

MINUTES

DEPARTMENT OF WATER SUPPLY COUNTY OF HAWAI'I WATER BOARD SPECIAL MEETING

January 7, 2010

Department of Water Supply, Operations Center Conference Room

- MEMBERS PRESENT: Mr. Dwayne Mukai, Chairperson
Mr. Robert Meierdiercks, Vice-Chairperson
Mr. George Harai
Mr. Bryan Lindsey
Mr. Art Taniguchi
Mr. Milton Pavao, Manager, Department of Water Supply
(ex-officio member)
- ABSENT: Mr. Riley Smith, Water Board Member
Ms. Bobby Jean Leithead-Todd, Director, Planning Department (ex-officio member)
Mr. Warren Lee, Director, Department of Public Works (ex-officio member)
- OTHERS PRESENT: Ms. Kathy Garson, Assistant Corporation Counsel

Department of Water Supply Staff
Mr. Kurt Inaba, Engineering Division Head
Mr. Keith Okamoto, Engineering
Mr. Larry Beck, Engineering

CALL TO ORDER - Chairperson Mukai called the Special Meeting to order at 10:02 a.m.

STATEMENTS FROM THE PUBLIC:

None.

NORTH KONA:

A. **PIPELINE INSTALLATION RIGHT OF ENTRY AGREEMENT WITH QUEEN LILI'UOKALANI TRUST (QLT) FOR THE PALANI ROAD TRANSMISSION WATERLINE PROJECT (JOB NO. 2003-823, PALANI ROAD TRANSMISSION WATERLINE, MĀMALAHOA HIGHWAY TO PALANI NO. 2 RESERVOIR):**

The Water Board was asked to consider approval of a Right-of-Entry (ROE) agreement across TMK 7-4-008:001 (Portion), to allow DWS's contractor, CTS Earthmoving, Inc., to continue work on JOB NO. 2003-823, PALANI ROAD TRANSMISSION WATERLINE, MĀMALAHOA HIGHWAY TO PALANI NO. 2 RESERVOIR.

Typically, the Manager of the Department of Water Supply (DWS) has the authority to sign Right-of-Entry Agreements; however, this matter must come before the Board because the property owners inserted an indemnification clause within the agreement.

The Department of Water Supply is already in the process of constructing the transmission waterline and related facilities in the North Kona area. Sections of the project will run across portions of Queen Lili'uokalani Trust (QLT) land through easements and two reservoirs will be built on portions of what is now QLT land.

Per an agreement that DWS and QLT wish to execute regarding cost-sharing and capacity-sharing, these easements will be granted to DWS and the reservoir sites will ultimately be purchased and owned by DWS. Although both parties have indicated that they agree to the proposed terms of that agreement, the parties have yet to complete the execution of that Agreement. *Please note that Board approval of that agreement will be agendaized for the January 26, 2010, Water Board meeting.* However, once that agreement is approved and executed, it will still require some time to complete the grant of easement and transfer of the reservoir sites to DWS.

CTS Earthmoving Inc., has already been working within the subject easements and reservoir sites based on a current, limited construction right of entry agreement, previously approved by the Water Board, which also has an indemnification clause. That scope of work was limited to clearing and grading.

Most of that work has been done, and to keep working, CTS needs to start installing pipeline in a matter of days. Therefore, QLT has consented to a new construction right of entry agreement which will allow CTS to also install pipe.

QLT is only granting the limited scope of work in order to push both sides to complete the main agreement. However, as mentioned above, even once the main agreement is executed, it will take some time to complete the legal transfer of the property and construction needs to continue without stop. Therefore, the department seeks approval from the Board for the Pipeline Installation Right of Entry Agreement.

The Manager recommended that the Water Board approve the execution of the Pipeline Installation Right of Entry Agreement, and further that the Chairman or Vice-Chairman be authorized to execute the Agreement, subject to review as to form and legality by Corporation Counsel.

MOTION: Mr. Meierdiercks moved to approve; seconded by Mr. Harai.

The Manager explained that this item is necessary to allow DWS's contractor to keep working, because currently the agreement that DWS has with QLT only involved grubbing and grading. He noted that, while the Manager normally has the authority to sign Right of Entry agreements, in this case, the agreement contains an *indemnification clause*, which requires the Board to approve it.

Mr. Beck, who is the project's lead engineer, explained that DWS is now working on an agreement with QLT regarding cost-sharing and capacity-sharing of the pipeline. QLT had wanted to spur DWS into getting the cost-sharing and capacity-sharing agreement executed.

QLT sought to limit the amount of work that they would allow DWS to do, so that DWS did not take its time. QLT was concerned that if DWS had full access, that DWS might delay getting the cost- and capacity-sharing agreement executed. QLT therefore put in the limited amount of work that DWS could do. However, Mr. Beck has notified QLT that the contractor was running out of work to do, and that to keep the contractor working DWS needed to allow the contractor to start installing pipelines. QLT has agreed to this, and therefore DWS is coming to the Board today. The contractor will be out of work within a matter of days at this point, and therefore DWS is asking the Board to approve the above ROE agreement so that the contractor can begin installing the pipeline (and keep the workers working). If DWS idles the contractor, there is a chance that DWS will incur a cost and a delay on the overall project.

Ms. Garson, speaking of the indemnification clause in the agreement, noted that this was typical for when DWS as in this instance is asking for an accommodation by a property owner. Such a clause says that if anything happens, DWS will indemnify QLT against any kind of harm, so that if QLT is brought into a lawsuit or similar dispute, that DWS will pay for that. She also drew the Board's attention to Page 7 of the agreement, regarding Dispute Resolution. She said that another reason that DWS needed to come to the Board today was because DWS is agreeing to either mediation or binding arbitration in the event of any dispute regarding this Right of Entry agreement. In such an event, DWS would be going to Dispute Prevention & Resolution (Hawai'i), which Ms. Garson described as a very reputable organization that does binding arbitration. Ms. Garson said she was keeping her promise to the Board to always point out any special provision in agreements.

Chairperson Mukai asked if it was QLT that wanted the Dispute Resolution clause included in the agreement.

Ms. Garson confirmed this, noting that Alternative Dispute Resolution (such as mediation and binding arbitration) generally saves money and time; it is faster than going through the courts. She said that Dispute Prevention & Resolution (Hawai'i) tended to monitor timetables a bit more carefully, along with the type of discovery that the parties' attorneys can do.

Mr. Harai asked to confirm that the effective date of the agreement was until March 31, 2010, and whether the work would be completed by that date.

Mr. Beck said the work may or may not be completed by that date because DWS still has reservoirs, etc. to build. He expected that DWS would need to renew this agreement at some point, but the agreement should give DWS ample time to work towards completion.

The Manager noted that the next Agenda item would cover this.

Regarding insurance mentioned in the agreement, Mr. Meierdiercks asked about the agreement's stipulation of a "minimum limit of \$1,000,000 per occurrence". He asked if that would be what the insurance will be specifically for, or will it be more than that. He noted that the wording was "minimum of," and asked if that left the upper limit open.

Ms. Garson said that from DWS's perspective, it would probably be the minimum.

The Manager said that was all that would be required.

Mr. Beck pointed out that this is the exact same agreement that the Board had already approved, except that the scope of work has changed. The scope of work has changed from grading and grubbing, to allow the installation of a pipeline.

Chairperson Mukai asked about Paragraph No. 4 in Item 3(A), expressing confusion about the wording that says: “Although both parties have indicated that they agree to the proposed terms of that agreement, the parties have yet to complete the execution of that Agreement.”

The Manager explained that DWS is working with QLT on a *separate* agreement, and *that* agreement is for QLT to pay DWS a certain amount for the privilege of using the pipeline for a certain capacity of flow that QLT needs to use at the Makalapua development. That is a separate agreement, on cost-sharing and capacity-sharing, that QLT was eager to hasten towards execution. That is why QLT has been sticky over the initial agreement – QLT wanted to hasten the execution of the separate agreement on cost-sharing and capacity-sharing. Once DWS and QLT settle the terms, DWS will be coming to the Board for approval of that separate agreement, which basically allows QLT a certain capacity of the transmission pipeline. The biggest term in that agreement will be the fee that QLT will pay DWS to have capacity in QLT’s pipelines.

Mr. Meierdiercks noted that DWS will also be acquiring property in access, adding that would not be in the *next* agreement.

The Manager said yes, DWS would acquire the easements, the pipeline, the tank sites, etc.

Mr. Beck confirmed that DWS would own the tank sites.

The Manager noted that right now the agreement only gives DWS the Right of Entry, but the other agreement gives DWS the property and access.

Ms. Garson said this means the right for DWS to be there permanently.

The Manager said the cost-sharing and capacity-sharing agreement should be coming to the Board relatively soon.

ACTION: Motion carried unanimously by voice vote.

