

## **AGREEMENT FOR WATER DELIVERY (NON-POTABLE WATER)**

THIS AGREEMENT ("Agreement") is made and entered into on this 1st day of May 2021 ("Effective Date"), by and between **MAUI LAND & PINEAPPLE COMPANY, INC.**, a Hawaii corporation, whose address is 200 Village Road, Lahaina, Hawaii 96761, hereinafter called "MLP", and **HAWAII WATER SERVICE COMPANY, INC.**, a Hawaii corporation, whose address is 68-1845 Waikoloa Rd #216, Waikoloa Village, HI 96738, hereinafter called "Water Company".

### R E C I T A L S:

A. MLP is the owner and operator of a water collection, transmission system and storage (the "Ditch System") that collects untreated surface water and transports it via the Honokohau Ditch and related infrastructure more particularly described on Exhibit A attached hereto.

B. Water Company is a regulated public utility company.

C. Concurrently herewith, Water Company has acquired from Kapalua Water Company, Ltd., a non-potable water distribution system (the "Non-Potable System") that Water Company will use to serve consumers within (i) its Hawaii Public Utilities Commission ("HPUC") approved service area at or near the Kapalua Resort at Kapalua, Maui, Hawaii, (ii) the "Kapalua Mauka" future expansion area (TMK 4-2-001-042 and TMK 4-3-001-006) that is more particularly described in the County of Maui's zoning code as "West Maui Project District 2 -- Kapalua Mauka subject to HPUC approval (collectively, the "Initial Service Area") and any additional service areas as contemplated by Section 1 below.

D. The parties desire to enter into this Agreement to formalize and set forth the terms and conditions upon which MLP will provide water from its Ditch System for Water Company's use and distribution via the Non-Potable System.

NOW, THEREFORE, in consideration of the above and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

**1. Delivery of Water; Delivery Points.** Subject to the terms and conditions herein, MLP does hereby undertake and agree to deliver from the Ditch System to Water Company, for the term of this Agreement, non-potable water in such quantities as Water Company may require to meet its service obligations in effect from time to time within (i) Water Company's Initial Service Area, and (ii) expansions of the Initial Service Area to Seller's future developments in Kapalua, as approved by the HPUC (collectively the "Service Area"). MLP shall deliver water to the Water Company at the delivery points shown on the map attached as Exhibit A, or such other locations as the parties may mutually agree to from time to time (each a "Delivery Point").

2. **Water Delivery Charges.** Water Company will pay to MLP for all water delivered to Water Company at the initial rate of \$260.00 per million gallons (i.e., \$0.26 per thousand gallons) plus the Hawaii general excise tax thereon, payable monthly in arrears (or such other time periods as may be mutually agreed upon by the parties in writing). Payments for each calendar month, or portion thereof, shall be due and payable no later than 30 days after receipt of invoice from MLP. On the first anniversary of the date of this Agreement, and each subsequent anniversary, the rate then in effect shall be increased by the lesser of (a) three percent (3%), or (b) the greater of (i) two percent (2%) or (ii) a percentage equal to the percentage increase over the preceding twelve months in the Consumer Price Index for All Urban Consumers (CPI-U) for Honolulu published by the U.S. Department of Labor – Bureau of Labor Statistics (1982-84=100) (“CPI”); provided that if such CPI index is discontinued MLP shall have the right to reasonably designate an alternative index of inflation. In addition, MLP reserves the right, no more frequently than once per year at the anniversary of the Effective Date, to adjust the rate in effect to be commensurate with any material increase in MLP’s costs in operating, maintaining and repairing the Ditch System (including material increases in the amounts payable for “Additional Services” under the Kapalua Honokohau Ditch Maintenance and Services Agreement between Water Company and MLP), but not including the cost of any capital improvements or replacements to the Ditch System, provided that such an increase shall be permitted only to the extent that the increases in MLP’s costs in operating, maintaining and repairing the Ditch System exceed the increases in the rate as provided in the preceding sentence. MLP shall provide Water Company with no less than thirty (30) days’ notice of such rate adjustment which notice shall include reasonably detailed information supporting such increase; Water Company may request additional documentation and shall be reasonably satisfied that such increase was calculated in accordance with this Section 2 before such increased rate is paid. Water Company shall pay to MLP together with each payment required hereunder which is subject to the State of Hawaii general excise tax on gross income, as it may be amended from time to time, or any successor or similar tax, an amount which, when added to such payment (currently 4.166% of each such payment), shall yield to MLP, after deduction of all such tax payable by MLP with respect to all such payments, a net amount equal to that which MLP would have realized from such payments had no such tax been imposed.

