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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
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KEN C. KAWAHARA, P.E.
DEPUTY DIRECTOR

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

February 17, 2010
Honolulu, Oahu

Fat Law's Farm, Inc.
APPLICATION FOR A NEW WATER USE PERMIT
Waiahole Ditch System, WUP No. 871
Future (Agricultural) Use for 1.220 mgd on TMK 9-2-004:010
Kunia, Oahu

APPLICANT / USE LANDOWNER:

Fat Law's Farm, Inc.
91-1023 Kaikoele Street
Ewa Beach, HI 96706

SOURCE LANDOWNER(S):

Agribusiness Development Corporation
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

-and-

State of Hawaii
Department of Land and Natural Resources
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

SUMMARY OF REQUEST:

The applicant is requesting that the Commission on Water Resource Management (Commission) approve a water use permit for an allocation of 1.220 million gallons per day (mgd) of non-potable ground water from the Waiahole Ditch System to supply 329 acres of diversified agriculture.

LOCATION MAP: See Exhibits 1a & 1b

BACKGROUND:

On March 4, 2009, Fat Law's Farm, Inc. submitted a completed water use permit application to the Commission on Water Resource Management (Commission). Additional information regarding the source, use, notification, and objections is provided in Attachment A.

On April 13, 2009, EarthJustice submitted objections to this application on behalf of Makawai Stream Restoration Alliance and Hakipuu Ohana. (Exhibit 2)

On April 27, 2009, the applicant responded to the objections to this application. (Exhibit 3)

Two of the three public hearings were held on July 7, 2009 and July 27, 2009.

During October 2009, staff was informed by the Attorney General's office that Water Use Permit applications for new use are not required to have public hearings when there are objections.

On December 18, 2009, a final public hearing session was held. At the close of the Public Hearing, EarthJustice requested a Contested Case Hearing, followed by a written request received on December 28, 2009.

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

Through the Waiahole Ditch System Contested Case Hearing, the Commission recognized a total amount of 15 mgd of ditch water available for offstream uses from the ditch system. Individual existing water use permits in this system are shown in Exhibit 4. A summary of the current available water conditions in the system is provided in Table 1:

Table 1. Waiahole Ditch System

<u>ITEM</u>	Waiahole Ditch System (mgd)
Available for offstream uses (Sustainable Yield)	15
Less: Other Existing Water Use Permits (shown in Exhibit 4)	12.440
Reservation to DHHL	0
Subtotal (Current Available Allocation)	2.560
Less: Other Completed Applications	0.590
Less: This Application	1.220
Subtotal (Potential Available Allocation/Allocation Deficit)	0.750

Based on this information, water is available from the allowable offstream supply from the Waiahole Ditch System to meet this request.

However, written public comments submitted during the objection period and oral testimony provided at the July 7, 2009 public hearing, raised issues regarding alternative sources of water rather than relying on the current available ditch water as shown above in Table 1. These issues are discussed in the following analysis section (2) of this submittal under the reasonable and beneficial criteria analysis. Further, management strategies to reduce other allocations (thereby adding water back into the Current Available Allocation described in Table 1) are discussed in Section (4) of this application.

(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 seeks to use non-potable ground water from the Waiahole Ditch System for irrigation of various crops under diversified agriculture. The application has outlined these crops, and their respective acres and duties over a net acreage of 329 acres on TMK 9-2-004:010. This parcel is within the former Campbell Estate lands TMK 9-2-004:001.

II. Quantity Justification

The applicant is requesting a total of 1.22 mgd for the crops and acreages listed in their application based on estimates made by irrigation experts from Crop Care Hawaii and Agtech Pacific. There were 17 different crops proposed to be irrigated on a rotating schedule using drip irrigation. Table 2 lists these crops and the “best estimate” duties made by the consultants for the applicant.

Since its presentation to the Commission in April 2008, the Commission staff has used an ArcGIS based numerical simulation model, created in conjunction with the College of Tropical Agriculture and Human Resources (CTAHR), from the University of Hawaii, as a *guideline* to help review irrigation requirements for proposed water use permit applications. Most applications do not have the level of irrigation analysis as provided by this application. Nevertheless, it is useful to use the Irrigation Water Requirement Estimation Decision Support System (IWREDSS) model for comparative purposes. Table 2 also lists the “best estimate” duties made by IWREDDSS alongside the applicant’s estimates.

Table 2. comparison of applied for and CWRM calculated duties

Crop	Applicant Duty (gpd/acre)	CWRM Duty (gpd/acre)	% difference	acres	Applicant demand (gpd)	CWRM demand (gpd)
Basil	3,566	2,704	-24%	108	385,115	292,032
Cucumber	3,566	2,717	-24%	14	49,922	38,038
Long Beans	3,722	3,051	-18%	6	22,334	18,306
Bittermelon	3,566	2,717	-24%	8	28,527	21,736
Chives	3,566	2,717	-24%	3	10,698	8,151
Long Eggplant	3,722	3,051	-18%	6	22,334	18,306
Galonga	3,722	3,493	-6%	8	29,779	27,944
Malongai	3,566	3,186	-11%	20	71,318	63,720
Taro Leaf	4,389	4,252	-3%	30	131,682	127,560
Taro	4,389	3,354	-24%	12	52,673	40,248
Banana	3,998	2,249	-44%	20	79,953	44,980
Betal Leaf	3,566	2,732	-23%	12	42,791	32,784
Lalot	3,566	2,759	-23%	2	7,132	5,518
Curry Leaf	3,566	3,160	-11%	20	71,318	63,200
Fruit Trees	3,566	2,714	-24%	50	178,294	135,700
On Choy	3,566	2,714	-24%	5	17,829	13,570
Peppermint	3,566	2,721	-24%	5	17,829	13,605
total (gpd)					1,219,528	965,398
total (mgd)					1.220	0.965

Both analyses consider issues regarding localized climatic conditions, soils, crops, and irrigation methods and practices (drip), and it is not unexpected that these “best estimate” duties differ as several reasonable assumptions vary in these complex analyses. One example is that many of the crops listed do not have evapotranspiration crop factors used in both analyses and substitute crops need to be used. Another example is that localized climatic conditions differ as the applicant used data from the closest weather station whereas the IWREDDDS model uses this station along with others to interpolate and synthesize weighted data at the site. Crop growth stage considerations, crop cycles, irrigation practices to field capacities, and the net area over which average duties are based differ amongst the analyses as well.

The estimates provided by the applicant (1.22 mgd) and calculated by CWRM (0.97 mgd) differ by approximately 20%.

III. Efficiency of Use

Based on the analysis in section II, the projected water use will be efficient as drip irrigation is specified as the primary irrigation practice, estimated at 85% application efficiency to meet irrigation needs. These were considered in the calculated duties in Table 2.

IV. Analysis of Practical Alternatives

The applicant has identified several alternatives to the proposed use of water from the Waiahole Ditch System. An analysis of each of the alternatives is as follows:

1. Del Monte Water System Wells

A Declaration of Covenants (DoC) was created by Campbell Estate to form the Kunia Water Association (KWA) with various landowners in the area (refer to Exhibit 5). This DoC describes the shared responsibility of costs associated with delivering water from the Del Monte System Wells, Wells 1 (2703-01 & -02), 3 (2803-05), & 4 (2803-07) to each of the landowners.

The applicant is among the landowners described in the DoC. The land owned by the applicant is designated as Section 8.

Well 1 (2703-01 & -02) is associated with a superfund site and per the Commission’s June 20, 2001 decision for WUP 507 for Del Monte for 1.075 mgd, both the U.S. Environmental Protection Agency (EPA) and State of Hawaii Department of Health (DOH) must approve the use of these wells prior to actual irrigation use. Currently, the water from this well is remediated to drinking water quality, and can be supplied to the property owned by the applicant. However, the duration of the availability of this remediated water is not currently known. Further, upon the final remediation of this well, production will need to stop for a protracted period, making it’s availability for a prolonged period of time uncertain.

Wells 3 and 4 (2803-05 & -07) are potable and have a current allocation of 3.960 mgd through Water Use Permit No. 870 for former Del Monte irrigation needs since 2001. An issue with using these wells as an alternative is that Item D. of the Waiahole Contested Case Hearing D&O III states that “the Commission’s prioritizing requires the use of non-potable ditch water instead of potable leeward ground water for agricultural irrigation of Campbell Estate’s lands.” However, because this current existing allocation from the wells is for agricultural use since April 11, 1980 under the BLNR approval prior to the creation of the CWRM, and the applicant has legal agreements to use these wells through the DoC, staff feels that it is an appropriate longstanding and continuing potable alternative to ditch water for irrigation needs.

The applicant has stated that the well water is prohibitively expensive compared to using the gravity fed Waiahole Ditch. Water from the wells are estimated to cost between \$1.47 to \$2.04 per 1,000 gallons while water from the Waiahole Ditch is estimated at \$0.517 per 1,000 gallons. This means that the well water costs 3 to 4 times more than the cost of the ditch water.

Another complicating factor regarding the availability of water from the wells is the incorporation of the State lands into the KWA. If the state participates in the association as described in the DoC, the applicant is entitled to 12.03% of the total water from wells 1, 3 and 4. If the state opts not to participate, the applicant is entitled to 13.74% of the water from wells 1, 3 and 4. Staff has consulted with the Land Division, who indicate that although there is no formal agreement for the State to participate in the KWA, that the State intends to work out an agreement for participation. This means the applicant is entitled to between 0.606 and 0.692 mgd from these wells, based on the Declaration of Covenants, and the assumption that 100% of the allocation from WUPs 507 & 870 ($1.075 + 3.960 = 5.035$ mgd) would be used from the three wells.

2. On-Site Well

The applicant reviewed drilling a well on-site within either the Ewa/Kunia or Waipahu/Waiawa Aquifer System Areas. However, capital cost estimates of at least \$2 million dollars and operating costs make this alternative very expensive. Additionally, the Ewa/Kunia Aquifer System does not have enough unpermitted allocation (0.540 mgd) available to meet the applicant’s needs. There is 19.144 mgd of unpermitted water in the Waipahu/Waiawa Aquifer System Area; however, in D&O III the CWRM specified that the non-potable ditch water be used instead of potable leeward ground water for agricultural irrigation of Campbell Estate’s lands. Unlike the pre-existing Del Monte Wells, this is a new source that would run counter to the D&O decision. Also, the proximity of the Well 1 superfund site also raises issues of liability to the applicant should the EPA and DOH decide such a new well impacts the remediation efforts.

3. Municipal sources

The applicant has contacted the Honolulu Board of Water Supply and such water is not available for the proposed use for a variety of reasons. Service area limitations and using potable water for irrigation are the main reasons. Costs were not discussed.

4. Wastewater reuse

The applicant represents that the majority of crops listed cannot use reuse water. Though possible to install a dual system the property is over 2 miles away from the nearest reuse water source and would be expensive.

5. Desalinization

Desalinization costs are considered prohibitive.

6. Surface water

There is no alternative surface water in the area other than the Waiahole Ditch System

(3) Interference with other existing legal uses

The applicant argues that the existing Commission decisions for the Waiahole Ditch System through D&O I, II, & III allow for this use and, therefore, do not interfere with other existing legal uses from the ditch or instream 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.”

Additionally, written public comments / objections (see Exhibits 2 and 3) and oral testimony from the July 7, 2009 public hearing to this application (other than state & county general plans and land use designation comments noted in criteria (5)) have been submitted and are summarized as follows:

1. Use will create 40 new jobs.

2. Commission should realize that transfers of agricultural business take time thus non-use issues should be cognizant of this fact.
3. Alternative analysis is not sufficient – Del Monte Wells higher cost is not the sole criteria to define practicability and is inflated.
4. Before any “unpermitted” Waiahole Ditch System water is allocated the Commission *should* first:
 - a. Set permanent instream flow standards for Windward streams,
 - b. Review, adjust, and re-allocate non-used portions of all other existing allocations,
 - c. Require ADC to reduce the permitted waste,
 - d. Additional excessive waste is already occurring,
 - e. Determine if Campbell transfers of Waiahole water are legal,
 - f. Go through rulemaking first before it can be made available for allocation,
 - g. Give all unpermitted water to windward streams,
 - h. Review freshwater contribution to the ocean,
 - i. Address pending reservation requests from the system,
 - j. Add a cost value on native species in windward streams to Waiahole Ditch System cost estimate.
 - k. Establish Rules for Native Hawaiian Rights section of the Water Code.
5. Public Hearings should not be closed, which would force a contested case hearing until more information and/or agreement on alternatives can be reached.

Many of the issues raised have already been discussed and addressed by the Waiahole Decision and Orders (D&Os). However, from the public hearings and discussions the priority issue for EJ has been that that the Commission should not allocate from the 2.43 mgd in unpermitted water as defined in the Commission’s D&O.

Waiahole Contested Case Decision and Order III, section H, states that:

The 2.43 mgd in unpermitted water will be diverted into the windward streams until such time as it is permitted for offstream use.

EarthJustice had made it clear that their intention is to request a contested case hearing to address further instream uses if the Commission does not attempt to address underutilized permitted uses or current waste since instream use values are at risk.

Revoking Unused Portions of Existing Allocation

Regarding item 4b., the unused portions of existing permitted allocations from the Waiahole Ditch System, the applicant had originally researched this by requesting other permitted users on the ditch to voluntarily relinquish any of their unused allocations. No user responded affirmatively to this request. Exhibits 6a through 6l graphically show the history of reported uses from permitted users and Table 3 below summarizes the 4-year non-use for each based on the 12-month moving average (12-mav).

Table 3: Waiahole Ditch System: Current 4-Year Non-Use (gpd)

WUP no	Permittee	Date	Allocation	12-mav	4-yr non-use
619	Castle and Cooke	Oct-09	2,130,000	1,446,029	683,971
630	State of Hawaii	Sep-09	150,000	60,925	89,075
631	Mililani Memorial Park	May-09	140,000	109,669	30,331
632	Mililani Golf Course	Aug-09	250,000	181,283	68,717
634	Nihonkai		480,000	n/a	0
636	KSBE	May-09	170,000	15,959	154,041
775	Puu Makakilo	Jan-09	750,000	15,840	734,160
804	Robinson Kunia Land	Oct-09	2,390,000	1,900,188	489,812
807	HARC	Jul-09	260,000	91,523	168,477
808	Pioneer Hi-Bred		470,000	n/a	0
827	Edmond Olson Trust	Oct-09	24,000	2,927	21,073
828	Monsanto	Feb-09	2,636,000	1,592,938	1,043,062
860	Syngenta	Aug-09	590,000	481,680	108,320
	Total available				3,591,039
	Total available (mgd)				3.591

refer to Exhibits 6 a-l for charts showing reported usage.

With the exceptions of Nihonkai, who is using in excess of their allocation, and Pioneer Hi-Bred, who has not had their permit for four years (due to transfer from the Estate of James Campbell on 7/13/06), the last column shows the 4-year non-use amounts for each permittee, with an overall total of 3.591 mgd.

It has not been the Commission's past policy to revoke allocations prior to acting on pending new use applications when there is water available. If there is no unpermitted water available, the Commission must initiate revocation actions if it seeks to accommodate of new use. In past Commission revocation actions (e.g. revocations to Oahu Sugar, Haseko, and Waialua Sugar) where no water was available the first step was to seek voluntary reductions from existing permittee, which worked in making water available for new applicants. The Commission has never had to initiate revocations for an active water use permittee to involuntarily free up water for a new user.

If the Commission were to defer action on this applicant to revoke 4-year non-uses first, this would be the first time the Commission seeks to revoke active water use permittees prior to acting on a new use when water is otherwise available. Since the current Waiahole permittees are not willing to voluntarily relinquish any part of their unused allocation, the Commission would have to initiate revocation proceedings to reduce the allocations accordingly on a case-by-case basis. Each permittee would be entitled to proper hearings including contested case hearings, if required. Staff does not believe this is a burden the applicant should have to bear when water is readily available according to D&O III. Also, it should be clear that even if the Commission revoked all 4-year non-use, actual offstream uses would still increase should the Commission approve the applicant's request and may required Gate 31 to remain open for longer periods of time.

Reducing ADC Waste

Regarding item 4c., State Agribusiness Development Corp. (ADC) Waste is in two parts: 1) scheduled fixes, and 2) current measured waste. Scheduled fixes per D&O III is currently a separate matter before the Commission, with the latest action occurring on May 20, 2009 where the permitted waste had been reduced to 2.000 mgd and further reductions to 1.420 mgd pending timeline resolution between ADC and the U.S. Army Corps of Engineers regarding fixes to reservoirs 155 & 225 with the latest projection to be completed in 2014 as reported to the Commission on September 2009.

For current measured waste, according to the D&O III, system losses are to be counted against ADC's allocation only when the gate is open and diverting flows in the ditch from windward tunnels. When the Gate 31 is closed system losses do not count against ADC's permit as all windward water from the system is returned to windward streams. Also, when Gate 31 is closed any flows that are developed within the Koolau transmission tunnel cannot flow back uphill to the windward side and it is beyond ADC's control to reduce losses that may occur in this situation above the difference between flows at Adit 8, metered end uses, and ADC permitted waste.

Exhibit 7 shows the reported losses to date from ADC that are calculated as the difference between metered flow at Adit 8 and actual end uses. Prior to September 2006 ADC was unable to segregate open and closed flows. It appeared that excessive waste was occurring. Beginning in September of 2006, ADC was able to segregate system losses with respect to when the windward Gate 31 was open and closed through use of a Supervisory Control and Data Acquisition (SCADA) system. Based on the segregated flows system loss appear to have been decreasing and is currently near the current permitted system loss allocation to ADC. Therefore, it appears that any unused permitted water, approximately 5-7 mgd, is being returned to windward streams when the gate is open.

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

The proposed uses are in the State **Agricultural** District, and the county zoning is **AG-1**. Therefore, the proposed use is consistent with these land use designations.

Normal agency review includes:

- 1) **STATE**: 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 (DDHL), and Land Use Commission (LUC); and the Office of Hawaiian Affairs (OHA)
- 2) **COUNTY**: the County's County Council, Department of Planning and Permitting, and the Department of Water Supply;

No comments were submitted from these agencies suggesting that the proposed use is inconsistent with the current land use designations.

Therefore, this application meets the state & county general plans and land use designations.

(6) County land use plans and policies

Again, no comments or objections from the county or state agencies mentioned in item (5) above have been made through this review to indicate the proposed use is inconsistent with county (or state) land use plans and policies.

Therefore, this application meets 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) and the Office of Hawaiian Affairs have reviewed this application and made no comments or objections. Further, 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. Also, since June 21, 2000, DHHL has had a reservation of 1.358 mgd, tracked as WUP 566, that has yet to be used by DHHL.

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

Other issues

There has been a strong interest of the applicant and objectors to avoid a contested case hearing as much as possible as evidenced by the continued public hearing sessions. Recently, staff has been advised by the attorney general's office that new water use permit applications do not require a public hearing; therefore, the requirement to request a contested case hearing before the close of a required public hearing under 13-167-52(a) does not apply. A request for contested case hearing can be made prior to and at the regular Commission meeting. This major change has complicated processing of this application as public hearings were already initiated, but does not reduce the due process rights of the applicant or public. Nevertheless, EarthJustice had requested a contested case hearing at the close of the final public hearing and provided the required written request.

In order to avoid a contested case hearing, staff proposed a calculation of the reasonable and beneficial allocation from Waiahole Ditch System for the applicant. The calculation is as follows:

- 1) The allocation should be based on the average between the applied for allocation of 1.220 mgd, and staff's irrigation model estimate of 0.965 mgd. This would be **1.093 mgd**.
- 2) The amount of the water available to the applicant from the Kunia Water Association should be based on the following premises:

- a) Water from the wells should be calculated as follows: 50% of the water from the allocation issued to Well 1 (1.075 mgd) should be used for KWA. Staff would normally make the argument that 0% of the water from Well 1 is available because of the uncertainty of remediation dates. However, both the applicant and objector agree that 50% of this allocation can be used, and thus reduce the need from Waiahole Ditch. Further, one can assume that 100% of the water is available from Wells 3 and 4 (3.960 mgd). Therefore, the total amount of water available from the wells to the entire KWA would be $(0.5 * 1.075 \text{ mgd}) + (3.960 \text{ mgd}) = 4.498 \text{ mgd}$.
 - b) The percentage of the water that the applicant is entitled to is based on the state's participation in the association, which would be 12.03%. Therefore, the total available water from Wells 1, 3 and 4 would be $(0.1203) * (4.498 \text{ mgd}) = \mathbf{0.541 \text{ mgd}}$.
- 3) Therefore, the total amount of water being that is now requested by the applicant from the Waiahole Ditch System is $1.093 - 0.541 = \mathbf{0.552 \text{ mgd}}$.

Finally, based on the above, attorneys for the applicant have provided a written letter of agreement and waiver of EJ objections and request for contested case hearing (see Exhibit 8). The final issue is that the agreement is for an allocation of 0.551 mgd, which is less than staff's assessment.

RECOMMENDATION:

Staff recommends that the Commission approve the issuance of water use permit no. 871 to Fat Law's Farm Inc. for the reasonable and beneficial use of 0.551 million gallons per day (based on a 12-month-moving average) of water for agricultural use on TMK 9-2-009:010. from the Waiahole Ditch System, subject to the standard water use permit conditions listed in Attachment B and the following special conditions:

1. Should an alternate permanent source of water be found for this use, then the Commission reserves the right to revoke this permit, after a hearing.

2. 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.

Respectfully submitted,



KEN C. KAWAHARA, P.E.
Deputy Director

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

Exhibit(s): 1a and b (Location Map & System Map)
 2 (EarthJustice Objections)
 3 (Fat Law Responses to Objections)
 4 (Existing Waiahole Ditch System Water Use Permits)
 5 (Declaration of Covenants)
 6a to 6l (Unused Waiahole Ditch System Permitted Use Charts)
 7 (ADC Permitted System Loss Use Charts)
 8 (Letter of Agreement and Waiver of Objections and Contested Case Hearing)

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN
Chairperson

WATER USE PERMIT DETAILED INFORMATION**Source Information**

SYSTEM:	Waiahole Ditch System, Oahu
Total offstream uses permitted	15 mgd
Existing water use permits:	12.440 mgd
Unpermitted Offstream Amount:	2.560 mgd
Total other pending applications:	0 mgd
This application:	1.220 mgd

Use Information

Quantity Requested:	1.220 mgd
Future Type of Water Use:	Agricultural
Place of Water Use:	TMK: 9-2-004: 010
Current 12-Month Moving Average:	3.465 mgd

Public Notice

In accordance with HAR §13-171-17, a public notice was published in the Honolulu Advertiser on March 20, 2009 and March 27, 2009 and a copy of the notice was sent to the Mayor's office. Copies of the completed application were sent to the Department/Board of Water Supply, Planning Department, Department of Land Utilization (Oahu only), Department of Health, Department of Hawaiian Home Lands, Office of Hawaiian Affairs, the various divisions within the Department of Land and Natural Resources, and other interested parties for comments. Written comments and objections to the proposed permit were to be submitted to the Commission by April 13, 2009.

STANDARD WATER USE PERMIT CONDITIONS

1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)
2. The right to use ground water is a shared use right.
3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
 - a. Can be accommodated with the available water source;
 - b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
 - c. Will not interfere with any existing legal use of water;
 - d. Is consistent with the public interest;
 - e. Is consistent with State and County general plans and land use designations;
 - f. Is consistent with County land use plans and policies; and
 - g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).
4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.
5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
 - a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
 - b. The interim or permanent instream flow standard, as applicable, must be amended.
6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.
7. The water use permit application and submittal, as amended, approved by the Commission at its February 17, 2010 meeting are incorporated into this permit by reference.
8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.
9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
 - a. protect the water sources (quantity or quality);
 - b. meet other legal obligations including other correlative rights;
 - c. insure adequate conservation measures;

- d. require efficiency of water uses;
- e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
- f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
- g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

- 10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
- 11. This permit shall be subject to the Commission's periodic review of the Koolauloa Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Koolauloa Aquifer System, or relevant modified aquifer(s), is reduced.
- 12. A permit may be transferred, in whole or in part, from the permittee to another, if:
 - a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
 - b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

- 13. The use(s) authorized by law and by this permit do not constitute ownership rights.
- 14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances which will affect the permittee's water use.
- 15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Koolauloa Ground-Water Management Area.
17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.
18. Special conditions in the attached cover transmittal letter are incorporated herein by reference.
19. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

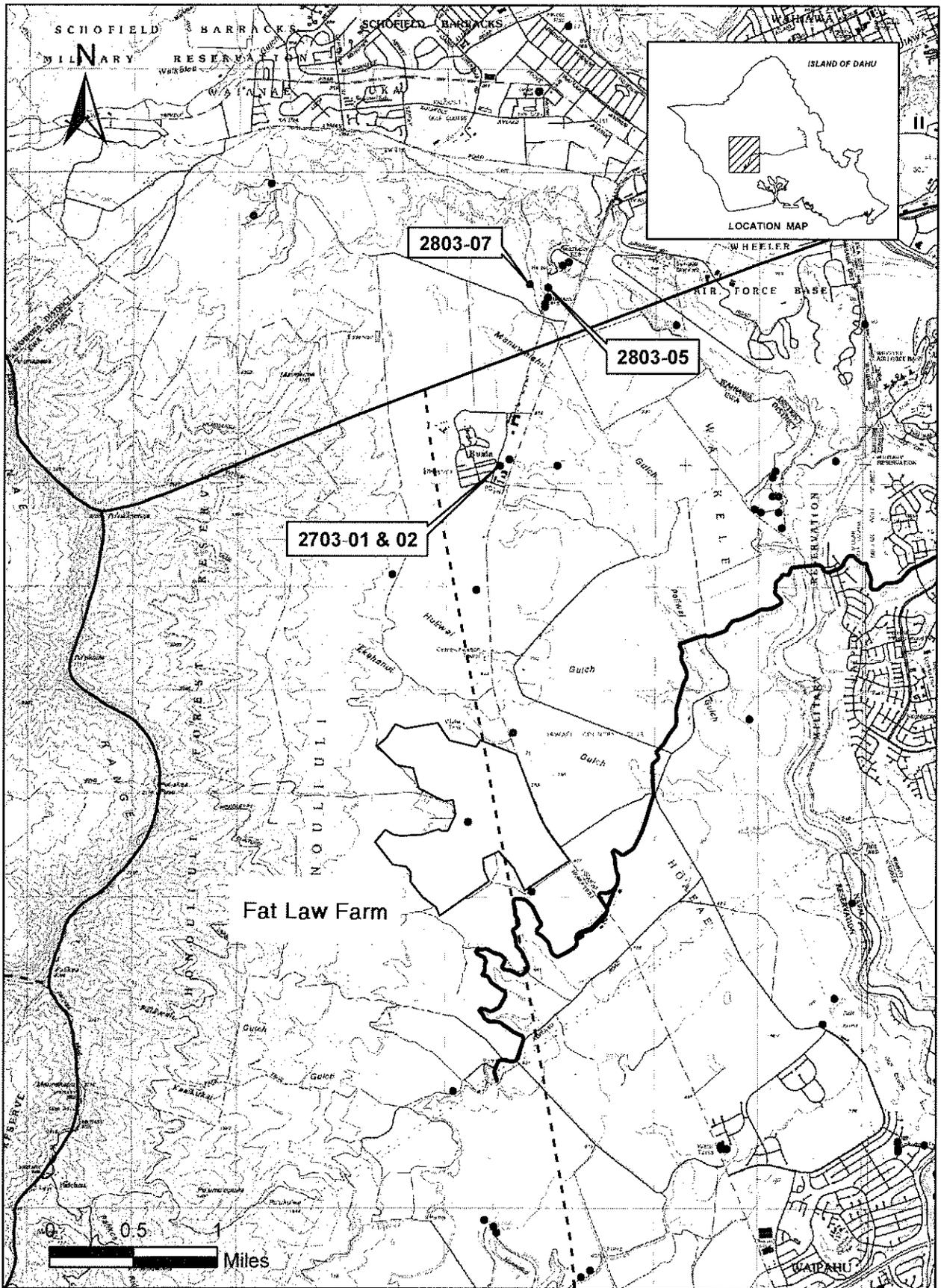


EXHIBIT 1



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

April 13, 2009

HAND DELIVERED

Commission On Water Resource Management
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813

Re: Water Use Permit No. 871

Dear Sir or Madam,

On behalf of Makawai Stream Restoration Alliance and Hakipu`u Ohana, Earthjustice hereby objects to Water Use Permit Application no. 871 ("WUPA"), submitted by Fat Law's Farms, Inc., Tony and Manyvone Law, Law Tieng's Farm, and Hae and Phouaugphet Viengkhou. The applicants seek a permit for 1.22 mgd from the Waiāhole Ditch System. The application fails to meet the Water Code's fundamental requirement that an application establish that there exist no practicable alternatives to diverting stream flows for private use. In fact, the application itself indicates that the applicants have practicable alternatives in the form of existing wells, but would prefer to use water from the Ditch System because it may be marginally less expensive. This does not comply with the applicable legal standard. The application therefore must be denied.

The requirement that an applicant establish a lack of practicable alternatives is not a formality. The Hawai'i Supreme Court, in In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000) ("Waiāhole I"), held that "permit applicants must ... demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of "reasonable-beneficial." 94 Haw. at 161, 93 P.3d at 473 (emphasis added). In In re Water Use Permit Applications, 105 Hawai'i 1, 93 P.3d 643 (2004) ("Waiāhole II"), the Court reiterated and underscored this requirement. 105 Hawai'i at 15, 93 P.3d at 657. The burden of proving the lack of alternatives is on the applicant; if that burden is not met, the application must be denied. Waiāhole II, 105 Hawai'i at 16, 93 P.3d at 658.

In Waiāhole I, the Court criticized the Commission for failing to "answer, with any reasonable degree of clarity, why it is not practicable for Campbell Estate to use ground water permitted to it and not otherwise in use as an alternative to diverting the sole source of water for windward streams, especially given the still unsettled state of the instream flow standards." 94 Hawai'i at 165, 9 P.3d at 477 (emphasis added). The applicants here fail to answer the same question.

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RESOURCE MANAGEMENT

The standard for whether an alternative is practicable, according to both the Commission and the Supreme Court, is whether it is "available and capable of being utilized after considering cost, technology, and logistics." Waiāhole II, 105 Hawai'i at 19, 93 P.3d at 661 (quoting D&O II). The applicants offer an alternatives analyses (WUPA, Exh. I), but it is apparent that the applicants' definition of practicability is not the standard quoted above, but merely whether the alternative carries the lowest possible cost to the applicants. The applicants fail to offer any other rationale for their conclusion that the alternatives they analyze are not practicable; they plainly view the alternatives analysis as a pro forma exercise, with the foregone conclusion that they are entitled to water from the Ditch System as long as their analysis purports to show it is the source costing them the least. But the Hawai'i Supreme Court established long ago that the Water Commission "is not obliged to ensure that any particular user enjoy a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." Waiāhole I, 94 Hawai'i at 165, 9 P.3d at 477.

For example, the applicants offer no evidence, analysis or even argument showing any relationship between the cost of water (according their own analyses) and any level of projected viability. That is, the applicants do not even attempt to establish they could not operate profitably if they were required to pay the cost they estimate for water from existing Del Monte well nos. 1, 3 and 4, or that using that alternative would be unduly burdensome in any way. That cost, according to the applicants, ranges from \$1.47 per thousand to \$2.04 per thousand, depending on the volume pumped. WUPA, Exh. I at 1. At the lower end of this range, the cost is comparable to the cost of agricultural-rate water from the Board of Water Supply, which currently is \$1.05 per thousand gallons (above the first 13,000 gallons per month, at \$2.46 per thousand), and which soon will cost \$1.13 per thousand (and \$2.66 for the first 13,000 gallons per month).¹

It would appear that the applicants themselves have been willing and able to pay the agricultural rate for water while operating similar farms profitably on O'ahu. Applicant Fat Law's Farm states it operated first in Wai'anae, then in Kahuku, and for over a decade has been farming in the 'Ewa Beach area, where it currently plants on over 100 acres. Fat Law's Farm reports it has been successful and profitable, expanding its acreage in 'Ewa Beach, with gross sales steadily increasing, and according to its web site it recently leased 150 acres in Hainan, China. Applicant Tony and Manyvone Law farm 35 acres in Kahuku, and applicant Law Tieng's Farm farms 60 acres in Kahuku.² The applicants have been profitable enough that they now want to expand operations to

¹ <http://www.hbws.org/cssweb/display.cfm?sid=1175> (last viewed April 1, 2009).

