

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

November 8, 2024

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

MAUI

Decision Making Regarding:

Recommendation to hold a contested case hearing over the proposed disposition of a water license by public auction or by direct negotiation to the County of Maui covering the diversion of public surface water not to exceed an amount of 85.23 million gallons per day from Koolau Forest Reserve, Island of Maui, Hawai'i ("proposed License" or "License").¹

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities.

INTRODUCTION

Over the last couple of years, DLNR has been diligently moving away from issuance of revocable permits and preparing for the public auction of a long-term License for the allocation of the diversion and use of water from state owned streams in East Maui. This matter has been in litigation over the last 30 years. A Final Environmental Impact Statement has been completed, and the Commission on Water Resource Management has established Interim Instream Flow Standards for the East Maui streams. A number of the streams have been restored to support traditional and customary lo'i kalo farmers and native stream habitat. The sugar plantations, which previously used the water for their operations have closed, and the lands that formerly used the water have transitioned to diversified agriculture. The result has been a significant reduction in the amount of water diverted due to the lower demand for water of diversified agriculture uses as opposed to the high demand previously needed for sugar. The Board has also withdrawn 30,000 acres of forest lands from the current revocable permit that were previously included in the prior licenses and revocable permits. While Staff believes that all of the above has narrowed the issues and provided Staff more accurate and current information to prepare and draft a 30-year term license to provide greater stability for both the water users and providers (private and public), Staff

¹ While the draft License (attached as **Exhibit A**) is currently written for disposition by public auction, the contested case hearing will consider both a license by public auction and a license by direct negotiation.

acknowledges that the issues continue to be challenging. Additionally, the establishment of the East Maui Regional Community Board (Water Authority) (“EMWA”) and the EMWA’s recent requests raise the possibility of issuing a license by direct negotiation to the County of Maui rather than to a private entity through public auction. Thus, the Chairperson has determined that rather than approving the issuance of the proposed-License for public auction or negotiation, the Board initiate on its own a contested case hearing with relevant parties over relevant issues related to the best management of East Maui stream diversions before the Board takes an action on the License or other long-term disposition to ensure informed decision making and sufficient due process for the relevant parties. *See* HAR § 13-1-29.

BACKGROUND AND LITIGATION

East Maui Irrigation Company, LLC (“EMI”), a subsidiary of Alexander & Baldwin, Inc. (“A&B”), has operated a diversion and ditch system (“EMI System”) in East Maui for over 140 years. The EMI System traverses both public and private land delivering water from the East Maui streams for primarily agricultural use in Central Maui. In 1938, the Territory of Hawai’i and EMI entered into the East Maui Water Agreement (“1938 Agreement”), which provided for the disposition of water licenses at public auction for lands owned by the Territory at four license areas identified (from west to east) as Huelo, Honomanu, Keanae, and Nahiku (the “license areas”). The 1938 Agreement also granted EMI a perpetual easement for the EMI System located in the State-owned license areas.² The most recent long-term licenses were issued in the 1950s and 1960s. Following their expiration, annual revocable permits were issued by the Board.

On May 26, 2000, the Board approved the issuance of four revocable permits (“RPs”) to A&B and EMI to take water from the four license areas. RP S-7263 (for Honomanu), S-7264 (for Huelo) and S-7265 (for Keanae) were issued to A&B, and RP S-7266 (for Nahiku) was issued to EMI. Collectively, A&B and EMI are referred to as “Permittee.”

Since 2019, the Sierra Club has challenged the issuance of revocable permits (“RPs”) for the diversion of water from East Maui streams to Alexander & Baldwin, Inc. (“A&B”) and East Maui Irrigation Company, LLC (“EMI”) through the EMI System. This has resulted in a trial (and appeal), multiple challenges to the denial of contested case hearings over the RPs, a court-ordered contested case hearing over the RPs for 2021 and 2022 (“2021 and 2022 RPs”) (now on appeal), a court-ordered contested case hearing over the RPs for 2023 (“2023 RPs”) (now stayed), and a pending request for contested case hearing over the RP for 2024 (“2024 RP”), which is substantially different from its predecessor RPs. This litigation has been extensively briefed in prior submittals to the Board. The following Board submittals provide background:

- November 13, 2020, item D-8, Continuation of the RPs for 2021 approved as amended.
 - <https://dlnr.hawaii.gov/wp-content/uploads/2020/11/D-8.pdf>
- July 23, 2021, item D-4, Informational briefing on litigation, non-action item.
 - <https://files.hawaii.gov/dlnr/meeting/submittals/210723/D-4.pdf>

² The East Maui Regional Community Board (Water Authority) (“EMWA”) has raised questions about whether the Board may transfer its rights under the 1938 Agreement to the County. This is an issue that may be considered and addressed during the contested case hearing.

- August 13, 2021, item D-4, Decision to hold contested case on 2021 and 2022 RPs, approved as amended.
 - <https://dlnr.hawaii.gov/wp-content/uploads/2021/08/D-4.pdf>
- November 10, 2022, item D-5, Continuation of RPs for 2023, approved as amended.
 - <https://dlnr.hawaii.gov/wp-content/uploads/2022/11/D-5.pdf>
- December 7, 2023, item D-8, Issuance of new RP for 2024, approved as amended.
 - <https://files.hawaii.gov/dlnr/meeting/submittals/231207/D-8.pdf>

In 2021-22, the Board held a contested case hearing over the 2021 and 2022 RPs. The Board's Findings of Fact, Conclusions of Law and Decision & Order is attached to November 10, 2022, item D-5 (<https://dlnr.hawaii.gov/wp-content/uploads/2022/11/D-5.pdf>) as Exhibit B (PDF page 15).

At its meeting on November 10, 2022, under agenda item D-5, the Board approved as amended the continuation of the RPs until December 31, 2023 ("2023 RPs"). Sierra Club filed a written petition for contested case regarding the 2023 RPs on November 21, 2022. At its meeting on December 9, 2022, under agenda item D-9, the Board denied the petition, and the RPs were continued until December 31, 2023. As noted above, the RPs have been the subject of many lawsuits, including the most recent lawsuit over the 2023 RPs, *Sierra Club v. BLNR*, 1CCV-22-1506. In the challenge to the denial of a contested case hearing over the 2023 RPs, the Circuit Court of the First Circuit ordered the Board to hold a contested case over the 2023 RPs. That order has since been stayed pending appeal in the Intermediate Court of Appeals. The 2023 RPs expired on December 31, 2023. On October 23, 2024, the Intermediate Court of Appeals issued an order granting the Board's motion for stay regarding the Circuit Court's order to hold the contested case. Therefore, at this present time, there is no outstanding court order requiring the Board to hold a contested case on any of the RPs.