3. **Water Meters.** Except as otherwise provided herein, Water Company shall, at its own expense, install and maintain suitable meters or gauges at accessible locations at each Delivery Point to assure an accurate and documented measurement of all water delivered to the Water Company. Together with each monthly payment under this Agreement, Water Company shall provide to MLP and to the best of its ability accurate and complete written report of all water delivered at each Delivery Point. Provided that Water Company diligently repairs or replaces meters known to be defective, Water Company shall have no liability for malfunctioning or inaccurate meters. Representatives of MLP shall have access to such meters and all records of meter readings at all reasonable times upon not less than forty-eight (48) hours’ notice for the purpose of checking the same and verifying Water Company’s reports. In the event access is not available, Water Company shall make a good faith estimate of meter readings, but shall not be liable for inaccuracies of the same.

4. **Term.** The term of this Agreement commences on the date of this Agreement and shall automatically renew on the 20<sup>th</sup> anniversary of such date, thereafter this Agreement shall automatically renew for successive 10-year terms unless terminated by mutual agreement of the parties. Notwithstanding the foregoing, MLP’s obligation to deliver irrigation

water pursuant to this Agreement shall terminate if Water Company (or its successor and assigns) acquires the Ditch System from MLP, permanently ceases operation of the Non-Potable System, dedicates the Non-Potable System to the County of Maui or other governmental entity, or develops wells or other alternative sources of water adequate to meet Water Company's service obligations.

5. **Limits on Use.** Water delivered pursuant to this Agreement shall be used only for irrigation and other non-potable uses within the Service Area as the same may be modified from time to time with the approval of the HPUC and may not be transmitted to or used at any lands outside of the Service Area. Water Company acknowledges that water delivered pursuant to this Agreement is not treated or suitable for human consumption and Water Company shall at all times take reasonable precautions to prevent any such use.

6. **Seller's Warranties, Representations & Covenants.** Except as set forth in Schedule 6 attached hereto MLP warrants, represents and covenants to Water Company:

(a) that MLP is the owner in fee simple or holds recorded easements for all of the lands underlying the portions of the Ditch System necessary to deliver water to the Delivery Point;

(b) that MLP currently holds, and will use commercially reasonable efforts to at all times maintain, all permits and approvals required by law for the operation of the Ditch System, including those required by the Commission on Water Resource Management of the State of Hawaii and the County of Maui;

(c) Except for ongoing Hawaii Commission on Water Resource Management ("CWRM") proceedings referenced below, there are presently no citations, summons, complaints, penalties, actions, suits, investigations or other proceedings pending or threatened against MLP in connection with the operation or maintenance of the Ditch System that may adversely affect MLP's or Water Company's ability to perform its obligations under this Agreement; and

(d) MLP acknowledges that Water Company is regulated by the HPUC and MLP shall cooperate with Water Company at no material expense to MLP, in Water Company's efforts to obtain approvals and to comply with all laws and HPUC related requirements applicable to the Ditch System and the supply of water to the Non-Potable System, including but not limited to the provision and confirmation of documents and information as required by the HPUC.

