

NAHIKU LICENSE

KNOW ALL MEN BY THESE PRESENTS:

That, the TERRITORY OF HAWAII, hereinafter called the "Licensor", by its Commissioner of Public Lands acting under the authority in her vested pursuant to Section 73 of the Hawaiian Organic Act and the Revised Laws of Hawaii 1945, duly advertised and offered for sale at public auction held on _____, at the Aupuni Street side door entrance to the Territorial Office Building at Wailuku, Maui, a land license to be known as "Nahiku License"; and

That, at said auction sale, _____ of _____ hereinafter called the "Licensee", was then and there the highest bidder therefor having bid the sum of _____ for the annual fee for said license; and

That, the Licensee did thereupon pay to the Licensor pursuant to the terms and conditions of such sale: (a) the sum of _____ being the first semi-annual payment of said annual fee, (b) the expenses in connection with sale in the sum of _____ DOLLARS (\$ _____), and (c) The sum of FOUR THOUSAND FIVE HUNDRED AND 00/100 DOLLARS (\$4,500.00), being one-half of an annual estimated rental of NINE THOUSAND AND 00/100 DOLLARS (\$9,000.00) for water diverted from the licensed premises, computed upon the basis of an assumed average annual yield of 7,143 million gallons at \$1.26 per million gallons;

That, in consideration of the foregoing and of the terms, conditions, covenants and agreements hereinafter contained and on the part of Licensee to be observed and performed, the Licensor hereby grants to the Licensee a

Final draft rec'd with letter # 142

license for the right, privilege and authority to enter and to go upon government land on the Island of Maui, said Territory, beginning at the top of Puu Hinai at the north-east corner of the Koolau Forest Reserve and running as follows: In a general southwesterly direction along the Hana Forest Reserve boundary to the rock known as "Pohaku Oki Aina" or "Pohaku Palaha" on the summit of Haleakala; thence along the easterly boundary of the Keanae License, along the easterly watershed of Waiohue Stream to the headwaters of the Paakea Stream, along the easterly watershed of the Paakea Stream to the point where it intersects the southerly boundary of Grant 4874 to M. Hanuna (Lot 38, Nahiku Homesteads); thence along the southerly boundary of the Nahiku Homesteads and Grant 11379 to Maui Agricultural Company, Limited to the point of beginning, shown in green on the plan attached hereto and made a part hereof, and hereinafter referred to as the "LICENSED AREA" and, subject to controlling provisions of existing laws relating to withdrawals; to thereupon:

1. Develop ground water within the Licensed Area by the construction of tunnels, shafts, wells, pumps, etc., at locations approved by the Licensor;

2. Divert by means of aqueducts or aqueduct systems now or hereafter situate on the Licensed Area government owned surface water from all streams in the Licensed Area and such government owned ground water as may be developed as aforesaid, except, however, such water as is used makai of the Licensed Area for domestic purposes (including the watering of livestock) and for the irrigation of kuleanas entitled to the same;

3. Use government owned water so diverted for the Licensee's own purposes or for sale to others, including use of such water for the development of electrical energy for its own use or for sale;

4. Use the Licensed Area for sites for hydro-electric power plants and rights-of-way for transmission lines to transport electrical energy, such sites and rights-of-way to be at locations approved by the Licensor;

5. Use, operate and maintain on the Licensed Area, jointly with the Licensor and with others now or hereafter holding under the Licensor as provided in that certain agreement between the Territory of Hawaii and East Maui Irrigation Company, Limited, dated March 18, 1938, recorded at the Bureau of Conveyances in Honolulu aforesaid in Liber 1435, Pages 1-12 and corrected by correction agreement, dated March 24, 1938, recorded at the Bureau aforesaid in Liber 1435, Pages 269-271, hereafter referred to as the "East Maui Water Agreement," the existing aqueduct system and all extensions thereof which now or hereafter cross government lands situated in East Maui extending from Nahiku to Honopou inclusive, together with the right to construct, at locations approved by the Licensor, any and all such extensions for the conveyance and control of water granted under this license and also of other water now or hereafter owned or controlled by the Licensee;

