



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

ref: wup767.sub

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

October 18, 2006
Honolulu, Oahu

Robinson Kunia Land, LLC
APPLICATION FOR A WATER USE PERMIT
Robinson No. 1 Well (Well No. 2602-03), TMK 9-4-04:12, WUPA No. 767
New (Industrial) Use for 0.100 mgd
Waipahu-Waiawa Ground Water Management Area, Oahu

APPLICANT:

Robinson Kunia Land, LLC
1132 Bishop St., Ste. 1930
Honolulu, HI 96813

LANDOWNER:

Same

SUMMARY OF REQUEST:

The applicant, Robinson Kunia Land, LLC (Robinson), requests that the Commission on Water Resource Management (Commission) approve a water use permit for 0.100 million gallons per day (mgd) of potable basal ground water from a new well for food processing at Waikele Farms, Inc. (Waikele Farms), an agricultural lessee. The proposed use of water from a new well will replace the current use of Waiahole Ditch water for the food processing use.

LOCATION MAP: See Exhibit 1

BACKGROUND:

On December 24, 1997, the Commission issued its Decision and Order in the Waiahole Ditch contested case hearing (CCH-OA95-1) granting Robinson a water use permit (WUP No. 758) for 2,490 mgd of Waiahole Ditch water for agricultural use on 1,854 acres of its Kunia lands. A portion of the water, estimated to be 0.100 mgd, is used for food processing by Waikele Farms.

On March 31, 2006, Robinson filed a water use permit application, requesting potable quality water from a new well to continue the food processing use (consisting of four food processing lines, two for

tomato and one each for bell pepper and bananas). Robinson states it would be more economical to develop and use the new well because the treated ditch water does not meet drinking water standards and more stringent quality standards for wash water are anticipated in the future.

On April 27, 2006, staff requested that additional information be submitted to comply with the heightened requirements for private commercial uses as clarified by the Supreme Court in the Waiahole Ditch contested case hearing (Exhibit 2).

On July 6, 2006, Robinson submitted additional supporting information (Exhibit 3).

On July 26, 2006, Robinson requested that the application be deferred to the Commission's October meeting because Larry Jeffs, owner of Waikele Farms, would be out of state during the months of August and September.

On September 29, 2006, staff conducted a site visit to Waikele Farms to document the existing food processing use.

Additional information regarding the source, use, notification, objections, and field investigation is provided in Attachment A.

ANALYSIS/ISSUES:

Section 174C-49(a) of the State Water Code establishes seven (7) criteria that must be met to obtain a water use permit. An analysis of the proposed permit in relation to these criteria follows:

(1) Water availability

New sustainable yields for the Waipahu-Waiawa and Ewa-Kunia Aquifer System Areas were adopted on March 15, 2000. In adopting reduced sustainable yield estimates to account for the loss in return irrigation recharge due to the cessation of sugarcane plantation operations, the Commission also adopted Allocation and Pumpage Milestones because of the uncertainty in the actual sustainable yield of the aquifers. Actions triggered by the milestones are shown in Exhibit 4.

Current permitted uses in this aquifer system area are shown in Exhibit 5. A summary of the current ground water conditions in the aquifer is provided in Table 1:

Table 1. Waipahu-Waiawa Aquifer System Area

<u>ITEM</u>	Waipahu-Waiawa Aquifer System Area (mgd)
Sustainable Yield	104
Allocation Milestone	82
Pumpage Milestone	62
Less: Current Allocations (shown in Exhibit 5) (12-Month Moving Average Withdrawals; Exhibit 6)	82.534 (51.404 ¹)
Reservation to DHHL	1.358
Subtotal (Current Available Allocation)	20.108
Less: Pending Allocation Requests	0
Pending Reservation Request (DHHL)	2.303
Less: This Application	0.100
Subtotal (Potential Available Allocation)	17.705

¹ 12-Month Moving Average Withdrawal as of 12/31/2005.

Table 1 shows that we are currently over the 82 mgd Allocation Milestone but within the sustainable yield of the aquifer. The latest twelve-month moving average withdrawal from the aquifer is estimated to be 51.404 mgd (see Exhibit 6), well within the 62 mgd Pumpage Milestone.

Exhibit 4 shows that once the Allocation Milestone is reached, the Commission must initiate the development of water shortage plans for the Pearl Harbor and Honolulu Aquifer Sector Areas and complete the water shortage plans within four years. The Allocation Milestone was reached in October 2005. Therefore, the deadline for water shortage plan development is October 2009.