Notwithstanding the foregoing, Water Company acknowledges that the Commission on Water Resource Management is currently working on amended Interim Instream Flow Standards for surface water sources that feed the Ditch System and that the outcome of that process, or subsequent similar processes, may affect the amount of water available to Water Company from the Ditch System, and Water Company assumes all risk of the same. Further, Water Company acknowledges that many components of the Ditch System are extremely old and/or are subject to damage, breakage or failures for a variety of reasons. Accordingly, except as set forth throughout this Agreement, MLP makes no warranties, express or implied, as to the Ditch System, the quantity or quality of Ditch System water available to Water Company, or any other

matters. Water Company expressly acknowledges and agrees that water in the Ditch System may contain soil, sediments, vegetation, debris and other contaminants and Water Company assumes all risk of the same.

**7. Reciprocal Representations and Warranties.** Each of MLP and Water Company, with respect to itself, does hereby represent, warrant and covenant to the best of their knowledge, information and belief, with such representations, warranties and covenants being true as of the date hereof, as follows:

- (a) it has the legal authority to enter into this Agreement;
- (b) is authorized to do business and in good standing under the laws of the State of Hawaii;
- (c) the persons signing this Agreement on its behalf have the power and authority to execute and deliver this Agreement pursuant to the Party's respective governing documents, and the execution, delivery and performance of this Agreement have been duly authorized and approved by all requisite action;
- (d) the execution and delivery of this Agreement and the performance of such Party's obligations hereunder: (i) will not conflict with or result in a violation of its governing documents, (ii) shall not violate or result in a default, immediately or with the passage of time, under any agreement contract or instrument to which such Party is a party or by which it is, or may be, bound; and (iii) shall not conflict with or violate any order, writ, judgment, or decree, issued by a governmental agency having jurisdiction, to which such Party is subject;
- (e) no additional approval, authorization or other action by, or filing with, any governmental authority is required in connection with such Party's execution and delivery of this Agreement by such Party; and
- (f) each of the provisions, covenants, and obligations contained in this Agreement is enforceable against such Party under Applicable Law

**8. Ditch System Maintenance.** MLP will at all times exercise commercially reasonable efforts to manage, repair and maintain the Ditch System in condition adequate for the reliable delivery of water to the Non-Potable System in accordance with this Agreement. Notwithstanding the foregoing, Water Company acknowledges that the Ditch System includes stream diversions, tunnels, ditches, siphons and other improvements that are very old and that in case of major casualty to or other failure of such components repair or replacement may not be possible at a commercially reasonable cost, so MLP makes no assurances as to its ability to continually maintain the Ditch System in case of such events.

**9. Force Majeure.** Water Company and MLP agree and understand that the ability of MLP and Water Company to perform their respective obligations under this Agreement are made expressly subject to earthquake, hurricanes, drought, landslides, tunnel or ditch collapse, casualty to the Ditch System, or other natural disasters or events which render MLP's Ditch System temporarily or permanently inoperable, actions of the federal, state and county

governments or agencies thereof, including without limitation enactment or enforcement of laws or governmental regulations, strikes, lock-outs, unavailability of labor or materials, wars, insurrections, rebellions, civil disorder, declaration of national emergencies, acts of God, pandemics, epidemics, and other reasons beyond the reasonable control of the party. Neither party shall have any liability for failure or inability to perform its obligations hereunder to the extent such failure or inability is caused by any such cause or event, and delays in performance shall be excused only for such period of delay as proximately caused by such cause or event.

**10. Use Priorities.** MLP has existing commitments to the County of Maui Department of Water Supply ("County") to provide a maximum of 2.5 MGD of water from the Ditch System that DWS uses at its Mahinahina Weir treatment plant to produce potable water for the DWS municipal system, and that MLP may from time to time upon the County's request commit additional Ditch System water to such use. Water Company acknowledges and agrees that the County's potable needs take priority in case drought or other conditions or events reduce the total flows in the Ditch System below levels necessary to meet the demands of all users. Water Company further acknowledges that MLP has existing commitments for irrigation water delivery to the owner of the Kapalua Resort's Plantation and Bay golf courses, golf academy and related golf facilities ("Golf Facilities") and other third-party irrigation water users, and in case of drought or other shortage Water Company and such other users shall have equal priority for the Ditch System's available capacity (after satisfaction of the County's potable needs).

