

December 5, 2021

Testimony of Kia'i Wai o Wai'ale'ale and Friends of Māhā'ulepū to the Board of Land and Natural Resources, Regular Meeting, December 10, 2021 at 9:00am (online) on: (1) Agenda Item D-1 (Denial of Petitions for Contested Case Hearing filed by Kia'i Wai o Wai'ale'ale and Friends of Maha'ulepu on December 19, 2020, Regarding December 11, 2020 Agenda Item D-5, Continuation of Revocable Permit S-7340 to Kauai Island Utility Cooperative for Water Use), and (2) Agenda Item D-2 (Holdover/Continuation of Revocable Permits for Water Use on the Islands of Hawai'i and Kaua'i.)

Aloha Chair Case and Board Members,

As a representative for Friends of Māhā'ulepū, a non-profit corporation and Kia'i Wai o Wai'ale'ale, an unincorporated association, respectively (collectively, "Petitioners"). We oppose the staff recommendation to deny our request for a contested case on Revocable Permit (RP or "permit") S-7340 to the Kaua'i Island Utility Cooperative (KIUC) under agenda item D-1. We also oppose approval of proposed holdover/continuation of RP S-7340 to KIUC and request a contested case on Agenda Item No. D-2 concerning the same.

I. Reject staff recommendation to deny contested case on KIUC's 2021 permit under D-1

The staff submittal for Item D-1 recommends denying Petitioners' request for a contested case on the 2021 RP. The recommendation is premised on incorrect facts and interpretations of applicable law and this Board should reject the staff recommendation, grant Petitioners' request for a contested case on the 2021 RP, and consolidate it into their contested case on the 2022 RP application. If, however, this Board decides not to grant KIUC's RP renewal application for 2022 because KIUC has, by its own statements, has not used any waters diverted from Wai'ale'ale and Waikoko throughout 2020 and 2021 and because the estimated ditch repair to enable use is estimated per KIUC to cost at least \$1 million, the requests for contested case would be withdrawn.

1. *HRS §171-58 is a law that defines the requirements that must be met to support a State permit for the use and ground or surface water. This law was enacted pursuant to the constitutional mandates for the protection of water, a public trust resource.*

Staff incorrectly assert HRS chapter 171 provisions "relate to the internal management of the Department of Land and Natural Resources, the technical methods of encumbering lands, and appraisal processes." D-1 Submittal at 4. The Hawai'i Supreme Court rejected this Board's position that HRS chapter 171 narrowly applies to custodial management of public property, which is a matter of internal agency management. *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai'i 114, 127, 424 P.3d 469, 482 (2018) (narrowing *Sharma v. State*, 66 Haw. 632, 673 P.2d 1030 (1983), and *Big Island Small Ranchers Association v. State*, 60 Haw. 228, 588 P.2d 430 (1978)).

Staff's incorrect interpretation of HRS chapter 171 more broadly extends to their incorrect understanding of HRS §171-58 as a law defining environmental quality. Petitioners' rights to a clean and healthful environment as defined under HRS §171-58 are property rights protected by the constitution. Hawai'i Const. art. XI, §9. The submittal asserts Petitioners lack a constitutionally protected interest in their rights to a clean and healthy environment as defined by HRS §171-58 on the basis that "Chapter 171 is

not a chapter concerning the control of pollution or the conservation, protection, and enhancement of natural resources - a law relating to ‘environmental quality.’” D-1 Submittal at 4. HRS §171-58 defines environmental quality, referring to, amongst other things, nonpolluting and non consumptive uses of water. *Id.*(c). The restrictions on revocable permits to a month, not to exceed a year, also define environmental quality. *Id.* Therefore, Petitioners’ constitutional rights to a clean and healthful environment are affected by the Board’s decision on the 2022 revocable permit renewal application. *In re Application of Maui Elec. Co.*, 141 Hawai‘i 249, 270, 408 P.3d 1, 22 (2017) (*MECO*).

