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

7448-07.sub

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

July 15, 2009
Honolulu, Oahu

Karl Toubman and Kathie Pomeroy
APPLICATION FOR AFTER-THE-FACT PUMP INSTALLATION PERMIT
Honopueo Well (State Well No. 7448-07)
Installed Pump: 3 gpm for Agricultural Use
TMK 5-4-009:024, Island of Hawaii

APPLICANT:

Karl Toubman and Kathie Pomeroy
P.O. Box 1556
Kapaau, HI 96755

LANDOWNER:

Same

SUMMARY OF REQUEST:

The applicant requests that the Commission approve an after-the-fact pump installation permit for a pump installed without a valid pump installation permit. The applicant also requests a pump installation permit for a proposed higher capacity pump.

DESCRIPTION:

Location: (See Exhibit 1)

Dimensions: (See Exhibit 2)

BACKGROUND:

August 27, 1989 – Construction of well no. 7448-07 was completed by the United States Geological Survey for the purposes of evaluating groundwater flow in the Hawi area of the Big Island.

May 28, 2003 – Deed issued to Karl Toubman and Katherine Pomeroy for the property with the well.

October 15, 2006 – Earthquake measuring 6.5 on the Richter scale impacts the Island of Hawaii, with an epicenter located near Pauanahulu on the Island of Hawaii, damaging existing structures including the Kohala Ditch System.

October 15, 2006 – Governor Linda Lingle issues an Emergency Proclamation (attached as Exhibit 3).

January 11, 2008 – Karl Toubman (not a licensed pump installer) installs a 3 gpm pump in Well No. 7448-07, with the assumption that this work was allowable under the Emergency Proclamation, to help out the community association who encountered hardships due to lost ditch water from the damaged Kohala Ditch.

June 10, 2008 – Karl Toubman and Kathie Pomeroy, as joint landowners, submit an application for an after-the-fact Pump Installation Permit for the 3 gpm pump on their own volition. The application is considered incomplete because the well owner is not correctly identified as the U.S. Geological Survey (USGS). A letter explaining the reason for the pump installation is attached as Exhibit 4.

March 30, 2009 – The USGS submits a Well Transfer Agreement identifying the transfer from the USGS to Toubman/Pomeroy (refer to Exhibit 5).

April 27, 2009 – Applicant sends in supplemental information to amend the application to request an increase to a new 30 gpm pump installation. However, no formal contractor-signed pump installation permit application has been submitted to date for this submittal.

WATER AVAILABILITY:

Hawi Aquifer System of the Kohala Sector

Estimated Sustainable Yield: 27 mgd

Current Aquifer System Pumpage (12-MAV as of 4/09): 0.758 mgd

Use (with currently installed pump): 1,440 gpd

ISSUES/ANALYSIS:

Statute and Rules

The following statutes outline pump installation permits:

HRS §174C-84(a) states that:

No well construction and no installation of pumps and pumping equipment shall commence without appropriate permit from the commission.

Further in that section:

An application for a permit for installation of a pump and pumping equipment shall be made by the pump installation contractor who will install the pump and pumping equipment.

The Hawaii Well Construction and Pump Installation Standards (HWCPIS) is authorized under HRS §174C-86 and implemented under HAR §13-168-14. Section 1.6 of the HWCPIS (revised February 2004) states that:

All work required in the installation of pumps and pumping equipment shall be performed by well drillers with a C-57 license, pump installers with a C-57a license, or general contractors with an A license obtained from the Hawaii Department of Commerce and Consumer Affairs, Division of Professional and Vocational Licensing.

HRS §174C-15(b) states that:

Any person who violates any provision of this chapter, or any rule adopted pursuant to this chapter, may be subject to a fine imposed by the commission. Such fine shall not exceed \$5,000. For a continuing offense, each day during which the offense is committed is a separate violation.

Emergency Proclamation Applicability

The Emergency Proclamation states on Page 4, item 4, that:

4. Sections 128-8(4), 128-9(8), and 128-10(10), and in order to provide emergency disaster relief and, to the extent necessary to repair, restore, rebuild, with any necessary improvements, any public structures, roadways or bridges damaged by the earthquake, I hereby suspend as allowed by federal law, the following statutes:

(among others) 1. Chapter 174C, state water code.

The applicant has stated that they thought that the Emergency Proclamation was applicable due to events transpiring as follows:

1. A letter dated December 11, 2006 from Gordon Tribble of the USGS to Larry Kanda of State Civil Defense, authorizing the use of the well as an emergency water source because of earthquake damage to the Kohala Ditch System (refer to attachment at the end of Exhibit 4).
2. A discussion of money from the Department of Defense via the Hawaii Economic Development Agency (refer to Exhibit 4) to install a pump that would supply emergency water to 600 surrounding areas of agricultural land. Pomeroy/Toubman ended up declining the money because matching funding would need to be raised and the long term authorization of use of the well was questionable.