B. PROPOSED AMENDMENT TO PIPELINE INSTALLATION RIGHT OF ENTRY AGREEMENT WITH QUEEN LILI‘UOKALANI TRUST (QLT) FOR THE PALANI ROAD TRANSMISSION WATERLINE PROJECT (JOB NO. 2003-823, PALANI ROAD TRANSMISSION WATERLINE, MĀMALAHOA HIGHWAY TO PALANI NO. 2 RESERVOIR):

The Department of Water Supply (DWS) proposed an amendment to the ROE Agreement to Queen Lili‘uokalani Trust (QLT). Due to the time constraints, the DWS has not been able to receive QLT’s agreement to this amendment at the time of the posting of this agenda. Therefore the DWS would like the Board’s pre-approval to amend the ROE should QLT agree. The department is proposing to amend the ROE Agreement with the addition of a self-executing clause that upon full signature and execution of the main agreement regarding cost sharing and capacity sharing, the construction right of entry agreement amends itself to include all types of construction related to the project and extends the period of the ROE agreement for

the duration of the project or until such time as the easement is granted and title to the properties has transferred to DWS. At that time, the ROE will self-terminate and only the terms of the main agreement will be in effect.

The Manager recommended that the Water Board approve the execution of the Amended Pipeline Installation Right of Entry Agreement, subject to QLT agreement and further that the Chairman or Vice-Chairman be authorized to execute the Agreement, subject to review as to form and legality by Corporation Counsel.

MOTION: Mr. Meierdiercks moved to approve; seconded by Mr. Taniguchi.

Mr. Beck said that this agreement was essentially the same agreement as the one that the Board just approved, except that on Page 3, DWS inserted a clause. Mr. Inaba came up with the idea of having this clause, which will allow DWS to have the agreement “self-amend,” or amend itself, upon execution of the cost-sharing and capacity-sharing agreement. The reason for having this clause is because, even once DWS and QLT execute that agreement, there will be a significant delay of time before DWS actually acquires title to the property (to the reservoir site) and get the grant of easement for the pipeline easement. By inserting this clause, this agreement will amend itself to include the **entire scope of work** for the project. The agreement will last for the duration of the project, or until such time as the lots in question are transferred to DWS by title, and DWS has full control and right of easement for the pipeline, Mr. Beck said. Having the clause is a simple way of keeping DWS from having to come to the Board again for the same thing.

The Manager confirmed this.

Mr. Beck said that at the time of posting today’s Agenda, DWS was not sure that it would be agreeable to QLT, so DWS included both possibilities on the Agenda for the Board’s approval. However, Mr. Beck said that he had spoken with QLT’s Ms. LeeAnn Crabbe, who agreed to this second version of the agreement. DWS did not see any harm in having the Board approve both versions, since there did not seem to be any relative difference by having the first version approved.

The Manager said that the clause makes everybody’s life easier. It makes QLT’s life easier because there will not be any hold-up in the work by the contractor, and it makes DWS’s life easier because the provisions are in. Finally, it makes the Board’s life easier because DWS will not have to come back every time the agreement expires. DWS is probably not going to assume title that quickly (the title takes a long time to obtain), so with this clause, DWS will not have to come back for another extension.

ACTION: Motion carried unanimously by voice vote.

STATEMENTS FROM THE PUBLIC:

None.

The Manager announced that there was an article about the late Water Board member, Mr. Francis Kuailani, in the West Hawai‘i Today this week. The article gave the date and time of the services as Saturday, January 9, from 9:00 a.m. to 6:00 p.m., at Moku‘aikaua

Congregational Church in Kailua-Kona. Scattering of ashes will be at Kaloko Pond at 10:00 a.m. on Sunday, January 10.

Chairperson Mukai asked if there were any Sunshine Law concerns with having more than two Board members attend.

Ms. Garson said no, because no Board business would be discussed.

ADJOURNMENT

Chairperson Mukai called for a Motion to adjourn. Mr. Meierdiercks so moved; seconded by Mr. Harai, and approved unanimously by voice vote. The Special Meeting adjourned at 10:18 a.m.

Senior Clerk-Stenographer

Anyone who requires an auxiliary aid or service for effective communication or a modification of policies or procedures to participate in this Water Board Meeting should contact Doreen Shirota, Secretary, at 961-8050 as soon as possible, but no later than five days before the scheduled meeting.

The Department of Water Supply is an Equal Opportunity provider and employer.

Notice to Lobbyists: If you are a lobbyist, you must register with the Hawai'i County Clerk within five days of becoming a lobbyist. {Article 15, Section 2-91.3(b), Hawai'i County Code} A lobbyist means "any individual engaged for pay or other consideration who spends more than five hours in any month or \$275 in any six-month period for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials." {Article 15, Section 2-91.3(a)(6), Hawai'i County Code} Registration forms and expenditure report documents are available at the Office of the County Clerk-Council, Hilo, Hawai'i.