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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

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

November 18, 2009
Honolulu, Hawaii

Request to Enter into a Right-of-Entry Agreement with
Waikoloa Mauka, LLC and Waikoloa Village Association In Order to Access
Pu'u Anahulu Monitor Well (5347-01), Waikoloa, Hawaii

SUMMARY OF REQUEST:

The Commission on Water Resource Management (CWRM) staff are seeking to engage in right-of-entry agreements with Waikoloa Village Association and Waikoloa Mauka, LLC in order to maintain access to the state-owned Pu'u Anahulu monitor well (5347-01). Sole vehicular access to the well is via a private road that crosses property owned by Waikoloa Village Association and Waikoloa Mauka, LLC.

BACKGROUND:

Since December 1996, CWRM has been monitoring water levels in the Pu'u Anahulu Monitor Well (5347-01) as part of its groundwater monitoring program in west Hawaii. Water-level data collected at the well is used to evaluate the effects of pumping and rainfall on aquifers in west Hawaii.

The Pu'u Anahulu Monitor Well is owned by the State of Hawaii and is located on state-owned TMK Parcel (3) 7-1-003:001 in Waikoloa, Hawaii (Exhibit A). Sole access to TMK the parcel is by a four-wheel drive, dirt road that extends off of Waikoloa Road and runs across privately owned land. Historically, CWRM staff had written or oral permission to use the four-wheel drive road to access the well site. In 2008, staff repeatedly encountered problems accessing the well due to a locked gate. Upon inquiring with the land owner, Waikoloa Land and Cattle Company, staff were informed that the land had been sold.

Based on conversations with Waikoloa Land and Cattle Company, and a review of County of Hawaii tax map documents, CWRM staff determined that the four-wheel drive road runs across

ITEM E1

property owned by two companies: Waikoloa Village Association and Waikoloa Mauka LLC. In 2009, staff contacted representatives from both companies and began discussions to secure legal access across their properties.

ANALYSIS/ISSUES:

Pu'u Anahulu monitor well (5347-01) is used by CWRM to collect valuable ground water monitoring data. The well is located approximately 2.5 miles south of Waikoloa Road in a lava field consisting of rough, broken rock. Sole access to the well site is via a four-wheel drive access road that extends south from Waikoloa Road and crosses two privately owned parcels: TMK (3) 6-8-002:015 (owned by Waikoloa Village Association) and TMK (3) 6-8-002:016 (owned by Waikoloa Mauka LLC) (Exhibit A).

Due to changes in land ownership, CWRM no longer has legal access to the four-wheel-drive road and, therefore, cannot access the well. In order to continue monitoring activities at the Pu'u Anahulu monitor well, CWRM is seeking to engage in right-of-entry agreements with Waikoloa Village Association and Waikoloa Mauka LLC that allow CWRM staff to use the access road to reach the well site. Right-of-entry agreements have been negotiated with each land owner and are provided as Attachments 1 and 2.

RECOMMENDATION:

Staff recommends that the Commission approve and allow the Chairperson to enter into the right-of-entry agreements (Attachments 1 and 2) with Waikoloa Mauka, LLC and Waikoloa Village Association. The agreements were drafted in consultation with the Attorney General's office.