² See WUPA, Exh. B; see also <http://www.fatlawfarm.com> (last viewed April 1, 2009).

April 13, 2009

Page 3

over 300 acres in Kunia. Applicants do not disclose the sources of water they have been using in Kahuku and 'Ewa Beach, or the cost of that water. Presumably, they have been using water from the Board of Water Supply. Certainly, many of their competitors pay that rate. Not only do many competing farmers on O'ahu pay it, but the rates being paid by Neighbor Island farmers, who also must incur shipping costs these applicants avoid, are often substantially higher.

Unable to show that water from these existing wells is not practicable as a factual matter, the applicants argue that it has already been established that well water is not a practicable alternative, as though the issue were somehow foreclosed. Thus, the applicants assert that, because the Commission years ago issued a permit to irrigate the subject lands with water from the Waiāhole Ditch (Water Use Permit no. 514, issued to Campbell Estate), "it has already been established that no reasonable alternative water source exists." WUPA, cover letter at 2; Exh. I (Table 3, Alternatives Analysis) at 3.

This distorts the law and the record. The Commission's issuance of a different permit fifteen years ago to irrigate these lands among thousands of other acres once owned by Campbell did not purport to determine, once and for all, that any occupant of the property need never again show practicability of alternatives. Nor could the Commission have done so. The determination must be made when an application is submitted, and will depend on the specific conditions at that time—the nature of the use, the economics of the business, the cost of alternatives to the permit applicant, the cost of water to its competitors, the available technology, and other factors.

When it issued Permit no. 514 to Campbell for its lands in Kunia, the Commission made no findings concerning the practicability of Del Monte's wells or any other alternatives. During the original contested case hearing, after Brian Nishida acknowledged that Del Monte had wells that could irrigate the lands at issue, Commissioner Miike noted, "So it's not a question of economic viability, you just want a cheaper source of water for that pineapple production, it's not that you cannot produce pineapples now, you have another water source, right?" TR, 12/12/1995, p. 213, ll. 4-7. Mr. Nishida responded that Del Monte's pineapple production had not been profitable, but had recently become "marginally profitable" as a result of "very aggressive efforts." *Id.*, p. 213, ll. 11-20. The current applicants cannot credibly maintain that having to compete on a level playing field with respect to water costs with the other farmers growing similar crops would prevent them from operating a viable business; they have already demonstrated otherwise in Kahuku and 'Ewa Beach. The Commission is not required to grant these private applicants a competitive advantage with a public trust resource, and should not do so.

Moreover, the applicants' cost estimates for Del Monte well nos. 1, 3 and 4 are substantially inflated. Specifically, the applicants include in their estimate the cost of no less than four full-time employees—a supervisor/administrator and three technicians, at a total cost of almost \$200,000 per year, including benefits—to do nothing but keep

these wells running. WUPA, Exh. I at 3. Compare this to the estimate provided by Campbell's expert witness in the Waiāhole Ditch contested case proceedings, Joseph Vierra with Belt Collins. During the second remanded hearings, Mr. Vierra testified that, whether Campbell used EP 5 & 6 or drilled new wells, "[i]n addition to the power cost, an annual cost of \$30,000 has been included for semi-weekly inspections and adjustments of the pumps and controls and to make miscellaneous purchases of lubricating oil and other items." Exh. B-RD-46 at 7 (attached hereto as Exh. 1).

If Mr. Vierra's estimated labor cost is substituted for the one supplied by these applicants, the **highest total** cost of water from Del Monte well nos. 1, 3 and 4, as otherwise calculated by the applicants, drops to only \$1.50 per thousand for 1 mgd, and decreases further at higher pumping volumes. Moreover, drawing water from the Waiāhole Ditch system has its own associated labor costs; someone must monitor and maintain the distribution system whether the water emerges from a well or from the Ditch.

It would be particularly inappropriate for the Commission to disregard the flaws in the applicants' WUPA in view of the pending issues concerning the interpretation and application of the Water Code's requirements for alternatives. One of the central points in the pending appeal from the Commission's Decision and Order III is the Commission's failure to require Campbell Estate to use well water to irrigate its lands, despite it having been established that using that alternative is technically and economically feasible, and despite the Court having previously reversed the Commission's grant of a permit to Campbell for "fail[ing] to answer, with any reasonable degree of clarity, why it is not practicable for Campbell Estate to use ground water permitted to it and not otherwise in use as an alternative to diverting the sole source of water for windward streams, especially given the still unsettled state of the instream flow standards." Waiāhole I, 94 Hawai'i at 165, 9 P.3d at 477.

It also would be inappropriate for the Commission to issue a permit for "unpermitted" windward stream water, as these applicants request, for several reasons. First, the Commission has yet to establish permanent instream flow standards for windward streams. The Water Code requires that the Commission "conduct investigations and collect instream flow data including fishing, wildlife, aesthetic, recreational, water quality, and ecological information and basic streamflow characteristics necessary for determining instream flow requirements," H.R.S. § 174-71(4); that it "protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State," H.R.S. §§ 174C-5(3) and 71(4); and that it "avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values..." H.R.S. § 174C-71(1)(E). The Commission has been admonished repeatedly by the Hawai'i Supreme Court for its failure to do so.

C

In Waiāhole I, the Court vacated the Commission's interim instream flow standards, and held that "the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams. In the meantime, the Commission shall designate an interim standard based on the best information presently available." 94 Hawai'i at 156, 9 P.3d at 468 (emphasis added). In Waiāhole II, the Court observed: "We take this opportunity ... to remind the Water Commission that seventeen years have passed since the Water Code was enacted requiring the Water Commission to set permanent instream flow standards by investigating the streams. HRS § 174C-71. In addition, four years have passed since this court held that 'the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams.' The fact that an [interim instream flow standard] is before this court evinces that this mandate has not yet been completed as of the Water Commission's D & O II." 105 Hawai'i at 12, 93 P.3d 654 (citation omitted).

Four more years have passed since the Court made this observation, and no permanent instream flow standards have yet been established.

Second, the Court emphasized specifically that there exist compelling legal reasons why the Commission should include the unpermitted water in the instream flow standards. Waiāhole I, 94 Hawai'i at 156-157, 9 P.3d at 468-469 ("several factors suggest to us that the interim standard should, at least for the time being, incorporate much of the total present instream flows.") After the Commission, in its D&O II, failed to make any findings supporting its decision to reject the Court's suggestion, the Court again reversed the Commission's attempt to withhold from the instream flow standards water not needed for offstream use. Waiāhole II, 105 Hawai'i at 13, 93 P.3d at 655.

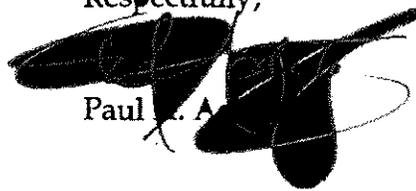
The present WUPA certainly does not establish that unpermitted windward stream water is "necessary for economic and efficient utilization" of the applicants' property as required by H.R.S. §§ 174C-49(a)(2), 174C-3 (definition of "reasonable-beneficial"), since not only do the applicants have the practicable option of using ground water, but also, the water already permitted for offstream use is not being fully utilized. The Commission has allocated a total of 12.57 mgd to water use permits from the Ditch. The applicants attach several letters from existing Leeward permittees who, not surprisingly, assert they are using their entire allocations, or intend to do so some day. (Notably, although the applicants sent thirteen letters, they received (or at least attach) only five responses (including the one from Campbell informing the applicants that Campbell no longer possesses any allocations)).

The Commission's records reflect that, in reality, during the most recent twelve-month period for which records of permitted usage are publicly available (March 2008

through February 2009), actual use averaged about 6 mgd, and has never exceeded 7.7 mgd. Although permittees have been insisting for fifteen years that use of their entire allocation is just around the corner, this has never occurred. In fact, the largest "use" of water from the Waiāhole Ditch remains waste from the Ditch System itself, in continuing violation of the Water Code and the Commission's orders. These system losses at times exceed 4 mgd. The Commission is now being asked, once again, to give its blessing to still further delay in addressing this problem in a separate, contemporaneous water use permit application from the system operator. Thus, *the Commission is being asked to allow the system operator to continue to waste large quantities of water that could be used either for stream restoration or permitted offstream use, from a system in which actual permitted use never approaches permitted levels, at the same time it is being asked to issue a permit for offstream use of the "unpermitted" water, by applicants with access to competitively-priced ground water, without having created any permanent instream flow standards twenty-two years after the Water Code mandated their creation.*

Before allocating any unpermitted water, the Commission, as trustee of the Public Trust resource, has a duty to establish permanent, science-based instream flow standards, and to examine the existing offstream allocations and make adjustments reflecting actual reasonable-beneficial use. All evidence indicates that, even if the Commission were to disregard the existence of practicable alternatives and issue a permit to these applicants from the Ditch System, if the existing Leeward allocations were properly managed, these applicants could be accommodated fully without tapping into the unpermitted water. The Hawai'i Supreme Court has emphasized repeatedly that "the Commission must not relegate itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." Waiāhole II, 105 Hawai'i at 15-16, 93 P.3d at 657-58 (citing Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455) (quotations omitted). See also H.A.R. §13-171-24(4) (Commission may revoke a permit as to any amount of water unused for four continuous years). The Commission must not continue to issue permits to use more and more windward stream water while ground water is available and practicable, existing permits remain perpetually underutilized, there exist no permanent instream flow standards—or any standards based on scientific data—and while the Ditch System, year after year, continues to leak substantial quantities of water. This violates the Commission's duties as trustee.

Respectfully,


Paul A. A.

cc: Fat Law's Farm, Inc.

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April 27, 2009

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Honolulu, Hawaii 96813

RECEIVED
COMMISSION ON WATER
RESOURCE MANAGEMENT
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Re: Water Use Permit Application No. 871
Applicants: Fat Law's Farms, Inc.
Law Tieng's Farm
Tony and Manyvone Law
Hae and Phouaugphet Viengkhou
Application for: New Use
Management Area: Waiāhole Ditch System (Oahu)
Source Area: Waiāhole Ditch System (Oahu)
End Use Area: TMK No. (1) 9-2-004-010
Formerly TMK No. (1) 9-2-004-001, Lot 882A
Campbell Estate, Parcel 8 (425 Acres)(Kunia, Hawaii)
End Use Zoning: AG-1 Restricted Agricultural
Quantity: 1.22 MGD; 3702 GPD/AC

Dear Honorable Commissioners:

Please accept this letter as Applicants Fat Law's Farm, Inc., Law Tieng's Farm, Tony and Manyvone Law, and Hae and Phouaugphet Viengkhou's (collectively "Applicants") reply ("Reply") to Makawai Stream Restoration (hereinafter "MSR") and Hakipu'u Ohana's (hereinafter "HO") objection to Water Use Permit Application No. 871 ("Application"), filed on April 13, 2009.

I. INTRODUCTION

MSR and HO object to the sufficiency of the Application based on the alleged failure to establish a lack of profitability using water from Del Monte Well Numbers 1, 3 and 4 (“Del Monte Wells 1, 3 and 4”) as an alternative to water from the Waiāhole Ditch System. However, profitability is not the standard alone by which an alternative is rendered practicable or impracticable. Applying the proper standard to Del Monte Wells 1, 3 and 4, and considering the showing made with respect to the six other alternative sources identified by Applicants, it is clear that the Applicants have established a lack of practicable alternative water sources to the Waiāhole Ditch System.

MSR and HO also object to the sufficiency of the Application based on the alleged failure to exhaust unused-permitted water from the proposed water source. However, the standard for awarding a water use permit does not require that an applicant exhaust already permitted waters within the proposed water source, by challenging the water needs of existing-permitted users. Even assuming the standard requires such a showing, Applicants have met their burden by requesting that holders of Waiāhole Ditch water permits identify any unused allocation for further adjudication by the Commission.

Finally, MSR and HO erroneously urge that the Commission on Water Resource Management (“Commission”) should not issue any further permit for windward stream water, including the permit sought here through the instant Application, because a permanent instream flow standard has not been established, and because the Commission has excluded unpermitted waters from the interim instream flow standard (“IIFS”). It has been unambiguously held by the Hawaii Supreme Court that the law does not mandate a ban on the issuance of offstream use permits. In addition, argument regarding the propriety of the instream flow standard itself is a red herring given that the statute governing instream use protection operates independently of procedures for water use regulation. In other words, MSR and HO’s contentions regarding the propriety of the IIFS are not properly brought before the Commission in reply to this WUPA.

II. ARGUMENT

A. Profitability Is Not the Standard Alone By Which an Alternative Is Rendered Practicable or Impracticable

MSR and HO challenge the sufficiency of the of the Application based on the alleged failure to establish a lack of profitability using water from Del Monte Wells 1, 3 and 4, as an alternative to water from the Waiāhole Ditch System. However, profitability is not the standard alone by which an alternative is rendered practicable or impracticable.

Under the proper standard, there must be a showing and a determination of “whether the alternative is available and capable of being utilized after considering cost, technology, and logistics in light of the overall water planning process.” *In re Water Use Permit*

Applications, 105 Haw. 1, 19, 93 P.3d 643, 661 (Haw. 2004) (“*Waiahole II*”). As a part of this determination, cost may be evaluated “from a broader, long-term social and economic perspective.” *In re Water Use Permit Applications*, 94 Haw. 97,165, 9 P.3d 409, 477 (Haw. 200) (“*Waiahole I*”). However, cost, “alone, would not render the alternative impracticable.” *Waiahole II*, 105 Haw. at 19, 93 P.3d at 661.

Examining the basic principles of the public trust doctrine, the Hawaii Supreme Court in *Waiahole II* explained:

“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.” *Waiahole I*, 94 Haw. at 160, 9 P.3d at 472. The Water Code requires, inter alia, that the applicant prove that **the proposed use of water is a “reasonable-beneficial use” and is “consistent with public interest.”** HRS §§ 174C-49(a)(2) and (4) (1993). **“Reasonable-beneficial use” is defined as “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 public interest.”** HRS § 174C-3 (1993) (emphasis added).

Furthermore, **besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources.** Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of ‘reasonable-beneficial’ use, and is an essential part of any balancing between competing interests.

Waiahole I, 94 Haw. at 161, 9 P.3d at 473 (citation omitted) (emphasis added)....

The Water Commission, on the other hand, is duty-bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes and **“weigh competing public and private water uses on a case-by-case basis[,]”** requiring a higher level of scrutiny for private commercial water usage. *Id.* 94 Haw. at 142, 9 P.3d at 454. Moreover, as discussed supra in section III.A.1., the Water Commission’s findings must reasonably explain and justify its conclusions and rulings. *Id.* 94 Haw. at 157-58, 9 P.3d at 469-70. Finally,

... the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including using alternative resources. . . . In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of

openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

Id. 94 Haw. at 143, 9 P.3d at 455 (citations omitted) (emphasis added). In light of the foregoing, this court must take a "close look" at the Water Commission's action to determine if it complies with the Water Code and the public trust doctrine.

Waiahole II, 105 Haw. at 15-16, 93 P.3d at 657-658 (emphasis added).

Specifically addressing the cost considerations of an alternative, the court in *Waiahole I* held "Stream protection and restoration **need not be the least expensive alternative for offstream users to be 'practicable'** from a broader, long-term social and economic perspective." *Waiahole I*, 94 Haw. at 165, 9 P.3d at 477 (emphasis added). Likewise, the court in *Waiahole II* held that the lack of evidence regarding economic viability does not affect the burden of proof, as follows:

Next, contrary to the Windward Parties' argument, **PMI's failure to proffer evidence regarding its financial condition does not affect whether it met its burden of proof**, inasmuch as it conceded that two of the three alternatives were economically feasible. PMI found, however, one alternative not economically feasible at \$ 3.00 per 1,000 gallons, which appears to be higher than the county rate schedules of 60 cents to \$ 2.47 per 1,000 gallons as cited in *Waiahole I. Id.* 94 Haw. at 165, 9 P.3d at 477. Regardless of PMI's financial situation, the Water Commission "is not obliged to ensure that any particular user enjoy a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." *Id.* As such, in the instant case, **PMI's ability to afford \$ 3.00 per 1,000 gallons, alone, would not render the alternative practicable, just as PMI's inability to afford \$ 3.00 per 1,000 gallons, alone, would not render the alternative impracticable. The Water Commission found that "an alternative source is practicable if it is available and capable of being utilized after taking into consideration cost, existing technology, and logistics in light of the overall water planning process."** [The Commission's Legal Framework, Findings Of Fact, And Decision And Order filed in Case No. CCH-OA95-1 on December 28, 2001[("D&O IP")] at 124-25. **Thus, the Water Commission, according to its own standard, must determine whether the alternative is available and capable of being utilized after considering cost, technology, and logistics.** Based on its *D&O II*, the Water Commission did as much.

Waiahole II, 105 Haw. at 19, 93 P.3d at 661 (emphasis added).

B. Del Monte Wells 1, 3 and 4 Are Not Practicable Alternatives Considering The Sustainable Yield, Potability, and Cost Prohibitions

Applying the proper standard set forth in *Waiahole I* and *Waiahole II*, as well as the non-exhaustive considerations of practicability set forth in *Waiahole II*, Del Monte Wells 1, 3 and 4 are not practicable alternatives to water from the Waiāhole Ditch System.

As stated above, the practicability of an alternative is determined by evaluating “whether the alternative is available and capable of being utilized after considering cost, technology, and logistics in light of the overall water planning process.” *Waiahole II*, 105 Haw. at 19, 93 P.3d at 661. Applying this standard, the court in *Waiahole II* found that *non-exhaustive* factors such as chloride levels, sustainable yield, costs of desalinating, construction, and operation, and the availability of leases and easements, could also render an alternative impracticable. *Waiahole II*, 105 Haw. at 18, 93 P.3d at 660.

In our case, Del Monte Wells 1, 3 and 4 are not practicable alternatives to water from the Waiāhole Ditch System, due to the sustainable yield, the potable quality of Del Monte Well water, and the significant cost prohibitions.

1. The sustainable yield has been exceeded for the main source of Del Monte Wells 3 and 4, and the demand for potable water to satisfy Central Oahu, Ewa, Nanakuli and Honolulu development exceeds the unallocated supply available from the source of Del Monte Well 1

The lack of a sustainable yield has been held to render an alternative water source impracticable. *Waiahole II*, 105 Haw. at 17-18, 93 P.3d at 559-660 (“[The applicant] met its burden of establishing the absence of practicable alternative water sources... [The applicant] concluded that these [three] alternatives were not practicable based on the... sustainable yield of alternative two...”).

In our case, Del Monte Wells 3 and 4 (State Well Nos. 2703-03 and 2703-04) draw water from the Wahiawa Aquifer System, and are the primary sources of supply for the Del Monte Wells System.¹ The sustainable yield for the Wahiawa Aquifer System, as presently established by the Commission, is 23 million gallons day (“mgd”).² However, the existing allocations exceed 23 mgd by 2.888 mgd.³ Accordingly, there is no remaining sustainable yield from the Wahiawa Aquifer System available to the Applicants, and thus Del Monte Wells 3 and 4 are rendered impracticable as an alternative water source.

¹ See Reply, at Exhibit Q, Report of Tom Nance dated April 23, 2009, p. 2.

² See Reply, at Exhibit Q, p. 2.

³ See Reply, at Exhibit Q, p. 2.

With respect to Del Monte Well 1 (State Well No. 2703-01), the planned and foreseeable development in areas supplied with drinking water from the same source as Del Monte Well 1 require water substantially exceeding the unallocated supply. Del Monte Well 1 is classified as being in the Ewa-Kunia Aquifer.⁴ The Ewa-Kunia aquifer has a sustainable yield of 16 mgd and current allocations of 15.547 mgd, with a remaining allocable supply of 0.543 mgd.⁵ Physically, Del Monte Well 1 draws water from the Waipahu-Wahiawa aquifer.⁶ The Waipahu-Wahiawa aquifer has a sustainable yield of 104 mgd and current allocations of 85.536 mgd, with a remaining allocable supply of 18.464 mgd.⁷ However, it is important to consider that “[w]ells drawing water from the Waipahu-Waiawa and Ewa-Kunia aquifers provide all of the drinking water supply for Central Oahu makai of Wahiawa, Ewa and Nanakuli. In addition, [the Board of Water Supply] exports more than 40 mgd from the Waipahu-Waiawa aquifer toward and into Honolulu and would like to increase that amount.”⁸ The “planned and readily foreseeable development in the areas supplied with drinking water from these two aquifer systems substantially exceeds their remaining unallocated supply.”⁹ Accordingly, Del Monte Wells 1 is not a practicable alternative water source when considered “in light of the overall water planning process.”

2. The use of potable water for agricultural farming irrigation does not conform to the Commission’s prioritization among public trusts

The water from the Wahiawa Aquifer System, the primary source for the Del Monte Wells System, and the sole source of water for Del Monte Wells 3 and 4, is potable.¹⁰ The water from the Ewa-Kunia and Waipahu-Waiawa aquifers, the classified and physical source of water for Del Monte Well 1, are also potable. Committing Applicants to the use of potable water for agricultural farming irrigation conflicts with the Commission’s stated prioritization among public trusts.

The Commission has held, in weighing and negotiating competing interests in regulating water resources, that “[n]on-potable Waiāhole Ditch water is available for its highest and best use, agricultural irrigation” while “[a]gricultural use is not the highest and best use of [a potable] Aquifer,” setting forth its reasoning as follows:

⁴ See Reply, at Exhibit Q, p. 3.

⁵ See Reply, at Exhibit Q, p. 3.

⁶ See Reply, at Exhibit Q, p. 3.

⁷ See Reply, at Exhibit Q, p. 3.

⁸ See Reply, at Exhibit Q, p. 3.

⁹ See Reply, at Exhibit Q, p. 3.

¹⁰ See Reply, at Exhibit Q, p. 2.

In *Waiāhole I*, the Court also confirmed that **imposing different permit conditions and restrictions** on some uses but not others were “**squarely within the Commission’s appointed function of weighing and negotiating competing interests in regulating the water resources of this state**” as long as those actions were not arbitrary and capricious. (94 Haw. at 168-169)

The Commission’s priorities are reflected in its “weighing and negotiating [of] competing interests.” In issuing water use permits for ditch waters, the Commission imposed stricter conditions for golf-course irrigation, because **the highest and best use of non-potable ditch water was for agriculture. On the other hand, the highest and best use of potable Waipahu-Waiawa Aquifer water is domestic use of the general public, particularly drinking water.** Municipal use does have the substantial purpose of domestic use of the general public, particularly drinking water, but it may also include commercial and industrial purposes, and the Court has yet to delineate the boundaries of “domestic use of the general public.” On a related issue, the Court has applied the doctrine of public use to public entities such as the BWS and in a decision involving the BWS, has commented that “we understand public use to mean the actual consumption of water by the general public.” (*Reppun v Board of Water Supply*, 65 Haw. 531, at 560, n. 21 and 22 (1982).)

It is the Commission’s priority that water resources be matched with their highest and best use. **When applied by the Commission to water for agriculture uses from a potable versus non-potable water source, the decision must be the use of Ditch water and not water from the Waipahu-Waiawa Aquifer to irrigate Campbell Estate’s agricultural lands. Non-potable Waiāhole Ditch water is available for its highest and best use, agricultural irrigation. Agricultural use is not the highest and best use of the Waipahu-Waiawa Aquifer. To use potable Waipahu-Waiawa Aquifer water when a non-potable source is equally and even more available, taking into consideration cost, existing technology and logistics in light of the overall water planning process, would be counter to the priorities of the Commission.**

45. The Court has concluded that “[c]onsidering whether alternative water resources are practicable innately requires prioritizing among public trust resources.” (105 Haw. at 20) The Commission’s prioritizing results in the conclusion that the highest use for Ditch water is for agricultural uses, while the highest use for Waipahu-Waiawa Aquifer water is for potable purposes. Campbell Estate’s water use permit application was for agriculture use on its lands, which is best met with Ditch waters. Thus, after prioritizing among these two public trust resources, the Commission concludes that Waipahu-Waiawa Aquifer water is not a practicable alternative water resource, and a new well using such water, or any

well utilizing the same source, is not a practicable alternative to the use of Ditch water to irrigate Campbell Estate's lands.

See the Commission's Legal Framework, Findings Of Fact, And Decision And Order filed in Case No. CCH-OA95-1 on July 13, 2006 ("*D&O III*"), at COL 44(d), p. 58-59, ln. 42-38 (emphasis added).

Like the case of water from the Waipahu-Waiawa Aquifer, waters from the - Wahiawa, Kunia-Ewa and Waipahu-Waiawa aquifer systems are potable.¹¹ Prioritizing among - Wahiawa, Kunia-Ewa and Waipahu-Waiawa waters, versus Waiāhole Ditch water, it must be concluded that (1) the highest and best use of potable Wahiawa, Kunia-Ewa and Waipahu-Waiawa waters is domestic use of the general public, particularly drinking water, (2) agricultural farming is not the highest and best use of water from the Wahiawa, Kunia-Ewa and Waipahu-Waiawa aquifer systems, and (3) the highest use for Waiāhole Ditch water is for agricultural uses. It therefore follows that the Del Monte Wells 1, 3 and 4, utilizing the Wahiawa, Kunia-Ewa and Waipahu-Waiawa aquifers as sources, are not a practicable alternative water resources to the use of Waiāhole Ditch water to irrigate Applicant's farm.

3. Del Monte Wells 1, 3 and 4 present significant operational difficulties and consequent cost prohibitions, that would place Applicants at an economic disadvantage

The geographic properties of Del Monte Wells 1, 3 and 4 result in significant operational difficulties, as well as consequent cost prohibitions. Such cost prohibitions will put Applicants at a substantial disadvantage in relation to their competitors. These operational difficulties and consequent cost prohibitions render Del Monte Wells 1, 3 and 4 impracticable alternatives.

The practicability of an alternative is properly determined by evaluating "whether the alternative is available and capable of being utilized after considering cost, technology, and logistics in light of the overall water planning process." *Waiahole II*, 105 Haw. at 19, 93 P.3d at 661. As such, it has been held that construction, operation and the cost thereof may render an alternative water source impracticable. *Waiahole II*, 105 Haw. at 17-18, 93 P.3d at 559-660 ("[The applicant] met its burden of establishing the absence of practicable alternative water sources... [The applicant] concluded that these [three] alternatives were not practicable based on the... costs of... construction, and operation...").

Here, the geographic properties of Del Monte Wells 1, 3 and 4 present substantial operational difficulties, including the maintenance and operation of multiple well locations, and the need for complex, costly and labor intensive pumping lifts to reach the Del Monte Wells 1, 3

¹¹ See Reply, at Exhibit Q, p. 2.

and 4 reservoir at 1,040 feet elevation. Del Monte Wells 1, 3 and 4, are three distinct wells at three separate well locations.¹² The multiplicity of locations results in the necessity for over 10 miles of conveyance pipelines, pressure relief valves, isolation valves and appurtenances, as well as a 2,000,000 gallon reservoir.¹³ The elevation of the open storage reservoir for Del Monte Wells 1, 3 and 4, is approximately 1,040 feet.¹⁴ The tremendous elevation results in the need for pumping lifts that are more complex, costly and labor intensive than their counterparts in Kahuku, in Ewa, or at Campbell Wells EP 5 & 6.¹⁵ For example, the Del Monte System's well pumps require daily manual operation, and cannot be automated on a practical level due to the large well pump capacities (2.16 mgd, 2.09 mgd and 1.07 mgd) relative to the modest storage capacity (less than 2.0 mgd).¹⁶ As well, the pump at Del Monte Well 4 is diesel driven through an angle gear drive, requiring more labor intensive maintenance and cost than its electric motor-driven counterpart.¹⁷

As a result of these operational difficulties, the water from Del Monte Wells 1, 3 and 4 come at a substantial cost. **It is estimated that water from Del Monte Wells 1, 3 and 4 will cost well over \$2.00 per 1,000 gallons during initial stages when pumping rates are low, and \$1.60 per 1,000 gallons when pumping rates reach 3.0 mgd, exclusive of pump replacement costs.**¹⁸ In addition, replacement costs for the pump at Del Monte Well 3 has been estimated at \$340,000.00, to be incurred in approximately 6 years.¹⁹ Replacement costs for the pump at Del Monte Well 4 has been estimated at \$475,000.00, to be incurred in approximately 2.5 years.²⁰ Replacement costs annualized at a rate of 8% would be \$73,500.00 for Well 3 and \$217,000.00 for Well 4.²¹ In other words, replacement costs will run more than \$0.25 per 1,000 gallons.²² Therefore, **water from Del Monte Wells 1, 3 and 4 will cost more than \$1.85 to \$2.25 per 1,000 gallons, inclusive of pump replacement costs.**

Applicants will be at a substantial competitive disadvantage relative to other farming operations on Oahu if required to use Del Monte Well water at the rate of \$1.85 to \$2.25 per 1,000 gallons, or even at \$1.60 to \$2.00 per 1,000 gallons assuming no pump replacement

¹² See Reply, at Exhibit R, Report of Donald R. McDonald, P.E., dated April 23, 2009, p. 1.

¹³ See Reply, at Exhibit R, p. 1.

¹⁴ See Reply, at Exhibit R, p. 1; and Exhibit Q, p. 1.

¹⁵ See Reply, at Exhibit Q, p. 1-2; and Exhibit R, p. 1.

¹⁶ See Reply, at Exhibit Q, p. 2.

¹⁷ See Reply, at Exhibit Q, p. 2; and Exhibit R, p. 1.

¹⁸ See Application, at Exhibit J, p. 1.

¹⁹ See Reply, at Exhibit R, p. 2.

²⁰ See Reply, at Exhibit R, p. 2.

²¹ See Reply, at Exhibit R, p. 2.

²² See Reply, at Exhibit R, p. 2.

will ever be needed. Ewa farmers are currently paying approximately \$0.70 per 1,000 gallons of water.²³ Kahuku farmers are paying approximately \$0.55 and \$0.85 per 1,000 gallons of water.²⁴ In fact, the Applicants themselves pay \$0.72 per 1,000 gallons in Ewa,²⁵ and \$0.55 to \$0.60 and \$0.82 per 1,000 gallons in Kahuku.^{26, 27} Water from the Waiāhole Ditch System is currently being provided to farmers at the rate of approximately \$0.517 per thousand gallons.²⁹ If Applicants were required to use Del Monte Wells 1, 3 and 4, even at the lowest estimated rate of \$1.60 per 1,000 gallons assuming no repairs are required, Applicants would nevertheless be substantially disadvantaged by water costs *at least* 228% of that paid by Ewa farmers, 290% of that paid by Kahuku farmers, and 309% of that paid by farmers utilizing water from the Waiāhole Ditch System. Accordingly, the Applicants would be at a distinct and substantial competitive disadvantage if required to use Del Monte Wells 1, 3 and 4.

