



**WRITTEN TESTIMONY BEFORE THE
BOARD OF LAND AND NATURAL RESOURCES**

IN SUPPORT OF

**THE HOLDOVER/CONTINUATION OF REVOCABLE PERMIT 7463 ISSUED TO
HAWAII ELECTRIC LIGHT COMPANY, INC. FOR NON-CONSUMPTIVE WATER
USE ALONG THE WAILUKU RIVER AT HILO, HAWAI'I (Item D-7, Exhibit A)**

Thursday, December 7, 2023
9:00 a.m.
Streamed Live Via YouTube

Dear Chair Chang and Members of the Board,

Hawaiian Electric Company, Inc. ("Hawaiian Electric") is writing in support of a one-year holdover/continuation of Revocable Permit 7463 issued to Hawaii Electric Light Company, Inc. ("HELCO") for non-consumptive use of water along the Wailuku River at Hilo, Hawaii.

HELCO has had year-to-year water permits for decades which has enabled it to operate two hydroelectric plants on the Wailuku River. Generating electricity by using falling water to turn a turbine and then returning it to its source is the oldest renewable energy resource in Hawaii. These hydroelectric plants play an important role in meeting the State's 100% renewable energy goal and is an important resource in our renewable energy portfolio.

One of the key goals of the 100% renewable energy mandate is to reduce and stabilize costs by getting off oil. Having a long-term water lease is especially critical for us to invest in the rebuilding of the Waiau Hydroelectric Plant, which was nearly a century old, when it was damaged and taken offline during Hurricane Lane in August 2018.

In 2016, a circuit court judge ruled that the holdover of revocable permits for multiple one-year permits is not consistent with the statute providing for temporary use of State lands. In response, and to avoid the abrupt stoppage of water being used by about a dozen permittees, including HELCO, Act 126 (2016) provided permittees three years to convert year-to-year permits to long-term leases.

Upon passage of Act 126 (2016), Hawaiian Electric immediately embarked on fulfilling the requirements for obtaining a long-term water lease. We had an environmental assessment prepared and obtained a Finding of No Significant Impact. In cooperation with the Department of Hawaiian Home Lands (“DHHL”) and the Department of Land and Natural Resources (“DLNR”), a DHHL beneficiaries meeting was held back in 2016 in Hilo to enable DHHL to make a request for a reservation of water from the Wailuku River, and determine that HELCO’s non-consumptive use of water for its hydroelectric plants would not interfere with DHHL’s need for water.

As reported in the D-7 submittal for the Board of Land and Natural Resources (“Board”) meeting held on December 9, 2022, the Board approved the sale of a license at public auction for the non-consumptive use of water from the Wailuku River, for hydroelectric generation purposes and accepted the proposed Wailuku Watershed Management Plan at the Board’s August 12, 2022 meeting. On August 22, 2022, DLNR received DHHL’s written petition for a contested case hearing. At the Board meeting held on December 9, 2022, the Board denied DHHL’s request for a contested case hearing. As a result, DLNR has been working with the Office of the Attorney General on the public auction documents. HELCO is looking forward to participating in the upcoming public auction.

HELCO continues to work toward securing a long term water lease that will help to

further the State's 100% Renewable Portfolio Standards goal, benefit its customers, and help improve Hawaii Island's energy resiliency. Accordingly, Hawaiian Electric strongly supports the holdover/continuation of Revocable Permit 7463 to HELCO for one year beginning on January 1, 2024. Thank you for the opportunity to submit this testimony.

December 5, 2023**Board of Land and Natural Resources****Re: ITEM D-7 Lindner Revocable Permit 7088**

Dear Chair and Board Members,

We write on behalf of Jeffrey Lindner and Moloaa Water Company (“Lindner”) regarding RP 7088 for State Well No. 1 (“State Well”). RP 7088 is attached as **Exhibit 1**.

The State Well was originally leased to the AMFAC/Lihue Plantation. When the lease terminated and Lindner purchased the property back in 1996, he sought but was denied a long-term lease because the Kauai Department of Water (“DOW”) had expressed interest in the State Well and wanted time to conduct a feasibility study to take over the well. DOW was initially given six (6) months to conduct its feasibility study as well as additional extensions. See Letter from BLNR Kauai member to Ernest Lau at DOW, attached as **Exhibit 2**.

Decades passed and DOW never moved forward on any significant action to take over the State Well. Meanwhile, pursuant to the 1997 RP, Lindner was obligated to provide irrigation water to DOW and Moloaa Hui Cooperative farmers at wholesale irrigation rates with no long-term State lease and no commitment from the Moloaa Hui farmers. RP condition (Condition 15) requires that Lindner continue the obligations of AMFAC (i.e. Lihue Plantation) to supply water to both the Moloaa Hui Cooperative and DOW. The prior obligations concerned the provision of irrigation water only and required DOW to support a long-term lease to the Lihue Plantation, not to sabotage it with its own proposed system take-over. See 1985 Agreement between Lihue Plantation and DOW, attached as **Exhibit 3**.

Moloaa Hui Cooperative leased land was purchased from Amfac in 1997 by a developer who subdivided the property and sold to many of the existing farm lease holders. The subdivision was approved without the requirement for a developer to build a potable water system. The subdivision was served with irrigation water from the State Well. In 2015, it was discovered that more than 47 people were residing in Moloaa Hui, and a number of users required water service that necessitated the creation of a public water system. The State Department of Health (“DOH”) designated the State Well and Lindner’s water system a public water system requiring the provision of potable water. See DOH letter attached as **Exhibit 4**. No provision was made in the RP to accommodate this new use or to compensate Lindner for the added expenses. Since then, Lindner has struggled to cover the costs of testing and treatment necessary to meet potable water standards without increasing an economic burden on the farm owners. In addition, Lindner’s primary water customer, Moloaa Hui farmers (no longer part of a cooperative but now owners of units in a land condominium), are developing their own domestic well in an effort to no longer rely upon the State Well and Lindner’s water system. In 2021, MIC, in the process of building their water system, installed their meter on MWC’s distribution line blocking our access to Koolau Road. MWC had been working on providing a different distribution line to DOW down Koolau Road for several years. Their

existing pipeline has been problematic for many years from not having enough pressure to fill DOW's tank. The pipeline feeding DOW's tank is a separate line from 1985 running through our land which they have maintained. Recently, their line has developed major leaks that need major repairs. Because of new rules at the DOW, they are not allowed to work on private systems, and neither do they have the ability to reimburse us for the repair without an agreement. They have been currently trucking water to their Koolau water tank for two months. We need access to Koolau Road to run a new distribution line that will provide DOW adequate pressure and will not involve them having their distribution line on private property, as well as to serve additional customers along Koolau Road who would like water service.

The Moloaa Hui farmers have not fully completed their new well and still rely upon the State Well water. Lindner has been in negotiations with the Moloaa Hui farmers representatives to separate the two water systems so that Lindner may serve new customers in Moloaa and allow for a new line to serve DOW along Koolau Road (where the systems would be separated). If the farmers agree to the separation, Lindner will agree to continue to supply water to them for a reasonable period to allow them to complete their new system. Beyond that, Lindner would need a lease from DLNR to negotiate a long-term commitment to supply the farmers.

Accordingly, the need for a long-term lease has become paramount to the continued viability of Lindner's water system. Presently, in order to continue to serve DOW and the Moloaa Hui farmers, pipes need to be repaired or replaced on both State land as well as on Lindner's property. Lindner cannot pass on these costs to the end users at irrigation rates and without long-term agreements with DOW and the Moloaa Hui farmers (both of which to date refuse to enter into long-term agreements). Lindner, therefore, has no economic incentive to repair the ruptured lines. He is able to serve his own land from a private well. Lindner is willing to make the upfront capital contributions necessary to repair and upgrade the system if he has a long-term entitlement to the State Well and the ability to sell potable water at potable rates. In addition to serving DOW and the Moloaa Hui farmers (to the extent they require water), there are additional lands in Moloaa that could be served by the system. Without the necessary repairs, however, Lindner will be forced to stop pumping for the foreseeable future to stop both the economic rupture as well as water losses.

We have worked with DLNR now for multiple years to process a long-term lease; a request that was made over twenty six (26) years ago. At this point, DLNR staff acknowledge that they need to follow up with DHHL to move the process forward. This process, however, appears to have no end in sight and will require pumping to stop for an extended period of time.

Lindner has diligently maintained the status quo for over twenty six (26) years and suffered for it. It has now gotten to the point that this cannot continue. We respectfully ask that the Board eliminate RP Condition 15. We also respectfully ask the Board to direct DLNR staff to expedite the process for leasing the State Well.