There is a significant amount of unused allocations in Waipahu-Waiawa that may be revoked due to four years of nonuse. Table 1 shows that revocation of 0.534 mgd would put allocations below the Allocation Milestone. Staff has been working with the permittee(s) for EP 18 (Well Nos. 2102-02, 04 to 22, 2002-03 to 22), which has an agricultural allocation for 7.969 mgd but has been using less than 3 mgd, to revoke some of the unused allocation. A two-year review

for possible revocation of unused allocation was attached as a special condition to the water use permit for EP 18 (approved in 2000). Revocation action may proceed as early as next month, depending on the outcome of staff's discussions with the current permittee. Even though planned revocation actions in Waipahu-Waiawa will result in allocations falling below the Allocation Milestone, staff has already initiated development of a water shortage plan for the Pearl Harbor Sector Area. It is anticipated this water shortage plan will be completed within the next two years.

The status of Milestone Requirements/Actions whose deadlines have passed as of this submittal's date are summarized below:

Table 2. Status of Milestone Requirements/Actions

Milestone Requirement/Action	Timeframe	Status
2. Execute WUP Revocations ¹	3/15/01	Completed.
3. Process Pending Requests ²	3/15/01	Completed ³ .
4.A. Develop monitoring plan, including agreement from parties for funding/construction, site selection, funding/data gathering, etc.	3/15/01	Ongoing. The USGS, CWRM, and BWS have formed a working group. A Memorandum of Agreement (MOA) to share data & work towards the development of a monitoring plan, including optimization and response measures, has been drafted and signed.
4.B. Develop monitoring plan, including agreement as to the number of new monitoring wells prior to reaching the Pumpage Milestone.	3/15/01	Same as status of 4.A above. Current withdrawals are 51.404 mgd, well below the 62 mgd Pumpage Milestone.
5.A. Set other resource monitoring criteria.	3/15/02	Same as status of 4.A. above.
6. Develop infrastructure optimization plan.	3/15/02	Same as status of 4.A. above.
6.A. List of impacted infrastructure	3/15/01	Completed
6.B. Develop optimization plan to include: 1) costs and available funding, 2) affected allocation amounts, 3) optimization enforcement policy, 4) water quality considerations, 5) implementation timeline.	3/15/02	Same as status of 4.A. above.
6.C. Reach agreement/commitment from various parties.	3/15/03	Same as status of 4.A. above.

¹ For permitted uses having 4 or more years of continuous nonuse as of March 15, 2000.

² For water use permit applications pending as of March 15, 2000.

- ³ Except for DHHL additional reservation request, which has been administratively deferred. DHHL is being encouraged to participate in the county's integrated resource planning process to update the Water Use and Development Plan that sets forth the broad allocation of water to land use. DHHL has an existing reservation for 1.358 mgd (WUP No. 566; see Exhibit 5) that was initially allocated in 1994 for 1.724 mgd. Since 1994, DHHL has only drawn down their reservation by 0.366 mgd.

Since the adoption of the new sustainable yields, the Commission and BWS have constructed additional deep monitor wells. Although several of the Milestone Requirements/Actions have not been fully complied with by their respective deadlines, the staff is not recommending that the Commission defer action on this application (which is an option under Note 4 of Exhibit 4) given the progress of the monitoring plan, current pumpage, the size of this request, staff's planned revocation actions, and ongoing development of a water shortage plan. Based on the foregoing, ground water is available to accommodate this request.

(2) Reasonable-beneficial

Section 174C-3 HRS defines "reasonable-beneficial use" is

"...the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest".

I. Purpose of Use

The applicant is requesting the use of potable ground water for industrial use to supply four food processing lines at Waikele Farms. The water is used to wash the produce prior to packing for delivery to local markets and restaurants. The food processing lines generally consist of an initial washing station, where water is recycled for a second pass, and a final wash cycle using chlorine-treated water.

Although the application characterizes the use as industrial, the State Water Code defines "agricultural use" as *"...the use of water for the growing, processing, and treating of crops, livestock, aquatic plants and animals, and ornamental flowers and similar foliage"*. Therefore, if approved, this allocation would be considered an agricultural, rather than industrial, water use.

The Declaration of Policy, Section 174C-2(c) HRS, states that the Water Code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for various purposes, including agricultural use.

