

From: [Hoku Aki](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Stop KIUC
Date: Thursday, December 9, 2021 12:24:09 AM

Aloha,

I do NOT believe KIUC should have a renewed lease for any reason. Stop the nonsense.

Mahalo

Hokuanu Aki

From: [Laurie And James](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Wai"ale"ale and Wai"koko
Date: Thursday, December 9, 2021 8:10:30 AM

Aloha BLNR,
To Whom It May Concern,

My Ohana and I are deeply concern on the diversion of the water your Department is planning for Wai'ale'ale and Wai'koko.

For all of you to decide where the water goes and who get what, is preposterous and unthinkable.

You all got to put the hydro plant up there, to "Benefit" All of Kaua'i. What changed? More "Affordable" houses? Please no, until the infrastructures downside are dealt with,sewage and traffic,that is when "We All" decide where the water should be going. Check out all the streams in Ko'kee, why are they all dry, what you all are doing is so concerning! We have a lot of farms, that depend on this water!

Please reconsider what your Department is Planning on doing and stop short changing the people that lives here on the Island of Kaua'i.

Mahalo for taking your time to read Our Concerns!

Sincerely,
Laurie Avilla and Ohana

From: [Steve Backinoff](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda item D-2
Date: Wednesday, December 8, 2021 4:20:38 AM

Aloha- I have been alerted to decisions before you/us concerning Kauai upland water use/ diversion. I have lived on Kauai for 30 years now and have hiked to what is known as Blue Hole , upper Wailua River and experienced the power and beauty of this area.

I am a KIUC member and use the minimum of electricity I can. I am in support of renewable energy from solar, wind, kai and wai water methods. I have visited and seen beauty of Wainiha hydro generator.

I am strong supporter of listening to indigenous Hawaiian cultural viewpoints as a life time visitor to these islands .I am grateful for our fresh water streams for recreation and well aware of historic diversion for plantations.

At this juncture in time, as our island environment both physical, spiritual, and economic are at precarious breaking points, I believe that it is paramount to go slow and fully examine what we do thru fully transparent, open, environmental impact studies and pay very close attention to LONG TERM sustainability for health of our land, waters, and people.

From what I understand KIUC has managed to assert some control of upland waters that is not proven to be needed for the general good and perhaps very detrimental for multiple cultural , health, recreational and environmental reasons.

Please consider retracting any permission to divert precious waters from most natural pathways and closely examine impacts before any future actions.

Mahalo nui loa for your kokua

Steve (stream) Backinoff
5921 Kapahi Road, Unit A
Kapaa, Hi 96746

808-346-2587 sbackinoff24@gmail.com

From: [Monique Carlson-Newell](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 9:34:16 AM

I am not in favor of allowing Kaua'i Utilities to divert the water any longer and absolutely am against a 60 year contract to do so.

Thank you for hearing me.

Sent from my iPhone

From: [Malia Chun](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 9:14:13 AM

Aloha BLNR,

Over the years I have written many letters to you in regards to protecting our precious wai sources on Kaua'i and throughout this pae 'āina. I will remind you of what you already know and understand...If you are appointed as the trustee of this most valuable public trust, then it is your kuleana to uphold the Hawai'i Constitution that requires you to protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment BEFORE the authorization of any off-stream water diversions! KIUC and any other private or commercial entity should NEVER BE GRANTED A 60 YEAR LEASE TO A PUBLIC TRUST!

Under the guise of a co-op KIUC has green washed and water banked our most sacred and precious life source from East Kaua'i and has plans to water bank the sources of West Kaua'i, giving them control over most of the waters of Kaua'i. They have already proven that they do not need the waters of Wai'ale'ale and Waikoko to operate their outdated Waiahi hydro plant. We can no longer afford to allow single entities to hold that much power over human life.

As we've seen in recent news...we simply cannot allow entities to continue to pollute, hoard, abuse, misuse and compromise water as if it is a never ending resource. Electricity sure makes life convenient however, it is NOT a NECESSITY for survival. Protecting our ancestral practices, natural resource management, sustainable food production...WAI, these are the only things that will ensure our keiki have a chance at surviving a future on this honua. I implore you to do what is pono and DENY RP S-7340.

Mahalo nui for your time and consideration,

Malia Kahaleinia Chun
P.O. Box 680
Kekaha, Hi. 96752

From: [Roslyn Cummings](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:25:08 AM

Aloha No Kakou,

Kou Inoa Manawaiakea, Roslyn Nicole Manawaiakea Malama Cummings

A hundred generations before me and a hundred generations after. I am he āina hawaii, of Hā Wai ‘I

I oppose any permitting of water theft. Water should be well managed and maintained. BLNR, DLNR must comply under Oath. Do not deprive me a woman, wahine Maoli of these lands. Right to water.

not-for-profits are not required to operate for the benefit of the public good

Kauai Island Utility Cooperative (KIUC) is a not-for-profit generation, transmission and distribution cooperative owned by the members it serves.

As a Wahine Maoli, member of KIUC. I say we put an end to the permitting of continuance with the mismanagement of our waters; āina (land and sea)

Water for our people is life; waiwai.

Hawai‘i water laws originate from kānāwai—traditional laws set forth by ali‘i nui (ruling chiefs) for the management and use of fresh water—which were codified in early laws of the Hawaiian Kingdom. The same rights are preserved today in the Hawai‘i State Constitution ([Article XII, Section 7](#) and [Article XI, Sections 7 and 9](#)) and Water Code ([HRS Chapter 174C](#)). These laws protect streams, ensuring that they have adequate water flowing through them to support:

- The cultivation of healthy crops, especially taro farming in lo‘i
- Thriving stream life
- Thriving ocean life, which is dependent on freshwater
- Families exercising their traditional and customary rights to gather resources supported by freshwater, including resources to feed their families
- Community members’ enjoyment of stream recreation activities
- Adequate recharge of underground aquifers
- Household uses
- Beautiful, healthy environments

Fiduciary duties- Fiduciary duty requires **board members to stay objective**, unselfish, responsible, honest, trustworthy, and efficient. Board members, as stewards of public trust, must always act for the good of the organization, rather than for the benefit of themselves.

I also, request to have full disclosure of all business operations regarding our lands including, but not limited to our waters.

The Fact that cannot be disputed is that the Hawaiian Islands is not part of the United States under the April 30, 1900 Organic Act Section Two of all the LAWS for the TERRITORY OF HAWAII. Simply, there are no Hawaiian Islands in the TERRITORY OF HAWAII as such there are no Hawaiian Islands in the Admissions Act of 1959 under section two. The TERRITORY OF HAWAII & THE STATE OF HAWAII have no Hawaiian Islands or metes and bounds.

NOTICE TO AGENT IS NOTICE TO PRINCIPAL
NOTICE TO PRINCIPAL IS NOTICE TO AGENT

This is a verified plain statement of fact

Truth is sovereign, and sovereign tells only the truth.

Without trust there is no honor, without honor there is no trust.

Land is common land; property, equity and rights. Air is trust law. Water is contract law.
LAW.

All men and women know that the foundation of law and commerce exists in the telling of the truth, whole truth, and nothing but the truth.

Truth as a valid statement of reality is sovereign in commerce.

An unrebutted affidavit stands as truth in commerce.

An unrebutted affidavit is acted upon as the judgement in commerce.

Guaranteed— All men and women have a remedy by the due course of law. If a remedy does not exist, or if the existing remedy has been subverted, then one may create a remedy for themselves and endow it with credibility by expressing it in their affidavit. (Ignorance of the law might be an excuse, but it is not a valid reason for the commission of a crime when the law is easily and readily available to anyone making a reasonable effort to study the law).

All corporate government is based upon Commercial Affidavits, Commercial Contracts, Commercial Liens and Commercial Distresses, hence, governments cannot exercise the power to expunge commercial processes.

The Legitimate Political Power of a corporate entity is absolutely dependent upon its possession of Commercial Bonds against Public Hazard, because no Bond means no responsibility, means no power of Official signature, means no real corporate political power, means no privilege to operate statutes as the corporate vehicle.

The Corporate Legal Power is secondary to Commercial Guarantors. Case law is not a responsible substitute for a Bond.

Municipal corporations which include cities, counties, states and national governments have no commercial reality without bonding of the entity, its vehicle (statutes) and its effects

(the execution of its rulings).

Except for a Jury, it is also a fatal offense for any person(s), even a Judge, to impair or to expunge, without a Counter-Affidavit, any Affidavit or any commercial process based upon an Affidavit.

Judicial non-jury commercial judgements and orders originate from a limited liability entity called a municipal corporation, hence must be reinforced by a Commercial Affidavit and a Commercial Liability Bond.

A foreclosure by a summary judgment (non-jury) without a commercial bond is a violation of commercial law.

Governments cannot make unbounded rulings or statutes which control commerce, free enterprise citizens, or sole proprietorships without suspending commerce by a general declaration of martial law.

It is tax fraud to use Courts to settle a dispute/controversy which could be settled peacefully outside of or without the Court.

An official (officer of the court, policemen, etc.) must demonstrate that he/she is individually bonded in order to use a summary process.

An official who impairs, debauches, voids or abridges an obligation of contract of the effect of a commercial lien without proper cause, becomes a lien debtor and his/her property becomes forfeited as the pledge to secure the lien. Pound breach (breach of impoundment) and rescue is a felony.

It is against the law for a Judge to summarily remove, dismiss, dissolve or diminish a Commercial Lien. Only the Lien Claimant or a Jury can dissolve a commercial lien.

Notice to agent is notice to principal; notice to principal is notice to agent.

PUBLIC HAZARD BONDING OF CORPORATE AGENTS All officials are required by federal, state, and municipal law to provide the name, address and telephone number of their public hazard and malpractice bonding company and the policy number of the bond and, if required, a copy of the policy describing the bonding coverage of their specific job performance. Failure to provide this information constitutes corporate and limited liability insurance fraud (15 USC) and is prim-a-facie evidence and grounds to impose a lien upon the official personally to secure their public oath and service of office.

Title 8 U.S. Code § 1481 Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality— (2) taking an oath or making an affirmation or other formal declaration of allegiances to a foreign state or a political subdivision thereof, after having attained the age of eighteen years;

Title 28 U.S. Code § 91 Hawaii. Hawaii constitutes one judicial district which includes the

Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Palmyra Island, Baker Island, Howland Island, Jarvis Island, Canton Island, and Enderbury Island: Provided, That the inclusion of Canton and Enderbury Islands in such judicial district shall in no way be construed to be prejudicial to the claims of the United Kingdom to said Islands in accordance with the agreement of April 6, 1939, between the Governments of the United States and of the United Kingdom to set up a regime for their use in common. Court shall be held at Honolulu.

Parties:

Roslyn Nicole Manawaiakea Cummings/Lien Claimant P.O. Box 315

Kalaheo, HI zip code exempt

non domestic

Lien Debtor(s):

DLNR (Department of Land and Natural Resources) c/o Suzanne Case

Kalanimoku Building

1151 Punchbowl St.

Honolulu, HI 96813

KIUC (Kauai Island Utility Cooperative) c/o David Bissel

4463 Pahee St. #1

Lihue, HI 96766

Allegations:

Allegations arise from the conduct of Lien Debtor(s) in regards to conduct doing business as Roslyn Nicole Manawaiakea Cummings.

1. Roslyn Nicole Manawaiakea Cummings was born as Roslyn Nicole Manawaiakea Malama on November 24, 1983, the daughter of Edmund Francis Malama Jr. and Darlene Rita.
2. Edmund Francis Malama Jr. was born on May 19, 1962, the son of Edmund Francis Malama and Gloria Jane Albarado.
3. Edmund Francis Ku Malama was born on March 26, 1942, the son of Joseph Ku Malama and Lucille Ahana.
4. Joseph Ku Malama was the son of Ku Nahinu Malama and Hana Keoua Puahi Pauahi.
5. Ku Nahinu Malama was the son of Nahinu Malama and Kahololio Hololio Kanewahine.
6. Nahinu Malama was the son of George William Kaila Malamanui Makanui and Luke "Lucy" B. Naumu.
7. Luke "Lucy" B. Naumu was the daughter of Naumu Benjamin Kapuaaiki/B. Naumu and Keawenui.
8. Naumu Benjamin Kapuaaiki/B. Naumu was the son of Kapuaaiki and Kupa/Kuwa/Kaapumohu/Kaapuwai/Kaapumoku/Kuwalu/Kawalu.
9. Kapuaaiki was the son of Kahaulani and Kahiwa Kanekapolei II.

10. Kahaulani was the son of Kalani Paiea Wohi o Kaleikini Kealiikui Kamehameha o Iolani I Kaiwikapu Kau Ka Liholiho Kunuiakea and Kanekapolei a Umiaemoku a Kauakahiakua o Lono/Kanekapolei I.
11. Roslyn Nicole Manawaiake Cummings is a public trust operating as a benefit to Roslyn Nicole Manawaiake Cummings acting as a holding trust for Roslyn Nicole Manawaiake Cummings.
12. Roslyn Nicole Manawaiake Cummings is the only contributing beneficiary of the Roslyn Nicole Manawaiake Cummings trust.
13. Jesse Kekoa Cummings, Roslyn Nicole Manawaiake Cummings, Jaidalyn Kuliaikaulani Cummings, Ryder Kekoa Cummings, Madison Nicole Wailana Cummings, Hunter Kaikoa Malama Cummings, Maddox Waika Malama Cummings, Noah Blake Kaeo Cummings, and Luke Jax Kanawai Ku Malama Cummings are the only legitimate trustees of claimant of all the proceeds, products, fixtures, and the like of the Roslyn Nicole Manawaiake trust.

Proof of Allegations:

1. Lien Debtor affirms that Roslyn Nicole Manawaiake Cummings was born as Roslyn Nicole Manawaiake Malama on November 24, 1983, the daughter of Edmund Francis Malama Jr. and Darlene Rita. If no timely rebuttal it is AFFIRMED.
2. Lien Debtor affirms that Edmund Francis Malama Jr. was born on May 19, 1962, the son of Edmund Francis Malama and Gloria Jane Albarado. If no timely rebuttal it is AFFIRMED.
3. Lien Debtor affirms that Edmund Francis Ku Malama was born on March 26, 1942, the son of Joseph Ku Malama and Lucille Ahana. If no timely rebuttal it is AFFIRMED.
4. Lien Debtor affirms that Joseph Ku Malama was the son of Ku Nahinu Malama and Hana Keoua Puahi Pauahi. If no timely rebuttal it is AFFIRMED.
5. Lien Debtor affirms that Ku Nahinu Malama was the son of Nahinu Malama and Kahololio Hololio Kanewahine. If no timely rebuttal it is AFFIRMED.
6. Lien Debtor affirms that Nahinu Malama was the son of George William Kaila Malamanui Makaanui and Luke "Lucy" B. Naumu. If no timely rebuttal it is AFFIRMED.
7. Lien Debtor affirms that Luke "Lucy" B. Naumu was the daughter of Naumu Benjamin Kapuaaiki/B. Naumu and Keawenui. If no timely rebuttal it is AFFIRMED.
8. Lien Debtor affirms that Naumu Benjamin Kapuaaiki/B. Naumu was the son of Kapuaaiki and Kupa/Kuwa/Kaapumohu/Kaapuwai/Kaapumoku/Kuwalu/Kawalu. If no timely rebuttal it is AFFIRMED.
9. Lien Debtor affirms that Kapuaaiki was the son of Kahaulani and Kahiwa Kanekapolei II. If no timely rebuttal it is AFFIRMED.
10. Lien Debtor affirms that Kahaulani was the son of Kalani Paiea Wohi o Kaleikini Kealiikui Kamehameha o Iolani I Kaiwikapu Kau Ka Liholiho Kunuiakea and Kanekapolei a Umiaemoku a Kauakahiakua o Lono/Kanekapolei I. If no timely rebuttal it is AFFIRMED.
11. Lien Debtor affirms that Roslyn Nicole Manawaiake Cummings is a public trust

operating as a benefit to Roslyn Nicole Manawaiakea Cummings acting as a holding trust for Roslyn Nicole Manawaiakea Cummings. If no timely rebuttal it is AFFIRMED.

12. Lien Debtor affirms that Roslyn Nicole Manawaiakea Cummings is the only contributing beneficiary of the Roslyn Nicole Manawaiakea Cummings trust. If no timely rebuttal it is AFFIRMED.

13. Lien Debtor affirms that Jesse Kekoa Cummings, Roslyn Nicole Manawaiakea Cummings, Jaidalyn Kuliaikaulani Cummings, Ryder Kekoa Cummings, Madison Nicole Wailana Cummings, Hunter Kaikoa Malama Cummings, Maddox Waika Malama Cummings, Noah Blake Kaeo Cummings, and Luke Jax Kanawai Ku Malama Cummings are the only legitimate trustees of claimant of all the proceeds, products, fixtures, and the like of the Roslyn Nicole Manawaiakea trust. If no timely rebuttal it is AFFIRMED.

NOTICE is hereby given that Lien Debtor has ten (10) days after receipt of this Affidavit of Obligation to rebut, deny, or otherwise prove invalid the above allegations. Failure to rebut, deny, or otherwise prove any allegation will be construed to be failure to rebut, deny, or otherwise prove all allegations.

Ledgering:

Ledgering in the instant matter is comprised solely of the value of the life-long labor of Roslyn Nicole Manawaiakea Cummings valued at the commercial rate of Two Billion (\$2,000,000,000.00) Dollars in functional currency of the United States.

Surety:

Surety for the value of this Affidavit of Obligation/Commercial Lien is:

Roslyn Nicole Manawaiakea Cummings P.O. Box 315 Kalaheo, HI 96741

I, Roslyn Nicole Manawaiakea Cummings, certify on my own commercial liability that I have read the above and do know that it is true, correct, and complete, and not misleading. The truth, the whole truth, and nothing but the truth.

ROSLYN CUMMINGS

c/o Roslyn Cummings

Living, Breathing Human Being

c/o General Delivery (Box 315)

Kalaheo Station

Kalaheo, Kauai, Hawaii Nei

(U.S.P.Z. Exempt - 96741)

Laws in America

1. The IRS is not a US government agency. It is an agency of the IMF (International Monetary Fund)

(Diviersified Metal Products v I.R.S. et al. CV-93-405E-EJE U.S.D.C.D.I., Public Law 94-564, Senate report 94-1148 pg. 5967, Reorganization Plan No. 26, Public Law 102-391)

2. The IMF (International Monetary Fund) is an agency of the U.N.

Blacks Law Dictionary 6th edition, page 816

3. The United States has NOT had a Treasury since 1921

41 Stat. Ch. 214 page 654

4. The U.S. Treasury is now the IMF

Presidential Documents Volume 240 No. 4 page 113, 22 U.S.C. 285-2887

5. The United States does not have any employees because there is no longer a United States! No more organizations. After 200 years of bankruptcy it is finally over.

Executive Order 12803

6. The FCC, CIA, FBI, NASA, and all other alphabet gangs were never part of the U.S. government. Even though the "U.S. Government" held stock in the agencies.

U.S. v Strang, 254 US491 Lewis v US, 680 F.2nd, 1239

7. *Social Security Numbers* are issued by the U.N. through the IMF. The application for a Social Security Number is the SS5 Form. The *Department of the Treasury* (IMF) issues the SS5 forms, not the Social Security Administration. The new SS5 forms do not state who publishes them while the old form states they are Department of the Treasury.

20 CFR Chap. 111 Subpart B, 422.103(b)

8. There are no Judicial courts in America, and have not been since 1789. Judges do 8. 8. There are no Judicial Courts in America, and have not been since 1789. Judges do not enforce Statutes and Codes. Executive Administrators enforce Statutes and Codes.

FRC v. GE 281 US 464 Keller v PE US 428 1 Stat. 138-178

9. There have not been and judges in America since 1789. There have been just administrators.

FRC v. GE 281 US 464 Keller v PE US 428 1 Stat. 138-178

10. According to GATT (The general Agreement on Tariffs and Trade) you MUST have a Social Security Number.

House Report 103-826

11. New York City is defined in Federal Regulations as the United Nations. Rudolph Guiliani states on C-Span that "New York City is the capitol of the World".

20 CFR Chap. III, Subpart B 44.103 (b) (2) (2)

12. Your Social Security check comes directly from the IMF, which is an agency of the United Nations.

(It says U.S. Department of Treasury at the top left corner, which again is part of the U.N. as pointed out above)

DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

SUMMARY

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- Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. For the purpose of Section 242, acts under the "color of law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this status include police officers, prison guards, and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race color, religion, sex, handicap, familial status or national origin of the victim.
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TITLE 18, U.S.C. SECTION 242

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- Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to deal.
-

because the USA's belligerent illegal occupation of the Hawaiian Kingdom they are forcing the USA rules and regulations upon a foreign country.

Since the United States Congress enacted a [joint resolution](#) purporting to annex the Hawaiian Islands, which was signed by President McKinley into U.S. law on July 7, 1898, American municipal laws have been illegally imposed within the territorial jurisdiction of the Hawaiian Kingdom. U.S. constitutional scholar, Westel Willoughby, wrote at the time of the purported annexation by legislative act:

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in the Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act... Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted.

WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES §239 (1929).

Along the same lines, the Hawaiian Kingdom Supreme Court, in *In re Francis de Flanchet* in 1858, stated that the “laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction.” There is no treaty transferring Hawaiian territory to the United States. As such, the Hawaiian Kingdom continued to exist as an independent State that was acknowledged by the United States in arbitral proceedings before the Permanent Court of Arbitration in [*Larsen v. Hawaiian Kingdom*](#) despite the unlawful overthrow of its government by the United States on January 17, 1893.