On October 13, 2023, Staff presented the Board with information about a long-term License meant to replace the use of RPs for the water and license areas. That agenda item is available at <https://dlnr.hawaii.gov/wp-content/uploads/2023/10/D-6.pdf>.

At its meeting on December 8, 2023, under agenda item D-8, the Board approved as amended the issuance of a single revocable permit for Tax Map Keys (2) 1-1-001:044 and 050, 1-1-002:por. 002, 1-2-004:005 & 007, 2-9-014:001, 005, 011, 012 & 017, to Alexander & Baldwin, Inc. and East Maui Irrigation Company, Limited, (collectively the "Permittee") for water use on the Island of Maui ("2024 RP"). The Board received both oral and written testimony on the item from the Sierra Club. The Board approved staff's recommendation as amended. That revocable permit was meant, in part, to mirror the future terms of the long-term License staff has been preparing to take to public auction. Sierra Club filed a written petition contested case hearing over the 2024 RP on December 18, 2023.

To reach a long-term resolution of the litigation and issues over stream diversions in East Maui, staff proposed proceeding with the broadened scope of the court-ordered contested case hearing that had been discussed during settlement negotiations, including both the long-term dispositions and outstanding issues from the 2023 RPs not previously adjudicated. The day before the Board was scheduled to hear that proposal as agenda item D-12 at its September 27, 2024, meeting,

County of Maui Mayor Bissen requested that D-12 be deferred to allow the County the opportunity to explore long-term partnership opportunities that will address the water needs of both public and private entities. Mayor Bissen wrote:

My hope is to end the long-standing conflict surrounding this water resource, and to bring the parties together to explore fair and equitable ways to balance everyone's water needs. The best way to accomplish this end is to come up with a working compromise rather than an expensive, lengthy contested case proceeding.

The Chairperson of the Board withdrew agenda item D-12 in response to this request from Mayor Bissen. However, based on the impending need for the Board to take action regarding the revocable permit for 2025 and the potential litigation resulting from this action, the number of active lawsuits, and a refusal to engage in settlement negotiations by some parties, the Chairperson recognizes the need to immediately move forward with long-term solutions, which will ultimately have to involve the Board. The recommendation to hold a contested case hearing is presented in the hopes of developing a comprehensive record reflecting genuine participation by all interested stakeholders from which the Board can make an informed decision on the best management of a water disposition from the Koolau Forest Reserve, Island of Maui, Hawai'i.

The Commission on Water Resource Management

In 2018, via Decision and Order (“D&O”), the Commission on Water Resource Management (“CWRM”) amended the Interim Instream Flow Standards (“IIFS”) for Honopou, Hanehoi/Puolua (Huelo), Waikamoi, Alo, Wahinepe‘e, Puohokamoa, Ha‘ipua‘ena, Punalau/Kōlea, Honomanū, Nua‘ailua, Piinau, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopiliula , Pua‘aka‘a, Waiohue, Pa‘akea, Waiaka, Kapaula, Hanawī, and Makapipi Streams. The 2018 D&O can be accessed via the following link:

<https://files.hawaii.gov/dlnr/cwrwm/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>

At its meeting on November 11, 2022, CWRM amended the IIFS for the Huelo-Region Surface Water Hydrologic Units of Ho‘olawa (6035), Waipi‘o (6036), Hoalua (6038), Hanawana (6039), Kailua (6040), Nailiilihaele (6041), Puehu (6042), ‘O‘opuola (6043), Ka‘aiea (6044), Punalu‘u (6045), Kōlea (6046), East Maui. The CWRM meeting minutes and staff submittal can be accessed via the following links:

<https://files.hawaii.gov/dlnr/cwrwm/minute/2022/mn20221115.pdf>;
<https://files.hawaii.gov/dlnr/cwrwm/submittal/2022/sb20221115B5.pdf>.

Any disposition is subject to DHHL reservations as established by CWRM. Water dispositions issued by this Board under both HRS §§ 171-55 and -58 are always subject to the IIFS. Additionally, the Board reserves the right to withdraw water for use by the State or county water authority, provided such a use is reasonable and beneficial.

Issues for consideration in the recommended Contested Case Hearing for the disposition of the Water License include but are not limited to:

1. Method to Determine Allocation of Water

The License is intended to provide for the allocation of water for the Licensee's diversified agriculture uses over a term of 30 years, subject to the interim instream flow standards as may be amended over time and for reasonable and beneficial uses. The proposed draft License is attached as **Exhibit A**. The total amount allowed to be diverted from State owned East Maui streams under the license is **85.23 million gallons per day (mgd), averaged monthly**, and inclusive of all uses under the license. Of that amount, a maximum of **6.0 mgd** shall be reserved for use by the County of Maui Department of Water Supply to provide water service to Upcountry Maui, and a maximum of **1.5 mgd**, leaving **77.73 mgd** for all other private uses including diversified agriculture. This amount is further subject to water availability under the IIFS, and any reservations made pursuant to Section 171-58, HRS and the terms and conditions of the License. The farm plan included in the Final Environmental Impact Statement (FEIS) prepared by the Permittee estimates a water demand of **65.88 mgd** for diversified agricultural uses at full planting over 20,650 acres. The maximum amount of 77.73 mgd allowed to be diverted for diversified agriculture under the license includes this amount and factors in additional water allowing for a system loss rate of **18%**. This results in average water demand of **3,764 gallons per acre per day (gad)**.

Staff believes this number is appropriate as it is both consistent with the Farm Plan information presented in the FEIS and the Agricultural Water Use and Development Plan Update (AWUDP) developed by the State Department of Agriculture in December 2019. The AWUDP calculated a water demand of 3,900 gad for diversified agriculture, for usable acreage that is 50% planted. By comparison, as of June 2024, approximately 10,384 acres of the total 20,650 acres irrigated by water diverted under the license have been planted.³ This amount was updated from the previous water demand of 3,400 gad for diversified agriculture calculated in the 2004 AWUDP. The AWUDP document can be accessed at the following link:

https://files.hawaii.gov/dlnr/cwrm/planning/awudp2019update/AWUDP_2019_1_Main.pdf

As an interim measure to ensure the efficient, reasonable, and beneficial use of the water as the farm plan is being implemented, staff recommends that the amount of water be limited to an amount that is equal to **3,764 gad multiplied by the planted acreage served by the water under the License, averaged monthly**. As an example, as of June 2024, the planted acreage totaled 10,384 acres, so the total amount of water diverted for all private uses could not exceed 39.085 mgd. This approach is consistent with the method used to determine the amount of water allowed to be used under the current revocable permit. For comparison, the amount of water used for diversified agriculture in June 2024 amounted to 31.08 mgd from all sources, including groundwater and surface water from streams not subject to the License. As additional acreage is planted, the amount of water allowed to be used would adjust automatically.

