

THIS INDENTURE, made this 18th day of March, 1938, by and between the TERRITORY OF HAWAII, acting by and through L. M. Whitehouse, Commissioner of Public Lands for the Territory of Hawaii, with the consent and approval of the Governor and of the Land Board of said Territory, hereinafter called the "Territory", and the EAST MAUI IRRIGATION COMPANY, LIMITED, an Hawaiian corporation, hereinafter called the "Company",

WITNESSETH THAT:

WHEREAS it is the desire of the Territory to have competitive bidding on licenses to divert water from government lands situated in East Maui; and

WHEREAS the joint use by any future Licensees of the Territory and by the Company of the aqueduct system on East Maui, Territory of Hawaii, extending from Nahiku to Honopou inclusive, which system is partly on government land and partly on Company land, will make competitive bidding possible,

NOW THEREFORE:

I.

THE TERRITORY, in consideration of the easements hereinafter granted to it by the Company and of the covenants and agreements herein contained to be observed and performed by the Company, does hereby grant to the Company a perpetual (except as to cancellation as hereinafter provided) right and easement:

- (1) To convey all water now or hereafter owned by the Company and all water covered by any water license now held by the Company or which in the future may be granted to it, jointly with the Territory, without charge, through any or all aqueducts now or hereafter crossing government lands situated in East Maui

STANLEY, WITOUSKI, PRATT & WIRTH
ATTORNEYS AT LAW
HONOLULU, HAWAII

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extending from Nahiku to Honopou inclusive; and

(2) To divert such water thus conveyed, after due allowance has been made for evaporation, leakage and seepage losses at a point or points designated by the Company, which have been or will be equipped at the Company's expense with suitable turn-out and water measuring devices, provided however, that such right and easement to convey and divert such water shall be subject to the following restrictions, to-wit:

(a) During times when the total water contributory to these jointly used aqueducts does not exceed the capacity thereof, that portion of the flow therein, which shall be considered the Company's water, is to equal the quantity of water contributed thereto from sources owned in fee and from those held under license by the Company, and the remaining water shall be considered the Territory's water;

(b) During times when the total water contributory to these jointly used aqueducts exceeds the capacity thereof, that portion of the flow therein which shall be considered the Company's water shall bear the same ratio to the total capacity thereof as the long term average water yield (as hereinafter defined) contributory thereto from sources owned in fee and held under license by the Company bears to the total long term average water yield contributory to these jointly used aqueducts, and the remaining water shall be considered the Territory's water.

II.

THE COMPANY, in consideration of the foregoing grant and of the covenants and agreements to be observed and performed by the Territory, herein contained, does hereby grant to the Territory a perpetual (except as to cancellation as hereinafter provided) right and easement:

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(1) To convey water jointly with the Company, without charge, through aqueducts crossing the Company's lands situated in East Maui extending from Nahiku to Honopou inclusive; and

(2) To divert water thus conveyed - after due allowance has been made for evaporation, leakage and seepage losses at points in said area designated by the Territory which have been equipped or will be equipped at the Territory's expense with suitable turn-outs and water measuring devices; the portion of the flow which shall be considered the Territory's water to be that specified above;

(3) To use reservoirs which are owned by the Company and are situated East of Honopou on East Maui, jointly with the Company, without charge, to the end that:

(a) Water in excess of the maximum capacity of, and otherwise contributory to, that portion of the aqueduct system crossing the drainage areas on which these reservoirs are situated, is to be conveyed jointly by the Territory and the Company into these reservoirs, in so far as this can be done by gravity using the existing aqueduct system (natural and artificial);

(b) Water in these reservoirs shall be drawn therefrom and put into that portion of the aqueduct system, which can thus be served by gravity, at a maximum rate limited either by the capacity of the reservoir outlets or the capacity of that portion of the aqueduct system into which the reservoir water is being put, so as to keep the aqueduct system flowing as nearly full as possible; the portion of the water thus drawn from the reservoirs which shall be considered the Territory's water shall bear the same ratio to the total water drawn therefrom as the long term average water yield (as hereinafter defined) contributory to that portion of the aqueduct system located on the drainage areas on

which these reservoirs are situated and derived from sources owned by the government not then under license to the Company, bears to the total long term average water yield contributory to said portion of the aqueduct system, and the remaining portion thus drawn from the reservoirs shall be considered the Company's water.

