorized to enforce any such environmental law. DWS shall not cause or permit any Hazardous Material to be brought upon, kept or used at or about the properties which are referred to in Section 2 of this Agreement (which, for the purposes of this Section, are collectively referred to as the "Premises"). If the presence of Hazardous Material at the Premises caused or permitted by DWS results in the contamination of the Premises or the Iao/Waikapu Ditch by Hazardous Materials otherwise occurs for which DWS is liable to Wailuku for damages resulting therefrom, then, to the extent permitted by law, DWS shall indemnify and defend Wailuku from any and all resulting claims, judgments, damages, penalties, fines, costs and liabilities or losses (including without limitation, diminution in value of the Premises or the Iao/Waikapu Ditch, damage for the loss or restriction on use of any part of the Premises or the Iao/Waikapu Ditch, attorney's fees and expert fees). Such obligation of DWS to so indemnify Wailuku includes, without limitation, any liability incurred in connection with any investigation of site conditions or any clean-up, and any remedial removal or restoration work required, because of any Hazardous Material being present in the soil or ground water on or under the Premises. Without limiting the foregoing, if the presence of any Hazardous Material at the Premises caused or permitted by DWS results in any contamination of the Premises or Iao/Waikapu Ditch, DWS shall promptly take all actions at its sole expense necessary to return the Premises or Iao/Waikapu Ditch to the condition existing prior to the introduction of any such Hazardous Material.
20. Shutdown of Ditch. Nothing in this Agreement shall be deemed to prevent Wailuku from shutting down all or part of the Iao/Waikapu Ditch system permanently or temporarily, as necessary or desirable in Wailuku's sole and absolute determination because of repair work being done to the Iao/Waikapu Ditch system, or because of operational or safety concerns, there being no representation, warranty or guaranty by this Agreement that Wailuku will continue to operate the Iao/Waikapu Ditch. In the event of a permanent shutdown, this Agreement shall be deemed terminated. If a shutdown is temporary, this Agreement shall be suspended for the duration of the shutdown.

21. **Force Majeure.** Wailuku shall not be responsible for any failure to make available the water that is the subject of this Agreement, if such failure arises out of or results from an event of force majeure including, without limitation, Act of God, strike or other labor trouble, national emergency, war, riot or other civil disturbance, sabotage, failures or delays in transportation, inability to secure raw materials, parts or supplies, rules, regulations, orders or directives of any governmental authority or the order of any court of competent jurisdiction, or any other cause, contingency or circumstance not subject to either of its reasonable control which prevents or hinders the availability of the water.
22. **Termination of Agreement.** Wailuku may terminate this Agreement in the event that DWS is in default under this Agreement by failing to observe or perform any or all of the covenants contained in the Agreement.
23. **Power and Authority:** Wailuku has the full power to consummate the transaction provided for in this Agreement. The execution and delivery of this Agreement by Wailuku has been duly and validly authorized by the necessary corporate action on the part of Wailuku and this Agreement constitutes the legal, valid and binding obligation of Wailuku.
- DWS has the full power to consummate the transactions provided for in this Agreement. The execution and delivery of this Agreement by DWS and the consummation of the transactions herein have been duly and validly authorized by the necessary action on the part of DWS and this Agreement constitutes the legal, valid and binding obligation by DWS.
24. **Independent Contractors.** The parties understand and agree that each of them has entered upon this Agreement as an independent contractor. The parties do not intend to create a partnership or joint venture between or among them by this Agreement. The parties do not intend to create a principal and agent relationship between or among them by this Agreement. No party has any authority or power to act as the agent for or bind the other in respect to any matter whatsoever.
25. **Notices.** Any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been delivered when (i) personally delivered, (ii) sent by facsimile transmission, or (iii) sent by certified or registered mail, postage prepaid, return receipt requested, to the address or facsimile number as the party to whom notice is to be given may provide in a written notice to the other parties. Notice also shall be deemed to have been delivered when given pursuant to more expeditious means, such as telephone or e-mail, as mutually agreed upon by the parties. If such more expeditious means is by other than written means, subsequent written notice shall be delivered pursuant to (i), (ii) or (iii) above within twenty-four hours.

If to DWS:

Department of Water Supply  
County of Maui  
200 South High Street  
Wailuku, Hawaii 96793  
Attn: Director, Department of Water Supply  
Facsimile No.: (808) 270-7951

or

Water Treatment Plant Operations Manager  
614 Palapala Drive  
Kahului, Hawaii 96732  
Facsimile No.: (808) \_\_\_\_\_

with copy to:

Department of the Corporation Counsel  
County of Maui  
200 South High Street  
Wailuku, Hawaii 96793  
Attn: Edward S. Kushi, Jr., Deputy Corporation Counsel  
Facsimile No.: (808) 270-7152

If to Wailuku:

Wailuku Agribusiness Co., Inc.  
255 East Waiko Road  
Wailuku, Hawaii 96793  
Attn: Avery B. Chumbley  
Facsimile No.: (808) 242-7068

with copy to:

C. Brewer and Company, Limited  
P. O. Box 1826  
Papaikou, Hawaii 96781-1826  
Attn: General Counsel  
Facsimile No.: (808) 964-8426

and with copy to:

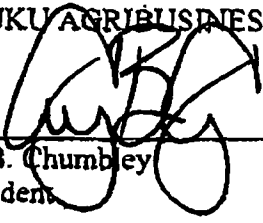
Mancini, Welch & Geiger, LLP  
33 Lono Avenue Suite 470  
Kahului, Hawaii 96732  
Attn: Paul R. Mancini  
Facsimile No.: (808) 871-0732

- 26. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.
- 27. Facsimile. Fax (facsimile) copies of this executed Agreement shall be fully binding and effective for all purposes whether or not original executed documents are transmitted to Escrow. Fax signatures on documents will be treated the same as original signatures. However, each party agrees that it will promptly forward originally executed agreements to each other.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed on the date first above written.

WAILUKU:

WAILUKU AGRIBUSINESS CO., INC.