Very truly yours,

/s/ Tim Irons

Tim Irons

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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

REVOCABLE PERMIT NO. S-7088

KNOW ALL MEN BY THESE PRESENTS:

THAT, effective the 1st day of October 1996, by and between the STATE OF HAWAII, hereinafter referred to as the "STATE", by its Board of Land and Natural Resources, called the "BOARD", and JEFFREY S. LINDNER hereinafter called the 'PERMITTEE', whose business and mailing address is P. O. BOX 518, Anahola, HI 96703 is permitted to enter and occupy, on a month-to-month basis only, pursuant to Section 171-55, Hawaii Revised Statutes, that certain parcel of Government land (and any improvements located thereupon) situate at Portion of government land of Moloaa, being a portion of Moloaa Forest Reserve, Papaa, Moloaa, Kawaihau, Kauai TMK: 4-9-01:por. 1 as indicated on the map attached hereto, if any, and made a part hereof, containing an approximate area of 125+ Acres which parcel is hereinafter referred to as the "Premises".

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Occupy and use the Premises for the following specified purposes only:

FOR OPERATION AND MAINTENANCE OF MOLOAA WELL SITE AND TRANSMISSION FACILITIES UNTIL SUCH TIME THE COUNTY OF KAUAI'S DEPARTMENT OF WATER CAN CONDUCT AN APPROXIMATE SIX (6) MONTH FEASIBILITY STUDY TO DETERMINE THE APPROPRIATENESS OF CREATING A NEW WATER SYSTEM

2. Pay, at the Office of the Department of Land and Natural Resources, Honolulu, Oahu or at the Office of its Land Agent on the Island where the Premises are located, the sum of TWO HUNDRED ONE AND 17/100 DOLLARS----- (\$201.17) on the first of each and every month commencing October 1, 1996

The interest rate on any and all unpaid or delinquent rentals shall be at one percent (1%) per month plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

LTFORM 4016 Rev. 6/97

EXHIBIT 1

3. Upon execution of this Permit, deposit with the Board of Land and Natural Resources, hereinafter called the "Board", the sum of \$402.34 as security for the faithful performance of all of these terms and conditions. The whole or portion of the deposit will be returned to the Permittee upon termination of this Permit, but only after all of the terms and conditions of this Permit have been observed and performed to the satisfaction of the representatives of the Department of Land and Natural Resources.
4. ~~At the Permittee's own cost and expense, keep the government-owned improvements located on the Premises insured against loss by fire and other hazards, casualties and contingencies, for the full insurable value of those improvements. The policies shall name the State of Hawaii as an additional insured and shall be filed with the Board. In the event of loss, damage, or destruction of those improvements, the Board shall retain from the proceeds of the policies those amounts it deems necessary to cover the loss, damage, or destruction of the government-owned improvements and the balance of those proceeds, if any, shall be delivered to the Permittee.~~
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5. Give the Board twenty-five (25) calendar days notice, in writing, before vacating the Premises.
6. If a holdover Permittee or licensee, pay all real property taxes, which shall be assessed against the Premises from the date of this Permit. In addition, a Permittee, not a holdover Permittee or licensee, who has occupied the Premises for commercial purposes for a continued period of one year or more, shall pay the real property taxes assessed against the Premises after the first year of the Permit as provided in Section 246-36(1)(D), Hawaii Revised Statutes.
7. Observe and comply with all laws, ordinances, rules, and regulations of the Federal, State, Municipal, or County governments affecting the Premises or improvements.
8. Repair and maintain all buildings or other improvements now or hereafter on the Premises.
9. Obtain the prior written consent of the Board before making any major improvements.
10. Keep the Premises and improvements in a clean, sanitary, and orderly condition.
11. Pay, when due, all payments for water and other utilities, and whatever charges for the collection of garbage that may be levied.

12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper or offensive use of the Premises.
13. At all times with respect to the Premises, use due care for public safety and agrees to indemnify, defend, and hold harmless the State of Hawaii, its officers, agents, and employees from and against all claims or demands for damage, including claims for property damage, personal injury or death, arising on or about the Premises, or by any fire or explosion thereon, or growing out of, or caused by any failure on the part of the Permittee to maintain the Premises in accordance with the terms and conditions of this Permit.
14. Procure, at its own cost and expense, and maintain during the entire period of this Permit, a policy or policies of commercial general liability insurance, in an amount acceptable to the Chairperson, insuring the State of Hawaii and the Permittee against all claims for personal injury, death and property damage. The policy or policies shall cover the entire Premises, including all buildings, improvements and grounds and all roadways or sidewalks on or adjacent to the Premises in the control or use of the Permittee. The Permittee shall furnish the State with a certificate showing the policy to be initially in force and shall furnish a like certificate upon each renewal of the policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the State of any intention to cancel any policy sixty (60) calendar days prior to actual cancellation. The procuring of this policy shall not release or relieve the Permittee of its responsibility under this Permit as set forth herein or limit the amount of its liability under this Permit.
15. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the Permittee (other than condemnation proceedings), the Permittee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State; furthermore, the Permittee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants and agreements of the Permit, in recovering possession of the Premises, or in the collection of delinquent rental, taxes, and any and all other charges.

B. Additional conditions:

1. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to the revocation; provided, however, that in the event payment of rental is

delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) business days prior to the revocation.

2. If the Permittee does not vacate the Premises upon the revocation of the Permit by the Board, the Permittee shall pay to the State Liquidated Damages at the daily rate of \$40.23 for each day, or portion thereof, the Permittee remains on the Premises over the date of revocation. The payment is in addition to any other rights or remedies the Board may be entitled to pursue for breach of contract, or for illegal occupancy, including the right to evict the Permittee without court action, and the cost thereof to be paid by the Permittee.
3. If the Permittee fails to vacate the Premises upon the revocation of the Permit, the Board, its agents and/or representatives may enter upon the Premises and remove and dispose of at Permittee's cost and expense, all vehicles, equipment, materials, and/or any personal property remaining on the Premises, and the Permittee agrees to pay for all costs and expenses of removal and disposition.
4. The Board may at any time increase or decrease the monthly rental by written notice at least 30 business days prior to the date of change of rent.
5. Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises; provided, however, that in the event the Permittee shall fail to remove the improvements within 30 calendar days, after written notice to remove has been sent, the Board may elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to the Permittee.
6. The Board reserves the right for itself, its agents, and/or representatives to enter or cross any portion of the premises at any time in the performance of its duties.
7. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.
8. It is understood that the Permittee has inspected the Premises and knows the conditions thereof and fully assumes all risks incident to its use.

9. The acceptance of rent by the Board shall not be deemed a waiver of any breach by the Permittee of any term, covenant or condition of this Permit nor of the Board's right to declare and enforce a forfeiture for any breach, and the failure of the Board to insist upon strict performance of any term, covenant or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition or option.
10. The term of this month-to-month permit beyond one year from date of issuance is subject to the prior approval of the Board.
11. The use and enjoyment of the Premises shall not be in support of any policy which discriminates against anyone based upon race, creed, color, sex, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.
12. Any and all disputes and/or questions arising under this Permit shall be referred to the Chairperson of the Board and his determination of these disputes or questions shall be final and binding on the parties.
13. Permittee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Permittee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Permittee's business, and then only after written notice is given to the Board of the identity of such materials and upon the Board's consent, which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the reasonable costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning Permittee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Permittee.

Permittee agrees to indemnify, defend, and hold the Board harmless, from any damages and claims resulting from the release of hazardous materials on the premises occurring while Permittee is in possession, or elsewhere if caused by Permittee or persons acting under Permittee. These covenants shall survive the expiration or earlier termination of the permit.

For the purpose of this permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other Federal, State, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

14. Prior to the termination of the subject permit, Permittee shall conduct a Level One (1) Hazardous Waste Evaluation and conduct a complete abatement and disposal, **if necessary**, satisfactory to the standards required by the Federal Environmental Protection Agency and the Department of Land and Natural Resources. The termination will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed.
15. Permittee shall assume the obligations of Amfac to provide water to the County of Kauai's Department of Water, Meadow Gold Dairies, Inc. And the Moloaa Farmers Cooperative.

Unless the text indicates otherwise, the use of any gender shall include all genders and, if the Permittee includes more than one person, the singular shall signify the plural and this Permit shall bind the persons, and each of them jointly and severally.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

DATED: December 16, 1997.