Staff does not believe that the Emergency Proclamation applies to this situation. The language of the proclamation clearly restricts the suspension of the state water code *“to the extent necessary to repair, restore, rebuild, with any necessary improvements, any public structures, roadways or bridges damaged by the earthquake” (emphasis added)*. Though at the time, the well was owned by the USGS and could be considered a “public structure”, it was not damaged by the earthquake. Rather, the privately owned Kohala Ditch was damaged by the earthquake. Further, installation of the pump did not facilitate restoration of water to the 600 acres of adjacent agricultural lands served by the Kohala Ditch before the damage. The installed pump only serves the individual use of the parcel in question.

Therefore, staff’s opinion is that the Governor’s Emergency Proclamation is not applicable in the suspension of the State Water Code for this pump installation activity.

Installation by non-licensed contractor

Because the Emergency Proclamation is not applicable, the 3 gpm pump and pumping equipment should have been installed by a licensed contractor rather than the owner. Installation by a licensed contractor would help to ensure that the pump is installed correctly to minimize adverse effects on the aquifer.

Agency Review

Copies of the application were sent to the Department of Health's Safe Drinking Water and Wastewater Branches, as well as the Historic Preservation Division and Land Division of the Department of Land and Natural Resources. No comments or concerns were indicated.

Fines and Remedies

For the protection of the aquifer and to ensure proper pump installation to avoid other issues such as waste, a licensed contractor should remove and reinstall the pump, to ensure a proper installation. The applicant has stated that they will be working with a licensed well driller, and is now seeking approval for the installation of a 30 gpm pump. However, no complete formal application was submitted for the new pump. Staff understands that the installation of a larger capacity pump would require a new electrical supply to the well since there is currently only solar power for the 3gpm pump. Additionally, the applicant has stated that the funding is not readily available to install the new 30 gpm pump, so they are looking at a 2-year window to secure the funding for the new pump installation.

Staff recommends that the Commission deny an after-the-fact pump installation permit for the currently installed 3 gpm pump. Rather, staff recommends that the Commission require the submission of a new completed pump installation permit application for the 30 gpm pump, by a licensed contractor. Upon the issuance of this new permit, which will be valid for 2 years, the contractor will be required to pull and reinstall the 3 gpm pump within a prescribed period of time (30 days), and will have the option to install a 30 gpm pump within 2 years from the date of issuance of the permit.

PENALTY POLICY:

The policy used in this submittal was adopted in 2001. Exhibit 6 is a summary of the penalty calculation.

Basic Component: Hawaii Revised Statutes (HRS) Section 174C-15, as amended, provides for fines up to \$5,000 per day per violation. The minimum fine established by the Commission's penalty policy is \$250 per violation (see Exhibit 6). Staff recommends this minimum basic fine component.

Gravity Components: Six elements are outlined in the Commission's Penalty Policy: a) damage to resource; b) risk to resource; c) refusal to correct; d) violator should have known; e) number of violations of standard conditions; f) failure to meet deadlines. The gravity component can add an additional \$250-\$1000 per violation, and initiate daily fines.

In this case, none of the gravity components considered are significant to warrant an increase to the basic fine component. Specifically, regarding item d), there was a misconception that the Emergency Proclamation exempted the applicant from the requirements set forth in the State Water Code and applicable Administrative Rules.

Mitigation Components: Six elements are outlined in the Commission's Penalty Policy:
a) attempt to remedy without notice of violation; b) good faith effort to remedy after notice;
c) diligence once notified; d) speedy compliance once notified; e) emergency considerations;
f) insignificant risk to resource.

The self reporting of the violation and follow up, as well as the negligible effects of a 3 gpm pump allow mitigative components a) and f) to be applied. Staff is therefore recommending a mitigative component of \$100.

Duration Calculation: The duration component is determined according to the circumstances surrounding each type of violation. When compliance is speedy, the policy is to limit the duration exposure to fine to a single day minimum. Since the owners came forward on their own volition without any notice of violation, staff recommends a single day duration.

Summary of Recommended Fines:

Because the applicant thought the Emergency Proclamation was applicable in exempting the requirements of the State Water Code, and self reported the violation and worked with staff in providing follow up information, the minimum fine of \$250 per day is recommended to be mitigated to \$150 for one day, for a total fine of **\$150**.

Alternative Settlement: Staff is not recommending an alternative settlement.

RECOMMENDATION:

That the Commission:

- A. Find the applicant in violation of HRS §174C-84(a) and HAR§13-168-7(a).
- B. Impose a fine of \$150 on the applicant as summarized in Exhibit 6, payable within 30 days.
- C. Deny the issuance of an after-the-fact Pump Installation Permit for the existing pump.
- D. Require the applicant to cause a new Pump Installation Permit application to be submitted by a licensed pump installer within 30 days, upon which a permit will be immediately issued, subject to the following special conditions:
 1. The existing installed 3 gpm pump shall be removed and reinstalled within 30 days, and a Well Completion Report Part II shall be submitted within 30 days of completion of that work.
 2. The permittee will be allowed to install a new pump of up to 30 gpm within 2 years.

- E. Suspend any current, pending or future applications related to Toubman/Pomeroy until the fines are paid and the applicant/driller completes the removal/reinstallation of the 3 gpm pump for this well.