On the subject of the 1898 joint resolution of annexation of the Hawaiian Islands, the U.S. Department of Justice’s Office of Legal Counsel, after covering the territorial limits of legislative acts, concluded in a 1988 legal opinion, “It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.” The complaint states: *If it was unclear how Hawai‘i was annexed by legislation, it would be equally unclear how the Congress could create a territorial government, under an [An Act to provide a government for the Territory of Hawaii](#) in 1900, within the territory of a foreign State by legislation. It would also be unclear how the Congress could rename the Territory of Hawai‘i to the State of Hawai‘i in 1959, under an [Act To provide for the admission of the State of Hawai‘i into the Union](#) by legislation.*

International law at the time obligated the United States to administer Hawaiian Kingdom law after it unlawfully overthrew the Hawaiian Kingdom Government. The law of occupation was triggered after the United States, as the occupying State, secured effective control over Hawaiian territory. This effective control began when Queen Lili‘uokalani conditionally surrendered to the United States President on January 17, 1893. The Queen stated: *Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.*

UNITED STATES HOUSE OF REPRESENTATIVES, 53RD CONGRESS, EXECUTIVE DOCUMENTS ON AFFAIRS IN HAWAII: 1894-95 (1895), 586.

President Cleveland initiated a presidential investigation on March 11, 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and to provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on March 29th, where he “directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels.” His first report was dated April 6, 1893, and his final report was dated July 17, 1893. On October 18, 1893, Secretary of State Gresham notified the President:

The Provisional Government was established by the action of the American minister and the

presence of the troops landed from the Boston, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.

The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act. ...

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign...

Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.

UNITED STATES HOUSE OF REPRESENTATIVES, 53RD CONGRESS, EXECUTIVE DOCUMENTS ON AFFAIRS IN HAWAII: 1894-95 (1895), 462-463.

When negotiations began at the U.S. Legation in Honolulu on November 13, 1893, U.S. Minister Albert Willis stated to the Queen the position taken by the President after a full investigation. Willis expressed “the President’s sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed.” “To this,” Willis noted, “she bowed her acknowledgements.” Negotiations continued for another month. The illegality of the overthrow was due to the international principle of non-intervention in the internal affairs of another State.

President Cleveland delivered a [manifesto](#) to the Congress on his investigation into the overthrow of the Hawaiian Government on December 18, 1893. The President concluded that the “military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.” He also determined “that the provisional government owes its existence to an armed invasion by the United States.” Finally, the President admitted that by “an act of war...the Government of a feeble but friendly and confiding people has been overthrown.” Referring to the annexation plot of the insurgents, Cleveland concluded “that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods.”

Unbeknownst to the President, an [agreement](#) of peace was reached on the very same day Cleveland gave his *manifesto* to the Congress. Gresham acknowledged receipt of Willis’ dispatch of the agreement dated December 20, 1893, in a telegram of January 12, 1894, in which he stated, “Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested.” According to the executive agreement, by exchange of notes, the President committed to restoring the Queen as the constitutional sovereign, and the Queen agreed, after being restored, to grant a full pardon to the insurgents. As a constitutional monarch, however, the agreement required an additional signature of a cabinet minister to make it binding under Hawaiian constitutional law.

From: jill.czarnecki@gmx.com
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 4:34:51 PM

Please deny RP S-7340!

The BLNR is a trustee for the public: The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

To legally authorize private use of stream water — whether by revocable permit or long-term lease — the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC admitted that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.

In a high production year, electricity from the Waiahi hydro plants accounts for less than 1% of KIUC's power generation, and water from Wai'ale'ale and Waikoko account for only a fraction of this percentage point. This tiny amount of hydropower is not worth diverting millions of gallons of water per day from Wai'ale'ale and Waikoko Streams. It has been proven that even without water from Wai'ale'ale and Waikoko, KIUC can keep the lights on as it has for the past 2 ½ years.

Please protect this irreplaceable community resource for all Hawaiians, residents and future generations!

Mahalo
Jill Czarnecki

--

Sent from my Android phone with GMX Mail. Please excuse my brevity.



December 9, 2021

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

Re: December 10, 2020, Agenda Item D-2: Holdover/Continuation of
Revocable Permits For Water Use on the Islands of Hawai'i and Kaua'i;
RP S-7340 to Kaua'i Island Utility Cooperative

Dear Chair Case and Members of the Board:

Earthjustice submits this testimony *in strong opposition* to the continuation of Revocable Permit S-7340 ("RP 7340") for diversion of water by Kaua'i Island Utility Cooperative ("KIUC"). In past years, the Board lacked sufficient information to adequately determine whether authorizing diversion of water from Wai'ale'ale and Waikoko streams complied with Hawai'i's public trust doctrine. However, now that *KIUC admits that it cannot use water* from Wai'ale'ale and Waikoko streams because of a siphon break, and *KIUC does not have any foreseeable plants to repair the ditch system*, this Board *has no conceivable legal basis* on which to approve RP 7340. Accordingly, Earthjustice respectfully requests that this Board deny KIUC's request that it renew RP 7340 for another 1-year term.

1. This Board's Duties Under the Hawai'i Constitution

"Article XI, section 1 and Article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." *In re Waiāhole Ditch Combined Contested Case Proceeding*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) ("*Waiāhole*"). Article XI, section 1 declares that "all public resources are held in trust by the state for the benefit of its people" and mandates that the "State and its subdivisions shall conserve and protect" the State's water resources. Article XI, section 7 reiterates that "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."

“The purpose of the state water resource public trust is to protect certain uses.” *Kaua’i Springs, Inc. v. Planning Comm’n of County of Kaua’i*, 133 Hawai’i 141, 172, 324 P.3d 951, 982 (2014). The protected trust uses of water are: (1) the maintenance of waters in their natural state; (2) the use of water to meet domestic (appurtenant) needs; (3) the exercise of Native Hawaiian traditional and customary rights; and (4) the Department of Hawaiian Homeland’s constitutionally protected reservations of water. *Id.* (citations omitted).

“When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state.” *Id.* at 173, 324 P.3d at 983. “The agency is duty-bound to place the burden on the [diverter] to justify the proposed water use in light of the trust purposes.” *Id.* The agency evaluates the proposed “use under a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.” *Id.*

Under this framework, off-stream users like KIUC must demonstrate their “actual needs and . . . the propriety of draining water from public streams to satisfy those needs.” *Waiāhole*, 94 Hawai’i at 162, 9 P.3d at 474.¹ Off-stream water users like KIUC “must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources.” *Id.* at 161, 9 P.3d at 473. “The continuing *authority* of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes.” *Id.* at 141, 9 P.3d at 453 (emphasis in original).

2. Renewal of KIUC’s Revocable Permit Violates the Hawai’i Constitution

For years on end, KIUC has failed to show that it needs water from Wai’ale’ale and Waikoko Streams to meet a reasonable-beneficial use that cannot be met using other alternative sources of water as required by the public trust doctrine. Now, KIUC lacks even the ability to use the water because of the siphon break in the ditch system. Rubberstamping yet another annual RP without any demonstrated prospect of actual

¹ See also Haw. Rev. Stat. § 174C-3 (defining “reasonable-beneficial use” as “the *use of water in such a quantity as is necessary* for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest”) (emphasis added).

use in the coming year and the indefinite future is legally untenable and would be the worst dereliction of the Board's constitutional public trust duties yet.

In past years, KIUC claimed it needed to divert water from Wai'ale'ale and Waikoko Streams to keep the Waiahi hydro plants running and to meet Kaua'i's energy needs. The Board accepted this justification, renewing RP 7340 in spite of repeated calls from the community that it determine, among other matters relevant to authorization of KIUC's off-stream diversion:

- (1) whether the Waiahi hydro plants qualify as a reasonable-beneficial use of stream water in light of the small amount of electricity they provide (around 1% annually); and
- (2) whether the Waihi hydro plants can be kept running using other, alternative sources of water located on private lands further down the ditch system.

The latest developments on the ground have affirmatively demonstrated what the Board has consistently refused to acknowledge—namely, that even after the siphon break has shut down the diversions of Wai'ale'ale and Waikoko and prevented KIUC from using *any* water from those streams for the past two and a half years, KIUC can still provide a stable supply of electricity for the island. In other words, KIUC simply does not need water from Wai'ale'ale and Waikoko to power the Waiahi hydro plants and meet Kaua'i's energy demands, as the utility had previously asserted. In fact, records requested by Earthjustice during last year's hearing demonstrate that the Waiahi hydro plants continued to generate electricity, ostensibly using water from streams located further down-ditch from Wai'ale'ale and Waikoko Streams, even after the "complete breach" in the ditch system that occurred in August 2019.² See Staff

² The 'Ili'ili'ula North Wailua Ditch provides water to the upper hydro plant and takes water from three primary diversions located on Wai'ale'ale, Waikoko, and 'Ili'ili'ula Streams, and six smaller streams. The lower hydro plant diverts water from Waiahi Stream, 'Ili'ili'ula Stream, and several smaller streams. See SSFM International, Inc. *Waiahi Hydropower Long-Term Water Lease, Draft Environmental Assessment, Island of Kaua'i, Hawaii*, at 5-6, 62 (2018) ("DEA"), available online at http://oeqc2.doh.hawaii.gov/Doc_Library/2019-12-08-KA-Republished-DEA-Waiahi-Hydropower-Long-Term-Water-Lease.pdf.

Submittal, Item D-2 at Exhibit B (Letter from D. Bissel with Tailrace and 2019 Power Production Records attached).³

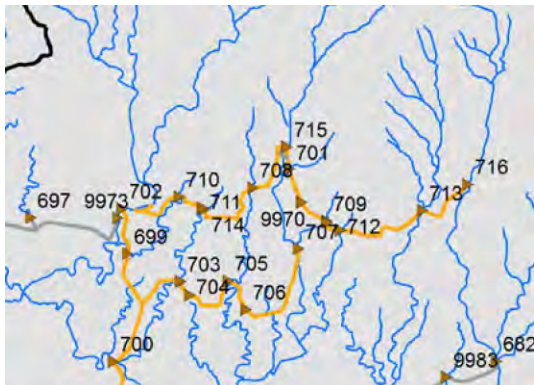
Under the public trust doctrine, this Board must deny KIUC's RP because the water from Wai'ale'ale and Waikoko Streams is not actually needed for a reasonable-beneficial use, and in fact cannot reach the Waiahi hydro plants to be put to any use at all.

3. Even If KIUC Repairs the Ditch System and Renews Its Request for a Water Permit Or Long-Term Lease The One Percent of Electricity Generated by the Waiahi Hydro Plants Is Not A Reasonable-Beneficial Use

As highlighted above, KIUC is able to both provide stable, affordable electricity to Kaua'i residents, **and** keep the Waiahi hydro plants running, without using water from Wai'ale'ale and Waikoko Streams, contrary to prior representations made to the community and this Board. Even if KIUC repairs the siphon at some point in the future and asserts that it "needs" water from Wai'ale'ale and Waikoko to maximize output from the Waiahi hydro plants, maximizing production from an outdated hydropower system is not necessarily a reasonable-beneficial use of water as this Board has assumed in past years.

Determination of reasonable-beneficial use is a fact-specific inquiry. As already highlighted in the staff submittal, KIUC's hydro plants do not qualify as "instream" uses because the 'Ili'ili'ula North Wailua ditch system takes from Wai'ale'ale Stream, which naturally drains into the North Fork of Wailua River and discharges the water through the Waiahi hydro plants and into Waiahi stream, which drains into the South Fork of Wailua River. *See Staff Submittal, Item D-2 at 4, Exhibit A.*

³ During last year's hearing Earthjustice requested that KIUC provide stream gaging and power production information to inform this Board's exercise of its public trust duties. It is unclear why KIUC has provided the Board only the old 2019 power production records that were provided to Earthjustice in January of this year rather than updated records including power production for 2020 and 2021 (if any).



This image depicts streams diverted into the 'Ili'ili'ula North Wailua ditch system. Only diversions 716 and 713, located on Wai'ale'ale and Waikoko Stream respectively, are located on publicly accessible lands.

Source: IFSAR at 86, Figure 13-1, *infra*, note 5.

Further, there are unique instream values at issue here because of the cultural significance of the Wai'ale'ale and Waikoko Streams, and also because these streams are among the few mauka tributaries of the Wailua River accessible to the public because they are located in the Līhu'e-Kōloa Forest Reserve, rather than on private lands. *See* Exhibit A (Earthjustice Comments on KIUC's Draft Environmental Assessment for the Waiahi Hydropower Long-Term Water Lease) (describing instream use values harmed by KIUC's diversions).⁴

Finally, even at maximum production, the Waiahi hydro plants have never accounted for more than 1.4% of KIUC's total power production. In recent years, energy from the Waiahi hydro plants has accounted for less than 1% of annual electricity, with water from Wai'ale'ale and Waikoko accounting for an even smaller proportion.⁵ This small amount of non-essential energy production must be weighed against the millions of gallons per day (mgd) that KIUC diverted from Wai'ale'ale and Waikoko Streams to power the Waiahi hydro plants in the past (13.5 mgd on average).⁶ On balance, KIUC's non-essential energy production simply does not outweigh the

⁴ The Office of Hawaiian Affairs ("OHA") requested a contested case hearing in 2004, when KIUC first requested a long-term water lease for these streams, raising many of these same issues. *See* Exhibit B (OHA Comments on KIUC's Draft Environmental Assessment for the Waiahi Hydropower Long-Term Water Lease).

⁵ *See* Comm'n on Water Res. Mgm't, State Dep't of Land & Nat. Res., Instream Flow Standard Assessment Report, Island of Kauai, Hydrologic Unit 2040, Wailua, at 93 (Aug. 2018) ("IFSAR"), *available online at* <https://files.hawaii.gov/dlnr/cwrm/submittal/2018/sb20180821B2Ex1.pdf>.

⁶ *See* DEA, *supra* note 2 at 15 (Table 3).

public's interest in the use and protection of these culturally and recreationally significant streams.

4. Proceedings Before the Commission on Water Resource Management Cannot Replace or Postpone This Board's Exercise of Its Public Trust Duties

Pursuant to a permit condition imposed by this Board in 2017, KIUC is required to leave enough water flowing in the streams to meet the amended interim instream flow levels ("IIFSs") proposed by Commission staff in August 2018 (3.5 of an estimated 11.5 million gallons per day (mgd) in Wai'ale'ale, and 0.8 of an estimated 2.5 mgd in Waikoko). The IIFSs proposed by staff in 2018, however, were never approved by the Commission. And in any event, they do not justify this Board continually rubberstamping a permit to KIUC year after year, without any scrutiny—and now without any demonstrated need or ability to use the water.

Further, because this Board has failed to require gaging by KIUC under past permits, the Board continues to lack visibility and data on what it is approving. Although Commission staff have installed a gage on Wai'ale'ale Stream, that gage was non-functional for much of the past year and a half, and there is not a calibrated stream gage on Waikoko Stream to monitor flow levels. KIUC's own gages measure water diversions into the 'Ili'ili'ula North Wailua Ditch, not the amount of water in the stream.

As background on the IIFSs, the Commission held a hearing on the IIFSs proposed by Commission staff on August 21, 2018, at Kaua'i Community College in Līhu'e. Earthjustice, Hui Ho'opulapula Nā Wai o Puna,⁷ and many other organizations and individuals testified that the staff proposed IIFSs—which leave less than one-third of median (Q₅₀) flow in the streams—were simply too low to protect native stream life and cultural practices that require flowing water.

Following public testimony, the Commissioners were considering a proposal to amend the staff proposed IIFSs **upwards**, when KIUC requested a contested case hearing to prevent further action by the Commissioners to amend the staff proposal. If

⁷ Earthjustice represents Hui Ho'opulapula Nā Wai o Puna in the contested case proceeding on IIFSs currently pending before the Commission.

any one of several more protective flow-setting methodologies used by the Commission to set IIFSs for other streams are ultimately adopted, the contested case will result in **more water** flowing in the streams than the staff proposed IIFS levels that are currently being implemented by KIUC.

As discussed in the 2018 Commission Staff Submittal, there are several methodologies for selecting a stream flow level based on habitat restoration values: (i) the Q_{70} value; (ii) 80% of the Q_{50} value; and (iii) 64% of the BFQ_{50} . For Wai'ale'ale Stream, the three values, respectively, are: (i) 10.5 mgd, (ii) 9.2 mgd, and (iii) 3.6 mgd.⁸ Commission staff did not explain their reasoning for selecting the methodology which results in the smallest amount of water staying in the stream, and provides the *least* benefit to stream life. Further, other methodologies used by the Commission to protect other instream values, including cultural values, provide for even higher restoration levels, including 100% restoration.

More importantly, IIFSs set a floor, and there can be no presumption under the public trust doctrine that flow levels above the IIFSs are available to off-stream users. On the contrary, as described above, stream diverters must always demonstrate and prove actual water needs and reasonable-beneficial use of diverted water, before the Board authorizes the taking of public waters. The Board is not entitled to rely on the Commission and the IIFS proceeding to execute its separate and independent duties as trustee to ensure that KIUC's proposed use of stream waters complies with the public trust.

Indeed, given KIUC that admits it has no ability to actually use the water this year and for the indefinite future, rubberstamping yet another permit for another year would be the height of dereliction and abdication of the Board's public trust duties. The Board should deny the request to renew RP 7340, without prejudice to KIUC reapplying if and when it can demonstrate an actual need for reasonable-beneficial use and otherwise justify any diversions of public waters in light of protected public trust purposes.

⁸ See Staff Submittal for the Meeting of the Commission on Water Resource Management, August 21, 2018, Līhu'e, Kaua 'i, Amended Interim Instream Flow Standards for the Surface Water Hydrologic Unit of Wailua (2040): Waikoko and North Fork Wailua Stream, at 12, *available online at* <https://files.hawaii.gov/dlnr/Commission/submittal/2018/sb20180821B2.pdf>.

Board of Land and Natural Resources

December 9, 2021

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Mahalo for this opportunity to submit testimony.



Leinā'ala L. Ley
Isaac H. Moriwake
EARTHJUSTICE

Enclosures



January 7, 2020

Via Email

Ian C. Hirokawa
Department of Land and Natural Resources
1151 Punchbowl Street, Room 220
Honolulu, HI 96813
ian.c.hirokawa@hawaii.gov

Re: Waiahi Hydropower Long-Term Water Lease, Draft Environment Assessment, Island of Kaua'i, Hawaii (Oct. 2019)

Dear Mr. Hirokawa:

Earthjustice submits these comments on behalf of Hui Ho'opulapula Nā Wai o Puna (the "Hui") in response to the Department of Land and Natural Resource's ("Department's") December 8th request for public comment on the Waiahi Hydropower Long-Term Water Lease, Draft Environment [sic] Assessment, Island of Kauai, Hawaii (Oct. 2019) ("DEA"). As discussed in detail below, withdrawing more than two thirds of natural stream flow from Wai'ale'ale and Waikoko Streams for a 65 year term will have significant effects on the environment and cultural practices in the diversion area. Therefore, the proposed finding of no significant impacts ("FONSI") made in the DEA is erroneous. Further, the DEA is invalid as a matter of law because it incorrectly defines the subject action, and because it proceeds from an erroneous exemption determination from the Attorney General, thereby predetermining the FONSI outcome.

Because the proposed 65 year water lease authorizing diversion of water from multiple streams in the Līhu'e-Kōloa Forest Reserve will have significant effects under the law, Kaua'i Island Utility Cooperative ("KIUC") must prepare an environmental impact statement ("EIS"), evaluating a reasonable range of alternatives, rather than the abbreviated and deficient environmental assessment currently under consideration. Without an EIS exploring a reasonable range of alternatives, **including complete decommissioning of the existing diversions and 100% restoration of water to Wai'ale'ale and Waikoko Streams**, the significant, long-term effects of the proposed 65 year water lease cannot be fully assessed, evaluated, mitigated, and addressed, as required by Hawai'i Revised Statutes ("HRS") Chapter 343, the Hawai'i Environmental Policy Act ("HEPA"), and other applicable law.

I. THE PROPOSED FONSI IS ERRONEOUS BECAUSE THE ACTION WILL HAVE SIGNIFICANT ADVERSE EFFECTS UNDER HAR § 11-200.1-13

HEPA's fundamental purpose is to ensure that State and County agencies fully and publicly examine the environmental impacts of their actions before those actions proceed. See HRS § 343-1. "An environmental assessment under HEPA is required if three conditions are satisfied: (1) the proposed activity is an 'action' under HRS § 343-2 (2010); (2) the action proposes one or more of the nine categories of land uses or administrative acts enumerated in HRS § 343-5(a) (2010); and (3) the action is not declared exempt pursuant to HRS § 343-6(a)(2) (2010)." *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 512, 403 P.3d 277, 289 (2017). An approving agency must take a "'hard look' at environmental factors" before exercising its discretionary authority to approve an action that is subject to HEPA, such as the proposed 65 year lease authorizing KIUC to take all stream water above low flow levels for hydropower generation. *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 342 167 P.3d 292, 335 (2007) (citation omitted).

Unfortunately, applicant KIUC and its consultant SSFM International, Inc. ("SSFM") chose to elevate form over substance in completing this DEA. The information provided in the DEA is at various times confusing, misleading, legally irrelevant, and incomplete, in contravention of the administrative rules. See Hawai'i Administrative Rules ("HAR") § 11-200.1-1(c)(1)-(3). For example, the DEA repeatedly raises the needs of downstream water users, including agricultural water users, as a factor supporting KIUC's long-term lease application. See DEA at 52, 72, 76, 99, 101, 102. However, the DEA provides absolutely no analysis as to whether the amounts of water taken from Wai'ale'ale and Waikoko Streams, two small tributaries with total median flow under 14 million gallons per day ("mgd"), are in fact necessary to augment the flow of Waiahi stream in order to meet legitimate, actual needs of downstream users.¹ Similarly, the DEA suggests that full restoration of Wai'ale'ale and Waikoko Streams could necessitate shutting down the Waihi hydropower plants altogether, with no supporting analysis. See DEA at 37. These conclusions lack factual support and do not foster fair and transparent public disclosure, inquiry, and analysis.