  
 \_\_\_\_\_  
 Avery B. Chumbley  
 Its President

  
 \_\_\_\_\_  
 Beverly Y. Crudele  
 Its Secretary

DWS:

COUNTY OF MAUI

\_\_\_\_\_  
 Alan M. Arakawa  
 Its Mayor



DWS:

COUNTY OF MAUI

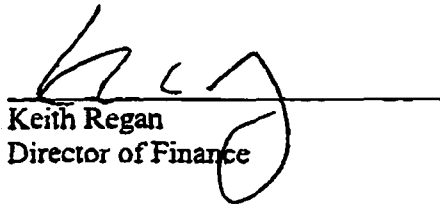


Alan M. Arakawa  
Its Mayor

**APPROVAL RECOMMENDED:**



George V. Tengan  
.. Director of Water Supply



Keith Regan  
Director of Finance

APPROVED AS TO FORM  
AND LEGALITY:



Edward S. Kushi, Jr.

(Please type or print name above)



Corporation Counsel  
County of Maui

STATE OF HAWAII )  
 ) SS.  
COUNTY OF HAWAII )

On this 19<sup>th</sup> day of May, 2004, before me appeared  
AVERY B. CHUMBLEY and BEVERLY Y. CRUDELE, to me personally known, who being  
by me duly sworn or affirmed, that they are the PRESIDENT and SECRETARY, respectively, of  
Wailuku Agribusiness Co., Inc., a Hawaii corporation, and that the foregoing instrument is the  
corporate seal of said corporation by authority of its Board of Directors, and said officers  
acknowledged said instrument to be free act and deed of said corporation.

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

Nora Rosario L.S.  
Name: Nora Rosario  
Notary Public, State of Hawaii

My commission expires: 12-13-2006

STATE OF HAWAII )  
 )SS.  
COUNTY OF MAUI )

On this            day of JUN 9 2004, 2004, before me 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, in the capacity shown, having been duly authorized to execute such instrument in such capacity, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed in behalf of said County of Maui by authority of its Charter, 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.

*Linda K. Yamashiro*

Notary Public, State of Hawaii

Print Name: LINDA K. YAMASHIRO

My commission expires: 10/17/06

15

# Exhibit "A"

TMK 3-5-01:01 WAIWAKU AGRIBUSINESS CO INC.

APDR 2,500 feet

County of Maui  
Department of Water Supply  
License Use Area  
Surface Water Agreement

IAD/Waikapu Ditch

TMK 3-5-01:07  
HAWAII LAND FARMING

LCAM

387

PART 5 SECTION 1

ALLEY

GRANT TO EDWARD BAILEY 172

LCAM 375 TO KERIPI

Ditch in T-10  
area

5  
± ACS



AMENDMENT TO AGREEMENT CONCERNING  
WITHDRAWAL FROM THE IAO/WAIKAPU DITCH

This Amendment is made this 29th day of November,  
2007, by and between WAILUKU WATER COMPANY, LLC, a Hawaii  
limited liability company (successor in interest to Wailuku  
Agribusiness Co., Inc.), whose address is 255 E. Waiko Road,  
Wailuku, Hawaii 96793, hereinafter referred to as "Wailuku", and  
the COUNTY OF MAUI, through its DEPARTMENT OF WATER SUPPLY,  
whose address is 200 S. High Street, Wailuku, Hawaii 96793,  
hereinafter referred to as "DWS",

WITNESSETH:

WHEREAS, Wailuku Agribusiness Co., Inc. and DWS  
entered into that certain unrecorded Agreement Concerning  
Withdrawal from the Iao/Waikapu Ditch dated June 9, 2004,  
hereinafter called "Agreement", wherein Wailuku Agribusiness  
Co., Inc. allowed DWS to withdraw surface water from the  
Iao/Waikapu Ditch for the purpose stated in said Agreement; and

WHEREAS, Wailuku Agribusiness Co., Inc. assigned its  
interest in said Agreement to Wailuku; and

WHEREAS, Wailuku and DWS wish to amend the Agreement  
with respect to the term of the Agreement;

NOW, THEREFORE, the parties hereto agree that the  
Agreement is hereby amended to extend the term of the Agreement  
from December 1, 2007 to February 29, 2008.

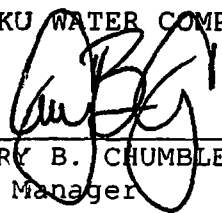
No other amendments are made herein, and Wailuku and DWS do hereby ratify, confirm and acknowledge as being in full force and effect all of the terms and conditions of the Agreement not amended hereby.

The parties hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts. For all purposes, including, without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

IN WITNESS WHEREOF, Wailuku and DWS have executed this instrument the day and year first above written.

WAILUKU WATER COMPANY, LLC

By

  
\_\_\_\_\_  
AVERY B. CHUMBLEY  
Its Manager

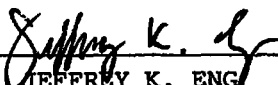
"Wailuku"

COUNTY OF MAUI, through its  
DEPARTMENT OF WATER SUPPLY

By   
CHARMAINE TAVARES  
Its Mayor

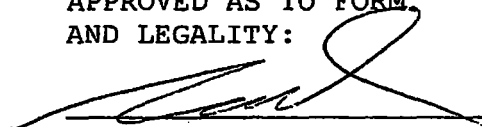
"DWS"

APPROVAL RECOMMENDED:

  
JEFFREY K. ENG  
Director of Water Supply

  
KELBERT K. YOUNG  
Director of Finance

APPROVED AS TO FORM  
AND LEGALITY:

  
Deputy Corporation Counsel  
County of Maui

STATE OF HAWAII )  
 ) SS.  
COUNTY OF MAUI )

On this 29<sup>th</sup> day of November, 2007, before me personally appeared AVERY B. CHUMBLEY, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

V.S.

  
Print Name: Genanne L. Anzola  
Notary Public, State of Hawaii.

My commission expires: August 15, 2010

STATE OF HAWAII )  
 ) SS.  
COUNTY OF MAUI )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me appeared CHARMAINE TAVARES, to me personally known, who, being by me duly sworn, did say that she is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to said instrument is the lawful seal of said County of Maui, and that the instrument was signed and sealed in 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 that the said CHARMAINE TAVARES acknowledged 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.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Notary Public, State of Hawaii.