**11. Transport of Water.** Water Company agrees to accept water from the Ditch System and transmit that water, less transmission, evaporation and other operational losses, through the Non-Potable System to the Golf Facilities. Notwithstanding the foregoing, Water Company's obligation to deliver water to the Golf Facilities shall remain in effect only so long as MLP's delivery agreements with the owner or Golf Facilities remain in effect or as otherwise provided below.

- (a) As consideration for use of the Non-Potable Water System, MLP will pay Water Company a fee for such use of the Non-Potable System equal to five percent (5%) of the following amount: (x) the total number of gallons of water received by Water Company at the Delivery Point for transport to the Golf Facilities multiplied by (y) the amount per gallon MLP invoices the Golf Facilities for delivered water ( $x \times y$ ), to which shall be added an amount sufficient to receive such amount net of any applicable Hawaii general excise tax and public service company tax (collectively "Pipe Fee"). No deduction or offset for water losses within the Non-Potable System shall be included in the Pipe Fee payments to Water Company.
- (b) Water Company shall assess the Pipe Fee for each calendar month by the 15<sup>th</sup> calendar day of the following month. MLP shall pay the Water Company invoice in full within 20 calendar days. HWSC shall have the right, without liability, to suspend transport of water pursuant to this section so long as the amounts remain unpaid.
- (c) All water delivered under this Section 11 shall not be subject to the water delivery charges set forth in Section 2 above and shall be delivered in

accordance with the specifications in Exhibit B attached hereto and incorporated herein.

- (d) Water Company's obligations to deliver water to the Golf Facilities shall terminate on October 1, 2070.

**12. Condemnation.** If the Ditch System or any part thereof shall be taken or condemned by any authority having the power of eminent domain, MLP shall be solely entitled to all compensation and damages payable with respect to the taking of the Ditch System, but Water Company shall be entitled to seek compensation and damages from the condemning authority for the loss of Water Company's rights and interests under this Agreement, including inverse condemnation damages arising from the diminution in value of the Non-Potable System from the loss of rights to obtain water from the Ditch System.

**13. Defaults and Remedies.** If a party fails to perform any of the terms, covenants and agreements contained herein, if such failure continues for a period of thirty (30) days after written notice, then the non-defaulting party shall be entitled to all remedies available to it at law or equity, including by way of example and not in limitation thereof, the right to sue such person for specific performance, injunctive relief and/or monetary damages, including without limitation, reasonable attorneys' fees, costs and expenses. Amounts due hereunder shall bear interest from the date due until the date paid at the rate of 1% per month. If MLP fails to maintain and repair the Ditch System and related water facilities to the Delivery Point in accordance with the requirements of this Agreement and such failure is not the result of the breach by Water Company (or any affiliate or subsidiary of Water Company) of its obligations under any applicable operations and maintenance agreement regarding the Wells, then upon such written notice and expiration of such 30-day period, Water Company shall have the right to enter such land and facilities as is necessary to do what MLP should have done, and in such event MLP shall promptly pay Water Company for the actual documented fully-allocated direct and indirect costs (including overhead) reasonably incurred by Water Company to do so plus an administrative fee of 15% of such costs.

**14. Indemnity.** Water Company agrees to indemnify, defend and hold MLP and its officers, directors, agents and employees harmless from and against any and all claims, losses, liabilities, damages attorneys' fees and costs arising from or related to Water Company's negligence, willful misconduct or breach of this Agreement. MLP agrees to indemnify, defend and hold Water Company and its officers, directors, agents and employees harmless from and against any and all claims, losses, liabilities, damages attorneys' fees and costs arising from or related to MLP's negligence, willful misconduct or breach of this Agreement.