MSR and HO dispute the Applicants' alternatives analysis of Del Monte Wells 1, 3 and 4, by (1) suggesting that Applicants have been using water from the Board of Water Supply while operating at a profit, (2) asserting that Applicants' cost analysis for the maintenance of Del Monte Wells 1, 3 and 4 is inflated when compared to a cost analysis for the maintenance of well EP 5 & 6; and (3) asserting that Waiāhole Ditch System water is only marginally less expensive than water from Del Monte Wells 1, 3 and 4, when analysis of Del Monte Wells 1, 3 and 4 is made by "substitute[ing]" labor costs relevant to the maintenance of well EP 5 & 6. However, MSR and HO's suggestions and assertions are based on pure speculation in so far as they "presume[e]" to know how much Applicants are paying for water at their Ewa and Kahuku farms, and to the extent they imply that a cost analysis for the maintenance of well EP 5 & 6 is "compare[able]" to, applicable to or can "substituted" for a cost analysis for the maintenance of Del Monte Wells 1, 3 and 4.

There is no basis in fact to MSR and HO's assertion that "It would appear applicants themselves have been willing and able to pay the agricultural rate for water while operating similar farms profitably on Oahu... Presumably, they have been using water form the Board of Water Supply." To the contrary, Applicants do not obtain water for their Ewa and Kahuku farms from the Board of Water Supply, nor do they pay the Board of Water Supply agricultural rate. Applicants obtain their water from sources outside of the Board of Water Supply and pay \$0.72 per 1,000 gallons in Ewa,³⁰ and \$0.55 to \$0.60 and \$0.82 per 1,000 gallons

²³ See Reply, at Exhibit Q, p. 1; and Exhibit R, p. 1.

²⁴ See Reply, at Exhibit R, p. 1.

²⁵ See Reply at Exhibit S, Affidavit of Frank Law.

²⁶ See Reply at Exhibit T, Affidavit of Thomas Law.

²⁷ See Reply at Exhibit U, Affidavit of Tony Law.

²⁹ See Reply, at Exhibit R, p. 1.

³⁰ See Reply at Exhibit S, Affidavit of Frank Law.

in Kahuku.^{31, 32} Moreover, it is evident that allegations made by MSR and HO are made absent any reasonable investigation, when considering that water from the Board of Water Supply is typically not used for irrigation in Ewa or Kahuku.³³ In other words, not only have MSR and HO forgone the presentation of hard facts, MSR and HO have also dispensed with the presentation conclusions reasonably drawn from facts. MSR and HO have provided the Commission with nothing by which it can find in favor of MSR and HO. Had MSR and HO conducted a reasonable investigation before presenting the Commission with inferences and presumptions, it would have become clear that irrigation water in Ewa is typically obtained from the former Campbell Estate water system at the above identified rate of approximately \$0.72 per 1,000 gallons, while irrigation water in Kahuku is generally obtained from Hawaii Reserves, Inc. and Malaekahana Partners at the rate of approximately \$0.55 and \$0.82 per 1,000 gallons respectively.³⁴

Likewise, there is no basis in fact or science supporting MSR and HO's inference that Donald R. McDonald, P.E.'s cost estimate to maintain Del Monte Wells 1, 3 and 4³⁵ can be "compared" or "substituted" with Joseph Vierra, P.E.'s cost estimate to maintain well EP 5 & 6.³⁶ It follows that there is also no basis in fact or science supporting MSR and HO's ensuing conclusion that Mr. McDonald's cost estimate is "inflated." Evaluating the relevant facts and applicable scientific principles, there are three reasons why Mr. Vierra's cost analysis for the maintenance of well EP 5 & 6 is simply not applicable to the maintenance costs for Del Monte Wells 1, 3 and 4. First, Mr. Vierra clearly states in the preface of his report:

... these cost estimates and ultimate analysis of the cost of water apply only to the conditions existing at year-end 2004. Construction costs are rising dramatically in Hawaii and, if current trends continue, construction costs and their conversion to annual costs for providing water will also rise dramatically.³⁸

Second, given the substantial differences in location and operating systems, parallels cannot be drawn between Mr. Vierra's cost analysis for well EP 5 & 6 and Mr. McDonald's cost analysis for the Del Monte Wells 1, 3 and 4. Mr. Vierra's estimate relates to a single well location, while Mr. McDonald's estimate covers the entire Del Monte Well System comprised on three different

³¹ See Reply at Exhibit T, Affidavit of Thomas Law.

³² See Reply at Exhibit U, Affidavit of Tony Law.

³³ See Reply, at Exhibit Q, p. 1; and Exhibit R, p. 1.

³⁴ See Reply, at Exhibit Q, p. 1; and Exhibit R, p. 1.

³⁵ See Application, at Exhibit J.

³⁶ See MSR and HO's Exhibit 1.

³⁸ See MSR and HO's Exhibit 1, at p. 1

locations.³⁹ Mr. McDonald's analysis therefore accounts for over 10 miles of conveyance pipelines, pressure relief valves, isolation valves and appurtenances, as well as a 2,000,000 gallon reservoir necessitated by the scattered nature of the Del Monte Well System, while Mr. Vierra's analysis does not account for such equipment and infrastructure. As well, Mr. Vierra's estimate relates to a low land well system requiring a pumping lift of 300 feet or less, while Mr. McDonald's estimate relates to wells with a reservoir at approximately 1,040 feet elevation requiring a pumping lift of over 1,000 feet.⁴⁰ As stated above, the tremendous elevation results in the need for pumping lifts that are more complex and labor intensive than pumping lifts adequate for lower elevations, ultimately requiring daily manual operation.⁴¹ Third, Mr. Vierra does not purport that his cost analysis for well EP 5 & 6 correlates to maintenance costs associated with Del Monte Wells 1, 3 and 4. Moreover, no other qualified expert in well maintenance has opined that Mr. Vierra's report is applicable to the maintenance costs for Del Monte Wells 1, 3 and 4. MSR and HO have not advanced a single shred of expert (or otherwise reliable) evidence upon which the Commission can rely to find in their favor.

As discussed above, MSR and HO's allegation that Waiāhole Ditch System water is only marginally less expensive than water from Del Monte Wells 1, 3 and 4, is based calculations improperly "substitut[ing]" labor costs relevant to the maintenance of Del Monte Wells 1, 3 and 4, with labor costs relevant to the maintenance of well EP 5 & 6, as discussed above. Looking properly to Mr. McDonald's cost estimate to maintain Del Monte Wells 1, 3 and 4, it is clear that the cost of Del Monte Well System water (not inclusive of replacement costs) is at least three times the cost of Waiāhole Ditch System water. It is estimated that water from Del Monte Wells 1, 3 and 4 will cost well over \$2.00 per 1,000 gallons during initial stages when pumping rates are low, and \$1.60 per 1,000 gallons when pumping rates reach 3.0 mgd, exclusive of pump replacement costs.⁴² When considering pump replacement costs, water from Del Monte Wells 1, 3 and 4 will cost more than \$1.85 to \$2.25 per 1,000 gallons, inclusive of pump replacement costs.⁴³ In contrast, water from the Waiāhole Ditch System is currently being provided to farmers at the rate of approximately \$0.517 per thousand gallons.⁴⁴ The cost of water from Del Monte Wells 1, 3 and 4 is at about 309% the cost of water from the Waiāhole Ditch System.

Considering the operational difficulties arising from the geographic properties of Del Monte Wells 1, 3 and 4, the consequent cost prohibitions associated with Del Monte Well

³⁹ See Reply, at Exhibit R, p. 1; and Exhibit Q, p. 1; *see also* Application, at Exhibit J, p. 2.

⁴⁰ See Reply, at Exhibit Q, p. 1; and Exhibit R, p. 1.

⁴¹ See Reply, at Exhibit Q, p. 1-2; and Exhibit R, p. 1.

⁴² See Application, at Exhibit J, p. 1.

⁴³ See Reply, at Exhibit R, p. 2.

⁴⁴ See Reply, at Exhibit R, p. 1.

water, the lack of a sustainable yield, and the potable quality of Del Monte Well water, Del Monte Wells 1, 3 and 4 must be rendered impracticable alternatives.

C. The Applicants Met Their Burden of Proof by Making Goodfaith Requests Upon Permittees For Unused-Permitted Waters

MSR and HO assert that Applicants have not met their burden of showing that the requested Waiāhole Ditch water is in such a quantity “as is necessary for economic and efficient utilization,” because Waiāhole Ditch “water already permitted for offstream use is not being fully utilized.” However, the standard for awarding a water use permit does not require that an applicant exhaust permitted waters within the proposed water source, by challenging the water needs of existing-permitted users. Even assuming the standard requires such a showing, Applicants have met their burden by requesting that holders of Waiāhole Ditch water permits identify any unused allocation for further adjudication by the Commission.

MSR and HO are wrong in so far as they infer Applicants are required to challenge the actual water needs of existing-permitted users of the proposed water source. Applicants have the burden of proving that the proposed use of water is “in such a quantity as is necessary for economic and efficient utilization.” *Waiahole II*, 105 Haw. at 15, 93 P.3d at 657. Under this condition required by the State Water Code for water use permits, “at a very minimum, applicants must prove **their own actual water needs.**” *Waiahole I*, 94 Haw. at 161, 93 P.3d at 473 (emphasis added). Under this condition, “applicants must also demonstrate the absence of practicable mitigating measures, including the use of **alternative water sources.**” *Id.* MSR and HO not only propose that Applicants are required to prove their own actual water needs, but also propose that Applicants are required to exhaust permitted waters within the proposed water source, by challenging the water needs of existing-permitted users. The later is simply not required under the “actual needs” prong. MSR and HO’s contentions regarding unused-permitted waters are more properly analyzed under the prong of “alternative water sources.” However, unused-permitted Waiāhole Ditch waters do not constitute alternative water sources since (1) an alternative water source, by its very nature, is water outside of the proposed water source, in this case Waiāhole Ditch water, and (2) Applicants do not have the practical option of annexing an existing user’s allocation where the State Water Code gives existing legal uses priority over new uses in the permitting process. See HRS § 174C-49(a)(3) (requiring applicants for new use to establish that the new use “will not interfere with any existing legal use of water). Indeed, it appears MSR and HO realize that unused-permitted Waiāhole Ditch waters do not constitute alternative water sources, and therefore advance the exhaustion of unused-permitted Waiāhole Ditch waters under the guise of “economic and efficient utilization.” However, the burden of proof for efficient utilization is met where the applicant’s own actual water needs are proved.

Even assuming *arguendo*, Applicants are required to exhaust unused-permitted waters, Applicants have met this burden. As MSR and HO point out, the Applicants sent thirteen letters to permittees of Waiāhole Ditch water, requesting that they identify any unused allocation

so that the information could be forwarded to the Commission.⁴⁵ Specifically, a letter was sent to every permittee of Waiāhole Ditch water. Applicants received five letters in response, all indicating that they had no unused allocation of Waiāhole Ditch water, either by virtue of use or lack of permit.⁴⁶ Thus, Applicants satisfied any burden they may have to seek unused-permitted waters by making a goodfaith request to existing permittees for the identification of unused-permitted waters, with the intent to forward such information to the Commission for further adjudication. Applicants are agreeable to accepting any unused-permitted Waiāhole Ditch water.

D. The Law Does Not Mandate A Bar On The Issuance of Offstream Water Use Permits During The Pendency of Interim Instream Flow Standards

There exists no legal basis for MSR and HO's demand that the Commission withhold from the issuance of a water use permit during the pendency of the IIFS. Moreover, any dispute MSR and HO have regarding the propriety of the IIFS is not properly brought before the Commission in response to this Application for water use permit.

It was previously proposed by a party to *Waiahole I*, as now propose by MSR and HO here, that "the Commission bar the issuance of any permits for offstream uses until sufficient scientific information on instream requirements becomes available." *See Waiahole I*, 94 Haw. at 159, 9 P.3d at 471. The Hawaii Supreme Court responded by unambiguously holding that the law does not mandate such a bar, as follows:

We do not believe that the law mandates such a per se rule. The Commission can hardly be expected to suspend all offstream uses, however reasonable and beneficial, for an indefinite period of time that, according to the Commission, may amount to years.

This dilemma offers no simple solution. At the present time, **we hold only that the Commission's inability to designate more definitive instream flow standards** neither allows the prolonged deferral of the question of instream use protection **nor necessarily precludes present and future allocations for offstream purposes.**

Id. (emphasis added). Accordingly, there exists no legal authority preventing the Commission's award of a water use permit by virtue of the IIFS.

Moreover, MSR and HO may not properly use this proceeding for adjudication under the water use regulation, as a venue to challenge the propriety of instream use protection standards. It has been held that "The statute relating to instream use protection, HRS Chapter

⁴⁵ See Application, at Exhibit L.

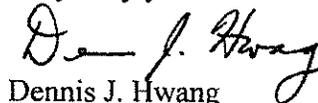
⁴⁶ See Application, at Exhibit L.

174C, part VI, or HRS § 174C-71, **operates independently** of the procedures for water use regulation outlined in HRS chapter 174C, part IV (1993 & Supp. 1999).” *Waiahole I*, 94 Haw. at 148, 9 P.3d at 460. Likewise, the Hawaii Administrative Rules (“HAR”) governing the petition procedures for adopting interim or permanent instream flow standards, HAR § 13-169-1, et seq., operates independently of the application procedures for water use permits, HAR § 13-171-1, et seq. Although Case No. CCH-OA95-1 involved the adjudication of flow standards together with the adjudication of applications for water use permits, the facts in Case No. CCH-OA95-1 differ from the facts here. In Case No. CCH-OA95-1, petitions were filed for water reservations, petitions were filed to amend the IIFS, and the Commission issued an order for a combined contested case hearing. In the case here, the Commission has not ordered that Applicants’ Application be combined with any petition to amend the IIFS. Accordingly, MSR and HO’s objections based on the propriety of the IIFS are inappropriate.

III. CONCLUSION

Based on the foregoing, it is respectfully requested that Fat Law’s Farm, Inc., Law Tieng’s Farm, Tony and Manyvone Law, and Hae and Phouaugphet Viengkhou’s Water Use Permit No. 871 be approved, and that the Commission issue a Water Use Permit accordingly.

Very truly yours



Dennis J. Hwang
Elmira K.L. Tsang

Encl. Exhibit Q - Report of Tom Nance dated April 23, 2009
Exhibit R - Report of Donald R. McDonald, P.E. dated April 23, 2009
Exhibit S – Affidavit of Frank Law
Exhibit T – Affidavit of Thomas Law
Exhibit U – Affidavit of Tony Law

cc: Paul Achitoff, Esq. w/encs.



Tom Nance Water
Resource Engineering

April 23, 2009
09-096 (07-46)

Dennis J. Hwang, Esq.
O'Connor Playdon & Guben LLP
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733 Bishop Street - 24th Floor
Honolulu Hawaii 96813

Dear Mr. Hwang:

Comments on the Earthjustice Objections to
Water Use Permit Application No. 871
to Use Waiahole Water for Agricultural Irrigation on
TMK 9-2-004:001 in Kunia, Oahu

This letter addresses three aspects of the objections to Water Use Permit Application (WUPA) No. 871 raised by Earthjustice (EJ) in its April 13, 2009 letter to the State Commission on Water Resource Management (CWRM). These aspects are: (1) incorrectly characterizing the costs of agricultural irrigation supply in Ewa and Kahuku [bottom of page 2 and top of page 3 of the EJ letter]; (2) incorrectly applying the costs presented by Joe Vierra for EP 5 & 6 as comparable to required operation and maintenance of the Del Monte system [top of page 4]; and (3) resource management choices the CWRM must make in evaluating WUPA No. 871.

Actual Operating Costs of Irrigation Supply in Ewa, Kahuku, and the Del Monte System in Kunia. EJ incorrectly assumes that irrigation water used in Ewa and Kahuku is provided by the Honolulu Board of Water Supply (BWS) at its present agricultural rate of \$1.05 per thousand gallons (kgal). In actual fact, BWS water is not used for this purpose in either location. In Ewa, the irrigation water is provided from former sugarcane plantation well batteries at a cost that is presently \$0.72/kgal. In Kahuku, irrigation water is supplied from private systems at prices which range from \$0.55 to \$0.82 per kgal. These prices are obviously far less than the anticipated rate of \$1.47 to \$2.04/kgal computed by AgTech Pacific for the Del Monte system (Appendix J of the WUPA). The largest factor accounting for this difference is the contrasting pumping lifts. Power, either electric or diesel, is the largest cost component of using a pumped groundwater system. In Ewa and Kahuku, farming is on land at low elevation which requires only modest pumping lifts of less than 300 feet (including delivery pressure to customers). In comparison, pumps in the three wells of the Del Monte system in Kunia lift water into an open storage reservoir at 1040-foot elevation. As a result, the power cost of pumping the Del Monte wells is more than three times greater than in Ewa or Kahuku.

Manpower Requirements to Run Del Monte's Kunia System. Agtech Pacific's estimated cost to operate and maintain Del Monte's Kunia irrigation system include a "... fixed operating cost of \$22,000 per month for maintenance and administration crew, maintenance materials and associated indirect costs." EJ states that this cost is "... substantially inflated". It suggests that this cost is just \$30,000 per year (ie. \$2500 per month) based on testimony in the Waiahole case by Joe Vierra that all that would be required

are "... semi-weekly inspections and adjustments of the pump controls." The reality is that Agtech Pacific's cost estimate (Appendix J of the WUPA) was made with accurate and detailed knowledge of the Del Monte system's actual operating and maintenance requirements and included, unlike Mr. Vierra's testimony in the Waihole case, all aspects of operating the entire system. Some of these aspects are:

- Operation of the system's well pumps is not automated, and due to the large well pump capacities (2.16, 2.09, and 1.07 MGD) relative to its modest storage (less than 2 MG), it is not practical to do so. Daily manual operation of the well pumps is required.
- Del Monte Pump 4 (State Well No. 2703-04) is run by a large diesel engine (520 HP) through an angle gear drive. Operation of the diesel engine is far more labor intensive than automated, electric motor-driven well pumps.
- Operation of the entire irrigation system is not limited to short, semi-weekly visits to the well pumps. It includes maintenance of the reservoir, booster pumps, transmission/distribution pipelines, air release valves, and customer meters. It also includes administrative tasks associated with the water system's personnel and the purchasing of supplies and replacement equipment. None of these actual system requirements were included in the testimony by Joe Vierra cited by EJ. They have been correctly included in the cost analyses by Agtech Pacific.

In short, Mr. Vierra's allowance for semi-weekly visits to a fully automated well pumping facility in Ewa is not comparable to the operating requirements of the Del Monte well pumps and also does not include any of the other tasks that go into operating a labor intensive and aging former plantation irrigation system.

Resource Management Choice Posed by WUPA No. 871. By incorrectly portraying the costs to operate the Del Monte system, as well as also incorrectly suggesting that its costs are comparable to operating costs in Ewa and Kahuku, EJ suggests that the Del Monte system is a practicable alternative and therefore a basis to deny WUPA No. 871. From a larger perspective of competing uses of limited water resources, the following aspects are relevant to judging the appropriateness of WUPA No. 871:

- Del Monte Pumps 3 and 4 (State Well Nos. 2703-03 and -04) are the primary sources of supply for the Del Monte system. They draw potable quality groundwater from the Wahiawa Aquifer System. At present, this aquifer's 23 MGD sustainable yield as set by the CWRM is over allocated by 2.888 MGD. In other words, there is no remaining allocable supply for new uses such as additional drinking water for the BWS system in Wahiawa, the Army's system is Schofield, and the Navy's system at NCTAMS. Where there is a practical alternative to using the drinking water supply for agricultural irrigation -- Waihole Ditch water in the case of WUPA No. 871 -- it should be utilized.

Dennis J. Hwang, Esq.
April 23, 2009 -- 09-096
Page 3

- At present, the CWRM lists Del Monte 1 (State No. 2703-01) as being in the Ewa-Kunia Aquifer. This aquifer system has a sustainable yield of 16 MGD and current allocations of 15.457 MGD, meaning the remaining allocable supply is 0.543 MGD. Physically, the well actually draws water from the Waipahu-Waiawa Aquifer. Its sustainable yield is 104 MGD. Total allocated supply is 85.536 MGD, leaving 18.464 MGD as the available unallocated supply.
- Wells drawing water from the Waipahu-Waiawa and Ewa-Kunia aquifers provide all of the drinking water supply for Central Oahu makai of Wahiawa, Ewa, and Nanakuli. In addition, BWS exports more than 40 MGD from the Waipahu-Waiawa Aquifer toward and into Honolulu and would like to increase that amount. Planned and readily foreseeable development in the areas supplied with drinking water from these two aquifer systems substantially exceeds their remaining unallocated supply. In other words, full use of the available and exploitable, potable quality groundwater supply is a foreseeable and not too distant reality. When it arrives, desalting saline groundwater or seawater will be necessary. Although BWS' planned desalting plant is at the makai end of James Campbell Industrial Park and will only provide water to customers in Ewa and Nanakuli, the cost of this far more expensive next increment of drinking water will be borne island wide. With a significant portion of drinking water provided by desalting, the price of BWS water for all island residents will likely to be at least 20 percent higher. That should be given significant weight in judging the appropriateness of the use of Waiahole water as an alternative to potable quality groundwater for agricultural irrigation.

Sincerely,



Tom Nance

○

AGTECH PACIFIC
PO Box 1246, Haleiwa, Hawaii, 96712

April 23, 2009

To: O'Connor Playdon & Guben LLP
733 Bishop Street, 24th Floor
Honolulu, Hawaii 96813-4070

Attn.: Dennis Hwang

Re: Earthjustice Objection to Water Use Permit Application no. 871

Dear Mr. Hwang:

After reviewing the Earthjustice objection to the Fat Law Water Use Permit application, I would like to offer a few comments.

Cost of water currently used by applicants

Mr. Achitoff states "Presumably, they have been using water from the Board of Water Supply", implying they have been successfully farming while paying comparable rates to what they would be paying for Del Monte well water. This is totally inaccurate. Farmers in the Ewa typically get their water from the former Campbell Estate water system consisting of pumps EP 3 & 4, EP 5 & 6 and EP 7 & 8, which is now owned by DR Horton. This water is charged at cost which varies from year to year. The 2008 rate was under \$0.70 per 1000 gallons. Fat Law gets their water indirectly from this system, actually purchasing it from Aloun Farms, their most current cost is \$0.72 per 1000 gallons. In Kahuku, the majority of farmers like Tony Law and Law Tieng's Farm get their water from 2 sources, Hawaii Reserves Inc. and Malaekahana Partners. Both provide water at comparable rates within the range of \$0.55 and \$0.82 per 1000 gallons. Currently Tony Law pays \$0.55 and \$0.82 per 1000 gallons at the locations he farms and Law Tieng's Farm pays \$0.60 and \$0.82 per 1000 gallons at the locations he farms. These rates are more comparable to the agricultural rate for Waiahole water which currently is \$0.517 per 1000 gallons.

Applicant's cost estimate for Del Monte well water

Mr. Achitoff states "applicants cost estimates for Del Monte well nos. 1, 3 and 4 are substantially inflated", then compares applicants cost estimates to those provided by Mr. Joseph Vierra for the operation of former Campbell well EP 5 & 6. This comparison is, in no way, a fair comparison and is grossly misleading. Mr. Vierra's estimate is for operation of a single well location. In contrast, the applicant's cost estimate for the Del Monte well water is for an entire water system including, not one well location, but 3 different well locations, approximately 10 miles of conveyance piping, pressure relief valves, isolation valves, miscellaneous appurtenances and a 2 million gallon reservoir. All wells are deep wells which pump to an elevation greater than 1000 feet. This can not be compared to EP 5 and 6 which has a pumping lift of less than 300'. In addition, one of the Del Monte wells, Well #4, is diesel driven adding an additional level of complexity with respect to maintenance and cost. So, in fact, the applicants estimate are based on

Phone: (808) 636-2020 • Fax (808) 638-8928 • e-mail: agtech@hawaii.rr.com

EXHIBIT " R "

AGTECH PACIFIC

PO Box 1246, Haleiwa, Hawaii, 96712

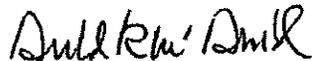
April 23, 2009, page 2

accurate factors and, if anything, would be underestimated as they do not consider future replacement costs.

Consideration of future replacement costs for Del Monte pumps: Bill Moore from Beylick Drilling & Pump Service evaluated Well #3 and #4 in October of 2007, refer to attachments. At that time he estimated life for Well #3 to be ~40,000 hours with a subsequent service cost estimated to be \$340,000. He estimated the life of Well #4 to be between 15 - 18,000 hours with a service cost estimated to be \$475,000. If we were to assume the pumps operate 75% of the time then major service will be required in 6 years for Well #3 and 2 ½ years for Well #4. Assuming an interest rate of 8%, equal annual payments of \$73,500 for Well #3 and \$217,000 for Well #4 would be required to finance this. This adds more than \$0.25 per thousand gallons to the Del Monte well cost.

Please let me know if I can be of any help.

Sincerely,



Donald R. McDonald PE



BEYLIK DRILLING & PUMP SERVICE, INC.

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WATERWELL DRILLING - MONITORING WELLS - WELL AND PUMP REPAIR - TEST HOLES

October 17, 2007

James Campbell, LLC
1000 Kamokila Blvd.
Kapolei, HI 96707

Attn: Lloyd Haraguchi

RE: Evaluation of Del Monte Wells 3

The question was asked, can this pump be throttled back to 1000 GPM and be operated in that mode for an extended period of time. If we look at the included stretch print out we see a note at 1100 GPM, that shaft downward movement is .841" and at 1000 GPM it is .861", however, given that the lateral available for this bowl assembly is .865" one would have to conclude that the minimum operating flow is somewhere between 1100 and 1000 GPM. To prove that the pumps can be operated at those points would require a test using an amp meter to detect at what point the impeller would strike the impeller bowl seats.

It is usual in cases like this to operate a vertical pump at 15% at either side from its design operating point, i.e.; 1190 GPM or 1610 GPM, however each case is evaluated individually because throttling impacts 2 areas.

They are:

1. Shutting in the head puts additional load on the motor thrust bearing, in this case at 1000 GPM the load on the bearing would be 28,300 lbs., this would represent 68% of the bearing rating. The weight load rates these bearings, and the RPM, all of this assumes that the bearing is well lubricated, and the lubricating oil is maintained in good condition.

We use ASTM B-10 rating system, in this case, given the age and service and rotating hours, this particular bearing has used about 6/10 of its useful life, adding additional load and heat would definitely shorten its life and do so proportionately.

2. Shutting in the head also puts additional stress on the bowl castings and the column pipe. We can only guess what long-term effect increasing hydraulic pressure on or in these components will have; additionally there is the cyclic pressurizing and de-pressurizing at higher pressures that would affect these components. If there is thinning due to metal loss and it would depend on where it is located, if for and, for example the metal loss was located on the ERW seam additional pressure could cause the seam to fail. The odds are that you should be okay, however, since it is an unknown and the pipe is relatively old, one should be prepared for the worse case that is a short projected life and an early failure. The question as to where these pumps are in terms of projected useful life is somewhat difficult to determine. Pump failures fall into several broad categories.

State of Hawaii Contractor's License No. AC-21896

projected useful life is somewhat difficult to determine. Pump failures fall into several broad categories.

They are:

- a) Effects of wear
- b) Effects of corrosion
- c) Effects of stress
- d) Effects of improper operation and or maintenance.

For the purposes of this report, we will evaluate only pump performance and the effects wear will have on the projected operating life.

My experience in Hawaii is that operating life is usually influenced by above listed components and will produce 3 categories of operating service.

- A. Severe, in these cases an expected operating life is 20 to 25,000 hrs.
- B. Moderate this is the median category pumps operating in this type of service have between 35 to 40,000 hrs of operating service.
- C. This is the best application and environment these units have 75 to 100,000 operating hrs. of run life

Observations and comments regarding Del Monte pump #3 which is powered by vertical hollow shaft 2300V electric motor.

The overall appearance of the surface components is very good. The area is clean and un-cluttered; maintenance records indicate that the required lubrication has been done systematically.

Equipment operated smoothly at a vibration level somewhat less than 4 mis at its operating frequency, it's shaft run out at the stuffing box is a minimal of 4 mis or less in both the run mode as well as the off and the coast down mode.

The pump performance was measured at 1400 GPM at its usual operating head; additionally the operator's logs indicate that there has been no change in the pump performance over a 2 plus years of operation.

Conclusion: this machine with approx. 40,000 plus operating hours can be described thusly.

- a) Pump shows no effects of wear or looseness.
- b) Down hole corrosion is unknown.
- c) No evidence of stress or stress risers was noted, a smooth operation indicates no couples are present and no produced binding moments were being transmitted through the shaft system.

The unit is well maintained. The pump appears to be in good condition. The remaining life before failure is estimated at approx. 40,000 hrs, noted in this case represents 3/5 of the estimated 100,000 hour run life remains, almost all vertical turbine pumps which reaches 75 or 100,000 hours of operation will fail due to a structural failure that is, shaft breakage or column separation or corrosion metal thinning.

This pump appears to be in good condition and is operating normally.

The following are a listing of cost that may be encountered if and when the pump needs to be serviced.

- 1) 500HP Vertical hollow shaft 2300 V motor approx..... \$45,000.00
- 2) Replacement of all column tube and shaft approx..... \$175,000.00
- 3) New bowl assembly approx.\$45,000.00
- 4) Removal, installation and other various services approx..... \$75,000.00

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WATER WELL DRILLING - MONITORING WELLS - WELL AND PUMP REPAIR - TEST HOLES

October 17, 2007

RE: Del Monte Deep Well #4

Del Monte Pump No. 4 is a prime mover powered unit with the performance conditions very similar to pump #3, that is 1400 GPM at 1186' of head. The overall appearance of the surface components is fair to good. All the mechanical components appear to be well maintained. That is, no loose or worn components visible. The control system and wiring harness though functional is fairly well coated with oil, considerable bulk and bundled and is draped over hangers appeared adequate and appropriate, noting that with engine drive systems generating motions and vibrations flexibility is needed so the stresses are absorbed and not transmitted to wire termination points.

Diesel engine was not evaluated. Engines have various maintenance milestones usually top over hauls at 15 to 20,000 operating hrs. and major or full overhauls at the 30 to 40,000 hrs mark. The pumping equipment was operated from start up to the operating RPM and then thru the backspin shut down.

The following was noted:

At the operating load and speed, between 10 and 15 mis of displacement at the gear was noted which is constant except at the lower speed as the rotating components pass through various critical speeds. The station operators indicate that the sounds, motions and appearance of the exposure rotating parts have been constant for some time. There are noticeable shaft movements at the stuffing box approximately 10 to 15 mis however, this movement is constant when the pump is under load, there is no metal-to-metal contact detected or noted. During the shut down and subsequent back spin there are considerable shaft movements at the stuffing box, is hard to tell if there is a single component causing these movements, there are many elements in motion, however, the shaft is the least stable as well as the most flexible, in this case I suspect looseness in the top tension bearing and a misalignment are the root causes of the motion observed. Most oil lubricated line shaft pumps wear from the bottom up and as the looseness increases the shaft motions are more noticeable usually accompanied by a noticeable thumping feeling in the area around the pump face. Most equipment of this size will establish operating characteristics early on and will continue that way until looseness develops then operation characteristics change in the form of noise and motion is increased. Pump 4 like pump 3, pumping performance was measured at 1400 GPM at 1186' of head, which is normal for this pump, which is now operating at 1500 RPM. The operator says that this has been stable for sometime.

Evaluation:

a) This machine has approx. 25 to 30,000 operating hours.

We note the following:

- b) The effects of corrosion are unknown.
- c) There are subtle motions in all the components, however no couples were flexing was noted.

State of Hawaii Contractor's License No. AC-21896

We would rate this pump at this time as being moderate, the remaining life before failure is estimated 15 to 20,000 hours, however, because this is the newest of the service pumps and it does show signs of looseness with accompanied movements I would estimate the remaining services life of approximate 15 to 18,000 hours at which time an overhaul may become evident.