III.

THE COMPANY, for the consideration aforesaid, does hereby agree that, in order to supplement the stream flows, it will endeavor to develop existing ground water on the Government and Company lands at Nahiku and Keanae above the existing aqueduct system by means of tunneling if in its opinion there are locations where it is feasible to develop water economically.

IV.

IT IS MUTUALLY COVENANTED AND AGREED by and between the parties hereto that:

(1) Each of the existing five licenses now held by the Company to use and convey water from government lands on East Maui shall be cancelled, and/or extended, as the case may be, so that they shall terminate on that June thirtieth nearest to the date stipulated in each respective license as the otherwise normal expiration date; and the final rental on each of these licenses shall be adjusted according to the resulting proportionate curtailment or extension of time, as the case may be;

(2) Licenses 267-B and 974 (two of the said five licenses) which overlap and have no definite line separating them shall be combined and considered under one license on and after the day following the above agreed termination by cancellation, namely on and after the first day of July, 1938.

V.

IT IS FURTHER AGREED that if the Territory, after due legal notice thereof, shall put up at public auction at least sixty days previous to its termination by the above agreed cancellation, and

thereafter at least sixty (60) days previous to its stipulated expiration, each of the aforementioned licenses (reduced to four in number) for a term of thirty (30) years, the Company agrees to bid on such licenses and offer to purchase the right to the water to be granted by any given license, providing the annual sums required to be paid by the licensee thereunder (i.e. the upset price) do not exceed the annual sums which would be required to be paid if the upset price were determined in the manner hereinafter set forth in subsections (a), (b) and (c) hereof and further providing such licenses contain provisions substantially similar to the provisions of subsections (d), (e), (f) and (g) hereof:

(a) When the average price per pound of raw sugar for a given annual payment period, July 1st to the following June 30th, inclusive, is three cents (3¢) or less, the price per million gallons of water diverted from the licensed area under consideration during the given payment period shall be that given in the price list hereinafter set forth;

(b) When the average price per pound of raw sugar for a given annual payment period, July 1st to the following June 30th, inclusive, is greater than three cents (3¢) and not more than four cents (4¢) the price per million gallons of water diverted from the licensed area under consideration during such given payment period shall be that resulting from the price given in the said price list being increased at a rate of three per cent. (3%) for every one-tenth (1/10th) of a cent the said average price of raw sugar exceeds three cents (3¢) per pound;

(c) When the average price per pound of raw sugar for a given annual payment period, July 1st to the following June 30th, inclusive, is greater than four cents (4¢) the price per million gallons of water diverted from the licensed area under consideration during the given payment period shall be that determined as above

for an average price per pound of raw sugar of four cents (4¢).

PRICE LIST FOR WATER DIVERTED FROM EAST MAUI LICENSED AREAS

LICENSE	AREA COVERED	PRICE PER MILLION GALLONS WHEN RAW SUGAR IS THREE CENTS OR LESS PER POUND
Nahiku	From Hana-Koolau boundary to Walaaka Stream	\$.9539
Keanae	From and including Walaaka Stream to Nuaailua Stream	1.5009
Honomanu	From and including Nuaailua Stream to Puohakumoa Stream	2.1043
Huelo	From and including Puohakumoa Stream to and including Honopou Stream	2.0980

(d) In the event the Company is the successful bidder on any license it shall, from March to November inclusive of each year, take all of the available East Maui water to which it has acquired a right by license and by ownership in fee, up to that portion of the capacity of the aqueduct system to which it has a right under this agreement; provided, however, if the sugar cane area irrigated by the Company's water is reduced by governmental restrictions this required minimum quantity of water to be taken by the Company may, if the Company desires, be reduced proportionately. During January, February and December of each year the Company shall take only such water as it desires. The curtailed quantity of water, resulting from either of the two foregoing reductions of water, shall be considered as having been taken proportionately from drainage areas, irrespective of whether owned by the Territory or by the Company, according to the long term average yield of each such area and such curtailed quantity of water deemed to be taken from a licensed area shall be the quantity

constructively (according to the above proportionate plan) diverted from that area.