My commission expires: \_\_\_\_\_



STATE OF HAWAII )  
 ) SS.  
COUNTY OF MAUI )

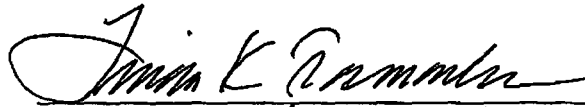
On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared AVERY B. CHUMBLEY, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

Print Name: \_\_\_\_\_  
Notary Public, State of Hawaii.  
My commission expires: \_\_\_\_\_

STATE OF HAWAII )  
 ) SS.  
COUNTY OF MAUI )

On this 30 day of November, 2007, before me appeared CHARMAINE TAVARES, to me personally known, who, being by me duly sworn, did say that she is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to said instrument is the lawful seal of said County of Maui, and that the instrument was signed and sealed in 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 that the said CHARMAINE TAVARES acknowledged 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.

  
Print Name: LINDA K. TAMASHIRO  
Notary Public, State of Hawaii.

My commission expires: 10/19/2010

**SECOND AMENDMENT TO AGREEMENT CONCERNING  
WITHDRAWAL FROM THE IAO/WAIKAPU DITCH**

This Amendment is made this 27 day of February, 2008, by and between WAILUKU WATER COMPANY, LLC, a Hawaii limited liability company (successor in interest to Wailuku Agribusiness Co., Inc.), whose address is 255 East Waiko Road, Wailuku, Maui, Hawaii, 96793, hereinafter referred to as "Wailuku", and the COUNTY OF MAUI, through its DEPARTMENT OF WATER SUPPLY, whose address is 200 South High Street, Wailuku, Maui, Hawaii, 96793, hereinafter referred to as "DWS".

**W I T N E S S E T H:**

WHEREAS, Wailuku Agribusiness Co., Inc. and DWS entered into that certain unrecorded Agreement Concerning Withdrawal from the Iao/Waikapu Ditch dated June 9, 2004, hereinafter called "Agreement", wherein Wailuku Agribusiness Co., Inc. allowed DWS to withdraw surface water from the Iao/Waikapu Ditch for the purpose stated in said Agreement; and

WHEREAS, Wailuku Agribusiness Co., Inc. assigned its interest in said Agreement to Wailuku; and

WHEREAS, by agreement entitled "Amendment to Agreement Concerning Withdrawal from the Iao/Waikapu Ditch" dated November 29, 2007, the parties amended the Agreement by extending the term of the Agreement to February 29, 2008; and

WHEREAS, Wailuku and DWS wish to further amend the Agreement with respect to the term of the Agreement;

NOW, THEREFORE, the parties hereto agree that the Agreement is hereby amended to extend the term of the Agreement from March 1, 2008 to March 1, 2011, provided, however, as to the payment for the delivery of water by Wailuku to DWS, the price for delivery shall be amended to equal the tariff rate applicable to DWS, as determined by the Public Utility Commission (P.U.C.) of the State of Hawaii in Docket No. 2008-0025; said rate to commence upon on final order of the P.U.C. under the referenced docket, provided further the volume of water required to be delivered by Wailuku to DWS under this Agreement can be amended by Wailuku, at its discretion, after the Commission on Water Resource Management has determined the Interim Instream Flow Standards under Case No. CCH-MA06-01. Such modified volume shall be effective upon written notice of the same by Wailuku to DWS.

Wailuku and DWS agree that it is necessary for DWS to make certain changes to its in-take from the Iao/Waikapu Ditch in order for DWS to effectively withdraw surface water from the Iao/Waikapu Ditch for the purpose stated in this Agreement. DWS covenants that it will design such changes, such design being subject to Wailuku's reasonable written approval of the same, and DWS will complete the construction of such approved changes at its sole expense no later than six (6) months from the date of this Second Amendment. Failure by DWS to complete such

construction within said six (6) month period shall result in the right of Wailuku to terminate this Agreement by written notice to DWS.

No other amendments are made herein, and Wailuku and DWS do hereby ratify, confirm and acknowledge as being in full force and effect all of the terms and conditions of the Agreement not amended hereby.

IN WITNESS WHEREOF, Wailuku and DWS have executed this instrument the day and year first above written.

WAILUKU WATER COMPANY, LLC

By: 

\_\_\_\_\_  
AVERY B. CHUMBLEY  
Its Manager

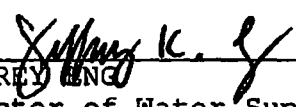
"Wailuku"

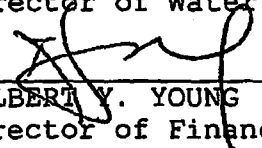
COUNTY OF MAUI

By: 

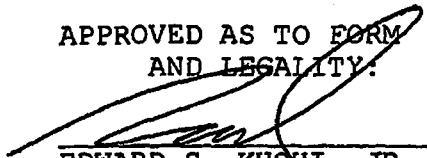
\_\_\_\_\_  
CHARMAINE TAVARES  
Its Mayor

APPROVAL RECOMMENDED:

  
\_\_\_\_\_  
JEFFREY KING  
Director of Water Supply

  
\_\_\_\_\_  
KALBERT V. YOUNG  
Director of Finance

APPROVED AS TO FORM  
AND LEGALITY:

  
\_\_\_\_\_  
EDWARD S. KUSHI, JR.  
Deputy Corporation Counsel  
County of Maui

STATE OF HAWAII            )  
  )SS.  
COUNTY OF MAUI            )

On this 27 day of February, 2008, before me personally appeared CHARMAINE TAVARES, to me personally known, who, being by me duly sworn or affirmed, did say that she 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 said instrument was signed and sealed in behalf of said County of Maui by authority of its Charter, and the said CHARMAINE TAVARES 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

**LINDA K. TAMASHIRO**

Print Name: \_\_\_\_\_

My commission expires: 10/19/2010

LS

**THIRD AMENDMENT TO AGREEMENT CONCERNING  
WITHDRAWAL FROM THE IAO/WAIKAPU DITCH**

This Amendment is made this 30<sup>th</sup> day of January, 2014, by and between WAILUKU WATER COMPANY, LLC, a Hawaii limited liability company (successor in interest to Wailuku Agribusiness Co., Inc.), whose address is P.O. Box 2790, Wailuku, Maui, Hawaii, 96793, hereinafter referred to as "Wailuku", and the COUNTY OF MAUI, through its DEPARTMENT OF WATER SUPPLY, whose address is 200 South High Street, Wailuku, Maui, Hawaii, 96793, hereinafter referred to as "DWS".