As just one example of the misleading nature of the information presented in the DEA, the no action alternative states in conclusory fashion: "While it may be possible for the two hydropower plants to operate with water from the 'Ili'ili'ula Stream Diversion only, this would result in . . . **an approximate doubling of energy cost per kWh.**" DEA at 37 (emphasis added). Of course, the Waiahi hydropower plants account for approximately 1% of energy generation

¹ Comm'n on Water Res. Mgm't, State Dep't of Land & Nat. Res., Instream Flow Standard Assessment Report, Island of Kauai, Hydrologic Unit 2040, Wailua, at 31 (Table 3-6) (Aug. 2018) ("IFSAR").

for the island, *see* IFSAR at 93, and the purported “doubling of energy cost” would apply to this same small portion of KIUC’s energy portfolio. KIUC has publicly acknowledged elsewhere that this would amount to no more than a “single-digit dollar[]” increase per ratepayer each month. *See* Minutes for the Meeting of the Comm’n on Water Res. Mgm’t (Aug. 21, 2018) available at <http://files.hawaii.gov/dlnr/cwrm/minute/2018/mn20180821.pdf>. However, this information is not disclosed anywhere in the DEA, leaving the reader with the impression that closing the Waiahi hydro plant will double electricity bills for KIUC’s ratepayers. The DEA is riddled with this type of misleading statement about the project.

Further, while the DEA goes through various environmental factors that could be affected by the proposed action—including air quality and climate, noise, geology and soils, natural hazards, water resources (downstream users and groundwater), biological resources, cultural resources, socioeconomic characteristics, and recreation and visual resources—the DEA spends a mere two pages analyzing the impacts on cultural practices and potential mitigation measures. *See* DEA at 90-92.² This choice is baffling because: the Office of Hawaiian Affairs (“OHA”) challenged the last lease application for failure to adequately analyze cultural impacts; cultural practices are the heart of the ongoing contested case hearing before the Commission on Water Resource Management (“CWRM”) that involves both KIUC and the Hui; and the Board of Land and Natural Resources (“Board”) required KIUC to engage in community discussions concerning cultural and environmental concerns as a condition of issuing KIUC a revocable permit for 2019. If anything, the impact of the proposed lease on cultural resources should be the heart of this DEA, but KIUC and SSFM have ignored this opportunity for “good faith,” “two-way communication” on the environmental impact of most significance to the Kauai community. *See* HAR § 11-200.1-1(c)(3).

Ultimately, the proposed finding of no significant impact (“FONSI”) made in the DEA is erroneous and fails to fully account for the significant cultural and environmental effects that may occur as a result of ongoing removal of water from Wai’ale’ale and Waikoko Streams. Under HRS § 343-5(c)(4) an EIS “shall be required if the agency finds that the proposed action **may** have a significant effect on the environment.” HRS § 343-5(c)(4) (emphasis added). As

² The Cultural Impact Assessment (CIA) attached as Appendix E does not remedy this shortcoming. Like the DEA, the CIA limits its discussion of impacts and proposed mitigation to a mere two and a half pages, without any discussion of the feasibility of implementing mitigation measures. *See* Appendix E at 144-46.

discussed further below, the proposed long-term lease of water certainly meets this standard, and therefore KIUC must prepare an EIS.³

A. The Proposed Action Irrevocably Commits a Natural, Cultural, or Historic Resource (HAR § 11-200.1-13(b)(1))

The DEA incorrectly concludes that the proposed action will not irrevocably commit a natural, cultural, or historic resource. DEA at 119. Every Hawai'i case to consider this question has recognized that diverting millions of gallons of water each day (whether surface water or ground water) is an action that is likely to irrevocably commit a natural resource, thereby triggering the requirement for a project applicant to prepare an EIS. See *Kepo'o*, 106 Hawai'i at 290, 103 P.3d at 959 (holding that "the withdrawal of millions of gallons of groundwater on a daily basis will 'likely' cause such irrevocable commitment" of natural resources defined as significant under HRS § 343-2); *Moloka'i Homesteaders Co-op. Ass'n v. Cobb*, 63 Haw. 453, 467, 629 P.2d 1134, 1143, 1144 (1981) (recognizing that a proposal for "withdrawal of water from one area for transport to another" is an action with a probable "significant effect" triggering the requirement to prepare an EIS). Like the long-term commitments at issue in *Kepo'o* and *Moloka'i Homesteaders*, the subject lease, authorizing withdrawal of water from Wai'ale'ale and Waikoko Streams for the next 65 years, irrevocably commits a natural resource to a specific use, thereby triggering the requirement to prepare an EIS.

As discussed further below, *infra* Part II, the FONSI is premised on the mistaken assumption that the environmental baseline is complete dewatering of the streams as historically occurred during the sugar plantation era. After properly identifying the proposed action as a new long term lease of state water to a private entity, however, it becomes clear that this is exactly the type of irrevocable commitment that triggers an EIS because of the significant environmental effects that may occur. See *Kepo'o*, 106 Hawai'i at 290, 103 P.3d at 959; *Moloka'i Homesteaders*, 63 Haw. at 467, 629 P.2d at 1144. This significance factor alone requires completion of an EIS to fully assess a reasonable range of alternatives before such an irrevocable commitment of public trust resources is made.

Among the issues that must be explored in an EIS is the option to enter a lease that has a more reasonable term, but no longer than ten to fifteen years. In light of rapidly evolving renewable energy technology, and declining rainfall levels that could reduce streamflow levels, there is no good reason for KIUC to insist on locking in outdated hydropower practices that use valuable stream water for another 65 years. More importantly, there is no good reason for the

³ KIUC must timely coordinate preparation of an EIS with appropriate federal agencies, including consulting with U.S. Fish and Wildlife Services on the Newcomb Snail, and consulting with the Army Corps of Engineers on a section 404 permit. See HAR § 11-200.1-31.

Department to enter into a lease irrevocably committing public resources for this amount of time. The last lease for this portion of the Wailua ditch system, signed before the State Water Code was adopted to implement modern water management practices, was for a thirty year term. DEA at 1. A new lease for an even longer term is a step backwards in time: it fails to incorporate modern water management practices, fails to address public trust concerns with water hoarding, and fails to reflect the ever changing renewable energy landscape. At minimum, the DEA must disclose why it believes a 65 year term is necessary and appropriate in light of the asserted need for the action (power generation), so that the public and the Department can assess and comment on KIUC's position on this issue.

B. The Proposed Action Curtails the Range of Beneficial Uses of the Environment (HAR § 11-200.1-13(b)(2))

The DEA incorrectly concludes that the proposed action will not curtail the range of beneficial uses of the environment. *DEA* at 119. On the contrary, as discussed in the Stream Habitat Assessment attached as Appendix D, taking water from Wai'ale'ale and Waikoko Streams, two small tributaries of the North and South Fork branches of Wailua River, and using the water to generate electricity by passing it through turbines, does in fact reduce stream habitat and affect stream life. In particular, the Stream Habitat Assessment notes that "larval 'ōpae kala'ole would have issues with entrainment due to the large amount of water being diverted and a small portion flowing downstream" under existing diversion conditions. Appendix D at 54. Additionally, while a substantial improvement in habitat is expected with implementation of amended interim instream flow standards ("IIFSs"), there is still a significant reduction in available stream habitat, of anywhere from 30.9% to 45.2% of habitat units.⁴ *Id.* at 151-52. These habitat units are important for 'o'opu as well as 'ōpae.⁵

The DEA completely ignores these facts, focusing instead on expected improvement from baseline diversion conditions (total low flow diversion) if IIFSs are implemented at anticipated levels: 3.5 mgd for Wai'ale'ale and 0.8 mgd for Waikoko. However, looking at the

⁴ Full diversion eliminates 73.7% of total habitat units whereas restoration under the anticipated IIFSs levels would constitute "[a] substantial improvement from 28.5% to 42.8%." Appendix D at 151-52. It is assumed here that "improvement" means that habitat will increase upwards in the amounts cited from the 26.3% of habitat units remaining after full diversion.

⁵ The failure of the DEA to draw a rational connection between the facts found in Appendix D and its legal conclusion that the action may not have significant effects is arbitrary and capricious, and therefore highlighted here. However, the Hui does **not** agree with a variety of conclusions in Appendix D, including that 'o'opu are not likely to inhabit areas upstream of Wailua and Kaholalele falls. Community observations indicate that 'o'opu do in fact occur above the falls in both stream segments.

appropriate environmental baseline as full flow levels, it is clear that ongoing diversion may curtail beneficial uses of the stream as habitat for indigenous stream life, even with proposed modifications to implement the expected IIFSs. Further, and of even greater concern, KIUC's proposed modifications to the Blue Hole diversion⁶ appear to lock in the **minimum** expected IIFS value for Wai'ale'ale Stream, which is not necessarily the value that will be selected by CWRM at the conclusion of the IIFS contested case hearing.⁷ See DEA at 40 ("The IFS/aquatic species passage V-notch weir and ramp is included in the design to pass **up to** 6 cfs [3.8 mgd] of flow in the stream.") (emphasis added). This arbitrary cap on future restoration values is in itself a significant adverse effect of the proposed modifications that is not clearly disclosed in the DEA, yet alone analyzed for potential mitigation as required by law. See HAR § 11-200.1-18(d)(7), (8).

Additionally, the proposed action may curtail the beneficial use of both Wai'ale'ale and Waikoko Streams as recreational and aesthetic resources for the community. Unlike many of the tributary streams feeding the Wailua River, Wai'ale'ale and Waikoko Streams are accessible to the general public because they are located on state lands within the Līhu'e-Kōloa Forest Reserve. The area is regularly accessed by members of the public, including members of the Hui, for swimming, gathering, praying, chanting, dancing, peaceful contemplation, and ceremonial practices. The recreational and aesthetic value of the streams for swimming, relaxing, and enjoying an otherwise unblemished wilderness area, is negatively affected by the Blue Hole diversion. As discussed further below, *infra* I.C., cultural practices such as ceremony, hula, and gathering, are also negatively affected by diversions. These potential negative effects on beneficial uses of the stream trigger the requirement that KIUC prepare an EIS more fully assessing the effects of its proposed long-term lease, and how to mitigate these adverse effects.

⁶ The term "Blue Hole diversion" is used to refer collectively to the diversion structures located on Wai'ale'ale and Waikoko Streams, but not to the streams themselves. Further, Wai'ale'ale is the name used for the tributary stream referred to as "North Fork Wailua" in the DEA.

⁷ Earthjustice raised concerns with the stream life methodology used to select the proposed IIFSs in the enclosed testimony dated August 21, 2019. As explained therein, CWRM discussed several different methodologies for selecting a stream flow to support habitat restoration in the IFSAR: (i) the Q₇₀ value; (ii) 80% of the Q₅₀ value; and (iii) 64% of the BFQ₅₀. For Wai'ale'ale Stream, the three values, respectively, are: (i) 10.5 mgd, (ii) 9.2 mgd, and (iii) 3.6 mgd. CWRM did not explain its reasoning for selecting the lowest value methodology which provides the **least** benefit to stream life, and is one of the issues raised by the Hui in the ongoing IIFS proceeding.

Of particular concern with the existing DEA is that it reserves a discussion of “aesthetic values” related to proposed modifications of the Blue Hole diversion until after the lease is secured. DEA at 38. In fact, the aesthetic impact of the diversion structures is one of the significant effects that the DEA must identify and assess, including proposed mitigation measures, before the Department enters into any new lease. HAR § 11-200.1-18(d)(7), (8). Community members have repeatedly raised concerns about the aesthetics of the diversion structures in revocable permit proceedings and the interviews conducted for this DEA. Relatedly, community members have repeatedly raised concerns about exposed rebar and the safety of the diversion structures, which also impede recreational use of the area. Adding additional concrete into the forest reserve without any consideration of how to remediate the site by removing the existing legacy sugar plantation structures, or using more place-based construction methods to accommodate aesthetic values, represents a complete failure to abide by the letter and spirit of HEPA.⁸

In summary, the DEA insufficiently considers the adverse effects of the proposed action on stream life, recreational use of the streams, the aesthetic value of the streams, and the safety of the public. The lack of any transparent consideration of these issues indicates that the DEA is skewed to avoid acknowledging potential adverse effects of the proposed action that would trigger the requirement to complete an EIS.

C. The Proposed Action Has Substantial Adverse Effect on the Cultural Practices Of the Community (HAR § 11-200.1-13(b)(4))

The DEA incorrectly concludes that the proposed action will not have substantial adverse effects on the cultural practices of the community. DEA at 119. As a threshold matter, the DEA incorrectly delineates between what it considers to be “traditional cultural practices” and “[c]oncerns expressed by the community. See DEA at 90-91. Among the “community concerns” noted in the DEA are the fact that Wai’ale’ale is sacred, and the stream water is used for ceremonial purposes. *Id.* However, the DEA does not adequately identify the scope of related traditional and cultural practices, the impact of the proposed long-term lease on those practices, or how to mitigate the negative effects arising from the proposed action. HAR § 11-200.1-18(d)(7), (8). At best, the DEA and Cultural Impact Assessment (CIA) included as Appendix E can be seen as a simple restatement of information obtained through a cursory review of print materials, archaeological surveys, and limited interactions with the Kaua’i community. At worst, the documents can be seen as an attempt to delegitimize traditional and customary cultural practices exercised in the diversion area that trigger the duty to prepare an EIS analyzing a range of alternatives that can minimize negative impacts to these practices.

⁸ CIA informants who raised aesthetic concerns include Hope Kallai, Dr. Mehana Vaughn, and Nicole Hoku Cody. See Appendix E.

First, both the DEA and the CIA ignore the fundamental importance of Wai'ale'ale and its waters as the piko of Kaua'i, with spiritual significance across the entire archipelago. The term piko has a dual meaning that refers to a blood relation or the reproductive organs, and also a summit or the center of a mountain. Waikoko translates to "blood water" and metaphorically references this stream's vital role in "bringing life to the land."⁹ "Just as a pregnant mother provides a life line of nourishment and energy through the piko or umbilical cord to her unborn child in the womb, Wai'ale'ale and its crater of waterfalls and streams sustain the island and its communities with life-giving waters." Kekua & Alapa'i at 58. These names and associations underscore the sacred significance of Wai'ale'ale, and, conversely, the grave hewa (wrong) caused by the historical dewatering of the streams.

In the hula tradition, the classic 'oli komo or admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, names the Wai'ale'ale area and numerous other celebrated places from mauka to makai along the Wailua River. Like other chants and songs composed for this area, the imagery of these places describes fresh water's foundational role as a physical and ethereal life force in this area and throughout Hawai'i nei. Kunihi ka Mauna is often the first 'oli komo learned by hula students across Hawai'i nei, not just on the island of Kaua'i, indicating widespread reverence for Wai'ale'ale itself as a sacred space.

Second, cultural resources in Hawai'i cannot be defined merely by the written record, or archaeological evidence. This is evident in traditional Hawaiian resource management concepts and paradigms. According to Wailua-area cultural practitioners, Wai'ale'ale, Kawaikini, and Kaipuha'a were traditionally considered Wao Akua, or "realm of the gods." Wao Akua is defined as "the sacred, montane cloud forest, core watershed, native plant community that is non-augmented and an area that was traditionally kapu (human access usually forbidden and prohibited)."¹⁰ In other words, a sparse archaeological record cannot be interpreted to mean that an area held less cultural or religious significance. Rather, it may indicate that the area was restricted for ceremonial purposes, or for other practices that required careful resource management, including feather gathering, plant gathering, and canoe tree gathering. Not once in the DEA or CIA is Wai'ale'ale's status as Wao Akua considered as a method of

⁹ K. Kekua and A. Alapa'i, *A Cultural Study: Native Hawaiian Traditions, Customary Practices and Perspectives of the Natural and Cultural Resources of Puna, Kaua'i Island* 58 (Apr. 2010) ("Kekua & Alapa'i").

¹⁰ Aha Moku Advisory Comm., Dep't of Land & Nat. Res., *Final Rules of Practice and Procedure*, (effective October 20, 2016) ("AMAC Rules") § 1-3.

supplementing the archaeological record to better understand traditional upland uses of the Wailua ahupua'a that continue today.¹¹

Further, while acknowledging that Wailua was historically the spiritual center of the island, as indicated by its extensive complex of heiau, the CIA does not discuss that the ali'i nui (high chief) of Kaua'i traveled on annual pilgrimages with members of the court to the Ka'awakō heiau located at Wai'ale'ale's summit. The royal court also periodically traveled from the lands near the ocean to Kawaikini, to pay homage to the cyclical movements of the atmosphere, the earth, and the network of waterways that bring forth ka wai ola a Kāne ("the sacred, life-giving waters of Kāne"). Kekua & Alapa'i at 56. The water that flows from the Wai'ale'ale area is the lifeblood of this mauka-makai cultural landscape and is "critical to the master plan of the ancients who established Wailuanuiaho'āno (historic name of the Wailua watershed) as a major religious center for Kaua'i and Hawai'i [nei]." *Id.* at 10. The entire ahupua'a is thus part of a single cultural landscape that must be recognized as having significance in the Kanaka Maoli worldview.

At a minimum, the DEA and CIA must acknowledge that taking water from Wai'ale'ale and Waikoko Streams in and of itself constitutes an injury for many cultural practitioners. This significant effect is both substantial and adverse. HAR § 11-200.1-13(b)(4). This specific cultural impact (spiritual injury) is distinct from the other cultural impacts such as the effects of diversion on stream life and vegetation that Hui members gather or wish to gather in the diversion area. Currently, all of these distinct harms are characterized as a single impact in the CIA. Appendix E at 144.¹² For many cultural practitioners, the spiritual injury can only be remedied by restoring at least 50% (and many times 100%) of natural stream flows because of the sacredness of these waters, and the use for ceremonial purposes including h'iuwai (full body immersion).¹³

¹¹ Members of the Hui regularly travel to Wai'ale'ale and Waikoko streams, including the area of the diversions, to engage in ceremonial practices in and around the stream, to sing, chant and pray within this sacred area, to bathe and swim in the stream waters, to use the water for subsistence purposes including drinking, to gather plants that grow near the stream, and to enjoy and commune with nature, including listening to the sound of running water. Members of the Hui have also looked for native stream life like 'o'opu and 'ōpae for gathering but have observed a decline in such species over the years.

¹² Impact 1 is described as follows: "Participants expressed their concern for low to no flow and the negative effects on water ecosystems *mauka to makai*; surrounding vegetation gathered for cultural practices; traditional subsistence gathering; and ceremonial purposes." Appendix E at 144.

¹³ The term "natural stream flows" is used herein to refer to the Q₅₀ value.

As far as potential mitigation measures for this specific cultural harm, the DEA must assess the feasibility of running the Waiahi hydropower plants without use of the Blue Hole diversion as well as other water use regimes that could minimize spiritual injury, such as capturing only high flows as a back-up power generation resource. While the CIA acknowledges that “restoring at least half (50%) of the water to North Fork” could mitigate cultural harms, Appendix E at 144, there is no discussion of this option in the DEA other than passing reference to a possible shut down of the hydro plants if full stream restoration were to be implemented. DEA at 37.

This conclusory statement is not a substitute for an appropriate feasibility study of KIUC’s power generation that includes more complete information regarding: (1) contribution of the Waiahi hydro plants to KIUC’s energy generation needs, (2) alternative water sources available to power the hydro plants, and (3) alternative energy sources to completely replace the Waiahi hydro plants in KIUC’s renewable energy portfolio. As repeatedly stated in comments to the Board of Land and Natural Resources on the revocable permits, the Board has an independent duty under the public trust doctrine to protect public trust water uses before issuing the subject lease. This duty cannot be met unless and until KIUC demonstrates its “actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.” *In re Waiāhole Ditch Combined Contested Case Hrg.*, 94 Hawai’i 97, 162, 9 P.3d 409, 474 (2000) (“*Waiāhole*”). This DEA is the most logical and opportune moment during the entire lease process for KIUC to disclose its actual need for hydropower to supplement its renewable energy portfolio, but the DEA fails to meet this most basic disclosure requirement under the public trust.

In summary, the DEA completely fails to adequately identify the adverse cultural impacts arising from the proposed long-term lease authorizing KIUC to divert all water above low flow levels of 3.5 mgd for Wai’ale’ale and 0.8 mgd for Waikoko, or appropriate alternatives and mitigation measures as required by law. HAR § 11-200.1-18(d)(7), (8).

II. THE DEA IS LEGALLY DEFICIENT BECAUSE IT ASSUMES THAT DIVERSION IS THE ENVIRONMENTAL BASELINE

In addition to the erroneous FONSI conclusion, the DEA is legally deficient because it fails to properly identify the scope of the subject action at issue in the DEA. *See Sierra Club v. Dep’t of Transp.*, 115 Hawai’i at 315, 167 P.3d at 308 (“[W]hether or not an agency has followed proper procedures or considered the appropriate factors in making its determination is a question of law.”). The DEA erroneously asserts that the subject action includes modification of the Blue Hole diversion to accommodate the forthcoming IIFSs currently under consideration by CWRM. DEA at 37. However, KIUC is under a legal duty to implement the IIFSs set by CWRM as long as it operates the Blue Hole diversion under its existing month-to-month

revocable permit, regardless of whether or not it receives a long-term water lease. In fact, the subject action is the proposed long-term lease of public waters to KIUC to power its Waiahi hydropower plants for the next 65 years (until 2084).

