

REQUEST FOR LEGAL SERVICES

RECEIVED

By Dept. of the Corporation Counsel at 8:30 am, Mar 19, 2024

Date: March 18, 2024
From: Tom Cook, Chair
Water and Infrastructure Committee

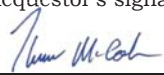
TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Caleb P. Rowe, Esq.

Subject: RESOLUTION 24-47, AUTHORIZING THE MAYOR TO ENTER INTO A WATER SOURCE DEVELOPMENT AGREEMENT WITH FREE MARKET VENTURES, LLC, IN ACCORDANCE WITH CHAPTER 14.01, MAUI COUNTY CODE (WAI-20)

Background Data: Please see revised resolution. Please submit your response to wai.committee@mauicounty.us with a reference to WAI-20.

Work Requested: FOR APPROVAL AS TO FORM AND LEGALITY
 OTHER:

Requestor's signature  Tom Cook, Chair	Contact Person <u>Jarret Pascual or Richard E. Mitchell</u> (Telephone Extension: <u>7141 or 7662, respectively</u>)
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ROUTINE (WITHIN 15 WORKING DAYS) RUSH (WITHIN 5 WORKING DAYS)
 PRIORITY (WITHIN 10 WORKING DAYS) URGENT (WITHIN 3 WORKING DAYS)

SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): March 25, 2024
REASON: For posting on the April 5, 2024, Council agenda.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: <u>CPR</u>	ASSIGNMENT NO. <u>2023-0137</u>	BY: <u>ALH</u>
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TO REQUESTOR: APPROVED DISAPPROVED OTHER (SEE COMMENTS BELOW)
 RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE):

DEPARTMENT OF THE CORPORATION COUNSEL

Date 3/25/24

By 

(Rev. 7/03)

Resolution

No. 24-47, CD1

AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO A WATER SOURCE DEVELOPMENT AGREEMENT WITH FREE MARKET VENTURES, LLC, IN ACCORDANCE WITH CHAPTER 14.01, MAUI COUNTY CODE

WHEREAS, under the Agreement between the County of Maui, Department of Water Supply and Free Market Ventures, LLC, the County intends to enter into a water purchase agreement attached and incorporated as Exhibit “1” (“Water Agreement”); and

WHEREAS, in accordance with Section 14.01.060, Maui County Code, the Council must approve by resolution any water source development agreement; now therefore,

BE IT RESOLVED by the Council of the County of Maui:

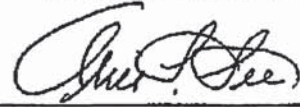
1. That, in accordance with Section 14.01.060, Maui County Code, the Council of the County of Maui authorizes the Mayor to execute the Water Agreement with Free Market Ventures, LLC, as well as all other necessary documents relating to the Water Agreement and any amendments; and
2. That certified copies of this Resolution be transmitted to the Mayor, Director of Finance, Director of Water Supply, and Free Market Ventures, LLC.

APPROVED AS TO FORM AND LEGALITY:



Caleb P. Rowe
Deputy Corporation Counsel
County of Maui

INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Alice L. Lee".

ALICE L. LEE

Upon the request of the Mayor.

DRAFT
March 11, 2024

WATER PURCHASE AGREEMENT

between

THE COUNTY OF MAUI DEPARTMENT OF WATER SUPPLY

and

FREE MARKET VENTURES, LLC

Exhibit "1"

THIS AGREEMENT is made and entered into as of the _____ day of _____ 2024.

BY AND BETWEEN:

- (i) Department of Water Supply, County of Maui ("**DWS**"); an agency of the County of Maui
- (ii) FREE MARKET VENTURES, LLC ("**Owner**").

WITNESSETH:

WHEREAS the County of Maui ("**the County**") through its water agency, DWS, desires to:

- 1) secure an abundant and clean upcountry water source to support local community needs, including for purposes of:
 - a. supporting on-island agriculture;
 - b. improving potable water safety and reliability; and
 - c. providing a resource for fire prevention and suppression.
- 2) Have water delivered at a base charge below the County's current rate charged to customers.
- 3) source electricity to power water wells, pumps, storage facilities and other water infrastructure priced below the per kilowatt hour cost that the County would otherwise pay to pump water uphill to upcountry areas or to pump from new wells using the public power grid.
- 4) obtain more than 85%+ of electricity used to power this water system from sustainable sources (with a goal of 100% sustainability).
- 5) ensure the system is designed as an integrated component of the County's existing water distribution system.

WHEREAS Owner has secured rights to purchase a 272-acre parcel (together with certain adjacent or nearby to be acquired real estate, the "**Property**") in Kula and commonly known as Kula Ridge Mauka that Owner plans to develop with one to four water wells and associated drilling, pump, piping, and power infrastructure with an expected pump capacity of between 800,000 and 1,500,000 gallons per day, per well and to develop on the surface of the Property certain residential, agricultural and/or commercial improvements (collectively the "**Project**").

WHEREAS Owner plans to develop as part of the Project a sustainable energy microgrid system that will power the well pumps and other elements of the Project primarily using solar energy, battery and water tank storage and which limits use of fossil fuel generators to periods when doing so is necessary for efficient system start up and testing, extending hours of operation, and to ensure system reliability (the "**Microgrid System**").

WHEREAS DWS desires an exclusive "take or pay" delivery right for the full capacity of the initial well located on the Property;

WHEREAS DWS desires option rights to have the water capacity of additional wells developed on the Property delivered to DWS and rights to utilize and operate supporting water infrastructure on the Property that Owner will develop on the Property to store and move water drawn from the wells to the DWS water distribution system;

WHEREAS Owner has secured rights to purchase the 7-acre Kula Community Center parcel (the "**Community Center**") and, conditioned on achieving certain Project success milestones, Owner desires to donate the Community Center to the County so that the County may have ownership of a critical community asset to improve community services and to avoid the risk that the County loses access to the Community Center in the future.

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration herein contained, the Parties hereto agree as follows:

1. DEFINITIONS.

- 1.1 **"Actual Monthly Energy Quantity"** means the number of kilowatts hours drawn from the Microgrid System to power the Wells and Supporting Infrastructure during each month of the Term.
- 1.2 **"Actual Monthly Water Quantity"** means the number of gallons of Extracted Water drawn from the Wells and delivered to the Supporting Infrastructure monthly during each month of the Term.
- 1.3 **"Affiliate"** means, with respect to any Person, any other Person that directly or indirectly owns, controls or holds the power to vote five (5%) percent or more of the outstanding voting securities of such Person or any other Person who controls, is controlled by, or is under common control with such Person.
- 1.4 **"Agreement"** means this contract as it may be amended from time to time.
- 1.5 **"Applicable Legal Requirements"** means all laws, rules, regulations and permits that are currently applicable to the building, ownership, operation and maintenance of the Water System.
- 1.6 **"Appointed Independent Engineering Team"** means the third-party water infrastructure engineering and design team to be engaged by Owner, at Owner's expense, to provide independent recommendations and support to DWS in connection with the design of Water System.
- 1.7 **"Available Monthly Water Quantity"** means the number of gallons of Extracted Water which the O&M Contractor certifies as available Monthly from each Well. The Available Monthly Water Quantity will be established without regard to whether DWS actually draws that amount of Extracted Water into the Supporting Infrastructure.
- 1.8 **"Available Monthly Energy Quantity"** means total kilowatt hours of electricity which the O&M Contractor certifies as drawn or available to be drawn in support of delivery of the Available Monthly Water Quantity. The Available Monthly Energy Quantity will be established without regard to whether kilowatt hours of electricity are actually drawn from the Microgrid System to power the Wells or Supporting Infrastructure.
- 1.9 **"Change in Law"** means the adoption, promulgation, modification or re-interpretation after the Effective Date by a Governmental Authority of any Applicable Legal Requirement that establishes requirements for the construction, ownership, operation or maintenance of the Water System that are more restrictive or onerous than the most restrictive or onerous requirements in effect as of the Effective Date.
- 1.10 **"Commencement Date"** for a Well Package means the date following the Effective Date on which Owner notifies DWS that Owner has closed on the purchase of the Property necessary for development of that Well Package and has awarded a contract with the Design Agent for preparation of initial Design Documents for that Well Package.
- 1.11 **"Community Center"** means the 7-acre parcel currently designated as the Kula Community Center.

- 1.12 “**Completion**” of a Well Package means completion of a Well Package to the degree that the Design Agent can provide the certification to Owner and DWS specified in Clause 7.2.
- 1.13 “**Completion Date**” for each Well Package means the date that Owner delivers notice to DWS that Completion has occurred in accordance with Clause 7.2 accompanied by the certification from the Design Agent specified in Clause 7.2.
- 1.14 “**Contract Year**” means every 12-month period following the Completion Date.
- 1.15 “**Contractor Team**” means the Design Agent, the EPC Contractor, the O&M Contractor and, as applicable, the Equipment Suppliers.
- 1.16 “**Construction and Testing Phase**” for each Well Package means the period between the Construction and Testing Phase Commencement Date and the Completion Date.
- 1.17 “**Construction and Testing Phase Commencement Date**” for each Well Package means the date on which Owner notifies DWS that the State of Hawaii and County of Maui have issued all permits necessary to allow the commencement of drilling of a Well and installation of the other elements of the associated Well Package and that Owner has awarded a contract with the EPC contractor to begin work on that Well Package.
- 1.18 The “**County**” means the County of Maui.
- 1.19 “**CPI**” means the CONSUMER PRICE INDEX for all Urban Consumers (All Items U.S. City Average 1982–84 equals 100), published by the Bureau of Labor Statistics, United States Department of Labor. For the purposes of determining the annual increase in the CPI, subtract 1 from the fraction whose denominator is the monthly CPI number for January of the calendar year prior to the calendar year that the determination of the annual increase in the CPI is being made and whose numerator is the corresponding monthly CPI number for January of the calendar year in which the determination of the annual increase in the CPI is being made. By way of example, and not as a limitation, if the monthly CPI number for January 2022 were 230 (denominator) and the monthly CPI number for January 2023 were 237 (numerator), then 1 subtracted from the fraction would mean an annual increase in the CPI of 3 and 4/100 percent (3.04%). Thereafter, the annual increase in the CPI for each 12-month period of this Agreement will be computed in a like manner and calculated cumulatively. If the CPI is terminated or unavailable for any reason, the calculation will be made by using the successor index or the one most nearly comparable to it.
- 1.20 “**Default**” means a breach of this Agreement by Owner or DWS as more particularly described in Section 17.
- 1.21 “**Design Agent**” means the architectural and engineering team or teams selected by Owner to work on Owner’s behalf with the EPC Contractor’s design personnel to prepare the Design Documents and oversee the work of the other members of the Contractor Team.
- 1.22 “**Design Documents**” means the design documents prepared by the Contractor Team for each Well Package setting forth the specifications, planned locations, performance capacity, On-Site Storage capacity, and other requirements of each Well Package.
- 1.23 “**Design Phase**” for each Well Package means the period between the Commencement Date through the Construction and Testing Phase Commencement Date.
- 1.24 “**DWS O&M Contractor**” means any Person or Persons designated by DWS and approved by Owner to provide operations and maintenance services for the Supporting Infrastructure of a Well Package following completion of that Well Package.

- 1.25 **"Easement Areas"** means those areas of the Project designated in the Site Plan as exclusive or non-exclusive easement areas benefiting the owner or operator of each Well Package for purposes of access, maintenance and utility service required for that Well Package.
- 1.26 **"Effective Date"** means the date of execution of this Agreement and the completion of all Schedules to be incorporated herein.
- 1.27 **"Energy Charge"** means an amount due from DWS to Owner for operation of the Microgrid System each month during the Term equal to the Energy Price times the Available Monthly Energy Quantity.
- 1.28 **"Energy Price"** initially means a \$.33/kWh. The Energy Price will escalate on each annual anniversary of the Effective Date to equal the greater of: a) the \$.33/kWh base rate increased by 3% per year from the Completion Date of Well One or b) an amount equal to the .33/kWh base rate multiplied by a fraction, the numerator of which is the most recently published Hawaii Electric Company rate "P" Large Power Use Business and the denominator of which is .3941/kWh (the HECO rate published for 2022 at <https://www.hawaiianelectric.com/billing-and-payment/rates-and-regulations/average-price-of-electricity>). If the Hawaii Electric Company or its successors no longer publishes its electric rates in a format consistent with the above, in calculating the foregoing item b) the Parties will utilize a similar proxy for the escalation in electric use charges that the Hawaii Electric Company charges to large business power users. If Hawaii Electric Company is replaced as the largest public electricity utility providing electricity on Maui, then the Parties will utilize the rate published by that successor entity in calculating the Energy Price. If the HECO rate is not available during any calendar month required for determination of the annual increase, then the Energy Price will be increased by 3%, as set forth herein, until the appropriate HECO rate becomes available, at which time the increase above 3%, if any, will be retroactive to the beginning of the period and be immediately due and payable to Owner.
- 1.29 **"EPC Contractor"** means the engineering, procurement and contracting firm(s) selected and retained by Owner to build the Well Package for Well One and the Well Package for each Follow-On Well developed as part of the Project.
- 1.30 **"Equipment Suppliers"** means the key equipment suppliers that have contracted with Owner separately from the EPC Contractor to supply, install and/or maintain Water System equipment not included within the scope of work of the EPC Contractor, anticipated to potentially include specialized well drilling rigs, electricity generation equipment and well pumps serving the Wells and Microgrid System.
- 1.31 **"Extracted Water"** means water extracted from the Wells.
- 1.32 **"Extracted Water Quality Standards"** the standards specified on Exhibit A which reflect the minimum standard of water quality that the Extracted Water must meet at Initial Testing and in connection with all following Performance Testing.
- 1.33 **"Follow-On Well(s)"** means those Wells developed on the Property in addition to Well One and subject to DWS's rights under this Agreement, which at this time are expected to include a redundancy well in support of Well One and a third and/or fourth well if and when permitted by the County, the State of Hawaii and other Governmental Authorities.
- 1.34 **"Governmental Approval"** means any approval, license, zoning modification, special use allowance, regulatory variance, committee review, hearings, subdivisions, or other governmental authorizations of any type required for drilling or operation of the Wells,

extraction of water from the Wells, installation and siting of Supporting Infrastructure and the Microgrid System on or off of the Property, access to and from the Property, distribution of Extracted Water, development of Surface Developments or other aspects of the Project.