Respectfully submitted,

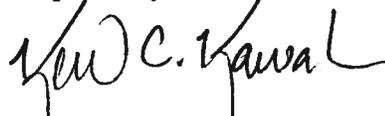

KEN C. KAWAHARA, P.E.
Deputy Director

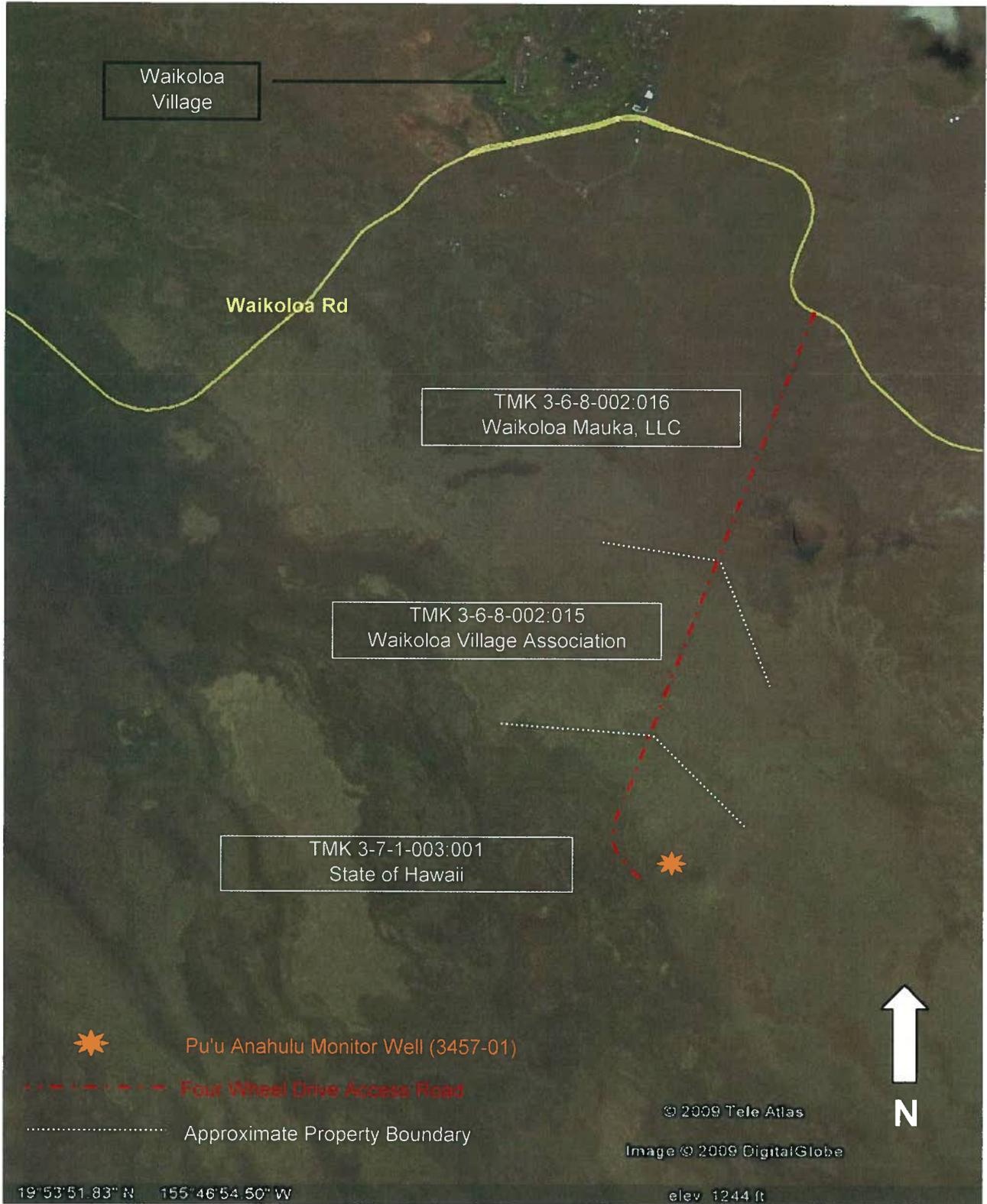
Exhibit A Location Map

Attachments: 1 Right-of-Entry Agreement: Waikoloa Village Association
2 Right-of-Entry Agreement: Waikoloa Mauka, LLC

APPROVED FOR SUBMITTAL:


LAURA H. THIELEN
Chairperson

EXHIBIT A - Location Map



RIGHT-OF-ENTRY AGREEMENT

THIS RIGHT-OF-ENTRY AGREEMENT ("Agreement"), between Waikoloa Village Association, hereinafter referred to as the "Grantor", and the State of Hawaii, by its Board of Land and Natural Resources on behalf of the Commission on Water Resource Management, hereinafter referred to as the "Grantee", executed on the respective dates indicated below, is effective as of _____, 2009,

WITNESSETH THAT:

WHEREAS, the Grantee requires access across a certain property owned by Grantor, located at Waikoloa, Hawaii TMK: 3-6-8-02:015 and hereinafter referred to as the Property, to access a well located on an adjoining parcel owned by the State of Hawaii, TMK 3-7-1-03:001, Grantee hereby requests access across the Property along the existing four-wheel-drive road as shown in Exhibit A.

NOW, THEREFORE, the Grantor and Grantee agree as follows:

1. Grant of entry. The Grantor hereby grants to the Grantee, its officers, employees, consultants and contractors, permission to enter upon the Property for the purpose of accessing TMK 3-7-1-03:001.
2. Grantee's responsibility. Relative to the Grantee's occupancy of the Property, the Grantee shall be responsible for damage and personal injury resulting from acts or omissions of Grantee's employees while acting within the scope of their employment to the extent that the Grantee's liability for such damage or injury has been determined by a court or otherwise agreed to by the Grantee. The Grantee shall pay for such damage and injury to the extent that funds have been authorized and appropriated by the Legislature for such purpose, and allocated.
3. No unreasonable interference. The Grantor agrees not to block or interfere with the Grantee's access to or use of the Property.
4. Term. The term of this agreement shall be from the effective date of this Agreement until terminated by either the Grantee or Grantor.
5. Amendment. This Agreement shall not be amended except in writing signed by the parties.

IN WITNESS WHEREOF, the parties execute this Agreement by their signatures, on the date below, to be effective as of the date first written above.

Under penalty of perjury, the undersigned representative of Licensor represents and warrants that such person is authorized to execute this Agreement on behalf Licensor and to bind Licensor to this Agreement.

Grantor: Waikoloa Village Association

By: Jim Whillock
Its: Community Association Manager

Grantee: STATE OF HAWAII

By: _____
Its: Chairperson, Board of Land and Natural Resources

Date: _____

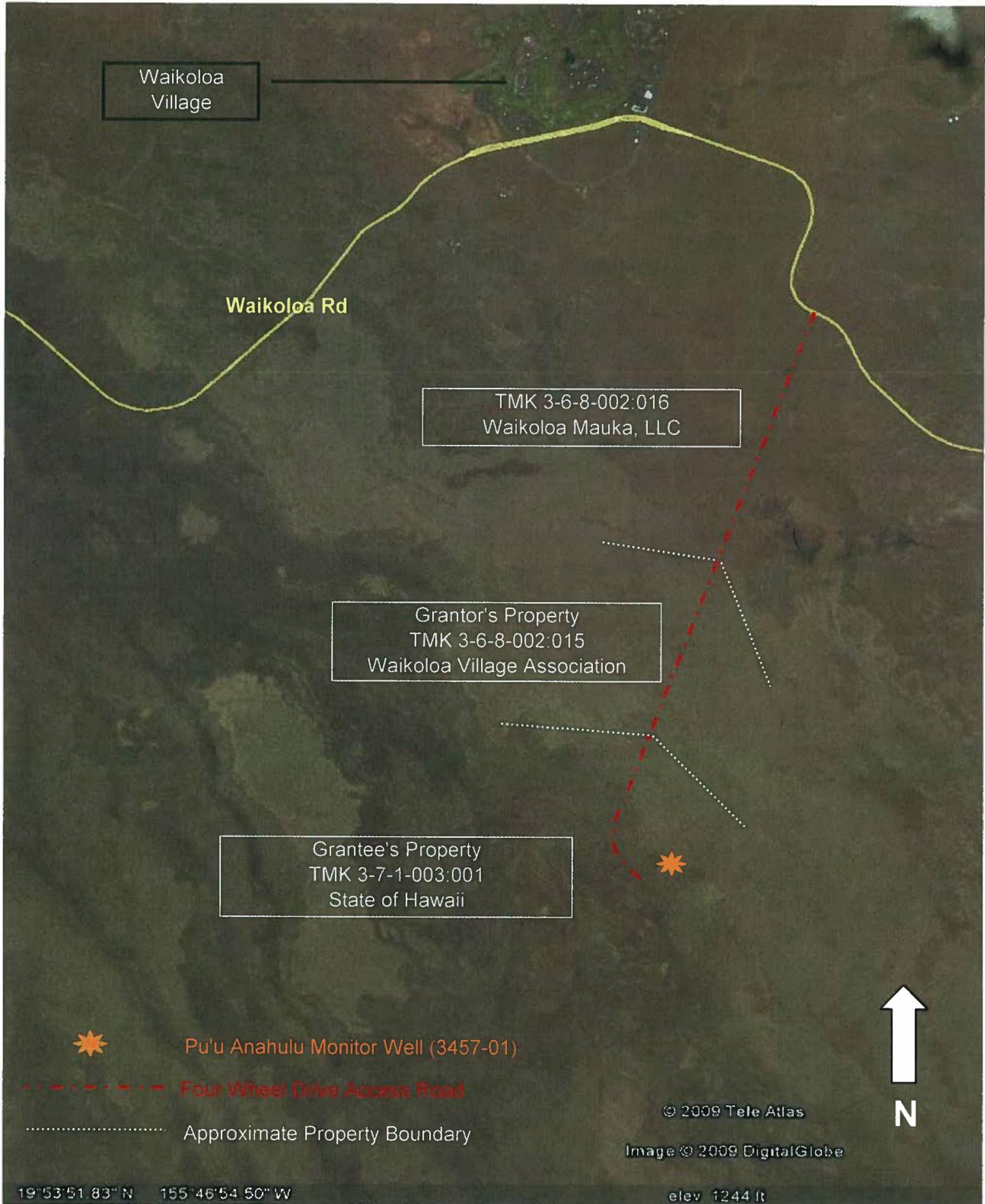
Approved by the Commission on Water Resource Management at its meeting held on (date)_____.