6. Pass and repass over the Licensed Area, but in a manner such as will interfere as little as practicable with the full use of such area by present and future lessees and licensees of the Licensor, and will avoid destruction or injury to the forest growth as far as is practicable; and in furtherance of the proper maintenance of said Licensed Area as a watershed area the Licensee hereby agrees to assist;

(a) The Licensor's Board of Agriculture and Forestry, in policing and protecting the Koolau Forest Reserve from estrays and damage from fire and in inspecting and reforesting this reserve;

(b) The Licensor's Board of Health, in preventing the pollution of so much of the

Licensed Area as is located above the Koolau-Wailoa Ditch (the ditch furthest mauka in said area); and

(c) The Licensor's Division of Hydrography and the Federal Weather Bureau in obtaining rainfall, water yields, run-offs, and other similar data;

7. Use, where practicable, with the prior approval of the Licensor's Board of Agriculture and Forestry, forest timber situated on the Licensed Area for maintenance and construction work on said aqueduct system and all future extensions thereof.

RESERVING TO THE LICENSOR, however, the following:

1. The right of ingress, egress and regress for its agents and representatives on the Licensed Area at any time in the performance of their duties and for inspection of said aqueduct system;

2. The right to use all facilities now or hereafter installed or placed on the Licensed Area for measuring and recording flows of water, even if owned or operated by the Licensee, together with the right to install, operate and maintain, at its own cost and expense, such further and other facilities as it may deem necessary for such purposes. Provided, that the Licensor in so doing does not unreasonably interfere with the operation and maintenance of said aqueduct system and any extensions thereof.

3. The right to issue other and further licenses and leases pertaining to the Licensed Area, ^{and the development & diversion of} and to the use of ^{further or additional water therein} existing roads and trails thereon, if jointly maintained by the users of same, so long as the issuance of such other and further licenses and leases does not interfere unreasonably ^{then existing} with the ^{then existing} operations of the Licensee hereunder.

THE TERMS, RENTALS, COVENANTS, CONDITIONS AND AGREEMENTS under which this license is hereby given are as follows:

1. The term of this license is for twenty-one (21) years, commencing as of _____, and ending on _____, unless sooner terminated as hereinafter provided, during which term the Licensee shall pay to the Licensor at the office of the Commissioner of Public Lands, net over and above all taxes, and in addition to such payment or payments as may hereinafter be required, an annual fee of _____ per annum, one-half of which shall be payable semi-annually in advance on the first day of July and January of each license year;

2. In addition to the annual fee to be paid as above required, the Licensee shall pay to the Licensor in the manner hereinafter set forth at the office of the Commissioner of Public Lands, net over and above all taxes, an annual rental which shall be equal to the product of the quantity of water actually or constructively diverted during each license year (a) from the Licensed Area ^{or} ~~and~~ (b) to a point within such Licensed Area where the same is used by the Licensee for power or agricultural irrigation purposes or delivered for sale to others, and the price per million gallons of water determined in accordance with the following schedule:

(1) When the average price per pound of raw sugar for the annual payment period is 6 cents or less, the price per million gallons of water diverted from the Licensed Area during said payment period shall be \$1.26.

(2) When the average price per pound of raw sugar for the annual payment period is greater than 6 cents and not more than 7.5 cents, the price per million gallons of water diverted from the Licensed Area during said payment period shall be \$1.26, increased at the rate of 2 cents for every 1/10th of a cent the said average price of raw sugar exceeds 6 cents per pound up to and including 7.5 cents per pound.

(3) When the average price per pound of raw sugar for the annual payment period is more than 7.5 cents, the price per million gallons of water diverted from the Licensed Area during said payment period shall be \$1.56.