STATE OF HAWAII

By Mont S. Coleman-Agana
Chairperson and Member
Board of Land and Natural Resources

Approved by the Board of Land and Natural Resources at its meeting held on August 8, 1997 (D-11)

PERMITTEE:

Jeffrey S. Lindner
JEFFREY S. LINDNER

APPROVED AS TO FORM:

Ray S. J. Awa
Deputy Attorney General
Dated: December 1, 1997

STATE OF HAWAII)
) SS.
COUNTY OF KAUAI)

On this 11th day of November, 1997, before me personally appeared
Jeffrey S. Lindner
to me known to be the person(s) described in and who executed the foregoing
instrument and acknowledged to me that he executed the same as his free act and
deed.



W. Maile S. Taniguchi
Notary Public, State of Hawaii

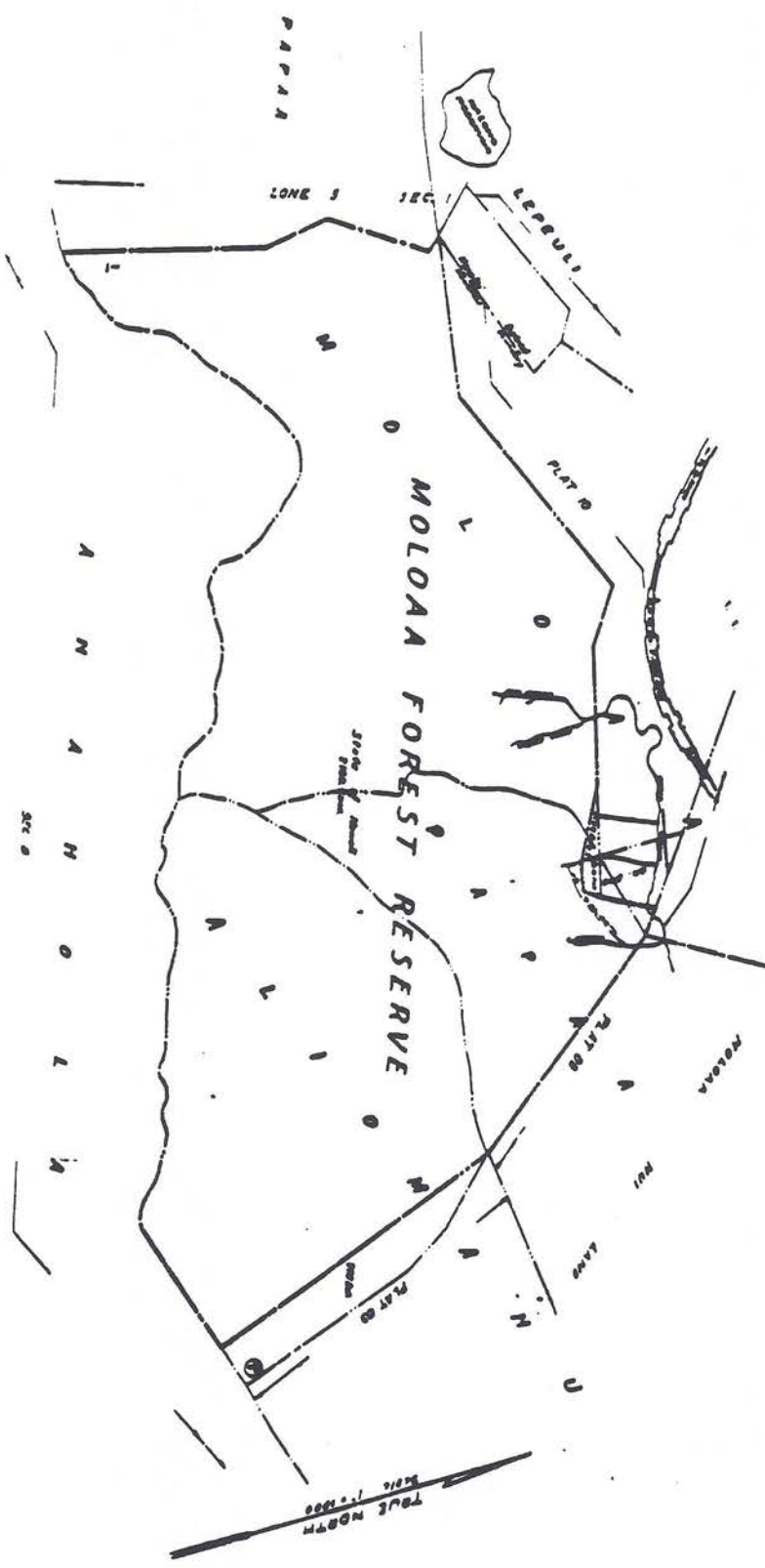
My Commission expires: 2/18/2000

STATE OF HAWAII)
) SS.
COUNTY OF)

On this ____ day of _____, 19__, before me appeared _____ and
_____, to me personally known, who being
by me duly sworn, did say that they are the _____
and _____, respectively of _____
_____, a Hawaii corporation, and that the
seal affixed to the foregoing instrument is the corporate seal of said corporation, and
that said instrument was signed and sealed on behalf of said corporation by authority of
its Board of Directors, and the said _____ and
_____ acknowledged said instrument to be the free act
and deed of said corporation.

Notary Public, State of Hawaii

My Commission expires: _____



LAND BY
EXHIBIT A

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 DIVISION OF LANDS & SURVEY
 HAWAII
 TAX MAP
 SECTION 4
 PLAT 9
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September 02, 1997

Mr. Ernest Lau, Director
Kauai County Water Department
4398 Pua Loke
Lihue, HI 96766



re: State Water Well at Moloaa, Kauai

Dear Ernest,

The State has issued a Revocable Permit to Mr. Jeffrey S. Lindner for the operation and maintenance of the above well site and transmission facilities. You will find attached a copy of the approval letter of August 18, 1997.

As we had discussed this well on August 7, 1997 and you asked to be kept notified of what transpired, you will need to mark a follow up in your calendar for this site. The County had told the State in October, 1996 that they would need 6 months to respond as to whether they wanted to assume this well. A response was not submitted. There is a two (2) month response time with this submittal for the County; but you will be given additional information with which to make a decision. You also have an additional twelve months commencing from August 8, 1997 to gather information to make your decision.

With these time deadlines, Mr. Lindner can make decisions on whether he wants to invest in new equipment or hold off on the purchase. This will also enable you to move beyond the current "rush" items to make your decision. Please however, be assured, these deadlines will not be extended even once.

Thank you for taking the time to discuss your thoughts with me. It is very important for government and business to work together as a partnership. That partnership shows clearly in the additional condition #9 which was written by Max Graham. Any questions, please call. Mahalo!

Me Ke Aloha Pumehana
With Warmest Aloha,

Lynn P. McCrory
Kauai BLNR Member

c: Sam Lee, Kauai District Land Agent (Letter Only)	fax: 808-274-3438
Dean Uchida, Land Division Administrator (Letter Only)	808-587-0455
✓ Max Graham, Esq. (Letter Only)	808-245-3277
Carol Suzawa, Chairperson Kauai County Water Board	Mail
Tish Uyahara, Deputy Director Dept. of Agriculture	Mail

For Your Information

AGREEMENT

THIS AGREEMENT made by and between THE LIHUE PLANTATION COMPANY, LIMITED ("Lihue") and the DEPARTMENT OF WATER, COUNTY OF KAUAI, by its Board of Water Supply (the "Board");

W I T N E S S E T H:

WHEREAS, Lihue leases water sources from the State of Hawaii ("State") and from the Keat Family ("Keat") located at Moloaa, Kauai, which two water sources are referred to as the "Moloaa sources";

WHEREAS, Lihue is committed to sell 340,000,000 gallons of water per year from the Moloaa sources to the MOLOAA FARMERS COOPERATIVE (the "Coop");

WHEREAS, Lihue owns the transmission mains transmitting the water to the Coop;

WHEREAS, Lihue is committed to sell 20,000,000 gallons of water per year to WARNER C. LUSARDI ("Lusardi") from the Moloaa sources;

WHEREAS, the Board lacks a suitable source of water for six (6) consumers residing along Moloaa Beach Road at Moloaa;

WHEREAS, the Board desires to purchase water from Lihue and to use Lihue's transmission mains to the Board's distribution intake in order to provide service to these six (6) consumers; and

WHEREAS, Lihue is willing to sell the water from the Moloaa sources under the terms and conditions set forth herein;

NOW, THEREFORE, based on the mutual promises and covenants contained herein, the parties hereto agree as follows:

1. Lihue shall sell water to the Board at the same rate at which Lihue sells water to the Coop, and shall transport

such water through Lihue's existing transmission mains to the Board's master water meter connection, located at Kuhio Highway near the Anuenue Road intersection, as indicated on Exhibit "A" attached hereto and made a part hereof.