II. Quantity Justification

The applicant is requesting a total of 0.100 mgd for agricultural process water (two

processing lines for tomato, and one processing line each for bell pepper and banana). The existing food processing use is not metered separately. The quantity of water needed has been estimated based on the delivery rate of the water, which can fluctuate, but is about 45-50 gpm. The application cover letter states that the requested amount is based on running each of the four processing lines five days each week for 12 hours each day. Each processing line will use approximately 35,000 gallons during the 12-hour period. Therefore, the requested year-round average is: $(4)(35,000)(5/7) = 100,000$ gpd.

III. Efficiency of Use

In addition to justifying the quantity of water proposed for use, applicants must also show that the use will be efficient. The applicant has stated that the wash water from the food processing lines will be recycled for irrigation use. Sumps will be installed to capture the water, and the water will be recycled by either directing it into the Waiahole Ditch (subject to the approval of the Agibusiness Development Corporation's Board) or into the farm's existing irrigation system. Waikele Farms is committed to recycling virtually 100% of the water.

Additional efficiency measures include the recycling of water for a second pass within each processing line, routine checking of all water lines for leaks, and the use of low consumption sprinklers in the food processing systems.

Finally, Robinson is willing to voluntarily relinquish an equivalent amount of allocation from their Waiahole Ditch water use permit (WUP No. 758) to preclude double-counting of the water needed for this end use. (Please refer to the section entitled "Other Issues" below for additional discussion on permit modification.)

IV. Analysis of Practical Alternatives

The applicant's current water source, Waiahole Ditch, is an alternative water source. This application is to use ground water in lieu of Waiahole Ditch water. Waikele Farms is proposing to convert its water source from Waiahole Ditch to a new ground water well in anticipation of more stringent water quality standards for food processing. Mr. Craig Bowden, a food safety consultant to Waikele Farms, recently conducted an inspection of the food processing and packaging operations and has recommended that Waikele Farms convert from treated Waiahole Ditch water to a potable-quality source. The open ditches of the Waiahole system create a significant possibility of contamination by parasites, bacteria, and viruses. The existing water treatment system provides reasonable protection against parasites but allows bacteria and viruses to pass through. Conversion to a well water source will remove the threat of bacteria and viruses in advance of regulation under the Hazard Analysis and Critical Control Point, a food safety program adopted by the Food and Drug Administration.

The application cover letter states that installing and operating a new treatment system, with

Waiahole Ditch as the raw water supply, is the only alternative to the requested use of ground water. Development and use of a new ground water well will be significantly more economical, particularly with more stringent quality standards anticipated in the future.

City water is not available at the farm site. There are no other practical alternatives.

(3) Interference with other existing legal uses

There are nine other wells within 1 mile of this source (Exhibit 7). All of the nine wells are observation wells and none are being used for production purposes. One is a Board of Water Supply observation well, the other eight are owned by the U.S. Air Force. Staff does not anticipate any interference with other existing legal uses.

(4) Public interest

Public interest is defined under §174C-2 - Declaration of policy, as follows:

“(c) The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.”

This application is for an agricultural use, which is listed as a beneficial water use and consistent with the public interest.

The food processing system is a critical part of Waikele Farms' overall operations. Waikele Farms employs 200 workers. One hundred percent of the produce that passes through the food processing system is sold locally. Local markets purchase the produce, and the majority of restaurants on Oahu, with the exception of a few very high-end restaurants, also purchase the produce.

The applicant has stated that, to the best of their knowledge, no public trust purposes will be negatively impacted by this proposed water use.

If this application is approved, the applicant has agreed to voluntarily relinquish an equivalent amount of its allocation for Waiahole Ditch water (WUP No. 758). Conversion to a well water source may allow an equivalent amount of water to remain in windward streams.

The Commission has received public comments on this application, which are summarized as follows:

1. The State Land Use Commission (LUC) has confirmed the location of the parcel is within the State Land Use Agricultural District. LUC has advised that the proposed use of water for the processing of crops, including the reuse of the water for irrigation, are consistent with statutorily permitted uses and are therefore appropriate uses within the Agricultural District.
2. The State Office of Hawaiian Affairs (OHA) has commented that the applicant should provide additional information regarding the efficiency of its proposed use and should indicate what measures are being taken to ensure that the proposed use is as efficient as possible. Secondly, OHA believes that, if this proposed use is an alternative to the existing allocation from Waiahole Ditch, the Waiahole Ditch allocation should be similarly reduced. OHA also notes that there is a lack of information in the application on whether the proposed use will impact Native Hawaiian Water Rights. Under the public trust doctrine and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. Lastly, OHA requests that any permit issued include a condition restricting the transfer of the permit to any entity not engaged in the same proposed use.

Staff Analysis: With regard to OHA's first comment, the applicant provided additional information on efficiency measures in writing (Exhibit 3) and verbally during staff's September 29, 2006 site visit. With regard to OHA's second comment, the applicant is willing to relinquish an equivalent amount of allocation from their Waiahole Ditch allocation. With regard to the burden of showing impacts to public trust purposes, the Deputy Attorneys General assigned to the Commission have advised that applicants must address this issue. If applicants are aware of public trust impacts, they must disclose such information in the application. If the applicants are not aware of any public trust impacts, this must be so stated in the application. Based on this legal advice, staff will revise its application forms to ensure that this issue is addressed by all future applicants. For this case, the applicant verbally stated to staff that they are not aware of any public trust impacts that will result from the proposed water use. Regarding the water use permit transfer restriction, the Deputy Attorneys General have advised staff that the statute and rule would need to be amended in order to enforce such a restriction on county agencies.

3. The State Historic Preservation Division (SHPD) has stated that they believe no historic properties will be affected by the proposed project. However, if historic resources, including human skeletal remains, are identified during the construction activities, all work needs to cease in the immediate vicinity of the find, the find needs to be protected from additional disturbance, and the SHPD needs to be contacted immediately at (808) 692-8015.

Staff Analysis: SHPD submitted similar comments on the accompanying well construction permit application for proposed Well No. 2602-03. A copy of SHPD's comments will be forwarded with the well construction permit, which will be administratively approved and issued if the Commission approves this water use permit. This issue is also addressed in

Standard Condition 6 of the well construction permit, which states “*In the event that historically significant remains such as artifacts, burials or concentrations of shells or charcoal are encountered during construction, the permittee shall stop work and immediately contact the Department of Land and Natural Resources’ Division of Historic Preservation*”.

4. The State Division of Aquatic Resources has commented that the proposed action should have no noticeable impact on the area’s aquatic resources, as there are no perennial streams in the immediate vicinity.
5. The City Department of Planning and Permitting confirmed the AG-1 Restricted zoning designation and that a Special Management Area Permit is not needed. The activity being proposed, food washing, is an agricultural activity consistent with the Central Oahu Sustainable Communities Plan and is allowed in the AG-1 Restricted Agricultural District.

Based on the foregoing, staff finds that this proposed use is consistent with the public interest.

(5) State & county general plans and land use designations

The State Land Use Commission (LUC) has confirmed the location of the parcel is within the State Land Use Agricultural District. LUC has advised that the proposed use of water for the processing of crops, including the reuse of the water for irrigation, are consistent with statutorily permitted uses and are therefore appropriate uses within the Agricultural District.

The City Department of Planning and Permitting confirmed the AG-1 Restricted zoning designation and that a Special Management Area Permit is not needed. The activity being proposed, food washing, is an agricultural activity consistent with the Central Oahu Sustainable Communities Plan and is allowed in the AG-1 Restricted Agricultural District.

Normal agency review includes:

- 1) the State’s Department of Land and Natural Resources (DLNR) and its State Parks, Aquatic Resources, Historic Preservation, and Land Divisions; the Department of Health (DOH) with its Clean Water, Safe Drinking Water, and Wastewater Branches; the Department of Hawaiian Home Lands (DHHL), and Land Use Commission (LUC); and the Office of Hawaiian Affairs (OHA).
- 2) the County’s Department of Planning and Permitting and the Board of Water Supply.

Comments made through this review are summarized in preceding sections. This proposed use is consistent with the state and county general plans and land use designations.

Therefore, this application is consistent with the state & county general plans and land use designations.

(6) County land use plans and policies

Normal County review includes the Mayor's Office, Department of Planning and Permitting and the Board of Water Supply. Comments received indicate consistency with county land use plans and policies.

Therefore, this application is consistent with the county land use plans and policies.

(7) Interference with Hawaiian home lands rights

All permits are subject to the prior rights of Hawaiian home lands. The Department of Hawaiian Home Lands (DHHL) has reviewed this application and has indicated it has no comments or objections. Comments from the Office of Hawaiian Affairs are presented in the Public Interest section of this submittal. Standard water use permit conditions 3.g., 6., and 9.f. notify all water use permittees that their permits are subject to and cannot interfere with Hawaiian home land rights.

