

19 March 19

Suzanne Case, Chairperson
Board of Land and Natural Resources
Department of Land and Natural Resources
Kalanimoku Building, 1151 Punchbowl St. Rm 220
Honolulu, HI 96813
blnr.testimony@hawaii.gov

Re: D-9
Informational Briefing on Facilitated Discussions
KIUC RP 7340 TMK (4) 3-9-001:001

Aloha e Chair Case and Land Board Members:

At the December 14, 2018 Land Board Meeting, Kauai Island Utility Cooperative (KIUC) was ordered to restore 4 mgd of streamflow to Wai`ale`ale Stream and 1.6 mgd of streamflow to Waikoko Stream. This has not been done. This permit should be revoked.

This permit enables the use of Wai`ale`ale (North Fork Wailua River) and Waikoko Stream waters for hydropower, only. The waters diverted from the RP waters, according to KIUC are used for agriculture, recreation and public drinking water. This permit should be revoked.

In that same BLNR meeting, about 2 hours and 44 minutes into the meeting, Chairperson Suzanne Case stated: "This is an overall comment, which is that the right sequencing of this is you, statewide, is that you establish your meaningful Instream Flow Standards, so that you have a detailed process on the Water Commission side, to evaluate Instream values, and offstream legitimate uses, and do all that evaluation. Set the standards, and that tells you how much water there is to divert. The, we have been successful in doing that in 3 separate cases on Maui, and successful in doing it in south Kauai, Waimea, Koke`e, through various processes, um, and I feel very good about the progress there. And that's the right sequence. that's the right sequence. So, in this case, these Revocable Permits, are temporary. They have ben going on for a long time, and that's why people are upset about them, but we are well on a track to convert them to applications for a long term leases. We still need, ideally, to establish the meaningful instream flow standard, in order to make the correct decision on the lease."

The proper sequencing is established, and understood and delineated by the Chair. There are no Instream Flow Standards (IFS) established yet by CWRM. KIUC thwarted the years long attempt to establish Instream Flows. This Board should follow her lead, and revoke this permit, at least until Instream Flow Standards are established. The IFS for Wailua must include consideration of water for RP 7310 to East Kauai Water Users Coop, which also uses the same source water, Wailua River. Water use for EKWUC

was left out of the August, 2018 IIFS for Wailua Instream Flow Standards Assessment Report. This permit should be revoked until IFS are established and EKWUC needs are considered.

As stated in RP 7340 conditions, this permit only considers water for hydroelectric power:

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Use the Water Resources for the following specified purposes only: To divert, take, draw off, conduct away and dispose of government-owned water emanating from the Blue Hole diversion (which consists of both of the stream diversions located at Blue Hole on the North Fork of the Wailua River and the diversion at the Waikoko Stream above USGS Gage 612 all of which are collectively referred to as the "Blue Hole" diversion) and use, operate, repair and maintain a portion of an existing government-owned water transmission infrastructure system including the Blue Hole diversion all for the purpose of generating hydroelectric power with the Permittee's two hydroelectric plants.

According to David Bissell, CEO of KIUC, these RP 7340 waters are used for agriculture, recreational users, and commercial water sales. This permit should be revoked.

RP 7340 states KIUC should maintain the dam and diversion.

8. Repair and maintain all buildings or other improvements now or hereafter part of the Water Resources.

The Wai`ale`ale dam is all bust up. It is not in good repair There is rebar and wire mesh sticking out all over, in both the dam face and in the live channel of the stream, in a popular recreational trail head in the Forest Reserve, on Conservation District Protective Sub-zine lands. This is a huge liability. Somebody falling on wet slippery rocks could get impaled on this metal. This permit should be revoked before someone gets hurt badly.

The turbine at the Upper Waiahi Powerplant, which used to generate 0.5 MW of power daily, has recently been upgraded to a 0.7 MW turbine. I do not believe this Board gave written permission. This permit should be revoked because KIUC did not obtain permission before making this major improvement.