2. Lihue shall provide no more than 5,000 gallons of water per day for the Board, measurement to be made by a master meter at the beginning of the Board's new line to Moloaa; provided, however, that Lihue's obligation to provide such amounts to the Board shall be subject and subordinate to Lihue's prior obligations to sell water to the Coop and Lusardi.

3. The Board acknowledges that the State has imposed an agricultural use limitation on the State Moloaa source, as described in the letter dated March 15, 1983 from James Detor of the State Department of Land and Natural Resources to Norito Kawakami, a copy of which is attached hereto as Exhibit "B", and that Lihue makes no representation or warranty as to the suitability of the water for any uses contemplated by the Board.

4. The Board acknowledges that the lease for the State Moloaa source expires on May 10, 1994, and that the lease for the Keat Moloaa source expires on December 5, 1987. Copies of the lease agreements have been made available to the Board for review.

5. The term of this Agreement shall expire upon the termination of the lease for the State Moloaa Source. Upon granting of an extension of the lease, as long as Lihue continues to operate the system, and as long as there is no objection from the State, the Board and Lihue agree to comply with the terms of this Agreement.

6. The Board acknowledges that Lihue has not tested the water from the Moloaa sources for pesticide contamination,

and that Lihue makes no representations or warranties whatsoever as to the suitability of the water for any use contemplated by the Board.

7. Lihue shall repair, operate and maintain its existing transmission lines from the Moloaa sources, subject to Lihue's right to recover from the Board its pro rata share of the cost of repair, operation and maintenance in the sale of water based on the total water usage of those water users connected to the Moloaa sources.

8. Lihue shall provide easements and rights-of-way over real property owned by Lihue as may be required for the Board to provide water from the point of the Board's distribution intake to the six (6) consumers and shall allow the Board to enter upon its real property as may be necessary for the Board to inspect or make emergency repairs to the water system and transmission lines serving said consumers.

9. The Board shall install and maintain a master meter at the connection between the Lihue transmission main and the Board's distribution intake.

10. The Board shall pay Lihue for the water delivered at the Board's master meter its share of the current water delivering charges assessed the Coop. The Board's share of the water charges shall be based upon its pro rata usage of the total amount of water supplied by the Moloaa sources. Payment shall be made monthly, within thirty (30) days of meter reading.

11. The Board shall, at its own cost, maintain its pipelines and meters in good working order and shall make all necessary repairs promptly.

12. The Board shall waive any and all claims it may have against Lihue that may arise from any breaks in lines or disruption in supply and delivery, other than a claim based on a

willful refusal on the part of Lihue to supply and or transport water pursuant to this Agreement.

13. The Board shall haul water to supply the six (6) consumers for a reasonable time in the event delivery by Lihue to the Board is interrupted because of an emergency or because of interruption in pumping from the Moloaa sources.

14. The Board shall hold Lihue harmless from and against all claims and demands for loss or damage, including property damage, personal injury and wrongful death arising out of or in connection with the exercise of the Board's rights under Paragraph 8 or with the failure of Lihue to supply and transport water to the Board as herein required, unless such failure results from a willful refusal to supply and or transport water pursuant to this Agreement, and shall reimburse Lihue for all its costs and expenses, including reasonable attorney's fees, incurred in connection with the defense of any such claim or demand.

15. The Board shall pay for and install at its own cost a Board-approved backflow prevention device between both Lihue's transmission mains and the Coop's connection as shown on Exhibit "A."

16. The Board shall undertake and complete a study within the first three (3) years of this Agreement of the feasibility of having the Board assume operational control and responsibility of the entire Moloaa water system.

17. No increase in water demand over 5,000 gallons per day by the Board's present consumers shall be allowed.

18. The Board agrees to cooperate with Lihue and to use its best efforts in

- a) obtaining an extension of the existing leases for the State and Keat Moloaa sources; and

b) obtaining the acknowledgement by and the consent of the State to the non-agricultural use of ~~on~~ the water from the State Moloaa E.S. source.

Dated: This 15th day of July, 1985.

THE LIHUE PLANTATION COMPANY, LIMITED

BY *[Signature]*
Its VICE PRESIDENT

Approved as to Form:

BY *[Signature]*
E.S.

BY *[Signature]*
Its SECRETARY

DEPARTMENT OF WATER SUPPLY
COUNTY OF KAUAI

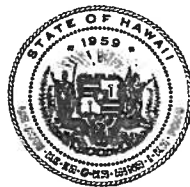
BY *[Signature]*
Its Chairperson
Board of Water Supply

APPROVED:

[Signature]
Manager and Chief Engineer

APPROVED AS TO FORM
AND LEGALITY:

[Signature]
Dep County Attorney



STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. BOX 3378
HONOLULU, HI 96801-3378

In reply, please refer to:
File: SDWB

Case-Lindner01.docx

September 3, 2015

The Honorable Suzanne Case
Chairperson
Department of Land and Natural Resources
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Mr. Jeffrey S. Lindner
P.O. Box 518
Anahola, HI 96703

Dear Ms. Case and Mr. Lindner:

SUBJECT: PUBLIC WATER SYSTEM NO. 435, MOLOAA WATER SYSTEM, ACTIVATION AS A NEW REGULATED PUBLIC WATER SYSTEM, OCTOBER 1, 2015

The Kauai District Health Office of the Department of Health (DOH) requested the Safe Drinking Water Branch's (SDWB's) assistance in determining if a public water system exists in the Moloaa area. The Kauai District Health Office has received a number of building permits to review and needed to determine the source of drinking water for these projects.

The Department of Land and Natural Resources owns the Moloaa Well No. 1 (State Well No. 1020-02). Mr. Jeffrey Lindner operates the Moloaa Well No. 1 on a 30-day Revocable Permit (permit no. S-7088). As part of its determination as to whether the Moloaa water system should be a regulated public water system, the SDWB in correspondence dated March 13, 2015, requested that Mr. Lindner provide the population of persons on the water system who use the water for human consumption, which includes drinking, oral hygiene, cooking, dishwashing and bathing. Mr. Lindner responded that he serves the former Meadow Gold Dairies Lands, the Moloaa Irrigation Cooperative (MIC) water system, and the Kauai Department of Water (DOW) Moloaa water system, and that the number of persons consuming the water was not known.

The DOH conducted a population survey of the Moloaa water system in May and June of this year. On August 18, 2015, the DOH met with the Department of Land and Natural Resources, Mr. Lindner's representative (Mr. Michael Lau), representatives of the MIC, the Kauai DOW, and other interested parties. The DOH also conducted a site inspection of the system on that date. The minutes of the meeting, and an inspection report are attached.

According to the completed population survey forms, the Moloaa water system serves 64 or more persons who use the water for human consumption, for six or more months a year. It has therefore been determined that the water system shall be regulated as a public water system. The effective date of system activation will be October 1, 2015. The system serves 25 or more residents year-round, therefore it will be classified as a Community water system. The parties jointly responsible for this water system shall be the well owner, the Department of Land and

The Honorable Suzanne Case
Mr. Jeffrey S. Lindner
September 3, 2015
Page 2

Natural Resources, and the current lessee, Mr. Jeffrey Lindner, who is responsible for the provision of well water to the parties named in the lease agreement.

The DOH SDWB regulates public water systems according to Hawaii Administrative Rules (HAR), Chapter 11-20, "Rules Relating to Public Water Systems." Please refer to Chapter 11-20 at: <http://health.hawaii.gov/opppd/files/2015/06/11-20.pdf>.

The Moloaa Well No. 1 serves the MIC water system, with its own population of 47 or more persons. The MIC water system will be classified as a *consecutive* water system because it does not have its own source of water, and it will be regulated as a separate public water system.

The Moloaa Well No. 1 serves the Kauai DOW Moloaa system, which serves three residents plus vacation rental consumers. The population of this water system is estimated to be approximately 15 persons. This water system does not meet the population criteria for separate regulation as a public water system.

System Inventory Sheet. Attached is a system inventory information sheet; please complete and/or correct the information, and return the form to the SDWB by September 11, 2015. Especially important are the phone and correspondence contact persons. The phone contact person will be the main point of contact for day-to-day communication and in the event of an emergency.

Public Notification. On October 1, 2015, the Department of Land and Natural Resources/ Mr. Jeffrey Lindner shall begin public notification to all customers to inform them the water delivered is not suitable for human consumption due to unknown water quality and the unapproved Moloaa Well No. 1 serving as the source of water for the public water system. A copy of a sample public notification is attached. Please work with the SDWB to finalize the language of this public notice. The public notice must be delivered to the consumers until the water quality of the source has been determined (refer to new source monitoring section below) and the source has been approved.