2. *Petitioners’ raised impacts to native Hawaiian traditional and customary rights supported by multiple declaration from those affected.*

The staff submittal incorrectly states Petitioners provided no statements as to impacts to Hawaiian traditional practices. D-1 Submittal at 3. Petitioners submitted declarations from kānaka maoli members Myrna Bucasas, Liberta L. Albao, Robin Danner, Joseph Kekaulike Kama‘i, James K. Torio, Puanani Rogers, Leah Ho‘okano Pereira, Keith K. Castaneda, Connie L.K. Castaneda, and Pauline A. Kupo, as well as Dr. Adam Asquith. D-1 Submittal, exh. A.

Petitioners’ kānaka maoli members attested to their cultural practices and impacts of the Board’s action in allowing diversion of Wai‘ale‘ale and Waikoko streams. For instance, Liberta Albao, a kanaka maoli cultural practitioner, declared impacts to Wai‘ale‘ale and Waikoko stream flows adversely affects “hunters, gathers, and other cultural practices of our community which also includes the sacred historical practices and recognition of the Blue Hole as a natural Heiau.” Submittal Exh. A at PDF14. Petitioners’ members raised caring for ‘āina as a cultural practice and “to commune and appreciate the sounds of life and the forested lands where KIUC’s hydropower plant diversions exist, as well as on lands now dewatered as a result of the diversions.” *Id.* ¶¶9-10. Albao referred to cultural practices that are passed down, “to revere and appreciate native birds . . . including those found on and near the areas affected by KIUC’s diversions[.]” *Id.* ¶11. Kama‘i described cultural practices of gathering, hiking on paths used by high chiefs through areas of Wai‘ale‘ale, Waikoko, and other streams, medicinal plants like kava, kaunaoa, and mamaki disappearing due to the diversions, and the importance of native species supported by these streams for his cultural practices. Submittal Exh. A at 19-20 (¶¶2-6). Torio also described cultural practices of hiking in areas on Wai‘ale‘ale and Waikoko, as well as the importance of native species that are affected by the lack of stream flow. *Id.* at 23-24.

3. *A contested case hearing is required to protect Petitioners’ constitutional rights.*

Staff incorrectly conclude: “Regarding the potential private interests that may be affected by the Board’s action (a clean, healthful environment and deprivation of the ability to enjoy traditional and cultural practices in the Blue Hole area and Wailua-a-hoanu), the potential interest is either not substantial in character compared to more significant actions, or the specific injury to that interest is not clearly articulated in the petition. A revocable permit is a temporary month-to-month permit for the use of water.” D-1 Submittal at 5. In *Flores*, an “interest in engaging in traditional Native Hawaiian cultural practices” was determined to be “substantial,” as it is guaranteed by article XII, Section 7 of the Hawai‘i Constitution.” *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai‘i 114, 127, 424 P.3d 469, 482 (2018).

Protection of environmental interests and rights have also been determined to be substantial, requiring a contested case. *See Community Ass’ns of Hualalai, Inc. v. Leeward Planning Comm’n*, SCOT-16-0000690, at \*38 (Hawai‘i Dec. 2, 2021) (slip op.) (“Hualalai alleges an injury in fact to the property and environmental and aesthetic interests of area property owners who claim that Bolton’s development

negatively affects their properties through noise, dust, negative aesthetic effects, diminished property values, and increased traffic. These claims amount to a legally cognizable injury.”); *In re Application of Maui Elec. Co.*, 141 Hawai‘i 249, 270, 408 P.3d 1, 22 (2017) (contested case required under article XI, §9 and HRS §269-6(b)); *Protect and Preserve Kahoma Ahupua‘a v. Maui Planning Comm’n*, CAAP-15-0000478, at \*12 (Haw. App. Sep. 14, 2020) (mem.) *affirmed* SCWC-15-0000478 (Hawai‘i Jun. 16, 2021) (slip op.) (contested case required under article XI, §9 and HRS chapter 205).

II. Petitioners oppose approval of KIUC’s 2022 permit, oppose exemption from HRS chapter 343 environmental review, and request a contested case on Item D-2.