9. Obtain the prior written consent of the Board before making any major improvements.

The dam and ditch are in serious disrepair. KIUC is not in compliance with RP Condition 10, which states :

10. Keep the Water Resources and improvements in a clean, sanitary, and orderly condition.

This permit should be revoked because it is not in an “orderly condition”.

KIUC’s Lease Application states their water use is non-Consumptive. This is a lie. The DLNR has found the use is 100% consumptive, as no water can be returned 5 miles and 300 vertical feet upslope to the streams of origin. This permit should be revoked because the consumptive use and permit payment based on non-consumptive use is fraudulent and unlawful. The 100% diversion of a spiritually and culturally significant water is improper and offensive to native Hawaiians and most environmentally sensitive people. This permit should be revoked.

12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Water Resources.

This unsafe dam shows no care for public health and safety. This permit should be revoked.

13. At all times with respect to the Water Resources, use due care for public health and safety.

There were no recreational “Tube the Flume” uses during the sugar plantation era. This is a new use, as is the export and sale of permit water delivered to Grove Farm for processing and commercial sale of potable water. This expansion of uses is not allowed. This permit should be revoked.

17. Use of the water taken from the Water Resources shall be limited to the areas presently or formerly served. Expansion is not permitted.

There has no way to quantify water diverted from Wai`ale`ale and Waikoko ditches.; there are only ditch gages, not stream gages. Ditch gaging does not reflect water loss due to leaks and spillage, which is as high as 30% loss. KIUC is not in compliance with surface water reporting of the diversion amount, not ditch flow amount. RP 7340 should be revoked.

18. The Permittee shall record and report monthly water use from the surface water diversions in accordance with Section 13-168-7, Hawaii Administrative Rules.

There are no established in-stream flow standards established yet for Wailua River. KIUC requested a Contested Case and stopped the process. Native Hawaiian traditional cultural practices are statutorily and judicially recognized rights that are ignored by KIUC, who has been diverting water for over 15 years without considering constitutionally protected water rights of the Department of Hawaiian Home Lands. This permit should have been revoked years ago, and should be revoked now.

20. The State reserves the right to withdraw water from this revocable permit to meet the following requirements as the State in its sole discretion may determine:

Constitutionally protected water rights, in-stream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under Section 221 of the Hawaiian Homes Commission Act, as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of Section 171-58(d), Hawaii Revised Statutes.

Again, KIUC has expanded and modified the turbine at Upper Waiahi Hydropower Plant without proposing anything to this Board. There is no documentation provided which states the new water demand of the increased capacity hydroplant.

21. Prior to any expansion or modification of any diversion works applicable to this project, Permittee shall document all proposed modifications to the hydropower plant and diversion works, and submit such documentation to the Commission on Water Resource Management ("CWRM"), and obtain, if necessary, approvals from CWRM.

This condition is very problematic. Water is delivered to Grove Farm for export to its private Lihue lands for commercial, non-Public Trust purposes, by the Upper Lihue Ditch, removing it from the Wailua State lands. The terms of the original RP have not been modified to consider the effects of global climate change on the diversion amount,

even though climate change was considered in the IFSAR. This permit should be revoked because Condition 22. a. does not consider current conditions.

22. It is in the State's best interests to have its water returned to State land for irrigation purposes after its initial diversion for hydroelectric purposes, as previously existed when the prior lessee managed the system. To that end:

a. The amount of water diverted into the ditch system at Blue Hole on an annual basis shall not exceed the average annual amount diverted as measured for the period from years 1992 to 2002.

b. Any applicable service charge to the cooperative members, by Grove Farm, shall be for the upkeep of the delivery system, not for the water.