Respectfully submitted,



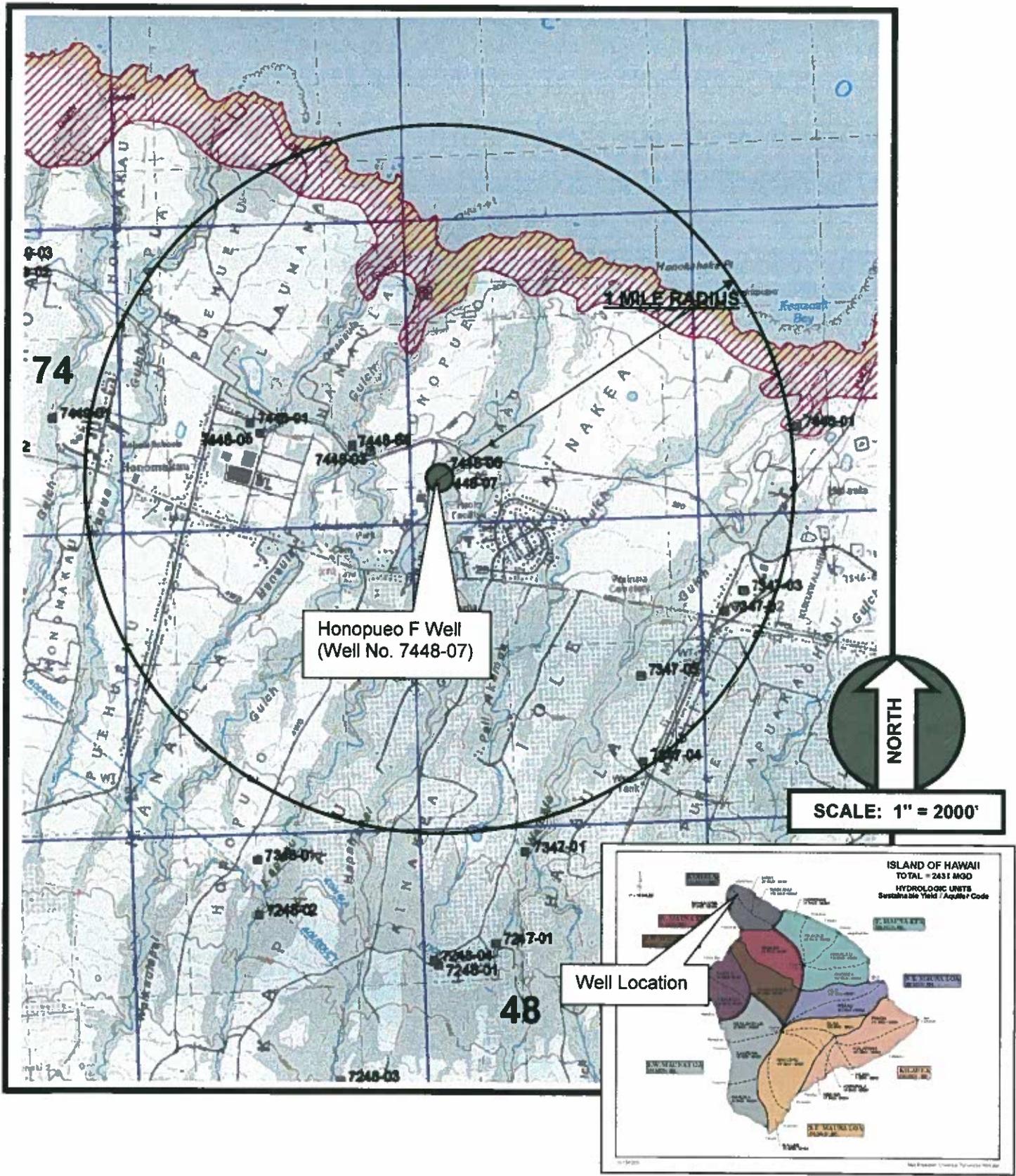
KEN C. KAWAHARA, P.E.
Deputy Director

- Exhibit(s):
1. (Location Map)
 2. (Well Information)
 3. (Emergency Proclamation)
 4. (Letter from Pomeroy)
 5. (Well Transfer Agreement)
 6. (Penalty Calculation Table)