The failure to properly identify the scope of the proposed action prohibits a transparent, rational, and meaningful analysis of the adverse impacts of a 65 year water lease, and available alternatives to mitigate those impacts, as required by law. *See* HAR § 11-200.1-18(d)(7), (8). For example, the only two alternatives considered in the DEA are: (1) ongoing diversion of stream water using the legacy plantation diversions designed to take one hundred percent of low flow from Wai'ale'ale; and (2) ongoing diversion of water through modified diversion structures designed to take what the DEA assumes will be the final IIFs (KIUC's preferred alternative). DEA at 37-51. The majority of the DEA is then spent explaining why KIUC's preferred alternative is better for the environment than continuing to divert water using the existing plantation era structures, but also how implementing the IIFs will have negative effects on hydropower generation when compared to historic diversion levels.

Completely absent from the DEA is any analysis of a true "no action" alternative that considers how to power the Waiahi hydro plants without using any water from Wai'ale'ale and Waikoko Streams, or using only high flows, in order to mitigate the negative impacts of diversions on the full range of beneficial environmental uses and cultural practices identified above. Further, the information in the DEA is insufficient to allow the public to independently analyze whether decommissioning the existing Blue Hole diversion structures is feasible to maintain whatever firm power contribution is currently made by the Waiahi hydro plants, and necessary for the reliable operation of the power grid.¹⁴

Information that is needed to make this assessment, and must be included in any future environmental review document, includes the following:

- Disclosure of daily time series for ditch flow using all six gages currently (or historically) located on the 'Ili'ili'ula-North Wailua portion of the ditch system,¹⁵ preferably using software comparable to HED-DSSVue.¹⁶

¹⁴ The multiple power outages shown in the DEA indicate that the Waiahi hydro plants are not in fact "firm" power sources, and have no inherent value beyond the 1% contribution they make to KIUC's power generating capacity. *See* DEA at 20 (Figure 11), 21 (Figure 12).

¹⁵ The DEA indicates that there are currently six gages installed on the ditch system, but only discloses data for the two immediately below the Wai'ale'ale and Waikoko diversions. *See* DEA at 14 & Figure 5.

¹⁶ Available at <https://www.hec.usace.army.mil/software/hec-dssvue/>.

- Using the time series, an analysis over the period of record that shows the amount of water available at the Waiahi hydro plants under historical conditions, compared with what would have been available for diversion with the new IIFs. Representative dry, middle-range, and wet periods must be selected in order to accurately focus the analysis on how water availability affects energy generation during each of these time periods.
- A document that clearly translates the hydrologic analyses into comparisons of generation at each of the power plants over the period of record (and in the focused representative periods) accounting for periods of non-generation due to insufficient flow, head loss, turbine efficiency, and other clearly identified factors.

III. THE DEA IS LEGALLY DEFICIENT BECAUSE IT RECEIVED AN IMPROPER EXEMPTION FROM THE ATTORNEY GENERAL THEREBY PREDETERMINING THE OUTCOME OF ENVIRONMENTAL REVIEW

The DEA is also legally deficient because it received an improper exemption from the attorney general, predetermining the outcome of this review. As stated in *Umberger*, an action is exempt from HEPA only if all four parts of the following test are met:

(1) it is within an exempt class promulgated by the Environmental Council in HAR § 11-200-8(a) or within an exemption category created by the agency itself pursuant to its authority under HAR § 11-200-8(d); (2) the relevant exemption category can be applied because the activity does not have a significant cumulative impact and it does not have a significant impact on a particularly sensitive environment, *see* HAR § 11-200-8(b); (3) the agency obtained the advice of other agencies or individuals having jurisdiction or expertise as to the propriety of the exemption, HAR § 11-200-8(a); and (4) the action will probably have minimal or no significant effects on the environment, HRS § 343-6(a)(2); *see also* HAR 11-200-8(b); *Sierra Club*, 115 Hawai'i at 315-16, 167 P.3d at 309-09.

140 Hawai'i at 524, 403 P.3d at 30. Because this four-part test cannot be met here, the exemption granted by the Attorney General was improper.¹⁷

First, none of the exemption categories apply to this lease. Although the DEA fails to specify the grounds for exemption, the Department's past policy and practice during annual renewal of the revocable permit is to exempt permits from HEPA pursuant to Exemption Class

¹⁷ Separate from the duties imposed by HEPA, the plain language of HRS § 171-58(c)(3) requires an environmental impact statement for water leases as a matter of law.

1, Item 51, promulgated by the Environmental Council on June 5, 2015.¹⁸ See, e.g., State of Hawai'i, Department of Land and Natural Resources, Land Division, Holdover of Revocable Permits for Water Use on the Islands of Hawai'i and Kauai, Exemption Notification (Dec. 14, 2018). However, this exemption category is inapplicable because a water lease does not involve the operation, repair or maintenance of existing structure, but rather the taking of water. Moreover, whether or not an existing diversion began before HRS chapter 343 was enacted, a new lease is a new action that must fully comply with HEPA. Indeed, none of the existing water diversions subject to the water lease requirements, including those maintained by KIUC, have ever undergone environmental review in any form. Therefore, the cited exemption does not apply here. *Umberger*, 140 Hawai'i at 524, 403 P.3d at 301; *Sierra Club*, 115 Hawai'i at 316, 167 P.3d at 309.

Second, assuming an exemption category applies, it could not be applied to this lease because of the significant cumulative effects of water diversion in the particularly sensitive environment of small, tributary streambeds. The long-term cumulative impacts of dewatering streams, such as has occurred at the Blue Hole diversion, have been universally established in numerous contested case proceedings before CWRM and the Board, and include loss of stream life, destruction of traditional and customary practices, and impairment of other public trust uses and values.

Third, as discussed above, this 65 year lease will have significant effects, including irrevocable commitment of a natural and cultural resource, and therefore fails under the fourth prong of the *Umberger* test.

The fact that an EA was prepared does not cure the improper exemption issued by the Attorney General. Because of the exemption, KIUC and its consultant SSFM had no incentive to fully and completely abide by the intent of HEPA, and the outcome of the EA was predetermined. This can be most clearly seen in the fact that the DEA serves primarily to justify KIUC's preferred alternative. As stated in the administrative rules: "Exemption notices, EAs, and EISs are meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." HAR § 11-200.1-1(c). Because this DEA serves no other purpose than to justify selection of KIUC's preferred alternative, it fails to satisfy HEPA.

¹⁸ Class 1 reads: "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing." Item 51 reads: "Permits, license, registrations, and rights-of entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing."

Ian C. Hirokawa
Department of Land and Natural Resources
January 7, 2020
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Thank you for your consideration of these comments.

Sincerely,



Leinā'ala L. Ley
Attorney

Enclosure

cc: SSFM International, Inc., jscheffel@ssfm.com
Kauai Island Utility Cooperative, dhuff@joulegroup.com



STATE OF HAWAII
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HRD 19-1445Q

November 7, 2019

Ian Hirokawa
Department of Land and Natural Resources, State of Hawai'i
1151 Punchbowl St., Rm. 220
Honolulu, HI 96813

Re: Comments on the Waiahi Hydropower Long-Term Water Lease—Draft Environmental Assessment (Anticipated Finding of No Significant Impact)
Wailua Ahupua'a, Puna Moku, Kaua'i Moku
Tax Map Keys: (4) 3-9-001:001; (4) 3-8-001:001, 002, and 003

Aloha mai kākou:

The Office of Hawaiian Affairs (OHA) has reviewed the draft environmental assessment (draft EA) for the above-titled project, which covers a 65-year water lease of stream water in Wailua, Kaua'i, and associated stream diversion works by the applicant, the Kauai Island Utility Cooperative (KIUC). The requested water lease will authorize KIUC to divert water from the North Fork of the Wailua River (also referred to as Wai'ale'ale Stream and the "Blue Hole" Diversion) of all amounts above 3.5 million gallons per day (mgd) at the diversion and from the Waikoko Stream of all amounts above 0.8 mgd at the diversion, along with associated permanent construction of diversion structures in the Wai'ale'ale and Waikoko stream channels to allow the aforementioned volumes to be diverted into the 'Ili'ili'ula North Intake Ditch System to feed the Waiahi Upper and Lower Hydropower Plants.

Background

In 2004, OHA objected to a prior request for a 65-year water lease from KIUC because, in part, KIUC and the Board of Land and Natural Resources (BLNR) did not consider the impacts on Native Hawaiian cultural practices and stream life. After OHA filed a contested case request to further the consideration of these issues, OHA and KIUC entered into a settlement in 2006, with terms set forth in a memorandum of agreement (MOA) that, among other things, required OHA and KIUC to agree upon the scopes of two studies—a cultural impact assessment and a study on the impacts of the diversions on stream life. Through further negotiations, OHA and KIUC reached agreements on the scopes of these stream life and cultural impact studies and along with other outstanding issues, followed by OHA withdrawing its contested case request in 2012.

In accordance with the 2006 MOA, KIUC produced a draft study on the diversions' impacts to stream life and submitted a draft report to OHA in 2013. Aided by information from Kaua'i community members knowledgeable about Wailua stream conditions, OHA provided its comments on the draft stream life impact report, which resulted in revisions to the report by KIUC's consultant. In 2017, KIUC produced a draft of its cultural impact assessment (CIA) and submitted its report to OHA. Again, aided by knowledgeable Kaua'i community members, OHA issued its comments on the 2017 CIA, noting several key shortcomings in the report as compared to the scope of work that had been agreed to by OHA and KIUC. Although OHA was not afforded an opportunity to review an updated CIA, both the stream life impact report and CIA are included as part of the draft EA as Appendices D and E, respectively.

In addition, OHA provided KIUC's consultant with pre-assessment consultation comments by letter dated August 28, 2018. In the 8/28/18 letter, OHA recommended that the draft EA consider both current and historic impacts of the water diversion and include the alternative of diverting less water than the preferred alternative, consistent with community input captured in the draft CIA.

Given the above, OHA offers its comments on the Waiahi Hydropower Long-Term Lease draft EA.

The Update to 2017 Cultural Impact Assessment provides minimal additional information and analysis

The *Update to 2017 Cultural Impact Assessment* (Appendix E) (hereinafter "Updated CIA") contains minimal additional information and analysis when compared to the 2017 draft CIA, which OHA had found "lacks components of the agreed upon scope of work for a study of cultural impacts from the Blue Hole Diversion and operation of the 'Ili'ili'ula North Wailua Ditch." Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017) (*see Attachment 1*). At no point did KIUC seek to amend the scope of work for the CIA as agreed to by OHA; therefore, OHA still relies upon the scope of work provided by KIUC's prior CIA contractor as the basis for its review of the Updated CIA.

Previously, OHA noted that the 2017 CIA did not include determinations on "the extent to which applicable resources including traditional and customary Native Hawaiian rights and practices will be affected or impacted by the project", nor did the 2017 CIA "[p]ropose viable action for mitigation, if applicable, to be taken for the purpose of reasonable protection and perpetuation of Native Hawaiian rights and customary practices if they are found to continue/exist in connection with any of the study project area." Both of these tasks were included in the scope of work for the CIA that had been agreed upon between OHA and KIUC.¹ These tasks are also fundamental inquiries in a *Ka Pa'akai* analysis for the BLNR in reviewing and potentially approving the proposed action. It therefore makes sense for this analysis to be part of project planning documents by the applicant, KIUC.

Unfortunately, such analyses are still absent from the Updated CIA. The Updated CIA includes new subsections that lists community members' identified "Impacts" and the "Proposed

¹ Native Kaua'i LLC, E Malii 'Ana: A proposal for your consideration (Sept. 21, 2011), Scope of Work nos. 6 and 7.

Actions” for each impact, but there are still no determinations on the extent to which traditional and customary rights and practices will be affected and no determinations on the viability of proposed mitigation actions. There are also no reasons provided for the selective adoption of certain proposed actions from the Updated CIA into the draft EA (such as procedures for inadvertent discoveries of iwi kupuna or cultural finds), but the rejection of other proposed actions (such as restoring at least half of the water to the North Fork or continued interactive consultation with Native Hawaiians whose cultural practices have been and will be impacted by the diversions).

The Updated CIA also lacks the additional community consultation called for by OHA in its 11/17/17 comment letter on the 2017 CIA, despite a purported reopening of consultation in November 2018. According to the Community Contact Table (Updated CIA, section 6.3), there appears to have been minimal additional community consultation, aside from a joint interview with Mr. Danny Hashimoto and Ms. Sabra Kauka. It is unclear what, if any, outreach or follow-up to other consulting parties occurred in this reopened consultation period, especially where the Community Contact Table documents numerous instances where the CIA contractor had been unable to engage in consultation in 2017 “due to time constraints.” Similarly, there appears to have been no attempt by the CIA contractor to conduct “huaka’i or cultural site excursions with selected Native Hawaiian kūpuna or elder informants, Kumu Hula or other experienced and seasoned cultural practitioners and experts who have firsthand knowledge of religious, spiritual, healing, gathering or subsistence practices”² aside from a site visit that had to be organized by consulting community members, also due to purported “time constraints” in 2017.

Alternatives Analysis Fails to Consider Reasonable and Previously Identified Alternatives

The alternatives analysis in the draft EA should minimally include reasonable alternatives, such as a shorter lease duration or smaller diversion volumes that leave stream water in its natural state. Such alternatives were previously suggested by OHA and community consulting parties to the CIA, but were not included in the draft EA, thereby hamstringing the staff of the Department of Land and Natural Resources in their review of the proposed action and the BLNR in its deliberations and review of its public trust responsibilities.

Mahalo for the opportunity to provide comments on the draft EA. Should you have any questions, please contact Everett Ohta, at (808) 594-01988 or everetto@oha.org.

‘O wau iho nō,



Sylvia M. Hussey, Ed.D.
Ka Pouhana Kūikawā, Interim Chief Executive Officer

SH:eo

Attachment: Letter from Dr. Kamana’opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

² Id. Scope of Work no. 5.

Ian Hirokawa, DLNR

November 7, 2019

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C: Colette Machado, OHA Chairperson
Dan Ahuna, OHA Kaua'i Trustee
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Attachment: Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

PHONE (808) 594-1888



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STATE OF HAWAII
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560 N. Nimitz Highway
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November 17, 2017

Brad Rockwell
Power Supply Manager
Kaua'i Island Utility Cooperative
brockwel@kiuc.coop

Re: Comments on "Draft Cultural Impact Assessment for Kaua'i Island Utility Cooperative Blue Hole Diversion Long-Term Lease Project, Wailua and Hanamā'ulu Ahupua'a, Līhu'e District, Kaua'i, TMKs: Multiple" prepared by Nicole Ishihara and Hallett H. Hammatt, Ph.D., Cultural Surveys Hawai'i

Aloha e Mr. Rockwell,

Pursuant to the November 9, 2006 Memorandum of Agreement Between Kaua'i Island Utility Cooperative (KIUC) and the Office of Hawaiian Affairs (OHA)¹ (hereinafter "2006 MOA"), OHA hereby submits its comments on the report, "Draft Cultural Impact Assessment for Kaua'i Island Utility Cooperative Blue Hole Diversion Long-Term Lease Project, Wailua and Hanamā'ulu Ahupua'a, Līhu'e District, Kaua'i, TMKs: Multiple" prepared by Nicole Ishihara and Hallett H. Hammatt, Ph.D., Cultural Surveys Hawai'i, submitted to OHA on October 19, 2017 (hereinafter "*Blue Hole CIA*").

As provided under the terms of the 2006 MOA, OHA sought the assistance of Kaua'i community members with personal knowledge of the Wailua and Hanamā'ulu ahupua'a and KIUC's diversion system to review the *Blue Hole CIA*. We recognize and mahalo those who have assisted through this process. In no way, however, should OHA's or any individual's participation or non-participation in this review be meant to foreclose a later opportunity to raise concerns or objections to the *Blue Hole CIA* or any future long-term lease application by KIUC.

The *Blue Hole CIA*, as currently drafted, lacks key components of the agreed upon scope of work for a study of cultural impacts from the Blue Hole Diversion and operation of the 'Ili'ili'ula North Wailua Ditch.

¹ The "Memorandum of Agreement Between Kaua'i Island Utility Cooperative and the Office of Hawaiian Affairs" represents a settlement of a contested case request related to KIUC's prior application for a 65-year lease to use water emanating from State lands and collected from Waikoko Stream and the North Fork of the Wailua River for the purpose of operating two KIUC hydroelectric power plants.

Attachment (cont.): Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

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As you are aware, under the 2006 MOA both KIUC and OHA were to agree upon the scope of work for a study of cultural impacts from the use of the Blue Hole Diversion, as well as a consultant to conduct the study. An agreement on the scope for a cultural impact study was one of seven conditions that needed to be met before OHA withdrew its request for a contested case hearing on KIUC's 2004 application to the Board of Land and Natural Resources for a 65-year lease of water rights for the use of the Blue Hole Diversion and 'Ili'ili'ula North Wailua Ditch.

Through negotiations, KIUC and OHA did reach an agreement on the scope of a study of cultural impacts, as set forth in a proposal by Native Kaua'i LLC, dated September 21, 2011 (hereinafter "*Scope of Work*"), and included as Appendix C to the "Stipulation for Withdrawal of Request for Contested Case Hearing" (hereinafter "*Stipulation*"). As noted in the *Stipulation*, the *Scope of Work* was the second attempt of KIUC and OHA to define the parameters of a study that would partially address OHA's concerns over the impacts to cultural resources and practices, after an initial study that described the cultural backdrop for the proposed lease was deemed inadequate by OHA. Accordingly, the *Scope of Work* represents the mutually agreed upon scope for a cultural impact study and must be used to evaluate the sufficiency of the recently completed *Blue Hole CIA*.

Although KIUC has kept OHA staff apprised of issues that necessitated a change in the consultant that prepared the *Blue Hole CIA*, this draft represents the first opportunity for OHA to review the *Blue Hole CIA* in its entirety, including the scope of work, background research, and analysis.²

We note that the scope of work for the *Blue Hole CIA* is far narrower than the September 21, 2011 *Scope of Work*. Section 1.3 of the *Blue Hole CIA* provides the scope of work for the report, as follows:

1. Examination of cultural and historical resources, including Land Commission documents, historic maps, and previous research reports with the specific purpose of identifying traditional Hawaiian activities including gathering of plant, animal, and other resources or agricultural pursuits as may be indicated in the historic record.
2. Review of previous archeology work at and near the subject parcel that may be relevant to reconstructions of traditional land use activities; and to the identification and description of cultural resources, practices, and beliefs associated with the parcel.
3. Preparation of a report that summarizes the results of these research activities and provides recommendations based on findings.

By contrast, the September 21, 2011 *Scope of Work* describes seven detailed consultative tasks that were to form the foundation for a cultural impact study. These seven tasks were

² OHA staff previously raised concerns about a proposal to conduct a CIA of limited scope. See E-mail from Everett Ohta, Esq., Counsel for Environmental Law and Native Rights, Office of Hawaiian Affairs, to Brad Rockwell, Power Supply Manager, Kaua'i Island Utility Cooperative (Dec. 20, 2016, 3:38 PM HST).

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agreed upon by OHA and KIUC, as required by the 2006 MOA. As described further below, the *Blue Hole CIA* falls short of the requirements set in the Scope of Work in many key areas and these deficiencies must be addressed prior to any action by KIUC to renew its application for a long-term lease from the State.

A. The *Blue Hole CIA* does not determine the extent of impacts to cultural resources and Native Hawaiian practices

The *Blue Hole CIA* does not make a determination on the extent to which the proposed lease will impact cultural resources and traditional and customary Native Hawaiian rights and practices, as provided in the *Scope of Work*.³ The discussion on the effect and impairment of applicable resources was summarized in a few sentences in Section 9.5 of the *Blue Hole CIA*, which described potential impacts from diverted stream flow, in general terms.⁴ Potential impacts to iwi kūpuna from project activities were similarly raised in general terms, using standard language common in many cultural impact assessments.

Although these identified impacts are unquestionably important, they fail to capture the full extent of the impacts to resources and cultural practices that are affected by an interruption in ma uka to ma kai stream flows resulting from the use and diversion of stream water at the North Fork of the Wailua River and Waikoko Stream. For example, many cultural practitioners stated that the diverted stream water, which originates from Wai‘ale‘ale, is itself sacred and used for ceremonial purposes (*Blue Hole CIA*, p.121). The *Blue Hole CIA* lacks a definitive statement of how the stream water resource and associated cultural practices will be affected by the proposed lease and water diversion that results in sections of the North Fork of the Wailua River being left dry. Similarly, the *Blue Hole CIA* does not make a determination on the extent to which the stream ecosystem, surrounding vegetation gathered for cultural practices, and subsistence resources will be affected by the proposed lease and water diversion; instead these issues are presented as mere concerns expressed by consulting parties. (*Blue Hole CIA*, p.122). These impacts should be analyzed in greater detail and compare the impacts from the diversion of water under the proposed water lease against a natural flow baseline, rather than merely using the historic diverted state to analyze associated impacts.

B. The *Blue Hole CIA* avoids discussing the viability of proposed mitigation actions to reduce the impacts to cultural resources and Native Hawaiian cultural practices

Similar to the deficiencies in determining the extent of impacts to cultural resources and practices, the *Blue Hole CIA* falls short in its discussion of viable mitigation actions, as

³ Task 6 under the *Scope of Work* states:

6. Determine the extent to which applicable resources including traditional and customary Native Hawaiian rights and practices will be affected or impaired by the project.