Approved as to form: _____
Deputy Attorney General

Dated: _____

Attachment 1

EXHIBIT A



RIGHT OF ENTRY AGREEMENT

This **RIGHT OF ENTRY AGREEMENT** (this "**Agreement**"), entered into this _____ day of _____, 2009 (the "**Effective Date**"), by and among **Waikoloa Mauka, LLC**, a Delaware limited liability company ("**Owner**"), the address of which is 431 N. Brand Blvd., Suite 201, Glendale, CA 91203, and the **State of Hawaii**, by its Department of Land and Natural Resources, Commission on Water Resource Management, the address of which is P. O. Box 621, Honolulu, Hawaii 96809 ("**Licensee**").

RECITALS

A. Licensee is the owner of that certain parcel of land located in Waikoloa, Island, County and State of Hawaii, identified by Tax Map Key No. (3) 7-1-3:01 ("**Licensee's Property**");

B. Owner is the owner of that certain parcel of land more particularly described as a portion of Lot 2-B, the same being a portion of Lot 2, as shown on File Plan 1172, filed in the Bureau of Conveyances of the State of Hawaii, and also identified by Tax Map Key: (3) 6-8-002: 016 (por.) ("**Owner's Property**"); and

C. Licensee has requested a right of access to Licensee's Property over an existing jeep road located on Owner's Property (the "**Access Road**") for the purpose of non-exclusive ingress and egress to Licensee's Property by Licensee and Licensee's employees and officers to monitor ground-water conditions in the State Well No. 5347-01 located on Licensee's Property. The Access Road is approximately shown on the aerial photograph attached hereto and made a part hereof as Exhibit A.

D. Other persons or entities have or may now or hereafter have the right to use the Access Road, including, but not limited to Edwin Deluz Trucking & Gravel, LLC, a Hawaii limited liability company ("**Quarry Licensee**") whose mailing address is P.O. Box 406, Paauilo, Hawaii 96776. Quarry Licensee uses the Access Road for access to a quarry located on a portion of Owner's Property more particularly described in that certain Quarry Site License (DeLuz Trucking) between Owner (as successor to Waikoloa Development Co., a Hawaii corporation) and Quarry Licensee, dated October 25, 2001, as the same has been or may in the future be amended (the "**Quarry License**").

E. Owner is willing to allow Licensee to enter upon and have access over and across the Access Road subject to the terms and conditions set forth below.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, Owner does hereby grant to Licensee and to the employees and officers of Licensee a nonexclusive right of entry over and across the Access Road solely for ingress and egress to Licensee's Property for the purpose of

monitoring, repairing, maintaining and using certain water wells owned by Licensee on Licensee's Property, subject, however, to the following terms and conditions:

1. Licensee and Licensee's employees and officers will abide by and fully comply with all laws, statutes, ordinances, and reasonable rules and regulations made by Owner or any governmental authority, while upon, occupying or using Owner's Property.

2. Licensee will not unreasonably interfere with any work being performed, or other operations being carried out, or use being engaged in on the Owner's Property, by, on behalf of, or authorized by Owner or any other person or entity having a right of access to or use of the Access Roadway and will take reasonable steps to ensure that the employees and officers of Licensee do not unreasonably interfere with such work, operations or use.

3. In the event that the activities of Licensee or the employees and officers of Licensee are in any way outside the scope of or in breach of this Agreement, Owner shall have the right to immediately terminate this Agreement after 30 days written notice without any liability or compensation whatsoever to Licensee.

4. Owner may at any time cancel this Agreement effective upon the delivery of written notice to Licensee at Licensee's address as above stated, by personal delivery of said notice to Licensee's employees or officers on Owner's Property, or by sending the same via certified mail, postage prepaid, or by electronic transmission, and any such notice shall be deemed conclusively to have been given or served upon the earlier to occur of the actual date of delivery, electronic transmission or three (3) days after the date of mailing.