- 1.35 "**Governmental Authority**" means DWS, the County, the State of Hawaii, any agency of the United States of America and all other public utilities or non-governmental entities with the power to provide Governmental Approvals or otherwise holding approval rights over any aspect of the Project, Owner, the Design Agent, the EPC Contractor, the O&M Contractor or their subcontractors or material suppliers.
- 1.36 "**Governmental Inaction**" means the failure of any Governmental Authority to approve, disapprove or complete review of a properly completed and filed application or request for Governmental Approval within ninety (90) days of Owner making the relevant application, request, or appearance. Failure of a Governmental Authority to issue a final determination (positively or negatively) on a permit, review or application will constitute Governmental Inaction regardless of whether that failure by law constitutes an approval or disapproval of the permit, review or application. Rejection or a negative determination regarding an application or request will not constitute Governmental Inaction.
- 1.37 "**Initial Testing**" means the initial Performance Testing of capacity and water quality to be conducted by the EPC Contractor on behalf of Owner and DWS to determine whether Extracted Water from a Well meets the required Extracted Water Quality Standards and to determine the Pumping Capacity of the Well, On-Site Storage capacity of the Supporting Infrastructure, optimal hours of operation of the Well Package, and delivery capacity of the Well Package of Extracted Water to the Point of Interconnection.
- 1.38 "**Land Charge**" means an amount due from DWS to Owner for use of the Property each month during the Term initially equal to the \$20,000 per year multiplied by the number of acres in the Land Area. The Land Charge per acre will increase at 3% per year on each annual anniversary of the Effective Date.
- 1.39 "**Land Area**" means the total acreage of the Property reserved for Supporting Infrastructure or restricted from use for purposes of supporting the operations of a Well Package. The Land Area will include any Easement Areas exclusive to the Water System but will not include non-exclusive Easement Areas commonly benefiting the owners of Surface Developments. The Land Area will exclude acreage on which the Microgrid System or wellhead of the Well are located.
- 1.40 "**Lender**" means any Person lending money to provide Project Financing to Owner.
- 1.41 "**Meter Charges**" means any meter fees, meter connection charges, equipment installation, rental, purchase or lease charges and any other fees or charges assessed against users of the Upcountry Water Distribution System for the privilege or ability to draw water from the Upcountry Water Distribution System and which are not assessed based on the quantity of water used by the user. At the time of execution, the only Meters Charges for the purposes of this agreement consist of the water system development fee as set forth in Maui County Code Section 14.07.030, the amount of which is set forth in the annual budget for the County of Maui.
- 1.42 "**Microgrid System**" means the microgrid energy system that Owner develops to provide electricity to the Project necessary to support the operations of each of the Wells and Supporting Infrastructure and to potentially provide electricity sufficient to support the Surface Developments.
- 1.43 "**On-Site Storage**" Extracted Water stored in the Supporting Infrastructure for the benefit of DWS.

- 1.44 **"O&M Contractor"** means any Person or Persons designated by Owner to provide operations and maintenance services for the Well and Microgrid System of each Well Package following completion of that Well Package and to provide oversight on behalf of Owner of the DWS O&M Contractor.
- 1.45 **"O&M Standards"** means the performance standards that the O&M Contractor and DWS O&M Contractor must cause each element of each Water Package to maintain during the Operations Phase.
- 1.46 **"Operations Phase"** for each Well Package means the period between the Completion Date and the Termination Date.
- 1.47 **"Operation and Maintenance Documents"** means the manuals which set forth the installation, operation, maintenance, and Performance Testing requirements, in accordance with customary industry practices, for each component of each Well Package necessary ensure the efficient and reliable operation and maintenance of each component of a Well Package in accordance with the O&M Standards and regular reporting to Owner and DWS on the performance of each Well Package.
- 1.48 **"Party"** or **"Parties"** means a Party or the Parties to this Agreement.
- 1.49 **"Performance Testing"** means the ongoing regular testing of each Well Package under the Operations and Maintenance Documents.
- 1.50 **"Performance Testing Requirements"** means the required Performance Test results developed by the Contractor Team and approved by DWS during the Design Phase that each Well Package must meet during Performance Testing.
- 1.51 **"Person"** means any individual, corporation, partnership, joint venture, association, joint stock company or unincorporated association, or any governmental unit or agency or political subdivision.
- 1.52 **"Point of Interconnection"** means the location specified in the Design Documents, where Extracted Water is transferred from the Supporting Infrastructure to the Upcountry Water Distribution System.
- 1.53 **"Project"** means the one to four water Wells on the Property including Supporting Infrastructure to be developed by Owner on the Property in accordance with this Agreement as well as the other roadways, access points, utility services and Surface Developments to be developed on the Property.
- 1.54 **"Project Financing"** means debt financing secured by the Property or a pledge of this Agreement or otherwise obtained by Owner to finance the acquisition of the Property or development of the Project, including any replacement financing.
- 1.55 **"Project Meeting"** means the regular meeting to be attended by representatives of Owner, Design Agent, the EPC Contractor, the Appointed Independent Engineering Team and a representative of DWS, to occur as agreed by Owner and DWS, which at either party's election may be as frequent as By-Weekly following the Effective Date.
- 1.56 **"Project Plan"** means for each Well Package, collectively the Site Plan (including Land Area), Design Documents, Project Schedule, Project Specifications, budget for the Supporting Infrastructure Cost, Performance Testing Requirements, O&M Standards and the Operation and Maintenance Documents, as developed by Owner during the Design Phase for a Well Package as the same may be updated by Owner from time to time.

- 1.57 **"Project Schedule"** means the schedule for Completion of each Well Package developed during the Design Phase and updated from time to time.
- 1.58 **"Project Specifications"** means the specifications for each component of each Well Package developed during the Design Phase and updated from time to time.
- 1.59 **"Pumping Capacity"** means the total daily capacity of a Well to draw Extracted Water from the Well and distribute that Extracted Water into the Supporting Infrastructure as from time to time determined by the O&M Contractor and supported by Initial Testing and subsequent Performance Testing.
- 1.60 **"Required Change"** means a change in the Project Plan and consequently the Project as a result of a Change in Law or an order by DWS to change the Project Plan notwithstanding Owner's objection.
- 1.61 **"Right of First Offer"** means the right of the DWS to make a priority offer to purchase the Water System under Article 14.
- 1.62 **"Right to of First Refusal"** means the right of the DWS to match third party offers to purchase the Water System under Article 14.
- 1.63 **"ROFO Purchase Agreement"** means an agreement to purchase the Water System in the form of Exhibit B with the date and place of closing and purchase price completed.
- 1.64 **"Site Plan"** means the site plan for the Project proposed by Design Agent and approved by Owner as part of the Project Plan designating the Land Area and Easement Areas for each Well Package. The Site Plan must be in recordable form.
- 1.65 **"Supporting Infrastructure"** means the pumps, water tanks, piping systems, lift stations, power lines and other infrastructure, including On-Site Storage, required or requested by DWS to store water in On-Site Storage on the Property or to move water from the wells or On-Site Storage areas on the Property to the Point of Interconnection and to transmit that water into the County's Water Distribution System.
- 1.66 **"Supporting Infrastructure Charge"** means an amount due from DWS to Owner for use of the Supporting Infrastructure each month equal to the Supporting Infrastructure Cost amortized monthly over the then remaining Term plus interest adjusting as of January 1 of each year of the Term to equal the greater of 7% or the five year treasury rate plus 3% as most recently published in the Wall Street Journal (or comparable publication if the Wall Street Journal is no longer published) as of the last day of December each calendar year during the Term.
- 1.67 **"Supporting Infrastructure Cost"** the actual cost of construction of the Supporting Infrastructure associated with each Well as calculated pursuant to Clause 5.5, together with such amounts as Owner may pay after the Completion Date to develop, maintain or improve Supporting Infrastructure by agreement of the Parties or as the result of a default by DWS or the DWS O&M Contractor to perform their obligations hereunder relating to the Supporting Infrastructure.
- 1.68 **"Surface Development"** means the development of improvements on the Property other than the Water System, including residential homes, associated common amenities (clubhouses, riding stables, swimming pools, storage buildings, maintenance buildings etc.), farming operations and agricultural buildings (including greenhouse structures) the supporting infrastructure, roadways, and sewer systems, utilities. The Surface

Development is not expected to exceed 21 homes (and considerably fewer with each well developed).

- 1.69 "**Term**" means the term of this Agreement from the Effective Date until the Termination Date.
- 1.70 "**Termination Date**" means the date thirty (30) years from the Completion Date of the Well Package for Well One, or thirty (30) years from the Completion of the Well Package for the last Well Package subject to this Agreement if DWS has exercised its Right of First Refusal with respect to any Follow-On Well. If DWS has exercised its option to extend this Agreement under Clause 3.2, the Termination Date will extend to the last day of any renewal term. If this Agreement is terminated earlier than the date specified above, the Termination Date will be accelerated to the date of termination.
- 1.71 "**Upcountry Water Distribution System**" means the pipes, pumps, towers, tanks, water retention ponds and other infrastructure located off of the Property by which the DWS distributes Extracted Water to upcountry areas serving users that are currently, or in the future will be, connected to the current distribution systems of the Olinda Water Treatment Plant, Piiholo Water Treatment Plant and Kamole-Weir Water Treatment Plant or future water treatments plants built in replacement or supplement thereof.
- 1.72 "**Water Charge**" means an amount due from DWS to Owner for Extracted Water delivered each month during the Term equal to the Water Price times the Available Monthly Water Quantity.
- 1.73 "**Water Price**" initially means \$5.95 per thousand gallons of Extracted Water. On each annual anniversary of the Effective Date during the Term, the Water Price will escalate cumulatively by the greater of a) 3% above the Water Price in effect during the previous year or b) the 12-month percentage increase in CPI. If the monthly CPI number is not available during any calendar month required for determination of the annual increase, then the Water Price will be increased by 3%, as set forth herein, until the appropriate monthly CPI becomes available, at which time the increase above 3%, if any, will be retroactive to the beginning of the period and be immediately due and payable to Owner.
- 1.74 "**Water System**" means the elements of the Project consisting all of the Well Packages together with all subsurface water rights, permits and other approvals necessary to draw and distribute Extracted Water and any power supply, maintenance, operations, warranty or other contracts relating to the Water Packages. The Water System will include all rights to utilize Easement Areas included within the Site Plan and designated as benefiting a Well Package.
- 1.75 "**Well(s)**" means Well One and any Follow-On Wells developed as part of the Project and subject to this Agreement.
- 1.76 "**Well One**" means an initial deep water well to be developed on the Property, currently planned as an expansion, deepening and preparation for water extraction of the currently existing bore hole on the Property.
- 1.77 "**Well Package**" means each Well, its component elements of the Microgrid System and all Supporting Infrastructure serving that Well.
- 1.78 **Interpretation**
Any reference in this Agreement to:
(i) an "**Appendix**" shall, subject to any contrary indication, be construed as a reference to an appendix to this Agreement;

- (ii) **“Bi-Weekly”** or **“Bi-Monthly”** means once every two weeks or two months, respectively.
- (iii) **“Business Day”** shall be construed as a reference to a day (other than a Saturday, a Sunday and any public holiday in the State of Hawaii on which banks generally are open for business in the State of Hawaii;
- (iv) a **“Clause”** shall, subject to any contrary indication, be construed as a reference to a clause of this Agreement;
- (v) a **“Company”** shall be construed so as to include any company, corporation or other body corporate, wherever and however incorporated or established;
- (vi) a **“Day”** shall be construed as a 24-hour period beginning and ending at 12:00 midnight;
- (vii) **“Include”** and **“Including”** shall be construed without limitation;
- (viii) a **“Month”** shall be construed as a calendar month beginning at 12:00 midnight on the last day of the preceding month and ending at 12:00 midnight on the last day of that month;
- (ix) the **“liquidation”, “bankruptcy”, “winding-up”, “dissolution”** or **“re-organization”** of a Company shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such Company is incorporated or constituted or any jurisdiction in which such Company carries on business.

1.79 **General**

- (A) Save where the contrary is indicated, any reference in this Agreement to:
 - (i) words importing the singular shall include the plural and vice versa;
 - (ii) any person shall be construed so as to include its and any subsequent successors, transferees and assigns in accordance with their respective interests;
 - (iii) this Agreement or any other agreement or document (whether or not defined in Clause 1.2) shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document as the same may have been, or may from time to time be, amended varied, novated, replaced or supplemented;
 - (iv) a time of day shall, save as otherwise provided in any agreement or document, be construed as a reference to State of Hawaii time; and
- (B) Headings to Clauses are for convenience only and do not affect the interpretation of this Agreement.