⁴ "Participants expressed their concern for low to no flow and the negative affects [sic] on water ecosystems mauka to makai; surrounding vegetation gathered for cultural practices; traditional subsistence gathering; and ceremonial purposes." *Blue Hole CIA*, p.122.

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contemplated in the *Scope of Work*.⁵ Mitigation recommendations are also presented in Section 9.5, which recommends “that the community (kama’āina, kupuna, cultural practitioners, etc.) be consulted to reduce negative impacts on Hawaiian cultural beliefs, practices, and resources for long-term mitigation measures.” (*Blue Hole CIA*, p.122). The *Blue Hole CIA* also provides for procedures in the event that iwi kūpuna or cultural resources are inadvertently found during project construction.

While again recognizing the validity of these recommendations, the limited scope of the proposed mitigation measures glosses over the collective mana’o found throughout the *Blue Hole CIA*—that cultural resources and practices will be impacted by the proposed water lease and that these impacts can at least be partially mitigated by a reduction in historic diversions of stream water. In fact, the *Blue Hole CIA* noted that “[c]ommunity members suggested restoring at least half (50%) of the water back to North Fork.” But, rather than incorporating the restoration of stream flow into a concrete recommendation, the *Blue Hole CIA* recommends additional consultation, with no specifics about how or when such consultation should occur or what should be the subject of such discussions.⁶ We recommend that the *Blue Hole CIA* add specific recommendations related to stream restoration that will occur prior to a renewed lease application.

In addition to a recommendation regarding restoring stream flows, additional recommendations from consulting parties included stream flow monitoring and stream biota monitoring. Although such studies are components of the 2006 MOA between KIUC and OHA, they can nonetheless be reviewed in the *Blue Hole CIA* for their viability as mitigation measures.

C. Additional community consultation should occur and be incorporated into a revised *Blue Hole CIA*

In addition to the recommendation for consultation specifically on restoring stream flows, consultation for the *Blue Hole CIA* should be expanded to gather additional community mana’o about cultural resources and practices in the project area. Given the shift to a non-Kaua’i-based consultant for the *Blue Hole CIA*, additional efforts should have been made to connect with cultural practitioners and knowledgeable community members. Instead, the Community Contact Table (*Blue Hole CIA*, p.60-79) includes numerous examples where outreach to potential consultants did not occur “due to time constraints” or occurred only by letter. “Time constraints”

⁵ Task 7 of the *Scope of Work* states:

7. Propose viable action for mitigation, if applicable, to be taken for the purpose of reasonable protection and perpetuation of Native Hawaiian rights and customary practices if they are found to continue/exist in connection with any of the study project areas.

⁶ Given the number of consulting parties that raised stream restoration as a mitigation measure, it is unclear how much additional consultation is needed before stream restoration can become a recommended mitigation measure.

Attachment (cont.): Letter from Dr. Kamana‘opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

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was also cited as a reason why a community meeting and site visit needed to be organized by consulting community members rather than Cultural Surveys Hawai‘i.⁷

The *Scope of Work* outlined a much more personal and holistic process than what was documented in the *Blue Hole CIA*.⁸ Although specified in task 3 of the *Scope of Work*, there is no mention of other field studies to the Upper and Lower Waiahi Hydropower Plants, ‘Ili‘ili‘ula Stream, Waiahi Stream, Waiaka Stream, or other water sources relevant to the study. Similarly, there is no discussion of field studies of Wai‘ale‘ale or the Alaka‘i watershed, nor a discussion of water resource pathways following discharge from the Waiahi Hydropower Plants. An overview of the water discharge pathways is particularly relevant to understanding which streams may have segments that are similarly affected by diversions that collect water as part of the ‘Ili‘ili‘ula North Wailua Ditch.

Additional efforts should also be made to follow-up with some of the identified consulting parties, given the emphasis on oral interviews in task 5 of the *Scope of Work*. A reliance on firm consultation deadlines places the burden of a compressed timeline on consulting parties, when any claimed urgency was really caused by issues between KIUC and the original CIA consultant. Consultation on cultural impacts should not now be cut short when the *Scope of Work* has been in place since 2011.

⁷ See *Blue Hole CIA*, p.70 (“CSH invited Ms. Kallai to participate in the CIA and expressed that there would be no public meetings with OHA or KIUC due to time constraints, however, CSH offered to meet with a small *hui* (group) for an interview if Ms. Kallai organized it.”).

⁸ Tasks 3 and 5 of the *Scope of Work* state:

3. *Field Studies of all project areas will be conducted at locations including, but not limited to: Upper and Lower Waiahi Hydropower Plants; Waikoko, ‘Ili‘ili‘ula, Waiahi, Waiaka and other additional water sources that contributed to the hydropower project being studied. A special pilgrimage coupled with the opportunity to conduct progressive field studies of the principal water sources at the summit of Wai‘ale‘ale and the Alaka‘i watershed will also be included in the CIA. It is of our expert opinion and intuitive knowledge that it is necessary to approach and carry out this work with a holistic understanding of the various water resources and the integral relationships that begin at the summit. We also intend to track and analyze the primary and collective water resources to its final ocean-ward destinations following discharge from the Waiahi Hydropower Plants.*

...

5. *Conduct oral interviews with persons knowledgeable about the historic and traditional practices in the project area and region. Such information may be obtained through individual, group and community meetings, as well as huaka‘i or cultural site excursions with selected Native Hawaiian kūpuna or elder informants, Kumu Hula or other experienced and seasoned cultural practitioners and experts who have firsthand knowledge of religious, spiritual, healing, gathering, or subsistence practices.*

Attachment (cont.): Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

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D. Land Commission Awards and other documents should be used to identify the scope of traditional gathering and agricultural practices.

The *Blue Hole CIA* contains substantial sections dedicated to mo'olelo, ka'ao, historic documents, maps, and past archaeological reports. However, the *Blue Hole CIA* does little to use these documents to identify the scope of traditional Native Hawaiian gathering and agricultural activities in the study areas, as provided in the *Scope of Work*.⁹ Through OHA staffs' review of LCA documents from the ahupua'a of Wailua and Hanamā'ulu, numerous parcels were found to contain reference to lo'i kalo and kula lands, which can collectively help in understanding the historic reliance on and distribution of freshwater systems in the area. The loko i'a of Debora Kapule could also be described in further detail, given that these fishponds were clearly fed by freshwater. The 'auwai and lo'i identified in the *Folk and Ida* (1981) reconnaissance study could be combined with information from the LCA documents to describe the distribution of freshwater systems in the area, based on available information.

Mahalo nui loa for the opportunity to provide comments on the draft *Blue Hole CIA*. Should you have any questions regarding this letter, please contact Everett Ohta (everetto@oha.org) or Wahine'aipōhaku Tong (natashja@oha.org).

'O wau iho nō me ka 'oia 'i'o,



Kamana'opono M. Crabbe, Ph.D.
Ka Pouhana, Chief Executive Officer

KC;eo/wt

C: Collette Machado, OHA Chairperson
Dan Ahuna, OHA Kaua'i Trustee
Kaliko Santos, OHA Kaua'i Community Outreach Coordinator
Yvonne Izu, Esq. (YIzu@moriharagroup.com)
Nicole Ishihara, Cultural Surveys Hawai'i (NIshihara@culturalsurveys.com)

⁹ Tasks 1 and 2 of the *Scope of Work* state:

1. Complete a thorough study and research of historical documents, Land Commission Awards, and historic maps with the specific purpose of identifying traditional Hawaiian activities including gathering of plant, animal and other resources or agricultural pursuits including the extent to which traditional and customary Native Hawaiian rights are exercised in any of the study areas.
2. Conduct in-depth research and examinations of archaic and historic period Hawaiian chants, mo'ō 'ōlelo or oral traditions, Hawaiian language newspapers and historical documents for any references related to or associated with the study project areas. This has proven to be exceptionally valuable in understanding Native Hawaiian perceptions, use and relationships that are held in high esteem with land environments and natural resources.

From: kfertello@gmail.com
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Letter of support for state park lot 56 (SP0191) on Kaua'i
Date: Thursday, December 9, 2021 8:20:04 AM

To whom this may concern, the DLNR Board members,

Although I no longer live on Kauai, the issue of extending the lease on Kaua'i's Waineke property in Koke'e (State Parks Lot 56/Kaua'i) to the Hawaii Conference Foundation is of great importance to me. I strongly urge you to grant the 15-year lease extension.

The Waineke Lodge is embedded in my wonderful memories of church camps, youth group activities, personal retreats, and family gatherings for many, many years. My sister even married on the property in an intimate and beautiful ceremony over 40 years ago, and we had a precious weekend family reunion there in 2008 before my dad passed away a few years later. My other family members who live on Kaua'i still enjoy the usage of this special place from time to time.

I love that the property has always been available to people on Kauai at a reasonable rate and has blessed the community in so many ways and for so many reasons. It has also been maintained well by people very committed to taking care of the property and respectful of the land.

Thank you very much for considering this concern!

Sincerely,
Kathy Fertello
206-790-6926
Kfertello@gmail.com

Sent from my iPhone

From: [Peleke Flores](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 11:22:49 PM

Aloha Board Members,

My name is Peleke Flores a Kanaka Maoli from Waimea Kaua'i. I am involved in many different aina based restoration efforts and cultural education with our Kaua'i Community.

I humbly request to please DO NOT RENEW Kaua'i Island Utility Cooperatives Permit to continue to divert water from our precious and historical water ways of Wai'ale'ale and Waikoko. Below are some resources that I found, besides my own thoughts above, that should give some background to why.

"It's been nearly three years since the siphon break that shut down diversions from Wai'ale'ale and Waikoko Streams. Despite no significant need for the water, Kaua'i Island Utility Cooperative (KIUC) has again filed a request to renew its Revocable Permit (RP) 7340 for the continued diversion of Wai'ale'ale and Waikoko Streams.

KIUC has never been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity.

Now, the stream water cannot reach the Waiahi hydro plants.

Since the siphon break in June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This history shows that KIUC does *not* need water from these streams for electricity. The Board of Land Natural Resources (BLNR) *must* deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

BACKGROUND

Water is a valued resource throughout Hawai'i. Wai'ale'ale and Waikoko streams on Kaua'i are uniquely important because of their

cultural and conservation significance. The classic oli komo or hula admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, describes the Wai'ale'ale area and the fresh water's foundational role as a physical and spiritual life force in Hawai'i. Additionally, these two streams are accessible to the public to use and enjoy in the forest reserve above Loop Road, unlike many of Wailua's other streams located on private lands owned by Grove Farm and other large landowners.

For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

KIUC currently has a draft environmental assessment pending before the BLNR for a **60-year lease of water** from Wai'ale'ale and Waikoko, but they continue to be given annual permits to divert the water without any environmental review. Even with this request to lock in its water diversions for decades, KIUC has not provided the BLNR with any information about how much water it receives from streams located further down the ditch on Grove Farm lands. KIUC has also failed to provide further information on why the water from Grove Farm lands is not enough to meet their hydro power needs."

Please hear our plea. This is not the best route for sustainable energy nor our water and natural resources.

Mahalo nui loa for your time!

From: [Marie Françoise](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 8:53:04 PM

Aloha.

My name is Marie Françoise Weber and I am writing to testify for Agenda Item D02 in regards to KIUC's file to renew its RP 7340 for continued diversion of Wai'ale'ale and Waikoko streams. These are very sacred and culturally important places. These are also important public access streams when so much of the public water sources have become privatized. The Hawai'i Constitution requires that BLNR protect Hawaiian rights as trustees to the public. This requires BLNR to ensure the public has their priority rights to Wai'ale'ale and Waikoko streams above KIUC.

In order for KIUC to be authorized private use of water, the diversion needs to be proven to meet a reasonable-beneficial use. When there has been an admission by KIUC that the water will be unable to reach the hydro plants due to a break in the ditch system, it becomes clear that this resource has not and will not be needed. This is also evident by the meager %1 or less even in a high production year that these two springs bring to KIUC. It is a negligible fraction compared to what it will take away from the landscape as well as the community. Thank you for choosing wisely.

From: [Madeleine Greczyn](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda item d-2
Date: Wednesday, December 8, 2021 6:27:48 PM

Aloha,

I am writing in testimony that I am AGAINST KUIC diverting the water from the Wai'ale'ale and/or Waikoko streams. It is unlawful for anyone to wake water without an actual realized need for it.

Thank you,

Madeleine greczyn

Sent from my iPhone

From: [Logan Hamilton](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:44:41 AM

Aloha,

I am a concerned citizen who wants to point out that under Hawai'i's public trust doctrine no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable beneficial use. The BLNR is a trustee for the public. The KIUC doesn't have priority rights to the Wai'ale'ale and Waikoko streams. The public does. There should be no water banking. The KIUC has admitted that the stream water from Wai'ale'ale and Waikoko can't reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340. Lastly, 1% is not a good trade. The electricity from the Waiahi hydro plant accounts for less than 1% of KIUC's power generation and water from the Wai'ale'ale and Waikoko account for only a fraction of this percentage point.

Thank you for your consideration on this matter,

Logan Hamilton



December 8, 2021

Board of Directors:

Board of Land and Natural Resources (BLNR)
Attn: Board Members
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Gary L. Hooser
President

Andrea N. Brower
Ikaika M. Hussey
Co-Vice Presidents

Kim Coco Iwamoto
Treasurer

Re: Agenda Item D-2, Renewal of RP 7340

Aloha Members of the Board of Land and Natural Resources,
On behalf of the Hawai'i Alliance for Progressive Action (HAPA) we respectfully request that the Board deny Kaua'i Island Utility Cooperative (KIUC)'s request for the renewal of RP 7340.

Paul Achitoff

Walter Ritte Jr.

Kaleikoa Ka'eo

Michael Miranda

Pua Rossi-Fukino

Karen Shishido

Leslie Malulani Shizue Miki

To legally authorize private use of stream water, whether by revocable permit or long-term lease, the Board must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC admitted that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system.

KIUC has not been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity. Now, the stream water cannot reach the Waiahi hydro plants.

Since the siphon break in June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This history shows that KIUC does not need water from these streams for electricity.

The BLNR must deny RP 7340 in order to uphold Hawai'i's public trust doctrine.

KIUC has failed to meet its burden under the public trust doctrine to show the lack of a feasible alternative. The Board can only authorize diversion of water from Wai'ale'ale and Waikoko after fully analyzing whether KIUC must take water from public lands.

Water is a valued resource throughout Hawai'i. Wai'ale'ale and Waikoko streams on Kaua'i are uniquely important because of their cultural and conservation significance.

The classic oli komo or hula admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, describes the Wai'ale'ale area and the fresh water's foundational role as a physical and spiritual life force in Hawai'i. Additionally, these two streams are accessible to the public to use and enjoy in the forest reserve above Loop Road, unlike many of Wailua's other streams located on private lands owned by Grove Farm and other large landowners.

For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

Wai'ale'ale and Waikoko Streams are sacred resources for the community, island, and the Hawaiian people and lāhui. The proposed permit unjustly allows KIUC to take most of the base flows from these sacred streams. For a stream of such cultural and environmental significance, in a conservation district, the bar must be set higher.

The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

It is important to note that of those historically testifying in favor of the ongoing diversion of the majority baseflow, most parties represent a financial interest in downstream diversions for commercial use.

We request that the board exercise its statutory responsibility to protect the public trust and therefore deny the renewal of RP 7340.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anne Frederick', written in a cursive style.

Anne Frederick, Executive Director
Hawai'i Alliance for Progressive Action



**WRITTEN TESTIMONY BEFORE THE
BOARD OF LAND AND NATURAL RESOURCES**

IN SUPPORT OF

**THE HOLDOVER/CONTINUATION OF REVOCABLE PERMIT 7463 ISSUED TO
HAWAII ELECTRIC LIGHT COMPANY, INC. FOR NON-CONSUMPTIVE WATER
USE ALONG THE WAILUKU RIVER AT HILO, HAWAII**

Friday, December 10, 2021

9:00 a.m.

Streamed Live Via YouTube

Dear Chair Case and Members of the Board,

Hawaii Electric Company is writing in support of a one-year holdover/
continuation of Revocable Permit 7463 issued to Hawaii Electric Light Company, Inc.
("HELCO") for non-consumptive use of water along the Wailuku River at Hilo, Hawaii.

HELCO has had year-to-year water permits for decades which has enabled it to
operate two hydroelectric plants on the Wailuku River. Generating electricity by
using falling water to turn a turbine and then returning it to its source is the oldest
renewable energy resource in Hawaii. These hydroelectric plants play an important
role in meeting the State's 100% renewable energy goal and is an important
resource in our renewable energy portfolio.

One of the key goals of the 100% renewable energy mandate is to reduce and
stabilize costs by getting off oil. Having a long-term water lease is especially critical for
us to invest in the rebuilding of the Waiau Hydroelectric Plant, which was nearly a
century old, when it was damaged and taken offline during Hurricane Lane in August
2018.

In 2016, a circuit court judge ruled that the holdover of revocable permits for

multiple one-year permits is not consistent with the statute providing for temporary use of State lands. In response, and to avoid the abrupt stoppage of water being used by about a dozen permittees, including HELCO, Act 126 (2016) provided permittees three years to convert year-to-year permits to long-term leases.

Upon passage of Act 126 (2016), Hawaiian Electric immediately embarked on fulfilling the requirements for obtaining a long-term water lease. We had an environmental assessment prepared and obtained a Finding of No Significant Impact. In cooperation with the Department of Hawaiian Home Lands (“DHHL”) and the Department of Land and Natural Resources (“DLNR”), a DHHL beneficiaries meeting was held back in 2016 in Hilo to enable DHHL to make a request for a reservation of water from the Wailuku River, and determine that HELCO’s non-consumptive use of water for its hydroelectric plants would not interfere with DHHL’s need for water.

HELCO continues to work toward securing a long term water lease that will help to further the State’s 100% Renewable Portfolio Standards goal, benefit its customers, and help improve Hawaii Island’s energy resiliency. Accordingly, Hawaiian Electric strongly supports the holdover/continuation of Revocable Permit 7463 for one year beginning on January 1, 2022. Thank you for the opportunity to testify.

From: [Irena](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Tuesday, December 7, 2021 10:44:40 PM

Aloha BLNR (Board of Land Natural Resources),

Please deny the request by the Kaua'i Island Utility Cooperative (KIUC) to renew its permit (RP 7340), for the diversion of Wai'ale'ale and Waikoko Streams.

Please preserve and restore the Wai'ale'ale and Waikoko Streams, and protect Hawai'i's public trust doctrine.

It's been nearly three years since a siphon break that shut down diversions from Wai'ale'ale and Waikoko Streams. And despite no significant need for the water, Kaua'i Island Utility Cooperative (KIUC) has filed a request to renew its permit for continued diversion of Wai'ale'ale and Waikoko Streams. KIUC has never been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity. Now, the stream water cannot reach the Waiahi hydro plants. This history, and present day realities, show that KIUC does not need water from these streams for electricity.

Furthermore, the Board of Land Natural Resources (BLNR) must deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

Under Hawai'i's public trust doctrine, no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable-beneficial use.

Please consider:

1. **The BLNR is a trustee for the public: The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions.** KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does. Please protect the public rights.
2. **No water banking:** To legally authorize private use of stream water — whether by revocable permit or long-term lease — the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC admitted that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. **Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.**
3. **1% is not a good trade:** In a high production year, electricity from the Waiahi hydro plants accounts for less than 1% of KIUC's power generation, and water from Wai'ale'ale and Waikoko account for only a fraction of this percentage point. This tiny amount of

hydropower is not worth diverting millions of gallons of water per day from Wai'ale'ale and Waikoko Streams. **It has been proven that even without water from Wai'ale'ale and Waikoko, KIUC can keep the lights on as it has for the past 2 ½ years.**

4. **The Wai'ale'ale and Waikoko streams should be preserved for ecological and cultural reasons.** Water is a valued resource throughout Hawai'i, and Wai'ale'ale and Waikoko streams on Kaua'i are uniquely important because of their cultural and conservation significance. The classic oli komo or hula admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, describes the Wai'ale'ale area and the fresh water's foundational role as a physical and spiritual life force in Hawai'i. Additionally, these two streams are accessible to the public to use and enjoy in the forest reserve above Loop Road, unlike many of Wailua's other streams located on private lands owned by Grove Farm and other large landowners. Also, in this time of Earth changes, it is vital to practice ecological restoration, to preserve natural freshwaters on island, and promote energy conservation (and perhaps less-impactful renewable energy sources like solar).

Mahalo nui for your time and consideration. Please deny KIUC's request to renew its permit (RP S-7340), and preserve Wai'ale'ale and Waikoko Streams and protect Hawai'i's public trust doctrine.

Mahalo nui,
Irena

From: [Hoku Aki](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Stop KIUC
Date: Thursday, December 9, 2021 12:24:09 AM

Aloha,

I do NOT believe KIUC should have a renewed lease for any reason. Stop the nonsense.

Mahalo

Hokuanu Aki

From: [Laurie And James](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Wai"ale"ale and Wai"koko
Date: Thursday, December 9, 2021 8:10:30 AM

Aloha BLNR,
To Whom It May Concern,

My Ohana and I are deeply concern on the diversion of the water your Department is planning for Wai'ale'ale and Wai'koko.

For all of you to decide where the water goes and who get what, is preposterous and unthinkable.