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN
Chairperson

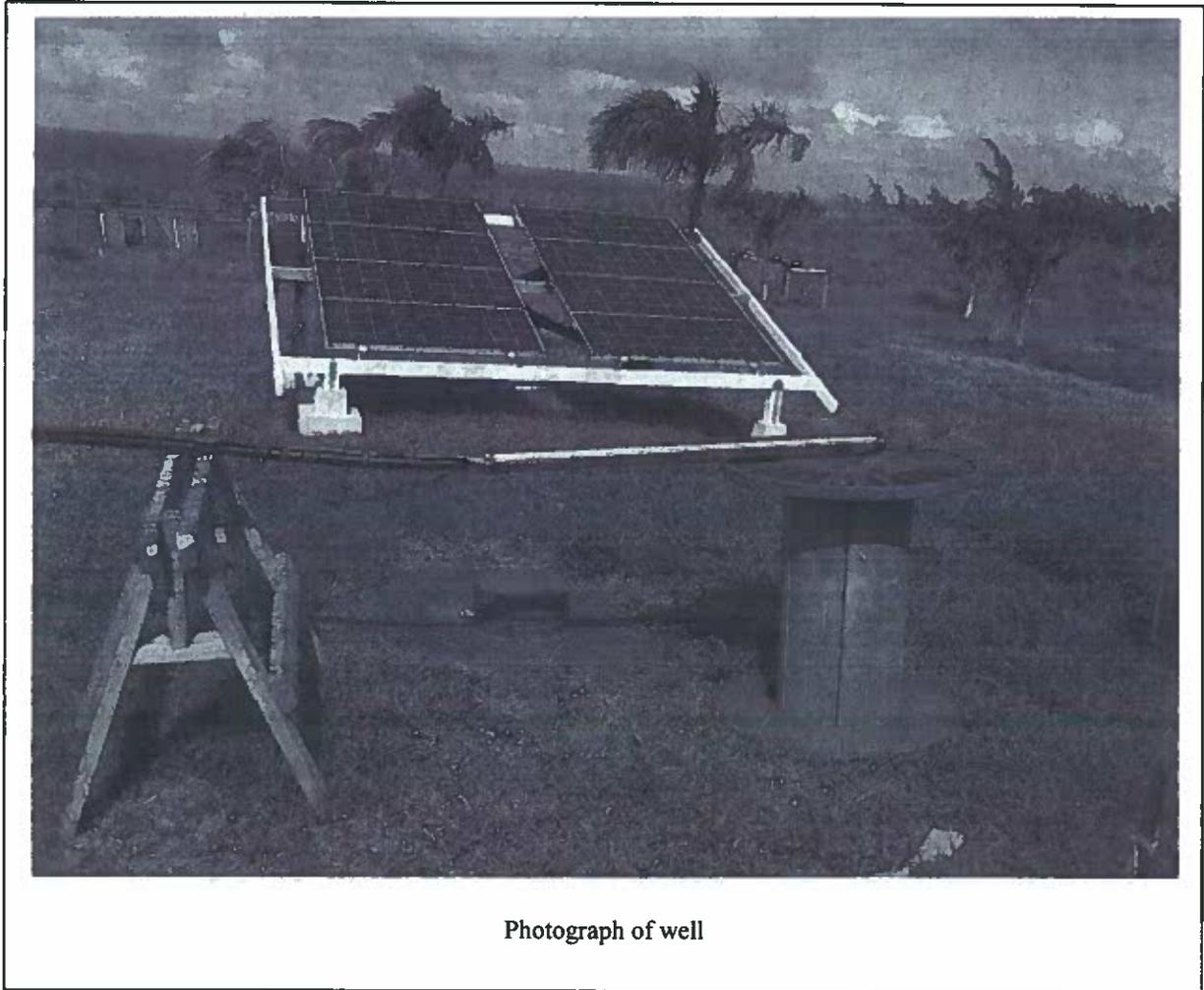


Honopue F Well
(Well No. 7448-07)

SCALE: 1" = 2000'

Well Location

EXHIBIT 1
Location Map



Photograph of well

EXHIBIT 2
Well Information

OFFICE OF THE GOVERNOR
STATE OF HAWAII

PROCLAMATION

By the authority vested in me as Governor by the Constitution and laws of the State of Hawaii, in order to provide relief for disaster damages, losses, and suffering, and to protect the health, safety, and welfare of the people, I, LINDA LINGLE, Governor of the State of Hawaii, hereby determine, designate and proclaim as follows:

WHEREAS, an earthquake measuring 6.5 on the Richter scale occurred on October 15, 2006 with an epicenter located near Pauunahulu in the county of Hawaii, was felt throughout the state and has caused damage to structures, private and public, and public roads and highways in the counties of Hawaii, Maui, Kauai, and the City and County of Honolulu, State of Hawaii; and

WHEREAS, this occurrence of a severe, sudden, and extraordinary event has caused damages, losses, and suffering of such character and magnitude to have affected the health, welfare, and living conditions of a substantial number of persons, and to have affected the economy of the State, and is of such a nature as to warrant rehabilitative assistance from the State; and

WHEREAS, the Legislature of the State of Hawaii has appropriated from the general revenues of the State, monies as may be necessary for expenditure by or under the direction of the Governor for the immediate relief of the conditions created by the disaster; and

WHEREAS, in expending such monies, the Governor may allot any portion to any agency, office, or employee, federal, state, or county for the most expeditious and efficient relief of the conditions created by the disaster; and

WHEREAS, pursuant to section 127-11, Hawaii Revised Statutes, the Governor is authorized to determine whether a major disaster has occurred and authorize the expenditure of funds thereunder; and

WHEREAS, pursuant to section 121-30, Hawaii Revised Statutes, the Governor may order the Hawaii National Guard, or any part thereof, into active service for assistance to civil authorities in disaster relief, civil defense, averting any imminent public danger and threat, and to insure the compliance with the civil laws of the State of Hawaii; and

WHEREAS, pursuant to section 209-2, Hawaii Revised Statutes, the Governor is authorized to make a determination whether a disaster has occurred, thereby making available housing relief, under part II of chapter 209, Hawaii Revised Statutes, and commercial and personal loans under part III of chapter 209, Hawaii Revised Statutes, for disaster relief and rehabilitation; and