2. THE PROJECT TO BE EXECUTED BY OWNER

- 2.1 **Responsibilities.** Owner will build and own each Well Package in accordance with the Project Plan. Following Completion of each Well Package, Owner will operate and maintain Well One, each Follow-On Well and the Microgrid System. DWS will operate, maintain and replace (as required) the Supporting Infrastructure associated with each Well Package.
- 2.2 **Development of the Water System in Phases.** Owner plans to develop the Water System by completing each Well Package in phases, beginning with the Design Phase, then the Construction and Testing Phase, and finally the Operations Phase. Owner will have no obligation to develop any Well Package, but to the extent that Owner elects to do so, each Well Package developed on the Property will be subject to DWS’ rights under this Agreement.
- 2.3 **Purchase Commitment.** Subject to Owner’s Completion of Well One and the component parts of the Well Package associated with Well One, and subject to Owner’s rights to utilize on-site water and electricity discussed in Clause 2.6 below, DWS contracts to pay for delivery of 100% of the Monthly Available Water Quantity drawn from Well One and 100%

of the Monthly Available Energy Quantity from the Microgrid System necessary to power the pumps and other Supporting Infrastructure allocable to Well One. The commitment of DWS to pay for Extracted Water, Supporting Infrastructure and associated Microgrid System costs under this Agreement is on a “take or pay” basis” and is an obligation of the County.

- 2.4 **Rights to Extracted Water from Follow-On Wells.** This Agreement and DWS’s right to pay for delivery of Extracted Water from Owner will initially only apply to the Well Package for Well One. If Owner secures a permit for the drilling and development of a Well Package for any Follow-On Wells, DWS will have a right of first refusal to purchase 100% of the Monthly Available Energy Quantity and Monthly Available Water Quantity from each Follow-On Well. Owner will provide DWS with not less than three (3) months prior written notice of the planned Commencement Date of any Follow-On Well to give time for DWS to exercise each future option and plan for integration of Extracted Water from Follow-On Wells into the Upcountry Water Distribution System. Should DWS exercise its option to pay for delivery of Extracted Water from Follow-On Wells, DWS will do so by providing written notice to Owner of its election prior to the Commencement Date for any Follow-On Well. Owner will design and develop the Well Package for any Follow-On Well subject to this Agreement in the same phased development process utilized for the Well Package for Well One. The Water Charge and Energy Charge for each Follow-On Well will be the same per gallon and per kilowatt hour as charged for the Well Package for Well One. Owner will be responsible for paying all costs associated with permitting and development of each Follow on Well.
- 2.5 **Exclusivity Charge.** If DWS has delivered notice of its election to pay for delivery of Extracted Water from a Follow-On Well pursuant to Section 2.4, and Owner achieves the Completion Date for that Follow-On Well, then within thirty (30) days of the Completion Date, DWS must pay to Owner \$5,000,000 to compensate Owner for exclusively reserving the capacity of the Follow-On Well for DWS. This \$5,000,000 charge will be in addition to other fees charged for Extracted Water from the Follow-On Well.
- 2.6 **Waiver of Right of First Refusal.** If DWS fails to affirmatively exercise its option to pay for delivery of Extracted Water from a Follow-On Well under Clause 2.4, DWS’s right of first refusal to pay for delivery of Extracted Water with respect to that Follow-On Well and all subsequent Follow-On Wells developed on the Property will expire. The Water System will thereafter be limited to those Well Packages subject to this Agreement and subsequent Well Packages developed on the Property will be owned exclusively by Owner.
- 2.7 **Owner’s Right to Retain Water and Energy for Surface Development.** Owner reserves the right to use Extracted Water from each Well and electricity from the Microgrid System to serve Owner’s Surface Developments. Owner will pay 100% of the costs of any additional meters, piping, pumps or other on-site infrastructure improvements necessary for the Microgrid System and Supporting Infrastructure to allow for direct delivery of Extracted Water and electricity to Surface Developments. Owner anticipates that its required use of Extracted Water for Surface Developments to be de minimus relative to total Pumping Capacity. Use of Extracted Water for Surface Developments will be capped at 5% of the Pumping Capacity of each Well unless otherwise agreed to by DWS. Owner will separately meter Extracted Water and Microgrid System electricity used by Owner for Surface Developments. The Available Monthly Water Quantity and Available Monthly Energy Quantity will exclude Extracted Water and kilowatt hours of electricity used by Surface Developments thereby ensuring that DWS pays nothing for Extracted Water and electricity delivered to Surface Developments directly from the Wells or the Microgrid System. Owner will be entitled to record against the Property perpetual easement agreements in favor of the owners of Surface Developments documenting the Surface Development owners’ rights under this Clause 2.7.

- 2.8 **If Surface Developments are Isolated.** If the Surface Developments are not tied into the Upcountry Water Distribution System or the HECO electrical grid, then the Extracted Water and Microgrid System are expected to be the sole source of water and power to Surface Developments. To ensure that Surface Developments are not isolated from water and power, in operating the Well Systems the Parties will ensure that the Surface Developments receive Extracted Water and electricity to avoid outages and shortfalls.
- 2.9 **Surface Developments Tied To DWS System.** After the Commencement Date for the Well Package for Well One, if the owner of any Surface Development elects to receive water from the Upcountry Water Distribution System, DWS will provide that water at customary rates and at the Surface Development Owner's expense. Owner will receive no priority rights to meters or other service.

3. TERM OF THE AGREEMENT

- 3.1 **Duration.** This Agreement will take effect on the Effective Date. The right of DWS to pay for delivery of Extracted Water from Well One and each Follow-On Well will commence on the Completion Date of the Well Package for Well One and will extend until the Termination Date.
- 3.2 **Optional Extension.** DWS will have a unilateral right to extend the Term for ten (10) years up to three times with respect to all Well Packages (but not less than all Well Packages) subject to this Agreement. DWS will exercise this option by written notice given not more than eighteen (18) Months nor less than twelve (12) Months before the date on which this Agreement would otherwise expire.
- 3.3 **County Cooperation Following Termination or Waiver.** If DWS allows this Agreement to terminate or elects not to exercise its option to pay for delivery of Extracted Water from a Follow-On Well, Owner will be entitled to develop the Wells and sell Extracted Water from Wells not subject to this Agreement as Owner elects. DWS will reasonably cooperate with Owner to allow Owner to sell Extracted Water from any Wells not subject to this Agreement to third parties. Reasonable cooperation will include allowing Owner to utilize the Supporting Infrastructure and the existing Upcountry Water Distribution System to move Extracted Water off of the Property and working with Owner to support the grant by the County, DWS and other County Governmental Authorities of reasonable easements and rights of way on land, easements areas and roadways in their possession or control to allow Owner to develop separate distribution infrastructure required to move Extracted Water elsewhere in the Upcountry and in areas of Maui below. Owner will be responsible for paying 100% of any costs for new improvements to the Upcountry Water Distribution System requested by Owner to move Extracted Water off of the Property. Owner will be responsible for 100% of any marginal costs that DWS incurs to assist Owner in moving Extracted Water in the Upcountry Water Distribution System or in the DWS easement areas off-site. Owner will be entitled to tie Follow-On Wells not subject to this Agreement into the Energy Microgrid and Supporting Infrastructure of Wells subject to this Agreement on the condition that Owner must separately meter the Microgrid System to ensure that DWS only pays its prorated share of electricity usage from the Microgrid System allocable to Well Packages subject to this Agreement. Nothing in this Agreement will require that DWS or the County exercise eminent domain powers over private property.

4. PERMITS AND APPROVALS

- 4.1 **Permitting Expense Waiver.** DWS's payment for delivery of Extracted Water is intended to be net of all County expenses, so to the extent not waived by the County, DWS will reimburse Owner for all real estate taxes, development fees, building department review expenses, permit fees and other county level governmental costs associated with the Property or the Water System during the Term and imposed by the County. DWS will make

payments under this Section 4.1 within sixty (60) days following the Completion Date of a Well and not before the Completion Date. Nothing in this Clause 4.1 will limit the County's rights to collect normal and customary fees, charges and taxes associated with Surface Development unrelated to the Wells. Nothing in this Clause 4.1 will limit the County's rights to collect normal and customary fees, charges and taxes associated with any Well System not subject to this Agreement. DWS will have no obligation to reimburse Owner for expenses relating to Surface Developments unrelated to the Wells or relating to any Well System from which the County elects not to pay for delivery of Extracted Water. If the County elects to waive its option to pay for delivery of Extracted Water from a Follow-on Well, the DWS and Owner will reasonably prorate any common expenses otherwise subject to reimbursement under this Section 4.1 (e.g. real estate taxes applicable to a tract of land not segregated into separate tax parcels) so that the County is not obligated to pay expenses unrelated to a Water System from which the County is not purchasing Extracted Water.

- 4.2 **Governmental Approvals Cooperation.** Owner shall be responsible for identifying and obtaining all necessary Governmental Approvals from each agency of any Governmental Authority having jurisdiction over any aspect of the Project. DWS agrees to work cooperatively with Owner to assist Owner in that permitting process. The Parties shall keep each other promptly and fully advised of their dealings with all Governmental Authorities and shall afford each other the full opportunity to participate in such meetings in recognition of their joint interest in timely performance of this Agreement. Provided that the Wells comply with Applicable Legal Requirements and conform to the requirements of this Agreement and Surface Improvements are within the scope described herein, DWS and the County will not object to (and will affirmatively support if requested by Owner) Owner's applications to other Governmental Authorities for Governmental Approvals necessary to approve the Project (including Surface Developments) and to complete each Well Package in the ordinary course. Nothing in this Agreement grants Owner rights to bypass normal and customary County Governmental Approvals processes relating to Surface Developments.

5. DESIGN PHASE

- 5.1 **Contractor Selection.** Promptly following the Effective Date, Owner will select the various parties required to complete Well One and its Supporting Infrastructure and the Microgrid System, including each member of the Contractor Team. Owner will have exclusive control over the method of selection and the terms of contracts with each member of the Contractor Team. All contracts relating to the Project must comply with the general laws of the State of Hawaii and of the County applicable to private construction and development projects. DWS is not responsible for contractor payment or methods associated with the Project. None of the contracts relating to the design, development, operations and maintenance or components of the Project will be deemed public contracts. None of the contracts with the Contractor Team or their subcontractors or material suppliers will be subject to public bidding and other State and County procurement requirements applicable to public projects.
- 5.2 **Design.** Commencing at the start of the Design Phase for the Well Package for each Well, Owner and the Contractor Team will (a) develop the Design Documents, (b) work with DWS and the Appointed Independent Engineering Team to ensure that the planned Supporting Infrastructure for the Well Package interconnects with the Upcountry Water Distribution System in a manner that allows DWS to receive the expected Available Monthly Water Quantity and (c) complete all other elements of the Project Plan for the applicable Well Package.
- 5.3 **Extracted Water and Power Capacity.** The Contractor Team's estimate of the expected Available Monthly Water Quantity and corresponding Available Monthly Energy Quantity

will be included in the Design Documents for each Well Package, subject to adjustment during the Construction and Testing Phase and Operations Phase based on actual Well Pumping Capacity, Owner's planned hours of Well and Microgrid System. In its planning and operations of each Well Package, Owner may elect to set the Available Monthly Water Quantity at less than 100% of the Pumping Capacity of a Well Package for such reasons as Owner elects, including for purposes of mitigating energy costs, allowing for emergency excess capacity, creating reserve capacity to fill On-Site Storage facilities, reducing Supporting Infrastructure Costs, maintenance expenses and other costs, and for such other purposes as Owner elects.

- 5.4 **Testing and Quality.** During the Design Phase, the Contractor Team will develop and present for Owner's and DWS' approval the Performance Testing Requirements as well as the anticipated Pumping Capacity, anticipated Available Monthly Water Quantity, anticipated Available Monthly Energy Quantity, and On-Site Storage capacity of the Supporting Infrastructure.
- 5.5 **Integration with Upcountry Water Distribution System.** Owner will engage the Appointed Independent Engineering Team at Owner's expense as a resource to DWS to assist DWS in reviewing the Project Plan for each Well and in planning and design of off-site infrastructure necessary to link each Well Package to the County's Water Distribution System. The Appointed Independent Engineering Team will invoice Owner directly for these services and Owner will be responsible for all amounts due the Appointed Independent Engineering Team in an amount not to exceed \$250,000 per well. The Appointed Independent Engineering Team will not be subject to Owner's direction and control but will be engaged to provide independent recommendations and advice to DWS. Within ten (10) Days following completion of the Project Plan by the Design Agent, Owner will present the Project Plan to the Appointed Independent Engineering Team and DWS for comment for the purpose of allowing DWS to begin design and planning for the integration of the Water System with the Upcountry Water Distribution System. The Site Plan included within the Project Plan will include all Easement Areas and a designation as to whether those Easement Areas are exclusive or non-exclusive and a designation of the burdened and benefitted parties. At each Project Meeting, the Appointed Independent Engineering Team and DWS will regularly update Owner and the Design Agent as to any changes to the Project Plan, including any needed changes to the Point of Interconnection, changes to the anticipated Pumping Capacity of each Well, the progress of permitting, the schedule for completion and specifications of each Well and Supporting Infrastructure and any likely impediments to linking the Upcountry Water Distribution System to the Water System. Owner may change the Project Plan as Owner may require from time to time and will bear no liability to DWS for any such modification, including costs incurred by the County to redesign or relocate the Upcountry Water Distribution System or the Point of Interconnection or to accommodate additional Well Packages. DWS's review and approval rights of the Project Plan for each Well Package will be limited to approval of (a) each Well Package's Point of Interconnection, (b) the required Extracted Water Quality Standards, (c) the desired On-Site Storage capacity and other elements of interoperability between the Water Package and the County's Water Distribution System, (d) the Initial Well Testing requirements and ongoing Performance Testing requirements for each Well Package. DWS will be responsible for all design work and permitting necessary to bring the Upcountry Water Distribution System to the Point of Interconnection with the Property and the Supporting Infrastructure for each Well. Prior to commencement of drilling of each Well, Owner and the County must affirm in writing the agreed final Point of Interconnection and neither Owner nor the County may change this final Point of Interconnection without approval of the other.
- 5.6 **Permit Submission.** Once Owner, DWS and the Appointed Independent Engineering Team approve the Project Plan for a Well Package, Owner, with assistance of Design

Agent and other selected legal counsel and advisors, will present the Project Plan to applicable Governmental Authorities and, at Owner's expense, oversee all efforts to secure applicable Governmental Approvals for development of each element of the Well Package for that Well Package.

- 5.7 **Supporting Infrastructure Cost and Land Cost.** Based on the Project Plan agreed to between Owner and DWS, Owner will determine the Supporting Infrastructure Cost which will equal 110% of the total cost bid by the Contract Team for the development of Supporting Infrastructure. Owner will control contractor selection and all other matters relating to the establishment of the Supporting Infrastructure Cost. Owner will regularly review all Supporting Infrastructure contractor and materials bids with DWS, the Appointed Independent Engineer and the DWS O&M Contractor solicit input on recommended changes to optimize the functionality and minimize Supporting Infrastructure Cost. Owner will not self-perform work relating to the Supporting Infrastructure and will review total budgets with DWS, the Appointed Independent Engineer and the DWS O&M Contractor prior to commencing construction of the Supporting Infrastructure. As part of the Project Plan, the Design Agent will specify the Land Area for purposes of calculating the Land Charge. The Supporting Infrastructure Cost and Land Area may increase or decrease with modifications to the Wells and Supporting Infrastructure during the Term. Owner will update the Supporting Infrastructure Cost budget and Land Area with each update to the Project Plan and provide that updated information to DWS.
- 5.8 **Changes.** If Owner wishes to make any substantial changes in its design for a Well Package which vary from the requirements of the Project Plan already approved, Owner will notify DWS in writing of the proposed changes before implementing any such changes. DWS will have the right to consent to any such changes, but only to the extent that DWS is entitled to comment on the Project Plan in the original instance.
- 5.9 **Drawings and Specifications.** The drawings, specifications and other documents representing Owner's design of each Well Package are instruments of service and shall not become the property of DWS regardless of whether DWS purchases the Water System. Such drawings, specifications and other documents shall not be used by DWS on other projects, except by written agreement between Owner and DWS. Submission or distribution of such documents by Owner or DWS to meet official regulatory requirements or for other public purposes in connection with the Project is not to be construed as publication in derogation of Owner's common law copyrights or other reserved rights. Notwithstanding anything in this Clause 5.6 to the contrary, Owner must maintain a complete set of such drawings, specifications and other documents reflecting as-built conditions which shall be updated periodically during the term of this Agreement in the event there are any substantial changes made to a Well Package.
- 5.10 **Warranty and Claims against Design Agent and EPC Contractor.** In its contract with each member of the Contractor Team, Owner will negotiate for customary warranties and indemnities for claims against Owner arising from errors in design or defects in work. As DWS is not the direct beneficiary of the Design Team Contracts, DWS will not be entitled to claim under warranties or indemnities granted by members of the Contractor Team in favor of Owner. To the extent that defects exist in the design or construction of any element of a Well Package that cause damage to DWS or DWS customers, including a failure of Owner to be to provide water to DWS as contracted hereunder, Owner will be liable to DWS for DWS's damages, but only to the extent that Owner is entitled to collect and actually collects those damages from a Contractor Team member. Nothing in this Clause 5.7 will exculpate Owner from any direct liability that Owner may have to DWS for its own negligence or default under this Agreement.
- 5.11 **Delays or Changes in Approval.** In the absence of another agreed timeframe and to

facilitate timely delivery of the Project, Owner and DWS will each approve or provide comments on any element of the Project Plan or change to the Project Plan in writing within fourteen (14) days of the other's request. If DWS requests modifications to any element of the Project Plan that DWS previously approved, DWS will be obligated to reimburse Owner for 110% of any additional costs incurred by Owner to modify the Project Plan and any work performed or materials purchased in reliance on DWS's prior approval. To be effective, changes in the Project Plan must be mutually agreed to by Owner and DWS in writing.

6. CONSTRUCTION AND TESTING PHASE I (Drilling)

- 6.1 **Construction.** During the Construction and Testing Phase, Owner shall undertake to construct each Well and associated elements of its Well Package in accordance with the Project Plan.
- 6.2 **Construction Control.** Other than DWS's right to enforce the terms of this Agreement or to give its approval of elements of the Project Plan as provided for in this Agreement, DWS shall have no right to control Owner or the Contractor Team in the performance of their duties. Owner shall have complete responsibility for coordinating all aspects of construction of each Well Package. Neither DWS nor the Appointed Independent Engineering Team will instruct or direct any person with regard to the construction of any Well Package, but may direct any comments, questions or requests in writing to Owner or its designated representative. Nothing set forth herein shall be deemed to give DWS the right to instruct or control Owner or its agents, employees or independent contractors in the conduct of their duties in constructing any Well Package.
- 6.3 **Costs.** With the exception of improvements to the County's Water Distribution System, Owner shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, utilities, transportation, and other work and services necessary for proper execution and Completion of the Project.
- 6.4 **Site Access.** Owner will allow DWS access to the Land Area and other locations where any portion of the Well Package for Well One or any Follow-On Well are being constructed to observe or inspect the quality and progress of construction. Subject to the provisions of Section 15.5, DWS will be liable for any damages to persons or property arising in whole or in part by reason of its personnel or contractors entering on the Property or damaged by their activities on the Property.
- 6.5 **Point of Interconnection.** DWS will provide on a timely basis specifications for its County Water Distribution infrastructure located at the Point of Interconnection for each Well Package so that the EPC Contractor may design and build the interconnection and install required metering. DWS shall grant to Owner and the Contractor Team all property interests necessary for Owner to build and maintain the interconnection. Failure of DWS to complete any element of the County's Water Distribution System on or before the end of the Construction and Testing Phase will not relieve the DWS of its obligations hereunder.
- 6.6 **As-built Drawings.** Owner shall maintain a complete set of as-built or record drawings of each Well Package and shall promptly make such drawings available to DWS if at any time DWS acquires ownership of any Well Package, provided that Owner shall retain its proprietary intellectual property rights in such drawings. Owner shall revise such drawings to as built quality within thirty (30) Days following the Completion of each Well Package and/or each addition, expansion, modification or other change.

7 CONSTRUCTION AND TESTING PHASE II (Testing & Commissioning)

- 7.1 **Initial Testing and Commissioning.** As a condition to ending the Construction and Testing Phase Owner will conduct the Initial Testing of each Well Package in accordance with the testing procedures developed by the Contractor Team during the Planning Phase. Owner will notify DWS in advance of conducting the Initial Testing to afford DWS's representatives an opportunity to observe such tests. Initial Testing will establish whether each Well Package subject to this Agreement is operational and capable of delivering Extracted Water meeting the Extracted Water Quality Standards to the Point of Interconnection in accordance with the O&M Standards.
- 7.2 **Completion Date.** Owner will notify DWS as soon as Owner has successfully achieved Completion of a Well Package. This Completion notice will be accompanied by a certificate from the Design Agent confirming (a) the Pumping Capacity, the expected Available Monthly Water Quantity and corresponding expected Available Monthly Energy Quantity, (b) that the Well Package can deliver the expected Available Monthly Water Quantity to the Point of Interconnection and that the Microgrid System can provide the Available Monthly Energy Quantity, (c) the capacity of On-Site Storage facilities, (d) that the Well Package is operating and can be operated in accordance with the O&M Standards, (e) that all Governing Authorities have issued Governmental Approvals required to operate the Well Package and sell Extracted Water from the Property, (f) the final Land Area, (g) the final Supporting Infrastructure Cost, (h) that the O&M Contractor is prepared to begin operating the Well and Microgrid System and to turn over operations of the Supporting Infrastructure to the DWS O&M Contractor so as to deliver Extracted Water to the Point of Interconnection. Delivery of this completion notice and accompanying Design Agent certificate will mark the Completion Date and consequently the end of the Construction and Testing Phase and the commencement of the Operations Phase. Owner may require that DWS and Owner execute an affirmation certificate confirming agreement that the Completion Date has occurred and specifying the date thereof.
- 7.3 **Preliminary Extracted Water.** If prior to the Completion Date Owner delivers Extracted Water to DWS at the Point of Interconnection and DWS accepts that Extracted Water, DWS will pay for such early delivery based on the number of gallons delivered at 200% of the Water Price, but without obligation to pay for electricity, metering fees, infrastructure charges, land charges or any other charges.

8 DELAYS AND EXTENSIONS OF TIME

- 8.1 **Extension of Completion Date.** DWS recognizes that Owner is taking the risk of delay arising by reason of Governmental Inaction delaying necessary Governmental Approvals. If Governmental Inaction occurs and Owner has not otherwise defaulted under this Agreement, any delays in the Commencement Date or the Completion Date of any Well Package will be presumptively deemed to be the result of that Governmental Inaction regardless of what other events contribute to the delay.
- 8.2 **Extension of Completion Date.** Owner may extend the Completion Date as Owner may require due to:
- (a) Governmental Inaction;
 - (b) Other delays in environmental review or in securing necessary Governmental Approvals, provided that Owner and the Contract Team continue to pursue those Governmental Approvals and has a reasonable probably of success in that effort.
 - (c) Delays in completing any Well provided that the Contractor Team is continuing to conduct regular drilling operations.
 - (d) Delays in Completion of any component of a Well Package due to material unavailability, worker shortage, or other reasonable delays provided that the Contractor Team is continuing to pursue Completion.
 - (e) Failure to satisfy any condition precedent set forth in the definition of Commencement Date, despite the reasonable efforts of Owner,

- (f) Any wrongful or negligent act or omission of DWS, its agents or employees, or any unreasonable delay on the part of DWS, its agents or employees in fulfilling DWS's obligations hereunder;
 - (g) The occurrence of a Force Majeure event, provided that the Party affected uses its best efforts and acts in good faith to avoid or overcome the effects of the event;
 - (h) Damage to or destruction of any element of a Well Package by fire or casualty, through no fault of Owner; and
 - (i) Failure of DWS to appoint a DWS O&M Contractor reasonably acceptable to Owner.
 - (j) Failure of DWS to satisfy any obligation of DWS hereunder.
- 8.3 **Notice of Events; Compensation for Extension.** If Owner claims that it is entitled to an extension of time under Clause 8.2, it shall give written notice to DWS of the acts or events claimed to give rise to the right to an extension of time. Such written notice shall fully document the facts giving rise to Owner's claim and in addition shall include an estimate of the probable effect of the claimed delay on the Completion Date. Any disputes with respect to such claims for extensions of time shall be resolved in accordance with the provisions of Clause 20.
- 8.4 **DWS Reviews and Inspections.** DWS will endeavor to complete reviews or inspections and provide comments or approvals to Owner within two weeks of Owner's request. If DWS fails to complete any review or inspection within two weeks, Owner may request a specific date as to when DWS will complete a review or inspection. If thereafter DWS fails to respond within ten days to Owner's request as to when the review or inspection will be completed or fails to complete the review or inspection within the updated timeframe offered, the approval of DWS shall be deemed to have been given.

9 OPERATIONS PHASE

- 9.1 **Delivery of Water.** On the Completion Date, Owner will commence delivery of Extracted Water into the Supporting Infrastructure for storage or distribution into the Upcountry Water Distribution System at the Point of Interconnection.
- 9.2 **Interruptions, Maintenance and Degradation.** Without liability to DWS, Owner may reduce or stop delivery of Extracted Water to the Supporting Infrastructure as necessary to: (a) perform required maintenance, testing, or cleaning, (b) correct equipment malfunctions, (c) perform equipment replacement, (d) as the natural consequence of Well or Well Package degradation (notwithstanding proper maintenance) (e) if a member of the Contractor Team recommends to Owner, for any reason, that the Well and its underlying aquifer require the reduction to avoid overuse or damage, or (f) as the result of Force Majeure. Owner will cause the O&M Contractor to regularly update DWS on the timing, cause and expected duration of any expected or actual interruptions and reductions in Extracted Water delivery.
- 9.3 **Current and Future Quality Standards.** Extracted Water must satisfy Extracted Water Quality Standards. Owner will be responsible for paying all costs necessary to improve each Water Package and or treat Extracted Water to otherwise ensure that Extracted Water meets the Extracted Water Quality Standards. If changes in Applicable Legal Requirements impose more stringent standards affecting the quality of Extracted Water subsequent to the execution of this Agreement, the Change in Law provisions of Clause 16.7 shall apply.
- 9.4 **Water Meters.** Owner shall be required to purchase and install appropriate water measurement devices detailed in the Design Documents which will include two integrating flow meters with an accuracy of $\pm 0.5\%$ or better, which shall verify Owner's compliance

with the quantity and quality requirements of this Agreement. The water measurement devices shall be calibrated and sealed after installation. The water measuring devices will measure and record the Actual Monthly Water Quantity delivered to the Supporting Infrastructure for eventual delivery to the Point of Interconnection.

- 9.5 **Energy Meters.** Owner will purchase and install appropriate electricity measurement devices detailed in the Design Documents to measure and verify the Actual Monthly Energy Quantity provided by the Microgrid System in support of the other elements of each Well Package.
- 9.6 **Water Sampling.** DWS shall have the right to sample and test the Extracted Water supply, at DWS's expense, upon reasonable notification to Owner. However, any such sampling or testing shall not excuse Owner's compliance with this Agreement.
- 9.7 **Calibration of Devices.** Owner shall calibrate and adjust measurement and testing devices on a regular basis, not less than annually. In the case of a discrepancy between the readings provided by the two integrated flow meters, the reading of the meter found to be more accurate shall be adopted for purposes of any required calculations at that time. In the event no determination of accuracy is possible, the average reading of the two meters will be used for such purpose.
- 9.8 **Records.** Throughout the duration of this Agreement, Owner shall maintain auditable records pertaining to its performance of this Agreement. Owner shall make such records available to DWS pursuant to DWS's reasonable request for inspection. The records shall verify the quantity, quality and delivery of Extracted Water and Microgrid System energy provided under the terms of this Agreement.
- 9.9 **Notification of Deficiencies.** If the O&M Contractor determines that the performance specifications for Extracted Water are not met, Owner will cause the O&M Contractor to promptly notify DWS and develop with DWS an action plan and schedule for correcting the deficiency.
- 9.10 **Supporting Infrastructure Operations.** Commencing on the Completion Date for any Well Package, DWS, through the DWS O&M Contractor, will assume the obligation to operate, repair, maintain and replace as necessary the Supporting Infrastructure in conformity with the Operation and Maintenance Documents. DWS will be entitled to store Extracted Water in On-Site Storage towers and basins developed on the Property as part of the Supporting Infrastructure. The DWS O&M Contractor and DWS will be solely responsible for electing how much of the Actual Monthly Water Quantity that DWS elects to store in On-Site Storage or distribute to the Upcountry Water Distribution System. The DWS O&M Contractor may periodically direct that Owner take actions to reduce the Actual Extracted Water Quantity from time to time to allow for maintenance, repairs or replacements to the Supporting Infrastructure, provided that such reductions will not reduce the Water Charge or Energy Charge.

10 MAINTENANCE RESPONSIBILITIES

- 10.1 **Maintenance of each Well Package.**
- 10.1.1 *O&M Contractor Responsibilities.* During the Operations Phase, Owner will retain the O&M Contractor to operate and maintain in good and safe condition and repair (a) each Well (including associated pumping equipment and access areas) and (b) the Microgrid System, as required by this Agreement, the Operating and Maintenance Documents and all Applicable Legal Requirements. The O&M Contractor will be responsible for performing

Performance Testing of the Wells and Microgrid System and providing regular reporting to DWS regarding the results of that Performance Testing against the O&M Standards, all in accordance with the Operations and Maintenance Documents. Owner will provide and pay for labor, materials, equipment, tools, machinery, water, electricity and other utilities, transportation, and other services, whether directly or through an O&M Contractor, to operate and maintain the Well and Microgrid as may be needed to ensure efficient and reliable service as required by this Agreement and Applicable Legal Requirements. Other than its right to enforce the terms of this Agreement, DWS shall have no right to control Owner or the O&M Contractor in the performance of their duties.

10.2 **DWS O&M Contractor Responsibilities.** During the Operations Phase, DWS shall retain designate the DWS O&M Contractor to operate and maintain in good and safe condition and repair the Supporting Infrastructure, as required by this Agreement, the Operations and Maintenance Documents and all Applicable Legal Requirements. The DWS O&M Contractor will be responsible for performing Performance Testing of the Supporting Infrastructure and providing regular reporting to Owner regarding the results of that Performance Testing, against the O&M Standards, all in accordance with the Operations and Maintenance Documents. The DWS O&M Contractor responsibilities may be divided between separate parties as DWS may elect, including potentially utilizing DWS internal personnel. DWS will provide and pay for labor, materials, equipment, tools, machinery, water, electricity and other utilities, transportation, and other services, whether directly or through an DWS O&M Contractor, to operate and maintain the Supporting Infrastructure as may be needed to ensure efficient and reliable service as required by this Agreement. Other than its right to enforce the terms of this Agreement, Owner shall have no right to control DWS O&M Contractor in the performance of its duties.

10.3 **Operation and Maintenance Manuals and Updates to O&M Standards.** During the Design Phase, the O&M Contractor and DWS O&M Contractor will meet with Owner, DWS and the other members of the Contractor Team and prepare and approve the Operation and Maintenance Documents and to set the O&M Standards. Quarterly during the Term, the O&M Contractor and DWS O&M Contractor will meet and review their performance against the O&M Standards and recommend any update to the Operation and Maintenance Manuals to allow for improvement of performance, maintenance and reporting for each element of each Well Package and to provide a joint recommendation for changes. Unless objected to by Owner, the Parties will accept the joint recommendations of the O&M Contractor and DWS O&M Contractor to any modification of the O&M Standards or Operation and Maintenance Documents by mutually executing a formal amendment thereto.

10.4 **Maintenance and Repairs.**

10.4.1 **Repairs, Replacements and Shutdowns of Wells and Microgrid System.** Owner or its O&M Contractor, at Owner's sole cost and expense, will perform all maintenance, repairs and replacements to each Well and to the Microgrid System in accordance with any manufacturers' instructions, the applicable Operations and Maintenance Manuals, and good industry practice. Prior to the Completion Date, and at least thirty (30) Days prior to each anniversary of the Completion Date, Owner shall provide DWS with a written schedule setting forth scheduled dates for repairs or maintenance requiring shutdown or restrictions of flow for a Well or the Microgrid System during the upcoming Contract Year. Furthermore, Owner will endeavor to separately notify DWS in writing five (5) Days in advance of any scheduled shutdowns or restrictions or flow of a Well or the Microgrid System and shall notify DWS as soon as practicable of any unscheduled shutdown or restrictions of flow of a Well or the Microgrid System. Any notice of shutdown or restrictions of flow will detail the anticipated length of the shutdown and the reduction in Extracted Water or available Microgrid System energy anticipated during the shutdown. Owner or its O&M Contractor shall be required to maintain at a location on the Hawaiian Islands, a

supply of spare parts and materials sufficient to ensure the ability of Owner or its O&M Contractor to promptly perform any necessary repairs to each Well and the Microgrid System as specified in the O&M Maintenance Standards.

- 10.4.2 *Repairs, Replacements and Shutdowns of Supporting Infrastructure.* DWS or its DWS O&M Contractor, at DWS's sole cost and expense, will perform all maintenance, repairs and replacements to the Supporting Infrastructure in accordance with any manufacturers' instructions, the applicable operations and maintenance manuals, and good industry practice. Prior to the Completion Date, and at least thirty (30) Days prior to each anniversary of the Completion Date, the DWS O&M Contractor or DWS will provide Owner with a written schedule setting forth the regularly scheduled repairs or maintenance requiring shutdown or restrictions of water flow relating to the Supporting Infrastructure during the upcoming Contract Year. Furthermore, the DWS O&M Contractor or DWS shall separately notify Owner in writing five (5) Days in advance of any scheduled shutdown or flow restriction of the Supporting Infrastructure and shall notify Owner as soon as practicable of any unscheduled shutdown or flow restriction of any component of the Supporting Infrastructure. Any notice of shutdown or flow restriction will detail the anticipated length of the shutdown or restriction, the reason for the shutdown or flow restriction and the anticipated reduction in Extracted Water needed during the shutdown or flow restriction. DWS or its DWS O&M Contractor shall be required to maintain at a location on the Hawaiian Islands, a supply of spare parts and materials sufficient to ensure the ability of DWS or its DWS O&M Contractor to promptly perform any necessary repairs to each element of the Supporting Infrastructure as specified in the O&M Maintenance Standards.
- 10.5 **Disruptions in Operation of Supporting Infrastructure.** During any shutdown or restriction of flow of a Well Package attributable to the Supporting Infrastructure, Owner will be entitled to restrict Extracted Water flow from the impacted Well and reduce electricity provided by the Microgrid System to the impacted Well and Supporting Infrastructure. Notwithstanding a reduction in the flow of Extracted Water or energy, DWS will nevertheless be obligated to continue to pay the Water Charge and Energy Charge.
- 10.6 **Reporting on Available Monthly Water Quantity and Monthly Available Energy Quantity.** O&M Contractor will provide within ten (10) Days following the end of each month during the Term a report including (a) the Available Monthly Water Quantity and Available Monthly Energy Quantity available during the preceding month, (b) the Actual Monthly Water Quantity and Actual Monthly Energy Quantity delivered during the prior month based on meter readings and (c) O&M Contractor's forecast of any scheduled increases or decreases to the Available Monthly Water Quantity and Monthly Available Energy Quantity in the succeeding months.
- 10.7 **Decreases in Available Monthly Water Quantity and Monthly Available Energy Quantity.** If for any month the Actual Monthly Water Quantity or Actual Monthly Energy Quantity is lower than Available Monthly Water Quantity or Available Monthly Water Quantity through no fault of the County, O&M Contractor will notify Owner and DWS and the Water Charge and Energy Charge will be decreased accordingly for that month to correspond to Actual Monthly Water Quantity and Actual Monthly Energy Quantity delivered during the prior month based on meter readings. O&M Contractor may decrease the Available Monthly Water Quantity or Available Monthly Water Quantity as necessary to maintain and service a Water System or for other operational reasons as the O&M Contractor determines necessary to the efficient operation of the Water System. O&M Contractor will endeavor to notify the County of any decrease to the Available Monthly Water Quantity or Available Monthly Water Quantity prior to the beginning of each month.
- 10.8 **Increases in Available Monthly Water Quantity and Monthly Available Energy Quantity.** If for any month the Actual Monthly Water Quantity or Actual Monthly Energy

Quantity is higher than the Available Monthly Water Quantity or Available Monthly Water Quantity forecasted by the O&M Contractor prior to the beginning of the Month, the County will only pay for that excess if the excess Extracted Water was provided at the County's request. O&M Contractor may increase the Available Monthly Water Quantity or Available Monthly Water Quantity if system improvements, seasonal changes in solar capacity, or other factors allow O&M Contractor to efficiently increase the capacity of a Water System. O&M Contractor must notify the County of any increase in the Available Monthly Water Quantity or Available Monthly Water Quantity at least two months prior to the increase.

- 10.9 **Books and Records.** Owner shall maintain complete records of all maintenance or repairs performed on each Well and the Microgrid System. The DWS O&M Contractor shall maintain and provide to Owner complete records of all maintenance or repairs performed on the Supporting Infrastructure. If at any time DWS acquires ownership of the Water System or Owner is in Default of this Agreement, DWS may inspect and copy the books and records of Owner relating to operation and maintenance of the Water System and Owner shall promptly provide such materials to DWS.
- 10.10 **Site Access; No Control.** DWS, through its authorized representative and upon reasonable advance notification to Owner, may enter the Property and observe operations and maintenance of each Well subject to this Agreement and of the Microgrid System. DWS and its authorized representative may not instruct or direct any Person with regard to the operation and maintenance, but may direct any comments, questions or requests to Owner or its designated representative. If such comments, questions or requests result in a dispute, any such dispute shall be resolved in accordance with the procedures set forth in Clause 20 of this Agreement. Nothing herein shall be deemed to authorize DWS to instruct or control Owner or its agents, employees or independent contractors in the conduct of their duties in operating and maintaining any Well or the Microgrid System. Owner will be entitled to inspect and access the Supporting Infrastructure as it deems appropriate and inquire as to the operations, maintenance or repairs to all Supporting Infrastructure in its capacity as Owner of the Property. Owner will not be entitled to direct the DWS O&M Contractor in the performance of its duties and will have no control over DWS or the DWS O&M Contractor.

11 CHANGES

- 11.1 **Ordinary Changes.** Parties recognize that changes to the Project Plan and its component parts may be required during the term of this Agreement, including any changes necessary to comply with Changes in Law. Moreover, technological changes or increased environmental or other regulatory requirements may necessitate modification of the Project or elements of the Project Plan during the term of this Agreement. Consequently, the Parties desire:
- (a) to provide for such modification or expansion of the Project should the need arise,
 - (b) to provide a mechanism under which they may negotiate to effect such modification or expansion, and
 - (c) to provide an acceptable mechanism for modifying or expanding the Project if they are unable to agree to effect the modification or expansion under this Agreement.
- 11.2 **Notice.** Each Party shall advise the other in a timely manner of the need for any change to any component of the Project Plan and the circumstances necessitating the change. Upon receipt of such notice, the Parties promptly shall arrange to meet and negotiate in good faith regarding the scope, cost and other particulars relating to the proposed change:
- 11.3 **Required Changes.** If the Parties are unable to agree upon an amendment to this Agreement regarding any change to the Project Plan proposed by DWS, DWS will be entitled to declare the change a Required Change. Owner must undertake any Required

Change declared by DWS provided that the Required Change conforms to Applicable Law, has been or can be approved by all Governmental Authorities, is reasonably achievable, can be achieved in a manner that does not damage the Property or the Well Package, result in a termination of warranties for any element of the Well Package or impose potential additional liability on Owner to third parties. Owner acknowledges that DWS's rights under this Clause 11.3 will allow DWS to direct Owner to make changes in the Project Plan over Owner's objections. DWS's declaration of a Required Change shall not constitute an abandonment of this Agreement. DWS shall notify Owner in writing of its intention to order Required Change. DWS's notice shall specify in reasonable detail the nature of the proposed change in the Project Plan and the reason for the change. As soon as reasonably practical, following a Required Change, Owner will provide DWS with the schedule setting forth the timing of design work and subsequent implementation work for the Required Change and all other changes to the Project Plan and its underlying documents. Owner will also present the required capital cost and ongoing operating expense increases that Owner will impose on DWS as a condition to the Required Change. DWS will be solely responsible for all costs of changes to the Project required by a Required Change ordered by DWS or as the result of Changes in Law. For changes in the Project Plan susceptible to clear definition prior to the commencement of the work required by the change, DWS may elect to pay to Owner the cost of the change up front, plus 10% as an administration fee as a condition to DWS undertaking the Required Change. In lieu of collecting cost up-front, Owner may require that DWS pay for the increase by means of a monthly surcharge added to the Water Charge over the remainder of the term equal to the cost of the Required Change amortized over the remainder of the Term, plus interest at 10%. If a Required Change increases Owner's operating expenses for the Water System, Owner will be entitled to recover the amount of such increase in operating expense as and when incurred, plus an administrative charge of 10%. If the Required Change requires the inclusion of more of the Property within the Land Area, Owner will increase the Land Charge accordingly and may include any amounts that Owner must pay to third parties to secure control of that additional property. Any charge or expense associated with a Required Change and supported by an estimate of the Contracting Team will be presumed correct absent fraud or gross error. Where a member of the Contracting Team offers the estimate in a range, Owner will be entitled to pass through the expense at the top of the range with a subsequent refund of the expense to DWS if the actual expense is lower. Owner will not be obligated to reduce any amounts otherwise due Owner hereunder as the result of any Required Change.

- 11.4 **Disputes.** Any dispute under this Clause 11 shall be resolved in accordance with the dispute resolution mechanism set forth in Clause 20.

12 METER SALES AND METER CHARGES

- 12.1 **Use by DWS of Extracted Water.** DWS will have sole authority to utilize Extracted Water delivered under this Agreement in such manner as DWS deems most beneficial to its operations and to the residents of Maui. Owner will have no right to require that the DWS issue new meters, that DWS store water off-site, or that DWS utilize Extracted Water in any manner.
- 12.2 **Sharing of Meter Charges.** The Water System will make possible the expansion by DWS of water service, long delayed due to water shortages. DWS will pay to Owner 50% of all Meter Charges collected by DWS within the Upcountry Water Distribution System and attributable to any period during the Operations Phase.
- 12.3 **Reporting.** Within ten (10) Days following the end of each month during the Operations Phase, the DWS will provide to Owner a report detailing all Meter Charges assessed and collected by the County from any party connected to the County's Water Distribution System during the preceding month. This report will detail the source of the charge, the

number of users charged and such other information as Owner reasonably requests to allow Owner to verify the amount of the Meter Fees due Owner hereunder. Within one hundred twenty (120) Days of the end of each calendar year during the Operations Phase, DWS will provide to Owner an audit of Meter Charges collected during the prior year (or such portion of the prior year included within the Operations Phase). If that audit details an overpayment of Meter Charges to Owner, DWS will collect the overpayment by offsetting Owner's portion of future Meter Charges or by collecting such overpayment directly from Owner if the Termination Date occurs and amounts remain uncollected. If that audit details an underpayment, DWS will pay to Owner the amount of the underpayment within thirty (30) Days following issuance of the audit report. If the DWS uses internal personnel or an outside auditing firm selected by DWS to conduct the Meter Charges Audit, DWS will pay the cost of the audit. If requested by Owner, and at Owner's expense, DWS will utilize a third-party independent auditing firm designated by Owner to perform the audit.

- 12.4 **Buy-Out Payment.** In lieu of paying Meter Charges to Owner, DWS can pay to Owner \$12,000,000 at the time that DWS first pays for delivery of Extracted Water from the Well Package for Well One. To continue to avoid paying Meter Charges, DWS must pay an additional \$12,000,000 concurrently with the first payment for delivery of Extracted Water from any Follow-On Wells subject to this Agreement. DWS will only be obligated to provide Meter Charge reporting or audits during periods that Owner is entitled to share in Meter Charges.

13 PAYMENT FOR DELIVERY OF WATER

- 13.1 **Water Charge; Take or Pay.** From and after the Completion Date, DWS will pay to Owner the Water Charge on a take or pay basis in arrears. DWS' obligation to pay the Water Charge will be without regard to whether DWS elects to take delivery of all of the Available Monthly Water Quantity.
- 13.2 **Excess Water.** If DWS elects not to accept delivery of Extracted Water into the Supporting Infrastructure, Owner will be entitled to reduce the pumping of a Well, release excess Extracted Water as surface run-off if doing so can be done safely and in compliance with applicable laws or sell excess Extracted Water to third parties. Owner will be entitled to retain any proceeds of delivery of excess Extracted Water without obligation to share those proceeds with DWS or to reduce amounts due from DWS hereunder. If Owner is not able to safely or cost efficiently reduce delivery of Extracted Water, Owner may require that DWS take delivery into the Supporting Infrastructure or to the Upcountry Water Distribution System. The Available Monthly Water Quantity will not be reduced by reason of actions that Owner elects to take to manage excess Extracted Water due to DWS' election to accept less than the Available Monthly Water Quantity, such as shutting or slowing down the operations of a Well and then restarting that Well. DWS will allow Owner to utilize the Supporting Infrastructure without charge and direct the DWS O&M Contractor to reasonably cooperate as Owner may require to transport or deliver excess water to third parties in accordance with this Clause 13.2.
- 13.3 **Energy Charge; Take or Pay.** From and after the Completion Date, DWS will pay to Owner the Energy Charge on a take or pay basis in arrears. DWS' obligation to pay the Energy Charge will be without regard to whether DWS elects to take delivery of all Extracted Water available for delivery (thereby potentially reducing the Actual Monthly Energy Quantity below the Available Monthly Energy Quantity).
- 13.4 **Excess Power.** The Microgrid System will be designed and built to allow for greater electricity supply than the Available Monthly Energy Quantity. Owner may use electricity in excess of the Available Monthly Energy Quantity to provide electricity to other Surface Developments or to sell that electricity to third parties. If weather or other circumstances

limit available electricity from the Microgrid System below levels necessary to power a Well Package and other Supporting Infrastructure, Owner may reduce the Available Monthly Water Quantity (and consequently electricity demands of a Well Package) to address the shortfall. Owner will be entitled to utilize any unused electricity from the Microgrid System as Owner elects and retain the proceeds thereof.

- 13.5 **Infrastructure Charge and Land Charge.** From and after the Completion Date, DWS will also pay to Owner monthly the Supporting Infrastructure Charge and the Land Charge, in arrears, to compensate Owner for the cost of developing and allowing the Supporting Infrastructure to be located on the Property. DWS' obligation to pay the Infrastructure Charge will be without regard to whether DWS elects to take delivery of that Extracted Water, or the quantity of Extracted Water delivered.
- 13.6 **Billing Cycle.** For the purpose of determining the Water Charge and Energy Charge, all quantities shall be calculated based upon a calendar Month billing cycle. Partial months at the beginning and end of the term of this Agreement or due to interruption and re-commencement of service shall be pro-rated for the portion of the Month during which Extracted Water is capable of being supplied. The bill for each Month shall be computed by adding (i) the product of the Water Charge, plus (ii) the Energy Charge, plus (iii) the Supporting Infrastructure Charge, plus (iv) the Land Charge. DWS will pay to Owner the Meter Charges as specified in Section 11 separately from the monthly billing cycle.
- 13.7 **Invoices.** An invoice will be submitted by Owner not later than the 10th Day after the end of the billing cycle and will provide for payment within twenty (20) Days thereafter which shall be the due date. Payment shall be made in full without right of set-off. Payments made after the due date will incur a late fee/interest charge at an interest rate equal to 15% per annum. If DWS disagrees with the determination of the amount payable it may request clarification and substantiation of the invoice but may not withhold payment.
- 13.8 **Payment dispute.** In the event of a billing dispute the full amount of any outstanding bill shall be paid when due. The dispute shall be resolved according to the dispute resolution procedures set forth in Clause 20.
- 13.9 **Currency.** All amounts due hereunder shall be paid in U.S. dollars.
- 13.10 **Price Adjustments.** Other than pursuant to Clause 11, Water Price and Energy Price adjustments shall be made annually on the anniversary of the Completion Date in accordance with the respective escalation formulas specified in the definition of Water Price and Energy Price.

14 DWS OPTION TO PURCHASE AND RIGHT OF FIRST REFUSAL

- 14.1 **The Options.** Contingent on the exercise by the DWS of its option to pay for delivery of 100% of the Available Monthly Water Quantity from all Well Packages developed on the Property and on DWS not being in default under this Agreement, DWS will have a right of first offer to purchase the Water System (the "Right of First Offer") and a right of first refusal to purchase the Water System (the "Right of First Refusal") as provided for in this Article 14.
- 14.2 **Right of First Offer.**
- 14.2.1 *Triggering ROFO.* At a time of Owner's choosing during the five (5) year period following the Completion Date of a third Well Package on the Property, Owner must deliver notice to DWS of the price that Owner will accept for the Water System. Owner's price must be supported by a formal valuation of the Water System provided by a third-party valuation company selected by Owner appraising the Water System at least equal to the price that

Owner offers. Owner must provide that valuation and all back up materials provided in support of that valuation to DWS along with Owner's Right of First Offer notice. Owner must also deliver with Owner's Right of First Offer notice a ROFO Purchase Agreement signed by Owner for acceptance by DWS and including the purchase price, closing date and whether the Microgrid System and any Surface Developments are included as part of the offer. If during that five (5) year period Owner fails to trigger the Right of First Offer, then at any time during the ninety (90) Days thereafter DWS may trigger the Right of First Offer by obtaining and delivering to Owner a third-party valuation and executing and unilaterally delivering to Owner a signed copy of the ROFO Purchase Agreement but excluding the Microgrid System and all Surface Developments. If exercised, DWS will be entitled to enforce its Right of First Offer under the ROFO Purchase Agreement by specific performance as its exclusive remedy.

- 14.2.2 **Acceptance of ROFO.** DWS will have sixty (60) Days following receipt from Owner of a Right of First Offer notice to elect whether to purchase the Water System by signing and returning to Owner the ROFO Purchase Agreement without modification (except as may be required by law). Closing on DFW's purchase of the Water System must then occur within sixty (60) Days after delivery of a valid ROFO Purchase Agreement.
- 14.2.3 **Rejection of ROFO.** If DWS elects not to exercise the Right of First Offer, then DWS will be deemed to have waived its Right of First Offer. Following DWS's waiver of the Right of First Offer, Owner will be free to sell the Water System at any price above the offer price provided by Owner to DWS. If during the eighteen (18) month period after DWS waives the Right of First Offer Owner receives and is prepared to accept an offer to purchase the Water System at a price below the price offered to DWS, DWS will have thirty (30) days to elect to match the offer and purchase the Water System at the lower price in accordance with the terms of the ROFO Purchase Agreement. In making the offer to sell the Water System pursuant to the Right of First Offer, Owner will be entitled to either include or exclude any Surface Developments and associated easement and access rights not yet sold to third parties and not included within the Land Area and may also include or exclude the Microgrid System.
- 14.3 **Right of First Refusal.** After the Right of First Offer expires, DWS will have an ongoing Right of First Refusal to match the terms of any purchase agreement that Owner receives and is willing to accept for the purchase of the Water System or of any Well Package. If elements of the Project not included in the Water System are the subject of the third-party offer (e.g. Surface Developments or the Microgrid System), then DWS must purchase those elements of the Project concurrently with the Water System elements purchased.
- 14.4 **Running with the Land.** The Right of First Offer and Right of First Refusal will run with the Land Area as evidenced by a memorandum of first offer and right of first refusal in the form attached as Exhibit C. Owner will execute and DWS may record the memorandum of right of first offer and right of first refusal against the Land Area on the Completion Date when the Land Area is finally established. If at any time the Right of First Offer or Right of First Refusal expire, DWS will sign and deliver to Owner or any successor in interest to the Land Area a notice of expiration of the Right of First Offer or Right of First Refusal within thirty (30) Days of request.
- 14.5 **Termination for Failure to Close.** If DWS waives the Right of First Refusal with respect to any Well Package or fails to close under the ROFO Purchase Agreement or any purchase agreement executed in connection with the Right of First Offer, DWS will be liable to Owner for damages as provided in the ROFO Purchase Agreement and both the Right of First Offer and Right for First Refusal will expire.
- 14.6 **Energy Supply.** If Owner elects to exclude the Microgrid System from the Water System and DWS exercises its Right of First Offer or Right of First Refusal to purchase the Water System, Owner or any successor purchaser of the Microgrid System must continue to

supply electricity equal to the Monthly Available Energy Quantity to the Water System at the Energy Charge substantially in accordance with the terms of this Agreement. As a condition to sale or lease of the Microgrid System, Owner must cause the owner or lessee of the Microgrid System to enter into a power supply and purchase agreement with DWS reasonably acceptable to DWS affirming the obligation to continuously supply electricity to the Water System at the Energy Charge and otherwise in accordance with the terms of this Agreement and for so long as the Water System is in operation.

- 14.7 **Recording of Site Plan and Establishment of Easement Areas.** If DWS exercises its Right of First Offer or Right of First Refusal to purchase the Water System under the Right of First Refusal or Right of First Offer, and Owner has not yet recorded the Site Plan against the Property, then concurrently with closing on the sale of the Water System to DWS, Owner will record the Site Plan against the Land Area and Easement Areas evidencing DWS's rights to occupy the Land Area and utilize the Easement Areas to support the Water System, documenting the rights of Surface Development owners under Clause 2.6, and preserving to Owner rights to use the entire Property in any manner that does not unreasonably interfere with DWS' maintenance or operation of the Water System. Terms of the Site Plan will be subject to Owner's discretion to the extent consistent with the terms of this Section 14.7.

15 INSURANCE REQUIREMENTS AND INDEMNITY

15.1 Coverages Required.

- 15.1.1 *Owner Coverages.* Owner will, at its own expense, maintain in effect at all times during the term of this Agreement, the insurance coverages and limits specified in Exhibit D-1. Such insurance coverages shall be with insurers and under forms of policies reasonably satisfactory to DWS and Owner. Each policy shall name DWS as an additional insured. At the time of execution of this Agreement, Owner shall furnish Certificates of Insurance evidencing that policies providing such coverages and limits of insurance are in full force and effect. These Certificates shall provide that not less than thirty (30) Days' notice will be given in writing to DWS prior to cancellation, termination, or any restrictive modification of such policies of insurance. Such notices shall be sent directly to DWS at the address set forth in the recitals.
- 15.1.2 *DWS O&M Contractor Coverages.* DWS, at its own expense, must cause the DWS O&M Contractor to maintain in effect at all times during the term of this Agreement, the insurance coverages and limits specified in Exhibit D-2. Such insurance coverages shall be with insurers and under forms of policies reasonably satisfactory to the DWS O&M Contractor and Owner. Each policy shall name Owner as an additional insured. Prior to the Completion Date, the DWS O&M Contractor shall furnish to Owner Certificates of Insurance evidencing that policies providing such coverages and limits of insurance are in full force and effect. These Certificates shall provide that not less than thirty (30) Days' notice will be given in writing to Owner prior to cancellation, termination, or any restrictive modification of such policies of insurance. Such notices shall be sent directly to Owner at the address set forth in the recitals.
- 15.2 **Lapse of Coverage.** Owner agrees that if it does not keep the aforesaid insurance in full force and effect and such insurance is available, DWS may take out the necessary insurance and pay the premium thereon. The repayment of the premium thereof shall be deemed an obligation of Owner.
- 15.3 **Waiver.** DWS and Owner waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under this Clause except such rights as they may have to the proceeds of such insurance.

- 15.4 **Subrogation.** Owner shall require that its insurance carrier(s) furnishing insurance with regard to the Project to waive all rights of subrogation against DWS, including each of its officers, agents, and employees. DWS shall waive all rights of subrogation against Owner, including its directors, officers, agents, and employees.
- 15.5 **Indemnity.** To the extent liability has been determined against the County by a Court of competent jurisdiction, or has otherwise been agreed to by the County pursuant to Chapter 3.16 of the Maui County Code, DWS will indemnify, defend, and hold harmless Owner from and against all losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees) resulting from third party claims for personal injuries, damage, theft, or loss of property occurring in connection the Supporting Infrastructure and or and in connection with the DWS O&M Contractor's activities in operating, maintaining, or replacing the Supporting Infrastructure, or liens which arise from work performed at the Property by or on behalf of DWS or the DWS O&M Contractor. DWS' obligations under this Clause 15.5 shall survive the termination of this Agreement. Owner will be entitled to select its own counsel to defend the claim and to settle the claim on any terms Owner considers reasonable. Any such settlement shall be valid as against the indemnitor. If any such claim arises out of the negligence of both Owner and DWS, responsibility for such claim shall be allocated between Owner and DWS based on their respective degrees of negligence.

16 **FORCE MAJEURE, CASUALTY AND CONDEMNATION**

- 16.1 **"Force Majeure"** as used herein means an event, condition, circumstance or cause affecting the Facility beyond the reasonable control of and without the fault or negligence of the Party claiming Force Majeure including acts of God; sudden, unanticipated actions of the elements; changed subsurface conditions; volcanic activity, lack of electricity; discovery of hazardous, artistic or archeological materials, Changes in Law, labor disputes (except those exclusively involving employees of Owner); actions by Governmental Authorities which conflict with the terms of this Agreement or prohibit either party's performance hereunder, Government Inaction; any action by Governmental Agencies which effectively dictates changes to the Project or to the composition of management or control of Owner, expropriation; acts of war, revolution, riot, insurrection, terrorism; and sabotage. DWS will not be able to claim Force Majeure by reason of any action of the State of Hawaii or the County.
- 16.2 **Effect.** Upon the occurrence of Force Majeure, the impacted Party obligated to otherwise perform shall not be liable for any failure or delay in performing its obligations; and any performance deadline by that Party shall be extended. Force Majeure shall not relieve a Party from any obligation to make any payment under this Agreement. Force Majeure shall not relieve DWS of its obligation to maintain and operate the Supporting Infrastructure associated with any Well Package.
- 16.3 **Conditions.** If a Party is rendered wholly or partially unable to perform its obligations under this Agreement because of Force Majeure, that Party shall be excused from such performance provided that:
- (i) The claiming Party provides the other with written notice describing the Force Majeure within five Days after the later of the occurrence or discovery of such event;
 - (ii) the suspension of performance is of no greater scope and of no longer duration than required by the Force Majeure circumstance;
 - (iii) The claiming Party immediately undertakes reasonable and prudent efforts to remedy its inability to perform as a result of the particular event; and
 - (iv) The claiming Party resumes performance of its obligations under this Agreement and provides the other with written notice of such resumption as soon as the Force Majeure circumstances are resolved or eliminated.

- 16.4 **Extension of Term.** The running of the term of this Agreement will be suspended during any Force Majeure.
- 16.5 **Change in Law.** If an event of Force Majeure is the result of the actions of Governmental Authorities or the result of a Change in Law, then Owner may designate that event of Force Majeure as a Required Change under Clause 11.3.
- 16.6 **Restoration.** If all or a component part of any Well Package is damaged by a casualty or other event of Force Majeure, with ninety (90) days thereafter Owner will provide DWS of Owner's Contractor Team's estimate for restoration time. If Owner concludes that restoration is impossible, or impractical, Owner may terminate this Agreement. If this Agreement is not so terminated, then Owner shall restore the Well Package. Commencing on the date of the casualty until delivery to DWS of the restored Well Package, the Water Charge and Energy Charge will be adjusted to reflect the reduced Available Monthly Water Quantity and reduced Available Monthly Energy Quantity. The Land Charge and Infrastructure Charge and Owner's right to share in Meter Charges will not abate. If and to the extent that a casualty event is the result of the negligence or default hereunder of DWS or the DWS O&M Contractor, Owner will have an independent claim against DWS and/or the DWS O&M Contractor for all losses or damages incurred by Owner (including loss of income under this Agreement and restoration costs).
- 16.7 **Condemnation.** If all or any portion of the Property is taken by eminent domain, or by a purchase in lieu thereof, in a manner that negatively impacts the operations of any Well Package, this Agreement will terminate at Owner's election upon notice from Owner as to the impacted Well Packages. If part of the Property is taken but this Agreement is not terminated, Owner will undertake reasonable efforts to restore operations of the impacted Well Package and the Land Charge will reduce in proportion with any reduced Land Area. Owner is entitled to the entire purchase price or award from any taking. DWS may make a separate claim against the taking authority (but not Owner) for such compensation as may be separately awarded or recoverable by DWS.

17 DEFAULT

- 17.1 **Default by Owner.** A Default shall take place upon the occurrence of any one of the events set forth in Clause 17.2 of this Agreement. If a Default occurs and if Owner does not cure the Default in accordance with Clause 17.3 of this Agreement, DWS shall, to the extent permitted by Applicable Legal Requirements, have the right to enforce any of the remedies described in Clause 17.4 of this Agreement.
- 17.2 **Owner Events of Default.** The occurrence of any of the following shall constitute an event of Default for purposes of this Agreement (other than as a result of Force Majeure or if necessary to protect public safety or to ensure that Extracted Water meets the Water Quality Standards):
- (i) **Refusal to Deliver Extracted Water.** Owner's refusal failure to deliver at least 50% of Pump Capacity for any Well subject to this Agreement for a period of one hundred eight (180) consecutive Days in a Contract Year other than by reason of Force Majeure.
 - (iii) **Violation of Applicable Legal Requirements.** Owner's violation of any Applicable Legal Requirements governing the Project, which violation has a material adverse effect on DWS and which is finally adjudicated.
 - (v) **Material Breach.** The breach of any provision of this Agreement by Owner which breach has a material adverse effect on DWS.

- (vi) **Inaccurate Representations and Warranties.** Any representation or warranty made by Owner proving to have been inaccurate or misleading and having a material adverse effect on Owner's ability to perform its obligations under this Agreement.
- 17.3 **Cure by Owner.** DWS shall give written notice to Owner of any such Default, providing the reasons for or evidence substantiating such Default. Owner shall have ninety (90) Days from such notice to cure such Default. If the Default is not cured at the expiration of the ninety (90) Day period (unless the nature of the Default is such that more than ninety (90) Days are reasonably required for its cure and Owner shall have diligently commenced such cure within such ninety (90) Day period and thereafter diligently prosecutes the same to completion), DWS may exercise any of the remedies set forth in Clause 17.5.
- 17.4 **Failure of Owner to Cure.** In the event Owner does not cure its Default as provided in Clause 17.3 DWS may, but shall not be obligated to:
- (i) **Replacement by a Contract Team Member.** Require Owner to retain the services of a replacement Contract Team member to replace the individual that caused the Default, to be selected by Owner and reasonably acceptable to DWS; or
 - (ii) **Replacement by DWS.** In the event Owner is unable to obtain the services of a replacement Contractor Team member pursuant to Clause 17.4(i) DWS may compel Owner to retain the services of another Person who shall satisfy the obligations Owner hereunder.
 - (iii) **Investment.** If the Default requires the expenditure of capital to repair, maintain or replace any element of a Well or the Microgrid System and Owner refuses to do so in violation of its obligations hereunder, DWS may elect to make the repair or replacement or perform the required maintenance and deduct the cost thereof from amounts otherwise due Owner hereunder.
- 17.5 **DWS Remedies.** In addition to the remedy permitted by Clauses 17.4(i), (ii) and (iii) and recovery of damages for breach of Clauses 17.2 (i) through (v), the only other remedy available to DWS for breach of this Agreement by Owner will be to accelerate the Right of First Offer and deliver notice that if Owner fails to deliver a ROFO Purchase Agreement within ninety (90) days of notice, DWS may do so in accordance with Clause 14.1.1.
- 17.6 **Limitation of Owner's Liability.** Owner shall not be liable to the DWS by reason of any Default or otherwise under this Agreement in contract, tort, warranty, strict liability or any other legal theory for any indirect, incidental, consequential, punitive or exemplary damages, including consequential financial or economic loss. In no event will Owner be obligated to expend amounts in excess of \$7,500,000 to cure any default by Owner hereunder.
- 17.7 **Default by DWS.** A Default by DWS shall take place upon the occurrence of any one of the events set forth in Clause 17.8. If a Default occurs and DWS does not cure the Default in accordance with Clause 17.9, Owner shall, to the extent permitted by applicable law, have the right to enforce the remedies described in Clause 17.11 of this Agreement.
- 17.8 **DWS Events of Default.** The occurrence of any of the following shall constitute an event of Default by DWS for purposes of this Agreement:
- (i) **Failure to Pay.** The failure to make timely payment in accordance with this Agreement following receipt of ten (10) Days' written notice of nonpayment.

- (ii) **Material Breach.** The breach of any provision of this Agreement by DWS having a material adverse effect on either Party's ability to perform its obligations under this Agreement, including the obligation to operate, maintain, repair and replace the Supporting Infrastructure in accordance with the Operating and Maintenance Documents.
 - (iii) **Dissolution.** The dissolution, liquidation, bankruptcy, declaration of insolvency, winding-up or re-organization of the County.
 - (iv) **Inaccurate Representations and Warranties.** Any representation or warranty made by DWS proving to have been inaccurate or misleading and having a material adverse effect on DWS's or Owner's ability to perform its obligations under this Agreement.
- 17.9 **Cure.** Owner shall give written notice to DWS of any such Default providing the reasons for or evidence substantiating such Default. With regard to Clauses 17.8 (ii) through (viii) DWS shall have sixty (60) Days from such notice to cure such Default. If the Default is not cured at the expiration of the sixty (60) Day period (unless the nature of the Default is such that more than sixty (60) Days are reasonably required for its cure and DWS shall have diligently commenced such cure within such sixty (60) Day period and thereafter diligently prosecutes the same to completion), Owner may exercise any of the remedies set forth in Clause 17.10. No cure period for Default shall be allowed based upon failure to make timely payments under Clause 17.8(i).
- 17.10 **Remedies.** In the event DWS does not cure its Default in addition to all remedies available at law or in equity Owner may, but shall not be obligated to:
- (i) Suspend the delivery of Extracted Water;
 - (ii) Terminate the Agreement;
 - (iii) Collect unpaid amounts or enforce this Agreement by specific performance and other equitable remedies; and/or
 - (iv) Continue to operate the Wells and sell Extracted Water to other customers pending DWS's cure of its default and collect damages against DWS for any deficiency.

If Owner elects the remedies described in Clauses 17.10 (i) or (ii) DWS shall deliver to Owner any necessary consents for sales to other parties.

18 TERMINATION

- 18.1 **Termination for Default.** The termination of this Agreement due to Default shall not relieve the defaulting Party from liability for such Default.
- 18.2 **Termination by Owner.** In addition to Owner's right to terminate for each Default listed in Clause 17.8, in the event of a Governmental Inaction that exceeds one hundred eighty (180) days, or a determination by Owner that a denial of a Governmental Approval will make development of the Well One, the Microgrid System or its Supporting Infrastructure impossible or prohibitively expensive or delayed, Owner may elect to terminate this Agreement. Such termination shall be effective thirty (30) Days following Owner's written notice to DWS of its intention to terminate, unless DWS notifies Owner during such thirty (30) Day period that it will immediately commence monthly payments to Owner, and does so commence, covering any and all Actual Costs of Owner on a current basis.
- 18.3 **Removal of Supporting Infrastructure.** All Supporting Infrastructure will be forfeited by the DWS and constitute the property of Owner at the expiration of the Term. Notwithstanding the foregoing, during the twelve-month period following the Termination Date, Owner will have the right to remove any Supporting Infrastructure and DWS will reimburse Owner for the cost of removal and disposal of that Supporting Infrastructure.