**15. Dispute Resolution; Submission to Jurisdiction; Attorney's Fees.**

- (a) The parties shall first seek to negotiate, in good faith and in timely fashion, a resolution of any dispute. If the Parties are unable to resolve the dispute with negotiations within thirty (30) days, the Parties agree to mediate any dispute with non-binding mediation conducted in Honolulu, Hawaii. The Parties may agree that a mediated resolution is binding. If the Parties cannot agree upon a mediator, each shall select one name from a list of mediators maintained by Dispute Prevention and

Resolution, Inc., the two selected shall then choose a third person who will serve as mediator. The Parties shall have twenty (21) days within which to commence the first mediation session following the conclusion of their good faith negotiations. The Parties shall each fund half the cost of the mediator(s) and shall bear their own costs incurred in connection with any such mediation unless agreed otherwise as a result of the mediation.

(b) If the mediation does not result in resolution of the dispute within forty-five (45) days after any Party's request for mediation, or sooner if reasonably necessary to prevent irreparable or substantial ongoing damage or losses, then the Parties may pursue other remedies available at law or in equity in the Second Circuit Court of the State of Hawaii and the Parties consent to the venue and jurisdiction of such courts. In addition to any other right or remedy to which a Party may be entitled, at law or in equity, any Party shall be entitled to enforce any provision of this Agreement by a decree of specific performance and to temporary, preliminary and permanent injunctive relief to prevent breaches or threatened breaches of any of the provisions of this Agreement, without posting any bond or other undertaking.

(c) Should any party hereto employ an attorney for the purpose of enforcing or construing, because of disagreement with the other party, this Agreement, or any judgment based on this Agreement, in any legal proceeding whatsoever, including insolvency, bankruptcy, arbitration, declaratory relief or other litigation, the prevailing party shall be entitled to receive from the other party or parties thereto reimbursement for all reasonable attorneys' fees and all costs, whether incurred at the trial or appellate level, including but not limited to service of process, filing fees, court and court reporter costs, investigative costs, expert witness fees and the cost of any bonds, whether taxable or not, and such reimbursement shall be included in any judgment, decree or final order issued in that proceeding.

**16. Notices.** All notices or other communications required hereunder to be given shall be in writing and shall be (i) delivered personally, (ii) deposited with the U.S. Postal Service, duly certified or registered, postage prepaid, (iii) delivered by a nationally recognized overnight courier, or (iv) transmitted by electronic mail ("e-mail"), if a copy of such electronic mail transmission is also delivered pursuant to one of the other transmission methods prescribed above. All notices / communications hereunder shall be addressed as set forth below:

To MLP: Maui Land & Pineapple Company, Inc.  
200 Village Road  
Lahaina, Hawaii 96761  
Attention: Paul Subrata

E-Mail Address: psubrata@kapalua.com

To Water Company: Hawaii Water Service Company, Inc.  
P.O. Box 384809  
Waikoloa, Hawaii 96738  
Attention: General Manager

E-Mail Address: [acarrasco@hawaiiwaterservice.com](mailto:acarrasco@hawaiiwaterservice.com)

With a Copy to:

California Water Service Company

1720 N. First Street

San Jose, CA 95112

Attn: Associate General Counsel

E-mail Address: [jkelsey@calwater.com](mailto:jkelsey@calwater.com)

**17. Assignment.** Except for an assignment made by Water Company in connection with the transfer of the Non-Potable System, subject to the terms and conditions of this Agreement, or to an affiliate or subsidiary of Water Company, Water Company may not assign any rights hereunder without the prior written consent of MLP, which consent may not be unreasonably withheld by MLP. Except for an assignment made by MLP in connection with the transfer of the Ditch System, subject to the terms and conditions of this Agreement, MLP may not assign any rights hereunder without the prior written consent of Water Company, which consent may not be unreasonably withheld by Water Company.

**18. No Rights or Interests in the Ditch System.** Nothing contained herein or in any other agreement between MLP and Water Company gives Water Company any interest in or right to acquire the Ditch System or the land on which the Ditch System is located.

**19. Binding Effect, Recordation.** This Agreement shall be binding on, and shall inure to the benefit of, the parties and their successors and permitted assigns.

**20. Entire Agreement.** This Agreement is the entire agreement between the parties with respect to the delivery of non-potable water to Water Company and supersedes all prior agreements, correspondence and negotiations except for that certain Asset Purchase Agreement dated December 20, 2019 between MLP, Water Company, Kapalua Water Company, Ltd. and Kapalua Water Treatment Company, Ltd., as amended by that certain First Amendment to Asset Purchase Agreement dated May 18, 2020 which is hereby incorporated by reference.

**21. Counterparts.** This Agreement may be executed in duplicate originals, each of which is deemed to be an original, but when taken together shall constitute one instrument. A signature in any form or medium (including without limitation any electronic or digital signature or symbol) shall have the same legal effect, validity and enforceability as a manually handwritten original signature. The Parties agree that if this Agreement is transmitted electronically, the electronic transmittal of the original execution signatures shall be treated as original signatures and given the same legal effect as an original signature.

**22. Amendment.** No modification, waiver, amendment, discharge or change of this Agreement shall be valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge or change is or may be sought.

23. **Governing Law.** This Agreement and its interpretation shall be governed by the laws of the State of Hawaii without regard to conflicts of laws principles.


24. **Severability.** If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction or any governmental body, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

25. **HPUC Commitments.** This Agreement shall be effective upon approval by the HPUC. MLP acknowledges that the obligations of Water Company herein may be amended or may change from time to time by order or approval of the HPUC. If the obligations of Water Company herein are at any time determined by the HPUC to require modification, then MLP and Water Company shall use reasonable best efforts and diligence to implement said modification or to obtain other authorization from the HPUC. Notwithstanding the foregoing, MLP's agrees, unless otherwise ordered by the HPUC or court order, that MLP will continue to provide water to Water Company in the amounts specified in this Agreement and under all other terms and conditions of this Agreement.

[SIGNATURES FOLLOW]

DATED: May 1, 2021.

**MAUI LAND & PINEAPPLE COMPANY,  
INC.**

By  \_\_\_\_\_  
Name: Paulus Subrata  
Its: Vice President

MLP

**HAWAII WATER SERVICE COMPANY,  
INC.**

By \_\_\_\_\_  
Name:  
Its:

By \_\_\_\_\_  
Name:  
Its:

Water Company

DATED: May 1, 2021.

**MAUI LAND & PINEAPPLE COMPANY,  
INC.**

By \_\_\_\_\_  
Name:  
Its:

MLP

**HAWAII WATER SERVICE COMPANY,  
INC.**

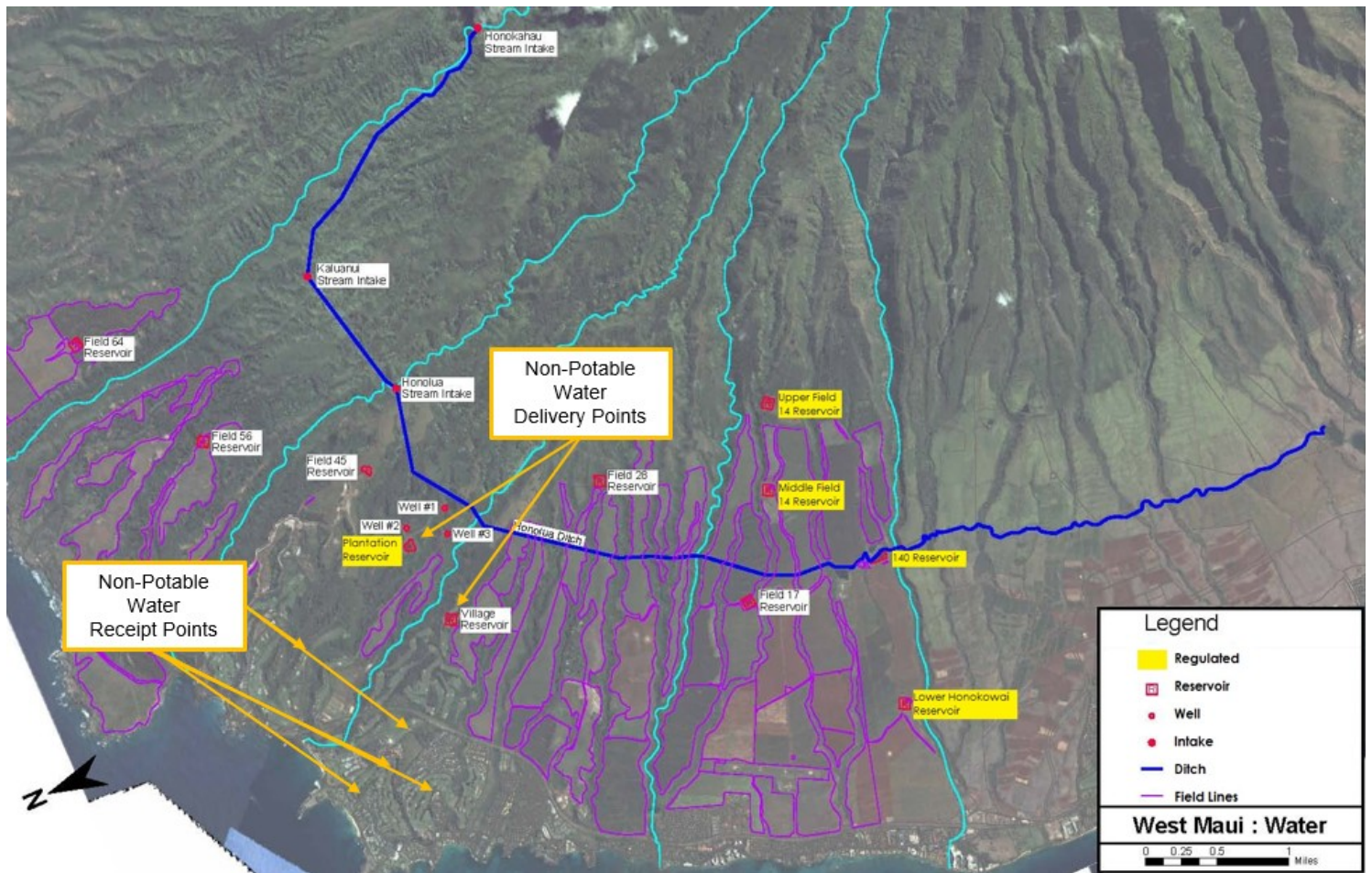
By Thomas Smegal  
Name: Thomas Smegal  
Its: VP, CFO & Treasurer