The staff submittal recommends approving continuation of KIUC’s permit despite the ongoing contested case on interim instream flow standards (IIFSs) for Waikoko and North Fork Wailua (Wai‘ale‘ale) streams pending before CWRM, the State Land streams that are the subject of RP 7340. The subject diversions are also on State Conservation Forest Land. D-2 Submittal at 6. This Board has been approving KIUC’s RP 7340 on an allegedly “temporary” basis every year since December 2002.<sup>1</sup> The full extent of the environmental and cultural impact of the Board’s decades-long permitting of diversions of these streams should be considered as part of this Board’s decision today. Petitioners oppose the staff recommendation to approve KIUC’s 2022 permit, oppose exemption from HRS chapter 343 environmental review, and request a contested case on Item D-2. This request is particularly imperative because KIUC has not used any water from these two State Land streams since the ditch system to which they are diverted suffered major damage from storms in 2019. Absent use of water, KIUC rate payers are paying hard earned money monthly to the State for a surface water diversion use that is not occurring.

1. *Rationale and application are inconsistent and improper reasons to approve the 2022 permit.*

KIUC concedes it “can’t predict when [it] might be in a position to divert again” and represents that the purpose of its permit application is to “at minimum continue maintenance activities, which helps avoid or minimize further degradation of the [diversion] system.” D-2 Submittal, exh. B at 2 (Letter from KIUC, dated Nov. 19, 2021). First, KIUC alleges it seeks to holdover the RP in order to shore up its system because it expects to obtain approvals to continue to divert these streams. KIUC’s long term lease is not a foregone conclusion and this Board should not prejudge the matter at this time when interested persons and the public have not been able to contest the lease application.

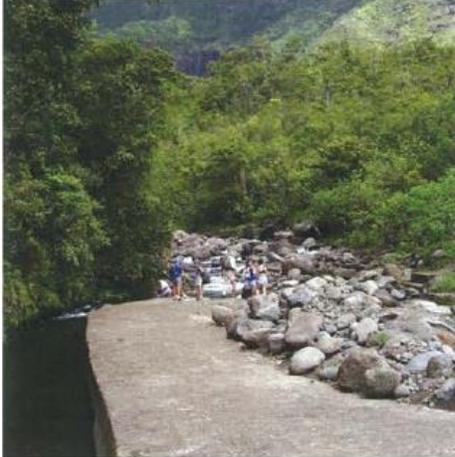
Second, KIUC’s position is inconsistent with DLNR staff’s citation to “the State’s renewable energy goals” as a reason to approve the KIUC RP. D-2 Submittal at 8. If KIUC is not in a position to use water from the two State Land streams covered under RP 7340, it would not be operating its hydropower plant to produce renewable energy.

Third, as raised to this Board previously, KIUC’s representation that it is will “at minimum” conduct maintenance and repair activities is suspect. What Petitioners and their members have rather observed is the ongoing degradation of KIUC’s diversion systems while this Board continues to allow them to holdover water rights to Wai‘ale‘ale and Waikoko streams.

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<sup>1</sup> In 2004, KIUC submitted an application for a 65-year lease. The Office of Hawaiian Affairs requested a contested case on the lease. KIUC still has not completed procedures for a water lease.

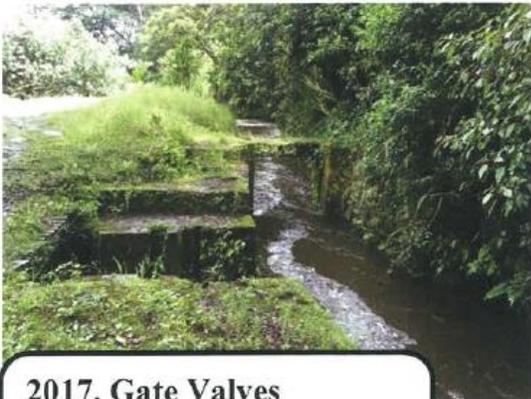
**2000. Wai`ale`ale Dam conditions when KIUC assumed control from Kauai Electric.**



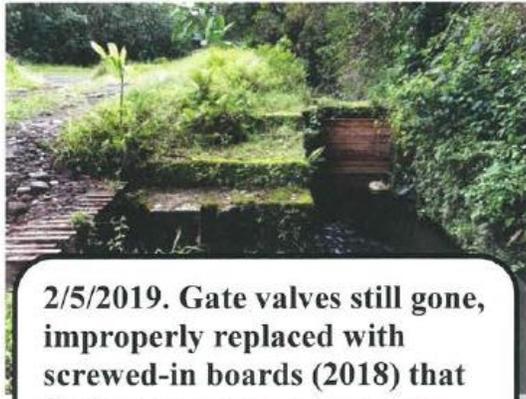
**4/30/2000. Wai`ale`ale, intake ditch and throwout with operational control valves, condition when KIUC assumed diversion operations.**



**2017. Gate Valves Removed. No way to regulate flow or prevent damage from storm events.**



**2/5/2019. Gate valves still gone, improperly replaced with screwed-in boards (2018) that limit emergency response to storm events, and continue baseflow diversion from Wai`ale`ale.**



*From Petitioners' testimony, dated April 24, 2019, to the Board's Regular Meeting on April 26, 2019, Item D-9 (Report Back on Facilitated Community Meeting with KIUC).*

As a public trustee, the Board is required "to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources." *Kelly*, 111 Hawai'i at 231, 140 P.3d at 1011 citing Haw. Const. art. XI, §1. RP7340 conditions require maintenance and repair, which KIUC has not done previously as demonstrated in the above photographs.

2. *Staff reliance on KIUC's renewable energy production in weighing public trust duties is incorrect.*

Even if KIUC does more than the “minimum” of maintaining its diversion structures and begins operating its hydropower plants again, staff incorrectly conclude that these operations’ contributions to the State’s renewable energy goals weigh against public trust uses of these surface waters in the “dual mandate” of public trust obligations. D-2 Submittal at 7-8. When KIUC was apparently operating their hydropower plants, both of them generated a mere 0.8% of the total power revenue for the island of Kaua‘i.<sup>2</sup> By contrast, the permit allows KIUC to resume diverting approximately 40 million gallons a day (mgd) to bring the 25 mgd allegedly needed to operate the upper Waiahi hydropower plant and 40 mgd to operate the lower hydropower plant.

The staff submittal does not address whether KIUC establishes the absence of practicable alternatives that would permit them to operate their Waiahi power plants at capacity without the diverted waters of Wai‘ale‘ale and Waikoko Streams. D-2 Staff Submittal at 8. As a public trustee, the Board is obligated to require this showing from KIUC. In discussing agency public trust obligations in assessing a permit application for commercial use of spring water, the Hawai‘i Supreme Court that in addition, “the applicant must demonstrate the absence of a practicable alternative water source.” *Kaua‘i Springs v. Kaua‘i Planning Comm’n*, 133 Hawaii 141, 173, 324 P.3d 951, 983 (2014) quoting *In re Water Use Permit Applications*, 94 Hawai‘i 97, 161, 9 P.3d 409, 473 (2000) (“*Waiāhole I*”). A “proposed use must be denied if the applicant does not show that there is no practicable alternative water source.” *Id. citing Waiāhole I*, 91 Hawai‘i at 161 n. 65, 9 P.3d at 473 n. 65. “Such a requirement is intrinsic to the public trust.” *Id. citing In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 116 Hawai‘i 481, 496, 174 P.3d 320, 335 (2007) (“The [agency] cannot fairly balance competing interests in a scarce public trust resource if it renders its decision prior to evaluating the availability of alternative sources of water.”).

KIUC has previously stated that renewal of RP 7340 is essential to the operation of the hundred year-old Waiahi hydropower plants. Neither KIUC nor DLNR staff have provided evidence that these hydropower plants would be unable to operate, at their 0.7 and 0.8 megawatt capacity, if the RP was not renewed. KIUC provided no evidence that its hydropower plants could not operate with the waters KIUC currently receives from at least four other stream diversions at ‘Ili‘ili‘ula, Iole, Waiaka, and Waiahi. Those streams all contribute to the waters carried by the ‘Ili‘ili‘ula ditch system that is estimated to carry or deliver 30 million gallons a day (mgd) to the Waiahi hydropower plants. Of that total, Wai‘ale‘ale and Waikoko contribute approximately 12-15 mgd.<sup>3</sup> Combined the ditch systems involved pull at least 40 MGD from Wailua streams, reducing aquifer and well recharge. Kaua‘i should not be subjected to the massive shift of water between neighboring watersheds for so minimal benefit.