19 ASSIGNMENT AND PLEDGES

- 19.1 **Mortgages by Owner.** DWS's rights under this Agreement are subject and subordinate to any lien of an existing or future mortgage to which the Property is subject, and all amendments thereto, and DWS shall promptly execute and deliver reasonable instruments to the holders thereof to confirm DWS's subordination and attornment. The term "mortgage" as used herein shall include ground leases, deeds of trust, security assignments, and any other encumbrances. Any reference to the "holder" of a mortgage shall include a ground lessor and the beneficiary under a deed of trust. Notwithstanding the foregoing, DWS shall not be obligated to execute an instrument subordinating any interests DWS may have in the Water System with respect to a future mortgage unless the holder of such mortgage agrees not to disturb DWS's rights hereunder except following a Default and failure to cure.
- 19.2 **Collateral Assignment by Owner.** Owner may collaterally assign this Agreement to any Lender(s) for purposes of financing. If Owner collaterally assigns this Agreement to secure financing, DWS will consent to any modification to satisfy Lender(s) requirements usual in non-recourse transactions. If any event of Default by Owner has occurred and the cure period has expired, the Lender(s) may at any time after notice of Default to DWS protect and enforce its or their rights and remedies against Owner by appropriate proceedings, whether for damages or the specific performance of any provision of this Agreement and under any financing or security agreement. In the event of an Owner Default, DWS will not terminate this Agreement without first providing the Lender with notice that the Default has occurred and that all applicable cure periods have expired together with an additional ninety (90) Days for the Lender to obtain possession of the Project and cure the Default, if curable.
- 19.3 **Estoppel Certificates.** Within twenty (20) Days of Owner's written request DWS will execute and deliver to Landlord an estoppel certificate containing customary provisions detailing factual matters relating to the Lease and estopping DWS from subsequently bringing claims or asserting facts contrary to matters certified to in the estoppel certificate. Owner's failure to deliver an estoppel certificate within the twenty (20) Day period shall constitute an immediate Event of Default.
- 19.4 **Assignment by Owner.** Owner will be entitled to assign its rights under this Agreement to any successor in interest to the Water System, provided that Owner will not separately assign Well Packages to different owners or assignees.
- 19.5 **Assignment by DWS.** DWS will not assign or transfer of this Agreement or any part thereof without the prior written consent of Owner, which consent Owner may withhold in Owner's sole discretion.
- 19.6 **Mechanic's Liens.** Neither DWS nor the DWS O&M Contractor will allow any lien or encumbrance to be placed upon the Project due to services or materials provided at their request. DWS shall cause any such lien or encumbrance to be discharged, or bonded over, within 30 days after notice from Owner notifying DWS of the filing or recording thereof. DWS's failure to discharge the lien within the 30-day period shall be deemed an immediate Default without cure rights.

20 DISPUTE RESOLUTION

- 20.1 **Disputes.** In the event of any dispute or claim (hereinafter "dispute") arising out of this Agreement, DWS or Owner shall give the other Party written notice of the dispute which shall set forth the nature of the dispute, the facts giving rise to the dispute and, if the dispute involves a claim for money or damages, the amount in controversy. Such notice shall be

given within one year after the occurrence of the event giving rise to the dispute or within one year after the aggrieved Party first recognizes the condition giving rise to the dispute, whichever is later. Failure to provide such notice within the period of the applicable statute of limitations, the one-year period notwithstanding, shall constitute a waiver of all claims arising out of the dispute.

- 20.2 **Meeting of Parties.** Within five business Days of notice of the dispute, the Parties shall meet at DWS's offices and negotiate in good faith with the aim of promptly resolving the dispute.
- 20.3 **Mediation.** If the dispute cannot be resolve between the Parties, then before proceeding to arbitration the Parties shall be obliged to submit the dispute to mediation according to the mediation rules of the International Chamber of Commerce. The mediation shall be held on Oahu, HA.
- 20.4 **Arbitration.** In the event the Parties are unable to resolve the dispute through the negotiation or mediation, the dispute shall be referred to arbitration before a panel of three arbitrators if the amount in dispute is US \$1,000,000. or more or to an arbitral tribunal of one member if the amount in dispute is less than US \$1,000,000.
- 20.5 **Notice of Claim; Reply.** An arbitration proceeding may be instituted under these provisions upon notice by the Party instituting such proceeding to the other Party. Such notice shall contain a statement setting forth the nature of the controversy or claim to be submitted to arbitration and the nature of the remedy sought.
- 20.6 **Selection of Arbitrators.** If one arbitrator is to be appointed, the Parties shall agree jointly on that appointment. If no agreement is reached within thirty (30) Days, the appointment shall be made by the International Chamber of Commerce ("ICC") from its panel of arbitrators in Hawaii. If three arbitrators are to be appointed the Party instituting the proceedings shall identify the name of one arbitrator in its notice of claim required by Clause 20.5. Within thirty (30) Days after the giving of such notice the other Party shall notify the Party instituting the proceeding of the name of the arbitrator appointed by such other Party. If within thirty (30) Days after giving notice instituting the arbitration proceeding the Parties shall not have agreed upon the third arbitrator either Party may request the appointment of the third arbitrator by the ICC. If any arbitrator is unwilling or unable to act in such capacity, his or her successor shall be appointed in the same manner as for the original appointment. The successor shall perform the same function and shall have the same powers as her or his predecessor. If either Party fails to designate an arbitrator during the time allowed for such designation, the appointment shall be made by the ICC from its panel of arbitrators in Hawaii. If within forty-five (45) Days after becoming entitled to do so, neither Party requests the appointment of the third arbitrator, the arbitration proceeding shall be deemed to have been abandoned.
- 20.7 **Place.** The arbitration shall take place in Oahu at such time and place as shall be fixed by the arbitrators.
- 20.8 **Award.** The arbitrators shall afford to both Parties a fair hearing and shall tender their award in writing. A signed counterpart of the award shall be transmitted to each Party. Any such award shall be final and binding upon the Parties. Each Party shall abide by and comply with any such award in accordance with these provisions. The award may grant any relief appropriate under the applicable law including without limitation declaratory relief and/or specific performance. The arbitral panel shall not decide in amiable composition. As part of their Award the panel may award attorneys fees and costs to the prevailing Party.

- 20.9 **Remuneration of Arbitrators.** The Parties shall fix the amount of remuneration of the arbitrators and such other persons as shall be required for the conduct of the arbitration proceedings.
- 20.10 **Enforcement.** If within thirty (30) Days after the counterparts of the award shall be delivered to the Parties the award shall not be complied with, any Party may enter judgment upon or institute a proceeding to enforce the award in any court of competent jurisdiction against any other Party, may enforce such judgment by execution or may pursue any other appropriate remedies against such other Party for the enforcement of the award and the provisions of this Agreement.
- 20.11 **Interim Relief.** Either Party shall be entitled to seek interim measures of protection in the form of pre-award attachment of assets or injunctive relief.
- 20.12 **Consolidation.** In the event that disputes arise under this Agreement and any other related agreements which also are subject to arbitration these disputes may be resolved in a consolidated arbitral proceeding. Any applicable consolidation provisions of law shall apply, notwithstanding the reference to the governing law provisions in Clause 23.

21 OWNER'S REPRESENTATIONS AND WARRANTIES

In addition to each obligation, representation and warranty set forth in other portions of this Agreement, Owner represents and warrants the following:

- 21.1 **Organization.** Owner is a limited liability company duly organized and validly existing and in good standing under the laws of the State of Delaware and authorized to do business in the State of Hawaii. Owner further warrants that it has full power and authority to carry on its business and to enter into and perform this Agreement, and to perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Agreement.
- 21.2 **Capacity to Design and Construct.** Owner is capable of designing and constructing, and is willing to design and construct, either on its own behalf or through experienced and capable contractors and subcontractors, the Well One Well Package described in this Agreement.
- 21.3 **Authorization.** The execution and delivery of this Agreement on behalf of Owner and the consummation of the transactions contemplated hereby have been fully authorized and approved by all requisite corporate action of Owner. No approval or consent of, or notice to or filing with, any person not a Party to this Agreement, or any governmental agency, is necessary to authorize the execution or delivery of this Agreement by Owner.

22 DWS'S REPRESENTATIONS AND WARRANTIES

In addition to each obligation, representation and warranty set forth in other portions of this Agreement, DWS represents and warrants the following:

- 22.1 **Organization.** DWS is an agency of the County and that it has the authority to enter into this Agreement and carry out all covenants and obligations on its part to be performed under this Agreement.
- 22.2 **Authorization.** All corporate action required to authorize the execution, delivery and performance by DWS of this Agreement and the transactions contemplated hereby have been taken. DWS has legal authority to enter into this agreement on behalf of itself and the County.

- 22.3 **Financial Capacity.** The funds which are to be used to pay Owner's fees under this Agreement are or will be available.
- 22.4 **Consents; No Default.** The execution and performance of this Agreement by DWS: (i) do not and will not require the consent, waiver, approval, license, designation or authorization of, or declaration with, any Person or public or private authority (except those consents, waivers, approvals, licenses, designations and authorizations obtained prior to execution of this Agreement); or (ii) do not and will not with or without the giving of notice or the passage of time or both, violate or conflict with or result in a breach or termination of any provision of, or constitute a Default under, or accelerate or permit the acceleration of the performance required by the terms of, or otherwise give rise to any liability or obligation under, any indenture, license, permit or any other agreement or instrument or any order, judgment, decree, statute, regulation or any other restriction of any kind or description to which DWS is a Party or by which DWS may be bound.
- 22.4.1 **Sovereign Immunity.** DWS and the County are subject to civil and commercial law with respect to its obligations under this Agreement. The making and performance of this Agreement constitute private and commercial acts rather than governmental or public acts. Neither DWS nor any of its properties or revenues has any right of immunity from suit, arbitration, court jurisdiction, attachment prior to judgment, attachment in aid of execution of a judgment, execution of a judgment or from any other legal process with respect to its obligations under this Agreement. To the extent that DWS may be entitled, in any jurisdiction in which judicial or arbitral proceedings may at any time be commenced, to claim for itself or its revenues or assets any such immunity and to the extent that in any such jurisdiction there may be attributed to DWS such an immunity (whether or not claimed), DWS irrevocably agrees not to claim and irrevocably waives such immunity.

23 COMMUNITY CENTER DONATION AND PURCHASE RIGHT

- 23.1 Completion and operation of the first Follow-on Well will eliminate sufficient risk to assure Owner that Owner will be able to repay its financing. Within sixty (60) days of (a) the payment for delivery of the first Extracted Water by DWS from a Follow-on Well, or (b) the sale by Owner to any third party of Extracted Water from a Follow-on Well, Owner commits to donate the Community Center to the County. The donation of the Community Center must occur, if at all, by January 1, 2031, after which time Owner's commitment to donate the Community Center will expire.
- 23.2 The County may at any time prior to January 1, 2031 purchase the Community Center for a purchase price of \$720,000 increasing at 7% per year compounding annually. The election to purchase the Community Center rather than wait for donation will be within the County's sole discretion. The County may record a memorandum of option against the Community Center Property in the County's discretion but will be obligated to release the memorandum of option if the Community Center is neither purchased nor donated prior to January 1, 2031.
- 23.3 Owner's donation of the Community Center and the County's right to purchase the Community Center will be conditioned on DWS not being in default of this Agreement and the County not being in default under the existing lease for the Community Center.
- 23.4 Nothing herein will modify the current Community Center lease of the Community Center to the County. The County will be responsible for paying for all utilities, contractor expenses and other expenses of operation and maintenance of the Community Center until the date of donation or purchase in accordance with the existing Community Center lease.

- 23.5 Following the donation or purchase, all expenses of the Community Center, whether arising before or after the donation will be the responsibility of the County.
- 23.6 The donation or purchase of the Community Center will be “as is, where is”. Owner will pay all usual and customary “seller” costs of transfer, including legal expenses, recording costs and other fees and costs of transfer. All environmental or asbestos remediation obligations applicable to the Community Center will transfer to and be assumed by the County at the time of donation. All other terms of the donation or purchase will be as reasonably negotiated between Owner and County.
- 23.7 The County will be responsible for securing all approvals required to accept the donation or authorize the purchase of the Community Center. The County may elect not to accept donation of the Community Center or purchase of the Community Center in the County’s discretion.

24 GOVERNING LAW

This Agreement shall be construed and interpreted in accordance with the law of the State of Hawaii.

IN WITNESS WHEREOF the Parties have caused this Agreement to be executed by their respective duly authorized officer(s) in duplicate, and duplicate originals have been delivered to each Party, as of the day and year first above stated.

DEPARTMENT OF WATER SUPPLY

By: _____
Name: _____
Its: _____

FREE MARKET VENTURES, LLC

By: _____
Name: _____
Its: _____

Exhibits

Exhibit A	Extracted Water Quality Standards
Exhibit B	ROFO Purchase Agreement
Exhibit C	Memorandum of Right of First Offer and Right of First Refusal
Exhibit D-1	Owner Insurance Requirements
Exhibit D-2	DWS Insurance Requirements

WAI Committee

From: Caleb Rowe <Caleb.Rowe@co.maui.hi.us>
Sent: Monday, March 25, 2024 11:39 AM
To: WAI Committee
Cc: Alice Hale; Jarret P. Pascual
Subject: WAI-20
Attachments: 2024-03-19 RFLS Pascual REVISED RESO 24-47 - Free Market Ventures.PDF

Please see attached.

With Aloha,

Caleb P. Rowe
Deputy Corporation Counsel, County of Maui