Cost for various replacement parts, these are estimates:

Item 1) Engine.....	\$80,000.00
Item 2) Centrifugal clutch and drive shaft.....	\$30,000.00
Item 3) Right angle gear drive.....	\$35,000.00
Item 4) Replacement column tube and shaft.....	\$175,000.00
Item 5) New bowl assembly.....	\$45,000.00
Item 6) Remove/ installation and other services costs.....	\$75,000.00
Item 7) Contingency items not listed.....	\$25,000.00

Bill Moore

Prepared by: Bill Moore
Baylk Drilling & Pump Service, Inc.
Contractor's License No.: AC-21888

10/17-07
Date

State of Hawaii Contractor's License No. AC-21896

STATE OF HAWAII

Regarding Application for Ground Water Use Permit

AFFIDAVIT OF FRANK LAW

FAT LAW'S FARM, INC., LAW TIENG'S FARM, TONY AND MANYVONE LAW, AND HAE AND PHOUAUGPHET VIENGKHOU,

Applicants,

AFFIDAVIT OF FRANK LAW

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

FRANK LAW, being first duly sworn on oath, deposes and says:

- 1. I am a resident of Honolulu, Hawaii.
2. I make this affidavit of my own personal knowledge and information and am competent to testify as to all matters contained herein.
3. I am the Vice President at Fat Law's Farm located at 91-2081 Fort Weaver Road, Ewa Beach, HI 96706.
4. At my farm, I pay \$0.72 cents per 1000 gallons of water.

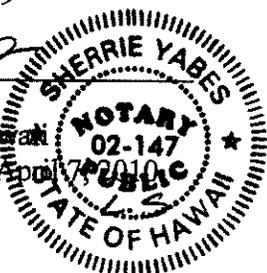
Further Affiant sayeth naught.

Handwritten signature of Frank Law over a horizontal line, with the text 'FRANK LAW' printed below.

Subscribed and sworn to before me this 23rd day of April, 2009

Handwritten signature of Sherrie Yabes

Print name: Sherrie Yabes
Notary Public, State of Hawaii
My Commission Expires: April 7, 2010



Doc. Date: NO date # Pages: 1
Sherrie Yabes First Circuit
Doc. Description: Affidavit

Handwritten signature of Sherrie Yabes
Notary Signature Date
NOTARY CERTIFICATION



EXHIBIT "S"

STATE OF HAWAII

Regarding Application for Ground Water Use Permit

AFFIDAVIT OF THOMAS LAW

FAT LAW'S FARM, INC., LAW TIENG'S FARM, TONY AND MANYVONE LAW, AND HAE AND PHOUAUGPHET VIENGGKHOU,

Applicants,

AFFIDAVIT OF THOMAS LAW

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU) SS:

THOMAS LAW, being first duly sworn on oath, deposes and says:

- 1. I am a resident of Waipahu, Hawaii.
2. I make this affidavit of my own personal knowledge and information and am competent to testify as to all matters contained herein.
3. I am the operator of Law Tieng's Farm located at 56-156 Kamehameha Highway, Kahuku, HI 96731.
4. At my farm, I get water from two sources. At one source, I pay \$0.60 cents per 1,000 gallons. At the second source, I pay \$0.82 cents per 1,000 gallons.

Further Affiant sayeth naught.

[Signature]
THOMAS LAW

Subscribed and sworn to before me this 22nd day of April, 2009

[Signature]
Print name: Sherrie Yabes
Notary Public, State of Hawaii
My Commission Expires: April 7, 2012



Doc. Date: No date # Pages: 1
Sherrie Yabes
Doc. Description: Affidavit
[Signature]
Notary Signature
NOTARY CERTIFICATION

EXHIBIT "T"

STATE OF HAWAII

Regarding Application for Ground Water Use Permit

AFFIDAVIT OF TONY LAW

FAT LAW'S FARM, INC., LAW TIENG'S FARM, TONY AND MANYVONE LAW, AND HAE AND PHOUAUGPHET VIENGGKHOU,

Applicants,

AFFIDAVIT OF TONY LAW

STATE OF HAWAII

)

) SS:

CITY AND COUNTY OF HONOLULU

)

TONY LAW, being first duly sworn on oath, deposes and says:

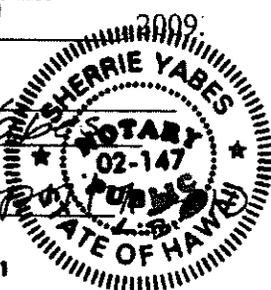
1. I am a resident of Kahuku, Hawaii.
2. I make this affidavit of my own personal knowledge and information and am competent to testify as to all matters contained herein.
3. I am the sole proprietor of Tony Law Farm located at 57-146 Kamehameha Highway, Hawaii 96731 operating in Waianae, Kahuku and Ewa Beach.
4. At my farm, I get water from two sources. At one source, I pay \$0.55 cents per 1,000 gallons. At the second source, I pay \$0.82 cents per 1,000 gallons.

Further Affiant sayeth naught.

Tony Law
TONY LAW

Subscribed and sworn to before me this 23rd day of April

Sherrie Yabes
Print name: Sherrie Yabes
Notary Public, State of Hawaii
My Commission Expires: April 2009



Doc. Date: No date # Pages: 1
Sherrie Yabes First Name: SHERRIE YABES
Doc. Description: Affidavit
Sherrie Yabes
Notary Signature
NOTARY CERTIFICATION OF HAWAII

EXHIBIT "U"

Aquifer System Area Water Use Permit Index *(total)*

ISLAND OF OAHU

Aquifer System Ground Water Management Area: **WAI AHOLE DITCH**

Sustainable Yield = 15

<i>WUP No</i>	<i>Approved</i>	<i>Applicant</i>	<i>Well No.</i>	<i>Well Name</i>	<i>WUP (mgd)</i>	<i>12-MAV (mgd)</i>
619	12/28/2001	DOLE/CASTLE & COOKE	2657-05	WAIAWA DEV TUN	2.130	
619	12/28/2001	DOLE/CASTLE & COOKE	2853-01	WAI AHOLE MAIN		
619	12/28/2001	DOLE/CASTLE & COOKE	2953-01	UWAW DEV TUN		
619	12/28/2001	DOLE/CASTLE & COOKE	2953-02	WAIKANE DEV TUN #2		
619	12/28/2001	DOLE/CASTLE & COOKE	2953-03	UWAW TUN EXT		
619	12/28/2001	DOLE/CASTLE & COOKE	3053-01	WAIKANE DEV TUN #1		
619	12/28/2001	DOLE/CASTLE & COOKE	3154-01	KAHANA DEV TUN		
630	12/28/2001	STATE DLNR	2657-05	WAIAWA DEV TUN	0.150	
630	12/28/2001	STATE DLNR	2853-01	WAI AHOLE MAIN		
630	12/28/2001	STATE DLNR	2953-01	UWAW DEV TUN		
630	12/28/2001	STATE DLNR	2953-02	WAIKANE DEV TUN 2		
630	12/28/2001	STATE DLNR	2953-03	UWAW TUN EXT		
630	12/28/2001	STATE DLNR	3053-01	WAIKANE DEV TUN 1		
630	12/28/2001	STATE DLNR	3154-01	KAHANA DEV TUN		
631	12/28/2001	MILILANI MEMORIAL PARK	2657-05	WAIAWA DEV TUN	0.140	
631	12/28/2001	MILILANI MEMORIAL PARK	2853-01	WAI AHOLE MAIN		
631	12/28/2001	MILILANI MEMORIAL PARK	2953-01	UWAW DEV TUN		
631	12/28/2001	MILILANI MEMORIAL PARK	2953-02	WAIKANE DEV TUN #2		
631	12/28/2001	MILILANI MEMORIAL PARK	2953-03	UWAW TUN EXT		
631	12/28/2001	MILILANI MEMORIAL PARK	3053-01	WAIKANE DEV TUN #1		
631	12/28/2001	MILILANI MEMORIAL PARK	3154-01	KAHANA DEV TUN		
632	12/28/2001	MILILANI GOLF CLUB	2657-05	WAIAWA DEV TUN	0.250	
632	12/28/2001	MILILANI GOLF CLUB	2853-01	WAI AHOLE MAIN		
632	12/28/2001	MILILANI GOLF CLUB	2953-01	UWAW DEV TUN		
632	12/28/2001	MILILANI GOLF CLUB	2953-02	WAIKANE DEV TUN #2		
632	12/28/2001	MILILANI GOLF CLUB	2953-03	UWAW TUN EXT		
632	12/28/2001	MILILANI GOLF CLUB	3053-01	WAIKANE DEV TUN #1		
632	12/28/2001	MILILANI GOLF CLUB	3154-01	KAHANA DEV TUN		
634	12/28/2001	NIHONKAI	2657-05	WAIAWA DEV TUN	0.480	
634	12/28/2001	NIHONKAI	2853-01	WAI AHOLE MAIN		
634	12/28/2001	NIHONKAI	2953-01	UWAW DEV TUN		
634	12/28/2001	NIHONKAI	2953-02	WAIKANE DEV TUN #2		
634	12/28/2001	NIHONKAI	2953-03	UWAW TUN EXT		

WUP No	Approved	Applicant	Well No.	Well Name	WUP (mgd)	12-MAV (mgd)
634	12/28/2001	NIHONKAI	3053-01	WAIKANE DEV TUN #1		
634	12/28/2001	NIHONKAI	3154-01	KAHANA DEV TUN		
636	12/28/2001	BISHOP ESTATE	2657-05	WAIAWA DEV TUN	0.170	
636	12/28/2001	BISHOP ESTATE	2853-01	WAIHOLE MAIN		
636	12/28/2001	BISHOP ESTATE	2953-01	UWAW DEV TUN		
636	12/28/2001	BISHOP ESTATE	2953-02	WAIKANE DEV TUN #2		
636	12/28/2001	BISHOP ESTATE	2953-03	UWAW TUN EXT		
636	12/28/2001	BISHOP ESTATE	3053-01	WAIKANE DEV TUN #1		
636	12/28/2001	BISHOP ESTATE	3154-01	KAHANA DEV TUN		
775	7/13/2006	PUU MAKAKILO	2657-05	WAIAWA DEV TUN	0.750	
775	7/13/2006	PUU MAKAKILO	2853-01	WAIHOLE MAIN		
775	7/13/2006	PUU MAKAKILO	2953-01	UWAW DEV TUN		
775	7/13/2006	PUU MAKAKILO	2953-02	WAIKANE DEV TUN #2		
775	7/13/2006	PUU MAKAKILO	2953-03	UWAW TUN EXT		
775	7/13/2006	PUU MAKAKILO	3053-01	WAIKANE DEV TUN #1		
775	7/13/2006	PUU MAKAKILO	3154-01	KAHANA DEV TUN		
804	2/22/2007	Robinson Kunia Land, LLC	2657-05	WAIAWA DEV TUN	2.390	
804	2/22/2007	Robinson Kunia Land, LLC	2853-01	WAIHOLE MAIN		
804	2/22/2007	Robinson Kunia Land, LLC	2953-01	UWAW DEV TUN		
804	2/22/2007	Robinson Kunia Land, LLC	2953-02	WAIKANE DEV TUN #2		
804	2/22/2007	Robinson Kunia Land, LLC	2953-03	UWAW TUN EXT		
804	2/22/2007	Robinson Kunia Land, LLC	3053-01	WAIKANE DEV TUN #1		
804	2/22/2007	Robinson Kunia Land, LLC	3154-01	KAHANA DEV TUN		
807	7/13/2006	HI Agricultural Research Ctr.	2657-05	WAIAWA DEV TUN	0.260	
807	7/13/2006	HI Agricultural Research Ctr.	2853-01	WAIHOLE MAIN		
807	7/13/2006	HI Agricultural Research Ctr.	2953-01	UWAW DEV TUN		
807	7/13/2006	HI Agricultural Research Ctr.	2953-02	WAIKANE DEV TUN #2		
807	7/13/2006	HI Agricultural Research Ctr.	2953-03	UWAW TUN EXT		
807	7/13/2006	HI Agricultural Research Ctr.	3053-01	WAIKANE DEV TUN #1		
807	7/13/2006	HI Agricultural Research Ctr.	3154-01	KAHANA DEV TUN		
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	2657-05	WAIAWA DEV TUN	0.470	
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	2853-01	WAIHOLE MAIN		
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	2953-01	UWAW DEV TUN		
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	2953-02	WAIKANE DEV TUN #2		
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	2953-03	UWAW TUN EXT		
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	3053-01	WAIKANE DEV TUN #1		
808	7/13/2006	Pioneer Hi-Bred Intl., Inc.	3154-01	KAHANA DEV TUN		
827	7/13/2006	Edmund C. Olson Trust No. 2	2657-05	WAIAWA DEV TUN	0.024	
827	7/13/2006	Edmund C. Olson Trust No. 2	2853-01	WAIHOLE MAIN		

WUP No	Approved	Applicant	Well No.	Well Name	WUP (mgd)	12-MAV (mgd)
827	7/13/2006	Edmund C. Olson Trust No. 2	2953-01	UWAU DEV TUN		
827	7/13/2006	Edmund C. Olson Trust No. 2	2953-02	WAIKANE DEV TUN #2		
827	7/13/2006	Edmund C. Olson Trust No. 2	2953-03	UWAU TUN EXT		
827	7/13/2006	Edmund C. Olson Trust No. 2	3053-01	WAIKANE DEV TUN #t		
827	7/13/2006	Edmund C. Olson Trust No. 2	3154-01	KAHANA DEV TUN		
828	7/13/2006	Monsanto Company	2657-05	WAIAWA DEV TUN	2.636	
828	7/13/2006	Monsanto Company	2853-01	WAI AHOLE MAIN		
828	7/13/2006	Monsanto Company	2953-01	UWAU DEV TUN		
828	7/13/2006	Monsanto Company	2953-02	WAIKANE DEV TUN #2		
828	7/13/2006	Monsanto Company	2953-03	UWAU TUN EXT		
828	7/13/2006	Monsanto Company	3053-01	WAIKANE DEV TUN #t		
828	7/13/2006	Monsanto Company	3154-01	KAHANA DEV TUN		
860	7/13/2006	Syngenta Hawaii LLC	2657-05	Waiawa Dev Tunnel	0.590	
860	7/13/2007	Syngenta Hawaii LLC	2853-01	Waiahole Main		
860	7/13/2007	Syngenta Hawaii LLC	2953-01	Uwau Tunnel		
860	7/13/2006	Syngenta Hawaii LLC	2953-02	Waikane Tunnel 2		
860	7/13/2006	Syngenta Hawaii LLC	2953-03	Uwau Tunnel Extension		
860	7/13/2006	Syngenta Hawaii LLC	3053-01	Waikane Tunnel t		
860	7/13/2006	Syngenta Hawaii LLC	3154-01	Kahana Tunnel		
862	5/20/2009	Agribusiness Development Corp.	2657-05	Waiawa Dev Tunnel	2.000	
862	5/20/2009	Agribusiness Development Corp.	2853-01	Waiahole Main		
862	5/20/2009	Agribusiness Development Corp.	2953-01	Uwau Tunnel		
862	5/20/2009	Agribusiness Development Corp.	2953-02	Waikane Tunnel 2		
862	5/20/2009	Agribusiness Development Corp.	2953-03	Uwau Tunnel Extension		
862	5/20/2009	Agribusiness Development Corp.	3053-01	Waikane Tunnel 1		
862	5/20/2009	Agribusiness Development Corp.	3154-01	Kahana Tunnel		
<i>Summary for WAI AHOLE DITCH (98 detail records)</i>					Totalling	12.440
					Available	2.560

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

August 8, 2008

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

Ref: 07od-080

OAHU

Authorization to Enter into Agreement with James Campbell Company LLC
Regarding Water Allocation and Easements for State Lands; Amend Prior Action
of December 14, 2007, Item D-26; Kunia, Ewa, Oahu, Tax Map key (1) 9-4-
012:001, 002 & 003.

BACKGROUND:

On December 14, 2007, under agenda item D-25, the Board approved the mutual cancellation of General Lease No. 4612 issued to Del Monte Fresh Produce (DM). Staff is working with the Department of the Attorney General regarding the cancellation document.

At the same meeting, under separate item (D-26) (Exhibit A), the Board authorized the public auction of the former DM lease land for intensive agriculture purposes. As mentioned in the D-26 submittal, water sources for the subject State lands come from three wells managed by DM on land owned by James Campbell Company LLC (JCC). The wells provide a crucial element to the successful operation of farming on the State lands. There was no information regarding the future planning of the water source when the Board authorized the said public auction.

On December 13, 2007, JCC recorded the "Declaration of Covenants Regarding Water Allocation and Easements" (Declaration) at the Bureau of Conveyances. A copy of the map showing the properties affected by the Declaration and the latest version of the Declaration are attached as Exhibit B and C respectively.

Briefly, the Declaration provides a general plan for the overall water administration, maintenance and preservation of JCC lands in the area. Kunia Water Association, Inc., a non-profit organization, will be formed. Members of the Association include all property owners and lessee of the affected properties. Each member is required to pay a fixed operating cost to cover, for example, the independent contractor running the system, or anticipated repairs to the structure. In addition, members need to pay a variable operating

D-11

cost based on the fuel consumption of the individual member. After the water is pumped to the delivery point of each member's respective area, the member is responsible for all the costs and maintenance thereafter. JCC also reserves a perpetual easement over its land for the entire irrigation system. Such covenants in the Declaration shall run with the title of the properties affected.

Pursuant to paragraph 2.9 of the Declaration, JCC reserves its right to annex the subject State lands and thereafter allocate water according to the schedule at Exhibit C-2 of the Declaration, and further subject to the State agrees to be bound by the terms and conditions of the Declaration. At the time of writing this submittal, staff understands that the allocation on Exhibit C-2 is based on the arable acreage of the lands involved.

Department of Facility Maintenance, Division of Aquatic Resources, and Historic Preservation Division have no objections/comments to the request.

Department of Health, Commission on Water Resources Management, and Department of Hawaiian Home Lands, and Office of Hawaiian Affairs have not responded as of the suspense date.

Board of Water Supply reiterates that water should be provided by the private water system, as there is no BWS water system serving the area.

Department of Planning and Permitting advised that JCC proposed to preserve the Kunia Village (portion of properties affected by the Declaration) as affordable housing unit, and the City's Planning Commission is supporting JCC's proposal in its zoning change application.

Department of Agriculture does not have objections to the request subject to the terms and conditions of the agreement reviewed and approved by the Department of the Attorney General (AG).

JCC also provides a draft operating budget, Exhibit D, which shows the State land's share in the draft budget is about \$5,200 per year. Staff notes that this figure is only a draft based on an estimated consumption.

As mentioned at the beginning of this submittal, the water system is a crucial element toward the success of operating on the subject State land. Staff recommends the Board granting the authorization to enter the Declaration, as amended, with JCC, and further subject to the review and approval by AG. In addition, staff recommends the Board authorize the Chairperson to negotiate, on the State's behalf, with JCC on the terms and conditions of the Declaration.

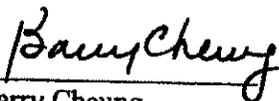
Upon approval of the subject request, staff recommends the Board amend its prior action of December 14, 2007, item D-26, by encumbering the subject State lands with the proposed agreement with JCC.

Also regarding the forthcoming public auction, US Army Corps of Engineers (ACOE) is planning to install sewer lines and surface road within the subject State land to serve the adjacent military facilities. However, ACOE does not have the final decision of the alignment yet, but ACOE requests its intention for such easement request be reflected in the public auction lease. Staff will work with the AG on the proper languages in the lease, notwithstanding there is a standard provision for withdrawing land for public purpose in the lease. Staff recommends the Board amend its prior action of December 14, 2007, item D-26 by adding a condition for the State to reserve a right for granting easements to ACOE, subject to approval by the AG.

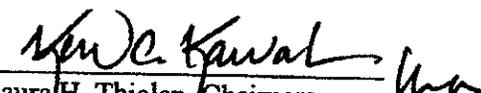
RECOMMENDATION: That the Board

- A. Authorize the Chairperson to negotiate and execute agreement with James Campbell Company LLC regarding water allocation and easements agreement for the above mentioned State lands, subject to the following:
1. Review and approval by the Department of the Attorney General; and
 2. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
- B. Amend its prior action of December 14, 2007, item D-26 by adding the following condition to paragraph 4 of the Recommendation:
- d. Subject to the Declaration of Covenants and its amendment regarding water allocation and easements recorded at the Bureau of Conveyances.
 - e. Reserve its right for the State to grant non-exclusive easement to US Army Corps of Engineers for access and utility purposes.

Respectfully Submitted,


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:


for Laura H. Thielen, Chairperson

026

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

December 14, 2007

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

PSF No.: 07OD-080

OAHU

Sale of Lease at Public Auction for Intensive Agriculture
Purposes, Waikele, Oahu, Tax Map Key: (1) 9-4-12:1,2,3

REQUEST:

Sale of lease at public auction for intensive agriculture
purposes

LEGAL REFERENCE:

Sections 171-14, -14.5, -16, -17 and other applicable sections of
Chapter 171, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Pouhala Mauka situated at Waikele,
Ewa, Oahu, identified by Tax Map Key: (1) 9-4-12:1,2,3, as shown
on the attached map labeled Exhibit A.

AREA:

578.265 acres, more or less, subject to confirmation by the
Department of Accounting and General Services, Survey Division.

ZONING:

State Land Use District: Agriculture
City & County of Honolulu CZO: AG-1 Restricted

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State
Constitution: YES _____ NO x

CURRENT USE STATUS:

Encumbered by General Lease No. S-4612, Del Monte Fresh Produce
(Hawaii), Inc., Lessee, for pineapple cultivation purposes.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
December 11, 2007 *KeK*

EXHIBIT " " ,
D-26

Lease to expire on December 31, 2008.

CHARACTER OF USE:

Intensive agriculture purposes

LEASE TERM:

Thirty (30) years

COMMENCEMENT DATE:

The date of sale if the current occupant is the successful bidder, otherwise, sixty (60) days after the date of sale; provided that if such date is not on the first day of any month, the commencement date shall be the first day of the month following such date; and further provided that the Chairperson may amend the commencement date for good cause.

MINIMUM UPSET ANNUAL RENT:

To be determined by staff or independent appraisal establishing fair market rent, subject to review and approval by the Chairperson.

METHOD OF PAYMENT:

Semi-annual payments, in advance.

RENTAL REOPENINGS:

At the 10th and 20th years of the lease term, by staff or independent appraisal.

PERFORMANCE BOND:

Twice the annual rental amount.

PROPERTY CHARACTERISTICS:

Utilities - Electricity and telephone service are available.
Slope - Gently sloping to nearly level.
Elevation - 720 feet to 880 feet.
Rainfall - 39 inches distributed throughout the year.
SCS Soil Series - Wahiawa silty clay (WaA), 0 to 3% slopes and was used for sugarcane, pineapple and pasture. This soil consists of well-drained, upland areas and has the highest capability classification rating of I if irrigated and predominates the 3 parcels. Very small area of WAB soil, 3 to 8% slopes. Very small area of Kunia silty clay (KyC) 8 to 15% slopes and was used for sugarcane and pineapple.

Land Study Bureau - B121 lists "a" for pineapple, "c" for

" THANKS

vegetable, sugarcane and orchard, "b" for forage and grazing. If irrigation is available all of the above commodity categories are rated "a".

Legal access to property - Staff has verified that there is legal access to the property off of Kunia Road.

Subdivision - Staff has verified that the subject property to be auctioned is a legally subdivided lot.

Encumbrances - Staff has verified that the following encumbrances exist on the property:

Pending General Lease No. S-5912, U.S. Army Garrison-Hawaii for security chain link fence.

Land Office Deed No. S-27850, Hawaiian Electric Co. for electrical transmission lines and poles.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. a, Item No. 1 that states "Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing."

BACKGROUND:

General Lease No. S-4612 was sold at public auction on October 19, 1979. The successful bidder was Del Monte Corporation. The lease term was for 15 years commencing on January 1, 1980 and expiring on December 31, 1994. The lease character of use was pineapple cultivation. The Land Board at its meeting of October 27, 1989, under agenda item F-1-g, consented to the assignment from Del Monte Corporation to PPI Del Monte Fresh Produce (Hawaii), Inc. The Land Board at its meeting of June 24, 1994, under agenda item D-7, approved a 14 year lease extension and consented to Bank of Hawaii \$1,250,000 loan. Expiration was December 31, 2008.

By letter dated March 5, 2007 from Mr. David W.H. Chee on behalf of Del Monte Fresh Produce (Hawaii) Inc. informed the Department his clients would not be renewing the lease and is interested in surrendering the land at a date earlier than December 31, 2008.

The Land Board at its meeting of December 9, 2005, under agenda Item D-1, approved to recommend to the Governor the issuance of executive order(s) setting aside various parcels throughout the State of Hawaii under the Departments' jurisdiction to the Department of Agriculture (DOA) pursuant to Act 90, Session Laws of Hawaii 2003. Total acreage is approximately 4,725.799 acres. The subject three (3) parcels are included in this transfer to DOA.

In August 2007, staff met with Ms. Stacie Sasagawa, General Manager for Del Monte. Ms. Sasagawa indicated more work needs to be done by Del Monte, therefore, returning the State property may occur around December 2008. They will continue to work with the Department.

On November 5, 2007, Ms. Sasagawa informed staff she was leaving Del Monte and that Mr. Gordon Rezentes will be managing the State property until it is returned to the State may be in the summer of 2008.

ANALYSIS:

The highest and best use allowable in the county zoning is agriculture.

Staff feels that these properties (under 1 lease) will be successfully sold at public auction. The recommended character of use (intensive agriculture) will allow any farm operation to decide what crop is appropriate. In the future, should there be a change in the consumer's diet or marketplace, at least the tenant can easily switch crops. As adjacent property owners sell large tracts of agricultural lands for urban development, the State is committed in keeping these properties in agriculture use. Therefore, there are farm operations interested in a long-term lease.

Comments were solicited from:

DHHL	No comment
DOA	No response
ADC	No response
City DPP	Best management practices must be utilized for pesticide and nutrient control.
BWS	No water system in the area. Water should be provided for by the private water system serving the area.
OHA	No comment

Currently, water for the State properties comes from three (3) wells Del Monte is managing and operating on James Campbell Company LLC lands. Surrounding properties in Kunia including the former pineapple workers camp and HCAP pre-school are dependent on this water. For some time, James Campbell Company has been selling off its Kunia land holdings. Eventually, when Del Monte leaves, managing and operating the wells will have to be done by someone. Representatives from James Campbell Company are uncertain if it will be a company or water cooperative. It is important that the State participates in order for the State

properties to continue in agriculture.

Yes, it would've been much easier if Del Monte had assigned the lease to a qualified farmer. Then there would have been a smooth transition. Staff and others have discussed this option with Ms. Sasagawa. This was flatly denied.

Since there is nothing final from James Campbell Company, when a document is generated requiring the State's commitment, Land Board approval will be obtained.

The mutual cancellation of General Lease No. S-4612 will be done in a separate Board submittal.

With the departure of Del Monte, Board approval will allow staff to start the necessary paperwork for the public auction.

RECOMMENDATION: That the Board:

1. Find the area to be an economic unit in terms of the intended use.
2. Find that the subject area is not suitable for hunting, nor will it become so during the term of the lease.
3. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
4. Authorize the sale of a lease at public auction covering the subject area for intensive agriculture purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - a. The standard terms and conditions of the most current intensive agriculture general lease form, as may be amended from time to time;
 - b. Within the first two (2) years of the lease term, the land under lease shall be utilized for the purposes for which the lease is sold, all in accordance with a conservation plan approved by the Chairperson;
 - c. Review and approval by the Department of the Attorney General; and

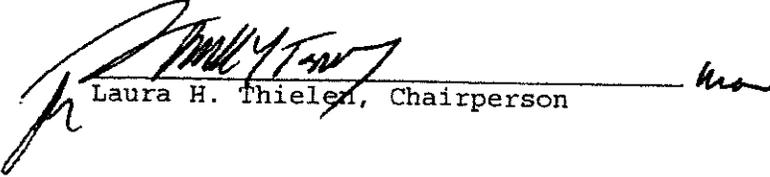
- d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thiele, Chairperson

PROPERTY LOCATION MAP
First Division Tax Map Key 9-4-12, Parcels 1, 2, and 3
General Lease No. S-4612
Kunia, Oahu, Hawaii

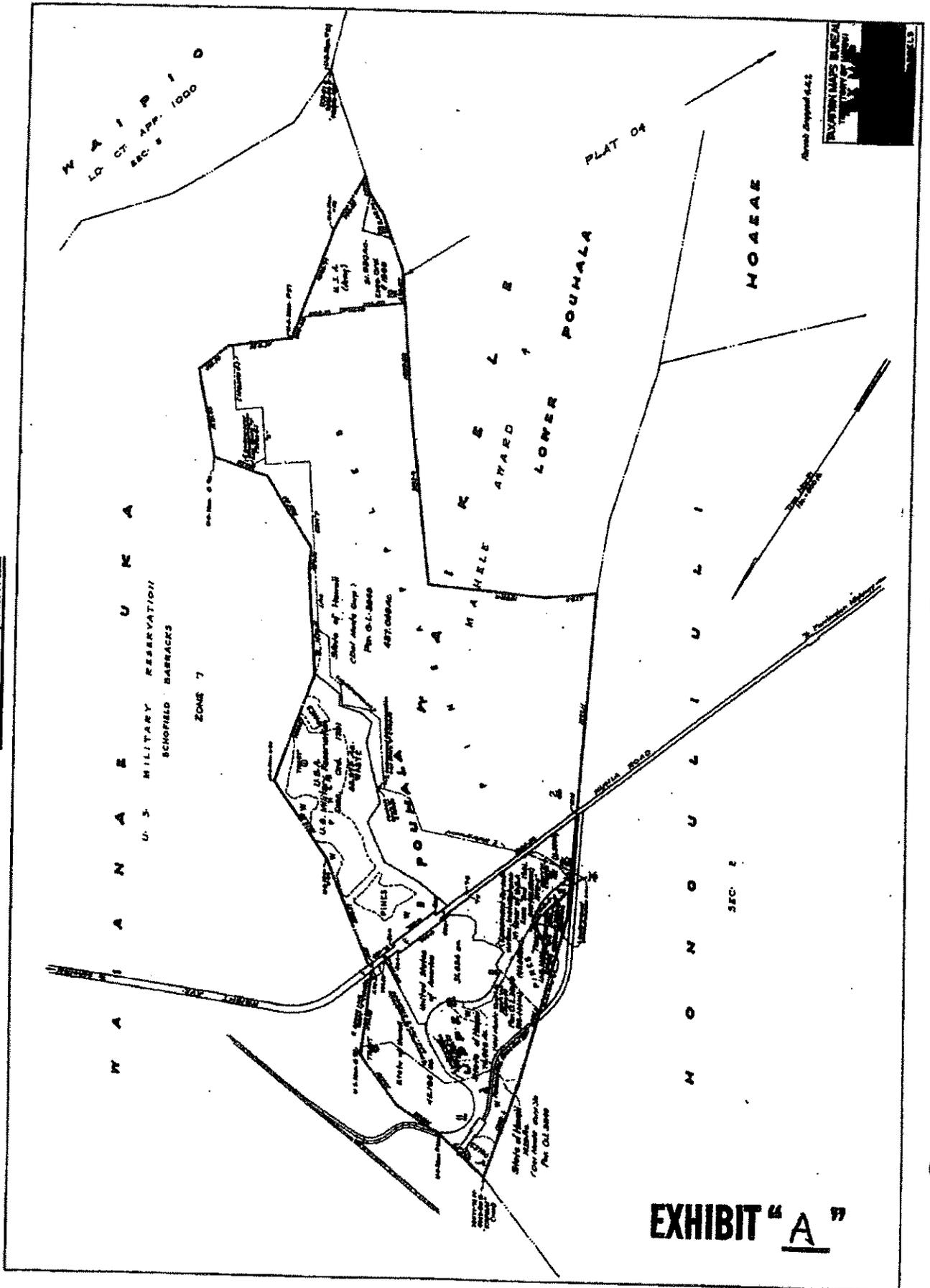
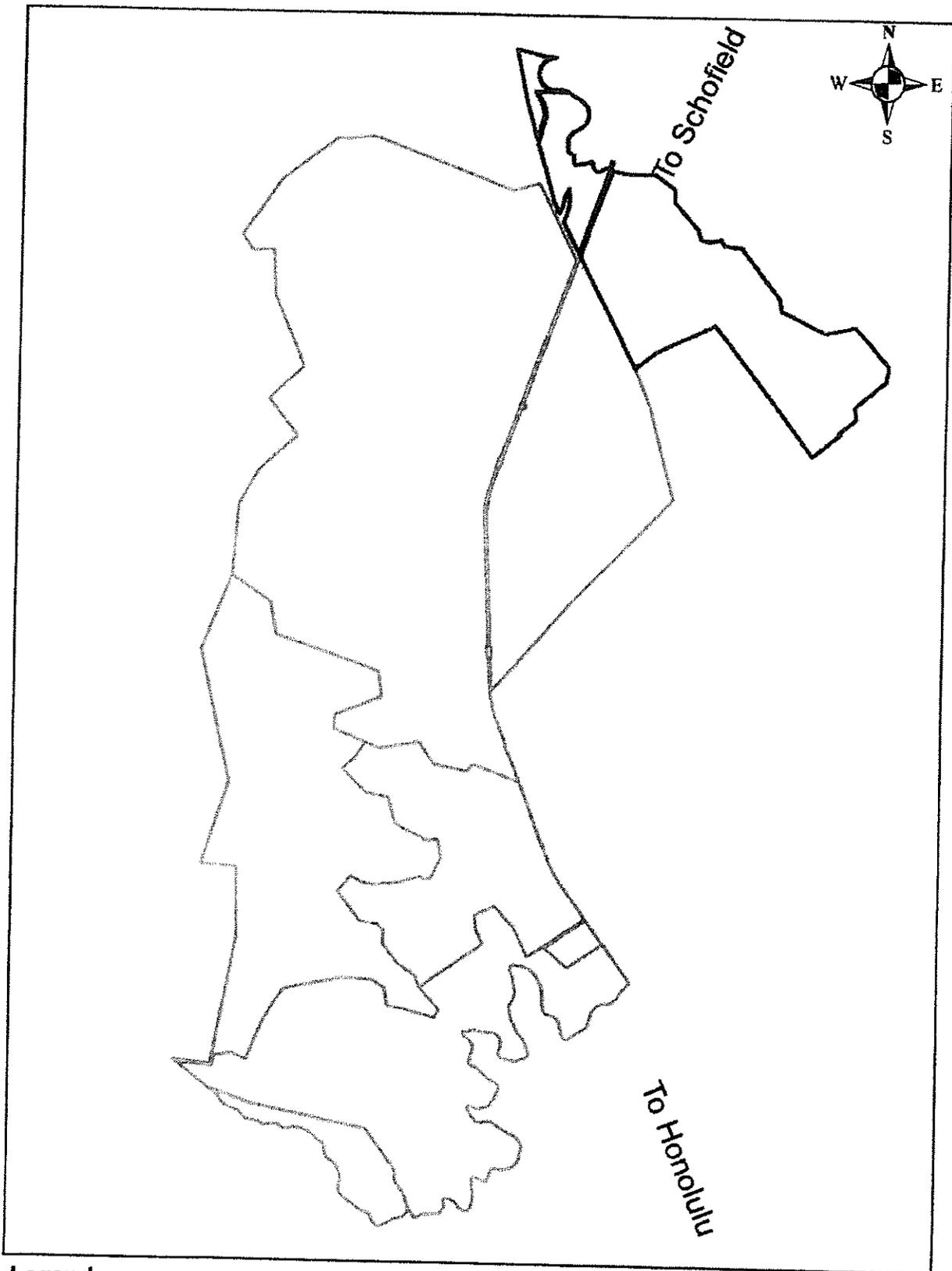


EXHIBIT "A"

Water Allocation and Easement, Kunia



Legend

 State of Hawaii

 James Campbell Company LLC

State of Hawaii - (1) 9-4-12:1,2 & 3

James Campbell Company - (1) 9-2-4:1,3,5 & 6
(1) 9-2-5:1,2 & 4

Exhibit B

LAND COURT

REGULAR SYSTEM

Return By Mail Pick-Up

CARLSMITH BALL LLP
318 Kapolei Building
1001 Kamokila Boulevard
Kapolei, Hawaii 96707
Attention: Mark K. Murakami
Telephone: 808.523.2561

TITLE OF DOCUMENT:

**AMENDED AND RESTATED DECLARATION OF COVENANTS REGARDING WATER
ALLOCATION AND EASEMENTS**

PARTIES TO DOCUMENT:

DECLARANT: **JAMES CAMPBELL COMPANY LLC,**
a Delaware limited liability company
James Campbell Building
1001 Kamokila Boulevard
Kapolei, Hawaii 96707

TAX MAP KEY(S): (Oahu) 9-2-004: parcels 001, 003, 005, and 006
 (Oahu) 9-2-005: parcels 001, 002, and 004

**Certificate of Title Nos. 830,900; 830,905; 830,906; 830,907; 830,908; 830,909;
830,910; 830,911; 830,912; 830,915; 830,917; 830,918; 892,319; 892,320; and
892,761**

(This document consists of __ pages.)

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ALLOCATION AND EASEMENTS
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EXHIBITS:

- EXHIBIT A: PROPERTY DESCRIPTION**
- EXHIBIT B-1: MAP OF SECTIONS**
- EXHIBIT B-2: MAP OF WATER SYSTEM AND LOCATION OF
DELIVERY POINTS (SECTIONS 6 & 8)**
- EXHIBIT C-1: CURRENT PERCENTAGE OF WATER ALLOCATION**
- EXHIBIT C-2: PERCENTAGE OF WATER ALLOCATION INCLUDING STATE OF
HAWAII LAND**
- EXHIBIT D: MAP OF STATE OF HAWAII LAND**

**AMENDED AND RESTATED DECLARATION OF COVENANTS REGARDING WATER
ALLOCATION AND EASEMENTS**

THIS AMENDED AND RESTATED DECLARATION OF COVENANTS REGARDING WATER ALLOCATION AND EASEMENTS ("Declaration") is made this _____ day of _____, 2008, by **JAMES CAMPBELL COMPANY LLC**, a Delaware limited liability company, whose place of business and post office address is James Campbell Building, 1001 Kamokila Boulevard, Kapolei, Hawaii 96707 (the "**Declarant**").

RECITALS

WHEREAS, Declarant entered into that certain Declaration of Covenants Regarding Water Allocation and Easements dated December 13, 2007 (Agreement No. A02081500); filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 3694441, and recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 2007-219110 (the "**Original Declaration**"); and

WHEREAS, under paragraph 7.5 (Amendment) of the Original Declaration, so long as the Declarant owns any portion of the Property, the Declarant reserved unto itself, the unilateral right to amend the Original Declaration for any purpose until the Substitution Date; and

WHEREAS, as set forth in **Exhibit A**, Declarant continues to own substantially all of the Property, and Declarant represents that the Substitution Date has not yet occurred; and

WHEREAS, after receiving input from various sources, including from prospective buyers for portions of the Property, Declarant believes that certain modifications to the Original Declaration are appropriate to make implementation of the Original Declaration more effective towards the goals set forth in the Original Declaration; and

NOW THEREFORE, in consideration of the foregoing and in consideration of the covenants and agreements set forth below, Declarant does hereby amend and restate in its entirety, the Original Declaration as follows:

BACKGROUND STATEMENT

Declarant, as holder of rights under the Original Declaration, and as the owner of substantial portions of the real property described in **Exhibit A** attached hereto and incorporated herein by this reference (the "**Property**"), intends by recording this Declaration to establish a general plan of water allocation for the areas known as Kunia Village and the surrounding Kunia Lands. Substantially all of the Property was or is encumbered by that certain unrecorded Lease dated April 29, 1994 (Lease No. L00977200) between James Campbell Company LLC, a Delaware limited liability company, as successor Lessors, and Del Monte Fresh Produce (Hawaii), Inc., a Delaware corporation ("**Del Monte**"), as Lessee, as amended and restated by instrument dated January 5, 1995 (collectively the "**Lease**"), the term of which expires on December 31, 2008, subject to earlier termination pursuant to the terms thereof.

By imposing the mutually beneficial restrictions created by this Declaration, Declarant seeks to allocate water use for the benefit of all Property Owners (as such term is defined below). This Declaration provides a flexible and reasonable procedure for present and future

water allocation as Declarant deems appropriate and provides for the overall water administration, maintenance, and preservation. An integral part of the water allocation plan is the creation of the Kunia Water Association ("**Association**"), an incorporated association to be comprised of all Property Owners to administer and enforce this Declaration. Prior to providing any water in accordance with this Declaration, Declarant shall adopt articles of incorporation and bylaws for the Association in order to implement the provisions of this Declaration.

For purposes of this Declaration, the "**Substitution Date**" shall mean the earlier of (i) the date by which Declarant or any successor of Declarant pursuant to paragraph 7.8 (Assignment) below no longer owns any portion of the Property, or (ii) when Declarant voluntarily assigns all of its rights, powers, duties and obligations retained under this Declaration to the Association, as evidenced by a written instrument to that effect, executed by Declarant and the Association, and records the same in the Office of the Assistant Registrar of the Land Court of the State of Hawaii and in the Bureau of Conveyances of the State of Hawaii. After the Substitution Date, every reference to Declarant herein shall be deemed to mean and refer to the Association. To the extent Declarant will own any portion of the Property after the Substitution Date, Declarant shall be deemed a Property Owner bound by the same terms and conditions, and with the same rights and privileges as all other Property Owners hereunder. Notwithstanding the foregoing, if the Association is formed prior to the Substitution Date, the Declarant may, but shall not be obligated to, delegate, from time to time, some or all of the Declarant's rights and obligations to the Association, which delegation will be on such terms as the Declarant determines in its sole and absolute discretion, and which delegation may be revoked by the Declarant for any or no reason.

For purposes of this Declaration, "**Property Owner**" shall mean the person or persons, corporation or corporations, or other legal entities named as grantee in the last recorded deed to any portion of the Property, or the vendee of the Property on the last recorded agreement of sale or subagreement of sale, as the case may be, or the lessee of the Property on the last recorded lease or sublease, as the case may be, for a period exceeding five (5) years, unless the deed, agreement of sale or subagreement of sale or lease or sublease document provides otherwise.

ARTICLE I **STATEMENT OF AGREEMENT**

Declarant hereby declares that all of the Property shall be held, sold, and conveyed subject to the covenants, conditions, and easements contained herein, which are made for the express benefit of: (i) Declarant, its successors and assigns, and (ii) the present and future Property Owners, the Association and its members. The covenants, conditions, and easements contained herein shall run with the title to the Property and shall inure to the benefit of Declarant, the Association and any other person who acquires any interest in all or any part of the Property.

In consideration of the mutual benefits and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Declarant, for itself and on behalf of the future Property Owners and the Association, hereby covenants and agrees as set forth herein.

ARTICLE II WATER ALLOCATION

2.1 Operation. Subject to any limitations or conditions precedent provided in this Declaration, Declarant (or the Association after the Substitution Date) in its sole discretion shall have the right to withdraw water from the Water Sources, as defined below, and allocate and deliver such water up to the delivery points ("Delivery Points") which will service the portions of land (each portion of land being defined as a "Section") within the Property by means of transmission and storage facilities and improvements (the "Water Delivery System"); Each Section is shown on the map attached as **Exhibit B-1** and incorporated herein by this reference. The Water Delivery System is shown on **Exhibit B-2** attached hereto and incorporated herein by this reference. The portions of the water system which begin from and include the Delivery Points and provide water to the areas solely within each Section shall be referred to herein as the "Property Owner Distribution Systems". As a general matter, all booster pump stations and water filtration stations will be part of the Property Owner Distribution Systems. In addition, all water meters and valves at each respective Delivery Point will be part of the Property Owner Distribution Systems, but will be operated and managed by the Declarant (or the Association after the Substitution Date) as if the same were part of the Water System. The initial Delivery Points for Section 6 and Section 8 are shown on **Exhibit B-2**.

2.2 Potential Water Sources. To Declarant's knowledge, the potential water sources available under this Declaration are Kunia Well No. 1 (State Well Nos. 2703-01 and 02), Kunia Well No. 3 (State Well No. 2803-05), Kunia Well No. 4 (State Well No. 2803-07), and the sewage treatment plant located in the Section known as the Kunia Village Area (as such Section is shown on **Exhibit B-1**) (collectively, the "Potential Water Sources").

2.3 Licenses, Permits and Approvals. Declarant's right (or the Association's right after the Substitution Date) to withdraw water from the Potential Water Sources and deliver water through the Water Delivery System to the respective Delivery Points is subject to Declarant and/or its agent or the Association obtaining and maintaining the right to all governmental licenses, permits and approvals necessary to withdraw water from the Potential Water Sources and deliver such water through the Water Delivery System to the respective Delivery Points. Del Monte currently owns the revocable permits for the use of water derived from the Potential Water Sources, and upon the expiration of the Lease, subject to the limitations below, Declarant will use commercially reasonable efforts to cause such revocable permits to be assigned to Declarant or its designee. If Del Monte currently holds permits or has other documented rights to (i) use the land underlying Kunia Well No. 3 (State Well No. 2803-05) for withdrawal of water; and/or (ii) to transmit water through pipelines under Kunia Road, Declarant will use commercially reasonable efforts to cause such permits or other documented rights to be assigned to Declarant or its designee; provided, however, that if Del Monte does not hold such permits or documented rights, Declarant shall have no duty or obligation to obtain the same from the applicable landowners or governmental authorities. As Declarant obtains such rights to the necessary licenses, permits and approvals, Declarant will annex each Potential Water Source to this Declaration which upon annexation shall be referred to herein as a "Water Source" or the "Water Sources" under this Declaration. If the sewer treatment plant located in the Section known as the Kunia Village Area becomes a Water Source, the Declarant (or the Association after the Substitution Date) hereby reserves the right to thereafter remove such Water Source from this Declaration at such time as the Declarant or the Association determines to be appropriate, in the Declarant's or in the Association's respective sole and absolute discretion. Upon the Substitution Date, Declarant will use commercially reasonable efforts to

assign or cause the assignment of all rights and interests under the licenses, revocable permits and approvals to the Association.

Declarant shall not annex Well No. 1 to this Declaration unless and until Del Monte (i) fulfills its obligations under the Consent Decree by and between the United States and Del Monte entered into by Del Monte on May 2, 2005, and (ii) has obtained all appropriate Certifications of Completion, as defined in said Consent Decree issued by the Environmental Protection Agency, as provided in said Consent Decree. Notwithstanding the foregoing, prior to annexing Well No. 1, Declarant (or the Association after the Substitution Date) in its sole discretion may accept treated water from Well No. 1 provided that Del Monte complies with the treatment standards for such water as set forth in the Del Monte Consent Decree, and Declarant (or the Association after the Substitution Date) may allocate such treated water to the Sections in accordance with the allocation provisions set forth in paragraph 2.4 (Water Allocation) below.

2.4 Water Allocation. The percentages shown on the attached **Exhibit C-1** represent the allocation of available water that will be delivered to the Delivery Points for each Section. In the event that Declarant exercises the right to annex the lands owned by the State of Hawaii pursuant to paragraph 2.9 (Annexation of Land) below, then the percentages of water allocation shall be as shown on the attached **Exhibit C-2**.

The exact location of the Delivery Points for the remainder of the Sections (other than Section 6 and Section 8) will be determined by mutual agreement between Declarant (or the Association after the Substitution Date) and the Property Owner(s) of the Section for which each Delivery Point services. The cost to construct the Delivery Point and the cost of the Property Owner Distribution System in a given Section will be the responsibility of the Property Owner(s) of the Section within which the Delivery Point is located. The cost to deliver water from the Water Sources to the Delivery Points, including maintenance, repair and replacement of the Water Delivery System, shall be an Operating Cost, and a Capital Recovery Cost, paid by the Property Owner(s) of each Section in accordance with Article V (Obligation to Pay Costs).

2.5 Change in Allocation and Delivery. Any changes in the allocation of water or in the Delivery Points shall require the consent of Declarant (or the Association after the Substitution Date) and the Property Owner(s) of the affected Section(s). Any changes in the costs associated with such change in allocation or Delivery Points will be the responsibility of the Property Owner(s) of the Section who benefits from such changes. Pursuant to paragraph 7.11 (Withdrawal), if Declarant (or the Association after the Substitution Date) withdraws any Section from this Declaration, then the water allocated to the withdrawn Section shall be re-allocated pro rata among the remaining Sections without the consent of the Property Owner(s) of the remaining Sections, and the percentages in **Exhibit C-1 and Exhibit C-2, as applicable**, shall be adjusted accordingly. If Declarant (or the Association after the Substitution Date) instead determines in its sole discretion that the water for the withdrawn Section shall be re-allocated among the remaining Sections in a different manner, then such re-allocation shall require the consent of the Property Owner(s) of the affected Sections.

2.6 Decrease in Water Output. Notwithstanding the occurrence of a decrease in water output from the Water Sources, any available water shall be delivered in accordance with the percentages provided in paragraph 2.4 (Water Allocation) above.

2.7 Redelivery of Water. Other than Declarant (or the Association after the Substitution Date), a Property Owner shall have no right to redeliver or otherwise redistribute the water outside of the Property without the prior written consent of Declarant (or the

Association after the Substitution Date), which consent may be withheld by Declarant (or the Association after the Substitution Date) in its sole discretion for any reason.

2.8. No Right to Use or Control of Facilities or Water. Assessment or payment of a Property Owner's obligation shall not confer on the Property Owner or any other person or entity any right, privilege or duty to own, manage, control, maintain, or use the Water Sources or the Water Delivery System, nor otherwise claim or be entitled to any legal or equitable interest therein or in any allocation of water for any purpose. Nothing in these restrictions shall be construed as imposing any duty whatsoever on the part of Declarant (or the Association after the Substitution Date) or any other person or entity to provide water to the Property or to a Property Owner, or to construct, develop or maintain facilities, or to plan for same, now or at any future time.

2.9. Annexation of Land. James Campbell Company LLC, a Delaware limited liability company ("**JCCLLC**"), reserves the right in its sole discretion to annex the lands owned by the State of Hawaii, as shown on the map attached as **Exhibit D**, and to thereafter allocate water to the State of Hawaii based on the percentage provided in **Exhibit C-2**; provided, however, that no water shall be allocated to the State of Hawaii unless and until the State of Hawaii agrees to be bound by the terms and conditions of this Declaration. The right to annex the lands owned by the State of Hawaii shall be a right personal to JCCLLC and shall not be a right which will be assumed by the Association upon the Substitution Date unless such right is expressly assigned by JCCLLC.

2.10. Condemnation. In the event of condemnation of all or a portion of the Water Sources, the Water Easements (defined below), the Water Delivery System or the Property Owner Distribution Systems, this Declaration shall cease and be null and void as to such portions of the system condemned, and the amount of water to which each Section shall be entitled under this Declaration shall be proportionately reduced or increased. If such condemnation action concerns only the Water Sources, the Water Easements or the Water Delivery System or portions thereof, Declarant (or the Association after the Substitution Date) shall have the sole and exclusive right to defend such condemnation action and all of Declarant's costs and expenses (or the Association's costs and expenses after the Substitution Date) relating to such defense shall be paid from the condemnation award, up to the amount of the condemnation award that is attributable to the Water Sources, the Water Easements or the Water Delivery System. The term "condemnation" shall include a taking pursuant to a conveyance under threat of condemnation. The entire amount of the condemnation award that is attributable to the Water Sources, the Water Easements or the Water Delivery System shall be payable solely and exclusively to Declarant (or the Association after the Substitution Date).

2.11. Agricultural Use. The Property Owners acknowledge and agree that the water to be allocated from the Water Sources and delivered to each Delivery Point under this Declaration is for agricultural use only, and in no event shall Declarant (or the Association after the Substitution Date) be responsible for the delivery of potable water or compliance with the Safe Drinking Water Act, as the same may be amended from time to time, or any similar federal, Hawaii state and local laws and ordinances, and regulations now or hereafter adopted. Nothing herein shall be deemed or construed to prohibit: (a) the Property Owner(s) in the Section known as Kunia Village Area from continuing to treat and use such water for domestic use; or (b) the Property Owners in the Sections other than the Kunia Village Area from using the water for potable, or domestic use in their Sections, provided that they obtain the required licenses, permits and approvals necessary for such use.

ARTICLE III EASEMENTS

3.1 Nonexclusive Easement. Declarant hereby reserves to itself and its successors and assigns, and grants to the Property Owners, a blanket, perpetual, nonexclusive easement over, under, and across the Property solely for water source, transmission and storage purposes in order to allocate and deliver water to the Property as provided in this Declaration ("Water Easements"), and for no other purposes. The location of the Water Sources, the Water Easements and the Water Delivery System, including also easements for access to and maintenance of the water meters and valves at each respective Delivery Point that are part of the Property Owner Distribution Systems, but that are operated and managed by the Declarant (or the Association after the Substitution Date) as if the same were part of the Water System (collectively the "Easement Areas") shall be mutually agreed upon by Declarant (or the Association after the Substitution Date) and the Property Owner(s) of the land upon which such easement(s) is to be located, but are generally located and shown on **Exhibit B-2**. To the extent that the Delivery Point for Section 6 is at its boundary, as shown on **Exhibit B-2**, there is no blanket easement within Section 6, and there are no Easement Areas within Section 6.

3.2 Access. Declarant hereby reserves to itself, its agents, successors and assigns, a blanket, perpetual, non-exclusive easement over, under, and across the Property for the purpose of access, ingress and egress, operation, maintenance and repair to the extent reasonably necessary for Declarant (or the Association after the Substitution Date) or its agents and assigns to perform its responsibilities with respect to the Water Sources, the Water Easements and the Water Delivery System. The location of such easements shall be mutually agreed upon by Declarant (or the Association after the Substitution Date) and the Property Owner(s) of the land on which such easement(s) is to be located.

3.3 Right to Relocate Easements. The Property Owner(s) shall have the right from time to time to realign or relocate the Easement Areas, or portions thereof as may be located on such Property Owner(s) land, provided that (a) such Property Owner(s) shall be solely responsible for paying the cost of realigning or relocating the Easement Areas (including the cost of realigning or relocating utilities, other infrastructure or improvements within the Easement Areas); (b) such Easement Areas shall be equivalent or better in quality and size to the Easement Areas being replaced; and (c) such realigning or relocating of the Easement Areas shall be completed in a manner that will not unreasonably interfere with or disturb the use and enjoyment of the Water Delivery System by the other Property Owners. Declarant (or the Association after the Substitution Date) shall not have any right to relocate any Easement Area without the prior written consent of each affected Property Owner.

3.4 Designation of Land Court Easements. Declarant (or the Association after the Substitution Date) and each Property Owner shall have the right to seek subdivision approval for the Easement Areas from the Department of Planning and Permitting of the City and County of Honolulu, and designation of the Easement Areas in the Office of the Assistant Registrar of the Land Court of the State of Hawaii without the joinder or consent of the other Property Owners. The party who seeks designation of the Easement Areas shall be responsible for the cost to obtain such governmental approvals to create such Land Court designated easement.

3.5 Right to Record. Declarant (or the Association after the Substitution Date) also reserves for itself the right and power to delineate, grant and record with the Assistant Registrar of the Land Court of the State of Hawaii such specific easements as may be necessary, in

Declarant's or the Association's respective sole discretion, in connection with the operation and maintenance of the Water Sources, the Water Easements and the Water Delivery System without the joinder or consent of the Property Owners.

3.6 Exercise of Easements. The Water Easements shall be used in such a manner as to minimize interference with the use and enjoyment of the property burdened by the easement.

3.7 Obstruction of Easement. No person shall construct, install, or maintain any obstruction of the Water Sources, the Water Easements or the Water Delivery System, or otherwise hinder Declarant's ability (or the Association's ability after the Substitution Date) to exercise the easement rights created hereby. Declarant (or the Association after the Substitution Date) shall have the right to remove any such obstruction placed in violation of this paragraph, without notice and without liability to the person(s) who constructed said obstruction or hindered such use.

ARTICLE IV MAINTENANCE

4.1 Rights and Obligations. Declarant (or the Association after the Substitution Date) shall have the right and the obligation to acquire, operate, maintain, repair, replace, and administer the Water Sources, Water Easements and Water Delivery System for which each Property Owner agrees to contribute to the cost of such maintenance as set forth in Article V (Obligation to Pay Costs) below. Each Property Owner acknowledges and agrees that Declarant (or the Association after the Substitution Date) shall have the right to engage the services of an independent contractor to acquire, operate, maintain, repair, replace, and administer the Water Sources, the Water Easements and the Water Delivery System and that the cost of such agreement shall be included in the Operating Costs to be paid by the Property Owners as set forth in Article V (Obligation to Pay Costs) below. The independent contractor shall hold all contracting and other licenses and permits required by law for the performance of such obligations and shall at all times during its engagement maintain liability insurance covering claims for bodily injury and property damage with a combined single limit of not less than \$1,000,000 naming the Property Owners and Declarant (or the Association after the Substitution Date) as additional insureds. The Property Owners further acknowledge and agree that upon Declarant's or the Association's engagement of an independent contractor that meets the requirements set forth above, and for so long as such independent contractor is engaged to do and does perform the obligations of Declarant or of the Association hereunder, the obligations of Declarant or the Association, each as applicable, to operate, maintain, repair and administer the Water Sources, the Water Easements and the Water Delivery System shall be deemed satisfied and Declarant and the Association shall have no further obligation or liability with respect to the same. In the event that the independent contractor ceases to perform such obligations, then Declarant or the Association, as the case may be, shall assume the performance of such obligations or engage the services of another independent contractor to perform such obligations. The Property Owner(s) of each Section shall have the obligation to operate, maintain, repair and administer the Property Owner Distribution System for their respective Sections.

4.2 Standard of Performance. Declarant (or the Association after the Substitution Date) shall operate, maintain, repair, replace, and administer the Water Sources, the Water

Easements and the Water Delivery System in good operating condition including, without limitation, repairing and replacing improvements, maintaining, repairing, and replacing equipment and fixtures, as well as such other duties as may be necessary or appropriate. The Property Owner(s) of each Section shall operate, maintain, repair, replace, and administer the Property Owner Distribution System located in their Section in good operating condition including, without limitation, repairing and replacing improvements, maintaining, repairing, and replacing equipment and fixtures, as well as such other duties as may be necessary or appropriate. Maintenance, as such term is used in this Declaration, shall mean maintaining, improving, repairing, replacing, insuring, paying taxes and other incidental charges incurred, and taking any and all steps to keep the systems in good operating condition including, without limitation, repairing and replacing improvements, maintaining, repairing, and replacing equipment and fixtures, as well as such other duties as may be necessary or appropriate. Declarant (or the Association after the Substitution Date) shall also be responsible for preparing and timely filing any and all monthly reports regarding water usage with the appropriate governmental entity.

4.3. Limitation of Liability. Notwithstanding anything contained herein to the contrary, in fulfilling its responsibilities hereunder Declarant and the Association shall not be liable for property damage or personal injury occurring on, or arising out of the condition of, property which it does not own unless, and only to the extent that, it has been grossly negligent in the performance of its maintenance responsibilities.

ARTICLE V OBLIGATION TO PAY COSTS

5.1 Operating Costs.

(a) Obligation to Pay Operating Costs. All Property Owners shall be obligated to pay for the costs to operate, maintain, repair, replace, and administer the Water Sources, Water Easements and the Water Delivery System used to deliver water to each Delivery Point (the "Operating Costs"). The Operating Costs will include, but shall not be limited to, all costs and expenses incurred by Declarant (or the Association after the Substitution Date), the independent contractor engaged pursuant to paragraph 4.1 (Rights and Obligations) above for operating, maintaining, repairing, replacing, and administering ditches, metering devices, pumps, transmission lines, appurtenances and other improvements and facilities for the production and/or delivery of water from the Water Sources, including without limitation, wages, salaries and benefits, security, insurance, materials and supplies, professional services, taxes, fees and permits, and energy, utility and communication charges, rates and assessments. The Operating Costs shall consist of: (i) that portion of Operating Costs that fluctuate depending upon the amount of water delivered from the Water Sources, through the Water Easements and the Water Delivery System, by way of example and not in limitation thereof, electricity charges, fuel charges, water charges, if any, payable to third parties (collectively "Variable Operating Costs"), and (ii) that portion of Operating Costs that do not fluctuate depending upon the amount of water delivered from the Water Sources, through the Water Easements and the Water Delivery System, by way of example and not in limitation thereof, the cost of the independent contractor engaged pursuant to paragraph 4.1 (Rights and Obligations), lease or other use or occupancy costs associated with use of the land underlying Kunia Well No. 3 (State Well No. 2803-05), wages, salaries and benefits, security, insurance, professional services, taxes, fees and permits, communication charges, and rates and

assessments (collectively "**Fixed Operating Costs**"). The determination of whether an Operating Cost is a Variable Operating Cost or a Fixed Operating Cost shall be made by the Declarant (or by the Association after the Substitution Date), in its sole and absolute discretion. The obligation to pay the Operating Costs shall be mandatory. No diminution or abatement of a Section's share of the Operating Costs or setoff shall be claimed or allowed by reason of any alleged failure of Declarant or the Association to perform its maintenance or operation responsibilities. Notwithstanding anything in this Declaration to the contrary, Operating Costs shall not include any costs or expenses incurred or to be incurred by Del Monte that are connected with or in any way related to the environmental cleanup and purification of contaminated groundwater and other environmental contamination.

(b) **Calculation of Share of Variable Operating Costs.** The Variable Operating Costs shall be charged to the Property Owners of each Section based on the actual metered amount of water delivered to the respective Property Owner's Delivery Point(s). Each Section's share of the Variable Operating Costs shall be computed by multiplying the total Variable Operating Costs for the applicable calendar year by the ratio of: (x) the actual metered water delivered to the applicable Section's Delivery Point(s) in that calendar year, to (y) the total actual metered water delivered to all Sections' respective Delivery Point(s) for that calendar year.

(c) **Calculation of Share of Fixed Operating Costs.** The Fixed Operating Costs shall be charged to the Property Owners of each Section based on the percentages provided in paragraph 2.4 (Water Allocation). Each Section's share of the Fixed Operating Costs shall be computed by multiplying the total Fixed Operating Costs for the applicable calendar year by the percentages provided in paragraph 2.4 (Water Allocation).

5.2 **Capital Recovery Costs.**

(a) **Obligation to Capital Recovery Costs.** All Property Owners shall be obligated to pay for capital expenditures incurred or reasonably anticipated to be incurred to keep the Water Sources, Water Easements and the Water Delivery System in good and working order (the "**Capital Recovery Costs**"). The Capital Recover Costs will include capital expenditures made by the Declarant (or by the Association after the Substitution Date) to construct, replace, upgrade, or retrofit, the common metering devices, pumps, transmission lines, reservoirs, appurtenants and other improvements and facilities for the production and/or delivery of water from the Water Sources to the Delivery Points. After the Substitution Date, the Association may include within Capital Recovery Costs, one or more capital reserve accounts established to accumulate capital funds for future reasonably anticipated capital expenditures. The determination of whether an expenditure is a "capital expenditure" or an "expense" shall be made by the Declarant (or by the Association after the Substitution Date) using accounting principles generally or customarily used by operators of agriculture water delivery systems in the State of Hawaii. The obligation to pay the Capital Recovery Costs shall be mandatory. No diminution or abatement of a Section's share of the Capital Recovery Costs or setoff shall be claimed or allowed by reason of any alleged failure of Declarant or the Association to perform its maintenance or operation responsibilities.

(b) **Calculation of Capital Recovery Costs.** The Capital Recovery Costs shall be charged to the Property Owners of each Section based on the percentages provided in paragraph 2.4 (Water Allocation). Each Section's share of the Capital Recovery Costs shall be computed by multiplying the total Capital Recovery Costs for the applicable calendar year by the percentages provided in paragraph 2.4 (Water Allocation).

5.3 Annual Budgets. By no later than November 1 of each calendar year during the term of this Declaration, each Property Owner shall provide the Declarant (or the Association after the Substitution Date) with that Property Owner's anticipated annual water usage for the following calendar year. Based partly upon such estimates and historical or other information that the Declarant (or the Association after the Substitution Date) has at that time, the Declarant (or the Association after the Substitution Date) shall prepare an annual budget of the anticipated Variable Operating Costs for the following calendar year (the "Variable Operating Costs Annual Budget"), the anticipated Fixed Operating Costs for the following calendar year (the "Fixed Operating Costs Annual Budget"), and the anticipated Capital Recovery Costs for the following calendar year (the "Capital Recovery Costs Annual Budget") (collectively, the Variable Operating Costs Annual Budget, the Fixed Operating Costs Annual Budget, and the Capital Recovery Costs Annual Budget may sometimes be referred to as the "Annual Budgets"). Once prepared, and no later than December 1 of each calendar year during the term of this Declaration, copies of the Annual Budgets shall be provided to the Property Owners for the following calendar year. The Variable Operating Costs Annual Budget shall include, at a minimum, (i) the estimated Variable Operating Costs for the Water Sources, Water Easements, and Water Delivery System for the applicable calendar year, expressed both as a cumulative total, and as a price per 1,000 gallons of water delivered, and (ii) each Section's estimated share of such Variable Operating Costs, based upon historical usage, or anticipated usage for the applicable calendar year. The Fixed Operating Costs Annual Budget shall include, at a minimum, (i) the estimated Fixed Operating Costs for the Water Sources, Water Easements, and Water Delivery System for the applicable calendar year, and (ii) each Section's estimated share of such Fixed Operating Costs. The Capital Recovery Costs Annual Budget shall include, at a minimum, (i) the estimated Capital Recovery Costs for the Water Sources, Water Easements, and Water Delivery System for the applicable calendar year, and (ii) each Section's estimated share of such Capital Recovery Costs. If the Declarant (or the Association after the Substitution Date) does not provide one or more of the Annual Budgets to the Property Owners by December 1, then until the applicable Annual Budget(s) is provided to the Property Owners, Variable Operating Costs shall continue to be assessed at the then current price per 1,000 gallons of water delivered, the Fixed Operating Costs, and the Capital Recovery Costs, shall continue to be assessed at the then current monthly rate until the applicable Annual Budget is prepared and provided to the Property Owners.

5.4 Estimated Payments.

(a) Variable Operating Costs.

(1) Monthly or Other Periodic Payments. From time to time, using the Declarant's best estimates, or the Association's best estimates, the Declarant or the Association, each as applicable, shall determine the then current estimated Variable Operating Costs for the Water System expressed as a price per 1,000 gallons of water delivered. Using such estimated price per 1,000 gallons, from time to time, or on a monthly or other periodic basis, the Declarant (or the Association after the Substitution Date) shall determine the amount of water delivered to each Section's Delivery Points for the period for which such determination is made, and invoice the applicable Property Owner for such water usage. The Property Owner(s) of each Section shall pay that Section's share of estimated Variable Operating Costs to Declarant (or to the Association after the Substitution Date) in cash in arrears within thirty (30) days of the date of receipt of an invoice for such estimated Variable Operating Costs.

(2) Annual Reconciliation. Each Section's share of the Variable Operating Costs for a calendar year shall be computed by multiplying the total Variable

Operating Costs for the Water System for the calendar year by the ratio of: (x) the actual metered water delivered to the applicable Section's Delivery Point(s) in that calendar year, to (y) the total actual metered water delivered to all Sections' respective Delivery Point(s) for that calendar year.

(b) Fixed Operating Costs. The Property Owner(s) of each Section shall pay that Section's share of estimated Fixed Operating Costs to Declarant (or to the Association after the Substitution Date) in cash monthly in advance on the first day of each month.

(c) Capital Recovery Costs. The Property Owner(s) of each Section shall pay that Section's share of Capital Recovery Costs to Declarant (or to the Association after the Substitution Date) in cash monthly in advance on the first day of each month.

5.5 Gross Receipts Taxes. In addition, the Property Owner(s) of each Section shall, with each payment of the Operating Costs, Capital Recovery Costs, or any other amount due to Declarant (or the Association after the Substitution Date) under this Declaration, reimburse Declarant (or the Association after the Substitution Date) for the applicable State of Hawaii general excise tax or any other similar tax on each such payment plus the tax thereon. It is the intent of Declarant (or the Association after the Substitution Date) and the Property Owners to insure that all amounts paid to Declarant (or the Association after the Substitution Date) by the Property Owners will be received by Declarant (or the Association after the Substitution Date) without diminution by any tax, assessment, charge or levy of any nature whatsoever, except any net income taxes of Declarant (or the Association after the Substitution Date), and the terms and conditions of this Declaration shall be liberally construed to effect such purpose.

5.6 Interest and Late Charges. Any amounts due for a Section and not paid within ten (10) days of when due will bear interest at the rate of one percent (1%) per month until paid. The Property Owner(s) of a Section shall also pay to Declarant (or the Association after the Substitution Date) a late charge of the five percent (5%) of any amount not paid within ten (10) days of when due and a fee for dishonored checks equal to five percent (5%) of the amount of any such check.

5.7 Annual Reconciliations. Following the end of each calendar year during the term of this Declaration, Declarant (or the Association after the Substitution Date) shall provide each Property Owner with a statement (an "Annual Statement") of the actual amount of the Variable Operating Costs, the actual amount of the Fixed Operating Costs, and the actual amount of the Capital Recovery Costs for the applicable calendar year, which statement must also include that Property Owner's share of such costs, as determined by the methodology set forth in paragraph 5.1(b) (Calculation of Share of Variable Operating Costs), paragraph 5.1(c) (Calculation of Share of Fixed Operating Costs), and paragraph 5.2(b) (Calculation of Share of Capital Recovery Costs). The Declarant (or the Association after the Substitution Date) will endeavor to complete each Annual Statement by March 31st following the end of each calendar year. If a Property Owner's payments of estimated Variable Operating Costs, estimated Fixed Operating Costs and estimated Capital Recovery Costs during the applicable calendar year was less than as shown in the Annual Statement, then the Property Owner shall pay any deficiency within thirty (30) days of receipt of the Annual Statement. If a Property Owner's payments of estimated Variable Operating Costs, estimated Fixed Operating Costs, and estimated Capital Recovery Costs during the applicable calendar year was more than as shown in the Annual Statement, then the Declarant (or the Association after the Substitution Date) shall provide that Property Owner with a credit against future payments of Variable Operating Costs, Fixed Operating Costs, or Capital Recovery Costs, each as applicable. In its discretion, the Declarant

(or the Association after the Substitution Date) may offset an overpayment of costs against an underpayment of other costs such that, for example, if a Property Owner overpays Variable Operating Costs for a given calendar year, but underpays Fixed Operating Costs for that calendar year, the overpayment of Variable Operating Costs can be applied towards the underpayment of Fixed Operating Costs for that calendar year.

5.8 Special Assessments. The Declarant (or the Association after the Substitution Date) may levy a special assessment (a "Special Assessment") at any time for the following reasons: (a) against a Property Owner, when, as a result of the Property Owner's act or failure or refusal to act in accordance with this Declaration, the Declarant (or the Association after the Substitution Date) incurs costs or expenses, or (b) against all Property Owners as a result of any Property Owner's failure to timely pay its estimated Operating Costs or estimated Capital Recovery Costs, respectively, and the Declarant (or the Association after the Substitution Date) is unable to timely recover such delinquency, and therefore the Declarant (or the Association after the Substitution Date) faces or may face a cash shortfall; or the Association is or may be unable to maintain an adequate capital reserve account(s), or (c) against all Property Owners where, due to unanticipated circumstances, an Annual Budget(s) is exceeded, or (d) for any other reason determined by the Declarant (or the Association after the Substitution Date) pursuant to and in advancement of its rights, obligations and duties under this Declaration or applicable laws. All Special Assessments shall be paid within thirty (30) days of the date of receipt of an invoice for such Special Assessment unless a different date for payment is set forth in such invoice.

5.9 Recordkeeping. Declarant (or the Association after the Substitution Date) shall maintain or cause to be maintained full and accurate books of account with respect to Operating Costs, Capital Recovery Costs, and any other matter covered by this Declaration.

5.10 Right to Audit. At any time within one (1) year after the receipt of an Annual Statement by the Property Owner(s) of each Section, but no more than once per calendar year, a Property Owner may cause an audit of Declarant's or of the Association's books and records related to the Operating Costs, the Capital Recovery Costs, or both, set forth in such Annual Statement. The audit will be at the requesting Property Owner's sole cost and expense and may be performed by an accountant selected by the Property Owner. Such accountant shall be permitted to inspect all books and records of Declarant or of the Association necessary to determine the amount of the Operating Costs, Capital Recovery Costs, or both. If the audit discloses that Declarant or the Association has overstated a Section's share of Operating Costs, Capital Recovery Costs, or both, then Declarant or the Association, each as applicable, shall immediately refund the amount overpaid to the Property Owner(s) of such Section. In addition, if any such audit discloses that Declarant or the Association has overstated the Section's share of Operating Costs, Capital Recovery Costs, or both, by more than two percent (2%), Declarant or the Association, each as applicable, shall immediately pay the costs of any such audit.

ARTICLE VI **ENFORCEMENT**

6.1 Abatement and Suit. Without limitation of any rights herein specifically provided, violation or breach of any restriction herein contained shall give to Declarant (or the Association after the Substitution Date) and the Property Owner(s) the right but not the obligation to prosecute a proceeding at law or in equity against the person or persons who have violated or

are attempting to violate any of these restrictions to enjoin or prevent them from doing so, to cause said violation to be remedied or to recover damages for said violation.

6.2 Shut Off of Water Delivery. In addition to any other right available at law or in equity, if a Property Owner fails to timely make any monetary payment to Declarant (or to the Association after the Substitution Date) required to be made under this Declaration, including by way of example and not in limitation thereof, estimated Operating Costs payments, estimated Capital Recovery Costs payments, any payment due after an annual reconciliation under paragraph 5.7 (Annual Reconciliations), or any Special Assessments, without the necessity of any additional written or verbal notice, the Declarant or the Association, as applicable, shall have the unilateral right to shut off the water being transmitted through the Water System to the Property Owner's Delivery Point(s) until such payment(s) is/are made.

6.3 Attorneys' Fees. In any legal or equitable proceeding for the enforcement or to restrain the violation of this Declaration or any provision hereof, the losing party or parties shall pay the attorneys' fees of the prevailing party or parties, in such amount as may be fixed by the Court in such proceeding. All remedies provided herein or at law or in equity shall be cumulative and not exclusive.

6.4 Inspection. Declarant (or the Association after the Substitution Date) may from time to time at any reasonable hour or hours, with at least twenty-four (24) hours prior notice to the affected Property Owner, enter and inspect the Property subject to these restrictions to ascertain compliance therewith.

6.5 Lien for Unpaid Charges.

(a) If the Property Owner(s) of a Section fails to pay any portion of the Section's obligation to Declarant or to the Association (or to whom Declarant or the Association directs such payment to be made), then Declarant or the Association may pay such monies for the account of the Property Owner(s) of such Section, and all expenses of Declarant or of the Association so incurred on account of such non-payment shall be payable by the Property Owner(s) of the Section to Declarant or to the Association, each as applicable, together with interest and late fees as provided in paragraph 5.6 (Interest and Late Charges) above, accruing from the date of expenditure by Declarant or by the Association until paid in full. The amount of the Section's obligation, together with all expenses of Declarant or of the Association incurred as set forth immediately above, as well as all other sums hereunder required to be paid by the Property Owner(s) of the Section to Declarant or to the Association and not paid when due, including without limitation attorneys' fees and all costs of collection shall constitute and be a lien in favor of Declarant or the Association on the Property upon filing of a notice of lien in the Office of the Assistant Registrar of the Land Court of the State of Hawaii.

(b) Such lien shall be subject and subordinate to the lien of any mortgage upon the Property filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii prior to the filing of Declarant's or the Association's notice of lien, and the sale or transfer of any lot in foreclosure of any such mortgage, whether by judicial proceedings or pursuant to a power of sale contained in such mortgage, or by the transfer or conveyance to the mortgagee by deed in lieu of foreclosure, shall extinguish the lien as to the payments of any assessment which became due prior to such sale, transfer or conveyance; provided, however, that no such sale, transfer or conveyance shall relieve the Property Owner of the Property or the purchaser or transferee thereof, with regard to assessments thereafter becoming due. Declarant or the Association, as applicable, shall record such notice of lien within one hundred eighty (180) days

following the occurrence of such default and shall commence proceedings to enforce such lien within six (6) months following such recordation. Such lien may be foreclosed by suit in the manner of foreclosure of a mortgage of real property, and Declarant or the Association or any other prospective purchaser thereof shall have the power to bid on the Property at foreclosure sale and to acquire and hold, lease, mortgage or convey the same. A suit to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving the lien securing the same. The foregoing remedies shall be in addition to any other remedies provided by law for the enforcement of any such assessment obligation.

(c) Upon request, Declarant or the Association shall issue a certificate stating the amount of indebtedness secured by a lien upon the Property. Such certificate shall be conclusively binding upon Declarant or the Association, as applicable, and the Property Owner(s) of a Section in favor of all persons who rely thereon in good faith as to the amount of such indebtedness existing on the date of the certificate. Property Owners may request that such a certificate be issued and may obtain a copy thereof for a reasonable fee charged by Declarant or the Association.

6.6 Failure to Enforce Not a Waiver of Rights. Each remedy provided for in this Declaration is cumulative and non-exclusive. The failure of Declarant or the Association in any case to enforce any of the provisions of any limitation, covenant, condition or restriction herein contained shall in no event be deemed to be a waiver of the right to enforce any such provision or to do so thereafter, nor of the right to enforce any other provisions of this Declaration.

ARTICLE VII GENERAL

7.1 Governing Law. This Declaration shall be governed and construed in accordance with the laws of the State of Hawaii, including the Water Code of the State of Hawaii and the rules and regulations of the Commission on Water Resource Management of the State of Hawaii ("**CWRM**") promulgated thereunder and, to the extent determined applicable, the statutes governing public utilities and the rules and the regulations of the Public Utilities Commission of the State of Hawaii ("**PUC**"); the Board of Water Supply of the City and County of Honolulu ("**BWS**"), the Department of Health of the State of Hawaii ("**DOH**") and other governmental authorities. Declarant excepts and reserves for itself, its successors and assigns, from this Declaration, the sole and exclusive right and power, with respect to all matters pertaining to water use, consumption, and development on or affecting the Water Sources, the Water Easements or the Water Delivery System; (a) to apply for, receive, hold and own permits and certificates, in its own name alone, issued by or under the authority of CWRM, or by or under the authority of any other governmental agency or body now or hereafter constituted with jurisdiction over water sources or development thereof ("**governmental authority**"); (b) to register wells or stream diversion works, if any, and facilities therefor, and to file any reports with CWRM or any governmental authority in connection therewith; (c) to make any necessary declarations and reports of water use as may be required by CWRM or governmental authority; and (d) to petition, apply to and appear before CWRM or other governmental authority in its name alone or on behalf of itself and a Property Owner. A Property Owner shall not take any of the foregoing actions with respect to the Water Sources, the Water Easements or the Water Delivery System unless and to the extent specifically authorized to do so in writing by Declarant. If requested by Declarant, a Property Owner shall join in any report, declaration, registration, petition, application to or appearance before CWRM or other governmental authority. Upon the

termination of this Declaration for any reason, and upon the written request by Declarant, the Property Owner shall apply, or join in any application made by Declarant to CWRM or governmental authority for the transfer of any permit involving the Water Sources in the Property Owner's name or in which the Property Owner may have an interest, to Declarant or Declarant's nominee, without payment of any consideration to the Property Owner therefor. In the event that the PUC, the BWS or any other governmental authority shall be determined to have jurisdiction over the Water Sources, the Water Easements, and/or this Declaration, this Declaration shall be further subject to any terms and conditions imposed by the PUC, the BWS or such other governmental authority, and Declarant may, if any of such conditions are not acceptable to Declarant, terminate this Declaration upon thirty (30) days' prior written notice to the Property Owners.

7.2 Release and Indemnity. Declarant makes no warranty or representation, express or implied, as to (a) the quality of the water, including its chemical or turbidity content, (b) its fitness for agricultural use or of any other kind, (c) the capacity of the Water Sources and the quantity of water output, (d) ownership of the water, (e) permits to use the water, or (f) the availability of water. Declarant and the Association will not be responsible for any loss, cost, damage, liability or claim, including attorneys' fees, for injury or death to persons or property arising out of or in connection with the use of the water delivered to the Property Owners. Each Property Owner indemnifies and holds Declarant and the Association harmless from and against any such loss, cost, damage, liability or claim arising therefrom. Declarant and the Association shall not be required to transmit water to a Property Owner for any period of time which Declarant or the Association is prevented from doing so as a result of equipment failure, government action, labor unrest, acts of God or other reasons beyond Declarant's or the Association's control.

7.3 Constructive Notice and Acceptance. Every or all person or persons, corporation or corporations, or other legal entity or entities who now or hereafter own or acquire any right, title or interest in or to any portion of the Property are and shall be conclusively deemed to have consented and agreed to every provision contained herein, whether or not any reference to this Declaration is contained in the instrument by which such person or persons, corporation or corporations, or other legal entity or entities acquired an interest in the Property.

7.4 Declaration Runs with Land. All provisions contained herein shall burden each and every part of the parcel of the Property; and shall operate as covenants running with the land, and shall apply to and bind the heirs, devisees, personal representatives, assignees and successors in interest of the Property Owners, and all lessees and sublessees or vendees of all or any portion of the Property, and shall be enforceable as such in accordance with the terms and provisions of this Declaration; provided, however, the right to enforce this Declaration is reserved to Declarant (or the Association after the Substitution Date), its successors and assigns, and to no one else.

7.5 Notice. Any notice provided for in this Declaration shall be served personally or shall be mailed by registered or certified mail to Declarant, the representative of a Section or the Association, as applicable. All such notices shall, for all purposes, be deemed delivered (a) upon personal delivery to the party or address specified above or (b) on the third day after mailing when mailed by registered or certified mail, postage prepaid, and properly addressed.

7.6 Amendment. In addition to specific amendment rights granted elsewhere in this Declaration, so long as Declarant owns any portion of the Property, Declarant unilaterally may amend this Declaration for any purpose until the Substitution Date. Thereafter, this Declaration

may be amended upon the written consent of the Property Owners of the Sections holding 75% of the water allocations set forth in paragraph 2.4 (Water Allocation) above; provided, however that so long as Declarant owns any portion of the Property, any amendment to this Declaration shall require Declarant's consent, which consent may be withheld by Declarant in its sole discretion. Amendments to this Declaration shall become effective upon recordation unless a later effective date is specified therein. Any procedural challenge to an amendment must be made within six months of its recordation, or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration. If an individual or entity consents to any amendment to this Declaration, it will be conclusively presumed that such individual or entity has the authority so to consent, and no contrary provision in any mortgage or contract between such individual or entity and a third party will affect the validity of such amendment. No amendment may remove, revoke, or modify any right or privilege of Declarant without Declarant's written consent or that of the assignee of such right or privilege, which consent may be withheld by Declarant its sole discretion.

7.7 Voting Rights of Each Section. The Property Owner(s) in each Section shall be entitled to a vote in the Association equal to the percentage of water allocation for that Section (i.e., if a Section has a water allocation of 25%, then the Property Owner(s) of that Section shall have a 25% voting interest in the Association). If there is more than one Property Owner in a Section, then the percentage vote allocated to that Section may be cast only in accordance with the agreement of a majority in interest of the Property Owners of that Section.

7.8 Assignment. The Property Owners acknowledge and agree that JCCLLC may assign its rights as Declarant under this Declaration to an affiliate without the consent of the Property Owners, and will assign its rights as Declarant to the Association on the Substitution Date, as more fully described above. Upon any such assignment to any such affiliate, or to the Association, the affiliate or the Association, each as applicable, must assume all of JCCLLC's obligations under this Declaration, and thereafter JCCLLC shall have no further liability under this Declaration.

7.9 Association's Role After the Substitution Date. Except for the rights provided in paragraph 2.9 (Annexation of Land) above, all rights and duties retained by Declarant under this Declaration shall pass to and be assumed by the Association on the Substitution Date.

7.10 Binding Effect. This Declaration and all of the terms, covenants and conditions hereof shall extend to the benefit of and be binding upon the respective successors and assigns of Declarant, the Association and the Property Owners.

7.11 Withdrawal. Declarant (or the Association after the Substitution Date) reserves, in its sole discretion, the right from time to time to withdraw from this Declaration a portion of the Property by recording with the Assistant Registrar of the Land Court of the State of Hawaii an amendment to this Declaration noting the withdrawal of such Property. An amendment recorded pursuant to this paragraph shall not require the consent of any person except the Property Owner(s) of such Property, if other than Declarant (or the Association after the Substitution Date). Upon the recordation of the amendment, such property shall be withdrawn from the Property, and shall be free and clear of the encumbrance of this Declaration and any and all obligations that may arise hereunder; provided, however, that Declarant (or the Association after the Substitution Date) shall not have the right to allocate or deliver any water from the Water Sources to such withdrawn property, and that the Water Sources, Water

Easements and Water Delivery System shall remain the property of Declarant or the Association.

7.12 Right to Terminate. Notwithstanding any other term or provision in this Declaration, this Declaration may be terminated unilaterally by Declarant (or the Association after the Substitution Date) if Declarant (or the Association after the Substitution Date) is unable to obtain and maintain the rights to all governmental licenses, permits and approvals necessary to withdraw water from the Water Sources, including the revocable permits currently owned by Del Monte for use of the Water Sources, pursuant to paragraph 2.3 (Licenses, Permits and Approvals) above. The termination of this Declaration shall be effective upon the recordation of a proper instrument with the Assistant Registrar of the Land Court of the State of Hawaii.

7.13 Duration. Unless terminated as provided above, this Declaration shall have perpetual duration. If Hawaii law hereafter limits the period during which covenants may run with the land, then to the extent consistent with such law, this Declaration shall automatically be extended at the expiration of such period for successive periods of 20 years.

7.14 Perpetuities. If any of the covenants, conditions, restrictions, or other provisions of this Declaration shall be unlawful, void, or voidable for violation of the rule against perpetuities, then such provisions shall continue only until 21 years after the death of the last survivor of the now living descendants of Elizabeth II, Queen of England.

7.15 Severability. Invalidation of any provision of this Declaration, in whole or in part, or any application of a provision of this Declaration by judgment or court order shall in no way affect other provisions or applications.

7.16 Captions. The captions of each Article and paragraph hereof, as to the contents of each Article and paragraph, are inserted only for convenience and are in no way to be construed as defining, limiting, extending, or otherwise modifying or adding to the particular Article or paragraph to which they refer.

[This space intentionally left blank; signature(s) on following page(s)]

IN WITNESS WHEREOF, the undersigned has executed this Declaration as of the date first above written.

DECLARANT:

JAMES CAMPBELL COMPANY LLC, a
Delaware limited liability company

By _____
Stephen H. MacMillan
Its President/Chief Executive Officer

By _____
Bertram L. Hatton
Its Executive Vice President
Hawaii Land Management

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this ____ day of _____, 2008, before me personally appeared Stephen H. MacMillan and Bertram L. Hatton, to me personally known, who, being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable in the capacities shown, having been duly authorized to execute such instrument in such capacities.

Notary Public, State of Hawaii
Name:
My commission expires:

EXHIBIT A
Property Description

KUNIA SECTION 2:

PARCEL ONE:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT M-8-B (area 854.23 acres), as shown on Map 5, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,900** issued to James Campbell Company LLC, a Delaware limited liability company.

End of Parcel One Description

KUNIA SECTION 6:

PARCEL TWO:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT M-9-A (area 19.296 acres), as shown on Map 6, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,905** issued to James Campbell Company LLC:

End of Parcel Two Description

PARCEL THREE:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 169 (area 0.693 acres), as shown on Map 27, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,906** issued to James Campbell Company LLC.

End of Parcel Three Description

PARCEL FOUR:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 171 (area 1.319 acres), as shown on Map 27, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,907** issued to James Campbell Company LLC.

End of Parcel Four Description

PARCEL FIVE:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 416 (area 91.99 acres), as shown on Map 76, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,908** issued to James Campbell Company LLC.

End of Parcel Five Description

PARCEL SIX:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 878 (area 432.503 acres), as shown on Map 109, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,909** issued to James Campbell Company LLC.

End of Parcel Six Description

PARCEL SEVEN:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 879 (area 198.580 acres), as shown on Map 109, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,910** issued to James Campbell Company LLC.

End of Parcel Seven Description

PARCEL EIGHT:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 880 (area 93.117 acres), as shown on Map 109, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,911** issued to James Campbell Company LLC.

End of Parcel Eight Description

PARCEL NINE:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 881 (area 11.129 acres), as shown on Map 110, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by Certificate of Title No. 830,912 issued to James Campbell Company LLC;

End of Parcel Nine Description

KUNIA SECTION 8:

PARCEL TEN:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 882-A (area 425.963 acres), as shown on Map 110, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 892,761** issued to Fat Law's Farm, Inc., Law Tieng's Farm LLC, Tony Tan Law and Manyone Law, husband and wife, and Hae Viengkhou and Phouangphet Viengkhou, husband and wife.

End of Parcel Ten Description

KUNIA SECTIONS 7 & 9:

PARCEL ELEVEN:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 17846 (area 2,395.961 acres), as shown on Map 1370, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 892,319** issued to James Campbell Company LLC, a Delaware limited liability company.

End of Parcel Eleven Description

PARCEL TWELVE:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT M-2 (area 0.028 acre), as shown on Map 4, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,915** issued to James Campbell Company LLC, a Delaware limited liability company.

End of Parcel Twelve Description

PARCEL THIRTEEN:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT M-4 (area 3.307 acres), as shown on Map 4, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,917** issued to James Campbell Company LLC, a Delaware limited liability company.

End of Parcel Thirteen Description

PARCEL FOURTEEN:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT M-5 (area 0.676 acre), as shown on Map 4, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 830,918** issued to James Campbell Company LLC, a Delaware limited liability company.

End of Parcel Fourteen

PARCEL FIFTEEN:

All of that certain parcel of land situate at Honouliuli, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

LOT 17847 (area 119.086 acres), as shown on Map 1370, filed in the Office of the Assistant Registrar of the Land Court to the State of Hawaii with Land Court Application No. 1069 of the Trustees under the Will and of the Estate of James Campbell, Deceased.

BEING all of the land described in and covered by **Certificate of Title No. 892,320** issued to James Campbell Company LLC, a Delaware limited liability company.

End of Parcel Fifteen Description

PARCEL SIXTEEN:

All of that certain parcel of land situate at Hoaeae, District of Ewa, City and County of Honolulu, Island of Oahu, State of Hawaii, more particularly described as follows:

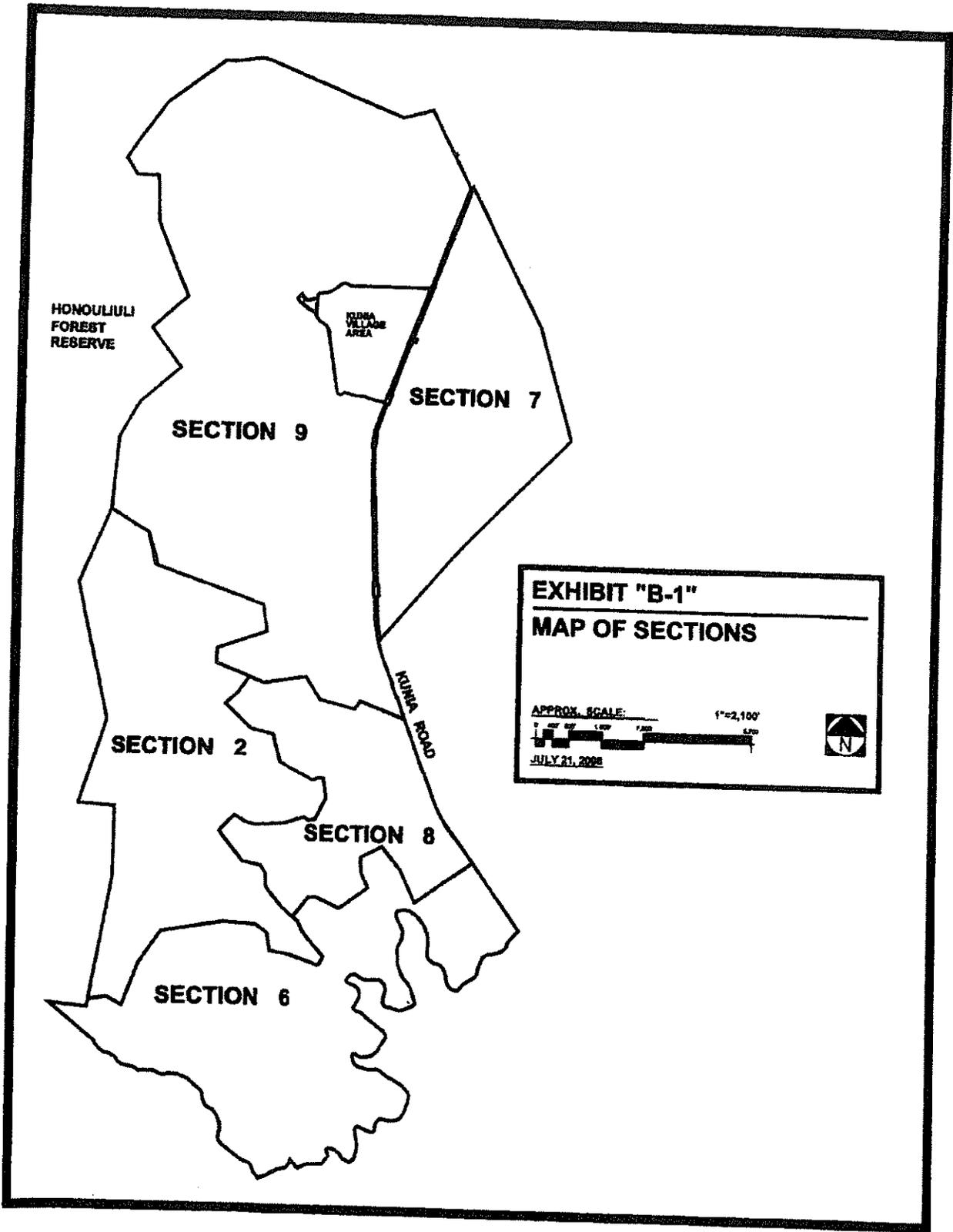
ROYAL PATENT NUMBER 4490, LAND COMMISSION AWARD 10,474, APANA 9 TO NAMAUU, situate, lying and being on the westerly side of Kunia Road, being **PARCEL 5**, and thus bounded and described as per survey dated August 8, 1988:

Beginning at the north corner of this parcel of land and on the westerly side of Kunia Road, the coordinates of said point being referred to Government Survey Triangulation Station "KAPUAI NEW", being 22,750.96 feet North and 4,331.52 feet East, thence running by azimuths measured clockwise from true South:

1. Along the westerly side of Kunia Road, on a curve to the left with a radius of 2,894.90 feet, the azimuth and distance of the chord being:
345° 29' 57" 611.81 feet;
2. 159° 26' 573.67 feet along Lot M-1-A-1 of Land Court Application 1069;
3. 221° 12' 30" 73.38 feet along Lot M-1-A-1 of Land Court Application 1069 to the point of beginning and containing an area of 11,930, square feet, more or less.

BEING a portion of the premises acquired by Trustees Limited Warranty Deed dated November 1, 2006, made by the Trustees under the Will and of the Estate of James Campbell, Deceased, as grantors, and James Campbell Company LLC, as grantee, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 3505988 and recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 2006-198463.

End of Parcel Sixteen Description



HONOULIULI
FOREST
RESERVE

KUIA
VILLAGE
AREA

SECTION 9

SECTION 7

SECTION 2

KUIA ROAD

SECTION 8

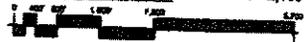
SECTION 6

EXHIBIT "B-1"

MAP OF SECTIONS

APPROX. SCALE:

1"=2,100'



JULY 21, 2008



EXHIBIT C-1

Current Percentage of Water Allocation

Section	Percentage of Water Allocation up to Delivery Point
9	40.78%
8	13.74%
7	17.36%
6	3.82%
2	14.18%
Kunia Village Area	10.12%

EXHIBIT C-2

Percentage of Water Allocation Including State of Hawaii Land

Section	Percentage of Water Allocation up to Delivery Point
9	35.70%
8	12.03%
7	15.20%
6	3.35%
2	12.41%
Kunia Village Area	8.87%
State of Hawaii	12.44%

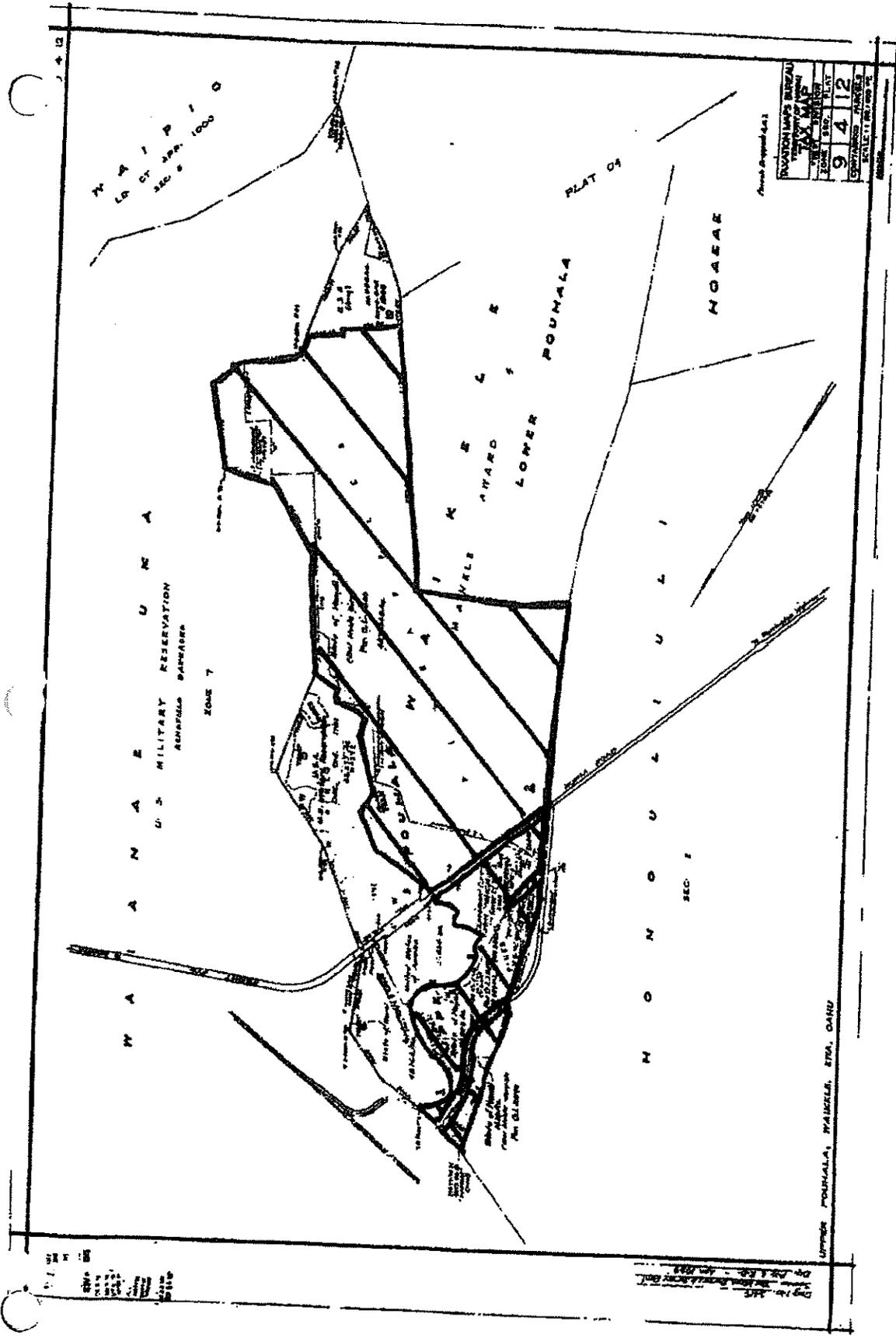


EXHIBIT D

DRAFT

Kunia Water Association - Operating BUDGET - Draft July 2008

Capital Costs:

Recline Reservoir	\$	100,000	Approx
Air vents (max)	\$	8,000	Approx
Replace isolation valves as needed	\$	25,000	Approx
Build Reserve to 50K by end of year 1	\$	50,000	
	\$	183,000	for 1st year
	\$	15,250	/mo

Fixed Costs:

Rent to Navy for Pump #3 @ \$19,500/year	\$	1,625	/mo
Management Contract	\$	20,000	
Insurance	\$	1,000	
Supplies & Miscellaneous	\$	1,000	(includes chlorine, annual Audit, etc)
System Maint costs	\$	3,000	

\$ 26,625 /mo

With the State Land

	Approx acreage	Allocation Water per docs	Water x1,000 gpd	Fixed Costs	Capital Costs & Reserve	Total Fixed & Capital	Cost per Acre/yr
Section 9	1,322	35.70%	5,035	9,505 \$	5,444 \$	14,949 \$	\$136
Section 8	406	12.03%	1,797	3,203 \$	1,835 \$	5,038 \$	\$149
Section 7	513	15.20%	606	4,047 \$	2,318 \$	6,365 \$	\$149
Section 6	90	3.35%	169	892 \$	511 \$	1,403 \$	\$187
Section 2	420	12.41%	625	3,304 \$	1,893 \$	5,197 \$	\$148
Kunia Village	N/A	8.87%	447	2,362 \$	1,353 \$	3,714 \$	
State	400	12.44%	626	3,312 \$	1,897 \$	5,209 \$	\$156
		100.00%	5,035	26,625 \$	15,250 \$	41,875 \$	
				0.174	0.100	0.273	

Cost per 1,000 gal assuming used at max allocation

Without the State Land

	Approx acreage	Allocation Water per docs	Water x1,000 gpd	Fixed Costs	Capital Costs & Reserve	Total Fixed & Capital	Cost per Acre/yr
Section 9	1,322	40.78%	5,035	10,858 \$	6,219 \$	17,077 \$	\$155
Section 8	406	13.74%	2,053	3,658 \$	2,095 \$	5,754 \$	\$170
Section 7	513	17.36%	692	4,622 \$	2,647 \$	7,270 \$	\$170
Section 6	90	3.82%	874	1,017 \$	583 \$	1,600 \$	\$213
Section 2	420	14.18%	192	3,775 \$	2,162 \$	5,938 \$	\$170
Kunia Village	420	10.12%	714	2,694 \$	1,543 \$	4,238 \$	
		100.00%	5,035	26,625 \$	15,250 \$	41,875 \$	
				0.174	0.100	0.273	

Cost per 1,000 gal assuming used at max allocation

EXHIBIT 12

Variable Costs - (when running at full allocation)

Pump 3
 KWH required to pump 1,000 gallons
 Cost per KWH 4.15
 Pump 3 electric Cost \$0.30 includes likely increase; about .24/KWH in April 2008
 Daily Capacity @ 1,400 gpm \$1.25 /1,000 gal Note: These costs incl a substantail discount from HECO (approx 20%) for Rider M in which DM agrees not to use power from 5 pm to 9 pm (peak hours)
 2,016,000

Pump 4 Diesel
 Daily Capacity @ 1,450 gpm 2,088,000
 Daily Capacity x 65% 1,357,200
 Combined Pump 3 & 4 capacity 3,373,200 Shared allocation is 3.96 MGPD

22 gallons of diesel/hour per Gordon
 Cost of off-road diesel per gal 22 gal
 Cost per Hour \$5.00 /gal (includes likey increases; Garlow in Jul 08 is at \$4.56/gal incl taxes)
 \$110.00
 Water Gallons per minute 1,450
 Water Gallons per hour 87,000
 Water x 1,000 gal 87
 Cost per 1,000 gal of water \$ 1.26

Pump 1
 Pump #1 costs (allocation is 1.075 MGPD):
 750,000 GPD
 Next 325,000 GPD @ \$2.00/1,000 gal 0
 \$ 650.00 /day (cost in early 2008 was \$1.50/1,000. Use \$2.00/1,000 for likely increases)

Utility Cost Per Day
 Pump #1 @ 1.075 MGPD Gallons x 1,000 1,075
 Pump #3 @ 2 MGPD 2,000
 Pump #4 @ 1.96 MGPD 1,960
 \$ 650.00
 \$ 2,490.00
 \$ 2,478.16
 \$ 5,618.16 5,035

Avg Variable Cost / 1,000 -running at full allocation 1.12

DRAFT

Variable Costs - (likely first year)

Assumptions:

- Section 8 & 6 combined needs less than 750K gpd
- Excess of water not used by Section 6 & 8 up to 750K gpd irrigates oats in Section 9
- Del Monte required to pump 750K gpd by EPA consent decree
- Del Monte provides water up to 750K gpd at no cost exiting well 1 sump pump
- Village uses 150K gpd Potable for drinking water and commercial = 15 hours per week pumping at 1,400 gpm (rotated between Well 3 & 4)
- If Village has some non potable needs, they come from Well 1
- If Farmers do not have adequate storage will they have to pay D.M. to pump from well 1, 7 day/week (DM does not have to pump 51 hrs/week)

Utility Cost Per Day

	Gallons x 1,000	
Pump 1	-	750 (Del Monte's cost in early 2008 was \$1.50/1,000 gallons)
Pump #3	93.38	75
Pump #4	94.83	75
	\$ 188.20	900
Avg Variable Cost / 1,000	0.21	

Assumed daily usage in Year 1:

	x 1,000 gal	Daily Variable cost	Monthly Variable cost	Annual Variable cost
Section 8	300	\$62.73	\$1,882.03	\$22,897.98
Section 6	192	\$40.15	\$1,204.50	\$14,654.71
Village incl commercial	150	\$31.37	\$941.01	\$11,448.99
	642	\$134.25	\$4,027.54	\$49,001.68

WUP 619 (Castle & Cooke)

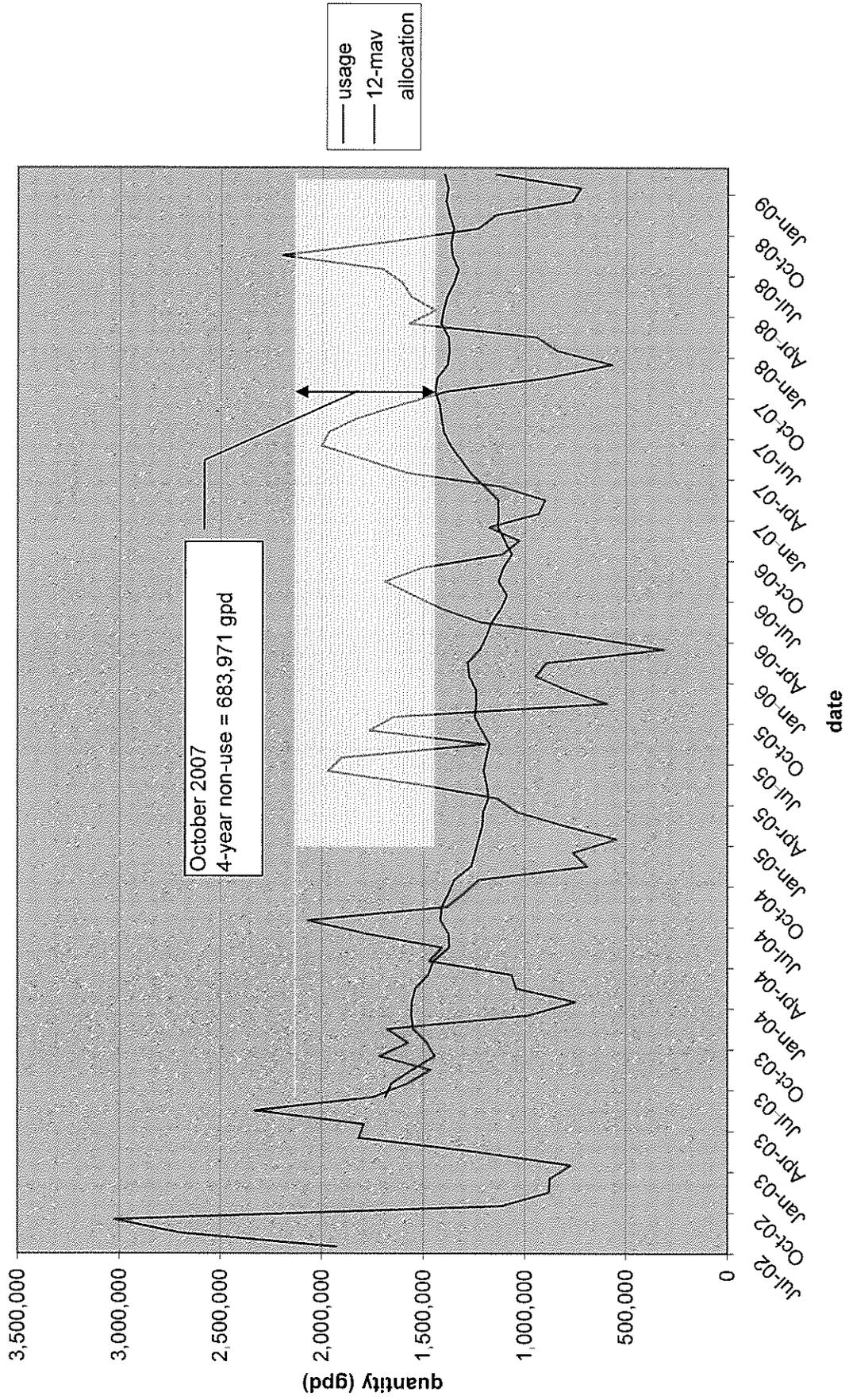
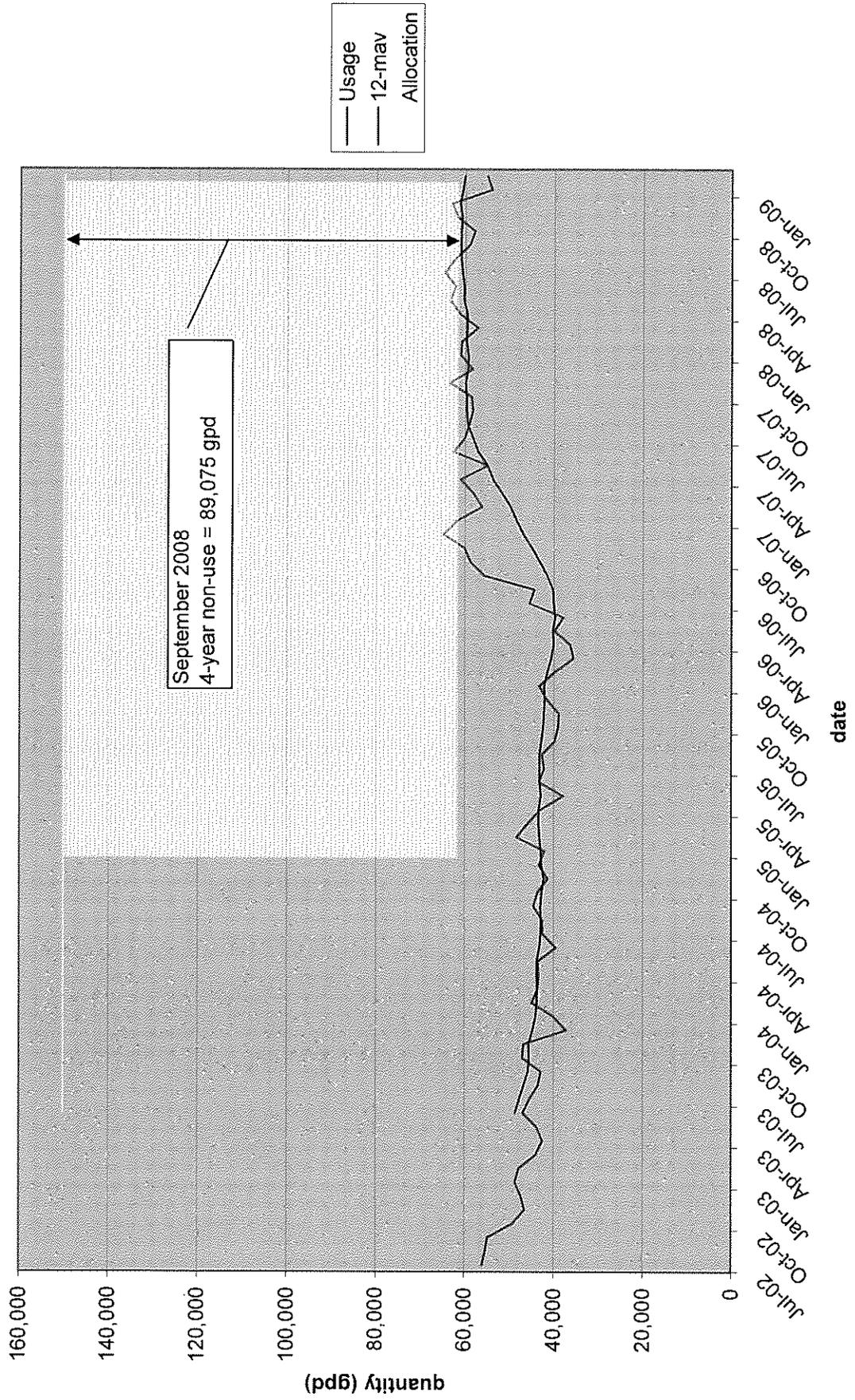
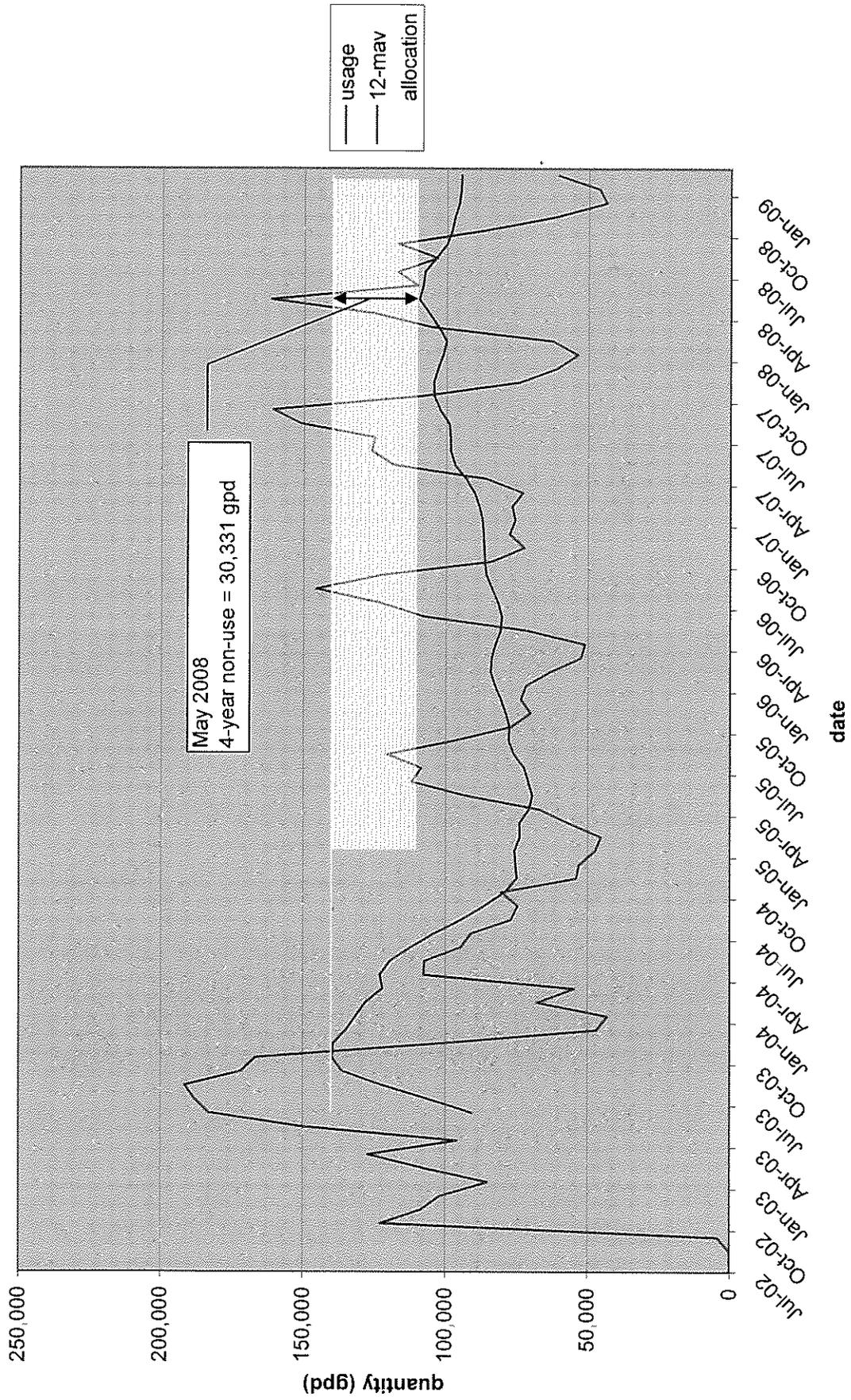


EXHIBIT 6a

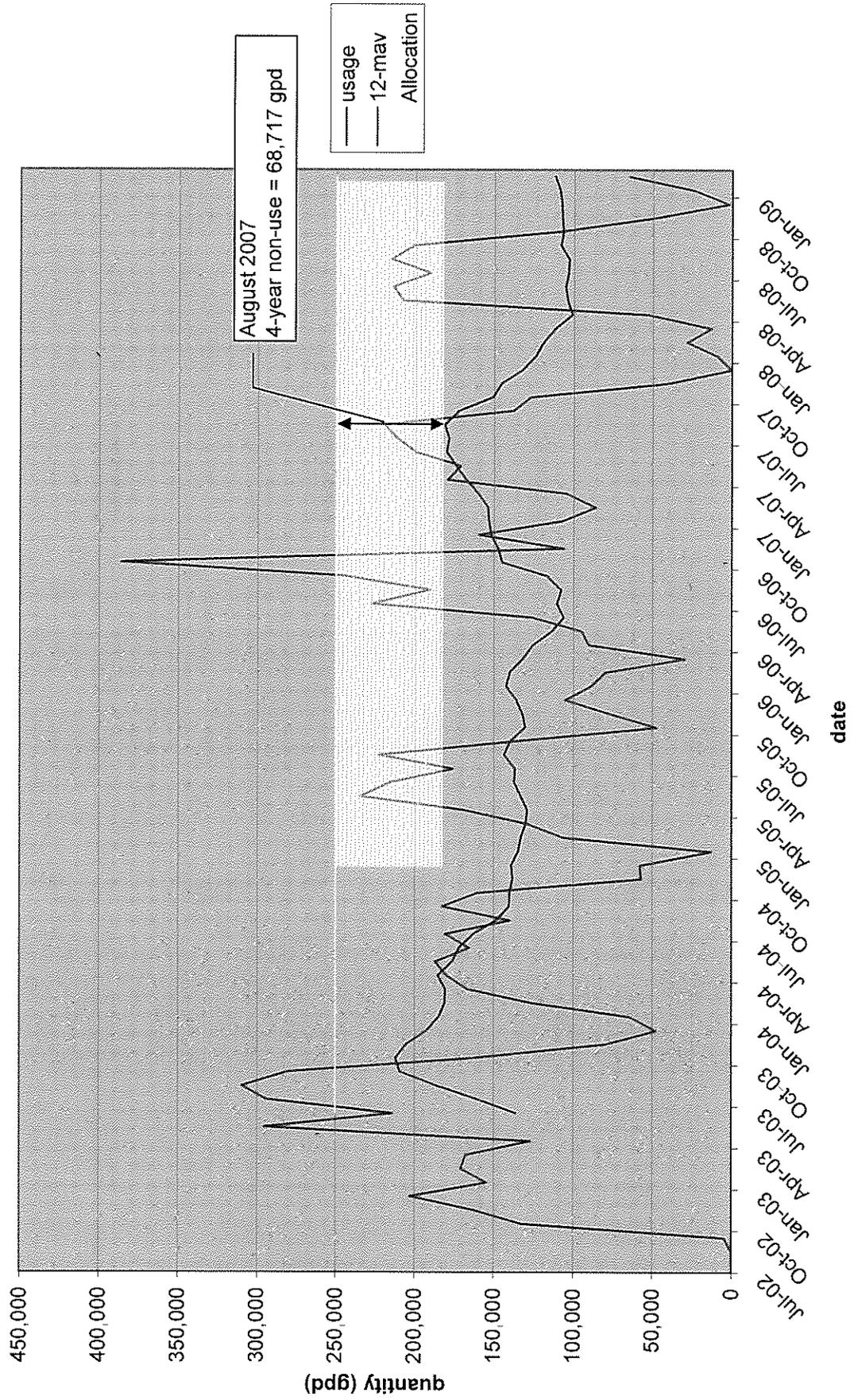
WUP 630 (State of Hawaii/Waiawa Corr)



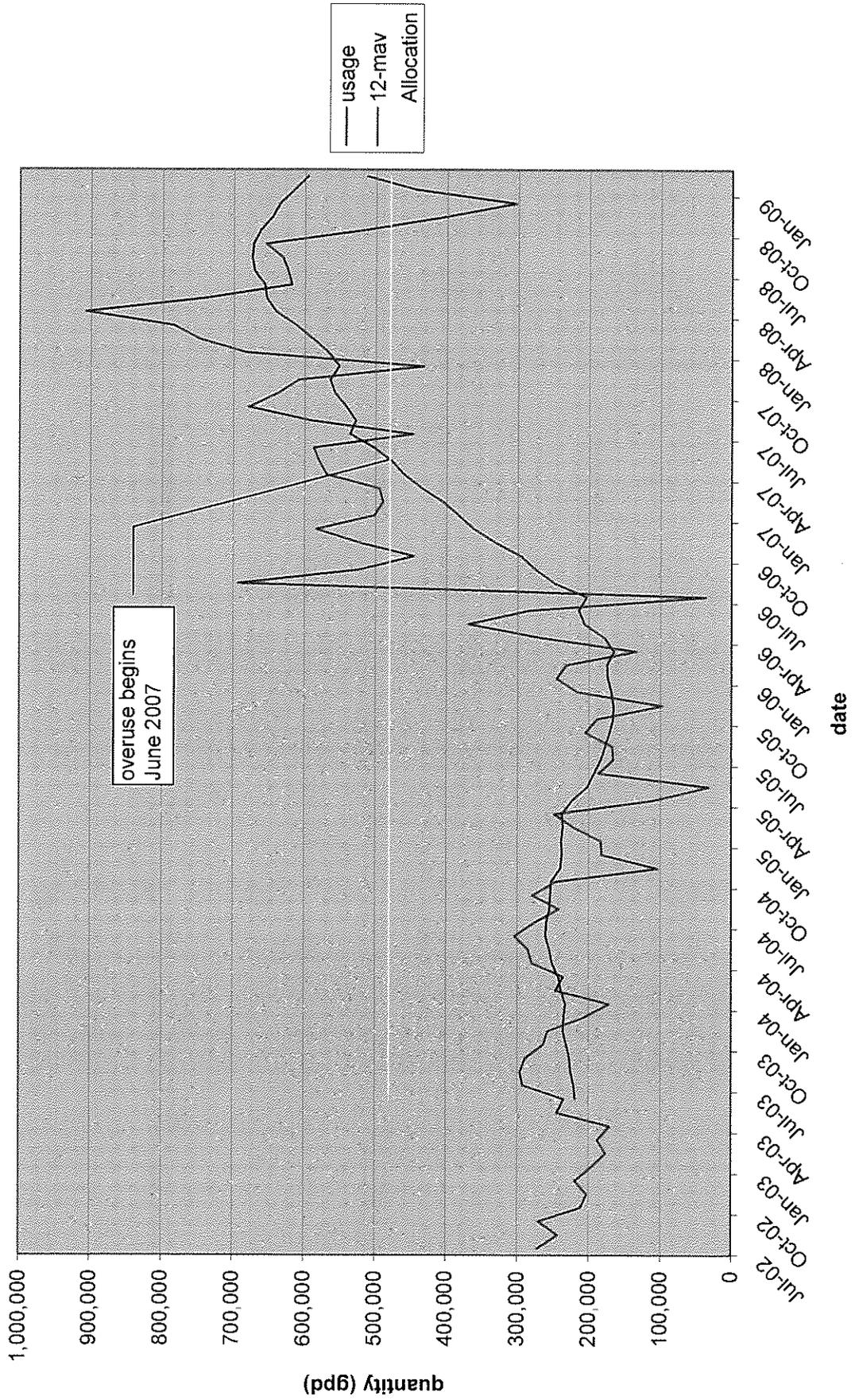
WUP 631 (Mililani Memorial)



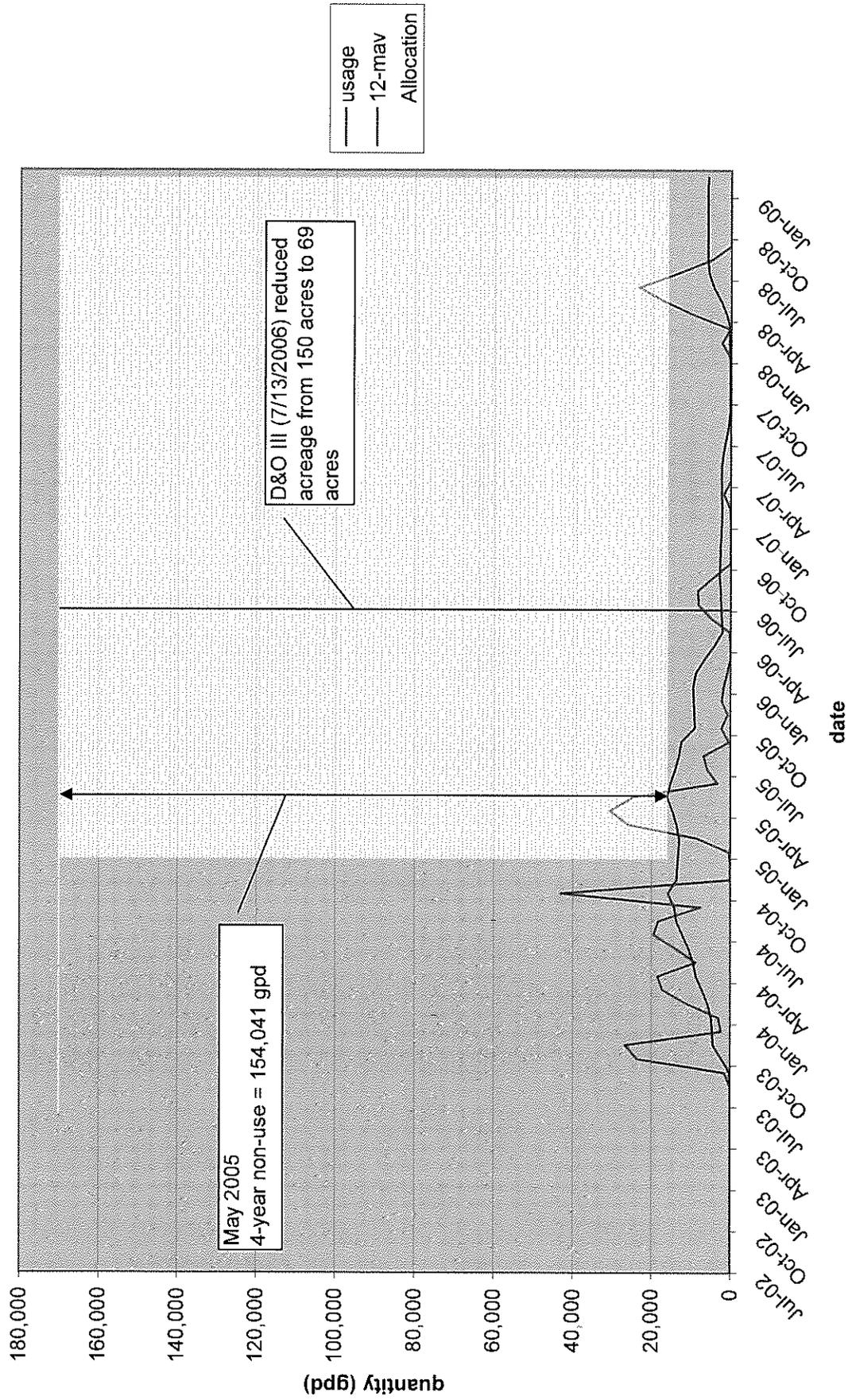
WUP 632 (Milliani Golf Course)



634 (Nihonkai)



WUP 636 (KSBE)



WUP 775 (Puu Makakilo)

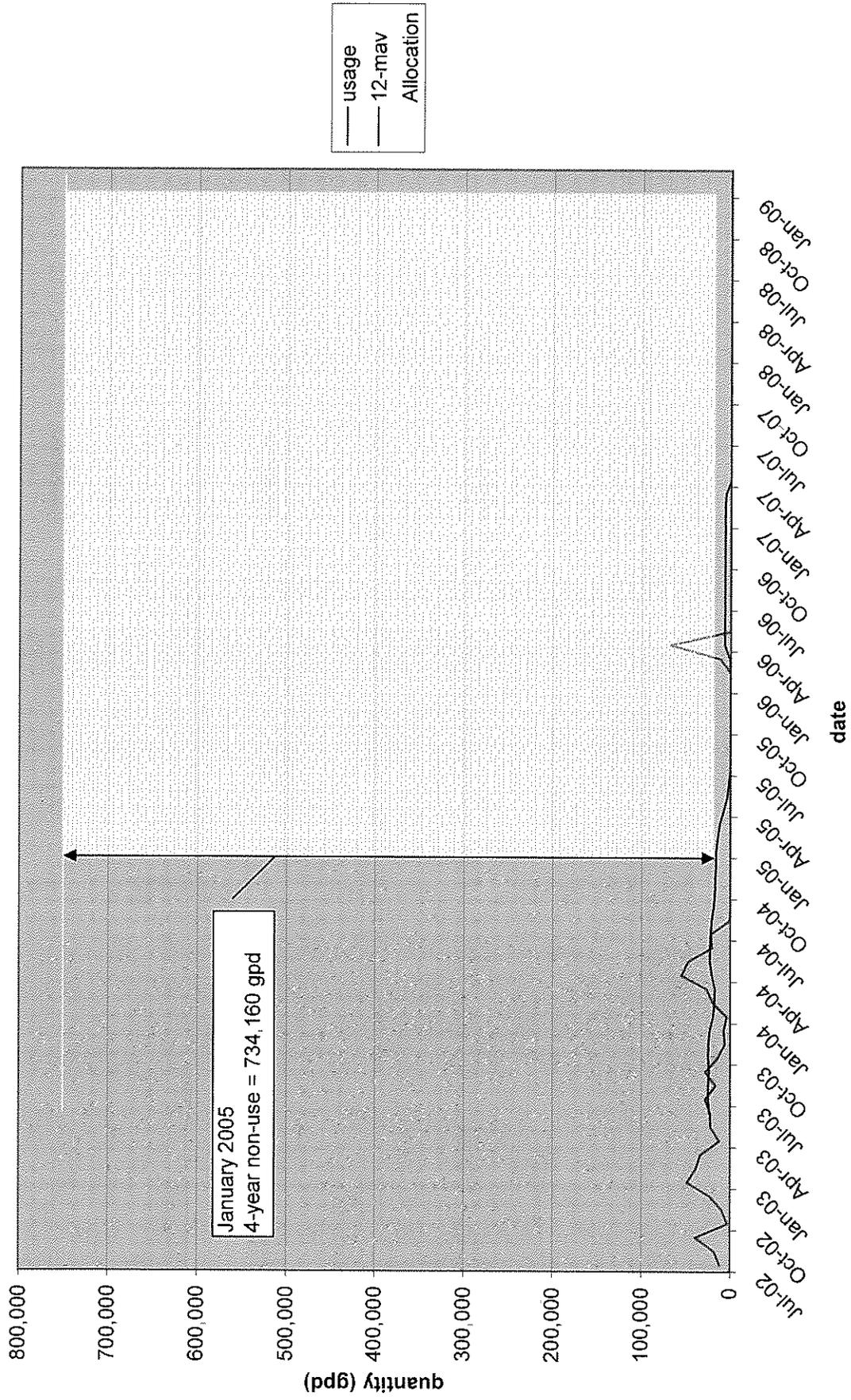
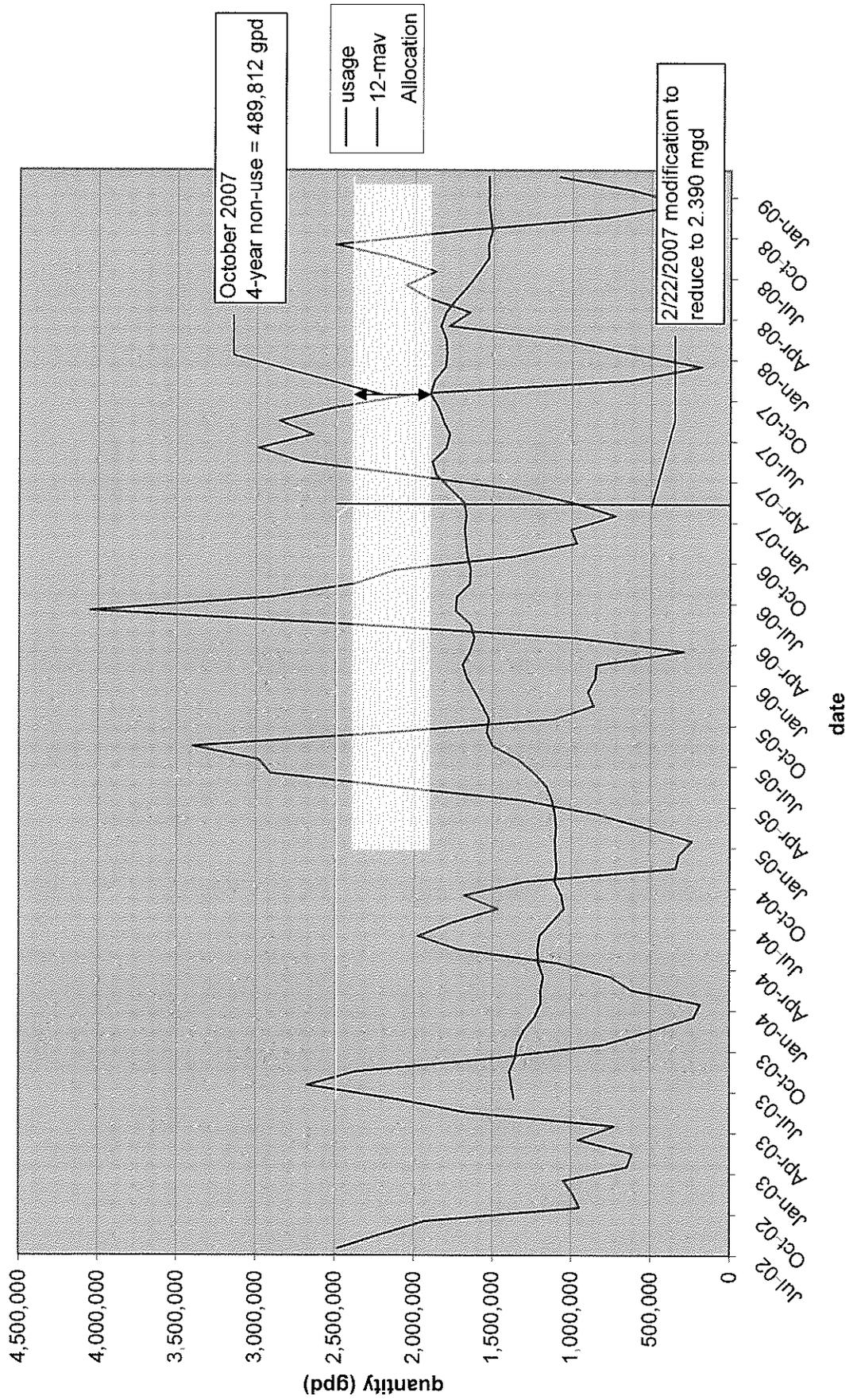
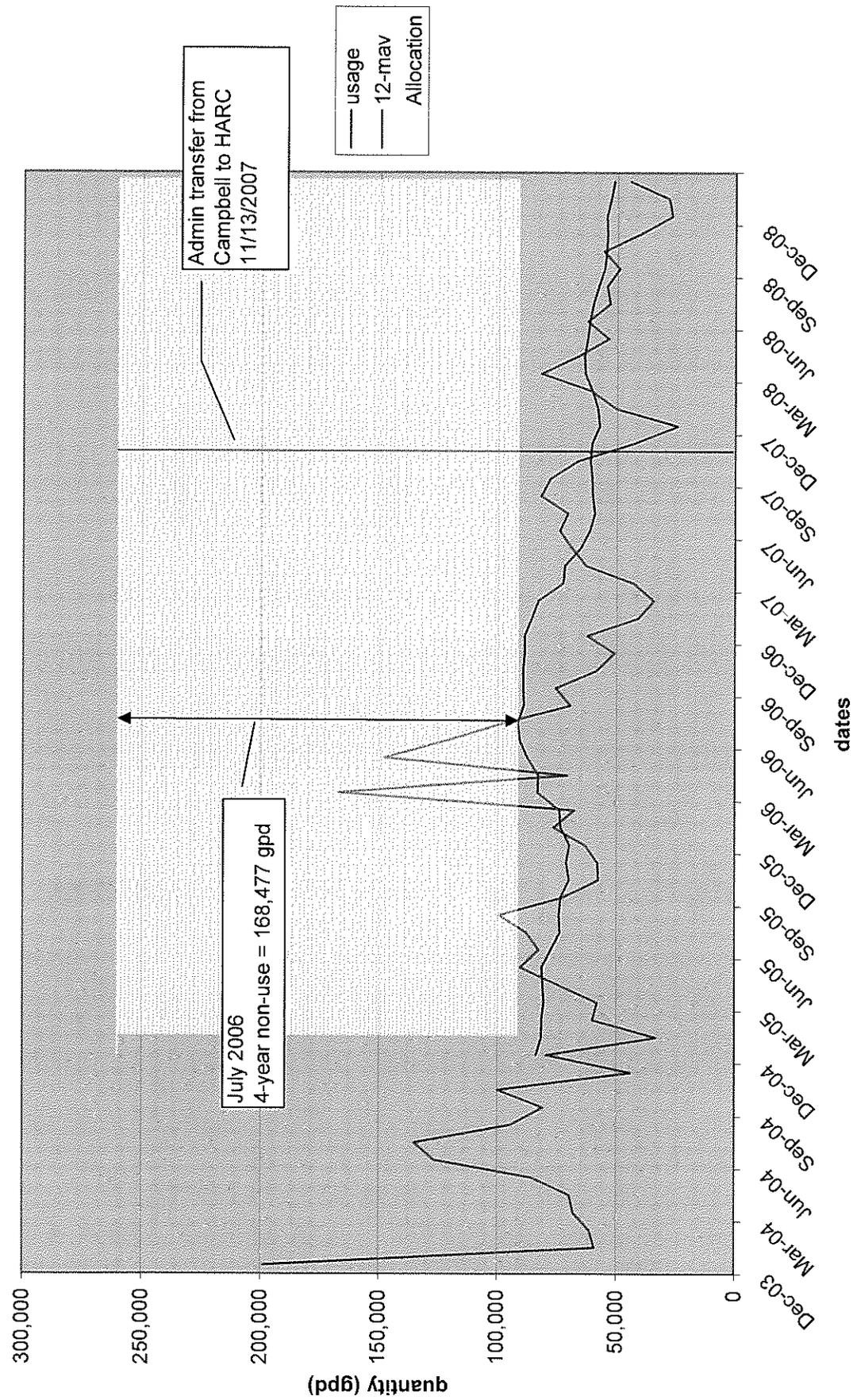


EXHIBIT 6g

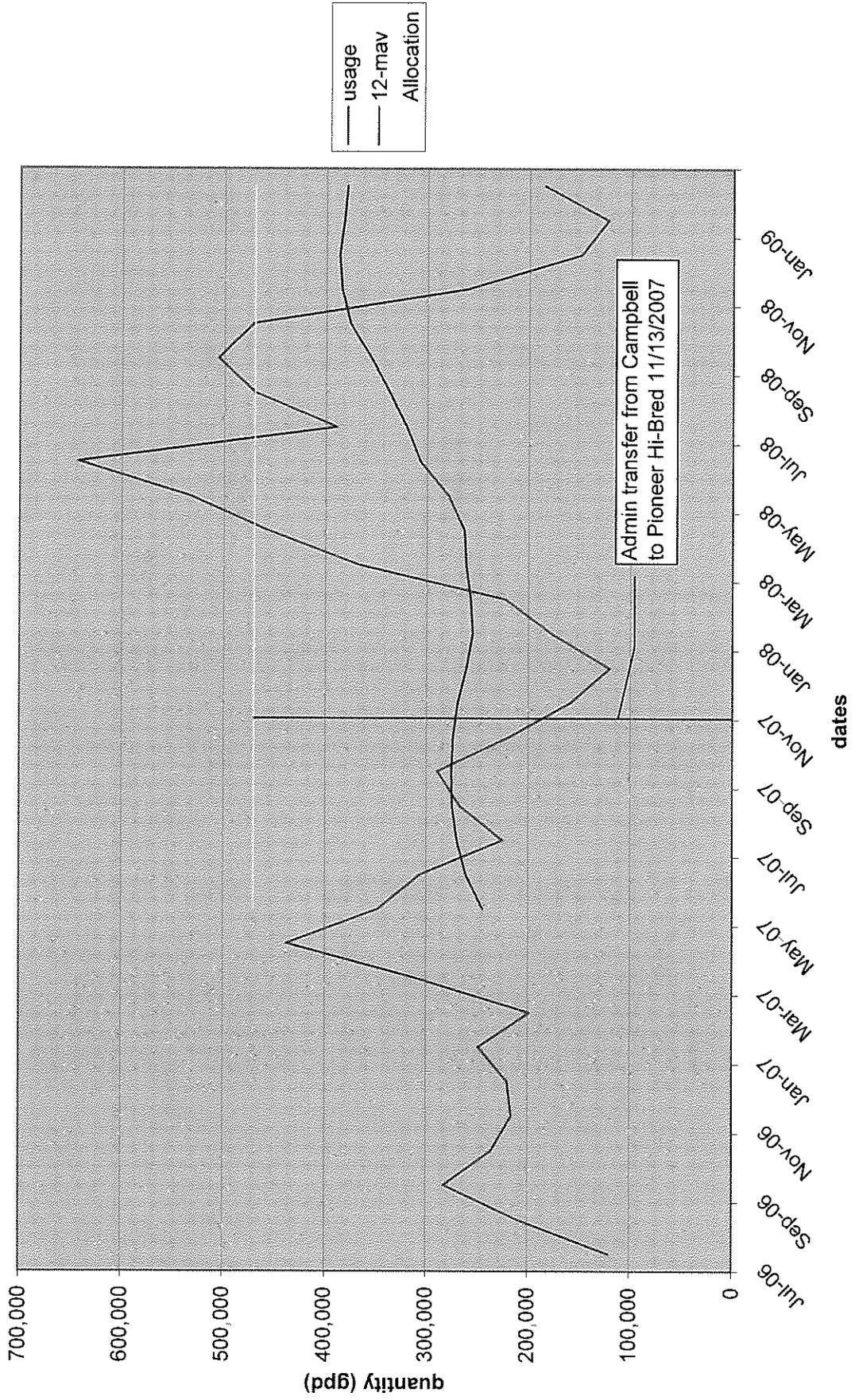
WUP 804 (Robinson)



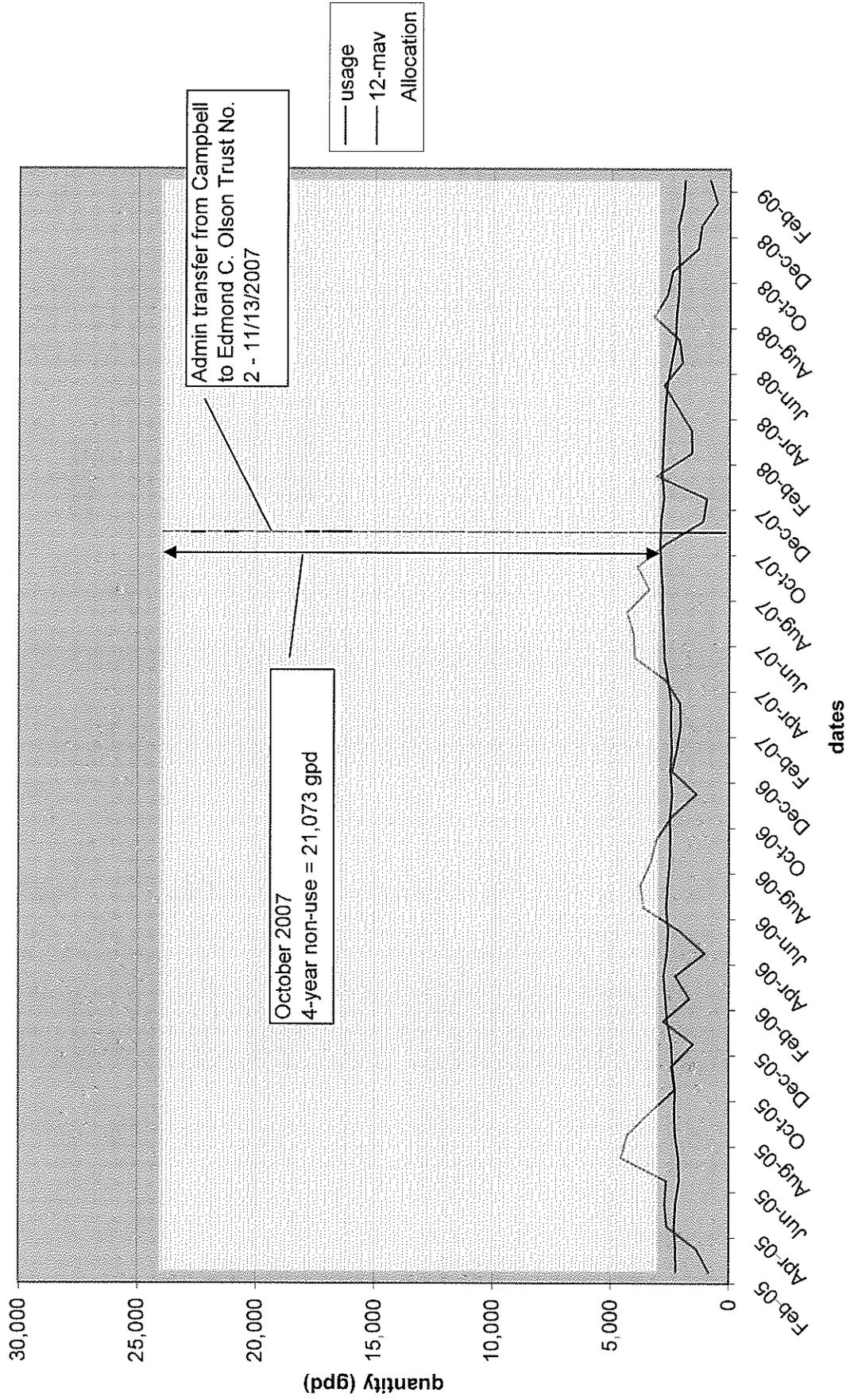
807 (HARC)



808 (Pioneer Hi-Bred)



827 (Edmond Olson)



828 Monsanto (corrected)

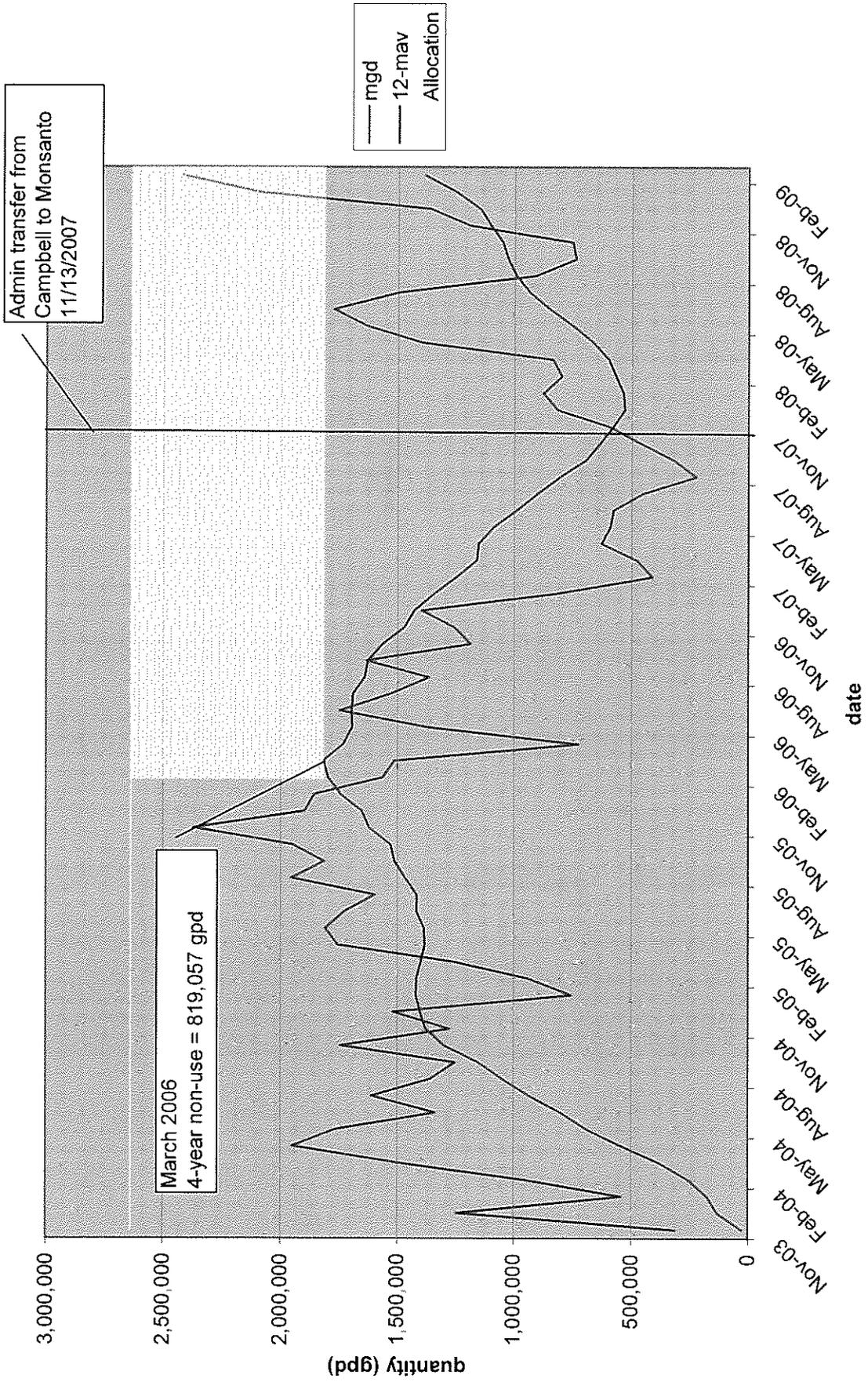


EXHIBIT 6I

System Losses

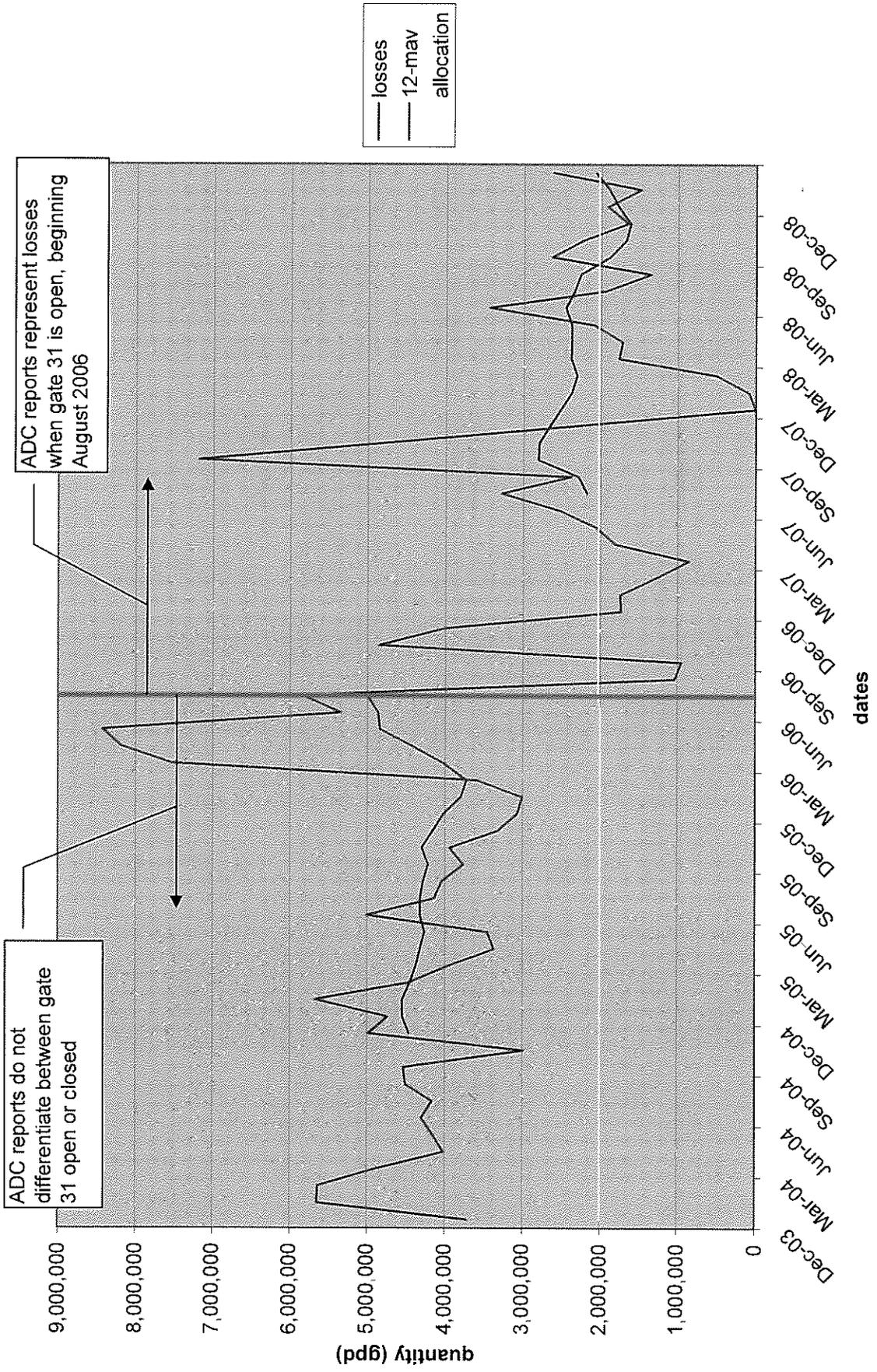


EXHIBIT 7

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January 25, 2010

Commission on Water Resource Management
Department of Land and Natural Resources
State of Hawaii
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813

Re: Water Use Permit Application No. 871
Applicants: Fat Law's Farms, Inc.
Law Tieng's Farm LLC
Tony and Manyvone Law
Hae and Phouangphet Viengkhou
Application for: New Use
Management Area: Waiāhole Ditch System (Oahu)
Source Area: Waiāhole Ditch System (Oahu)
End Use Area: TMK No. (1) 9-2-004-010
Formerly TMK No. (1) 9-2-004-001, Lot 882A
Campbell Estate, Parcel 8 (425 Acres)(Kunia, Hawai'i)
End Use Zoning: AG-1 Restricted Agricultural

Agreement and Waiver of Objection to 0.551 MGD

Dear Honorable Commissioners:

Whereas:

1. Applicants Fat Law's Farm, Inc., Law Tieng's Farm LLC, Tony Law, Manyvone Law, Hae Viengkhou, and Phouangphet Viengkhou (hereinafter collectively referred to as Applicants"), and Makawai Stream Restoration Alliance and Hakipu'u Ohana (hereinafter collectively referred to as "Windward Parties"), wish to resolve the above entitled matter without the need for a contested case hearing; and

2. Applicants and the Windward Parties have reached an agreement to proceed without a contested case hearing in the event the Commission on Water Resource Management (hereinafter referred to as the "Commission") issues a water use permit to Applicants for no more and no less than 0.551 million gallons per day (hereinafter "mgd") of water from the Waiahole Ditch System;

Now, therefore, Applicants and Windward Parties, by and through their respective counsel, agree as follows:

- A. Applicants are agreeable to the issuance of a water use permit to Applicants for 0.551 mgd of water from the Waiahole Ditch System, and hereby amend Water Use Permit Application No. 871 to request no more and no less than this amount;
- B. Applicants waive objection and their right to request a contested case hearing in the event the Commission issues a water use permit to Applicants in an amount no less than 0.551 mgd of water from the Waiahole Ditch System, but reserve the right to object and request a contested case hearing for an amount less than 0.551 mgd;
- C. Windward Parties hereby withdraw their objection to the issuance of a water use permit to Applicants in an amount that does not exceed 0.551 mgd of water from the Waiahole Ditch System;
- D. Windward Parties waive further objection to the issuance of a water use permit to Applicants in an amount that does not exceed 0.551 mgd of water from the Waiahole Ditch System;
- E. Windward Parties hereby withdraw their Petition Requesting A Contested Case Hearing Before the Commission on Water Resource Management, filed herein on December 28, 2009;
- F. Windward Parties hereby withdraw their request for contested case hearing made during the public hearing conducted herein on December 18, 2009; and

Commission on Water Resource Management
Department of Land and Natural Resources
State of Hawai'i
September 30, 2009
Page 3 of 3

- G. Windward Parties hereby waive their right to a contested case hearing where a water use permit is issued to Applicants in an amount that does not exceed 0.551 mgd of water from the Waiahole Ditch System, but reserve the right to object and request a contested case hearing for an amount that exceeds 0.551 mgd.

Very truly yours,

PAUL H. ACHITOFF
Attorney for Windward Parties
MAKAWAI STREAM RESTORATION
ALLIANCE and HAKIPU'U OHANA

DENNIS J. HWANG
Attorney for Applicants
FAT LAW'S FARM, INC.,
LAW TIENG'S FARM, TONY LAW,
MANYVONE LAW, HAE VIENGGKHOU,
and PHOUANGPHET VIENGGKHOU