You all got to put the hydro plant up there, to "Benefit" All of Kaua'i. What changed? More "Affordable" houses? Please no, until the infrastructures downside are dealt with,sewage and traffic,that is when "We All" decide where the water should be going. Check out all the streams in Ko'kee, why are they all dry, what you all are doing is so concerning! We have a lot of farms, that depend on this water!

Please reconsider what your Department is Planning on doing and stop short changing the people that lives here on the Island of Kaua'i.

Mahalo for taking your time to read Our Concerns!

Sincerely,
Laurie Avilla and Ohana

From: [Monique Carlson-Newell](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 9:34:16 AM

I am not in favor of allowing Kaua'i Utilities to divert the water any longer and absolutely am against a 60 year contract to do so.

Thank you for hearing me.

Sent from my iPhone

From: [Roslyn Cummings](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:25:08 AM

Aloha No Kakou,

Kou Inoa Manawaiakea, Roslyn Nicole Manawaiakea Malama Cummings

A hundred generations before me and a hundred generations after. I am he āina hawaii, of Hā Wai ‘I

I oppose any permitting of water theft. Water should be well managed and maintained. BLNR, DLNR must comply under Oath. Do not deprive me a woman, wahine Maoli of these lands. Right to water.

not-for-profits are not required to operate for the benefit of the public good

Kauai Island Utility Cooperative (KIUC) is a not-for-profit generation, transmission and distribution cooperative owned by the members it serves.

As a Wahine Maoli, member of KIUC. I say we put an end to the permitting of continuance with the mismanagement of our waters; āina (land and sea)

Water for our people is life; waiwai.

Hawai‘i water laws originate from kānāwai—traditional laws set forth by ali‘i nui (ruling chiefs) for the management and use of fresh water—which were codified in early laws of the Hawaiian Kingdom. The same rights are preserved today in the Hawai‘i State Constitution ([Article XII, Section 7](#) and [Article XI, Sections 7 and 9](#)) and Water Code ([HRS Chapter 174C](#)). These laws protect streams, ensuring that they have adequate water flowing through them to support:

- The cultivation of healthy crops, especially taro farming in lo‘i
- Thriving stream life
- Thriving ocean life, which is dependent on freshwater
- Families exercising their traditional and customary rights to gather resources supported by freshwater, including resources to feed their families
- Community members’ enjoyment of stream recreation activities
- Adequate recharge of underground aquifers
- Household uses
- Beautiful, healthy environments

Fiduciary duties- Fiduciary duty requires **board members to stay objective**, unselfish, responsible, honest, trustworthy, and efficient. Board members, as stewards of public trust, must always act for the good of the organization, rather than for the benefit of themselves.

I also, request to have full disclosure of all business operations regarding our lands including, but not limited to our waters.

The Fact that cannot be disputed is that the Hawaiian Islands is not part of the United States under the April 30, 1900 Organic Act Section Two of all the LAWS for the TERRITORY OF HAWAII. Simply, there are no Hawaiian Islands in the TERRITORY OF HAWAII as such there are no Hawaiian Islands in the Admissions Act of 1959 under section two. The TERRITORY OF HAWAII & THE STATE OF HAWAII have no Hawaiian Islands or metes and bounds.

NOTICE TO AGENT IS NOTICE TO PRINCIPAL
NOTICE TO PRINCIPAL IS NOTICE TO AGENT

This is a verified plain statement of fact

Truth is sovereign, and sovereign tells only the truth.

Without trust there is no honor, without honor there is no trust.

Land is common land; property, equity and rights. Air is trust law. Water is contract law.
LAW.

All men and women know that the foundation of law and commerce exists in the telling of the truth, whole truth, and nothing but the truth.

Truth as a valid statement of reality is sovereign in commerce.

An unrebutted affidavit stands as truth in commerce.

An unrebutted affidavit is acted upon as the judgement in commerce.

Guaranteed— All men and women have a remedy by the due course of law. If a remedy does not exist, or if the existing remedy has been subverted, then one may create a remedy for themselves and endow it with credibility by expressing it in their affidavit. (Ignorance of the law might be an excuse, but it is not a valid reason for the commission of a crime when the law is easily and readily available to anyone making a reasonable effort to study the law).

All corporate government is based upon Commercial Affidavits, Commercial Contracts, Commercial Liens and Commercial Distresses, hence, governments cannot exercise the power to expunge commercial processes.

The Legitimate Political Power of a corporate entity is absolutely dependent upon its possession of Commercial Bonds against Public Hazard, because no Bond means no responsibility, means no power of Official signature, means no real corporate political power, means no privilege to operate statutes as the corporate vehicle.

The Corporate Legal Power is secondary to Commercial Guarantors. Case law is not a responsible substitute for a Bond.

Municipal corporations which include cities, counties, states and national governments have no commercial reality without bonding of the entity, its vehicle (statutes) and its effects

(the execution of its rulings).

Except for a Jury, it is also a fatal offense for any person(s), even a Judge, to impair or to expunge, without a Counter-Affidavit, any Affidavit or any commercial process based upon an Affidavit.

Judicial non-jury commercial judgements and orders originate from a limited liability entity called a municipal corporation, hence must be reinforced by a Commercial Affidavit and a Commercial Liability Bond.

A foreclosure by a summary judgment (non-jury) without a commercial bond is a violation of commercial law.

Governments cannot make unbounded rulings or statutes which control commerce, free enterprise citizens, or sole proprietorships without suspending commerce by a general declaration of martial law.

It is tax fraud to use Courts to settle a dispute/controversy which could be settled peacefully outside of or without the Court.

An official (officer of the court, policemen, etc.) must demonstrate that he/she is individually bonded in order to use a summary process.

An official who impairs, debauches, voids or abridges an obligation of contract of the effect of a commercial lien without proper cause, becomes a lien debtor and his/her property becomes forfeited as the pledge to secure the lien. Pound breach (breach of impoundment) and rescue is a felony.

It is against the law for a Judge to summarily remove, dismiss, dissolve or diminish a Commercial Lien. Only the Lien Claimant or a Jury can dissolve a commercial lien.

Notice to agent is notice to principal; notice to principal is notice to agent.

PUBLIC HAZARD BONDING OF CORPORATE AGENTS All officials are required by federal, state, and municipal law to provide the name, address and telephone number of their public hazard and malpractice bonding company and the policy number of the bond and, if required, a copy of the policy describing the bonding coverage of their specific job performance. Failure to provide this information constitutes corporate and limited liability insurance fraud (15 USC) and is prim-a-facie evidence and grounds to impose a lien upon the official personally to secure their public oath and service of office.

Title 8 U.S. Code § 1481 Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions. (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality— (2) taking an oath or making an affirmation or other formal declaration of allegiances to a foreign state or a political subdivision thereof, after having attained the age of eighteen years;

Title 28 U.S. Code § 91 Hawaii. Hawaii constitutes one judicial district which includes the

Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Palmyra Island, Baker Island, Howland Island, Jarvis Island, Canton Island, and Enderbury Island: Provided, That the inclusion of Canton and Enderbury Islands in such judicial district shall in no way be construed to be prejudicial to the claims of the United Kingdom to said Islands in accordance with the agreement of April 6, 1939, between the Governments of the United States and of the United Kingdom to set up a regime for their use in common. Court shall be held at Honolulu.

Parties:

Roslyn Nicole Manawaiakea Cummings/Lien Claimant P.O. Box 315

Kalaheo, HI zip code exempt

non domestic

Lien Debtor(s):

DLNR (Department of Land and Natural Resources) c/o Suzanne Case

Kalanimoku Building

1151 Punchbowl St.

Honolulu, HI 96813

KIUC (Kauai Island Utility Cooperative) c/o David Bissel

4463 Pahee St. #1

Lihue, HI 96766

Allegations:

Allegations arise from the conduct of Lien Debtor(s) in regards to conduct doing business as Roslyn Nicole Manawaiakea Cummings.

1. Roslyn Nicole Manawaiakea Cummings was born as Roslyn Nicole Manawaiakea Malama on November 24, 1983, the daughter of Edmund Francis Malama Jr. and Darlene Rita.
2. Edmund Francis Malama Jr. was born on May 19, 1962, the son of Edmund Francis Malama and Gloria Jane Albarado.
3. Edmund Francis Ku Malama was born on March 26, 1942, the son of Joseph Ku Malama and Lucille Ahana.
4. Joseph Ku Malama was the son of Ku Nahinu Malama and Hana Keoua Puahi Pauahi.
5. Ku Nahinu Malama was the son of Nahinu Malama and Kahololio Hololio Kanewahine.
6. Nahinu Malama was the son of George William Kaila Malamanui Makanui and Luke "Lucy" B. Naumu.
7. Luke "Lucy" B. Naumu was the daughter of Naumu Benjamin Kapuaaiki/B. Naumu and Keawenui.
8. Naumu Benjamin Kapuaaiki/B. Naumu was the son of Kapuaaiki and Kupa/Kuwa/Kaapumohu/Kaapuwai/Kaapumoku/Kuwalu/Kawalu.
9. Kapuaaiki was the son of Kahaulani and Kahiwa Kanekapolei II.

10. Kahaulani was the son of Kalani Paiea Wohi o Kaleikini Kealiikui Kamehameha o Iolani I Kaiwikapu Kau Ka Liholiho Kunuiakea and Kanekapolei a Umiaemoku a Kauakahiakua o Lono/Kanekapolei I.
11. Roslyn Nicole Manawaiake Cummings is a public trust operating as a benefit to Roslyn Nicole Manawaiake Cummings acting as a holding trust for Roslyn Nicole Manawaiake Cummings.
12. Roslyn Nicole Manawaiake Cummings is the only contributing beneficiary of the Roslyn Nicole Manawaiake Cummings trust.
13. Jesse Kekoa Cummings, Roslyn Nicole Manawaiake Cummings, Jaidalyn Kuliaikaulani Cummings, Ryder Kekoa Cummings, Madison Nicole Wailana Cummings, Hunter Kaikoa Malama Cummings, Maddox Waika Malama Cummings, Noah Blake Kaeo Cummings, and Luke Jax Kanawai Ku Malama Cummings are the only legitimate trustees of claimant of all the proceeds, products, fixtures, and the like of the Roslyn Nicole Manawaiake trust.

Proof of Allegations:

1. Lien Debtor affirms that Roslyn Nicole Manawaiake Cummings was born as Roslyn Nicole Manawaiake Malama on November 24, 1983, the daughter of Edmund Francis Malama Jr. and Darlene Rita. If no timely rebuttal it is AFFIRMED.
2. Lien Debtor affirms that Edmund Francis Malama Jr. was born on May 19, 1962, the son of Edmund Francis Malama and Gloria Jane Albarado. If no timely rebuttal it is AFFIRMED.
3. Lien Debtor affirms that Edmund Francis Ku Malama was born on March 26, 1942, the son of Joseph Ku Malama and Lucille Ahana. If no timely rebuttal it is AFFIRMED.
4. Lien Debtor affirms that Joseph Ku Malama was the son of Ku Nahinu Malama and Hana Keoua Puahi Pauahi. If no timely rebuttal it is AFFIRMED.
5. Lien Debtor affirms that Ku Nahinu Malama was the son of Nahinu Malama and Kahololio Hololio Kanewahine. If no timely rebuttal it is AFFIRMED.
6. Lien Debtor affirms that Nahinu Malama was the son of George William Kaila Malamanui Makaanui and Luke "Lucy" B. Naumu. If no timely rebuttal it is AFFIRMED.
7. Lien Debtor affirms that Luke "Lucy" B. Naumu was the daughter of Naumu Benjamin Kapuaaiki/B. Naumu and Keawenui. If no timely rebuttal it is AFFIRMED.
8. Lien Debtor affirms that Naumu Benjamin Kapuaaiki/B. Naumu was the son of Kapuaaiki and Kupa/Kuwa/Kaapumohu/Kaapuwai/Kaapumoku/Kuwalu/Kawalu. If no timely rebuttal it is AFFIRMED.
9. Lien Debtor affirms that Kapuaaiki was the son of Kahaulani and Kahiwa Kanekapolei II. If no timely rebuttal it is AFFIRMED.
10. Lien Debtor affirms that Kahaulani was the son of Kalani Paiea Wohi o Kaleikini Kealiikui Kamehameha o Iolani I Kaiwikapu Kau Ka Liholiho Kunuiakea and Kanekapolei a Umiaemoku a Kauakahiakua o Lono/Kanekapolei I. If no timely rebuttal it is AFFIRMED.
11. Lien Debtor affirms that Roslyn Nicole Manawaiake Cummings is a public trust

operating as a benefit to Roslyn Nicole Manawaiakea Cummings acting as a holding trust for Roslyn Nicole Manawaiakea Cummings. If no timely rebuttal it is AFFIRMED.

12. Lien Debtor affirms that Roslyn Nicole Manawaiakea Cummings is the only contributing beneficiary of the Roslyn Nicole Manawaiakea Cummings trust. If no timely rebuttal it is AFFIRMED.

13. Lien Debtor affirms that Jesse Kekoa Cummings, Roslyn Nicole Manawaiakea Cummings, Jaidalyn Kuliaikaulani Cummings, Ryder Kekoa Cummings, Madison Nicole Wailana Cummings, Hunter Kaikoa Malama Cummings, Maddox Waika Malama Cummings, Noah Blake Kaeo Cummings, and Luke Jax Kanawai Ku Malama Cummings are the only legitimate trustees of claimant of all the proceeds, products, fixtures, and the like of the Roslyn Nicole Manawaiakea trust. If no timely rebuttal it is AFFIRMED.

NOTICE is hereby given that Lien Debtor has ten (10) days after receipt of this Affidavit of Obligation to rebut, deny, or otherwise prove invalid the above allegations. Failure to rebut, deny, or otherwise prove any allegation will be construed to be failure to rebut, deny, or otherwise prove all allegations.

Ledgering:

Ledgering in the instant matter is comprised solely of the value of the life-long labor of Roslyn Nicole Manawaiakea Cummings valued at the commercial rate of Two Billion (\$2,000,000,000.00) Dollars in functional currency of the United States.

Surety:

Surety for the value of this Affidavit of Obligation/Commercial Lien is:

Roslyn Nicole Manawaiakea Cummings P.O. Box 315 Kalaheo, HI 96741

I, Roslyn Nicole Manawaiakea Cummings, certify on my own commercial liability that I have read the above and do know that it is true, correct, and complete, and not misleading. The truth, the whole truth, and nothing but the truth.

ROSLYN CUMMINGS

c/o Roslyn Cummings

Living, Breathing Human Being

c/o General Delivery (Box 315)

Kalaheo Station

Kalaheo, Kauai, Hawaii Nei

(U.S.P.Z. Exempt - 96741)

Laws in America

1. The IRS is not a US government agency. It is an agency of the IMF (International Monetary Fund)

(Diviersified Metal Products v I.R.S. et al. CV-93-405E-EJE U.S.D.C.D.I., Public Law 94-564, Senate report 94-1148 pg. 5967, Reorganization Plan No. 26, Public Law 102-391)

2. The IMF (International Monetary Fund) is an agency of the U.N.

Blacks Law Dictionary 6th edition, page 816

3. The United States has NOT had a Treasury since 1921

41 Stat. Ch. 214 page 654

4. The U.S. Treasury is now the IMF

Presidential Documents Volume 240 No. 4 page 113, 22 U.S.C. 285-2887

5. The United States does not have any employees because there is no longer a United States! No more organizations. After 200 years of bankruptcy it is finally over.

Executive Order 12803

6. The FCC, CIA, FBI, NASA, and all other alphabet gangs were never part of the U.S. government. Even though the "U.S. Government" held stock in the agencies.

U.S. v Strang, 254 US491 Lewis v US, 680 F.2nd, 1239

7. *Social Security Numbers* are issued by the U.N. through the IMF. The application for a Social Security Number is the SS5 Form. The *Department of the Treasury* (IMF) issues the SS5 forms, not the Social Security Administration. The new SS5 forms do not state who publishes them while the old form states they are Department of the Treasury.

20 CFR Chap. 111 Subpart B, 422.103(b)

8. There are no Judicial courts in America, and have not been since 1789. Judges do 8. 8. There are no Judicial Courts in America, and have not been since 1789. Judges do not enforce Statutes and Codes. Executive Administrators enforce Statutes and Codes.

FRC v. GE 281 US 464 Keller v PE US 428 1 Stat. 138-178

9. There have not been and judges in America since 1789. There have been just administrators.

FRC v. GE 281 US 464 Keller v PE US 428 1 Stat. 138-178

10. According to GATT (The general Agreement on Tariffs and Trade) you MUST have a Social Security Number.

House Report 103-826

11. New York City is defined in Federal Regulations as the United Nations. Rudolph Guiliani states on C-Span that "New York City is the capitol of the World".

20 CFR Chap. III, Subpart B 44.103 (b) (2) (2)

12. Your Social Security check comes directly from the IMF, which is an agency of the United Nations.

(It says U.S. Department of Treasury at the top left corner, which again is part of the U.N. as pointed out above)

DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

SUMMARY

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- Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. For the purpose of Section 242, acts under the "color of law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this status include police officers, prison guards, and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race color, religion, sex, handicap, familial status or national origin of the victim.
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TITLE 18, U.S.C. SECTION 242

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- Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to deal.
-

because the USA's belligerent illegal occupation of the Hawaiian Kingdom they are forcing the USA rules and regulations upon a foreign country.

Since the United States Congress enacted a [joint resolution](#) purporting to annex the Hawaiian Islands, which was signed by President McKinley into U.S. law on July 7, 1898, American municipal laws have been illegally imposed within the territorial jurisdiction of the Hawaiian Kingdom. U.S. constitutional scholar, Westel Willoughby, wrote at the time of the purported annexation by legislative act:

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in the Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act... Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted.

WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES §239 (1929).

Along the same lines, the Hawaiian Kingdom Supreme Court, in *In re Francis de Flanchet* in 1858, stated that the “laws of a nation cannot have force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction.” There is no treaty transferring Hawaiian territory to the United States. As such, the Hawaiian Kingdom continued to exist as an independent State that was acknowledged by the United States in arbitral proceedings before the Permanent Court of Arbitration in [*Larsen v. Hawaiian Kingdom*](#) despite the unlawful overthrow of its government by the United States on January 17, 1893.

On the subject of the 1898 joint resolution of annexation of the Hawaiian Islands, the U.S. Department of Justice’s Office of Legal Counsel, after covering the territorial limits of legislative acts, concluded in a 1988 legal opinion, “It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.” The complaint states: *If it was unclear how Hawai‘i was annexed by legislation, it would be equally unclear how the Congress could create a territorial government, under an [An Act to provide a government for the Territory of Hawaii](#) in 1900, within the territory of a foreign State by legislation. It would also be unclear how the Congress could rename the Territory of Hawai‘i to the State of Hawai‘i in 1959, under an [Act To provide for the admission of the State of Hawai‘i into the Union](#) by legislation.*

International law at the time obligated the United States to administer Hawaiian Kingdom law after it unlawfully overthrew the Hawaiian Kingdom Government. The law of occupation was triggered after the United States, as the occupying State, secured effective control over Hawaiian territory. This effective control began when Queen Lili‘uokalani conditionally surrendered to the United States President on January 17, 1893. The Queen stated: *Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.*

UNITED STATES HOUSE OF REPRESENTATIVES, 53RD CONGRESS, EXECUTIVE DOCUMENTS ON AFFAIRS IN HAWAII: 1894-95 (1895), 586.

President Cleveland initiated a presidential investigation on March 11, 1893 by appointing Special Commissioner James Blount to travel to the Hawaiian Islands and to provide periodic reports to the U.S. Secretary of State Walter Gresham. Commissioner Blount arrived in the Islands on March 29th, where he “directed the removal of the flag of the United States from the government building and the return of the American troops to their vessels.” His first report was dated April 6, 1893, and his final report was dated July 17, 1893. On October 18, 1893, Secretary of State Gresham notified the President:

The Provisional Government was established by the action of the American minister and the

presence of the troops landed from the Boston, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.

The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act. ...

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign...

Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.

UNITED STATES HOUSE OF REPRESENTATIVES, 53RD CONGRESS, EXECUTIVE DOCUMENTS ON AFFAIRS IN HAWAII: 1894-95 (1895), 462-463.

When negotiations began at the U.S. Legation in Honolulu on November 13, 1893, U.S. Minister Albert Willis stated to the Queen the position taken by the President after a full investigation. Willis expressed “the President’s sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed.” “To this,” Willis noted, “she bowed her acknowledgements.” Negotiations continued for another month. The illegality of the overthrow was due to the international principle of non-intervention in the internal affairs of another State.

President Cleveland delivered a [manifesto](#) to the Congress on his investigation into the overthrow of the Hawaiian Government on December 18, 1893. The President concluded that the “military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.” He also determined “that the provisional government owes its existence to an armed invasion by the United States.” Finally, the President admitted that by “an act of war...the Government of a feeble but friendly and confiding people has been overthrown.” Referring to the annexation plot of the insurgents, Cleveland concluded “that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods.”

Unbeknownst to the President, an [agreement](#) of peace was reached on the very same day Cleveland gave his *manifesto* to the Congress. Gresham acknowledged receipt of Willis’ dispatch of the agreement dated December 20, 1893, in a telegram of January 12, 1894, in which he stated, “Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested.” According to the executive agreement, by exchange of notes, the President committed to restoring the Queen as the constitutional sovereign, and the Queen agreed, after being restored, to grant a full pardon to the insurgents. As a constitutional monarch, however, the agreement required an additional signature of a cabinet minister to make it binding under Hawaiian constitutional law.

From: jill.czarnecki@gmx.com
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 4:34:51 PM

Please deny RP S-7340!