Payment of such rental shall be made semi-annually in advance on the first day of July and January of each year in installments of \$4,500.00 each, the yearly aggregate of which sums shall be subject to adjustment (supplemental payment or credit against the next semi-annual payment of rental, as the case may be, the Licensor agreeing to refund any excess payment which may be due at the end of the term hereof) following the expiration of each license year to conform with the known quantity of water diverted and the average price of raw sugar for such year. Anything preceding to the contrary notwithstanding the Licensee shall at the end of the first ten (10) year period and again at the termination of this license, average the annual payments for said periods and should said average be less than Nine Thousand Dollars (\$9,000.00) per annum the Licensee shall pay the difference so as to guarantee to the Licensor a minimum payment of NINETY THOUSAND AND 00/100 DOLLARS (\$90,000.00) for the first ten (10) years and a minimum payment of NINETY-NINE THOUSAND AND 00/100 DOLLARS (\$99,000.00) for the remaining eleven (11) year period, a total of ONE HUNDRED EIGHTY-NINE THOUSAND AND 00/100 DOLLARS (\$189,000.00) for the term of this license.

3. For purposes of assisting the Licensor in computing rental payments and the adjustments to be made thereto required under paragraph 2 above, the Licensee shall, within three months after the expiration of each license year (June 30th), except in subparagraph (e) following, submit to the Licensor a statement prepared in duplicate for such license year showing in detail:

(a) The quantity of water diverted and conveyed from the Licensed Area by means of the jointly used

aqueduct system, such quantity of water to be determined pursuant to the East Maui Water Agreement.

(b) The quantity of water diverted and conveyed by means of any other aqueduct system, whether the same be diverted and conveyed from the Licensed Area or to a point within such Licensed Area where the same is used by the Licensee for power or agricultural irrigation purposes or delivered for sale to others.

(c) The average price of raw sugar for said license year.

(d) The computation whereby an adjustment of payment is determined so that the resulting rental paid by the Licensee shall conform with the rental required under paragraph 2 above.

(e) The quantity of water diverted and conveyed from the Licensed Area for the first ten (10) year period and again at the termination of this license for the remaining period.

Unless the Licensor and Licensee shall disagree with the factual information or computation so submitted, in which event such disagreement shall be determined by arbitration as provided for in the East Maui Water Agreement, the final adjustment of rental payments shall be made in accordance with such statement.

4. The Licensee shall, from March 1 to November 30, inclusive, of each license year, take all of the available water to which it has a right by this license up to that portion of the capacity of the aqueduct system to which the Licensor as the owner of the Licensed Area has a right under the East Maui Water Agreement; provided, however, if the sugar cane area irrigated by the Licensor's water is reduced by governmental restrictions, the aforesaid requirement for the taking of water may, at the option of the Licensee, be reduced proportionately.

5. The Licensee shall, during January, February, and

December of each license year, take from such Licensed Area only such water as it desires; provided, however, if the Licensee for purposes of replenishing the ground water resources of the Central Maui area (and not for the irrigation of sugar cane or other plant crops) shall desire to take further water therefrom and discharge the same into gulches, reservoirs and other places approved by the Territorial Hydrographer, the Licensee may do so without payment of rental therefor; provided further, however, that the right to take and to discharge surplus water upon the Central Maui area shall be limited to that quantity of water as shall be in excess of the needs of the Licensor for public purposes; that if the Licensor shall, during the months of January, February, and December, notify the Licensee in writing of a need for surplus water for public purposes the Licensee shall convey through the aqueduct system on the Licensed Area and through any system to which the Licensee may be entitled under the East Maui Water Agreement and under other licenses and agreements with the Licensor now or hereafter in effect, such quantity of surplus water as may be required by the Licensor, without charge, except for payment of that portion of the cost of the operation and maintenance of such system or systems as is properly allocable to the water required and taken by the Licensor.

6. The Licensor and Licensee agree to furnish each other with all data obtained from any facilities for measuring and recording rainfall and the flows of water diverted from the Licensed Area and will allow each other the privilege of checking the same as well as inspecting the operation and maintenance of said water measuring stations.

7. The Licensee shall keep at all times in good order and repair the whole, or that portion as the case may be of any aqueduct system or systems as shall now or hereafter be operated by the Licensee within the Licensed Area; provided, however,

that the cost of the operation and maintenance of any jointly used system or systems shall be borne by the Licensee in direct proportion to the use made thereof as provided in the East Maui Water Agreement, and the cost of any system or systems used exclusively by the Licensee, including all costs for the development of ground water by the Licensee, shall be borne exclusively by the Licensee.

8. The Licensee shall not, without the written consent of the Licensor first obtained, assign or transfer this license or any interest therein or thereunder.

9. The Licensor and Licensee agree that the terms, conditions and agreements contained in the East Maui Water Agreement, a copy of which is attached hereto and made a part hereof, including the special meanings given to the words and phrases appearing therein, shall apply to and be deemed a part of this license so far as applicable and not inconsistent with the provisions of this license.

10. That the Licensee shall, on or before _____, file with the Commissioner of Public Lands, and thereafter keep in full force and effect during the period of this license, a good and sufficient bond conditioned for the full and faithful observance and performance by said Licensee of all of the terms, covenants, and conditions of this license and in the sum of EIGHTEEN THOUSAND AND 00/100 DOLLARS (\$18,000.00). Such bond shall be supported by the obligation of a corporate surety or not less than two personal sureties for which justifications shall be filed as provided in Section 497, Revised Laws of Hawaii 1945; provided, however, the Licensee may furnish a bond in like amount and conditioned as aforesaid executed by it alone, as obligor, if in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with the Commissioner security in certified checks, certificates of deposit (payable on demand or after such period as the Commissioner may stipulate), bonds, stocks or other negotiable securities

or execute and deliver to said Commissioner a deed or deeds of trust of real property, all of such character as shall be satisfactory to said Commissioner and valued in the aggregate of not less than the principal amount of said bond. It is agreed that the value at which any securities may be accepted and at any time thereafter held by the Commissioner under the foregoing proviso shall be as determined by said Commissioner, and that the Licensee may, with the approval of the Commissioner, exchange other securities or money for any of the deposited securities if in the judgment of the Commissioner the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Licensee, but only upon the written consent of the Commissioner and that until such consent be granted, which shall be discretionary with the Commissioner, no surety shall be released or relieved of its obligation hereunder.

11. In case of the violation or failure to observe or perform any of the terms, conditions, covenants and agreements of this license by the Licensee at any time or times, the Licensor may, after sixty (60) days' written notice to the Licensee and if the Licensee has not then remedied such failure or default, cancel this license and thereupon, as well as upon the termination of this license by elapse of time or for any other cause, all improvements now or hereafter erected upon the Licensed Area, including the whole of such aqueduct system and all extensions thereof and improvements made thereto, but excluding such improvements as are provided for in the next succeeding paragraph, shall revert to and become the sole property of the Licensor; provided, however, that any such cancellation or termination of this license shall in no way affect the rights that the Licensee may have under the provisions of the East Maui Water Agreement and other existing licenses or agreements in full force and effect from or with the Licensor for the conveyance of water over and

across said Licensed Area.

12. It is agreed that the Licensee may, on or before the termination of this license by elapse of time, or within sixty (60) days or such further reasonable time as the Licensor may allow following the cancellation or termination of this license for cause, remove any improvements, including power plants, power and telephone lines and all appurtenances thereto which have been or will have been constructed, erected and maintained by the Licensee upon or across the Licensed Area for purposes other than those necessary to operate any aqueduct system or systems.

13. The terms, conditions and agreements hereof shall be binding upon and run in favor of the Licensor, its legal successors and assigns, and the Licensee, its successors and permitted assigns, or transferees, respectively, as the case may be; words in the singular or plural number signify both the plural and singular number; and each of the terms "or" and "and" has the meaning of the other or of both, where the subject matter, sense and connection require such construction.

IN WITNESS WHEREOF, the Licensor has caused its name to be hereunto subscribed by its Commissioner of Public Lands under her official seal, by and with the approval of the Governor of the Territory of Hawaii, this day of , 1954, as of ; , and the Licensee has caused its corporate name to be hereunto subscribed by its proper officers thereunto duly authorized by its Board of Directors in acceptance of the conditions herein set forth, this day of , 1954, also as of

TERRITORY OF HAWAII

APPROVED:

SAMUEL WILDER KING
Governor of the Territory
of Hawaii

By _____
Commissioner of Public Lands
Licensor

By _____
Its

And By _____
Its
Licensee

Civil No. 19-1-0019-01 (JPC)

Defendant A&B/EMI's Exhibit AB-118

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____