³ The ADWUP calculates higher water demands for diversified agriculture under different circumstances, but staff does not believe using a higher amount is appropriate for this License.

2. Reporting and Monitoring Requirements

The License contains quarterly reporting requirements very similar to what has been required for the revocable permits. Staff would be able to monitor and confirm compliance through review of the information contained in the quarterly reports. To ensure compliance, the License provides the Board the authority to reduce the amount of water allowed to be diverted if there is a violation of the IIFS or the water is not used in a manner that is not reasonable and beneficial, such as exceeding the limit, or not in compliance with the character of use. As with any other disposition, continuing violations that are not satisfactorily cured may result in a termination of the License for default. Staff believes that setting the allocation limits on a monthly average, as opposed to an annual average, provides for effective monitoring as well as greater oversight and accountability of the water use as opposed to the ambiguity and uncertainty of an annual average.

3. System Losses

In addition to the water use limits, the License further addresses system losses by limiting system loss rates to 22.7% for the first ten years of the License, then reduced to 20% for the second ten years, then further reduced to 18% for the final ten years of the License. Staff based the reduced rates and timeframe for compliance on consultation with CWRM staff to determine an optimal system loss rate that is also reasonable for the Licensee to achieve. The License defines system losses as the amount of water diverted subject to the License solely for diversified agriculture, historical industrial and non-agricultural uses existing at the time of the execution of the license (in essence all non-county uses) that **is not** used for the intended purposes. Staff believes that counting all private non-agricultural uses as system losses will result in limiting the use of water for those purposes. Staff further notes that the FEIS states that the water subject to the License will no longer support those uses at the full implementation of the Farm Plan, and instead be used completely to support diversified agriculture.

Additionally, to further mitigate system losses, the License strongly encourages the lining of the reservoirs that store water diverted under the License. To provide an incentive to incur the cost, the Board may approve a rent credit in amount of equal to the cost of lining reservoirs, up to a period of 20 years, provided that the reduced or waived rent shall not exceed the total cost of lining the reservoirs. The rent credit is authorized pursuant to Act 222, Session Laws of Hawaii (SLH) 2021, as amended by Act 219, SLH 2024. The acts provide for the rent credits when the lessee is required to provide infrastructure for the lessee to “make productive use of the land”. Staff believes that criteria is satisfied in this instance, as lining reservoirs would certainly allow for the Licensee to make productive use of the water.⁴

4. Restrictions on the Sale of Water

The License seeks to ensure that the water is used as a resource to support the Licensee’s reasonable and beneficial needs and not as an economic commodity. The License deters the Licensee from selling water subject to the License to unrelated third parties by limiting the character of use solely for the Licensee’s diversified agriculture, historical industrial and non-

⁴ Water is included in the definition of “Land” under Section 171-1, HRS.

agricultural uses existing at the time of the execution of the License, and reservoir, fire protection and hydroelectric purposes. Furthermore, the License prohibits any sublicensing of water to other parties and using the License as collateral for any mortgage. Finally, the License requires that Licensee enter into agreements with the Division of Forestry and Wildlife to support the implementation of a watershed management plan, and CWRM for cost sharing for stream monitoring equipment. These agreements are separate matters and are not subject to this present action.

5. Term of the License

Staff is proposing a term of thirty (30) years.

6. Capacity to Deliver Water Effectively and Efficiently.

Staff notes that the licensee should be able to demonstrate the legal authority and capacity to efficiently transport water to Central Maui through an existing system.

7. Watershed Management

The licensee shall comply with the requirements of HRS § 171-58(e).

8. Method of Disposition

The License may be issued by public auction or by direct negotiation. Prior to the creation of the East Maui Regional Community Board (Water Authority) (“EMWA”), Staff had anticipated the License would be issued by public auction pursuant to the provisions of HRS § 171-58. Work on the development of the draft License predates the creation of EMWA. Because the County, through EMWA, only recently expressed interest in obtaining the License by direct negotiation, the current draft License reflects disposition by public auction. However, the License will likely have similar terms and conditions regardless of the method of disposition. Thus, the contested case hearing should give serious consideration to both options.

DISCUSSION

A. The Benefits of Holding a Contested Case Hearing Over the Long-Term License.

The proposed License is for a term of thirty (30) years. While this Board has issued licenses for the subject water, this proposed License is the first of its kind because the disposition is limited only for the consumptive use of water. Previous dispositions have also included license areas consisting of over 30,000 acres of forest reserve land. However, both the 2024 RP and proposed License are limited to only the diversion and use of water. The use of the land for the EMI System is resolved through the easement granted in the 1938 Agreement. No additional lands will be disposed as part of the License. There are numerous stakeholders that have expressed an interest in the water that is the subject of the proposed license, including kalo farmers, the County of Maui Department of Water Supply (“DWS”), and small and large agricultural users, including a county

agricultural park. Holding a contested case hearing allows for more input and consideration of the different users, given the specifics of this water system.

Additionally, considering the amount of testimony and litigation these dispositions have received and the mixed results in court proceedings, the Chairperson has determined that the Board should consider a recommendation to initiate a contested case hearing before approving the public auction for or direction negotiation of the License. Many of the issues challenged over the years in the RPs may be relevant to the License. Thus, holding a contested case hearing over the disposition of the License via public auction or direct negotiation may assist the Board's final decision.

While the Board's legal position has been and remains that a disposition under HRS §§ 171-55 and -58 does not implicate a property interest as outlined by the Sierra Club, the Chairperson believes it is in the Board's and public's best interest as a matter of policy and discretion to hold a contested case hearing in an effort to fully and transparently gather and address long standing issues and concerns to ensure informed decision making by the Board before issuing the License.

B. The Contested Case Hearing Should be Limited to Issues Relevant to the Long-Term License that have not previously been adjudicated.