Condition 22. b. Includes consideration for Grove Farm, who's use is not addressed in this or any other state water use permit. Why is Grove Farm mentioned in KIUC's RP? The Public Trust water, delivered by KIUC to Grove Farm, is sold by the millions of gallons daily, to the County of Kauai Department of Water, beginning in 2004 for \$2 million per year for 3 million gallons delivered daily to the Waiahi Surface Water Treatment Plant. Grove Farm has increased the charge to the county for the water, not for the delivery system, to \$2.3 million per year. Over 30 million dollars has been charged to the Kauai Department of Water by Grove Farm, for water delivered by KIUC. RP 7340 should be revoked because it enables the sale of Public Trust Waters.

Condition 23. b. considers the downstream needs of EKWUC and the diversion from North Fork Wailua River at the Wailua Reservoir diversion, but there is no consideration for this water use in the Wailua IFSAR. KIUC has caused an "economic drought" by their placing their commercial profit making needs above mandated environmental concerns. The 100% diversion of baseflow at each of the KIUC system-wide stream diversions creates permanent "low volume periods (e.g. drought). Permit 7340 to KIUC should be revoked as it enables the cessation of mauka-to-makai flow in waters essential to Wailua ahupua`a, for commercial sales elsewhere.

b. Permittee shall provide data and recommendations concerning the allocation of water during low volume periods (e.g. drought) between the Blue Hole diversion, the Stable Storm diversion, the Wailua Reservoir diversion, and Aahoaka diversion.

B. Additional Conditions:

1. This Permit is issued and effective on a month-to-month basis. The Permit shall automatically terminate one year from the commencement date, unless earlier revoked as provided below, provided further that the Board may allow the Permit to continue on a month-to-month basis for additional one year periods. Any such extension shall have the same terms and conditions as this Permit, except for the commencement date and any amendments to the terms, as reflected in the Board minutes of the meeting at which the Board acts. Permittee agrees to be bound by the terms and conditions of this Permit and any amendments to this Permit so long as Permittee continues to hold a permit for the Water Resources or continues to use the Water Resources.

2. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to the revocation; provided, however, that in the event payment of rental is delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) calendar days prior to the revocation.

This permit should be revoked. KIUC blatantly refused to perform the HRS 171-58 statutorily required studies. It was created as a month-to-month permit, able to be revoked by this Board at any time. This Board and the Legislature have been lied to. Act 124, from 2004 considers only non-consumptive use of water. KIUC has been actively lobbying for the passage of HB 1326, extending the Holdover Permit time, even though they have refused to begin the required studies. This permit should be revoked, now. Enough already. Revoke RP 7340.

State Revocable Permit 7340 waters are conveyed to Grove Farm for commercial sale., instead of being returned to State Lands. This permit should be revoked as Public Trust waters are being transformed to commercial profit.

This RP fails to consider the needs of protected people, Native Hawaiians and

8. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.

traditional cultural practitioners and discriminates against their use and enjoyment. The failure of KIUC to complete the Cultural Impact Assessment Report further fails to consider their needs.

KIUC is using herbicides along the ditches and trails in the Conservation District, in the State Forest lands, with the water being delivered to Grove Farm for sale as potable water. Herbicides in drinking water is unconsonable, with unknown health hazards. This permit should be revoked ASAP.

Currently there is no way to modify the volume diverted into the KIUC ditch as was mandated by the Board in December, 2018. There is no way to measure flow or retain

and upon the Board's consent which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning the Permittee's best knowledge and belief regarding the presence of hazardous materials on or in the Water Resources placed or released by Permittee.

For the purpose of this permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

water at the site of either diversion. KIUC has chosen to ignore the Board's mandate, and are returning some flow to the diverted stream channels approximately 300' below the point of diversion by the KIUC dam. 300' of low flow in Wai`ale`ale below the diversion is harmful to the aquatic ecosystem. Waikoko is dry below the diversion on most days - there is **no aquatic ecosystem**. KIUC has done nothing to restore the flow to the stream channel below the diversion at Waikoko. KIUC has recently removed the control gate valve and installed permanent dam boards in the ditch and sluice to return some water to the dry stream, again approximately 300' below the dam. Now there is no way to alter the ditch flow.

Please use your authority to revoke Revocable Permit 7340.

Mahalo,

Hope Hamilton Kallai

POB 655

Kilauea, HI

96754

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April 25, 2019

Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawai'i 96813
Blnr.testimony@hawaii.gov

Re: April 26, 2019, Agenda Item D-9: *Informational briefing on the status of the facilitated discussions between the Kauai Island Utility Cooperative (KIUC), Earthjustice, Kia'i Wai O Wai'ale'ale, Sierra Club, Grove Farm, and the Department of Hawaiian Home Lands, regarding their respective positions on KIUC's request to use State water for its hydroelectricity plants pursuant to Revocable Permit No. S-7340, Lihue-Koloa Forest Reserve (Wailua Section), Kauai, Tax Map Key (4) 3-9-001:001.*

Chair Case and Members of the Board:

Earthjustice thanks this Board, Robbie Alm, and the other participants in the facilitated discussions for the time dedicated to this community-building effort. Mr. Alm's participation ensured that the facilitated discussions took place in a fair and respectful manner. Earthjustice also thanks Kaua'i Island Utility Cooperative ("KIUC") for reaching out to Mr. Alm to act as facilitator, and for hosting the initial meeting at its headquarters in Lihue.

On the issue of diversion, Earthjustice stands by its testimony submitted December 13, 2018 in opposition to holdover of Revocable Permit ("RP") S-7340. As previously stated, the December staff submittal recommending holdover of RP S-7340 is an insufficient basis upon which to authorize continued diversion of water from Wai'ale'ale and Waikoko Streams. Specifically:

1. The staff submittal does not consider protection of public trust uses of Wai'ale'ale and Waikoko Streams as required under Hawai'i Revised Statutes ("HRS") section 171-58;
2. The staff submittal does not contain any information on KIUC's actual water needs, alternative sources of water, or appropriate mitigation measures, as required when the Board acts in its capacity as trustee to dispose of public trust assets;¹ and
3. Additional permit conditions are necessary to protect public trust uses of state waters.

In lieu of continued discussions, Earthjustice urges this Board to exercise its power as trustee of public stream waters by, at minimum, imposing the following permit conditions on KIUC with specific deadlines:

¹ *Kauai Springs, Inc. v. Planning Comm'n*, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014).

- Install water gauges on all streams feeding the ditch system to ensure the minimum amounts of restored water are maintained in the streams at all times;
- Repair any dangerous conditions like the exposed rebar on the diversion located on Wai‘ale‘ale Stream (an existing permit condition);
- Make demonstrable progress on repairs to prevent water loss through the ditch system;
- Demonstrate actual, reasonable-beneficial need for diversion of water from Wai‘ale‘ale and Waikoko Streams in light of alternative water and electricity sources;
- Assess alterations to diversion structures and practices to shift from capturing low flows to capturing high flows;
- Finalize a watershed management plan and/or contribution amounts; and
- Complete an environmental impact study.

Earthjustice notes that during its December meeting this Board explicitly contemplated imposing additional permit conditions at the time of this report back in order to ensure that its approval of RP S-7340 does not violate the constitutional public trust in water. Additional permit conditions are necessary to protect the public trust, and should be considered by this Board at this or a future Board meeting.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Leinā'ala L. Ley".

Leinā‘ala L. Ley
Isaac H. Moriwake
EARTHJUSTICE

From: rhoda libre <rhodalibre2018@gmail.com>
Sent: Friday, April 26, 2019 9:03 AM
To: Bridget Hammerquist <bridgethammerquist@hawaiiintel.net>
Cc: DLNR.BLNR.Testimony <blnr.testimony@hawaii.gov>
Subject: Re: Revocation Required - Agenda Item D9 - BLNR Meeting 4/26/2019

Nice

On Wednesday, April 24, 2019, Bridget Hammerquist <bridgethammerquist@hawaiiintel.net> wrote:

**FRIENDS OF
MAHA'ULEPU**



NĀ HOA O MAHA'ULEPU



Friends of
Maha'ulepu - PO Box 1654 Koloa, HI 96756



Kia'i Wai o Wai'ale'ale
A Community Group dedicated to
protect waters of

Wai'ale'ale kiaiwaiialeale@gmail.com

Memorandum To: Chair Suzanne Case and members of the Board of Land and Natural Resources

From: Friends of Maha'ulepu &
Kia'i Wai o Wai'ale'ale

RE: BLNR Meeting 4/26/2019 Agenda Item D-9
Report Back on Facilitated Community Meeting with KIUC

DATE: 4/24/2019

On behalf of the members of Friends of Maha'ulepu & Kia'i Wai o Wai'ale'ale, please accept the following testimony as our report back on the facilitated meetings and the results of further discussion with KIUC on their continued diversion of State waters from Wai'ale'ale and Waikoko streams. Although the waters diverted are taken via State land stream diversions that happen to be on forest reserve in conservation district lands, there have been no completed environmental studies since the current revocable permit issued in 2003 there has also been no Conservation District Use Permit application filed. Attached is a copy of KIUC's RP 7340, 22 of the 27 permit conditions are not currently met by KIUC, identified in red boxes, not the least of which is condition A1 limiting the water diverted to hydro power production only and condition B8 which prohibits the transfer of water to another entity.

In 2003 when the attached RP was prepared, KIUC was informed of the need to come before the Board and obtain approval if they proposed to modify or change the use for which the permit was issued. KIUC has never done so and we ask this Board to exercise their authority and revoke RP 7340 allowing the applicant 30 days to reapply and properly indicate all uses of the diverted water with further requirement that each user be identified as a co-applicant. In the course of attending these hearings, and largely due to community input, the Department of Land and Natural Resources and its Board of Directors is now aware that the waters diverted by KIUC from the State land streams identified in RP 7340 are used by Back Country Adventures for a commercial recreational tubing operation, by agricultural lessees of Grove Farm and by Grove Farm in the production of drinking water from its Waiahi surface water treatment plant. The attached Kauai Department of Water Manager's report has a copy of the agreement entered into by the County of Kauai with Grove Farm in 2004 for the production and purchase of drinking water. In addition, the County agrees to cover the cost of KIUC's electricity charges for operation of the surface water treatment plant.

When the 2004 agreement was made by the County, there was an option created for the County to purchase the plant on or before the end of Feb. 2019. In the attached Report, the manager advised the Water Board that he could not recommend the Board exercise its option to purchase because he was unable to find documents to support Grove Farm's right to the source water or right to charge the County for same:

"The Department has previously requested a copy of the agreements referenced in Section 2.b. Control of Surface Water System, but to date has not received them. Without a copy of these agreements, the Department cannot properly evaluate the possibility of acquiring the SWTP. Without documentation regarding Grove Farm ownership rights to the source water (for e.g. appurtenant and riparian rights), the ditch system, and its obligations to other parties with whom it may have water agreements, the Department cannot ensure the continued supply of water as a transferee of these 'rights.'" KDOW MgrRpt attached

Also attached is a copy of a recent Freedom of Information Act request for documents from a member of Kia`i Wai o Wai`ale`ale, Puanani Rogers, and the County's response. Upon receiving the document Ms. Rogers requested the County provide any additional information upon receipt. None has been provided thus far.

Attached is a copy of the report prepared by the community meeting facilitator, Robbie Alm, and a copy of a record of the Waiahi power plants, upper and lower, power generation statistics from 2005-2017. KIUC informed the facilitator that the upper plant required 25mgd and the lower 42mgd for the hydro power generation reported in the attached. As evident from the power generation report, through 2017 KIUC's 2 hydro power plants have never produced more than 1.9% of Kauai island's daily power production. As of 2018, another 20 megawatts of renewal energy via solar panels with battery backup came online on Kauai substantially lowering the

percentage of power production from these 2 sites. Further evidence of the questionable beneficial use of the Waiahi power plants is the fact that there was no hydro power produced for more than one year between Nov. 2009 and Dec. 2010. As the Board noted when we last met, hydro power is not a public trust use for the diverted waters of Wai`ale`ale and Waikoko. Consequently, any renewal or approval of an application of hydro power production should balance the quantity of stream diversion proposed against the intended beneficial use and only after the instream flow standard is determined as Chair Case stated at the December 14, 2018 BLNR KIUC RP renewal:

BLNR Meeting KIUC D13 12-14-2018

https://drive.google.com/open?id=1R3gb_vmQoD3E7jOwuoW2V1d-FI2Nt8x0

2:44:20 Chair Case: "This is an overall comment, which is that the right sequencing of this is you, statewide, is that you establish your meaningful Instream Flow Standards, so that you have a detailed process on the Water Commission side, to evaluate Instream values, and offstream legitimate uses, and do all that evaluation. Set the standards, and that tells you how much water there is to divert." BLNR Audio Link

When the Land Board last convened on KIUC's RP7340, the Board renewed their RP with specific provisions, one of which was that any continued diversion was conditioned on a minimum flow of 4mgd left in Wai`ale`ale and 1.6mgd in Waikoko Streams.

2:48:01 "OK, so far they said, Wai`ale`ale you put back in 4 million gallons per day. Any other streams you're gonna put water back in?"

2:48 "Dean Uyeno: Waikoko"

2:48 "Director Roehrig: And how much for Waikoko?"

2:48 "Dean Uyeno: So the proposal, or per the, um, Land Division submittal, 1.6 million gallons per day for Waikoko Stream." BLNR Audio Link

The Land Board's final motion was:

3:12 Director Yuen: "... I'm making a motion to approve the renewal of the permit, with the conditions set by the Staff Recommendation which is to involve putting back 4 million gallons per day into Wai`ale`ale Stream and a million plus gallons, I don't remember exactly, per day into Waikoko Stream..." BLNR Audio Link

Unfortunately, KIUC in recent testimony to the Legislature, misstated this requirement and reported that the Land Board had directed them to leave 4mgd in Wai`ale`ale but only 0.8mgd in Waikoko:

"In 2017 and 2018, KIUC has complied with additional conditions placed on its RP holdovers, which include returning water to the streams below the diversions, collaborating with DHHL, and initiating facilitated discussions with community stakeholders. Pursuant to the 2018 RP holdover approval, KIUC is maintaining minimum stream flow requirements that are equivalent to CWRM's proposed IIFS of 4 MGD for North Fork Wailua and 0.8 MGD for Waikoko Stream. In implementing the proposed IIFS, the current RP restricts KIUC from diverting more than 8 MGD at North Fork Wailua and 1.6 MGD at Waikoko at median flow in the stream."

See attached KIUC testimony WTL-WAM 4-2-2019 Proposed Page 3



De-watered Waikoko Stream March 6, 2019

Despite the clear ruling of the Land Board and even with winter rains, KIUC's operation of the State's dam diversion at Waikoko Stream leaves that stream de-watered for at least 100 yards below the diversion. See attached Water Booklet Pages 1-4. Even 10 yards of a de-watered stream is a stream whose public trust protection has been violated.

Based on KIUC's failure to comply with 22 of their 27 permit conditions and clear failure to care for the streams in a manner consistent with the Constitutional protection mandated for Hawaii State streams, KIUC must be given notice of revocation and be directed to take immediate corrective and restorative action.

Mahalo nui loa,

Bridget Hammerquist, President

Friends of Maha`ulepu, a 501(c)(3)

Kia`i Wai o Wai`ale`ale, Co-founder

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