WHEREAS, section 127-10, Hawaii Revised Statutes, provides that when sections 127-1 to 127-9, Hawaii Revised Statutes are not in effect, the Governor may exercise any and all powers contained in chapter 128, Hawaii Revised Statutes, in order to provide other disaster relief and that all provisions of the law provided in chapter 128, Hawaii Revised Statutes, during such period, are made applicable to other disaster relief, including without limitation, provisions making or authorizing appropriations or expenditures; and

WHEREAS, pursuant to Act 35, Regular Session Laws of Hawaii 1961, sections 127-1 to 127-9, Hawaii Revised Statutes, have been indefinitely suspended and are not in effect, the provisions of Chapter 128, Hawaii Revised Statutes, are applicable to other disaster relief; and

WHEREAS, pursuant to section 127-10, Hawaii Revised Statutes, other disaster relief includes, but is not limited to the preparation for and the carrying out of all functions, other than functions for which military forces are primarily responsible, to minimize and repair injury and damage resulting from disasters caused by fire, flood, tidal wave, volcanic eruption, earthquake, or other natural causes and major disasters caused by acts of man, including but not limited to, massive oil spills, nuclear accidents, airplane crashes and civil disturbances; and

WHEREAS, pursuant to section 128-8(4), Hawaii Revised Statutes, the Governor is

authorized to suspend any law which impedes or tends to impede or is detrimental to the expeditious and efficient execution of, or conflict with, disaster relief or other emergency functions; and

WHEREAS, pursuant to section 128-9(8), Hawaii Revised Statutes, the Governor is further authorized to relieve hardship and inequities or obstructions to the public health, safety, and welfare found by the Governor to exist in the laws by suspending laws in whole or in part, or by alleviating the provisions of laws on such terms and conditions as the Governor may impose; and

WHEREAS, pursuant to section 128-10(10), Hawaii Revised Statutes, the Governor may suspend chapter 103D and sections 103-50, 103-53, 103-55, 105-1 to 105-10, and 464-4, Hawaii Revised Statutes, and I find that these provisions, in whole or in part, impede or tend to impede the expeditious discharge of emergency disaster relief functions for this occurrence and that compliance therewith is impracticable due to existing conditions; and

WHEREAS, pursuant to section 128-10(5), Hawaii Revised Statutes, the Governor is further authorized to order and direct government agencies, officers, and employees, state or local, to take such action and employ such measures for law enforcement, medical, health, fire fighting, traffic control, warnings, and signals, engineering, rescue, construction, emergency housing, and other welfare, hospitalization, transportation, water supply, public information, training, and other civil defense and emergency functions as may be necessary, and utilize the services, materials, and facilities of the agencies and officers; and

WHEREAS, pursuant to section 128-10(11), Hawaii Revised Statutes, the Governor may appoint, employ, train, equip, and maintain, with compensation, or on a volunteer basis without compensation and without regard to chapters 76, 78, and 88, such agencies, officers, and other persons as the Governor deems necessary to carry out emergency disaster relief functions; determine to what extent any law prohibiting the holding of more than one office or employment applies to the agencies, officers, and other persons; and subject to section 128-15, provide for and effect the interchange of personnel, by detail, transfer, or otherwise, between the State and any

political subdivision, or among any agencies or departments of the State; and

WHEREAS, pursuant to section 128-10(15), Hawaii Revised Statutes, the Governor may take any and all steps necessary or appropriate to carry out the purposes of chapter 128 and to provide for civil defense and other emergency functions; and

NOW, THEREFORE, I LINDA LINGLE, Governor of the State of Hawaii, hereby determine that a major disaster and catastrophe contemplated by sections 127-11, 121-30, 209-2, 128-8(4), 128-9(8), 128-10(5), 128-10(10), 128-10(11), 128-10(15), and parts II and III of chapter 209, Hawaii Revised Statutes, have occurred on the above dates and in the above areas in the State of Hawaii, and do hereby proclaim these areas to be disaster areas for the purpose of authorizing the expenditure of State monies as appropriated for the speedy and efficient relief of the damages, losses, and suffering resulting from the disaster, and hereby authorize and invoke the following measures under the Hawaii Revised Statutes:

- 1. Section 127-11, major disaster fund.**
- 2. Part II of chapter 209, housing relief.**
- 3. Part III of chapter 209, commercial and personal loans.**
- 4. Sections 128-8(4), 128-9(8), and 128-10(10), and in order to provide emergency disaster relief and, to the extent necessary to repair, restore, rebuild, with any necessary improvements, any public structures, roadways or bridges damaged by the earthquake, I hereby suspend as allowed by federal law, the following statutes:**
 - a. Chapter 6E, historic preservation except for those provisions relating to burial sites.**
 - b. Chapter 89, collective bargaining in public employment.**
 - c. Chapter 89C, public officers and employees excluded from collective bargaining.**
 - d. Section 102-2, contracts for concessions in government buildings; bid requirements.**
 - e. Section 103-50, building design to consider needs of persons with disabilities.**
 - f. Section 103-53, contracts with the State or counties; tax clearances,**