While Staff suggests granting a contested case hearing over the License pursuant to the Chairperson's position, Staff recommends limiting the scope of the contested case hearing to relevant and not previously adjudicated issues. The Decision and Order from the 2021-22 RPs Contested Case Hearing has not been disturbed on appeal, and the 2018 and 2022 CWRM amendments to IIFS have not been appealed. Thus, the scope of this contested case hearing should be limited to issues not previously adjudicated in the prior contested case hearing or CWRM amendments. However, upon a showing of good cause during CCH, all relevant issues may be considered.

C. Participants in the Contested Case Hearing

Staff recommends allowing any party to a prior lawsuit related to the RPs, any party involved in the 2018 CWRM D&Os over the East Maui streams, and any person who can demonstrate a use of water from the EMI System be allowed to intervene as a participant in the contested case hearing. Additionally, Staff recommends allowing other persons/legal entities with potentially relevant information to participate as witnesses.

Additionally, East Maui Regional Community Board Water Authority ("EMWA") has requested that the Board grant the EMWA a long-term water license via direct negotiation. Because there are many water users potentially affected by any long-term disposition for this water system, Staff recommends that EMWA be admitted as a participant to the contested case hearing. Staff believes that instead of separately considering competing dispositions (public auction vs. direct negotiation) to different entities, the EMWA can participate in the proposed contested case hearing and Board can consider the request by EMWA as part of its decision and order for the contested case.

RECOMMENDATION

For the foregoing reasons, the Board is recommended to:

1. Hold a contested case hearing over the disposition over the proposed water license covering the stream diversions from Koolau Forest Reserve, Island of Maui, Hawai'i.
2. Include in the contested case hearing consideration of the proposed-License attached as **Exhibit A**.
3. Limit the scope of the contested case hearing to issues relevant to the management of stream diversions for the Koolau Forest Reserve.
4. Allow any party to a prior lawsuit related to the aforementioned revocable permits, any party involved in the 2018 Commission on Water Resource Management Decision and Order setting the Interim Instream Flow Standards for the East Maui streams, any party who can demonstrate a use of water from the EMI System, and East Maui Regional Community Board Water Authority to intervene as participants in the contested case hearing.
5. Set deadline of January 7, 2025, for submission of applications to intervene in the contested case hearing, which will be decided by the Board. *See Exhibit B* for application.
6. That the Board authorize the Chairperson to select and appoint a hearing officer and issue any necessary preliminary procedural orders.

Respectfully Submitted,



Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson

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STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

WATER LICENSE NO. S-

THIS WATER LICENSE, hereafter referred to as "License", made this _____ day of _____, 20__, by and between the STATE OF HAWAII, hereinafter referred to as the "Licensor," by its Board of Land and Natural Resources, called the "Board," and _____, whose address is _____, hereinafter referred to as the "Licensee."

WITNESSETH:

The Licensor, pursuant to Sections 171-14 and 58(c), Hawaii Revised Statutes, for and in consideration of the rent to be paid and of the terms, covenants and conditions herein contained, all on the part of the Licensee to be kept, observed and performed, does License unto the Licensee, and the Licensee does License from the Licensor the right to develop, divert, impound, transmit, and use in a consumptive manner, that certain public surface water from the Koolau Forest Reserve, Hana, Maui, Hawaii, Tax Map Keys (2) 1-1-001:044 and 050; 1-1-002:002 (por.); 1-2-004:005 & 007; 2-9-014:001, 005, 011, 012 & 017; as shown on the maps marked Exhibit "A," attached hereto and made parts hereof, hereinafter referred to as the "Water Resource".

TO HAVE AND TO HOLD the licensed rights unto the Licensee for the term of thirty (30) years, commencing on the day of _____, 20__, up to and including the day of _____, 20__, unless sooner terminated as hereinafter provided, the Licensor reserving and the Licensee yielding and paying to the Licensor at the Department of Land and Natural Resources, Fiscal Office, P.O. Box 621 Honolulu, Hawai'i 96809, an annual rental as provided hereinbelow, payable in advance, without notice or demand, on _____ of each and every year during the term as follows:

- A. For the first ten (10) years, the sum of _____ DOLLARS (\$ _____) per annum.
- B. For years 11 through 20, the annual rental amount

shall be the prior annual rent amount increased by __ per cent (__%).

C. For years 21 through 30, the annual rental amount shall be the prior annual rent amount increased by __ per cent (__%).

D. 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) a month for each delinquent payment.

Under this License, the Licensee may divert an amount of the Water Resource not to exceed 3,764 gallons per acre per day (gad) multiplied by the amount of planted acreage irrigated by the Water Resource, averaged monthly, not to exceed a total of 77.73 million gallons per day (mgd), averaged monthly, inclusive of system losses, and subject to availability under the interim instream flow standards (IIFS) as may be amended by the Commission on Water Resource Management under the License, solely for the Licensee's diversified agriculture, historical industrial and non-agricultural uses existing at the time of the execution of this License, and reservoir, fire protection, fire restoration and hydroelectric purposes. The Licensee shall divert a portion of the Water Resource for use by the County of Maui Department of Water Supply and the Kula Agricultural Park subject to the following conditions. The amount of the Water Resource diverted for the County of Maui Department of Water Supply under this License shall not exceed 6.0 mgd, averaged monthly. The amount of the Water Resource diverted for the County of Maui Kula Agricultural Park under this License shall not exceed 1.5 mgd, averaged monthly. The Water Resource diverted pursuant to this License shall be always in compliance with the IIFS as may be amended by the Commission on Water Resource Management, and for reasonable and beneficial uses consistent with the character of use. If the Licensor finds that the use of the Water Resource is in violation of the IIFS, not reasonable and beneficial, or is not consistent with the character of use, Licensee shall cease such use. Further, the Licensor may, at its sole discretion, reduce the amount of the Water Resource diverted under this License if the Licensor finds that the Water Resource is not being used for reasonable and beneficial purposes or to comply with the IIFS as may be amended from time to time.

RESERVATIONS:

1. Minerals and waters. (a) All minerals as hereinafter defined, in, on or under the premises and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove the minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of the minerals by any means whatsoever, including strip mining. "Minerals," as used herein, shall mean any or all oil, gas, coal, phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources, in, on, or under the land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and used in general construction in furtherance of the Licensee's permitted activities on the premises and not for sale to others. (b) All surface and ground waters not specifically granted by this Lease; provided, however, that as a condition precedent to the exercise by the Licensor of the rights reserved in this paragraph, just compensation shall be paid to the Licensee for any of Licensee's improvements taken.