(e) The rental payments required to be made for each of said licenses, in the event the Company is the successful bidder therefor, shall be made semi-annually in advance on or before July 10th and January 10th of each license year, and the amount thereof shall be determined as follows:

(f) The estimated rental shall be determined for the ensuing six months on the basis of the successful bid and upon the assumption that the average price of raw sugar for said six months will be three and one-half cents (~~3 $\frac{1}{2}$~~) per pound, and that the quantity of water diverted from the licensed area under consideration will be the long term average quantity for six (6) months diverted therefrom;

(g) Adjustment of rental shall be made within six (6) months after the expiration of the license year, June 30th, so that the resulting rental paid by the Licensee to the Territory will conform to the successful bid, average price of raw sugar for the license year under consideration and the quantity of water actually and constructively diverted during this license year from the licensed area under consideration; refunds or additional payments as the case may be will be made accordingly.

VI.

IT IS ALSO AGREED that:

(1) Failure to bid, by the Company, on any of the said licenses under the specified conditions shall not automatically operate as a cancellation of this agreement but such failure shall give the Territory the option of cancelling the same;

(2) Failure to put up at auction any of the said licenses at the specified time, or failure to fix the upset price in the manner herein required shall not automatically operate as a cancella-

tion of this agreement but such failure shall give the Territory the option of cancelling the same.

VII.

The cost of operation and maintenance of said aqueduct system shall be borne by the Territory and the Company in direct proportion to the use made thereof; that is to say, so long as the Territory has not granted a license to any one other than the Company to take and use water from any of said land or otherwise made use of any of said water, the Company shall be deemed to be the sole user of said aqueduct system and the total cost of operation and maintenance of said aqueduct system shall be borne by the Company. If, however, one other than the Company should become the purchaser of one or more of the licenses, or otherwise become the user of any of said water, then, and in that event the cost of operation and maintenance shall be borne by the Territory and the Company in direct proportion to the product of the water conveyed, and the distance through which it is conveyed through the artificial channels of said aqueduct system by each party respectively.

VIII.

WORDS AND PHRASES appearing herein shall have the following additional special meanings in so far as they apply:

- (1) "Territory" shall include its duly appointed representatives, successors, assigns, licensees and lessees;
- (2) "Company" shall include its duly appointed representatives, successors and assigns;
- (3) "Aqueduct" or "aqueduct system" shall include open ditches, tunnels, flumes, pipe lines, natural and artificial channels, reservoirs, diverting dams, gravel and sand traps, intake structures, together with regulating gates, spillway structures and water measuring devices, and shall also include roads, trails, bridges, etc., used in connection therewith;

(4) "Long term average water yield" shall be the arithmetical average annual water yield which would have been diverted from any given drainage area under consideration had the aqueduct system, at the time of the determination, been in existence during the entire period in which water records are available for such area, and shall be determined jointly by the Territory's and the Company's hydrographers based on all available applicable water measurements and long term rainfall records;

(5) "Average price per pound of raw sugar" shall mean the average of the daily full New York market price, Hawaiian basis, of ninety-six degree (96°) centrifugal raw sugar (at present officially reported from time to time by the Hawaiian Sugar Planters' Association) or its equivalent. In case there is more than one quotation of such market price during any day the arithmetical average of the quotations shall be the market price for such day. In case there is no quotation of such market price for any day then the market price for the last previous day shall be taken as the market price of any such day for which there is no quotation. The average market price for the license year, July 1st to June 30th inclusive, shall be determined by taking the arithmetical average of the daily market prices for each and every day, including Sundays and holidays, for said license year.

IX.

All matters of disagreement that may arise under this agreement which cannot be adjusted by the parties hereto to their mutual satisfaction, as well as any matter herein left to future mutual agreement at the option of either the Territory or Company, shall be submitted to and determined by three arbitrators in the manner prescribed in Chapter 116 of the Revised Laws of Hawaii 1935, as amended from time to time. In any such case either

party may give to the other written notice of the desire to so arbitrate the matter in difference and shall appoint one arbitrator in such notice, whereupon the other party shall, within ten (10) days after receipt of such notice, appoint a second arbitrator, and in case of failure so to do, the arbitrator first named shall appoint such second arbitrator, and the two arbitrators so appointed (in either manner) shall select and appoint a third arbitrator; in the event that the two arbitrators so appointed shall fail to select and appoint a third arbitrator within ten (10) days after the appointment of the second arbitrator, either party may request the appointment of such third arbitrator by the person then holding the position of First Judge of the Circuit Court of the First Judicial Circuit in the Territory of Hawaii at that time; the three arbitrators so appointed shall thereupon proceed to determine the matter in question, difference or disagreement to be determined, and the decision of any two of them, including the disposition of the costs of arbitration, shall be final, conclusive and binding upon both parties unless vacated, set aside or modified as provided by the statutes aforesaid. The arbitrators shall have the powers and duties prescribed by said statutes and judgment may be entered upon such award by said Circuit Court of the First Judicial Circuit.

X.

Nothing herein contained shall be construed to in any way affect any easement or right of way heretofore granted by the Territory to the Company.

IN WITNESS WHEREOF the parties hereto have duly executed

this instrument, in duplicate, the day and year first above written.

TERRITORY OF HAWAII,
By [Signature]
Commissioner of Public Lands.

EAST PAUL IRRIGATION COMPANY, LIMITED,
By [Signature]
Its Vice-President
By [Signature]
Its Treasurer.

APPROVED:
[Signature]
Governor of the Territory of Hawaii.

APPROVED:
[Signature]
Member of the Land Board, Territory of Hawaii.

APPROVED AS TO FORM:
[Signature]
C. E. Kemp, Attorney General,
Territory of Hawaii.

LIBER 1435 PAGE 12

CORPORATION
TERRITORY OF HAWAII, }
City and County of Honolulu } ss.

On this ...18th day of ...March..... A. D. 1938; before me appeared
.....J. Whitehouse and Jas. F. Morgan.....
to me personally known, who, being by me duly sworn, did say that they are the
.....Vice-President and Treasurer.....
respectively of ...East Maui Irrigation Company, Limited.....

and that the seal affixed to the foregoing instrument is the corporate seal of said
corporation and that said instrument was signed and sealed in behalf of said corpora-
tion by authority of its Board of Directors, and the said
Jas. F. Morgan..... acknowledged said instrument to be the
free act and deed of said corporation.

Abbie C. Sprout
Notary Public, First Judicial Circuit,
Territory of Hawaii.

-TERRITORY OF HAWAII-)
: Ss
-CITY AND COUNTY OF HONOLULU-)

On this 21st day of March, A.D. 1938, before me
personally appeared L. M. WHITEHOUSE, Commissioner of Public
Lands of the Territory of Hawaii, to me known to be the
person who executed the foregoing instrument, under his
official seal, and acknowledged that he executed the same
as his free act and deed as such Commissioner of Public
Lands, on behalf of the Territory of Hawaii.

Abbie C. Sprout
Notary Public, First Judicial
Circuit, Territory of Hawaii.

-TERRITORY OF HAWAII-)
: Ss
-CITY AND COUNTY OF HONOLULU-)

On this 21st day of March, A.D. 1938, before me
personally appeared J. B. POINDEXTER, Governor of Hawaii,
to me known to be the person who executed the same as his
free act and deed as such Governor, on behalf of the Territ-
ory of Hawaii.

Abbie C. Sprout
Notary Public, First Judicial
Circuit, Territory of Hawaii.