Therefore, this proposed permit will not interfere with Hawaiian home lands rights.

OTHER ISSUES

Staff is recommending that the Commission attach a special condition to require modification of the applicant's existing water use permit for Waiahole Ditch (WUP No. 758) to reduce the allocation by an equivalent amount to preclude a double-counting of the water needed to support the food processing use.

Section 174C-57 HRS, provides for modification of water use permits. The permit modification process would involve the filing of a water use permit modification application, which is treated as an initial application subject to sections 174C-51 to 174C-56 HRS. However, section 174C-57(b)(2) HRS contains a provision that allows the Commission, at its discretion, to approve the proposed modification without a hearing, provided that proposed modification does not involve an increase in the quantity of water and provided that the proposed modification would result in a more efficient utilization of water than is possible under the existing water use permit. The proposed modification of WUP No. 758, to reduce the permitted use by 0.100 mgd, meets these criteria for approval without a hearing, and staff is recommending that the Commission delegate the authority to the Chairperson to approve the proposed modification.

The processing of the modification application would be identical to initial permit applications with respect to application notice and review. If substantive issues are raised during the review process, the staff will submit the modification application to the full Commission for action.

To ensure that WUP No. 758 is modified in a timely manner, the staff is recommending that the Commission attach a special condition to the approval of WUPA No. 767 that requires Robinson to submit a completed modification application for WUP No. 758 within 60 days for administrative

approval by the Chairperson. The enforcement of the modified WUP No. 758 would take effect when Well No. 2602-03 is operational and on line. If Robinson does not submit a completed modification application by the 60-day deadline, the staff is recommending that the water use permit that is the subject of this submittal, WUPA No. 767, be deemed denied without prejudice without the need for another hearing before the Commission.

RECOMMENDATION:

This application meets the criteria for obtaining a water use permit, and staff recommends that the Commission:

1. Approve the issuance of Water Use Permit No. 767 to Robinson Kunia Land, LLC for the reasonable and beneficial use of 0.100 million gallons per day of ground water for agricultural (food processing) use from the Robinson No. 1 Well (Well No. 2602-03), subject to the standard water use permit conditions listed in Attachment B and the following special conditions:
 - a. Should an alternate permanent source of water be found for this use, the Commission reserves the right to revoke this permit, after a hearing.
 - b. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
 - c. The permittee shall ensure that the water is recycled by either directing it into the Waiahole Ditch for use by downstream farmers (subject to the approval of the Agibusiness Development Corporation's Board) or into Waikele Farm's existing irrigation system.
 - d. The permittee shall file a completed application to modify WUP No. 758 to reduce the allocation by 0.100 mgd within 60 days. If a completed water use permit modification application is not received within 60 days from this submittal's date, then the subject water use permit application (WUPA No. 767) shall be deemed denied without prejudice without the need for another hearing.
2. Find that the water use permit modification application required under Special Condition d. will result in a more efficient use of water than is possible under the existing permit, and delegate the authority to the Chairperson to approve the water use permit modification application without a hearing, provided that no substantive issues are raised during the review period. If substantive issues are raised, then the staff will submit the modification application to the full Commission for action.

Respectfully submitted,

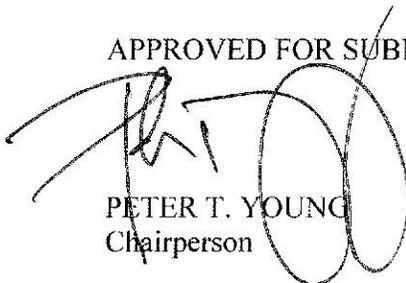


DEAN A. NAKANO
Acting Deputy Director

Attachment(s): A (Water Use Permit Detailed Information)
 B (Water Use Permit Standard Conditions)

Exhibit(s): 1 (Location Map)
 2 (April 27, 2006 Letter from Dean A. Nakano to Mr. Bill Paty)
 3 (July 5, 2006 Letter from Tom Nance to Mr. Dean A. Nakano)
 4 (Milestones)
 5 (Current Water Use Permits)
 6 (Waipahu-Waiawa Aquifer System Area Pumpage)
 7 (Other Nearby Wells)

APPROVED FOR SUBMITTAL:



PETER T. YOUNG
Chairperson