The BLNR is a trustee for the public: The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

To legally authorize private use of stream water — whether by revocable permit or long-term lease — the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC admitted that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.

In a high production year, electricity from the Waiahi hydro plants accounts for less than 1% of KIUC's power generation, and water from Wai'ale'ale and Waikoko account for only a fraction of this percentage point. This tiny amount of hydropower is not worth diverting millions of gallons of water per day from Wai'ale'ale and Waikoko Streams. It has been proven that even without water from Wai'ale'ale and Waikoko, KIUC can keep the lights on as it has for the past 2 ½ years.

Please protect this irreplaceable community resource for all Hawaiians, residents and future generations!

Mahalo
Jill Czarnecki

--

Sent from my Android phone with GMX Mail. Please excuse my brevity.



December 9, 2021

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

Re: December 10, 2020, Agenda Item D-2: Holdover/Continuation of
Revocable Permits For Water Use on the Islands of Hawai'i and Kaua'i;
RP S-7340 to Kaua'i Island Utility Cooperative

Dear Chair Case and Members of the Board:

Earthjustice submits this testimony *in strong opposition* to the continuation of Revocable Permit S-7340 ("RP 7340") for diversion of water by Kaua'i Island Utility Cooperative ("KIUC"). In past years, the Board lacked sufficient information to adequately determine whether authorizing diversion of water from Wai'ale'ale and Waikoko streams complied with Hawai'i's public trust doctrine. However, now that *KIUC admits that it cannot use water* from Wai'ale'ale and Waikoko streams because of a siphon break, and *KIUC does not have any foreseeable plants to repair the ditch system*, this Board *has no conceivable legal basis* on which to approve RP 7340. Accordingly, Earthjustice respectfully requests that this Board deny KIUC's request that it renew RP 7340 for another 1-year term.

1. This Board's Duties Under the Hawai'i Constitution

"Article XI, section 1 and Article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." *In re Waiāhole Ditch Combined Contested Case Proceeding*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) ("*Waiāhole*"). Article XI, section 1 declares that "all public resources are held in trust by the state for the benefit of its people" and mandates that the "State and its subdivisions shall conserve and protect" the State's water resources. Article XI, section 7 reiterates that "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."

“The purpose of the state water resource public trust is to protect certain uses.” *Kaua’i Springs, Inc. v. Planning Comm’n of County of Kaua’i*, 133 Hawai’i 141, 172, 324 P.3d 951, 982 (2014). The protected trust uses of water are: (1) the maintenance of waters in their natural state; (2) the use of water to meet domestic (appurtenant) needs; (3) the exercise of Native Hawaiian traditional and customary rights; and (4) the Department of Hawaiian Homeland’s constitutionally protected reservations of water. *Id.* (citations omitted).

“When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state.” *Id.* at 173, 324 P.3d at 983. “The agency is duty-bound to place the burden on the [diverter] to justify the proposed water use in light of the trust purposes.” *Id.* The agency evaluates the proposed “use under a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.” *Id.*

Under this framework, off-stream users like KIUC must demonstrate their “actual needs and . . . the propriety of draining water from public streams to satisfy those needs.” *Waiāhole*, 94 Hawai’i at 162, 9 P.3d at 474.¹ Off-stream water users like KIUC “must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources.” *Id.* at 161, 9 P.3d at 473. “The continuing *authority* of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes.” *Id.* at 141, 9 P.3d at 453 (emphasis in original).

2. Renewal of KIUC’s Revocable Permit Violates the Hawai’i Constitution

For years on end, KIUC has failed to show that it needs water from Wai’ale’ale and Waikoko Streams to meet a reasonable-beneficial use that cannot be met using other alternative sources of water as required by the public trust doctrine. Now, KIUC lacks even the ability to use the water because of the siphon break in the ditch system. Rubberstamping yet another annual RP without any demonstrated prospect of actual

¹ See also Haw. Rev. Stat. § 174C-3 (defining “reasonable-beneficial use” as “the *use of water in such a quantity as is necessary* for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest”) (emphasis added).

use in the coming year and the indefinite future is legally untenable and would be the worst dereliction of the Board's constitutional public trust duties yet.

In past years, KIUC claimed it needed to divert water from Wai'ale'ale and Waikoko Streams to keep the Waiahi hydro plants running and to meet Kaua'i's energy needs. The Board accepted this justification, renewing RP 7340 in spite of repeated calls from the community that it determine, among other matters relevant to authorization of KIUC's off-stream diversion:

- (1) whether the Waiahi hydro plants qualify as a reasonable-beneficial use of stream water in light of the small amount of electricity they provide (around 1% annually); and
- (2) whether the Waihi hydro plants can be kept running using other, alternative sources of water located on private lands further down the ditch system.

The latest developments on the ground have affirmatively demonstrated what the Board has consistently refused to acknowledge—namely, that even after the siphon break has shut down the diversions of Wai'ale'ale and Waikoko and prevented KIUC from using *any* water from those streams for the past two and a half years, KIUC can still provide a stable supply of electricity for the island. In other words, KIUC simply does not need water from Wai'ale'ale and Waikoko to power the Waiahi hydro plants and meet Kaua'i's energy demands, as the utility had previously asserted. In fact, records requested by Earthjustice during last year's hearing demonstrate that the Waiahi hydro plants continued to generate electricity, ostensibly using water from streams located further down-ditch from Wai'ale'ale and Waikoko Streams, even after the "complete breach" in the ditch system that occurred in August 2019.² See Staff

² The 'Ili'ili'ula North Wailua Ditch provides water to the upper hydro plant and takes water from three primary diversions located on Wai'ale'ale, Waikoko, and 'Ili'ili'ula Streams, and six smaller streams. The lower hydro plant diverts water from Waiahi Stream, 'Ili'ili'ula Stream, and several smaller streams. See SSFM International, Inc. *Waiahi Hydropower Long-Term Water Lease, Draft Environmental Assessment, Island of Kaua'i, Hawaii*, at 5-6, 62 (2018) ("DEA"), available online at http://oeqc2.doh.hawaii.gov/Doc_Library/2019-12-08-KA-Republished-DEA-Waiahi-Hydropower-Long-Term-Water-Lease.pdf.

Submittal, Item D-2 at Exhibit B (Letter from D. Bissel with Tailrace and 2019 Power Production Records attached).³

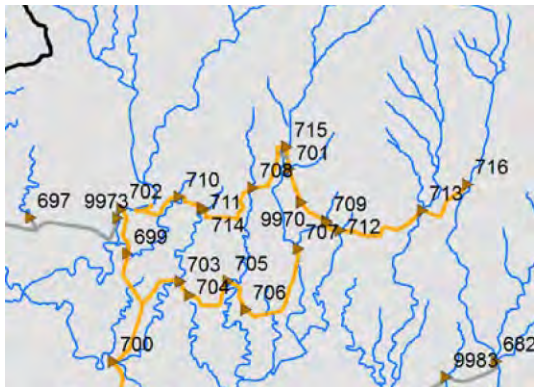
Under the public trust doctrine, this Board must deny KIUC's RP because the water from Wai'ale'ale and Waikoko Streams is not actually needed for a reasonable-beneficial use, and in fact cannot reach the Waiahi hydro plants to be put to any use at all.

3. Even If KIUC Repairs the Ditch System and Renews Its Request for a Water Permit Or Long-Term Lease The One Percent of Electricity Generated by the Waiahi Hydro Plants Is Not A Reasonable-Beneficial Use

As highlighted above, KIUC is able to both provide stable, affordable electricity to Kaua'i residents, **and** keep the Waiahi hydro plants running, without using water from Wai'ale'ale and Waikoko Streams, contrary to prior representations made to the community and this Board. Even if KIUC repairs the siphon at some point in the future and asserts that it "needs" water from Wai'ale'ale and Waikoko to maximize output from the Waiahi hydro plants, maximizing production from an outdated hydropower system is not necessarily a reasonable-beneficial use of water as this Board has assumed in past years.

Determination of reasonable-beneficial use is a fact-specific inquiry. As already highlighted in the staff submittal, KIUC's hydro plants do not qualify as "instream" uses because the 'Ili'ili'ula North Wailua ditch system takes from Wai'ale'ale Stream, which naturally drains into the North Fork of Wailua River and discharges the water through the Waiahi hydro plants and into Waiahi stream, which drains into the South Fork of Wailua River. *See Staff Submittal, Item D-2 at 4, Exhibit A.*

³ During last year's hearing Earthjustice requested that KIUC provide stream gaging and power production information to inform this Board's exercise of its public trust duties. It is unclear why KIUC has provided the Board only the old 2019 power production records that were provided to Earthjustice in January of this year rather than updated records including power production for 2020 and 2021 (if any).



This image depicts streams diverted into the 'Ili'ili'ula North Wailua ditch system. Only diversions 716 and 713, located on Wai'ale'ale and Waikoko Stream respectively, are located on publicly accessible lands.

Source: IFSAR at 86, Figure 13-1, *infra*, note 5.

Further, there are unique instream values at issue here because of the cultural significance of the Wai'ale'ale and Waikoko Streams, and also because these streams are among the few mauka tributaries of the Wailua River accessible to the public because they are located in the Līhu'e-Kōloa Forest Reserve, rather than on private lands. *See* Exhibit A (Earthjustice Comments on KIUC's Draft Environmental Assessment for the Waiahi Hydropower Long-Term Water Lease) (describing instream use values harmed by KIUC's diversions).⁴

Finally, even at maximum production, the Waiahi hydro plants have never accounted for more than 1.4% of KIUC's total power production. In recent years, energy from the Waiahi hydro plants has accounted for less than 1% of annual electricity, with water from Wai'ale'ale and Waikoko accounting for an even smaller proportion.⁵ This small amount of non-essential energy production must be weighed against the millions of gallons per day (mgd) that KIUC diverted from Wai'ale'ale and Waikoko Streams to power the Waiahi hydro plants in the past (13.5 mgd on average).⁶ On balance, KIUC's non-essential energy production simply does not outweigh the

⁴ The Office of Hawaiian Affairs ("OHA") requested a contested case hearing in 2004, when KIUC first requested a long-term water lease for these streams, raising many of these same issues. *See* Exhibit B (OHA Comments on KIUC's Draft Environmental Assessment for the Waiahi Hydropower Long-Term Water Lease).

⁵ *See* Comm'n on Water Res. Mgm't, State Dep't of Land & Nat. Res., Instream Flow Standard Assessment Report, Island of Kauai, Hydrologic Unit 2040, Wailua, at 93 (Aug. 2018) ("IFSAR"), *available online at* <https://files.hawaii.gov/dlnr/cwrn/submittal/2018/sb20180821B2Ex1.pdf>.

⁶ *See* DEA, *supra* note 2 at 15 (Table 3).

public's interest in the use and protection of these culturally and recreationally significant streams.

4. Proceedings Before the Commission on Water Resource Management Cannot Replace or Postpone This Board's Exercise of Its Public Trust Duties

Pursuant to a permit condition imposed by this Board in 2017, KIUC is required to leave enough water flowing in the streams to meet the amended interim instream flow levels ("IIFSs") proposed by Commission staff in August 2018 (3.5 of an estimated 11.5 million gallons per day (mgd) in Wai'ale'ale, and 0.8 of an estimated 2.5 mgd in Waikoko). The IIFSs proposed by staff in 2018, however, were never approved by the Commission. And in any event, they do not justify this Board continually rubberstamping a permit to KIUC year after year, without any scrutiny—and now without any demonstrated need or ability to use the water.

Further, because this Board has failed to require gaging by KIUC under past permits, the Board continues to lack visibility and data on what it is approving. Although Commission staff have installed a gage on Wai'ale'ale Stream, that gage was non-functional for much of the past year and a half, and there is not a calibrated stream gage on Waikoko Stream to monitor flow levels. KIUC's own gages measure water diversions into the 'Ili'ili'ula North Wailua Ditch, not the amount of water in the stream.

As background on the IIFSs, the Commission held a hearing on the IIFSs proposed by Commission staff on August 21, 2018, at Kaua'i Community College in Līhu'e. Earthjustice, Hui Ho'opulapula Nā Wai o Puna,⁷ and many other organizations and individuals testified that the staff proposed IIFSs—which leave less than one-third of median (Q₅₀) flow in the streams—were simply too low to protect native stream life and cultural practices that require flowing water.

Following public testimony, the Commissioners were considering a proposal to amend the staff proposed IIFSs **upwards**, when KIUC requested a contested case hearing to prevent further action by the Commissioners to amend the staff proposal. If

⁷ Earthjustice represents Hui Ho'opulapula Nā Wai o Puna in the contested case proceeding on IIFSs currently pending before the Commission.

any one of several more protective flow-setting methodologies used by the Commission to set IIFSs for other streams are ultimately adopted, the contested case will result in **more water** flowing in the streams than the staff proposed IIFS levels that are currently being implemented by KIUC.

As discussed in the 2018 Commission Staff Submittal, there are several methodologies for selecting a stream flow level based on habitat restoration values: (i) the Q_{70} value; (ii) 80% of the Q_{50} value; and (iii) 64% of the BFQ_{50} . For Wai'ale'ale Stream, the three values, respectively, are: (i) 10.5 mgd, (ii) 9.2 mgd, and (iii) 3.6 mgd.⁸ Commission staff did not explain their reasoning for selecting the methodology which results in the smallest amount of water staying in the stream, and provides the *least* benefit to stream life. Further, other methodologies used by the Commission to protect other instream values, including cultural values, provide for even higher restoration levels, including 100% restoration.

More importantly, IIFSs set a floor, and there can be no presumption under the public trust doctrine that flow levels above the IIFSs are available to off-stream users. On the contrary, as described above, stream diverters must always demonstrate and prove actual water needs and reasonable-beneficial use of diverted water, before the Board authorizes the taking of public waters. The Board is not entitled to rely on the Commission and the IIFS proceeding to execute its separate and independent duties as trustee to ensure that KIUC's proposed use of stream waters complies with the public trust.

Indeed, given KIUC that admits it has no ability to actually use the water this year and for the indefinite future, rubberstamping yet another permit for another year would be the height of dereliction and abdication of the Board's public trust duties. The Board should deny the request to renew RP 7340, without prejudice to KIUC reapplying if and when it can demonstrate an actual need for reasonable-beneficial use and otherwise justify any diversions of public waters in light of protected public trust purposes.

⁸ See Staff Submittal for the Meeting of the Commission on Water Resource Management, August 21, 2018, Līhu'e, Kaua 'i, Amended Interim Instream Flow Standards for the Surface Water Hydrologic Unit of Wailua (2040): Waikoko and North Fork Wailua Stream, at 12, *available online at* <https://files.hawaii.gov/dlnr/Commission/submittal/2018/sb20180821B2.pdf>.

Board of Land and Natural Resources

December 9, 2021

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Mahalo for this opportunity to submit testimony.



Leinā'ala L. Ley
Isaac H. Moriwake
EARTHJUSTICE

Enclosures



January 7, 2020

Via Email

Ian C. Hirokawa
Department of Land and Natural Resources
1151 Punchbowl Street, Room 220
Honolulu, HI 96813
ian.c.hirokawa@hawaii.gov

Re: Waiahi Hydropower Long-Term Water Lease, Draft Environment Assessment, Island of Kaua'i, Hawaii (Oct. 2019)

Dear Mr. Hirokawa:

Earthjustice submits these comments on behalf of Hui Ho'opulapula Nā Wai o Puna (the "Hui") in response to the Department of Land and Natural Resource's ("Department's") December 8th request for public comment on the Waiahi Hydropower Long-Term Water Lease, Draft Environment [sic] Assessment, Island of Kauai, Hawaii (Oct. 2019) ("DEA"). As discussed in detail below, withdrawing more than two thirds of natural stream flow from Wai'ale'ale and Waikoko Streams for a 65 year term will have significant effects on the environment and cultural practices in the diversion area. Therefore, the proposed finding of no significant impacts ("FONSI") made in the DEA is erroneous. Further, the DEA is invalid as a matter of law because it incorrectly defines the subject action, and because it proceeds from an erroneous exemption determination from the Attorney General, thereby predetermining the FONSI outcome.

Because the proposed 65 year water lease authorizing diversion of water from multiple streams in the Līhu'e-Kōloa Forest Reserve will have significant effects under the law, Kaua'i Island Utility Cooperative ("KIUC") must prepare an environmental impact statement ("EIS"), evaluating a reasonable range of alternatives, rather than the abbreviated and deficient environmental assessment currently under consideration. Without an EIS exploring a reasonable range of alternatives, **including complete decommissioning of the existing diversions and 100% restoration of water to Wai'ale'ale and Waikoko Streams**, the significant, long-term effects of the proposed 65 year water lease cannot be fully assessed, evaluated, mitigated, and addressed, as required by Hawai'i Revised Statutes ("HRS") Chapter 343, the Hawai'i Environmental Policy Act ("HEPA"), and other applicable law.

I. THE PROPOSED FONSI IS ERRONEOUS BECAUSE THE ACTION WILL HAVE SIGNIFICANT ADVERSE EFFECTS UNDER HAR § 11-200.1-13

HEPA's fundamental purpose is to ensure that State and County agencies fully and publicly examine the environmental impacts of their actions before those actions proceed. See HRS § 343-1. "An environmental assessment under HEPA is required if three conditions are satisfied: (1) the proposed activity is an 'action' under HRS § 343-2 (2010); (2) the action proposes one or more of the nine categories of land uses or administrative acts enumerated in HRS § 343-5(a) (2010); and (3) the action is not declared exempt pursuant to HRS § 343-6(a)(2) (2010)." *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 512, 403 P.3d 277, 289 (2017). An approving agency must take a "'hard look' at environmental factors" before exercising its discretionary authority to approve an action that is subject to HEPA, such as the proposed 65 year lease authorizing KIUC to take all stream water above low flow levels for hydropower generation. *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 342 167 P.3d 292, 335 (2007) (citation omitted).

Unfortunately, applicant KIUC and its consultant SSFM International, Inc. ("SSFM") chose to elevate form over substance in completing this DEA. The information provided in the DEA is at various times confusing, misleading, legally irrelevant, and incomplete, in contravention of the administrative rules. See Hawai'i Administrative Rules ("HAR") § 11-200.1-1(c)(1)-(3). For example, the DEA repeatedly raises the needs of downstream water users, including agricultural water users, as a factor supporting KIUC's long-term lease application. See DEA at 52, 72, 76, 99, 101, 102. However, the DEA provides absolutely no analysis as to whether the amounts of water taken from Wai'ale'ale and Waikoko Streams, two small tributaries with total median flow under 14 million gallons per day ("mgd"), are in fact necessary to augment the flow of Waiahi stream in order to meet legitimate, actual needs of downstream users.¹ Similarly, the DEA suggests that full restoration of Wai'ale'ale and Waikoko Streams could necessitate shutting down the Waihi hydropower plants altogether, with no supporting analysis. See DEA at 37. These conclusions lack factual support and do not foster fair and transparent public disclosure, inquiry, and analysis.

As just one example of the misleading nature of the information presented in the DEA, the no action alternative states in conclusory fashion: "While it may be possible for the two hydropower plants to operate with water from the 'Ili'ili'ula Stream Diversion only, this would result in . . . **an approximate doubling of energy cost per kWh.**" DEA at 37 (emphasis added). Of course, the Waiahi hydropower plants account for approximately 1% of energy generation

¹ Comm'n on Water Res. Mgm't, State Dep't of Land & Nat. Res., Instream Flow Standard Assessment Report, Island of Kauai, Hydrologic Unit 2040, Wailua, at 31 (Table 3-6) (Aug. 2018) ("IFSAR").

for the island, *see* IFSAR at 93, and the purported “doubling of energy cost” would apply to this same small portion of KIUC’s energy portfolio. KIUC has publicly acknowledged elsewhere that this would amount to no more than a “single-digit dollar[]” increase per ratepayer each month. *See* Minutes for the Meeting of the Comm’n on Water Res. Mgm’t (Aug. 21, 2018) available at <http://files.hawaii.gov/dlnr/cwrm/minute/2018/mn20180821.pdf>. However, this information is not disclosed anywhere in the DEA, leaving the reader with the impression that closing the Waiahi hydro plant will double electricity bills for KIUC’s ratepayers. The DEA is riddled with this type of misleading statement about the project.

Further, while the DEA goes through various environmental factors that could be affected by the proposed action—including air quality and climate, noise, geology and soils, natural hazards, water resources (downstream users and groundwater), biological resources, cultural resources, socioeconomic characteristics, and recreation and visual resources—the DEA spends a mere two pages analyzing the impacts on cultural practices and potential mitigation measures. *See* DEA at 90-92.² This choice is baffling because: the Office of Hawaiian Affairs (“OHA”) challenged the last lease application for failure to adequately analyze cultural impacts; cultural practices are the heart of the ongoing contested case hearing before the Commission on Water Resource Management (“CWRM”) that involves both KIUC and the Hui; and the Board of Land and Natural Resources (“Board”) required KIUC to engage in community discussions concerning cultural and environmental concerns as a condition of issuing KIUC a revocable permit for 2019. If anything, the impact of the proposed lease on cultural resources should be the heart of this DEA, but KIUC and SSFM have ignored this opportunity for “good faith,” “two-way communication” on the environmental impact of most significance to the Kauai community. *See* HAR § 11-200.1-1(c)(3).