- assignments.**
- g. Section 103-55, wages, hours, and working conditions of employees of contractors performing services.**
 - h. Chapter 103D, procurement code.**
 - i. Sections 105-1 to 105-10, use of government vehicles, limitations.**
 - j. Sections 142-2 to 142-12, as these sections may apply to the arrival of dogs used by search and rescue teams approved by the State of Hawaii, Department of Defense.**
 - k. Chapter 171, public lands, management and disposition of.**
 - l. Chapter 174C, state water code.**
 - m. Chapter 180, soil and water conservation districts.**
 - n. Chapter 180C, soil erosion and sediment control.**
 - o. Chapter 183, forest reserves, water development, zoning.**
 - p. Chapter 183D, wildlife.**
 - q. Chapter 184, state parks and recreation areas.**
 - r. Chapter 195, natural areas reserves system.**
 - s. Chapter 195D, conservation of aquatic life, wildlife, and land plants.**
 - t. Chapter 198D, hawaii statewide trail and access system.**
 - u. Chapter 205, land use commission.**
 - v. Chapter 205A, coastal zone management.**
 - w. Chapter 264, highways.**
 - x. Chapter 269, public utilities commission.**
 - y. Chapter 286, highway safety.**
 - z. Chapter 341, environmental quality control.**
 - aa. Chapter 342B, air pollution.**
 - ab. Chapter 342D, water pollution.**
 - ac. Chapter 342E, non-point source pollution management and control.**
 - ad. Chapter 342F, noise pollution.**
 - ae. Chapter 343, environmental impact statements.**
 - af. Chapter 343D, environmental disclosure.**
 - ag. Chapter 344, state environmental policy.**

ah. Section 464-4, public works required to be supervised by certain professionals.

5. Section 121-30, Hawaii Revised Statutes, active service of the National Guard; and I hereby order the National Guard into active service effective immediately, and the Adjutant General of the Hawaii National Guard is DIRECTED AND AUTHORIZED to activate such units of the Hawaii National Guard as may be necessary to assist and aid civilian authorities in disaster relief and in averting any imminent public danger and threat and to insure the compliance with the civil laws of the State of Hawaii.
6. Section 128-10(5), Hawaii Revised Statutes, and in order to provide emergency disaster relief, I hereby direct all state and county agencies and officers to cooperate with and extend their services, materials, and facilities as may be required to assist in all efforts to eliminate the danger.

I FURTHER DECLARE that a disaster emergency relief period shall commence October 15, 2006 and continue until such an appropriate time for termination, as I will determine. I will set a date after which no further applications for assistance under the law shall be accepted, which date I may extend for a reasonable time for good cause.

Done at the State Capitol State of Hawaii, this 15th day of October, 2006.


LINDA LINGLE
Governor of Hawaii

APPROVED:


MARK J. BENNETT
Attorney General
State of Hawaii

**Karl Toubman and Kathie Pomeroy
P.O. Box 1556,
Kapa'au, Hawaii 96755**

**Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809**

June 9, 2008

Dear Water Commission members,

Please find enclosed the two forms requested by Mr. Ryan Imata:

- 1) Application for Well Pump Installation Permit with attachments (10 copies)**
- 2) Well Completion Report, Part 2 (1 copy)**
- 3) We have also made 10 copies of this cover letter with attachments.**

Mr. Imata asked us to explain why we installed a pump without a permit. It was due to our own misunderstanding of the requirement. We'll tell you our story about what has taken place, and hope that the Commission will be able to take these circumstances into account when deciding whether or not to process our pump permit after the fact. Please bear with our cumbersome paperwork here. We want you and Gordon Tribble (Director, USGS Pacific Islands Water Science Center) to see documentation of our track record so far, rather than relying solely on our word or future intentions. In requesting that this permit be accepted and processed, if it is of any benefit for our particular case, we want to demonstrate to you that the water resource has been and will be used for the public good.

The pump was installed on January 11, 2008 by Karl Toubman with the help of two other men. We see on the Pump Permit that a licensed pump installer was required and we did not have one (although, in retrospect, we must have consulted with at least three of them, not realizing at the time that it was a licensed profession). One man who helped us had installed two pumps before in a ranch well in California. The other man has a business installing irrigation systems and helped to complete the ditch water irrigation system for our community association, which serves 12 lots and about 600 acres (no ditch water now, however). Karl Toubman, who has a business installing solar and wind power systems, installed the solar panels and did the wiring for the pump. Utmost care has always been taken not to contaminate the wells. Our farm is organic and no poisons that could mire the water table are used. In fact, we were the ones who told Gordon Tribble in 2003 that the well covers were open and rusted through. In response to this update, he immediately had all the well covers in Kohala replaced and locked.