2. Right to withdraw. Licensor reserves the right to withdraw the Water Resource or any portion thereof to meet the following requirements as the Licensor in its sole discretion may determine:

- a. Constitutionally protected water rights; reservations, including but not limited to the 11,455,510 gallons per day reserved by the Department of Hawaiian Home Lands from Koolau Forest Reserve to meet the Department of Hawaiian Home Lands' rights under Section 221 of the Hawaiian Homes Commission Act; as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of Section 171-58(d), Hawaii Revised Statutes;

- b. Amounts of water necessary to remain in Koolau Forest Reserve to satisfy instream flow standards, as set by the Commission on Water Resource Management; and
- c. Amounts of water for use by the Licensor or a county water authority, provided such use is reasonable and beneficial.

Provided, however, that if any portion of the Water Resource should be withdrawn for any purpose, where the portion withdrawn renders the remainder unsuitable or of inadequate quantity or flow for the use or uses for which the Water Resource was licensed, the determination of unsuitability being within Licensee's sole discretion, the Licensee shall have the option to surrender this License and be discharged and relieved from any further liability.

AGREEMENTS AND COVENANTS BETWEEN PARTIES:

1. Payment of rent. The Licensee shall pay the rent to the Licensor at the times and in the manner and form provided in this License, and at the place specified above, or at any other place the Licensor may from time to time designate, in legal tender of the United States of America.

2. Taxes, assessments, etc. The Licensee shall pay or cause to be paid, when due, the amount of all taxes, rates, and assessments of every description associated with the use of the Water Resource or any part, which the Licensor or Licensee, are now or may be assessed or become liable by authority of law during the term of this License.

3. Utility services. The Licensee shall be responsible for obtaining any utility services and shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, associated with the use of the Water Resource or any part, for which the Licensor or Licensee may become liable for during the term, whether assessed to or payable by the Licensor or Licensee.

4. Covenant against discrimination. The use and

enjoyment of the Water Resource shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

5. Water quality. In using the Water Resource, the Licensee shall do all things reasonably necessary to prevent the degradation by Licensee of the quality of the water in the Koolau Forest Reserve and Licensee is expressly prohibited from engaging in any acts or omissions that may endanger the public health, safety, and welfare with respect to the use of the Water Resource.

6. Waste and unlawful, improper or offensive use of Water Resource. The Licensee shall not commit, suffer or permit to be committed any waste, nuisance, strip, or unlawful, improper or offensive use of the Water Resource or any part. Nor without the prior written consent of the Licensor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.

7. Compliance with laws. The Licensee shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the Water Resource, now in force or which may be in force.

8. Inspection by Licensor. (a) The Licensee shall permit the Licensor and its agents, at all reasonable times during the License term, access to the diversion works and facility for which the Water Resource is being used and permit the Licensor and its agents at reasonable times during the term of this License to conduct such examinations as may be reasonably related to this License solely for the purpose of confirming Licensee's compliance with the terms and conditions of this License; provided that in the exercise of these rights, the Licensor shall not interfere unreasonably with the Licensee or Licensee's use and enjoyment of the Water Resource.

(b) Licensor shall have reasonable access to the diversion works and facility for purposes of inspecting the same and shall be subject to the requirement that Licensor shall give Licensee prior written notice of at least seventy-two (72) hours of any such inspection, and Licensor shall conduct such

inspections in accordance with such reasonable guidelines as Licensee shall provide to protect the security and integrity of such facility.

9. Modification of water works. Prior to any expansion or modification of any works applicable to the Water Resource, the Licensee shall document all such proposed expansions or modifications and obtain all required governmental permits and approvals.

10. Liens. The Licensee shall not commit or suffer any act or neglect which results in the Water Resource or the leasehold estate of the Licensee becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this License, and shall release, indemnify, defend, and hold the Licensor harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses.

11. Character of use. The Licensee shall use or allow the Water Resource licensed to be used solely for the Licensee's diversified agriculture, historical industrial and non-agricultural uses existing at the time of the execution of this License, and reservoir, fire protection and hydroelectric purposes. The Licensee shall also provide a portion of the Water Resource under this License to the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park for municipal and agricultural use. The use of the Water Resource by the County of Maui under this License shall receive priority over the Licensee's uses.

12. Assignments, etc. The Licensee shall not transfer, assign, or permit any other person or entities to use the Water Resource, or any portion, or transfer or assign this License or any interest, either voluntarily or by operation of law, except by way of devise, bequest, or intestate succession, and any transfer or assignment made shall be null and void; provided that with the prior written approval of the Board the assignment and transfer of this License, or any portion, may be made in accordance with current industry standards, as determined by the Board.

If the Licensee is a partnership, joint venture or corporation, the sale or transfer of 20% or more of ownership interest or stocks by dissolution, merger or any other means shall be deemed an assignment for purposes of this paragraph.

Notwithstanding the foregoing, if Licensee is a party to any transaction involving a merger or corporate reorganization with an affiliate entity, meaning any entity that directly or indirectly owns, is owned by or is under common ownership with Licensee, such transaction shall not be deemed an assignment for purposes of this Paragraph 12 (Assignments, etc.).

13. Sublicensing. The Licensee shall not sublicense the whole or any part of the Water Resource.

14. Release and indemnity. The Licensee shall release, indemnify, defend, and hold the Licensor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of Licensee relating to Licensee's use or enjoyment of the Water Resource; 2) any failure on the part of the Licensee to protect the quality of the Water Resource; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Licensee's non-observance or non-performance of any of the terms, covenants, and conditions of this License or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

15. Costs of litigation. In case the Licensor shall, without any fault on Licensor's part, be made a party to any litigation commenced by or against the Licensee (other than condemnation proceedings), the Licensee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the Licensor; furthermore, the Licensee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the Licensor in enforcing the covenants and agreements of this License, in recovering possession of the premises, or in the collection of delinquent rental, taxes, and any and all other charges.

16. Liability insurance. The Licensee shall procure and maintain, at its cost and expense and acceptable to the Licensor, in full force and effect throughout the term of this License, general liability insurance, or its equivalent, with an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not

less than "A- VIII" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000.00 for each occurrence and \$2,000,000.00 aggregate, and with coverage terms acceptable to the Chairperson of the Board. The policy or policies of insurance shall name the State of Hawaii as an additional insured. A Certificate of Insurance required by the Licensor shall be filed with the State of Hawaii, Department of Land and Natural Resources.

The Licensee, prior to the use of the Water Resource or within fifteen (15) days from the effective date of this License, whichever is sooner, shall furnish the Licensor with a Certificate of Insurance required by the Licensor showing the policy(s) to be initially in force, keep the Certificate of Insurance required by the Licensor on deposit during the entire License term, and furnish a Certificate of Insurance required by the Licensor upon each renewal of the policy(s). This insurance shall not be cancelled, limited in scope of coverage, or nonrenewed until after thirty (30) days written notice has been given to the Licensor. The Licensor may at any time require the Licensee to provide Licensor with copies of the insurance policy(s) that are or were in effect during the License period or other documentation required by the Licensor.

The Licensor shall retain the right at any time to review the coverage, form, and amount of the insurance required by this License. If, in the opinion of the Licensor, the insurance provisions in this License do not provide adequate protection for the Licensor, the Licensor may require Licensee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Licensor's requirements shall be reasonable and shall be designed to assure protection for and against the kind and extent of risks which exist at the time a change in insurance is required. The Licensor shall notify Licensee in writing of changes in the insurance requirements and Licensee shall deposit copies of acceptable Certificate of Insurance with the Licensor no later than thirty (30) days after receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit Licensee's liability under this License nor to release or relieve the Licensee of the indemnification provisions and requirements of this License. Notwithstanding the policy(s) of insurance, Licensee shall be obligated for the full and total amount of any damage, injury,

or loss caused by Licensee's negligence or neglect connected with this License.

It is agreed that any insurance maintained by the Licensor will apply in excess of, and not contribute with, insurance provided by Licensee's policy.

17. Bond or security deposit; Performance. The Licensee shall, at its own cost and expense, within fifteen (15) days from the effective date of this License, procure and deposit with Licensor and thereafter keep in full force and effect during the term of this License a good and sufficient surety bond, conditioned upon the full and faithful observance and performance by Licensee of all the terms, conditions, and covenants of this License, in an amount equal to two times the annual rental then payable. This bond shall provide that in case of a breach or default of any of the License terms, covenants, conditions, and agreements, the full amount of the bond shall be paid to the Licensor as liquidated and ascertained damages and not as a penalty.

In the alternative, Licensee may deposit a security deposit, in the amount equal to two times the base rent then payable, in lieu of a surety bond. The Licensor shall be authorized to withdraw amounts from the security deposit in case of a breach or default of any of the License terms, covenants, conditions, and agreements, and the costs, expenses or loss incurred by Licensor as a result of such breach or default, on the condition that (a) Licensor provides at least three (3) days prior notice to Licensee of its intent to withdraw from the security deposit and (b) if Licensee disputes Licensor's right to such withdrawal, any such withdrawal by Licensor shall be without prejudice to claims by Licensee that such withdrawal was not appropriate or warranted by Licensor.

18. Mortgage. The Licensee shall not mortgage, hypothecate, or pledge any portion, or any interest of the Water Resource in this License.

19. Breach. Time is of the essence in this agreement. If the Licensee shall fail to pay the rent, or any part thereof, at the times and in the manner provided in this License and this failure shall continue for a period of more than thirty (30) days after delivery by the Licensor of a written notice of breach or default and demand for cure, by

personal service, registered mail or certified mail to the Licensee, or if the Licensee shall become bankrupt, or shall abandon the diversion infrastructure associated with this License, or if this License and Water Resource shall be attached or taken by operation of law, or if Licensee shall fail to observe and perform any of the covenants, terms, and conditions contained in this License and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) days after delivery by the Licensor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Licensee at its last known address, the Licensor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once terminate this License without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination Licensor shall retain all rent paid in advance to be applied to any damages.

20. Condemnation. If at any time, during the term of this License, any portion of the Water Resource should be condemned, or required for public purposes by any county or city and county, the rent shall be reduced in proportion to the value of the portion of the premises condemned. The Licensee shall not by reason of the condemnation be entitled to any claim against the Licensor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Licensor. The foregoing rights of the Licensee shall not be exclusive of any other to which Licensee may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the Water Resource was licensed, the Licensee shall have the option to surrender this License and be discharged and relieved from any further liability.

21. Acceptance of rent not a waiver. The acceptance of rent by the Licensor shall not be deemed a waiver of any breach by the Licensee of any term, covenant, or condition of this License, nor of the Licensor's right to declare and enforce a forfeiture for any breach, and the failure of the Licensor to insist upon strict performance of any term, covenant, or condition, or to exercise any option conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option.

22. Extension of time. Notwithstanding any provision contained in this License, when applicable, the Board may for good cause shown, allow additional time beyond the time or times specified in this License for the Licensee to comply, observe, and perform any of the License terms, conditions, and covenants.

23. Justification of sureties. Any bonds required by this License shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawaii Revised Statutes; provided, however, the Licensee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with the Licensor security in certified checks, certificates of deposit (payable on demand or after a period the Licensor may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the Licensor a deed or deeds of trust of real property, all of a character which is satisfactory to Licensor and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the Licensor shall be determined by the Licensor, and that the Licensee may, with the approval of the Licensor, exchange other securities or money for any of the deposited securities if in the judgment of the Licensor the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Licensee, but only upon the written consent of the Licensor and that until this consent is granted, which shall be discretionary with the Licensor, no surety shall be released or relieved from any obligation.

24. Waiver, modification, reimposition of bond and liability insurance provisions. Upon substantial compliance by the Licensee with the terms, covenants, and conditions contained in this License on its part to be observed or performed, the Licensor at its discretion may in writing, waive or suspend the performance bond requirements or may, in writing, modify the particular bond(s) or liability insurance requirements by

reducing its amount; provided, however, that the Licensor reserves the right to reactivate the bonds or reimpose the bond(s) or liability insurance in and to their original tenor and form at any time throughout the term of this License.

25. Quiet enjoyment. The Licensor covenants and agrees with the Licensee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Licensee to be observed and performed, the Licensee shall have use of the Water Resource for the term of the License, without hindrance or interruption by the Licensor or any other person or persons lawfully claiming by, through, or under it.

26. Surrender. The Licensee shall, at the end of the term or other sooner termination of this License, peaceably cease the use of the Water Resource. Furthermore, upon the expiration, termination, or revocation of this License, should the Licensee fail to cease the use of the Water Resource, the Licensee shall be liable for and shall pay to Licensor an amount that is equal to the annual rental amount in effect on the date of termination, prorated on a daily basis for the period from the date of termination of this License to the date that Licensee ceases the use of the Water Resource. This provision shall survive the termination of the License.

27. Non-warranty. The Licensor does not warrant the availability or quality of the Water Resource. Availability of the quantity of water is subject to Paragraph 2 (Right to Withdraw) above.

28. Hazardous materials. Licensee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Licensee shall not allow the storage or use of such materials in the vicinity of the Diversion Point(s) or Return Point(s) in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Licensee, then the Licensee shall be responsible for the reasonable costs thereof. In addition, Licensee shall execute affidavits, representations and the like from time to time at Licensor's request concerning Licensee's best knowledge

and belief regarding the presence of hazardous materials in or near the Koolau Forest Reserve placed or released by Licensee.

Licensee agrees to release, indemnify, defend, and hold Licensors harmless, from any damages and claims resulting from the release of hazardous materials in or near the Koolau Forest Reserve during the term of this License and in association with the use of the Water Resource. These covenants shall survive the expiration or earlier termination of the License.

For the purpose of this License "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.

29. Hawaii law. This License shall be construed, interpreted, and governed by the laws of the State of Hawaii.

30. Exhibits - Incorporation in License. All exhibits referred to are attached to this License and hereby are deemed incorporated by reference.

31. Headings. The article and paragraph headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this License.

32. Partial invalidity. If any term, provision, covenant or condition of this License should be held to be invalid, void or unenforceable, the remainder of this License shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

33. Force Majeure. If either party believes an event of Force Majeure, including, without limitation, an act of God, acts of war, terrorism, civil disorders, strikes, government regulation, civil or military authority or any other cause beyond the reasonable control of a party, which excuses performance of either party hereunder is likely to be permanent,

such party may notify the other party of such belief. Such notice shall state the reasons for the belief that the event of Force Majeure will be permanent and why there are no steps which can be taken at a commercially reasonable cost to eliminate such Force Majeure event. The party receiving such notice shall respond within thirty (30) days stating either (i) that it concurs that the Force Majeure event is likely to be permanent, or (ii) that it disagrees that such Force Majeure event is likely to be permanent and its reasons therefor. Unless otherwise mutually agreed, this License shall be terminated if both parties concur that the Force Majeure event is likely to be permanent.

34. Counterparts. This License may be executed in two or more counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

SPECIAL CONDITIONS

35. Clearances. The Licensee shall be responsible for obtaining all necessary federal, state or county clearances.

36. Audit of Water Resource. The Licensee shall, at all reasonable times, permit the Licensor or its authorized agents and employees, upon reasonable notice of at least seventy-two (72) hours given by the Licensor, to audit, examine and to make copies of information relating to Licensee's use of the Water Resource for diversified agriculture, historical industrial and non-agricultural uses existing at the time of the execution of this License, and reservoir, fire protection and hydroelectric purposes, and any measurements collected by the Licensee relating to the use of the Water Resource for these purposes. Licensor shall not have the right under this Paragraph 35, to audit any other records of Licensee.

37. Environmental regulations. Licensee shall comply with all applicable federal, state and county environmental impact regulations, including but not limited to chapter 343, Hawaii Revised Statutes, as amended, and regulations governing historic preservation.

38. Assignment to bondholders. The Licensee shall be

allowed to assign the License to the trustee for the bondholders subject to the prior approval of the Board.

39. Watershed Management Plan. No later than sixty (60) days following the effective date of this License, Licensee shall enter into written agreement with the Licensor for the implementation of a watershed management plan ("Plan") which Plan shall include, but not be limited to, the prevention of degradation of surface water quality of the Koolau Forest Reserve to the extent that degradation can be avoided using reasonable management practices. The Licensee shall be solely responsible to pay for its monetary or in-kind contribution(s), if any, under the Plan.

40. Stream Monitoring Equipment. No later than sixty (60) days following the execution of this License, Licensee shall work with the Commission on Water Resource Management to determine the appropriate stream monitoring equipment and develop a cost share for such equipment, payable over the term of the License, to assist with determining the amounts of water necessary to remain in the streams that water may be diverted from under this License per RESERVATIONS, Paragraph 2.b (Right to withdraw) of this License. The cost share requirement in this Paragraph 40 is separate from, and in addition to, the monetary contribution(s), if any, under the Plan.

41. Water for farm, ranch and other public uses. Pursuant to section 171-58(d), Hawai'i Revised Statutes, as amended, Licensee shall provide from the Water Resource to any farmer or rancher engaged in irrigated pasture operations, crop farming, pen feeding operations, or raising of grain and forage crops, or to those public uses and purposes as may be determined by the Board, at the same rental price paid under this License, plus the proportionate actual costs, as determined by the Board, to make this Water Resource available, so much of the Water Resource as is determined by the Board to be surplus to Licensee's needs and for that minimum period as the Board shall accordingly determine; provided, however, that in lieu of the payment for the Water Resource or such portion as may be taken for public uses and purposes, the Board may elect to reduce the rental price under this License in proportion to the value of the Water Resource and the proportionate actual costs of making the water available. Licensee may have the option to surrender this License and be discharged and relieved from any further liability except for those responsibilities, obligations,

liabilities, and claims that accrued prior to the effective date of cancellation, or that are intended to survive the termination or cancellation of the License, or as otherwise agreed, if the portion withdrawn renders the remainder unsuitable or of inadequate quantity for the use or uses for which the Water Resource was licensed. If the Licensee exercises Licensee's option to cancel this License, the parties shall execute a cancellation of License.

42. Legislative Disapproval. This License shall be subject to disapproval by the Legislature by two-thirds vote of either the Senate or the House of Representatives or by any majority vote of both, in any regular or special session next following the date of this disposition.

ADDITIONAL SPECIAL CONDITIONS

43. Licensee shall complete the removal of diversions as required by the Commission on Water Resources that affect streams that the Water Resource may be diverted from under this License no later than _____, 20___. Licensor may extend this date for good cause with concurrence by the Commission on Water Resource Management.

44. There shall be no waste of the Water Resource. System losses and evaporation shall not be considered as a waste of water, provided that Licensee shall ensure that system losses do not exceed 22.7% at the date of commencement; 20% beginning on _____, 2035; and 18% beginning on _____, 2045.

"System losses" shall be defined as the amount of the Water Resource diverted subject to this license solely for diversified agriculture, historical industrial and non-agricultural uses existing at the time of the execution of this License, and reservoir, fire protection, fire restoration and hydroelectric purposes, that is not used for the intended purposes.