**WITNESSETH:**

WHEREAS, Wailuku Agribusiness Co., Inc. and DWS entered into that certain unrecorded Agreement Concerning Withdrawal from the Iao/Waikapu Ditch dated June 9, 2004, hereinafter called "Agreement", wherein Wailuku Agribusiness Co., Inc. allowed DWS to withdraw surface water from the Iao/Waikapu Ditch for the purpose stated in said Agreement; and

WHEREAS, Wailuku Agribusiness Co., Inc. assigned its interest in said Agreement to Wailuku; and

WHEREAS, by agreement entitled "Amendment to Agreement Concerning Withdrawal from the Iao/Waikapu Ditch" dated November 29, 2007, the parties amended the Agreement by extending the term of the Agreement to February 29, 2008; and

WHEREAS, in February 2008 by an agreement entitled "Second Amendment to Agreement Concerning Withdrawal from the Iao/Waikapu Ditch", the parties extended the terms of the Agreement to March 1, 2011; and

WHEREAS, the parties have continued the Agreement and abided by the terms of the

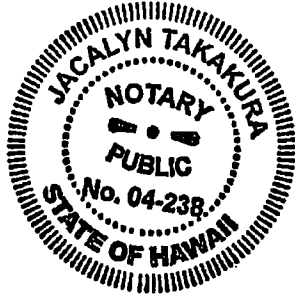
Agreement as of this date; and,

WHEREAS, Wailuku and DWS wish to further amend the Agreement with respect to the term of the Agreement;

NOW, THEREFORE, the parties hereto agree that the Agreement is hereby amended to extend the term of the Agreement from March 1, 2011 to February 28, 2018, provided, however, as to the payment for the delivery of water by Wailuku to DWS, the price for delivery shall be amended to equal the tariff rate applicable to DWS, as determined by the Public Utility Commission (P.U.C.) of the State of Hawaii in Docket No. 2008-0025, said rate to commence upon on final order of the P.U.C. under the referenced docket; Provided further, the volume of water required to be delivered by Wailuku to DWS under this Agreement may be amended by Wailuku, at its discretion, after the Commission on Water Resource Management (the "Commission") has determined the Interim Instream Flow Standards, which determination by the Commission is currently pending. The amount of water to be delivered shall only be amended to the extent required by the Commission and no more. Lastly, the volume of water to be delivered may be amended by Wailuku, in its discretion, pursuant to the volume of water provided to DWS under the surface water use permit to be issued to DWS by the Commission. Such modified volume shall be effective upon written notice of the same by Wailuku to DWS, provided such volume shall not be less than the volume of water permitted to be delivered under said surface water use permit.

No other amendments are made herein, and Wailuku and DWS do hereby ratify, confirm and acknowledge as being in full force and effect all of the terms and conditions of the Agreement not amended hereby.

IN WITNESS WHEREOF, Wailuku and DWS have executed this instrument the day and year first above written.



WAILUKU WATER COMPANY, LLC

By:

  
AVERY B. CHUMBLEY  
Its Manager

"Wailuku"

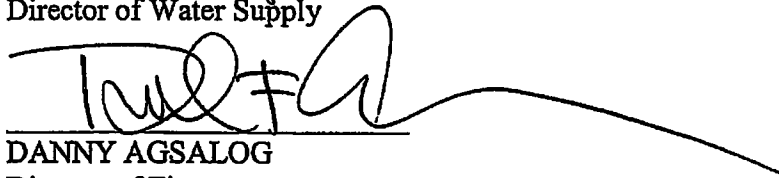
COUNTY OF MAUI

By:


  
ALAN ARAKAWA  
Its Mayor

APPROVAL RECOMMENDED:

  
DAVID TAYLOR  
Director of Water Supply

  
DANNY AGSALOG  
Director of Finance

APPROVED AS TO FORM  
AND LEGALITY:

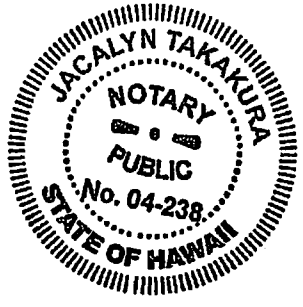
  
for EDWARD S. KUSHI, JR.  
Deputy Corporation Counsel  
County of Maui



STATE OF HAWAII )  
County of Maui )SS.

On this 29<sup>th</sup> day of January, 20 14, before me personally appeared Avery Chumbley, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

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



Jacalyn Takakura  
Notary Public, State of Hawaii  
Print Name: Jacalyn Takakura  
My commission expires: 05/02/16

Doc. Date: Undated # Pages: 5  
Name: Jacalyn Takakura Second Circuit  
Doc. Description: Third Amendment to Agreement concerning Withdrawal from the Iao/Waikapu Ditch

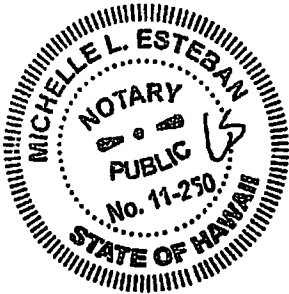
Jacalyn Takakura 1/29/14  
Notary Signature Date

NOTARY CERTIFICATION

STATE OF HAWAII )  
 )SS.  
COUNTY OF MAUI )

On this 30<sup>th</sup> day of January, 20 14, before me personally appeared ALAN ARAKAWA, to me personally known, who, being by me duly sworn or affirmed, did say that ~~she~~<sup>he was/VP</sup> 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 said instrument was signed and sealed in behalf of said County of Maui by authority of its Charter, and the said ALAN 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.



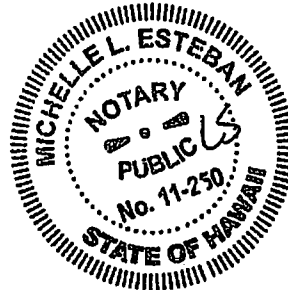
Michelle L. Esteban  
Notary Public, State of Hawaii

Print Name: MICHELLE L. ESTEBAN

My commission expires: 8-14-2015

Doc. Date: 1/30/2014 # Pages: 5  
Michelle L. Esteban Second Circuit  
Doc. Description: 3rd Amendment  
Withdrawal from the 601  
Waikapu Ditch  
Michelle L. Esteban 1/30/2014  
Notary Signature Date

NOTARY CERTIFICATION



inconsistent with these objectives.

(l) The commission may designate certain uses in connection with a particular source of supply which, because of the nature of the activity or the amount of water required, would constitute an undesirable use for which the commission may deny a permit under the provisions of part IV.

(m) The commission may also designate certain uses in connection with a particular source of supply which, because of the nature of the activity or amount of water required, would result in an enhancement or improvement of the water resources of the area. Such uses shall be preferred over other uses in any action pursuant to sections 174C-50(h) and 174C-54.

(n) The commission may add to the Hawaii water plan any other information, directions, or objectives it feels necessary or desirable for the guidance of the counties in the administration and enforcement of this chapter.

(o) In formulating or revising the plans, each county and the commission shall consult with and carefully evaluate the recommendations of concerned federal, state, and county agencies.

(p) The commission shall not adopt, approve, or modify any portion of the Hawaii water plan which affects a county or any portion thereof without first holding a public hearing on the matter on the island on which the water resources are located. At least ninety days in advance of such hearing, the commission shall notify the affected county and shall give notice of such hearing by publication within the affected region and statewide.

(q) In formulating or revising each county's water use and development plan, the state water projects plan, the water resource protection plan and the water quality plan, each county and the commission shall incorporate the current and foreseeable development and use needs of the department of Hawaiian home lands for water as provided in section 221 of the Hawaii Homes Commission Act.

Each county shall update and modify its water use and development plans as necessary to maintain consistency with its zoning and land use policies. [L 1987, c45, pt of §2; am L 1988, c 276, §1; am L 1991, c 325, §6; am L 1998, c 101, §1; am L 1999, c 197, §2; am L 2008, c 233, §10]

**§174C-32 Coordination.** (a) Respective portions of the water resource protection and water quality plans, and the water use and development plans of each county, shall be developed together to achieve maximum coordination.

(b) The development of the Hawaii water plan or any portion thereof shall proceed in coordination with and with attention to the Hawaii state plan described in chapter 226.

(c) The Hawaii water plan and its constituent parts, except for the water quality plan, shall be adopted by the commission not later than three years from July 1, 1987. The commission shall receive the water quality plan from the department of health and incorporate this part in the Hawaii water plan. [L 1987, c 45, pt of §2; am L 1999, c 197, §3]

## PART IV. REGULATION OF WATER USE

**§174C-41 Designation of water management area.** (a) When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.

(b) The designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission. The chairperson, after consultation with the

appropriate county council, county mayor, and county water board, shall act upon the petition by making a recommendation for or against the proposed designation to the commission within sixty days after receipt of the petition or such additional time as may be reasonably necessary to determine that there is factual data to warrant the proposed designation.

(c) Designated ground water areas established under chapter 177, the Ground Water Use Act, and remaining in effect on July 1, 1987, shall continue as water management areas. [L 1987, c 45, pt of §2; am L 1999, c 197, §4]

**§174C-42 Notice; public hearing required.** When a recommendation for designation of a water management area has been accepted, the commission shall hold a public hearing at a location in the vicinity of the area proposed for designation and give public notice of the hearing setting forth:

- (1) A description of the land area proposed to be designated in terms of appropriate legal subdivisions and tax map keys;
- (2) The purpose of the public hearing; and
- (3) The time, date, and place of the public hearing where written or oral testimony may be submitted and heard.

The notice shall be given once each week for three successive in the appropriate county and the last notice shall be not less than ten days nor more than thirty days before the date set for the hearing. The notice of public hearing shall be considered as sufficient notice to all landowners and water users who might be affected by the proposed designation. [L 1987, c 45, pt of §2; am L 1998, c 2 §43]

**§174C-43 Investigations required.** Before any proposed water management area is designated by the commission, the chairperson may conduct, cooperate with the appropriate federal or county water agency in conducting, or administer contracts for the conduct of, any scientific investigation or study deemed necessary for the commission to make a decision to designate a water management area. In connection with such investigation or study, the chairperson from time to time may require reports from water users as to the amount of water being withdrawn and as to the manner and extent of the beneficial use. Such reports shall be made on forms furnished by the commission. [L 1987, c 45, pt of §2; am L 1999, c 197, §5]

**§174C-44 Ground water criteria for designation.** In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per cent of the sustainable yield of the proposed ground water management area;
- (2) There is an actual or threatened water quality degradation as determined by the department of health;
- (3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;
- (4) Whether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upconing or encroachment of salt water;
- (5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;
- (6) Whether excessive preventable waste of ground water is occurring;
- (7) Serious disputes respecting the use of ground water resources are occurring; or
- (8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the commission, in one of the above conditions.

Notwithstanding an imminent designation of a ground water management area conditioned on a rise in the rate of ground water withdrawal to a level of ninety per cent of the area's sustainable yield, the commission, when such level reaches the eighty per cent level of the sustainable yield, may invite the participation of water users in the affected area to an informational hearing for the purposes of assessing the ground water situation and devising mitigative measures. [L 1987, c 45, pt of §2; am L 1999, c 197 §6]

**[§174C-45] Surface water criteria for designation.** In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;
- (2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or
- (3) Serious disputes respecting the use of surface water resources are occurring. [L 1987, c 45, pt of §2]

**§174C-46 Findings of fact; decision of commission.** After public hearing and any investigations deemed necessary have been completed, the chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall make a recommendation to the commission for decision. The commission shall render its decision within ninety days after the chairperson's recommendation to the commission. If the commission decides to designate a water management area, it shall cause a public notice of its decision to be given in the appropriate county and when so given, its decision shall be final unless judicially appealed. [L 1987, c 45, pt of §2; am L 1998, c 2, §44 and C 101, §3; am L 1999, c 197, §7]

**[§174C-47] Modifying and rescinding designated areas.** The modification of the boundaries or the rescinding of existing water management areas by the commission may be initiated by the chairperson or by a petition to the commission by any person with proper standing. The procedure for modifying the boundaries of an existing water management area or for rescinding an existing water management area shall be substantially similar to that for the designation of a water management area. [L 1987, c 45, pt of §2]

**[§174C-48] Permits required.** (a) No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission. However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water. An existing use in newly designated areas may be continued until such time as the commission has acted upon the application subject to compliance with section 174C-51.

(b) In its regulation of water resources in designated water management areas, the commission shall delegate to the county boards of water supply the authority to allocate the use of water for municipal purposes, subject to the limits of water supply allocated to the county boards of water supply in their role as water purveyors. [L 1987, c 45, pt of §2]

**[§174C-49] Conditions for a permit.** (a) To obtain a permit pursuant to this part, the applicant shall establish that the proposed use of water:

- (1) Can be accommodated with the available water source;
- (2) Is a reasonable-beneficial use as defined in section 174C-3;

- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;
- (5) Is consistent with state and county general plans and land use designations;
- (6) Is consistent with county land use plans and policies; and
- (7) Will not interfere with the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act.

(b) Within sixty days after receipt of a notice of a permit application, the county shall inform the commission if the proposed use is inconsistent with county land use plans and policies.

(c) The common law of the State to the contrary notwithstanding, the commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed from which it is taken if the commission determines that such transport and use are consistent with the public interest and the general plans and land use policies of the State and counties.

(d) The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided that all presently existing legal uses of water shall be protected.

(e) All permits issued by the commission shall be subject to the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act, whether or not the condition is explicitly stated in the permit. [L 1987, c 45, pt of §2; am L 1991, c 325, §7]

**§174C-50 Existing uses.** [2001 amendment retroactive to July 1, 1987. L 2001, c 10, §3] (a) All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).

(b) After publication as provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria in subsection (a) are met and the existing use is reasonable and beneficial.

Whether the existing use is a reasonable-beneficial use and is allowable under the common law of the State shall be determined by the commission after a hearing; provided that the commission may make such a determination without a hearing, if the quantity of water applied for does not exceed an amount per month established by rule or if the quantity of water applied for exceeds an amount per month established by rule, but no objection to the application is filed by any person having standing to file an objection. In determining whether an application does not exceed the amount per month established by rule, the commission shall consider an average of water use over the three-month period immediately preceding the filing of the application.

(c) An application for a permit to continue an existing use must be made within a period of one year from the effective date of designation. Except for appurtenant rights, failure to apply within this period creates a presumption of abandonment of the use, and the user, if the user desires to revive the use, must apply for a permit under section 174C-51. If the commission determine that there is just cause for the failure to file, it may allow a late filing. However, the commission may not allow a late filing more than five years after the effective date of rules implementing this chapter. The commission shall send two notices, one of which shall be by registered mail, to existing users to file for an application for a permit to continue an existing use.

(d) An application shall be acted upon by the commission within ninety calendar days of an application not requiring a hearing, or within one hundred eighty calendar days of an application requiring a hearing. The time periods prescribed in this subsection shall not be deemed to run for any period in which an application is not complete in all material respects in the judgment of the commission.

(e) The commission shall issue an interim permit; provided that the existing use meets the conditions of subsection (b). The commission shall also issue an interim permit for an

estimated, initial allocation of water if the quantity of water consumed under the existing use is not immediately verifiable, but the existing use otherwise meets the conditions of subsection (b) for a permit of an interim permit. An interim permit is valid for such time period specified therein. The commission may issue successive interim permits of limited duration. Interim permits are subject to revocation under section 174C-58. Whenever interim permits are to be issued, the time periods specified in subsection (d) apply to the issuance or nonissuance of interim permits.

(f) A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use. The quantity being consumed shall be determined and verified by the best available means not unduly burdensome on the applicant, as determined by the commission. The commission may prescribe the installation of metering or gauging devices, and, if so prescribed, such metering or gauging devices shall be in place and operational for at least one year before a determination is made as to the quantity of water being consumed in an existing use and a final permit is issued.

(g) If an interim permit is issued pending verification of the actual quantity of water being consumed under the existing use, a final determination of that quantity shall be made within five years of the filing of the application to continue the existing use. In the final determination, the commission may increase or reduce the amount initially granted the permittee.

(h) Two or more existing uses of water are deemed to be competing when they draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. If applications are made to continue existing uses which are competing and the uses otherwise meet the requirements of subsection (b), the commission shall hold a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use.

(i) A permit user of water with a continuous reduced water usage shall be given priority to reobtain its permitted level of water usage over any other application; provided that the use remains the same and is reasonable and beneficial and water is available. [L 1987, c 45, pt of §2; am L 1999, c 197, §8; am L 2001, c 10, §1]

**[§174C-51] Application for a permit.** All permit applications filed under this part shall contain the following:

- (1) The name and address of the applicant and landowner; provided that:
  - (A) In the event the applicant is an association, organization, partnership, trust, corporation, or any other legal entity doing business in Hawaii, the address of its principal place of business shall be stated in the application; and
  - (B) In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit;
- (2) The date of application;
- (3) The water source of the water supply;
- (4) The quantity of water requested;
- (5) The use of the water and any limitations thereon;
- (6) The location of the use of water;
- (7) The location of the well or point of diversion; and
- (8) Such other relevant information that the commission may request from time to time.

The commission in its discretion may allow a person to apply for several related withdrawals in the same application for a water permit. [L 1987, c 45, pt of §2]

**[§174C-51.5] Dual line water supply systems; installation in new industrial and commercial developments located in designated water management areas.** (a) The

commission, as a condition for issuing permits pursuant to this part, may require the use of dual line water supply systems in new industrial and commercial developments located in designated water management areas. The commission shall not require the use of dual line water supply systems if:

- (1) There is a threat to existing water quality or to public health and safety, as determined by the department of health;
  - (2) A source of nonpotable water will not be reasonably available in the near future as determined by the commission; or
  - (3) There is a serious threat to permitted ground or surface water uses within a designated water management area as determined by the commission.
- (b) The county boards of water supply, in consultation with the department of health, shall adopt standards for nonpotable water distributed through dual line water supply systems, and rules regarding the use of nonpotable water. The standards and rules shall be adopted in accordance with Chapter 91 and shall protect existing water quality and the health and safety of the public.
- (c) For the purposes of this section, the term:

“Developments” means one or more commercial or industrial subdivisions approved after May 30, 2000. It shall not apply to any modification, addition to, or replacement of, any commercial or industrial subdivision in existence prior to May 30, 2000.