To give you an example of community benefit, Kathie Pomeroy secured a USDA grant (\$10,000) for the solar/wind powered pump. The grant was from the 2006 Hawaii Agricultural Development Program (HADP) via the Big Island Resource, Conservation, and Development Council to interface with Ka Hana Noe'au, a youth program (see enclosed letter from Mr. Fuertes to Mr. Skipper, dated 6/6/06). Karl and Kathie's farm, Kohala Medicinal Herb Farm,

EXHIBIT 4

Letter from Pomeroy to Commission

was honored to be awarded this grant for two consecutive years, which is very unusual (three HADP award letters enclosed.). The grant, awarded before the 10/15/06 earthquake, was to be used for other purposes, including completion of irrigation laterals for ditch water. Altering the grant budget to install the pump was allowed by the USDA inspector because, as he judged it, having ag water was more important than completing the irrigation system. (As you know, the Kohala ditch water system was destroyed by the earthquake.) The grant did not involve submitting permits and we were still under the apparently mistaken impression we that didn't need one.

How did we get this impression? It goes back to just after the earthquake. Please find enclosed the December 11, 2006 letter from Gordon Tribble to Larry Konda of Hawaii State Civil Defense which authorizes us to use the well temporarily. This letter is not the reason for our confusion, rather, it was the scramble to garner funds to pump well 7448-07 and two others (owned by Surety Kohala Corp.) in this district to supply emergency water. We were a humble "tag along" contingent of an emergency effort by hydrologists, Surety, FEMA, and county and state civil defense to get water back into the ditch. The money (over \$180,000 as we recall) was being channeled from a Dept. of Defense fund on Oahu via the Hawaii Economic Development Agency. We were to get \$60,000 to pump the well on our property to the 600 surrounding acres of ag land since the transfer pipes were already installed. We were to get a 25 horsepower pump and 45 hp generator, or really any pump and generator civil defense could come up with (they had none). In the end, only \$30,000 would be available to us from the fund. We formally declined the \$30,000 because it would mean our neighbors would have to supply the matching \$30,000. We could not see organizing the community association for such money, even if anyone had it, as the well use was authorized only temporarily by Gordon Tribble and title to the well is still unclear. An alternate source of water became available and we were able to use \$5,000 of that fund to install a pipe to get water for the community association. Unfortunately, nothing was in writing (from Surety) and that was discontinued not long after the pipe was installed. It is unlikely that ditch water will return to much of Kohala because two of the three lateral feeder pipes are old and need replacing, at an estimated cost of \$800,000 for the pipe to our area. People are looking for alternatives, and we are lucky to have the wells on our property, so we used one as soon as we were able, which was when we got the HADP grant budget changed to buy the necessary equipment.

Because of these events after the earthquake, everything was geared toward supplying water any way possible. Civil defense inspected the well and its access to see how they could bring equipment in. An "inner circle" of well connected experts were finding money for us to pump well 7448-07. It was as if we were swept up in some wave to provide water because we could. It simply didn't occur to us that paperwork was needed, and no one else ever mentioned it. The only paperwork ever requested by these authorities was the letter enclosed from Mr. Tribble to Mr. Konda. We thought any permits had been waived. In fact, the members of our community association, who had been waiting three years for the DWS to supply us with county water (meters and transfer pipes already paid for), was able to finally get county water only a few months after the earthquake. An additional year's worth of steps and paperwork were waived by the DWS. So we simply had a mindset that overlooked this important detail of getting the pump

EXHIBIT 4

permit. It was our mistake entirely, but this gives you some background as to the oversight.

Gordon Tribble has been helpful in gaining USGS permission to pump well 7448-07. With the help of the USGS solicitor he has taken time to navigate the unfamiliar territory of our case, a process which started seven years ago. Gordon researched and cited the USGS Policy Memo 87.17 that allows the USGS to turn ownership of a USGS well over to the land owner. Recently, however, various Title Reports for our property raised the fundamental question of well ownership. With all due respect to the USGS, Gordon Tribble, and the Water Commission, that is why we have filled out the Well Completion Report, Part 2, Item # 10 ("well owner") as "USGS and/or Toubman/Pomeroy?" Gordon has offered to consult the USGS solicitor regarding the necessary documentation for establishing well ownership as soon as he is able, probably this month.

We would like to get all these loose ends straight as we are increasingly feeling pressure to supply water to neighbors. We had some hesitation about an agricultural water cooperative, but now think it is possible to do it without encumbering our property too much. We are now in the initial stages of looking into this with the USDA Rural Development Agency. If an ag water cooperative is possible, we would need to get a bigger pump, a wind turbine, more solar panels, and generator back up, and the necessary reservoir(s) to serve this area. A cooperative would make substantial federal funding available to us. Of course, we would not make the same mistake twice and install any equipment without the proper permits.

Additionally, we would like to better understand our chances of continuing to use the well as it is or even possibly expand its use since on June 3 (see enclosed USDA email) the USDA requested Kathie's grant application for a Community Food Project (due July 2). This is a \$300,000 grant involving multiple stakeholders from the community over a three year period. The enclosed Letter of Intent gives more details if you're interested. The organizing principle for this is also an ag cooperative. We are not yet sure if this would include an ag water coop (ditch and /or well water) or if that would be separate, but we do know that the availability of the well water, even at its current maximum level of 1440 gal/day, is key to the success of this project as we would use our land and irrigation as a demonstration farm area and for community gardens.