5. Licensee acknowledges and agrees that the Access Road is used by Quarry Licensee for heavy trucking related to its quarrying activities. Owner shall not be liable in any way for any damage or injury resulting from and/or caused by the entry by Licensee or the employees or officers of Licensee upon and/or use of the Access Road or Owner's Property or the activities of Licensee or the employees or officers of Licensee thereupon, or any negligence or willful misconduct of Licensee or its employees or officers, and Licensee, on behalf of itself and every employee and officer exercising any rights hereunder, hereby fully and completely releases and discharges Owner and its subsidiaries, affiliates, agents, officers, directors, members, managers, member-managers, agents and employees (collectively, "Owner Parties") from any and all claims relating thereto. All property of Licensee or Licensee's employees and officers brought onto and/or used within the Access Road shall be so used at the sole risk of Licensee or such employee or officer. Under no circumstances shall Licensee or its employees, or officers park any vehicles on the Access Road or Owner's Property nor shall Licensee or any of employees or officers store or leave any equipment or personal property on the Access Road or Owner's Property. Licensee, on its own behalf, and on behalf of every employee and officer of Licensee exercising any rights hereunder, hereby assumes all known and unknown risks associated with its entry onto and use of the Access Road and Owner's Property.

6. This Agreement does not grant access across Owner's property to Licensee's contractors. Licensee shall secure a written agreement from Owner, either in the form of an addendum to this agreement or a separate Right-of-Entry agreement, for all contractors prior to allowing Licensee's contractors entrance to Owner's Property or the Access Road.

7. Licensee shall not be considered to be an employee or agent of Owner.
8. Licensee shall be responsible for damages or injury caused by Licensee and by Licensee's employees and officers in the course and scope of their employment to the extent that the Licensee's liability for such damage or injury has been determined by a court or otherwise agreed to by the Licensee. Licensee shall pay for such damage and injury to the extent permitted by law provided that an appropriation is enacted for that purpose.
9. Licensee, as a sovereignty is self-insured and therefore insurance, including but not limited to, public liability and property damage is not required.
10. Licensee shall repair any damage to the Access Road or Owner's Property caused by Licensee's access to, or use of, the Access Road.
11. Licensee accepts the Access Road in its "as is, where is" location, without representation or warranty of any type whatsoever. Owner hereby disclaims any representation or warranty regarding fitness of the Access Road for any particular purpose, whether or not known to Owner. Owner shall have no obligation to Licensee to maintain the Access Road or make the Access Road safe for Licensee's use. Owner reserves the right to relocate the Access Road, without Licensee's consent. Further, Licensee's rights hereunder shall be subject to any rights Owner may now or hereafter have to develop Owner's Property and Owner shall have no obligation to develop Owner's Property in such a way as to assure Licensee of continued access to Licensee's Property.
12. Neither this Agreement nor a memorandum hereof will be recorded against Owner's Property. This Agreement is, and at all times shall be, subject and subordinate to all liens and encumbrances now or hereafter recorded against Owner's Property, including, without limitation, any mortgages now or hereafter recorded against Owner's Property, without further consent or signature from Licensee.
13. Licensee and the employees and officers of Licensee shall coordinate its and their activities on and its and their access to and over the Access Road with any other person or entity now or hereafter holding any lease, license or other rights of possession or use of the Access Road, including, without limitation, Quarry Licensee.
14. Subject to the requirements of Section 12 above, time of access over the Access Road shall be between the hours of 7:30 a.m. to 4:30 p.m. on normal business days.
15. This Agreement may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts. For all purposes, duplicate unexecuted pages of the counterparts may be discarded and the remaining pages assembled as one document. The submission of a signature page transmitted by facsimile (or similar electronic transmission facility) shall be considered as an "original" signature page for purposes of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the Effective Date.

Under penalty of perjury, the undersigned representative of Licensor represents and warrants that such person is authorized to execute this Agreement on behalf Licensor and to bind Licensor to this Agreement.

Waikoloa Mauka, LLC,
a Delaware limited liability company

By: _____
Name: _____
Title: _____

"Owner"

Department of Land and Natural Resources
Commission on Water Resource Management

By _____
Chairperson: _____
Commission on Water Resource Management

"Licensee"

Approved by the Commission on Water Resource Management at its meeting held on (date)_____.

Approved as to form: _____
Deputy Attorney General

Dated: _____

Attachment 2

EXHIBIT A