Sanitary survey. Once the system inventory sheet is completed and submitted to the SDWB, our staff will schedule with the main point of contact a sanitary survey of the water system in early October 2015.

New source monitoring. The Moloaa Well No. 1 (State Well No. 1020-02) is not approved as a source of drinking water to serve a regulated public water system in accordance with HAR Section 11-20-29, "Use of new sources of raw water for public water systems." This section requires that all new public water system sources be approved by the Director of Health (Director) prior to their use. Such approval is based primarily upon the submission of a satisfactory engineering report which addresses the requirements set forth in HAR Section 11-20-29.

The engineering report must identify all potential sources of contamination and evaluate alternative control measures which could be implemented to reduce or eliminate the potential for contamination, including treatment of the water source. In addition, water quality analyses for

The Honorable Suzanne Case
Mr. Jeffrey S. Lindner
September 3, 2015
Page 3

all regulated contaminants, performed by a laboratory certified by the State Laboratories Division of the State of Hawaii, must be submitted as part of the report to demonstrate compliance with all drinking water standards. Additional parameters may be required by the Director for this submittal or additional tests required upon her review of the information submitted.

All sources of public water systems must undergo a source water assessment which will delineate a source water protection area. This process is preliminary to the creation of a source water protection plan for that source and activities which will take place to protect the source of drinking water.

The Department of Land and Natural Resources/Mr. Jeffrey Lindner shall submit an engineering report for Moloaa Well No. 1 meeting the "Guidelines for Preparation of Engineering Reports for New Drinking Water Sources for Regulated Public Water Systems," dated September 12, 2007. The report shall be submitted no later than December 31, 2015. The Guidelines may be found at: <http://health.hawaii.gov/sdwb/files/2013/06/New-Source-Report-Guidelines.pdf>.

As an interim step, the Department of Land and Natural Resources/Mr. Jeffrey Lindner shall take water quality samples of the raw water quality of Moloaa Well No. 1 no later than September 30, 2015. The analyses shall be submitted to the SDWB no later than October 10, 2015. The sampling and analyses shall include all contaminants listed in "Contaminants to be Tested in All New Sources of Drinking Water" document which can be found at: <http://health.hawaii.gov/sdwb/files/2014/04/ContaminantsTestNewSources.pdf>.

All analyses shall be performed by a laboratory certified or approved by the Hawaii DOH, State Laboratories Division. However, turbidity and water quality parameters must be done using EPA approved methods.

System plans. The Department of Land and Natural Resources/Mr. Jeffrey Lindner, shall submit system plans or a layout of the system, including the location of the well, tank, chlorination facilities and all service connections no later than September 15, 2015 to the SDWB. The system plans or layout of the system will be used to develop water quality sampling plans for the water system.

System water quality monitoring. The Department of Land and Natural Resources/Mr. Jeffrey Lindner, as the purveyor of a regulated public water system, will need to monitor for the following: total coliform bacteria, organic and inorganic chemicals (also commonly referred to as Phase II/Phase V monitoring), lead and copper, total trihalomethanes and total haloacetic acids, and radionuclides.

Total Coliform bacteria. The system must submit a sample site plan to Ms. Ann Zane of the SDWB Compliance section for review and approval. One total coliform bacteria sample must be collected each month, by your sampler, beginning October 1, 2015. The State Laboratories Division will analyze the routine Total Coliform samples. SDWB staff will assist you in developing the sample site plan and taking special samples in September 2015.

The Honorable Suzanne Case
Mr. Jeffrey S. Lindner
September 3, 2015
Page 4

Phase II/Phase V monitoring. Once the Moloaa Well No. 1 has been approved as a drinking water source, the SDWB will send you information on the chemical and radiological monitoring that will be required. In essence, one quarterly sample for inorganic chemicals, two quarterly samples for organic chemicals, and four quarterly samples for radionuclides, will be required, starting in the first quarter of well operation after gaining new source approval.

The samples must be taken at each entry point to the distribution (EPD) system. The Moloaa water system will have two (2) EPDs. The first EPD will be prior to the MIC service connection. The second EPD will be downstream of the chlorination facility and Lindner Tank.

Disinfection Byproducts. Once the Moloaa Well No. 1 has been approved as a drinking water source, the SDWB will send you information on the disinfection byproducts monitoring that will be required. In essence, one dual sample set will need to be collected each year. A dual sample set consists of one trihalomethane and one haloacetic acid sample at a particular sample site. The SDWB will assist you in identifying the sample site and collection schedule. You should maintain (and update as needed) a sampling plan (a site map depicting the location of the sampling site on a schematic of your system with the sampling schedule). Once the appropriate sample point has been determined and the samples have been collected, the State Laboratories Division will analyze these samples.

Lead and copper. For the period January to June 2016, the Department of Land and Natural Resources/Mr. Jeffrey Lindner will need to complete one round of lead and copper monitoring. Please see the attached enclosure for information on implementing the Lead and Copper Rule.

Certified distribution system operator. Public water systems in the state must be operated by certified public water system operators as specified in Hawaii Administrative Rules, Title 11, Chapter 25, "Rules Relating to Certification of Public Water System Operators." Section 11-25-2.5 of Chapter 25 requires all public water systems to have a certified distribution system operator who is in direct responsible charge of the water system. This operator must be certified by the state of Hawaii Board of Certification of Public Water System Operators. Please note that because your system population is less than 1500 persons, the system must be under the responsible charge of a certified Distribution System Operator, Grade 1, as of October 1, 2015. You can download a copy of Chapter 11-25 at: <http://gen.doh.hawaii.gov/sites/har/admrules1/11-25.pdf>

Consumer confidence report. The Department of Land and Natural Resources/Mr. Jeffrey Lindner will need to distribute to its consumers a water quality report by July 1, 2016, for water quality data collected during the calendar year 2015. A quick reference guide to the Consumer Confidence Report Rule is attached.

Penalties. Chapter 340E, Hawaii Revised Statutes provides for maximum penalties of \$25,000 per day per violation for each day of violation of any requirement of Chapter 340E or regulations developed pursuant to Chapter 340E (HAR, Title 11, Chapter 20, "Rules Relating to Public Water Systems," and HAR, Title 11, Chapter 25, "Rules Relating to Certification of Public Water System Operators").

The Honorable Suzanne Case
Mr. Jeffrey S. Lindner
September 3, 2015
Page 5

Attached information. Enclosed for your information are the following documents:

1. Minutes of the Moloaa Water Systems Meeting, August 18, 2015;
2. Moloaa Water Systems – Site Inspection Report, August 18, 2015;
3. System inventory sheet – Moloaa water system;
4. Sample public notice;
5. Total Coliform Rule: A Quick Reference Guide;
6. Implementing the Lead and Copper Rule;
7. Lead and Copper Rule: A Quick Reference Guide; and
8. Consumer Confidence Report Rule: A Quick Reference Guide

If you have any questions on compliance with drinking water rules, please contact the following SDWB staff:

Regulatory requirement	Contact Name	Contact email address
Public Notification	Ann Zane	ann.zane@doh.hawaii.gov
New source engineering report & monitoring	Jennifer Nikaido	jennifer.nikaido@doh.hawaii.gov
Total Coliform Rule	Ann Zane	ann.zane@doh.hawaii.gov
Phase II/Phase V monitoring	Zhaohui Wang	zhaohui.wang@doh.hawaii.gov
Disinfection Byproducts Rule	Jennifer Nikaido	jennifer.nikaido@doh.hawaii.gov
Lead and Copper Rule	Jennifer Nikaido	jennifer.nikaido@doh.hawaii.gov
Operator certification	Jodi Yamami	jodi.yamami@doh.hawaii.gov
Consumer confidence report	Zhaohui Wang	zhaohui.wang@doh.hawaii.gov

Thank you for your assistance. We look forward to working with you in the future.