Kohala ditch water is not likely to become available again to our community association, although our community association still trying to get it back, also possibly via a coop to get the \$800K to fix the feeder pipe. Ideally we would have ditch water and well water. However, if we did get ditch water again, and another earthquake happens, the ditch could go down again. The well seems more reliable in such a scenario, which, although we hesitate to even feature it, is entirely possible. If the Community Food Project gets funded, or for the next ag grant we secure, we would like to use the well water as much as possible. Our neighbors continue to press us to expand the well production to make ag endeavors possible here. We have explained the current limitations to this and that we are trying to work it out via the proper channels. Their access to irrigation water would augment any efforts to grow crops/raise livestock, for the Community Food Project or otherwise. Using county water, even with our ag rates, is quite expensive by

EXHIBIT 4

Letter from Pomeroy to Commission

comparison in the long run and even limited. We understands that the DWS can cut our ag water off in favor of residential use under drought conditions, which parts of the state are experiencing now.

This is probably more than you would like to know, but we thought it was better to tell more than to tell less. We take full responsibility for overlooking the pump permit, but perhaps you can now better understand how we managed to do so. Please accept our apologies and accept this belated application, assuming the pump installation has met the standards. If they have not been met, we will make every effort to bring them up to par.

Sincerely,



Karl Toubman



Kathie Pomeroy

Enclosures:

- 1) Application for Well Pump Installation Permit (10 copies)
 - i) USGS topographic map with well location
 - ii) Property map (TMK 3/5-4-9:24) w/ well site and access schematic
 - iii) Photograph of well site
- 2) Well Completion Report, Part 2 with attachments (1 copy)
 - i) pump performance curve
 - ii) photo of well head
- 3) This cover letter with enclosures (10 copies)
 - i) Letter from Gordon Tribble to Civil Defense dated 12/11/06
 - ii) HADP 2005 & 2006 grant award letters (3 letters)
 - iii) Email from USDA requesting grant proposal from K. Pomeroy dated 6/3/08
 - iv) Letter of Intent for USDA Community Food Project dated 1/9/08
 - v) Letter from David Fuentes, dated 6/6/06

Cc:

Gordon Tribble, Director, USGS Pacific Islands Water Science Center



United States Department of the Interior

**U. S. GEOLOGICAL SURVEY
Pacific Islands Water Science Center
677 Ala Moana Blvd #415
Honolulu, HI 96813
808-587-2405**

To: Mr. Larry Konda, Hawaii State Civil Defense

December 11, 2006

From: Gordon Tribble, Director, USGS Pacific Islands Water Science Center

Pages: 1

Larry,

To follow up on our telephone conversation, I am providing the following information about the well at Kapa'ia (State well number 7448-07) on property owned by Karl Toubman and Kathie Pomeroy.

- 1) USGS is currently the legal owner of the well. The USGS is planning to transfer ownership of the well to Toubman and Pomeroy, pending an agreement between Toubman/Pomeroy and Hawaii DWS.
- 2) Toubman and Pomeroy are authorized to use this well as an emergency water source because of earthquake damage to the Kohala Ditch system. This authorization will continue until the Ditch system is restored or emergency situation no longer exists.
- 3) The well was drilled by the USGS in 1989 to study ground water resources in the area. The well is currently not used, but is not considered abandoned.

I hope this information is helpful. Please feel free to contact me if you have any questions.

Cc: Karl Toubman

EXHIBIT 4

Letter from Pomeroy to Commission

U.S. DEPARTMENT OF THE INTERIOR
U.S. Geological Survey

Agreement Number HI-2009-01

Well Transfer Agreement

The U.S. Geological Survey (USGS) agrees to transfer ownership of the observation well(s), hereinafter referred to as "the well," or "wells" located at Lat. 20 deg 15 min Long. 155 deg 48 min, and/or

Hawaii State Well 8-7448-07, Honopuao Test Well

(Provide other location description and/or attach map, plat, drawings, photographs, or other descriptive information.)

to Karl J. Toubman & Katherine D. Pomeroy (married), hereinafter referred to
(Name of Landowner)

as "Landowner," giving the Landowner all ownership rights to the wells.

Landowner agrees to assume responsibility for the noted wells(s). Landowner agrees to accept the well (s) "as is" and to not hold USGS or the U.S. Government responsible in any way for any construction deficiencies or repairs that may be needed to make the well to meet any safety, government, or other standards. Landowner agrees to: (a) accept responsibility for any liability, such as liens, fines, damages, penalties, forfeitures or judgments arising from the continued use of existence of the well(s); (b) release the USGS and the U.S. Government for liability for any injuries or damage to persons and for property of any kind arising out of the continued use of existence of the well(s); and (c) indemnify the USGS and the U.S. Government from any claims arising out of the use of existence of the well(s). If Landowner chooses or is forced to abandoned a well, Landowner agrees to assume full responsibility for its disposition in compliance with applicable federal, state, and local laws.

The transfer of the noted well(s) is effective on the date this agreement is fully executed.

U.S. GEOLOGICAL SURVEY
By

Michael Shulters

Michael Shulters

Date: 3/25/2009

COMMISSION ON WATER
RESOURCE MANAGEMENT

09 MAR 30 PM 2:00

RECEIVED

Transferee
By

*Karl J. Toubman
Katherine Pomeroy*

Karl Toubman & Katherine Pomeroy

Date: 3/28/09

Notary Seal:

