

JOHN WAINALE
GOVERNOR OF HAWAII



KEITH W. AHUE, CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES

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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

P. O. BOX 621
HONOLULU, HAWAII 96809

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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

FEB 1 1994

File No.: MA-2663

MEMORANDUM

TO: Brian J. J. Choy, Director
Office of Environmental Quality Control

FROM: Roger G. Evans, Administrator
Office of Conservation and Environmental Affairs

SUBJECT: Negative Declaration for Bendon Water Transmission Line at Kohakuloa,
Maui

The Department of Land and Natural Resources has reviewed the comments received during the 30-day public comment period which began on October 23, 1993. The Department has determined that this project will not have significant environmental effect and has issued a negative declaration. Please publish this notice in the forthcoming OEQC Bulletin.

We have enclosed a completed OEQC Bulletin Publication Form and four copies of the final EA.

Please contact Don Horiuchi at 587-0381 if you have any questions.

1994-02-23-MA-FEA - Bendon Water
Transmission Line

FEB 23 1994

FINAL ENVIRONMENTAL ASSESSMENT

APPENDIX

BENDON WATER TRANSMISSION LINE
Kahakuloa, Maui, Hawaii

TMKs 3-1-6:01 and 03 (por.);
3-1-1:03, 06, 15, 17, 37 and 38 (por.)

December, 1993

FINAL ENVIRONMENTAL ASSESSMENT

BENDON WATER TRANSMISSION LINE
Kahakuloa, Maui, Hawaii

TMKs 3-1-6:01 and 03 (por.);
3-1-1:03, 06, 15, 17, 37 and 38 (por.)

Applicants:

James and Susan Bendon
c/o Law Offices of Isaac Hall
2087 Wells Street
Wailuku, HI 96793

Prepared through:
Law Offices of Isaac Hall
2087 Wells Street
Wailuku, HI 96793

December, 1993

SUMMARY SHEET

APPLICANTS: James and Susan Bendon
c/o Law Offices of Isaac Hall
2087 Wells St.
Wailuku, HI 96793
Telephone: 244-9017

APPROVING AGENCY: The Board of Land and Natural
Resources of the State of
Hawaii

PROPOSED ACTION: Bendon Water Transmission Line

LOCATION: Kahakuloa, Maui, Hawaii

TAX MAP KEYS: TMKs 3-1-6:01 and 03 (por.);
3-1-1:03, 06, 15, 17, 37, and
38 (por.)

LOT AREA: State lands; 5,360 acres
(por.); Other private lands:
495 acres (por.);
Total: 5,855 acres (por.)

STATE LAND USE
CLASSIFICATION: State lands: Conservation
District, Resource Subzone;
Other private lands:
Agriculture

COUNTY ZONING: State lands: None. (Maui County
does not zone land within the
State Conservation District).
Other private lands:
Agriculture

SPECIAL MANAGEMENT AREA: State lands: None of the state
lands are located within the
SMA;
Other private lands: lands
below Kahekili Highway are
within the SMA

AGENCIES CONSULTED IN
MAKING ASSESSMENT: Department of Land and Natural
Resources, Planning Office
Maui County Planning Department

I. IDENTIFICATION OF APPLICANTS

James and Susan Bendon
c/o Law Offices of Isaac Hall
2087 Wells St.
Wailuku, HI 96793
Telephone: 244-9017

II. IDENTIFICATION OF APPROVING AGENCY

The Board of Land and Natural Resources
of the State of Hawaii

III. IDENTIFICATION OF AGENCIES CONSULTED

Department of Land and Natural Resources,
Planning Office
Maui County Planning Department

IV. GENERAL DESCRIPTION OF THE ACTION'S TECHNICAL, ECONOMIC,
SOCIAL AND ENVIRONMENTAL CHARACTERISTICS

A. Technical Characteristics

The primary purpose of the proposed action is to transmit water to lands served by an auwai which are owned by the applicants in Kahakuloa, Maui, Hawaii. Because the auwai is a significant historic resource and, in places, in disrepair, a maximum of a two inch pipeline will be placed alongside the auwai. A portion of the pipeline would lie on state lands in the Conservation District, necessitating the receipt of a Conservation District Use ("CDUA") permit from the Board of Land and Natural Resources ("BLNR"). BLNR has granted three similar CDUA permits in the past.

The Maui County Planning Department has advised that a Special Management Area ("SMA") use permit may be required for that portion of the pipeline which lies below Kahekili Highway. An application for an SMA minor permit is being filed with the Maui County Planning Department.

1. Summary of Proposed Use:

This application is in many ways similar to that submitted by the Nakoas family and approved by the Board of Land and Natural Resources. See File No. MA-4/7/89-2235 and Exhibit "M". All Exhibits referenced here are attached to the accompanying application for a Conservation District Use permit.

The Bendons own kuleana lands, adjoining (in one case) and nearby (in the remaining cases) the kuleana lands owned by the Nakoas. Exhibit "G". These kuleana lands are served by

the same auwai which receives water from Makamakaole Stream. Exhibit "C".

The applicants wish to install up to a two (2) inch "drisco" pipeline for the transportation of water from the beginning of the auwai to kuleana Land Commission Awards 6148-Q; R.P. 4747 to Keaka (1.997 acres) (TMK 3-1-1:06) and 6740, Apana 2, R.P. 6171 to Luwale (.366 acres) (TMK 3-1-01:17). The total pipeline would be approximately 10,000 linear feet long. Exhibit "J". The pipeline intake head would be situated within the auwai. Approximately 2,000 linear feet of the pipeline would be placed along the auwai on Conservation District/state-owned lands. The water from the pipeline will be used for agricultural and domestic purposes, but not for drinking water.

This pipeline will have the capacity to deliver between approximately 60,000 and 87,000 gallons per day ("gpd"). The applicants have a 25,000 gallon storage tank. They seek only a delivery of 50,000 gpd. In the event of a critical low flow, as determined by the Forestry Manager, the applicants could reduce this amount to a minimum of 1,000 gpd.

The applicants anticipate that the cost to install the whole pipeline will be in the range of \$15,000 (materials: 2" pipe = \$11,000 + labor: \$4,000).

2. Description of Parcel

a. Existing structures/Use

Only a portion of this project lies upon state lands. These lands are identified as TMK 3-1-6:01 and 03. Exhibit "A". These state lands are within the State Land Use Conservation District, Resource Subzone.

An existing auwai runs from a concrete waterhead in Makamakaole Stream across state lands and travels downslope to agricultural properties. Exhibit "C". Several existing pipelines are already installed at the waterhead. Exhibits "D" and "E". The auwai is described to be in a state of disrepair such that pipelines are required to transport water. The auwai has existed for over 90 years.

The ancient auwai system, in this case, reflects appurtenant water use customs which are slightly at variance with other areas.

The auwai departs from Makamakaole Stream at roughly the 1,400 foot elevation and descends a ridge headed towards Mokeehia Island until it meets the Nakoa and Bendon kuleanas which are located at roughly the 1,000 foot elevation. The

auwai runs at an almost 45 degree angle away from Makamakaole Stream. The stream descends immediately after the intake for the auwai into a deep gulch which opens to the ocean. The kuleanas are separated from Makamakaole Stream by a very wide gulch.

There is no evidence that there ever was a return flow from these kuleanas to Makamakaole Stream. This is so because of the physical layout of this particular auwai and the topography of the area. The excess water from this auwai runs off into smaller drainage areas and then into the ocean. The builders of this auwai system evidently did not contemplate the return of water to Makamakaole Stream, at least from the Nakoas and Bendon kuleanas, or that a return flow was necessary to serve such purposes as protecting instream values, potential downstream users or the near shore waters. The other individuals with intakes in the auwai are similarly situated and do not return flow to Makamakaole Stream.

The auwai was constructed over 90 years ago. Exactly how much water was originally diverted into the auwai is not known. The auwai itself, however, is two to three feet wide and in places three or more feet deep. Judging from the physical characteristics of the auwai it had the capacity to carry large volumes of water.

In the recent past, beginning at least 20 or 30 years ago, a dam or waterworks was constructed in Makamakaole Stream including an intake for the auwai. This waterworks dam diverts a regular amount of water into the auwai.

A number of individuals have been granted CDUAs to take water from the auwai in the same location. The Board approved on April 25, 1975 the application of Joseph Texeira (MA-1/30/75-630) to construct a small diversion dam and to deploy a two-inch pipeline from the dam, to a 10,000 gallon water tank on private property.

On February 9, 1979, the Board approved the application of Ernest Mendez (MA-8/21/78-1088) to deploy a two inch pipeline connected to an existing four-inch pipeline to service private property TMK 3-1-01:22 with water. Both Mr. Texeira and Mr. Mendez have actually completed the work authorized through the CDUAs and currently take water from the auwai.

On September 8, 1989, the Board approved the application of Ned Nakoas (MA-4/7/89-2235) to install a four-inch pipeline in the auwai for the transport of water to kuleana properties. Exhibit "M". Since the preparation of the Draft Environmental Assessment, the Nakoas have begun installing their pipeline; however they have not yet begun taking water

from the auwai. Maps are attached depicting Makamakaole Stream, the concrete waterhead, the Texeira's small diversion dam, the pipes currently placed in the auwai and the proposed location of the Bendon pipe. Exhibits "D" and "E".

b. Existing access

The applicants have access from their kuleanas across the larger piece of property within which the kuleanas lie, which the applicants also own, designated as TMK 3-1-1:15 (146.83 acres). Exhibit "K". This takes the applicants to Kahekili Highway.

On the mauka side of Kahekili Highway, the applicants have secured the right to lay a pipeline and a right of access across the 346 acre parcel currently owned by Kahakuloa Acres (TMKs 3-1-1:3, 37 and 38). A description of the location of this Pipeline Easement is attached as Exhibit "F". The Kahakuloa Acres property adjoins the state land which is the subject of this application.

Concurrently or upon approval of this application, the applicants will seek a right of access from the State of Hawaii to cross these state lands to install and maintain the pipeline.

3. Description of Proposed Use

The applicants propose to place the front of their pipeline in the auwai immediately behind the Mendez, Texeira and Nakoa pipelines. Exhibit "E". Because the auwai is a significant historic resource and, in places, in disrepair, the pipeline will then rise out of the auwai and run along the makai side of the auwai until it leaves state lands and enters Kahakuloa Acres property. The pipeline will then cross Kahakuloa Acres property in a location already agreed upon by Kahakuloa Acres and the applicants. Exhibit "F". The pipeline will then cross Kahekili Highway and pass through the applicant's larger parcel to reach the applicant's two kuleanas. Exhibits "C" and "G".

To install the pipeline on state lands, grasses and weeds along the auwai will need to be trimmed and cut. After installation of the pipeline is completed, the area will return to its natural state.

The purpose of the proposed action is to supply water to kuleanas entitled to that water through an auwai system off of Makamakaole Stream. The applicants hold title to two kuleanas: LCA 6148-8, RP 4747 to Keaka, 1.997 acres in size, identified as TMK 3-1-1:06 and LCA 6740, Apana 2, RP 6171 to Luwale, .366 acres in size, identified as TMK 3-1-1:17.

Exhibits "K" and "L". These kuleanas lie within a larger homestead parcel owned by the applicants, 146.83 acres in size, identified as TMK 3-1-1:15. Exhibits "G" and "K". Historically the auwai provided water to the kuleana parcels and the surrounding homestead lands. Extensive evidence of terracing on the kuleana and homestead parcels establishes that prior cultivation took place there.

The Nakoa family also owns two kuleanas within applicants' larger parcel. One, TMK 3-1-1:07, adjoins one of the kuleanas owned by the applicants (TMK 3-1-1:06). The third Nakoa kuleana lies outside the applicants' larger parcel, but nearby. Exhibit "G".

The Nakoa family obtained a court order determining that their three kuleanas had appurtenant water rights to tap the auwai which runs from Makamakaole Stream, across (a) state lands, (b) Kahakuloa Acres property, (c) the applicants' larger parcel, to the three kuleana. See Kahakuloa Acres v. Mendes v. Nakoa; Civil No. 6277 (2) in the Second Circuit Courts and Exhibit "H". They also have Pipeline Easements across Kahakuloa Acres property and that of the applicants.

For the same reasons that the Nakoa kuleanas have appurtenant water rights, the applicants have appurtenant water rights to water in Makamakaole Stream, delivered through the auwai. Kahakuloa Acres has indirectly recognized these rights by granting the Pipeline Easement to applicants. Exhibit "F". The applicants have also registered these water rights with the Commission on Water Resources Management. Exhibit "I". Their declaration was placed in Category 3 because there was no existing use. With this CUA and the installation of the pipeline, the applicants' declaration can be elevated to Category 1, as an actual existing use.

Through this permit, the applicants seek to perfect their appurtenant water rights and to exercise these rights by transporting water to properties entitled to its use.

This water will be used for agricultural and domestic purposes but not as potable drinking water. The types of agricultural uses on the kuleana and surrounding lands supported by this water are pasture and livestock uses, taro growth, reforestation of the property through planting ironwood, paper bark, palms, Mexican cypress, Monterey pine and kikuya.

B. Socio-economic characteristics

Kahakuloa is a rural, agricultural community to which water services are not yet supplied by the County of Maui. Historically, owners of kuleana lands in the region have

relied upon water from Makamakaole Stream transported through the auwai. Even today, various landowners, described above, continue to rely upon the auwai, in a manner which accommodates its historical significance and its state of disrepair, to deliver water from Makamakaole Stream to downslope agriculture properties.

The applicants are mindful of the comments upon the Nakoa family application submitted by Forestry Manager Wesley C.H. Wong, Jr. He suggests that at some point, applying sound water management principles, some system for the whole area should be developed, rather than relying upon the construction of a system on a case by case basis as has taken place in the past. The applicants here are simply perfecting their existing water rights and do not wish to defer action pending the development of a water management system for the whole area.

There is a sufficient volume of water to supply the existing four inch pipelines placed in the auwai as well as the Nakoa pipeline. These other pipelines are subject to CDUA permits and monitoring by the Board of Land and Natural Resources ("BLNR"). Ample water still remains in the auwai for the proposed Bendon two inch intake and pipeline. This water would otherwise continue in the auwai for a considerable distance and then percolate into the ground due to the current state of disrepair of the auwai. Thus, there is enough water which has been diverted into the auwai on a regular basis for the last 20 or 30 years to supply the Bendons as well as those with intakes above them, which water would otherwise be wasted further down the auwai.

Those who rely upon the auwai now cooperate so that the kuleana water rights of those entitled to them can be respected. The applicants intend to mitigate the impact of their taking water upon those who now take water by placing their pipeline in the auwai immediately behind the intakes of existing users.

This pipeline will enable the applicants to put their kuleanas to use for agricultural and domestic uses without compromising other protected interests.

C. Environmental Characteristics

The applicants' pipeline will lie immediately next to, or roughly in the same location, as the Nakoa pipeline. The Nakoa family application was the subject of detailed environmental analysis by many state and county agencies. The environmental characteristics of the applicants' water transmission line are virtually the same as the environmental characteristics of the Nakoa family water transmission line.

Serious environmental concerns were raised by reviewing agencies and mitigation measures were developed to reduce any significant adverse impacts to acceptable levels. The applicants have reviewed these comments and the conditions to the Nakoia family permit. The applicants endorse these, with only minor modifications.

H.A.R. §11-200-12 sets out criteria to determine the significance of potential environmental effects caused by the proposed use. The water transmission line will be installed in a single phase, over a period of time. No major impacts are anticipated during this short period of time. Impacts of other types are considered below.

V. SUMMARY DESCRIPTION OF THE EFFECTED ENVIRONMENT

A. The Auwai is a Significant Historic Resource

The existing auwai represents an artifact of prehistoric Hawaii when the ahupua'a concept of land divisions and auwai water rights to the tenants of the land prevailed. This is an excellent example of an ancient water system still in functioning condition, although it is in disrepair in many places.

B. Makamakaole Stream is an Environmentally Sensitive Area

Makamakaole Stream is known for the high quality of its in-stream values. O'opu hui kole (lentipes concolor), a species of Hawaiian gobi, are found in Makamakaole Stream. This species is rapidly becoming threatened and endangered in other areas. The one half mile stretch of stream above the auwai also supports a good population of native opai. O'opu alamoo, o'opu nopili, opai kalaole and hihiwai also inhabit the stream. Should water be withdrawn from Makamakaole Stream, there is a risk that all of these inhabitants of the stream could be adversely affected, if an adequate minimum stream flow were not assured.

C. Public Health Issues

The Department of Health is charged with the responsibility for assuring that water used for drinking purposes meets all federal and state potable water standards.

D. Other potentially affected environments

Flora, fauna, significant habitats, other historical/archaeological and cultural sites will not be affected by this project.

VI. IDENTIFICATION AND SUMMARY OF MAJOR IMPACTS AND ALTERNATIVES CONSIDERED

A. Impact upon the Auwai as a Significant Historic Site

The pipeline will simply be laid along the auwai on the surface and no ground alteration (grading or trenching) will take place. In this way, this project will have no adverse effect upon this potentially significant historic site.

B. Impact upon Makamakaole Stream as an Environmentally Sensitive Area

The applicants will not divert water from Makamakaole Stream. They will only use water already flowing within the auwai consistent with their kuleana water rights and the kuleana water rights of others in the area.

Because the Bendons will not divert any more amounts of water from Makamakaole Stream than have been diverted for the last 20 or 30 years, there should be no impact upon instream uses, downstream users or the near shore ocean environment and no need to amend current instream standards.

No modification to the existing stream diversion structure is proposed. Any work which will take place will be within the auwai, which is a man-made water course.

As such, no stream channel alteration permit, pursuant to H.A.R. §13-169-50(a), should be required; no stream diversion works permit, pursuant to H.A.R. §13-168-32(a), should be required and no amendment of the interim instream flow standards for Maui streams, pursuant to H.A.R. §13-169-48, should be required. In result, approval of the State Commission on Water Resources Management should not be necessary.

Nevertheless, due to the sensitivity of the Makamakaole Stream environment, when it is determined by the Forestry Manager that there is insufficient stream flow below the applicants' intake, the applicants understand that extraction of water from Makamakaole Stream can be limited, along with others entitled to kuleana water.

First, the interim instream flow standards in effect require maintenance of the current flow in Makamakaole Stream. These flow levels may fluctuate due to natural causes. What "current flow" is may be difficult to define. There is, however, no proposal to diminish "current flows" so no instream amendment is necessary.

Second, the instream values must be protected. There must be sufficient water in Makamakaole to sustain stream life. There may be times when, even though no further amounts are diverted into the auwai, the stream flow diminishes due to the natural causes to the extent that stream life is threatened. Under these circumstances, which can be discerned by the Forestry Manager, the amount of water flowing into the auwai will have to be decreased. This is why the Bendons have stated a willingness to decrease the amounts delivered to them from 50,000 gpd to 1,000 gpd in times of critical low flows in Makamakaole and to have their CDUA conditioned to allow such a reduction. The other CDUA permits either have similar conditions or could be amended to include such a provision.

C. Public Health Concerns

The applicants will agree not to use the water drawn from the auwai for domestic potable water purposes.

D. Other Major Impacts

There are no significant environmental impacts upon other resources which cannot be mitigated through conditions similar to those attached to the Nakoa family permit.

E. Alternatives Considered

Various alternatives were considered in shaping the Nakoa family project into the reasonable project which was proposed. The same considerations have led the applicants to propose a similar project.

VII. PROPOSED MITIGATION MEASURES

To a large extent, proposed mitigation measures have already been discussed above. The conditions attached to the Nakoa family project are reasonable, mitigate any adverse impacts by reducing them to acceptable levels and may be incorporated with respect to the applicants' project.

A. Mitigation Measures with Respect to the Auwai as a Historic Resource

The applicants agree that the removal of vegetation during construction shall be kept to a minimum and such removal shall be under the supervision of the Forestry Manager.

B. Mitigation Measures with Respect to Makamakaole Stream

The applicants agree that (1) no work, or modification of any kind, other than in the course of normal maintenance, shall be done on the existing diversion structure that would result in additional water being diverted from Makamakaole Stream and (2) the applicants shall exercise their rights in a manner consistent with the rights and privileges of others entitled to use water from the stream and from the auwai.

C. Mitigation Measures with Respect to Public Health

The applicants agree not to use the water for drinking water purposes.

D. General Mitigation Measures

The applicants will agree to the conditions normally imposed by the Board of Land and Natural Resources in granting CDUA permits.

VIII. PROPOSED AGENCY DETERMINATION

An Environmental Impact Statement is required if the proposed action may have a significant effect on the environment. H.A.R. §11-200-12 provides criteria helpful in determining if a significant effect on the environment will take place.

In applying these criteria, every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short and long-term effects of the action must be considered.

Applying these criteria, within the context above, it is clear that the proposed action will not have a significant effect on the environment.

IX. PROPOSED AGENCY FINDINGS AND REASONS SUPPORTING THE DETERMINATION

A. The proposed action does not involve an irrevocable commitment to loss or destruction of any natural or cultural resource;

B. The proposed action will not curtail the range of beneficial uses of the environment;

C. The proposed action does not conflict with the state's long-term environmental policies or goals and guidelines as expressed in Chapter 344;

D. The proposed action will not substantially affect the economic or social welfare of the community or state;

E. The proposed action will not substantially affect public health;

F. The proposed action does not involve substantial secondary impacts, such as population changes or effects on public facilities;

G. The proposed action does not involve a substantial degradation of environmental quality;

H. The proposed action is individually limited and does not cumulatively have a considerable effect upon the environment or involve a commitment for larger action;

I. The proposed action does not substantially affect a rare, threatened or endangered species, or its habitat;

J. The proposed action does not detrimentally affect air or water quality or ambient noise levels; and

K. The proposed action does not affect an environmentally sensitive area such as a flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters.

X. AGENCIES TO BE CONSULTED IN THE PREPARATION OF THE ENVIRONMENTAL IMPACT STATEMENT, IF APPLICABLE

It is not anticipated that an EIS will be required.

APPENDIX

Comments received on the Draft Environmental Assessment and the Applicants' Replies to these Comments:

1. Comments from Mr. Brian J.J. Choy of the Office of Environmental Quality Control dated October 15, 1993 and the Applicants' responses thereto dated December 23, 1993.
2. Comments from Mr. David L. Morton, Water Claims Manager for the Native Hawaiian Advisory Council dated November 8, 1993 and the Applicants' responses thereto dated December 23, 1993.

JOHN WAIHEE
GOVERNOR



BRIAN J. J. CHOY
Director

STATE OF HAWAII
OFFICE OF ENVIRONMENTAL QUALITY CONTROL
220 SOUTH KING STREET
FOURTH FLOOR
HONOLULU, HAWAII 96813
TELEPHONE (808) 586-4185

October 15, 1993

Mr. Keith W. Ahue, Chairperson
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Attention: Don Horiuchi


Dear Mr. Ahue,

Subject: Draft Environmental Assessment (DEA) for a Water
Transmission Line at Kohakuloa, Maui

Thank you for the opportunity to review and comment on the subject document. In the Final Environmental Assessment, please discuss the effects of the proposed project on the community. Specifically, will current users of the auwai water supply be adversely affected by the Bendons' proposed draw of 50,000 gallons per day?

If you have any questions, please call Faith Caplan.

Sincerely,


Brian J.J. Choy
Director

c: Isaac Hall
James and Susan Bendon

ISAAC DAVIS HALL

ATTORNEY AT LAW

2087 WELLS STREET

WAILUKU, MAUI, HAWAII 96793

(808) 244-9017

FAX (808) 244-6775

OF COUNSEL:
G. RICHARD GESCH

December 23, 1993

Mr. Brian J.J. Choy
Office of Environmental Quality Control
220 S. King St., 4th floor
Honolulu, HI 96813

Re: Response to Comments upon the Draft Environmental
Assessment ("DEA") for the Bendon Water Transmission
Line, Kahakuloa, Maui, Hawaii

Dear Brian J.J. Choy:

Thank you for your comments dated October 15, 1993. You ask us to discuss the effects of the proposed project resulting from the withdrawal from the auwai of 50,000 gallons per day on the community and, specifically, on current users of the auwai.

This raises questions about the Bendon water transmission line which, by and large, have already been addressed in the Draft Environmental Assessment ("DEA") and by the Board of Land and Natural Resources ("BLNR") during its prior review of the Nakoa family application for a conservation district use ("CDUA") permit for a larger water transmission line in Kahakuloa.

The auwai, into which the intake of the Bendon water transmission line will be placed, was laid out to benefit specific parcels of land which thereby had and have appurtenant water rights. The Bendons' kuleanas are among these. These established appurtenant water rights confer upon the Bendons a right to take far more than 50,000 gallons of water per day from the auwai.

There has been no formal determination as to which of the other existing pipelines with intakes in the auwai serve parcels of land with appurtenant water rights or as to how much water those with other pipelines in the auwai have the right to take from the auwai to satisfy their water rights, if any.

The BLNR originally imposed as Condition 9. to the Nakoa application the following:

That the applicant will not interfere with, nor reduce, the existing diversion of water from the auwai flowing to other parties....

Thereafter, the Nakoas' attorney, Mr. Alan T. Murakami of the Native Hawaiian Legal Corporation, requested a modification of this term which was later adopted by the Board. The amended version is as follows:

That the applicant shall exercise his rights in a manner consistent with the rights and privileges of others entitled to use water from the stream and from the auwai.

The purpose of the amendment which the Nakoas sought and obtained was to reflect the current status of water law in Hawaii. The Bendons seek similar protection.

Nevertheless, pending any real dispute as to the water in the auwai, until a formal determination is made pursuant to the water code and to increase harmony in the community, the Bendons have agreed not to place their intake above any existing intakes in the auwai.

I trust that the above directly answers your questions and indicates how the issues which you have raised have been incorporated into the planning process. If you have any further questions, please do not hesitate to contact me.

Sincerely yours,


Isaac Hall

IH/jp

cc: Don Horiuchi
Anne Cua
James and Susan Bendon



NATIVE HAWAIIAN ADVISORY COUNCIL

'Aha kāko 'o kanawai no ka na 'auao, no ke kulāwi, no ka Hawai'i

ANONPROFIT 501(C)(3) CORPORATION

1088 Bishop St., Suite 1204, Honolulu, Hawaii 96813 • (808)523-1445, Facsimile 599-4380
684 Keolu Drive, Suite NHAC, Kailua, Hawaii 96734 • (808)261-6318, Facsimile 261-2012

1993 November 8

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

COMMENTS ON DRAFT ENVIRONMENTAL ASSESSMENT (DEA), BENDON WATER TRANSMISSION LINE, KAHAKULOA, MAUI, HAWAII (Deadline November 23, 1993)

NHAC supports, with reservations, applicant's intent to use water already withdrawn from Makamakaole stream. The appurtenant water rights claimed by applicants would allow them to withdraw water from Makamakaole. However, depending upon the nature of immemorial water uses upon which these rights were established, these rights would probably (in the case of rights established upon irrigation of lo'i kalo) carry obligations to return substantial portions of withdrawn water back to the stream. It is not difficult to see how, for instance, a pattern of low return flows throughout the watershed could have significant impacts upon instream flows and downstream water users. The DEA (p.2, Existing structures/Use) should identify the current discharge point and volumes of unused 'auwai flow for comparison with the return flows that would be achieved by applicants.

The DEA identification of proposed water uses (bottom of p.4) is not sufficiently detailed to allow identification of return flow volumes. A table showing the breakdown of water uses, acreage, irrigation volume, irrigation method, and return flow would be helpful in this regard. Part V.B. of the DEA (p. 6, SUMMARY DESCRIPTION OF THE EFFECTED ENVIRONMENT, Makamakaole Stream is an Environmentally Sensitive Area) should mention the impacts of irrigation return flows upon this environmental sensitivity. "Should water be withdrawn from and not returned to Makamakaole Stream ..." might cover it (emphasis added).

Similarly, if current 'auwai return flows to Makamakaole stream would be decreased by virtue of applicants' higher consumptive use of 'auwai water, then amendment of the interim instream flow standards for Maui streams could be required since applicants' use would effectively diminish streamflow in downstream reaches. This should be addressed in Part VI.B. of the DEA (p. 7, IDENTIFICATION AND SUMMARY OF MAJOR IMPACTS AND ALTERNATIVES CONSIDERED, Impact upon Makamakaole Stream as an Environmentally Sensitive Area),

which currently states that "no amendment of the interim instream flow standards .. should be required."

The discussion of proposed limitation of extractions when there is insufficient streamflow below the applicants' intake (DEA p. 7) requires further detail. What are the criteria and standards used by the Forestry Manager to make such determinations? How will the limitations be scaled among all those entitled to kuleana water? If some water users are generating higher proportions of return flows than others, they should not be subjected the same level of extraction limitations.

We agree with the Forestry Manager's suggestion (DEA p. 5) that more sound water management principles should be applied and some system for the whole area should be developed. One principle to be considered in developing this system is the necessity of irrigation return flows sufficient for maintaining and enhancing stream and nearshore ecosystem health and for guaranteeing adequate irrigation water for downstream end users.

Mahalo,

David L. Martin

David L. Martin, Water Claims Manager

pc: James and Susan Bendon c/o Law Offices of Isaac Hall
Land Board members
Water Commission and Commissioners
Native Hawaiian Water Rights Task Force & members
Stream Protection and Management Task Force & members
Appurtenant Water Rights Survey Advisory Group & members
Eugene Dashiell
Office of Hawaiian Affairs
Office of State Planning
DLNR Division of Forestry & Wildlife
Forestry Manager Wesley C.H. Wong, Jr.

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OF COUNSEL:
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December 23, 1993

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Water Claims Manager
Native Hawaiian Advisory Council
1088 Bishop St., Suite 1204
Honolulu, HI 96813

Re: Response to Comments upon the Draft Environmental
Assessment for (DEA) for the Bendon Water Transmission
Line, Kahakuloa, Maui, Hawaii

Dear David Martin:

Thank you for your comments dated November 8, 1993 on the Draft Environmental Assessment (DEA) for the Bendon Water Transmission Line in Kahakuloa, Maui, Hawaii. What follows is a point by point response to your thoughtful comments and an indication as to how the issues which you have raised have been incorporated into the planning process for this project. There are several somewhat unique features to this particular auwai system which must be understood in responding to your comments.

1. Return Flow

The ancient auwai system, in this case, reflects appurtenant water use customs which are slightly at variance with other areas.

The auwai departs from Makamakaole Stream at roughly the 1,400 foot elevation and descends a ridge headed towards Mokeehia Island until it meets the Nako and Bendon kuleanas which are located at roughly the 1,000 foot elevation. The auwai runs at an almost 45 degree angle away from Makamakaole Stream. The stream descends immediately after the intake for the auwai into a deep gulch which opens to the ocean. The kuleanas are separated from Makamakaole Stream by a very wide gulch.

There is no evidence that there ever was a return flow from these kuleanas to Makamakaole Stream. This is so because of the physical layout of this particular auwai and the topography of the area. The excess water from this auwai runs off into smaller drainage areas and then into the ocean. The builders of this auwai system evidently did not contemplate the return of water to Makamakaole Stream, at least from the

Nakoa and Bendon kuleanas, or that a return flow was necessary to serve such purposes as protecting instream values, potential downstream users or the near shore waters. The other individuals with intakes in the auwai are similarly situated and do not return flow to Makamakaole Stream.

The auwai was constructed over 90 years ago. Exactly how much water was originally diverted into the auwai is not known. The auwai itself, however, is two to three feet wide and in places three or more feet deep. Judging from the physical characteristics of the auwai it had the capacity to carry large volumes of water.

In the recent past, beginning at least 20 or 30 years ago, a dam or waterworks was constructed in Makamakaole Stream including an intake for the auwai. This waterworks dam diverts a regular amount of water into the auwai.

There is a sufficient volume of water to supply the existing four inch pipelines placed in the auwai as well as the Nakoa pipeline. These other pipelines are subject to CDUA permits and monitoring by the Board of Land and Natural Resources ("BLNR"). Ample water still remains in the auwai for the proposed Bendon two inch intake and pipeline. This water would otherwise continue in the auwai for a considerable distance and then percolate into the ground due to the current state of disrepair of the auwai. Thus, there is enough water which has been diverted into the auwai on a regular basis for the last 20 or 30 years to supply the Bendons as well as those with intakes above them, which water would otherwise be wasted further down the auwai. Because the Bendons will not divert any more amounts of water from Makamakaole Stream than have been diverted for the last 20 or 30 years, there should be no impact upon instream uses, downstream users or the near shore ocean environment and no need to amend current instream standards.

2. Allocation of Water Among Users

The auwai, into which the intake of the Bendon water transmission line will be placed, was laid out to benefit specific parcels of land which thereby had and have appurtenant water rights. The Bendons' kuleanas are among these. These established appurtenant water rights confer upon the Bendons a right to take far more than 50,000 gallons of water per day from the auwai.

There has been no formal determination as to which of the other existing pipelines with intakes in the auwai serve parcels of land with appurtenant water rights or as to how much water those with other pipelines in the auwai have the

right to take from the auwai to satisfy their water rights, if any.

BLNR originally imposed as Condition 9. upon the Nakoas application the following:

That the applicant will not interfere with, nor reduce, the existing diversion of water from the auwai flowing to other parties....

Thereafter, the Nakoas' attorney, Mr. Alan T. Murakami of the Native Hawaiian Legal Corporation, requested a modification of this term which was later adopted by the BLNR. The amended version is as follows:

That the applicant shall exercise his rights in a manner consistent with the rights and privileges of others entitled to use water from the stream and from the auwai.

The purpose of the amendment which the Nakoas sought and obtained was to reflect the current status of water law in Hawaii. The Bendons seek similar protection.

Nevertheless, pending any real dispute as to the water in the auwai, until a formal determination is made pursuant to the water code and to increase harmony in the community, the Bendons have agreed not to place their intake above any existing intakes in the auwai. Any disputes which do arise between those who take water from the auwai can be resolved pursuant to the dispute resolution provisions of the State Water Code.

You raise an interesting issue with regard to the criteria and standards to be applied by the Forestry Manager in assuring that adequate flow remains in the stream. First, the interim instream flow standards in effect require maintenance of the current flow in Makamakaole Stream. These flow levels may fluctuate due to natural causes. What "current flow" is may be difficult to define. There is, however, no proposal to diminish "current flows" so no instream amendment is necessary. Second, the instream values must be protected. There must be sufficient water in Makamakaole to sustain stream life. There may be times when, even though no further amounts are diverted into the auwai, the stream flow diminishes due to the natural causes to the extent that stream life is threatened. Under these circumstances, which can be discerned by the Forestry Manager, the amount of water flowing into the auwai will have to be decreased. This is why the Bendons have stated a willingness to decrease the amounts delivered to them from 50,000 gpd to 1,000 gpd in times of critical low flows in Makamakaole and to have their CDDA conditioned to allow such

a reduction. The other CDA permits either have similar conditions or could be amended to include such a provision.

I trust that the above directly answers your questions. I have modified the Final Environmental Assessment to cover several of the issues you have raised. If you have any further questions, please do not hesitate to contact me.

Sincerely yours,



Isaac Hall

IH/jp

cc: Don Horiuchi
Anne Cua
James and Susan Bendon

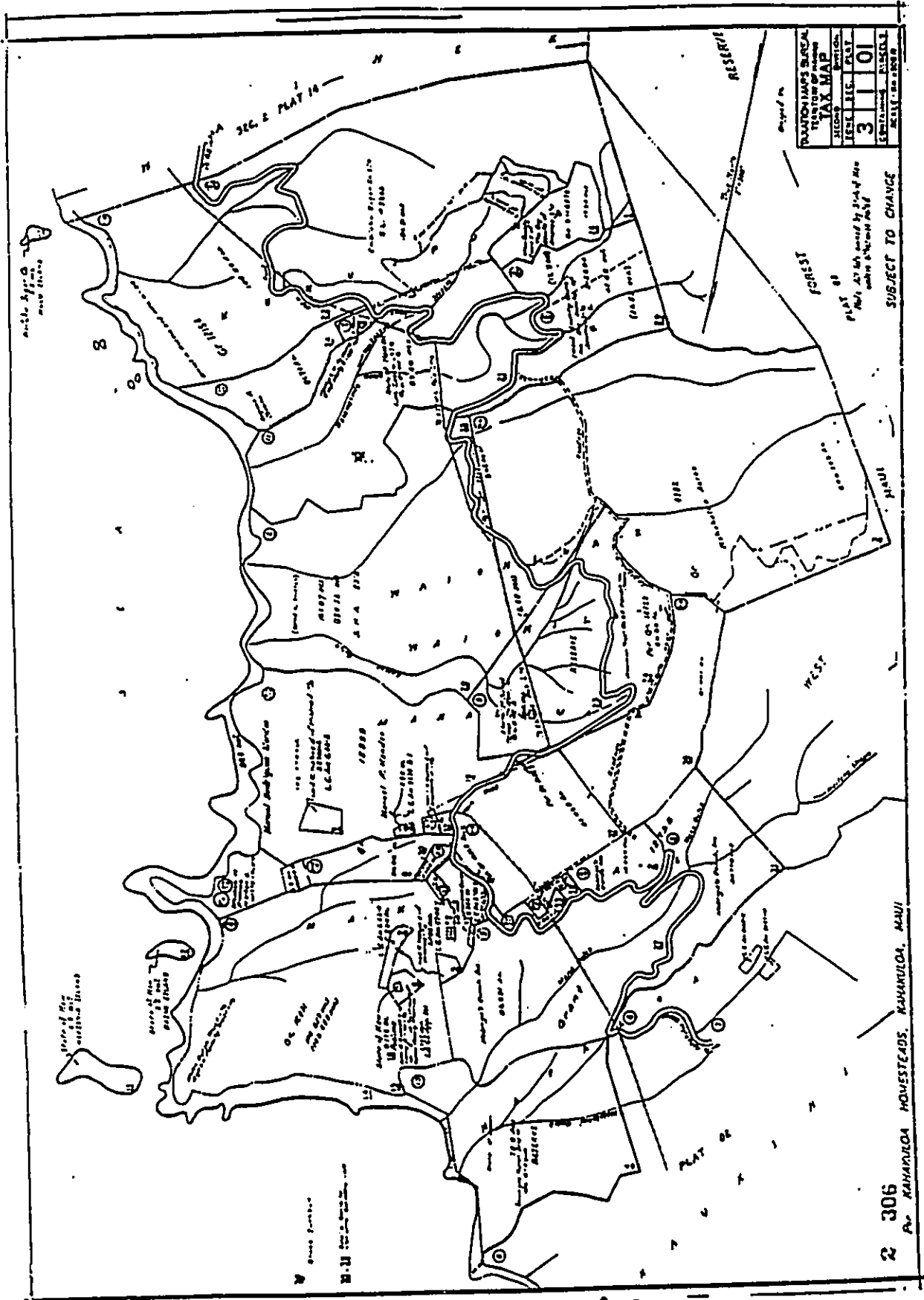


EXHIBIT "A"

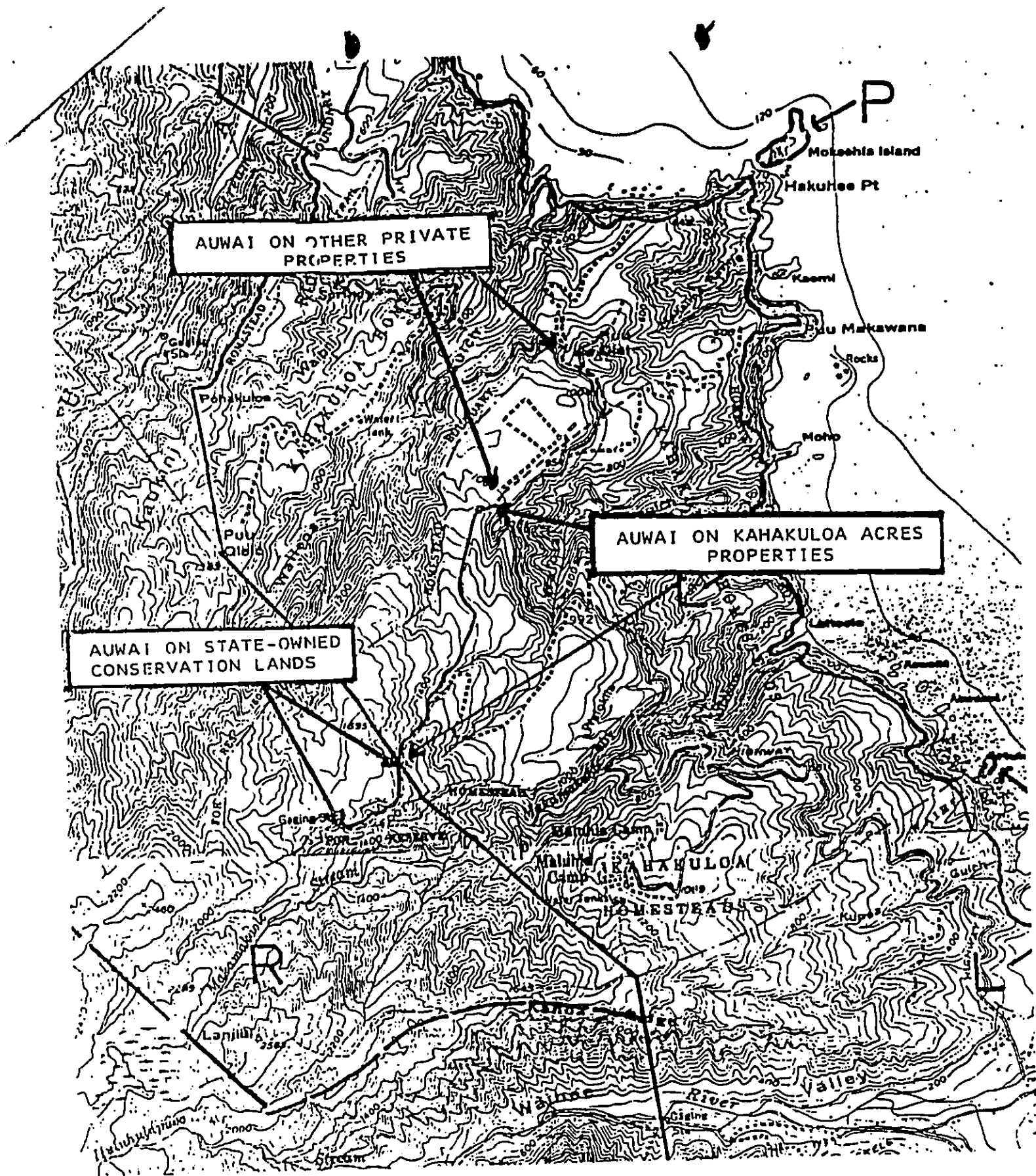
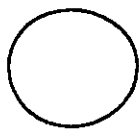
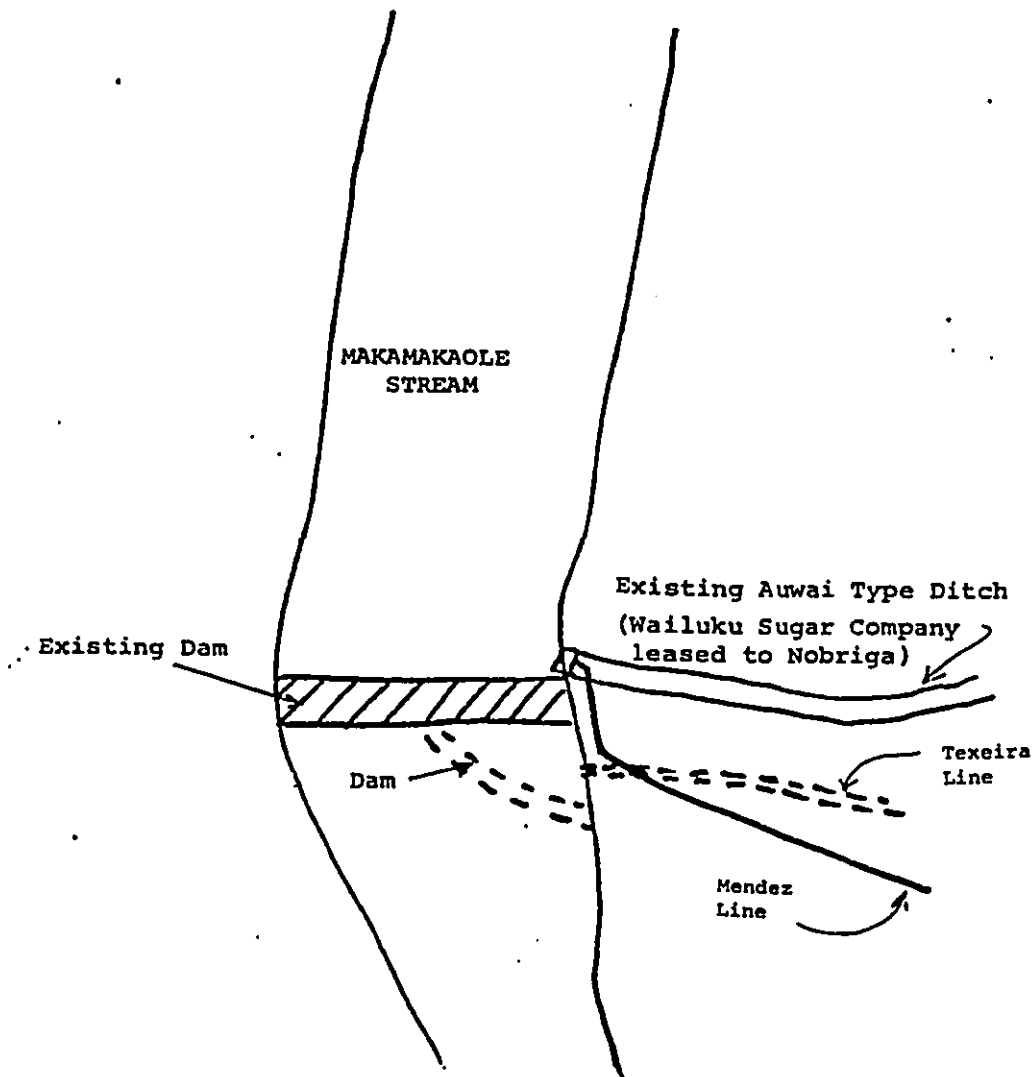