Sincerely,



VIRGINIA PRESSLER, M.D.
Director of Health

Enclosures

c: Mr. Michael Lau (w/encls.)
Mr. Marvin Mikasa (w/encls.)
The Honorable Scott Enright (w/encls.)
Mr. Gerald Takamura, DOH Kauai DHO (w/encls.) [via email]
Monitoring section (w/o encls.) [via email]
Engineering section (w/o encls.) [via email]
Compliance section (w/o encls.) [via email]

December 10, 2020

VIA E-Mail

Board of Land and Natural Resources
State of Hawaii
Honolulu, HI 96813
E-mail: blnr.testimony@hawaii.gov**Re: December 11, 2020 BLNR Meeting, Item D-5, RP S-7088 (Lindner)**

Dear Chairperson Case and Board Members:

We write on behalf of Jeffrey Lindner and Moloaa Water Company¹ (collectively, "Lindner") with regard to the holdover/continuation of revocable permit no. RP S-7088 (Lindner) (the "Permit"), Item D-5 for the Board's December 11, 2020 meeting. Staff recommends continuation of the Permit subject to the unusual condition that:

"The Board requires Mr. Lindner to reach agreement with the [Moloaa Irrigation Cooperative "MIC"] no later than March 31, 2021 to complete the water meter relocation. Furthermore, staff recommends that the Board also require Mr. Lindner provide a written update on the status of the agreement no later than April 7, 2021...In the event the parties fail to reach an agreement by the deadline, staff may bring the matter back to the Board to consider whether the revocable permit should be continued." Item D-5, p. 4.

This condition appears to have arisen from a November 16, 2020 complaint filed by MIC with the Commission on Water Resource Management ("CWRM") regarding the relocation of a water meter that serves Moloaa Hui agricultural lands, in Moloaa, Kauai. The staff submittal provides little context as to what the underlying dispute is and why the Board should interject itself into its resolution. This letter is an effort to provide background information necessary for the Board to make an informed decision.

The underlying dispute is decades old and involves litigation in multiple forums. The dispute concerns private ownership of easements and water facilities, land development rights and violations of CC&Rs running with the land. Forcing Lindner to negotiate with MIC by a date certain under threat of losing the Permit would unreasonably interfere with Lindner's private property rights and economic relations and is not in the best interests of the State.

¹ Lindner (through MWC) owns the water facilities serving three separate water tanks: (1) the Kauai Department of Water ("DOW") water tank, (2) the Moloaa Farms LLC water tank and (3) the Moloaa Hui farmers water tank that is managed (but not owned) by MIC. The water meter serving the Moloaa Hui tank is currently located on Moloaa Farms LLC's property, an entity owned and controlled by Lindner.

MIC's attempt to leverage the continuation of the Permit to gain an unfair and unwarranted negotiating advantage should be rejected outright. **if the Board seeks to impose a condition that interferes with Lindner's prospective economic relations, Lindner requests that a contested case hearing be held to determine whether the State's (and not a private third party's) interests are being served.**²

I. BACKGROUND

A. The Sale Of The Lihue Plantation Lands

On February 10, 1997, Lindner loaned \$500,000 to developer Moloaa Hui Lands, Inc. ("MHL")³ to fund the purchase of the Lihue Plantation property on Kauai identified by Tax Map Key Nos. (4) 4-9-09:1, 9-25, 27-29, 35-38 (the "Property"), with an option to acquire a portion of the Property (the "Option"). (**Ex. 1**) This purchase paved the way for farmers who were leasing lots from AMFAC to purchase ownership interests in the land. Under the Option, developer MHL agreed to use best, good faith, efforts to subdivide or condominiumize the Property and permit residential farm dwelling density of 15 units on Lindner's portion and Lindner agreed to provide irrigation water to MHL for the development of the Project, including Lindner's portion. (*Id.* at pp. 2, 9 and 12) Paul Huber, President of MIC, signed off on the Option as an individual and officer of MHL.

On March 13, 1997, MHL proceeded to purchase, consolidate and re-subdivide the Property through a Variance Permit—creating Lot 1 (approximately 590 acres where Moloaa Hui I and II Condominium Property Regimes ("CPRs") are located) and Lot 2 (approximately 134 acres now owned by Lindner's entity, Moloaa Farms LLC and others). MHL placed CCRs on all of the Property (the "1997 Declaration"). (**Ex. 2**) The County of Kauai conditioned tentative subdivision approval on, *inter alia*, the provision of potable water to the Property. (**Ex. 3**) Lindner exercised the Option to Lot 2 on August 27, 1998 and took title subject to the 1997 Declaration. (**Ex. 4**) From the beginning, both Lots 1 and 2 were to be served by the same water system and MHL entered into a water supply agreement with Lindner to access the irrigation water from State Well No. 1, for which Lindner holds the Permit.

B. The 1997 Declaration of CCRs For All The Moloaa Lands, Including Lot 2

The 1997 Declaration states that the existing system and water tank on the Property are to be used for the Project (defined as including all lands, including Lots 1 and 2). The Declaration provides, in part, at page 12:

"The existing water system for the Project will continue to be used as long as it is available.... Declarant continues in negotiations for water usage as of the execution of

² HRS §171-55, provides in part:

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which **will serve the best interests of the State**, subject, however, to those restrictions as may from time to time be expressly imposed by the board. (Emphasis added.)

³ MHL was owned and controlled by Michael Strong (now deceased), Candace Strong and Paul Huber. Paul Huber is also a founder and current President of MIC.

this document. Ownership of the existing water tank on the Project is unclear, but to the extent Declarant owns it, it will be reasonably used for the Project.” (*Id.*)⁴

A condition of ownership is *bona fide* agricultural use, which must occur on a continuous basis as demonstrated to the declarant (MHL) or to the Farm Review Committee set up by the 1997 Declaration. The Declaration also confirms that residential use is subject to a Farm Review Committee and subject to agricultural residential use restrictions including an anti-speculation provision. (Ex. 2)

An amendment to the 1997 Declaration was recorded on March 16, 2000 eliminating, among other things, the anti-speculation provision allowing the developer and its principals to profit from unit sales. (Ex. 5) The amendment also substituted the condition of “bona fide agricultural use of the Property” with a condition that all lots comply with the County Agricultural Dedication Rules under Section 5A-9.1 of the Kauai County Code, as amended. (*Id.*) The Ag Dedication Rules provide that the land must be used for one of 9 agricultural uses, for profit, on a continuous and regular basis. (Ex. 6) Factors considered to determine whether the owner intends to obtain a monetary profit is evidenced by the fact that the land enjoys County agricultural water rates. (*Id.*)

As noted above, Lindner agreed to provide irrigation water to MHL, which enabled the farmers to continue to operate in conformity with the subdivision conditions of approval, state land use laws and the CC&Rs.

C. The Formation Of CPRs On Lot 1 And Denial Of Water To Lot 2

Lot 1 was condominiumized into Moloaa Hui I and II CPRs. Moloaa Hui I was divided into 43 separate units. (Ex. 7) Moloaa Hui II was divided in 18 units. In February 2000, the Planning Commission approved an increase of farm dwellings on Lot 1 from 9 to 13. (Ex. 8) The Moloaa Hui III condominium that was also created by MHL was abandoned and subdivided into individual Roadway Lots. Lot 1’s 13 farm dwellings were approved without MHL providing potable water or meeting other requirements of the Kauai County subdivision ordinance or the County Ag Dedication rules. In addition, in 2010, the County adopted a new farm worker housing ordinance that paved the way for a massive increase in farm dwellings on Lot 1. Over time, the Moloaa Hui water tank went into disrepair due to lack of maintenance by MHL, MH I and MH II.

From the outset, Lot 2 (Lindner’s lot) was denied access to the water system and prevented from developing its promised 15 farm dwellings. At an annual meeting for Moloaa Hui I, II and III in June of 2000, Alberto Cartiga asked Michael Strong (a principal and officer of MHL) “if J. Lindner will use our water tank for his house sites.” Mr. Strong answered “no, definitely not.” (Ex. 8A at 3) In 2010, when Paul Huber was exploring the formation of MIC, Lot 2 was depicted as private land not serviced by the water system. (Ex. 8B at 14) In 2013, MHL still sought to control the water tank—a facility that is to be used for the all the Moloaa Hui Lands, including Lot 2. (Ex. 8C at 3) The denial of access to the water system has undermined Lindner’s ability to serve Lot 2, as originally contemplated under the Option and 1997 Declaration.

⁴ In subsequent CPR filings, Declarant MHL confirmed ownership of the water tank and listed the water system as a common element.

D. The Water Supply Agreement

As contemplated under the Option for the purchase of the Lihue Plantation Property, MHL entered into a Water Supply Agreement (“WSA”) with Lindner for the subdivision’s water supply. Under the WSA, MHL could not assign its rights without Lindner’s prior written consent. **(Ex. 9)** When MHL was involuntarily dissolved by the State in 2008, no new agreement was put in place. Therefore, neither the owners of Lot 1 nor the Roadway Lots have a water supply agreement with Lindner to provide State well water.