“Dual line water supply system” means a supply system that distributes potable and nonpotable water through parallel but separate distribution lines. [L 2000, c 144, §2]

**[§174C-52] Notice.** (a) Upon receipt of the application, the commission shall cause a notice thereof to be published in a newspaper having general circulation within the affected area. The notice shall be published at least once a week for two consecutive weeks. In addition, the commission shall cause a copy of such notice to be sent to any person who has filed a written request for notification of any pending applications affecting a particular designated area and to the mayor and the water board of the affected county. This notification shall be sent by regular mail before the date of last publication. The commission shall also make available to the public, upon request, a monthly bulletin of all pending applications.

(b) The notice and the monthly bulletin shall contain the name and address of the applicant; the date of filing; the date set for a hearing, if any; the source of the water supply; the quantity of water applied for; the use to be made of the water and any limitations thereon; the place of the use; and the location of the well point or diversion.

(c) The notice shall state that written objections to the proposed permit may be filed with the commission by a specified date. The commission shall establish by rules the time limits within which objections must be filed. The commission, at its discretion, may request further information from either applicant or objectors, and a reasonable time shall be allowed for such responses. Each applicant shall be notified by the commission of the objections filed to an application. [L 1987, c 45, pt of §2]

**[§174C-53] Permit issuance.** (a) The commission shall determine, after a hearing, if required, whether the conditions set forth in section 174C-49(a) have been established; provided that the commission may make such determination without a hearing if the quantity of water applied for does not exceed an average amount per month to be established by rule or if the quantity of water applied for exceeds an average amount per month to be established by rule, but no objection to the application is filed by any person having standing to file an objection.

(b) In acting upon any application, the commission need consider only those objections filed by a person who has some property interest in any land within the hydrologic unit from which the water sought by the applicant is to be drawn or who will be directly and immediately affected by the water use proposed in the application. The commission shall adopt rules governing the filing of objections and the persons having standing to file objections.



(c) An application shall be acted upon within ninety calendar days of an application not requiring a hearing, or within one hundred eighty calendar days of an application requiring a hearing. The time periods prescribed in this section shall not be deemed to run for any period in which an application is not complete in all material respects, in the judgment of the commission.

(d) As a condition for the issuance of a permit the commission may require the permittee to install meters, gauges, or other appropriate measuring devices. [L 1987, c 45, pt of §2]

**[§174C-54] Competing applications.** If two or more applications which otherwise comply with section 174C-49 are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest. [L 1987, c 45, pt of §2]

**[§174C-55] Duration of permits.** Each permit for water use in a designated water management area shall be valid until the designation of the water management area is rescinded, unless revoked as provided in section 174C-58 or modified as provided in section 174C-57. [L 1987, c 45, pt of §2]

**[§174C-56] Review of permits.** At least once every twenty years, the commission shall conduct a comprehensive study of all permits issued under this chapter to determine whether the conditions on such permits are being complied with. The commission shall prepare a formal report to the legislature which shall be available to the public [L 1987, c 45, pt of §2]

**[§174C-57] Modification of permit terms.** (a) A permittee may seek modification of any term of a permit. A permittee who seeks to change the use of water subject to the permit, whether or not such change in use is of a material nature, or to change the place of use of the water or to use a greater quantity of water than allowed under the permit or to make any change in respect to the water which may have a material effect upon any person or upon the water resource, shall make application pursuant to section 174C-51 in respect to such a change. Modification of one aspect or condition of a permit may be conditioned on the permittee's acceptance of changes in other aspects of the permit.

(b) All permit modification applications shall be treated as initial permit applications and be subject to sections 174C-51 to 174C-56; except that if the proposed modification involves an increase in the quantity of water not exceeding an average amount per month to be established by rule, the commission, at its discretion, may approve the proposed modification without a hearing provided that the permittee establishes that:

- (1) A change in conditions has resulted in the water allowed under the permit becoming inadequate for the permittee's needs; or
- (2) The proposed modification would result in a more efficient utilization of water than is possible under the existing permit.

(c) County agencies are exempt from the requirements of this section except where the modification involves a change in the quantity of water to be used or where the new use would adversely affect the quality of the water or quantity of use of another permittee. [L 1987, c 45, pt of §2]

**[§174C-58] Revocation of permits.** After a hearing, the commission may suspend or revoke a permit for:

- (1) Any materially false statement in the application for the water permit, a modification of a permit term, or any materially false statement in any report or statement of fact required of the user pursuant to this part.

- (2) Any willful violation of any condition of the permit.
- (3) Any violation of any provision of this chapter.
- (4) Partial or total nonuse, for reasons other than conservation, of the water allowed by the permit for a period of four continuous years or more. The commission may permanently revoke the permit as to the amount of water not in use unless the user can prove that the user's nonuse was due to extreme hardship caused by factors beyond the user's control. The commission and the permittee may enter into a written agreement that, for reasons satisfactory to the commission, any period of nonuse may not apply towards the four-year revocation period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section 174C-62 shall not apply towards the four-year period of forfeiture.

The commission may cancel a permit, permanently and in whole, with the written consent of the permittee. [L 1987, c 45, pt of §2]

**§174C-59 Transfer of permit.** A permit may be transferred, in whole or in part, from the permittee to another, if:

- (1) The conditions of use of the permit, including, but not limited to, place, quantity, and the purpose of the use, remain the same; and
- (2) The commission is informed of the transfer within ninety days.

Failure to inform the commission of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in section 174C-57, is also invalid and constitutes a ground for revocation. [L 1987, c 45, pt of §2; am L 1999, c 197, §9]

**[§174C-60] Contested cases.** Chapter 91 shall apply except where it conflicts with this chapter. In such a case, this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision. [L 1987, c 45, pt of §2]

**[§174C-61] Fees.** The commission shall promulgate a schedule of application and permit fees. The fees shall be used to defray the administrative costs of the permit systems established under this chapter. A public agency shall not be subject to the payment of any fees. [L 1987, c 45, pt of §2]

**[§174C-62] Declaration of water shortage.** (a) The commission shall formulate a plan for implementation during periods of water shortage. As a part of the plan, the commission shall adopt a reasonable system of permit classification according to source of water supply, method of extraction or diversion, use of water, or a combination thereof.