EXHIBIT 'C'



NORTH

CDUA NO. MA-2235

APPLICANT NED K. NAKOA

AGENT _____

TMK 3-1-6: 01, 03 (por.)

EXHIBIT E

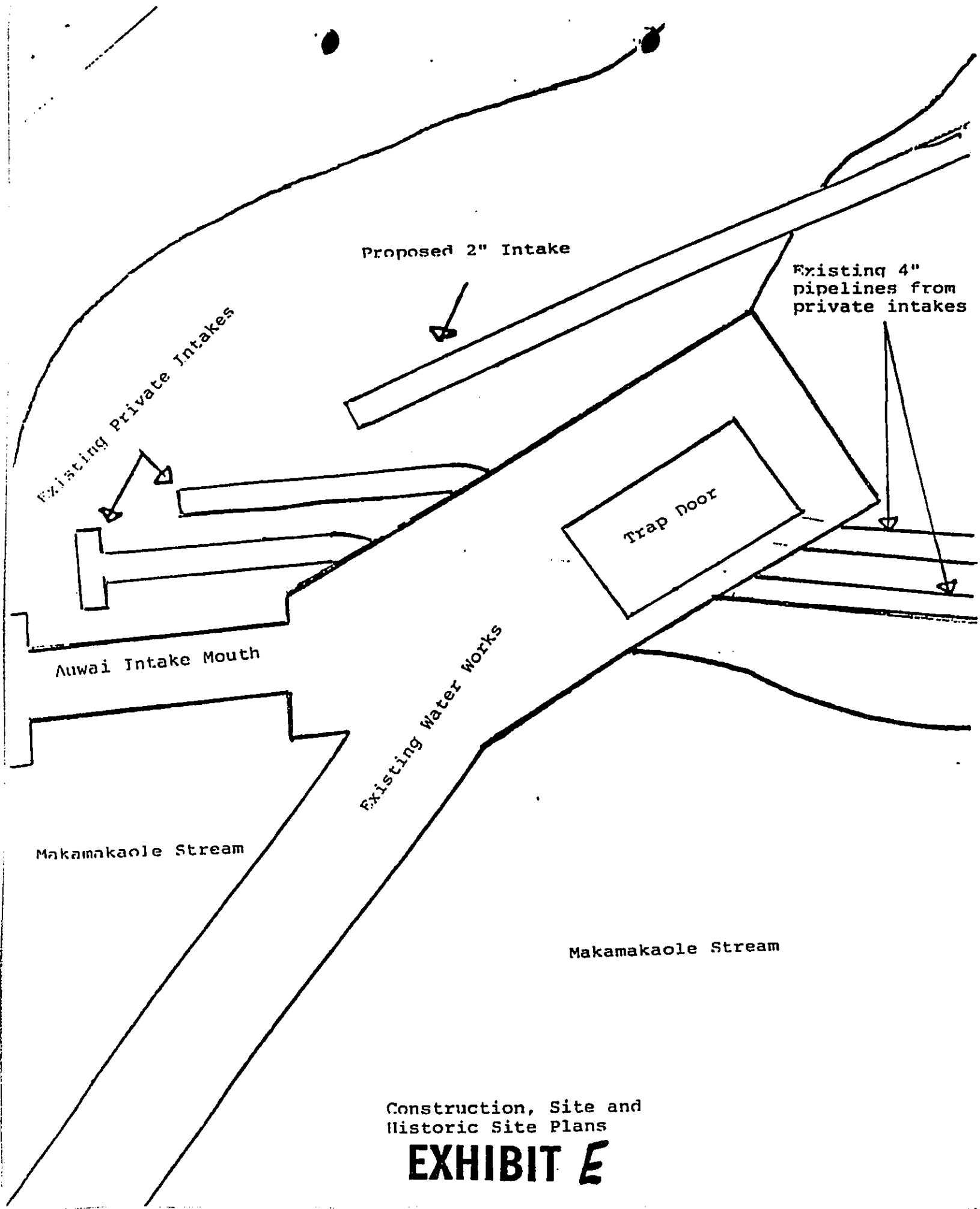
SUBZONE PROTECTIVE

RESOURCE

LIMITED

GENERAL

EXHIBIT 'D'



Construction, Site and
Historic Site Plans

EXHIBIT E