E. MIC’s Formation, Miss-Management And Lack Of Maintenance Of The Subdivision’s Water System

MIC was formed by owners of Lot 1 in October 2010 to manage and administer water resources and facilities for agricultural purposes. In July 2011, MIC entered into a water management agreement (“WMA”) with the owners of Lot 1 and the owners of the Roadway Lots **to manage** the subdivision’s water system, including the Moloaa Hui water tank. **(Ex. 10)** The WMA transferred “water management responsibilities” to MIC but **no ownership rights**. (*Id.*) The responsibilities include water delivery, billing, maintenance of the water lines and the water tank and the collection and management of a prudent maintenance and operations cash reserve. (*Id.*) The WMA is subject to termination after 10 years (without cause) or immediate termination in the event of a default by either MIC or the Lot 1 owners. (*Id.*) MIC was directed to negotiate a supply contract with the water supplier (Lindner) but failed to do so. (*Id.*)

In 2015, MIC was declared a Public Water System (“PWS”) due to the massive increase in farm dwellings built on Lot 1’s prime agricultural land. MIC was declared a PWS despite not owning any water facilities, having no contractual rights to a water supply, and being only a manager/middleman conveying water at cost.⁵ In 2016, MIC was awarded State funding to help address water deficiencies in the system caused by the lack of basic maintenance. MIC was awarded State funding despite having no ownership rights to the private water system. MIC has not focused on repairing the existing system but has spent money on a new water tank proposal and drilling a new supply well- while claiming it lacked money to move its water meter onto Lot 1.

In a nutshell, the developers (including Paul Huber as principal) used the CPR process to create and sell, **for profit**, dozens of land units without putting in place basic infrastructure necessary to accommodate the development. Huber then formed MIC and sought State funding for capital improvements that should have been the responsibility of the developer. MIC’s formation, therefore, was an elaborate effort to shift

⁵ Hawaii Administrative Rules, Title 11, Chapter 20, “Rules Relating to Public Water Systems,” section 11-20-2, state that a public water system is “a system which provides water for human consumption, through pipes or other constructed conveyances if the system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least sixty days out of the year.”

Section 11-20-1 states that Chapter 20 “applies to each public water system, **unless the public water system meets all of the following conditions:**

- 1) it consists only of a distribution and storage facilities (and does not have any collection and treatment facilities);
- 2) it obtains all its water from, but is not owned or operated by a public water system to which such rules apply;
- 3) it does not sell water to any person; and
- 4) it is not a carrier which conveys passengers in interstate commerce.

private costs to the State. Despite all of the State funds received, MIC has done nothing to repair the Moloaa Hui water tank that has been deficient since at least 2013. (Ex. 8C)

1. MIC Allegedly Acquires The Water Tank Unit

While MIC has done little to fix deficiencies in the existing water system, MIC has, apparently, spent State funds on acquiring and developing new facilities. In April 2018, MIC purchased condominium Unit 33 (by quitclaim deed) underlying the Moloaa Hui water tank. MIC purchased Unit 33 from a newly incorporated Moloaa Hui Lands, Inc., listing Eric Michael Strong as President/Chief Executive Officer. The deed was recorded on April 25, 2018 as Document No. 66890441. (Ex. 11) According to Department of Commerce and Consumer Affairs, the original MHL entity, which owned Unit 33 and whose members included Paul C. Huber, Michael R. Strong and Candace L. Strong, was involuntarily dissolved on June 10, 2008. (Ex. 12) In June of 2014 a new entity was “re-incorporated” by Eric Strong but dissolved December 1, 2017. (*Id.*) On the date of dissolution, yet another Moloaa Hui Lands, Inc. was registered in Hawai‘i. (*Id.*) The newly formed Moloaa Hui Lands, Inc., therefore, did not hold title to convey Unit 33 to MIC. Tax assessment records show that there were no transactions between 1999 and the April 2018 transaction. And apparently, back taxes were never paid to the State.

In other words, the entity that originally acquired Unit 33 dissolved and a new entity (with the same name but none of the same officers/owners) was created that acted as grantor under the deed. This was a sham transaction and leaves open the question of ownership of the unit under the water tank. And, this further calls into question whether MIC has/had any ownership/control over the water system necessary to secure State funding.⁶

2. MIC Fails To Properly Maintain The System, Violates Clean Water Act Requirements And Is Declared A Public Water System

MIC has done little to maintain and upgrade the aging water system; all the while imposing reserve and service charges on its customers. The roof of the water tank is in extremely poor condition due to severe corrosion and is essentially failing. To date, MIC has not repaired the water tank roof, which allows for contaminants to enter into the system. Due to the fact that the water tank has no back flow preventer, when well pumping ceases, water from the tank flows back up the main line into Lindner’s system. As a result of the deficient water tank, an enforcement order was issued by the Department of Health. Despite the enforcement action, MIC did not repair the water tank but spent its State acquired funds on a proposal to build a brand new water tank.

⁶ In May of 2018, MIC applied for a State Drinking Water SRF loan in the amount of \$995,325. All projects under the program require various assurances, including that the applicant has the legal, institutional, managerial and financial capability to ensure adequate construction, operation and maintenance of the drinking water treatment works. It is a mystery how MIC could apply for and accept long-term financing based on an operating agreement that can be terminated in 2021 or sooner under an early termination provision. Based on its lack of ownership of the system or a reliable long-term source of water, MIC does not and did not appear to have the requisite authority to obtain SRF funding. Ex. 13.

MIC was also required to maintain an accounting system in accordance with generally accepted accounting principles. *Id.* According to State records, MIC has applied for SRF funding of up to \$3,875,000 for a new water tank, upgrades to pipelines and related improvements. Ex. 14. To date, it is unclear what money MIC has actually received and how it has been spent.

At the time the State became aware of deficiencies in the water tank, it discovered that Lot 1 owners had constructed dozens of farm dwellings—all served by the water tank. The State declared the “MIC system” a Public Water System, despite the fact (noted above) that MIC did not qualify as a PWS. As a result, Lindner’s system (designed to provide only irrigation water for agricultural purposes as expressly reflected in the DLNR Permit) was also designated a PWS and forced to test and treat water at the State well source due to the increase in potable demand. In addition, Lindner’s farm was also required to test and treat its water. While Lindner ever only agreed to provide raw irrigation water, the PWS designation requires potable water. Lindner has born significant costs as a result of the PWS designation directly caused by the expansion of farm dwellings on Lot 1.

3. MIC Imposes A \$700,000 Reserve Charge For Lot 2 To Access The Common Water System

In the spring of 2019, Lindner approached MH I and MH II through their Presidents, Paul Huber and Ned Whitlock, to connect to the water system for the benefit of Lot 2, as contemplated by the subdivision approval and 1997 Declaration. Rather than address the issue on behalf of the owners of the system, Huber and Whitlock insisted that any agreement would need to be with the managing agent, MIC. However, MIC was never authorized by Lot 2 ownership to manage the water system on their behalf.

Despite the fact that Lot 2 has a legal right to connect to and use the water system, Huber and Whitlock demanded that Lot 2 pay a reserve charge in excess of \$700,000 and water rates 10% above all other subdivision owners. Huber and Whitlock, therefore, used MIC as a shield to block Lot 2’s fair access to the system and forced Lindner to demand arbitration. **The arbitration and litigation that arose are ongoing.**

II. ISSUES RAISED BY THE RELOCATION OF THE MAIN WATER METER TO THE MOLOAA HUI WATER TANK

Given the proper context of the dispute, the staff proposed condition presents a number of problems. First and foremost, MIC is not authorized to bind the owners of the Moloaa Hui water system to a settlement with Lindner. MIC is a managing agent of the owners of Lot 1 and the Roadway Lots. Lot 2 holds equal rights and interests in the common water system. Any negotiation regarding the relocation of the water meter must include representatives of Lot 2, MH I, MH II and the Roadway Lots ownership. MIC may only negotiate on behalf of those owners/interests that have specifically authorized MIC to act on their behalf. MIC has not and cannot provide such authorization. If the State were to impose a Permit condition to resolve this particular dispute (which is not recommended), **all interested parties must be represented and required to negotiate in good faith.**

Second, relocation of the meter involves significant property interests. For many years, Lindner has requested that the main water meter for the Moloaa Hui water tank be relocated from his property to Lot 1. The current location of the meter creates a number of problems. Water from the Moloaa Hui water tank flows back up the hill into Lindner’s pipes due to the absence of a back flow preventer at the tank site. This means that the defects in the water tank (such as the leaking roof) can cause water contamination that enters into Lindner’s system. Further, the location of the water meter prevents Lindner from using a large portion of his water main to provide new service makai of Kooloau Road. By relocating the water meter onto Lot 1, Lindner can run a lateral pipeline down Kooloau Road to the DOW tank and/or

to a tank on Lot 2. If the meter is not moved to Lot 1, Lindner would be forced to expend millions of dollars installing a new pipeline under Kuhio Highway to expand service to DOW and/or Lot 2 customers. MIC's proposed relocation of the water meter, therefore, would deprive Lindner the full use of his system and allow the back flow from the water tank to continue up to the placement of the meter. In short, **MIC is attempting to use the Permit condition as leverage for a *de facto* take-over of a significant portion of the main water line, over which ownership is hotly contested.**

On December 9, 2020, we were provided a copy of the underlying MIC complaint filed with CWRM. MIC claims that Lindner is responsible for waste that is actually due to MIC's lack of system maintenance and failure to make capital improvements. MIC alleges that relocating the water meter to a location just mauka of Kooloau Road will somehow reduce waste. If this were true, then moving the meter all the way to the tank site would reduce waste even more. But the MIC complaint is really not about reducing waste. MIC seeks to relocate the meter to a location that will best serve **MIC's interests** and is using waste as an excuse to take over part of Lindner's system and to prevent the expansion of his service area.