Entered of Record this 22nd day of March
o'clock A.M. and compared. Mark N. Huckestein, Registrar of Conveyances.
A. D. 1938 at 9:28

By _____

This indenture made this 24th day of March, 1938, by and between THE TERRITORY OF HAWAII, acting by and through L. M. Whitehouse, Commissioner of Public Lands for the Territory of Hawaii, with the consent and approval of the Governor and of the Land Board of said Territory, hereinafter called the "Territory" and the EAST MAUI IRRIGATION COMPANY, LTD., an Hawaiian corporation, hereinafter called the "Company".

W I T N E S S E T H T H A T:

Whereas, through inadvertence, the word "Territory" appears on page 8 in the fourth line of paragraph VI sub-paragraph (2) of that certain agreement dated March 18, 1938 by and between the above mentioned parties which agreement is recorded in the office of the Bureau of Conveyances, Honolulu, City and County of Honolulu said Territory and in Book 1435, pages 1 to 12, and

Whereas the parties desire to correct such error by deleting the word "Territory" and substituting in lieu thereof the word "Company".

NOW, THEREFORE:

It is agreed by and between the parties hereto that the word "Territory" appearing on page 8 in the fourth line of paragraph VI, sub-paragraph (2) of that certain agreement dated March 18, 1938, recorded in the office of the Bureau of Conveyances said Honolulu in Book 1435, pages 1 to 12 be deleted and the word "Company" be inserted in lieu thereof.

IN WITNESS whereof the parties hereto have duly executed this instrument, in duplicate, the day and year first

above written.

TERRITORY OF HAWAII

By *J. W. Whitmore*
Commissioner of Public Lands

EAST MAUI IRRIGATION COMPANY, LTD.

By *J. W. Whitmore*
Its VICE-PRESIDENT

By *[Signature]*
Its TREASURER

APPROVED:

[Signature]
Governor of the Territory
of Hawaii.

[Signature]
Member of the Land Board,
Territory of Hawaii.

APPROVED AS TO FORM:

[Signature]
Attorney General of said Territory.

CORPORATION

TERRITORY OF HAWAII,

City and County of Honolulu

ss.

LIBER 1435 PAGE 271

On this 24th day of MARCH A. D. 1938, before me appeared
 J. WATERHOUSE and JAS. F. MORGAN
 to me personally known, who, being by me duly sworn, did say that they are the
 VICE-PRESIDENT and TREASURER
 respectively of EAST MAUI IRRIGATION COMPANY, LTD., a Hawaiian corporation

and that the seal affixed to the foregoing instrument is the corporate seal of said
 corporation and that said instrument was signed and sealed in behalf of said corpora-
 tion by authority of its Board of Directors, and the said J. WATERHOUSE and

JAS. F. MORGAN acknowledged said instrument to be the
 free act and deed of said corporation.

Arthur J. Waterhouse
 Notary Public, First Judicial Circuit,
 Territory of Hawaii.

-TERRITORY OF HAWAII-)
 : Ss
 -CITY AND COUNTY OF HONOLULU-)

On this 11th day of April, A.D. 1938, before me
 personally appeared L. M. WHITEHOUSE, Commissioner of Public
 Lands of the Territory of Hawaii, to me known to be the per-
 son who executed the foregoing instrument under his official
 seal, and acknowledged that he executed the same as his free
 act and deed as such Commissioner of Public Lands, on behalf
 of the Territory of Hawaii.

Abbie C. Spratt
 Notary Public, First Judicial
 Circuit, Territory of Hawaii.

-TERRITORY OF HAWAII-)
 : Ss
 -CITY AND COUNTY OF HONOLULU-)

On this 11th day of April, A.D. 1938, before me
 personally appeared J. B. POINDEXTER, Governor of Hawaii,
 to me known to be the person who executed the foregoing in-
 strument and acknowledged that he executed the same as his
 free act and deed as such Governor, on behalf of the Terri-
 tory of Hawaii.

Abbie C. Spratt
 Notary Public, First Judicial
 Circuit, Territory of Hawaii.

Entered of Record this 13th day of April A. D. 1938 at 9:04
 o'clock A.M. and compared. Mark N. Huckestein, Registrar of Conveyances.

By *Gay* Clerk

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