(b) The commission, by rule, may declare that a water shortage exists within all or part of an area when insufficient water is available to meet the requirements of the permit system or when conditions are such as to require a temporary reduction in total water use within the area to protect water resources from serious harm. The commission shall publish a set of criteria for determining when a water shortage exists.

(c) In accordance with the plan adopted under subsection(a), the commission may impose such restrictions on one or more classes of permits as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous condition.

(d) A declaration of water shortage and any measures adopted pursuant thereto may be rescinded by rule by the commission.

(e) When a water shortage is declared, the commission shall cause a notice thereof to be published in a prominent place in a newspaper of general circulation throughout the area. The notice shall be published each day for the first week of the shortage and once a week thereafter until the declaration is rescinded. Publication of such notice shall serve as notice to all water users

in the area of the condition of water shortage.

(f) The commission shall cause each permittee in the area to be notified by regular mail of any change in the conditions of the permittee's permit, any suspension thereof, or of any other restriction on the use of water for the duration of the water shortage.

(g) If an emergency condition arises due to a water shortage within any area, whether within or outside of a water management area, and if the commission finds that the restrictions imposed under subsection (c) are not sufficient to protect the public health, safety, or welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, municipal, agricultural, or other reasonable uses, the commission may issue orders reciting the existence of such an emergency and requiring that such actions as the commission deems necessary to meet the emergency be taken, including but not limited to apportioning, rotating, limiting, or prohibiting the use of the water resources of the area. Any party to whom an emergency order is directed may challenge such an order but shall immediately comply with the order, pending disposition of the party's challenge. The commission shall give precedence to a hearing on such challenge over all other pending matters. [L 1987, c 45, pt of §2]

**[§174C-63] Appurtenant rights.** Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62. [L 1987, c 45, pt of §2]

## PART V. WATER QUALITY

**[§174C-66] Jurisdiction over water quality.** The department of health shall exercise the powers and duties vested in it for the administration of the State's water quality control program as provided by law. [L 1987, c 45, pt of §2]

**§174C-67 Exchange of information.** (a) The department of health shall submit to the commission such information as the commission shall require as prescribed in its rules, provided it does not jeopardize any pending or ongoing enforcement action.

(b) The commission shall submit to the department of health such information as the department of health shall require, for the performance of its water quality functions. [L 1987, c 45, pt of §2; am L 1999, c 197, §10]

**§174C-68 Water quality plan.** (a) The department of health shall formulate a state water quality plan for all existing and potential sources of drinking water and that plan shall become part of the Hawaii water plan described in part III. Requirements for the plan shall be governed by chapters 340E and 342. The state water quality plan shall include water quality criteria for the designation of ground water management areas and surface water management areas pursuant to section 174C-44 and 174C-45.

(b) The state water quality plan shall be periodically reviewed and revised by the department of health as needed.

(c) In formulating or revising the state water quality plan, the department of health shall consult with and carefully evaluate the recommendations of concerned federal, state, and local agencies, particularly county water supply agencies.

(d) The department of health may ban the importation into this State of any substances which the department of health reasonably believes may present a danger to the water quality of this State. [L 1987, c 45, pt of §2; am L 1999, c 197, §11]

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## Maui is negotiating for new water sources

**The mayor hopes to reach a deal  
with C. Brewer for water**

By Gary T. Kubota  
[gkubota@starbulletin.com](mailto:gkubota@starbulletin.com)

WAILUKU >> Maui Mayor Alan Arakawa said his administration is negotiating an agreement to use millions of gallons of water daily from C. Brewer's system in the West Maui Mountains.

Finding new sources of water is crucial to economic expansion and development in Central and South Maui because the number of new taps could be restricted due to underground sources reaching their withdrawal limit.

Arakawa, serving his second year in a four-year term, made the comments during his annual State of the County address yesterday in the Council Chambers before a crowd of more than 90 people.

Arakawa's water strategy is a departure from that of his predecessor, former Maui Mayor James "Kimo" Apana.

Apana, fearing that C. Brewer would sell off portions of its lands, wanted the county and several private landowners to buy about 13,000 acres of West Maui watershed land that included the water irrigation system.

Arakawa said his administration hoped to negotiate an agreement with C. Brewer similar to the contract with East Maui Irrigation, a company that delivers water to the Upcountry region.

Under a 1973 agreement, the county pays 6 cents per 1,000 gallons of untreated water for the delivery of the East Maui Irrigation water, then converts it into drinking water at a treatment plant.

Arakawa said surface water from Iao and Waihee streams on C. Brewer property, "formerly dedicated to plantation agriculture," conservatively yields 50 million gallons a day.

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He said the county could consume half of the average daily flow, or about 25 million gallons a day, for the central and southern portions of the Valley Isle and even parts of Upcountry Maui.

Arakawa said he hopes to have an agreement completed within a year.

Avery Chumbley, executive vice president of C. Brewer, said the company has been discussing delivering water to the county but has been "far apart" on some issues.

Chumbley said the water diverted from the streams is still used for agricultural purposes.

Arakawa said the county has to come to grips with how to provide housing for "ordinary nonmillionaire residents."

He estimated the county needed 4,000 affordable-housing units and that 90 percent of the homes sold in Maui County were being purchased by wealthy nonresidents.

"So, however much we've attempted to catch up with the demand for housing, we have not been able to satisfy the needs of our local community," he said.

Arakawa said he wants to make sure that housing units in county-sponsored projects remain affordable upon resale.

In the past, the county has turned down exercising an option to buy back a house built in a county-sponsored project because the price of the home had risen too high to be in the affordable range.

Councilwoman Charmaine Tavares said the county had a 7 percent annual ceiling on the equity a home buyer could have for a county-sponsored home.

But she said at one county project, homeowners were raising the value of their equity by making home improvements.

Arakawa said he did not have any proposal for keeping county housing units affordable forever, but expected that a solution would arise in talks with the County Council.

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