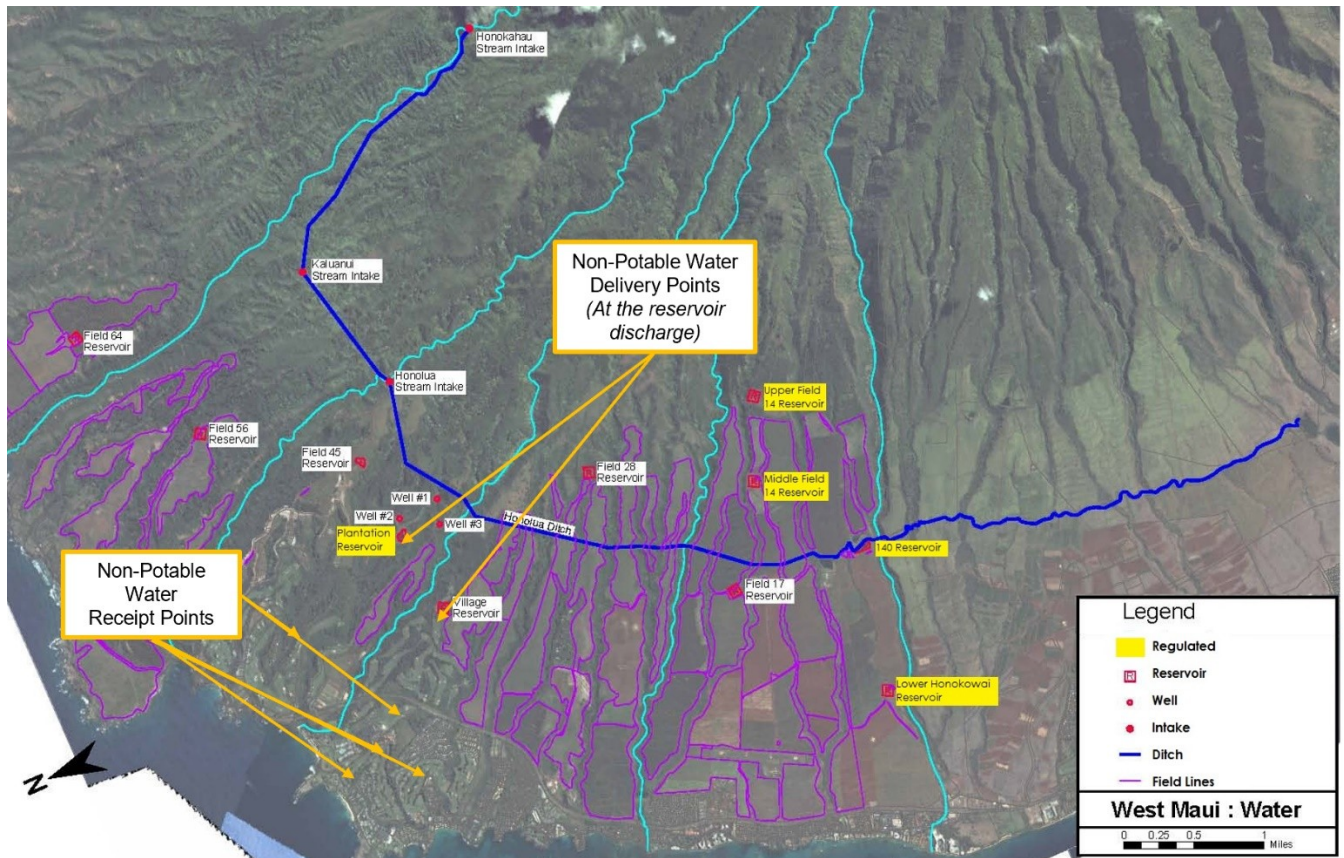
By Michelle Mortensen  
Name: Michelle Mortensen  
Its: VP, Corporate Secretary

Water Company

## **EXHIBIT A**

Map of Delivery Points to the Water Company's Non-Potable System





## **EXHIBIT B**

### **Specifications for Transport of Water**

1. **Delivery Point(s).** The point(s) designated on Exhibit A hereto indicate where water is delivered to the Non-Potable System from MLP. MLP, at its expense, is responsible for the construction and maintenance of connection facilities conveying water to the Delivery Point.
2. **Receipt Point(s).** The point(s) designated on Exhibit A hereto indicate where water is diverted from the Non-Potable System for receipt by the Golf Facilities. Water Company, at its expense, is responsible for the maintenance of equipment to measure water at the Receipt Point except for replacement of meter(s).
3. **Volume of Water.** Water Company agrees to use the Non-Potable System to transport up to 60 million gallons of water per month from the Delivery Point to the Receipt Point. Water Company and MLP will arrange between them a schedule and volume of delivery for the water. Water Company shall not be liable for any inability to deliver water at any agreed to schedule or volume.
4. **Interruptions and Disruptions.** Water Company's obligation to deliver water to the Golf Facilities shall be subject to the availability of water at the Delivery Point, as determined by MLP. Water Company may discontinue or reduce the quantity of water delivered to the Golf Facilities to investigate, replace or repair the Non-Potable System. Water Company shall coordinate any discontinuance or reduction with MLP and shall endeavor to provide at least twenty-four (24) hours' advance notice except in cases of emergency. Water Company shall not be liable for any damages when such reduction or interruption occurs.
5. **Measurement of Water.** Water Company will measure the total quantity of water delivered using the meter at the Receipt Point and will report such water quantities to MLP for each water billing cycle. MLP is responsible for invoicing the Golf Facilities for water deliveries.