If the Licensee provides infrastructure for the purpose of reducing system losses, such as lining reservoirs containing the Water Resource, the Licensor may approve a reduction or waiver of license rent for up to a period of twenty (20) years, provided that the aggregate amount of the reduced or waived

lease rental shall not exceed the amount of the Licensee's total expenditures for the provision of such infrastructure.

45. Licensee shall cleanup trash and debris from areas that are accessible and close to streams that the Water Resource may be diverted from under this License; "trash and debris" shall be defined as "any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)". For purposes of clean-up, debris shall not include any structure or equipment that is either currently used for the water diversions, or for which the Commission on Water Resource Management has not required removal.

46. It is an essential component to the Licensor's stewardship of the Water Resource to understand how much water is being diverted. Licensee shall therefore provide quarterly written reports to the Licensor containing at a minimum the following information:

(a) The amount of water actually used on a monthly basis, including the monthly amount of water delivered for: the County of Maui Department of Water Supply and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses; and reservoir/fire protection/ hydroelectric uses. Descriptions of diversified agricultural uses shall also provide information as to location, crop, and use of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water.

(b) An estimate of the system loss for all water systems under the ownership, management and control of the Licensee that divert, transmit, receive and store water diverted under this License, also on a monthly basis.

(c) For each stream that is subject to the June 20, 2018 Commission on Water Resource Management Decision & Order, as may be amended from time to time, a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been modified or removed as required by CWRM.

(d) Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including documenting any reports of such items that Licensee has received from the Licensor, other public or private entities and members of the general public and the action(s) taken by Licensee, if any, to remove the reported items.

(e) The method and timeline for discontinuing the diversion of water from Waipio and Hanehoi streams into the Ho'olawa stream, including status updates on implementation.

(f) A listing of all privately owned reservoirs that receive water diverted under this License, with the following information provided for each:

- i. The capacity of each such reservoir;
- ii. The surface area of each such reservoir;
- iii. The agricultural fields that are irrigated by each such reservoir, or in the alternative, which reservoirs service the County of Maui's domestic needs, Kula Agricultural Park farmers, and Department of Hawaiian Home Lands;
- iv. Which reservoirs are lined, and with what material, and which are not;
- v. The estimated amount of evaporation per day from the surface of each such reservoir;
- vi. An analysis of the cost and time to line at least one such reservoir; and
- vii. Information on any reservoirs planned to be taken out of service.

(g) The number, location, timing, and approximate acreage of fires fought during the quarter using water from reservoirs supplied with water from this License.

(h) The names and locations of the reservoirs from which water was drawn to fight fires during the quarter,

together with:

- (i) Whether those reservoirs are lined or not;
- (ii) The average depth of water in those reservoirs;
- (iii) Estimated average monthly inflows and outflows from those reservoirs; and
- (iv) The amount of water used for hydroelectric purposes, if any.

(i) A listing of all irrigation wells in the water system serviced by this License, with the water levels and chloride levels in each well that is in active use noted.

Each quarterly report shall be submitted in a format with tracked changes that clearly show the differences/ updates from the prior quarter.

Such quarterly reports shall be due to the Licensor no later than one month after the last calendar day of the subject quarter. Thus, the reports shall come due as follows:

Q1 Report—April 30

Q2 Report—July 31

Q3 Report—October 31

Q4 Report—January 30 of the following year.

47. The Licensee shall also comply with all conditions required by the Commission on Water Resource Management regarding the streams that the Water Resource may be diverted from under this License.

48. Licensee shall cooperate with the Commission on Water Resource Management and the Department of Land and Natural Resources Division of Aquatic Resources (DAR) in facilitating studies, site inspections and other actions as necessary to address the streams that the Water Resource may be diverted from under this License.

49. Licensee shall work with the Commission on Water Resource Management and the Department of Land and Natural Resources Division of Forestry and Wildlife to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Licensee shall include the status of alternatives in its quarterly reports.

50. For water used for agricultural crops, Licensee is to estimate how much water is required for each crop per acre per day.

51. Licensee shall supply up to ___ gallons per day of water to the Maui Invasive Species Committee, despite it not being an agricultural use, be considered a reasonable and beneficial and permitted use under this License.

52. If the Licensor determines that any of the preceding "Additional Special Conditions" are no longer applicable or conflict with other obligations of the Licensee under this License, the Licensor in its sole discretion may amend the License to remove such provision.

Definitions.

1. The use of any gender shall include all genders, and if there is more than one lessee, then all words used in the singular shall extend to and include the plural.

2. As used in this License, unless clearly repugnant to the context:

(a) "Chairperson" means the Chairperson of the Board of Land and Natural Resources of the State of Hawaii or his/her successor.

(b) "Licensee" means and includes the Licensee, its officers, employees, invitees, successors or permitted assigns.

(c) "Waste" includes, but is not limited to, (1) utilizing the Water Resource in an uneconomic and inefficient manner; (2) for a purpose not authorized under this License; and (3) permitting significant degradation in the quality of the

Water Resource.

(e) "Days" shall mean calendar days, unless otherwise specified.

(f) "Board" shall mean the Board of Land and Natural Resources.

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.

STATE OF HAWAII

Approved by the Board
of Land and Natural
Resources at its meeting
held on _____.

By
DAWN N.S. CHANG
Chairperson
Board of Land and
Natural Resources

LICENSOR

LICENSEE

APPROVED AS TO FORM:

Deputy Attorney General

Dated:

STATE OF HAWAII)
) SS.
COUNTY OF)

On this _____ day of _____, 20____, before me personally appeared _____ and _____, to me known to be the person(s) described in and who executed the foregoing instrument and acknowledged that _____ executed the same as free act and deed.

Notary Public, State of Hawaii

My commission expires:

STATE OF HAWAII)
) SS.
COUNTY OF)

On this _____ day of _____, 20____, 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 said instrument was signed in 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:

STATE OF HAWAII)
) SS.
COUNTY OF)

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

Notary Public, State of Hawaii

My commission expires:



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name	2. Contact Person	
3. Address	4. City	5. State and ZIP
6. Email	7. Phone	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER	
17. Board Action Being Contested	
18. Board Action Date	19. Item No.
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection	
22. Any Disagreement Petitioner May Have with an Application before the Board	
23. Any Relief Petitioner Seeks or Deems Itself Entitled to	
24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest	
25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR	

- Check this box if Petitioner is submitting supporting documents with this form.
- Check this box if Petitioner will submit additional supporting documents after filing this form.

 Petitioner or Representative (Print Name)

 Signature

 Date