In any case, KIUC, per their 2020 and 2021 RP7340 renewal applications, confirm **no use of water** from Wai‘ale‘ale and Waikoko streams. They offer no evidence of any detrimental consequence from the loss of this water and they fail to make any showing to the impact to the power need or used for the island of Kauai. This confirms what we have always maintained every year we have objected to the renewal of RP7340, that the water diverted daily from State Land and other Wailua streams is not necessary to meet the power needs of Kauai. For this reason alone RP7340 should not be renewed.

### 3. *Permitting KIUC’s diversion system prior to establishing IIFSs violates the Board’s public trust duties.*

Representations that CWRM staff “confirmed that KIUC is compliant with stream flow restoration

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<sup>2</sup> KIUC *Currents* magazine, V.3, at 19 (Fall 2020) available at: <https://kiuc.coop/sites/default/files/documents/currents/2020/2020-03-Currents.pdf> .

<sup>3</sup> Commission on Water Resources Management, Instream Flow Standard Assessment Report, Island of Kaua‘i, Hydrologic Unit 2040, Wailua, Draft PR-2018-06, at 95 (Aug. 2018).

requirements” does not establish that present and potential instream uses are protected. D-2 Submittal at 5. Those requirements are not based on the IIFS, which is the mechanism for protecting these uses. An IIFS is determined by “weigh[ing] the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses[.]” HRS §174C-71(2)(D).

No permit for diversion should issue until it can be informed by the IIFSs. As Chair Case stated at the December 14, 2018 Board meeting in regard to KIUC’s previous request for RP renewal:

This is an overall comment, which is that the right sequencing of this is . . . statewide, . . . 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. We have been successful in doing that in three different cases on Maui and successful in doing it in two cases in South Kaua’i - Waimea and Koke’e - through various processes. And I feel very good about the progress there. And that’s the right sequence. That’s the right sequence. In this case, these revocable permits are temporary. They have been going on a long time and that why people are upset about it. But we are well on a track to convert them to applications for long term leases. You still need, ideally, to establish the meaningful instream inflow standard in order to make the correct decision on the lease.<sup>4</sup>

The irony in this circumstance is that KIUC themselves stopped the Commission from setting the IIFS at their August 2018 meeting when they interrupted the process and requested a contested case. The Commission abruptly adjourned after a daylong meeting and a motion to set the IIFS when KIUC made their request. Less than ten days after the adjournment, KIUC was told that they had no standing to request the contested case but meanwhile others had felt compelled to join in the KIUC request to protect the public trust interests and so we are not left with no IIFS awaiting a contested case hearing. Without information from the IIFS, the Board does not know how much is available to safely divert to KIUC. The Board is obligated, at minimum, to obtain this information as stated here and above by Chair Case, because issuing the 2022 permit.

Approving the KIUC 2022 RP in the absence of this information would violate the Board’s public trust obligations. The Board does not have before it a sufficient record to assess the impacts of KIUC’s continued diversions. *See Kelly v. 1250 Oceanside Partners*, 111 Hawai’i 205, 227, 140 P.3d 985, 1007 (2006) (rejecting Hawai’i county’s contention that it lacked a public trust duty to take affirmative actions to make pre-permit or post-flood event assessments of development impacts), assuming KIUC in fact makes the required repair to the ditch system to enable it to use the water diverted from Wai’ale’ale and Waikoko streams. An agency’s public trust duties exist even “where there is no change in use of the public trust resource[.]” *In re Application of Gas Co.*, 147 Hawai’i 186, 207, 465 P.3d 633, 654 (2020) *citing Ching v. Case*, 145 Hawai’i 148, 170, 449 P.3d 1146, 1168 (2019) (agency may violate public trust duties by failing to reasonably monitor trust property). That is, that KIUC’s permit continues to be a “holdover” does not excuse the Board from its public trust obligations to obtain the necessary, meaningful information from the IIFS before making decisions on the permit.

4. *A contested case may gather information on diversion impacts to better protect public trust resources.*

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<sup>4</sup> Audiofile of Regulation Meeting of the Board of Land and Natural Resources, Item D-13 at 2:44:20 (Dec. 14, 2018) available at: [https://drive.google.com/open?id=1R3gb\\_vmQoD3E7jOwuoW2V1d-Fl2Nt8x0](https://drive.google.com/open?id=1R3gb_vmQoD3E7jOwuoW2V1d-Fl2Nt8x0)

Since 1965, these streams have been under Board leases and permits allowing diversion.<sup>5</sup> Rather than grant a permit that could allow KIUC to begin diverting again, the Board should grant Petitioners' contested case request. That is, to the extent KIUC correctly represents that it has ceased diverting in 2020,<sup>6</sup> the Board and CWRM have an opportunity to examine the streams. Island residents and our local media have been aware of increased sand and silt filling the mouth of the Wailua River and there is little or no evidence of increased flow in the as would be anticipated if the diversion of Wai'ale'ale and Waikoko streams had ended.

The Board may not "relegate itself to the role of a 'mere umpire[.]'" *Mauna Kea Anaina Hou*, 136 Hawai'i 376, 406, 363 P.3d 224, 254 (2015) quoting *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006) (quoting *Waiahole I*, 94 Hawai'i at 143, 9 P.3d at 456). And instead, it must "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process" pursuant to its public trust duties. *Mauna Kea Anaina Hou*, 136 Hawai'i at 406, 363 P.3d at 254. Granting a contested case will allow Petitioners and their witnesses to bring evidence of the diversion impacts historically, as well as information about the effects of desired stream restoration.

5. *Environmental review compliance is required prior to granting the 2022 permit.*

KIUC has been diverting Wai'ale'ale and Waikoko waters since 2003. The submittal recommends exempting the 2022 permit from environmental review on the basis that: "Revocable permits are temporary in nature." D-2 Submittal at PDF17. The Board has permitted KIUC to effectively segment its lease proposal under "temporary" one-year revocable permits and concurrently, to evade comprehensive environmental review because the use did not change from one year to the next. HRS chapter 343 prohibits such segmentation as offensive to the statute's purpose of ensuring comprehensive disclosure of the environmental impacts of agency decision-making. KIUC's new application and its previous such RP applications should be "treated as a single action" because the actions are "essentially identical" and a single EIS could "adequately address the impacts of each action and those of the group of actions as a whole" on the environment. HAR § 11-200-7(4). "Rules like HAR § 11-200-7 are meant to keep applicants or agencies from escaping full environmental review by pursuing projects in a piecemeal fashion."

6. *Petitioners request a contested case on proposed approval of 2022 permit for KIUC.*

Petitioners request a contested case on approval of the 2022 RP7340 to KIUC. KIUC's diversions of Wai'ale'ale and Waikoko streams, and their maintenance and repair of systems in preparation to continue to do so, violates Petitioners' constitutional rights under article XI, §§ 1 and 9 of the Hawai'i Constitution, as defined by HRS chapter 343. The Board cannot deprive Petitioners of their rights under the subterfuge that KIUC's 2022 permit is only of a "temporary nature." The loss of constitutional freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 350 (1976) (affirming grant of preliminary injunction where first amendment rights would be infringed) cited by *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402, 1417-19 (1997) (irreparable harm prong satisfied by first amendment violation claims, notwithstanding a nine month delay in bringing suit); *id.* ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary") (quoting 11A Charles A. Wright, et. al, Federal Practice and Procedure § 2948.1, at 161 (1995)).

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<sup>5</sup> See General Lease No. S-3827 to the East Kaua'i Water Company, expired in 1995.

<sup>6</sup> Petitioners understand there may remain approximately 100 yards of a dry streambed in Waikoko stream.

Petitioners are seeking to protect instream uses of water that are necessary to their exercise of rights to a clean and healthful environment and native Hawaiian traditional and customary practices that are recognized as property rights under article XI, §§1, 7, and 9, and article XII, §7 of the Hawai‘i Constitution. As a public trustee, the Board “is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai‘i Constitution when such rights are implicated by an agency action or decision.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 414–15, 363 P.3d 224, 262–63 (2015). Petitioners’ entitlement to a contested case on KIUC’s permits are discussed further *infra*.

For the foregoing reasons, we request that the Board reject the staff’s recommendation to deny our contested case request and to hold a contested case on KIUC’s application for renewal of RP7340. If this Board decides not to renew KIUC’s RP7340, there will be no need to proceed with the request for contested case. Please contact me with any questions.

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