Lindner has been a steward of the State well water for over twenty years and is protective of the resource. He has supplied water to Kauai DOW and Moloaa Farms LLC reliably and without incident. He has tested and treated the water after being unfairly designated a PWS based on the increase in farm dwellings on Lot 1. Lindner has not been made whole for the increased operating costs. MIC's waste of State funds, lack of capital improvements and failure to provide basic maintenance of the existing system (including the deficient water tank) accounts for MIC's alleged waste of State water resources. The few overflow events at the Moloaa Hui water tank referenced in the complaint resulted from MIC's failure to install a simple shut-off valve within the Moloaa Hui water system. Rather than update the Moloaa Hui water system to fix the problem, MIC sought to install a radio controlled system to take control of Lindner's well pump—a pump that serves not only the Moloaa Hui water tank but the tanks of DOW and Moloaa Farms LLC. Lindner is under no obligation to give up control of the well pump to MIC, an entity with which Lindner has no contractual relationship.⁷ Lindner agrees the water meter should be relocated off of his property and onto Lot 1 near the water tank. The location of the meter, however, has nothing to do with eliminating water waste and should not in any way impact the Board's decision on the Permit.

III. CONCLUSION

The relocation of the main water meter concerns the existing water system and existing private property rights and interests. No State interests would be served by the Board interjecting itself into this dispute or providing one private entity an advantage over another. Accordingly, Lindner requests that the Permit be approved without any conditions concerning the relocation of the water meter.

Sincerely,

/s/ Timothy H. Irons
Counsel

Attachment (Exs. 1-14)

⁷ Given MIC's role in denying Lot 2 fair access to the water system, MIC is not a trustworthy partner.

MORIHARA LAU & FONG LLP

A LIMITED LIABILITY LAW PARTNERSHIP

September 25, 2015

Joanna L. Seto, P.E., Chief
Safe Drinking Water Branch
State of Hawaii
Department of Health
919 Ala Moana Blvd., Room 308
Honolulu, HI 96814-4920

RE: Moloaa Water System (PWS ID NO. 436)

Dear Ms. Seto:

Pursuant to the Department of Health's letter dated September 3, 2015, and as extended by letter dated September 22, 2015, attached is the water system layout plan for the water system operated by Mr. Jeff Lindner at Moloaa, Kauai. The plan, which is plotted on a satellite image of the area, delineates the approximate locations of the well, the system pipeline, and the respective water meters connecting to the Department of Water's ("DOW") system and the Moloaa Irrigation Cooperative ("MIC"). The map does not include the infrastructure owned by the DOW or MIC, although MIC's water tank can be seen on the lower portion of the map.

Also shown on the map (depicted in yellow) are the chlorination facilities and water tank which serve the buildings and other facilities owned by Mr. Lindner on the property. The location of the water sampling points utilized by the Safe Drinking Water Branch recently to take water samples is also shown on the map.

Please contact me should you have any questions regarding the above. Thank you.

Very truly yours,

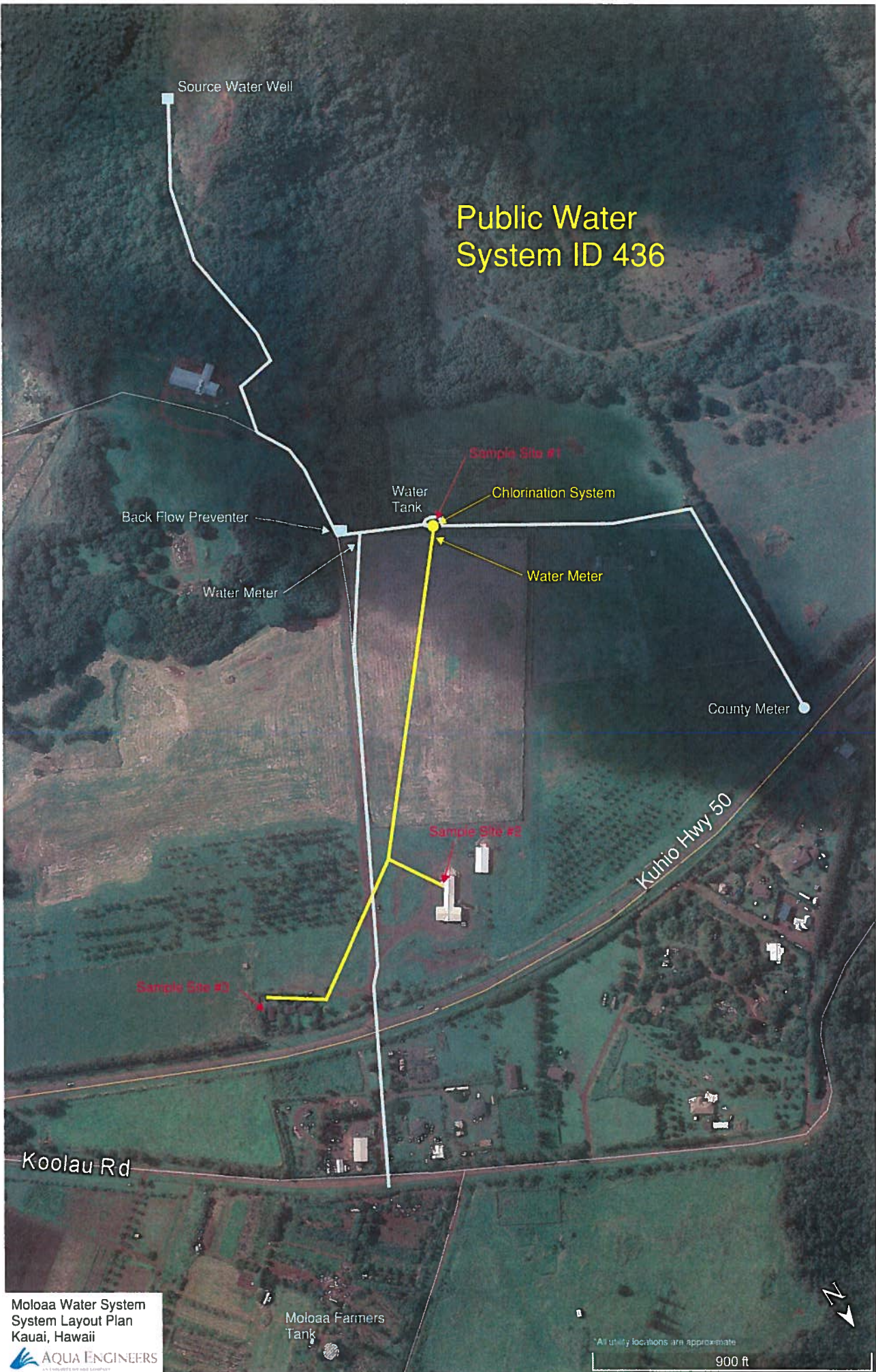


Michael H. Lau

cc: Mr. Jeffrey Lindner
Mr. Hugh Strom (Aqua)
Mr. Kevin Moore (DLNR)

{00084997-2}

Public Water System ID 436



Source Water Well

Back Flow Preventer

Water Meter

Water Tank

Sample Site #1

Chlorination System

Water Meter

County Meter

Kuhio Hwy 50

Sample Site #2

Sample Site #3

Koolau Rd

Moloaa Farmers
Tank

*All utility locations are approximate

900 ft