Ultimately, the proposed finding of no significant impact (“FONSI”) made in the DEA is erroneous and fails to fully account for the significant cultural and environmental effects that may occur as a result of ongoing removal of water from Wai’ale’ale and Waikoko Streams. Under HRS § 343-5(c)(4) an EIS “shall be required if the agency finds that the proposed action **may** have a significant effect on the environment.” HRS § 343-5(c)(4) (emphasis added). As

² The Cultural Impact Assessment (CIA) attached as Appendix E does not remedy this shortcoming. Like the DEA, the CIA limits its discussion of impacts and proposed mitigation to a mere two and a half pages, without any discussion of the feasibility of implementing mitigation measures. *See* Appendix E at 144-46.

discussed further below, the proposed long-term lease of water certainly meets this standard, and therefore KIUC must prepare an EIS.³

A. The Proposed Action Irrevocably Commits a Natural, Cultural, or Historic Resource (HAR § 11-200.1-13(b)(1))

The DEA incorrectly concludes that the proposed action will not irrevocably commit a natural, cultural, or historic resource. DEA at 119. Every Hawai'i case to consider this question has recognized that diverting millions of gallons of water each day (whether surface water or ground water) is an action that is likely to irrevocably commit a natural resource, thereby triggering the requirement for a project applicant to prepare an EIS. See *Kepo'o*, 106 Hawai'i at 290, 103 P.3d at 959 (holding that "the withdrawal of millions of gallons of groundwater on a daily basis will 'likely' cause such irrevocable commitment" of natural resources defined as significant under HRS § 343-2); *Moloka'i Homesteaders Co-op. Ass'n v. Cobb*, 63 Haw. 453, 467, 629 P.2d 1134, 1143, 1144 (1981) (recognizing that a proposal for "withdrawal of water from one area for transport to another" is an action with a probable "significant effect" triggering the requirement to prepare an EIS). Like the long-term commitments at issue in *Kepo'o* and *Moloka'i Homesteaders*, the subject lease, authorizing withdrawal of water from Wai'ale'ale and Waikoko Streams for the next 65 years, irrevocably commits a natural resource to a specific use, thereby triggering the requirement to prepare an EIS.

As discussed further below, *infra* Part II, the FONSI is premised on the mistaken assumption that the environmental baseline is complete dewatering of the streams as historically occurred during the sugar plantation era. After properly identifying the proposed action as a new long term lease of state water to a private entity, however, it becomes clear that this is exactly the type of irrevocable commitment that triggers an EIS because of the significant environmental effects that may occur. See *Kepo'o*, 106 Hawai'i at 290, 103 P.3d at 959; *Moloka'i Homesteaders*, 63 Haw. at 467, 629 P.2d at 1144. This significance factor alone requires completion of an EIS to fully assess a reasonable range of alternatives before such an irrevocable commitment of public trust resources is made.

Among the issues that must be explored in an EIS is the option to enter a lease that has a more reasonable term, but no longer than ten to fifteen years. In light of rapidly evolving renewable energy technology, and declining rainfall levels that could reduce streamflow levels, there is no good reason for KIUC to insist on locking in outdated hydropower practices that use valuable stream water for another 65 years. More importantly, there is no good reason for the

³ KIUC must timely coordinate preparation of an EIS with appropriate federal agencies, including consulting with U.S. Fish and Wildlife Services on the Newcomb Snail, and consulting with the Army Corps of Engineers on a section 404 permit. See HAR § 11-200.1-31.

Department to enter into a lease irrevocably committing public resources for this amount of time. The last lease for this portion of the Wailua ditch system, signed before the State Water Code was adopted to implement modern water management practices, was for a thirty year term. DEA at 1. A new lease for an even longer term is a step backwards in time: it fails to incorporate modern water management practices, fails to address public trust concerns with water hoarding, and fails to reflect the ever changing renewable energy landscape. At minimum, the DEA must disclose why it believes a 65 year term is necessary and appropriate in light of the asserted need for the action (power generation), so that the public and the Department can assess and comment on KIUC's position on this issue.

B. The Proposed Action Curtails the Range of Beneficial Uses of the Environment (HAR § 11-200.1-13(b)(2))

The DEA incorrectly concludes that the proposed action will not curtail the range of beneficial uses of the environment. *DEA* at 119. On the contrary, as discussed in the Stream Habitat Assessment attached as Appendix D, taking water from Wai'ale'ale and Waikoko Streams, two small tributaries of the North and South Fork branches of Wailua River, and using the water to generate electricity by passing it through turbines, does in fact reduce stream habitat and affect stream life. In particular, the Stream Habitat Assessment notes that "larval 'ōpae kala'ole would have issues with entrainment due to the large amount of water being diverted and a small portion flowing downstream" under existing diversion conditions. Appendix D at 54. Additionally, while a substantial improvement in habitat is expected with implementation of amended interim instream flow standards ("IIFSs"), there is still a significant reduction in available stream habitat, of anywhere from 30.9% to 45.2% of habitat units.⁴ *Id.* at 151-52. These habitat units are important for 'o'opu as well as 'ōpae.⁵

The DEA completely ignores these facts, focusing instead on expected improvement from baseline diversion conditions (total low flow diversion) if IIFSs are implemented at anticipated levels: 3.5 mgd for Wai'ale'ale and 0.8 mgd for Waikoko. However, looking at the

⁴ Full diversion eliminates 73.7% of total habitat units whereas restoration under the anticipated IIFSs levels would constitute "[a] substantial improvement from 28.5% to 42.8%." Appendix D at 151-52. It is assumed here that "improvement" means that habitat will increase upwards in the amounts cited from the 26.3% of habitat units remaining after full diversion.

⁵ The failure of the DEA to draw a rational connection between the facts found in Appendix D and its legal conclusion that the action may not have significant effects is arbitrary and capricious, and therefore highlighted here. However, the Hui does **not** agree with a variety of conclusions in Appendix D, including that 'o'opu are not likely to inhabit areas upstream of Wailua and Kaholalele falls. Community observations indicate that 'o'opu do in fact occur above the falls in both stream segments.

appropriate environmental baseline as full flow levels, it is clear that ongoing diversion may curtail beneficial uses of the stream as habitat for indigenous stream life, even with proposed modifications to implement the expected IIFSs. Further, and of even greater concern, KIUC's proposed modifications to the Blue Hole diversion⁶ appear to lock in the **minimum** expected IIFS value for Wai'ale'ale Stream, which is not necessarily the value that will be selected by CWRM at the conclusion of the IIFS contested case hearing.⁷ See DEA at 40 ("The IFS/aquatic species passage V-notch weir and ramp is included in the design to pass **up to** 6 cfs [3.8 mgd] of flow in the stream.") (emphasis added). This arbitrary cap on future restoration values is in itself a significant adverse effect of the proposed modifications that is not clearly disclosed in the DEA, yet alone analyzed for potential mitigation as required by law. See HAR § 11-200.1-18(d)(7), (8).

Additionally, the proposed action may curtail the beneficial use of both Wai'ale'ale and Waikoko Streams as recreational and aesthetic resources for the community. Unlike many of the tributary streams feeding the Wailua River, Wai'ale'ale and Waikoko Streams are accessible to the general public because they are located on state lands within the Līhu'e-Kōloa Forest Reserve. The area is regularly accessed by members of the public, including members of the Hui, for swimming, gathering, praying, chanting, dancing, peaceful contemplation, and ceremonial practices. The recreational and aesthetic value of the streams for swimming, relaxing, and enjoying an otherwise unblemished wilderness area, is negatively affected by the Blue Hole diversion. As discussed further below, *infra* I.C., cultural practices such as ceremony, hula, and gathering, are also negatively affected by diversions. These potential negative effects on beneficial uses of the stream trigger the requirement that KIUC prepare an EIS more fully assessing the effects of its proposed long-term lease, and how to mitigate these adverse effects.

⁶ The term "Blue Hole diversion" is used to refer collectively to the diversion structures located on Wai'ale'ale and Waikoko Streams, but not to the streams themselves. Further, Wai'ale'ale is the name used for the tributary stream referred to as "North Fork Wailua" in the DEA.

⁷ Earthjustice raised concerns with the stream life methodology used to select the proposed IIFSs in the enclosed testimony dated August 21, 2019. As explained therein, CWRM discussed several different methodologies for selecting a stream flow to support habitat restoration in the IFSAR: (i) the Q₇₀ value; (ii) 80% of the Q₅₀ value; and (iii) 64% of the BFQ₅₀. For Wai'ale'ale Stream, the three values, respectively, are: (i) 10.5 mgd, (ii) 9.2 mgd, and (iii) 3.6 mgd. CWRM did not explain its reasoning for selecting the lowest value methodology which provides the **least** benefit to stream life, and is one of the issues raised by the Hui in the ongoing IIFS proceeding.

Of particular concern with the existing DEA is that it reserves a discussion of “aesthetic values” related to proposed modifications of the Blue Hole diversion until after the lease is secured. DEA at 38. In fact, the aesthetic impact of the diversion structures is one of the significant effects that the DEA must identify and assess, including proposed mitigation measures, before the Department enters into any new lease. HAR § 11-200.1-18(d)(7), (8). Community members have repeatedly raised concerns about the aesthetics of the diversion structures in revocable permit proceedings and the interviews conducted for this DEA. Relatedly, community members have repeatedly raised concerns about exposed rebar and the safety of the diversion structures, which also impede recreational use of the area. Adding additional concrete into the forest reserve without any consideration of how to remediate the site by removing the existing legacy sugar plantation structures, or using more place-based construction methods to accommodate aesthetic values, represents a complete failure to abide by the letter and spirit of HEPA.⁸

In summary, the DEA insufficiently considers the adverse effects of the proposed action on stream life, recreational use of the streams, the aesthetic value of the streams, and the safety of the public. The lack of any transparent consideration of these issues indicates that the DEA is skewed to avoid acknowledging potential adverse effects of the proposed action that would trigger the requirement to complete an EIS.

C. The Proposed Action Has Substantial Adverse Effect on the Cultural Practices Of the Community (HAR § 11-200.1-13(b)(4))

The DEA incorrectly concludes that the proposed action will not have substantial adverse effects on the cultural practices of the community. DEA at 119. As a threshold matter, the DEA incorrectly delineates between what it considers to be “traditional cultural practices” and “[c]oncerns expressed by the community. See DEA at 90-91. Among the “community concerns” noted in the DEA are the fact that Wai’ale’ale is sacred, and the stream water is used for ceremonial purposes. *Id.* However, the DEA does not adequately identify the scope of related traditional and cultural practices, the impact of the proposed long-term lease on those practices, or how to mitigate the negative effects arising from the proposed action. HAR § 11-200.1-18(d)(7), (8). At best, the DEA and Cultural Impact Assessment (CIA) included as Appendix E can be seen as a simple restatement of information obtained through a cursory review of print materials, archaeological surveys, and limited interactions with the Kaua’i community. At worst, the documents can be seen as an attempt to delegitimize traditional and customary cultural practices exercised in the diversion area that trigger the duty to prepare an EIS analyzing a range of alternatives that can minimize negative impacts to these practices.

⁸ CIA informants who raised aesthetic concerns include Hope Kallai, Dr. Mehana Vaughn, and Nicole Hoku Cody. See Appendix E.

First, both the DEA and the CIA ignore the fundamental importance of Wai'ale'ale and its waters as the piko of Kaua'i, with spiritual significance across the entire archipelago. The term piko has a dual meaning that refers to a blood relation or the reproductive organs, and also a summit or the center of a mountain. Waikoko translates to "blood water" and metaphorically references this stream's vital role in "bringing life to the land."⁹ "Just as a pregnant mother provides a life line of nourishment and energy through the piko or umbilical cord to her unborn child in the womb, Wai'ale'ale and its crater of waterfalls and streams sustain the island and its communities with life-giving waters." Kekua & Alapa'i at 58. These names and associations underscore the sacred significance of Wai'ale'ale, and, conversely, the grave hewa (wrong) caused by the historical dewatering of the streams.

In the hula tradition, the classic 'oli komo or admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, names the Wai'ale'ale area and numerous other celebrated places from mauka to makai along the Wailua River. Like other chants and songs composed for this area, the imagery of these places describes fresh water's foundational role as a physical and ethereal life force in this area and throughout Hawai'i nei. Kunihi ka Mauna is often the first 'oli komo learned by hula students across Hawai'i nei, not just on the island of Kaua'i, indicating widespread reverence for Wai'ale'ale itself as a sacred space.

Second, cultural resources in Hawai'i cannot be defined merely by the written record, or archaeological evidence. This is evident in traditional Hawaiian resource management concepts and paradigms. According to Wailua-area cultural practitioners, Wai'ale'ale, Kawaikini, and Kaipuha'a were traditionally considered Wao Akua, or "realm of the gods." Wao Akua is defined as "the sacred, montane cloud forest, core watershed, native plant community that is non-augmented and an area that was traditionally kapu (human access usually forbidden and prohibited)."¹⁰ In other words, a sparse archaeological record cannot be interpreted to mean that an area held less cultural or religious significance. Rather, it may indicate that the area was restricted for ceremonial purposes, or for other practices that required careful resource management, including feather gathering, plant gathering, and canoe tree gathering. Not once in the DEA or CIA is Wai'ale'ale's status as Wao Akua considered as a method of

⁹ K. Kekua and A. Alapa'i, *A Cultural Study: Native Hawaiian Traditions, Customary Practices and Perspectives of the Natural and Cultural Resources of Puna, Kaua'i Island* 58 (Apr. 2010) ("Kekua & Alapa'i").

¹⁰ Aha Moku Advisory Comm., Dep't of Land & Nat. Res., *Final Rules of Practice and Procedure*, (effective October 20, 2016) ("AMAC Rules") § 1-3.

supplementing the archaeological record to better understand traditional upland uses of the Wailua ahupua'a that continue today.¹¹

Further, while acknowledging that Wailua was historically the spiritual center of the island, as indicated by its extensive complex of heiau, the CIA does not discuss that the ali'i nui (high chief) of Kaua'i traveled on annual pilgrimages with members of the court to the Ka'awakō heiau located at Wai'ale'ale's summit. The royal court also periodically traveled from the lands near the ocean to Kawaikini, to pay homage to the cyclical movements of the atmosphere, the earth, and the network of waterways that bring forth ka wai ola a Kāne ("the sacred, life-giving waters of Kāne"). Kekua & Alapa'i at 56. The water that flows from the Wai'ale'ale area is the lifeblood of this mauka-makai cultural landscape and is "critical to the master plan of the ancients who established Wailuanuiaho'āno (historic name of the Wailua watershed) as a major religious center for Kaua'i and Hawai'i [nei]." *Id.* at 10. The entire ahupua'a is thus part of a single cultural landscape that must be recognized as having significance in the Kanaka Maoli worldview.

At a minimum, the DEA and CIA must acknowledge that taking water from Wai'ale'ale and Waikoko Streams in and of itself constitutes an injury for many cultural practitioners. This significant effect is both substantial and adverse. HAR § 11-200.1-13(b)(4). This specific cultural impact (spiritual injury) is distinct from the other cultural impacts such as the effects of diversion on stream life and vegetation that Hui members gather or wish to gather in the diversion area. Currently, all of these distinct harms are characterized as a single impact in the CIA. Appendix E at 144.¹² For many cultural practitioners, the spiritual injury can only be remedied by restoring at least 50% (and many times 100%) of natural stream flows because of the sacredness of these waters, and the use for ceremonial purposes including h'iuwai (full body immersion).¹³

¹¹ Members of the Hui regularly travel to Wai'ale'ale and Waikoko streams, including the area of the diversions, to engage in ceremonial practices in and around the stream, to sing, chant and pray within this sacred area, to bathe and swim in the stream waters, to use the water for subsistence purposes including drinking, to gather plants that grow near the stream, and to enjoy and commune with nature, including listening to the sound of running water. Members of the Hui have also looked for native stream life like 'o'opu and 'ōpae for gathering but have observed a decline in such species over the years.

¹² Impact 1 is described as follows: "Participants expressed their concern for low to no flow and the negative effects on water ecosystems *mauka to makai*; surrounding vegetation gathered for cultural practices; traditional subsistence gathering; and ceremonial purposes." Appendix E at 144.

¹³ The term "natural stream flows" is used herein to refer to the Q₅₀ value.

As far as potential mitigation measures for this specific cultural harm, the DEA must assess the feasibility of running the Waiahi hydropower plants without use of the Blue Hole diversion as well as other water use regimes that could minimize spiritual injury, such as capturing only high flows as a back-up power generation resource. While the CIA acknowledges that “restoring at least half (50%) of the water to North Fork” could mitigate cultural harms, Appendix E at 144, there is no discussion of this option in the DEA other than passing reference to a possible shut down of the hydro plants if full stream restoration were to be implemented. DEA at 37.

This conclusory statement is not a substitute for an appropriate feasibility study of KIUC’s power generation that includes more complete information regarding: (1) contribution of the Waiahi hydro plants to KIUC’s energy generation needs, (2) alternative water sources available to power the hydro plants, and (3) alternative energy sources to completely replace the Waiahi hydro plants in KIUC’s renewable energy portfolio. As repeatedly stated in comments to the Board of Land and Natural Resources on the revocable permits, the Board has an independent duty under the public trust doctrine to protect public trust water uses before issuing the subject lease. This duty cannot be met unless and until KIUC demonstrates its “actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.” *In re Waiāhole Ditch Combined Contested Case Hrg.*, 94 Hawai’i 97, 162, 9 P.3d 409, 474 (2000) (“*Waiāhole*”). This DEA is the most logical and opportune moment during the entire lease process for KIUC to disclose its actual need for hydropower to supplement its renewable energy portfolio, but the DEA fails to meet this most basic disclosure requirement under the public trust.

In summary, the DEA completely fails to adequately identify the adverse cultural impacts arising from the proposed long-term lease authorizing KIUC to divert all water above low flow levels of 3.5 mgd for Wai’ale’ale and 0.8 mgd for Waikoko, or appropriate alternatives and mitigation measures as required by law. HAR § 11-200.1-18(d)(7), (8).

II. THE DEA IS LEGALLY DEFICIENT BECAUSE IT ASSUMES THAT DIVERSION IS THE ENVIRONMENTAL BASELINE

In addition to the erroneous FONSI conclusion, the DEA is legally deficient because it fails to properly identify the scope of the subject action at issue in the DEA. *See Sierra Club v. Dep’t of Transp.*, 115 Hawai’i at 315, 167 P.3d at 308 (“[W]hether or not an agency has followed proper procedures or considered the appropriate factors in making its determination is a question of law.”). The DEA erroneously asserts that the subject action includes modification of the Blue Hole diversion to accommodate the forthcoming IIFs currently under consideration by CWRM. DEA at 37. However, KIUC is under a legal duty to implement the IIFs set by CWRM as long as it operates the Blue Hole diversion under its existing month-to-month

revocable permit, regardless of whether or not it receives a long-term water lease. In fact, the subject action is the proposed long-term lease of public waters to KIUC to power its Waiahi hydropower plants for the next 65 years (until 2084).

The failure to properly identify the scope of the proposed action prohibits a transparent, rational, and meaningful analysis of the adverse impacts of a 65 year water lease, and available alternatives to mitigate those impacts, as required by law. *See* HAR § 11-200.1-18(d)(7), (8). For example, the only two alternatives considered in the DEA are: (1) ongoing diversion of stream water using the legacy plantation diversions designed to take one hundred percent of low flow from Wai'ale'ale; and (2) ongoing diversion of water through modified diversion structures designed to take what the DEA assumes will be the final IIFs (KIUC's preferred alternative). DEA at 37-51. The majority of the DEA is then spent explaining why KIUC's preferred alternative is better for the environment than continuing to divert water using the existing plantation era structures, but also how implementing the IIFs will have negative effects on hydropower generation when compared to historic diversion levels.

Completely absent from the DEA is any analysis of a true "no action" alternative that considers how to power the Waiahi hydro plants without using any water from Wai'ale'ale and Waikoko Streams, or using only high flows, in order to mitigate the negative impacts of diversions on the full range of beneficial environmental uses and cultural practices identified above. Further, the information in the DEA is insufficient to allow the public to independently analyze whether decommissioning the existing Blue Hole diversion structures is feasible to maintain whatever firm power contribution is currently made by the Waiahi hydro plants, and necessary for the reliable operation of the power grid.¹⁴

Information that is needed to make this assessment, and must be included in any future environmental review document, includes the following:

- Disclosure of daily time series for ditch flow using all six gages currently (or historically) located on the 'Ili'ili'ula-North Wailua portion of the ditch system,¹⁵ preferably using software comparable to HED-DSSVue.¹⁶

¹⁴ The multiple power outages shown in the DEA indicate that the Waiahi hydro plants are not in fact "firm" power sources, and have no inherent value beyond the 1% contribution they make to KIUC's power generating capacity. *See* DEA at 20 (Figure 11), 21 (Figure 12).

¹⁵ The DEA indicates that there are currently six gages installed on the ditch system, but only discloses data for the two immediately below the Wai'ale'ale and Waikoko diversions. *See* DEA at 14 & Figure 5.

¹⁶ Available at <https://www.hec.usace.army.mil/software/hec-dssvue/>.

- Using the time series, an analysis over the period of record that shows the amount of water available at the Waiahi hydro plants under historical conditions, compared with what would have been available for diversion with the new IIFs. Representative dry, middle-range, and wet periods must be selected in order to accurately focus the analysis on how water availability affects energy generation during each of these time periods.
- A document that clearly translates the hydrologic analyses into comparisons of generation at each of the power plants over the period of record (and in the focused representative periods) accounting for periods of non-generation due to insufficient flow, head loss, turbine efficiency, and other clearly identified factors.

III. THE DEA IS LEGALLY DEFICIENT BECAUSE IT RECEIVED AN IMPROPER EXEMPTION FROM THE ATTORNEY GENERAL THEREBY PREDETERMINING THE OUTCOME OF ENVIRONMENTAL REVIEW

The DEA is also legally deficient because it received an improper exemption from the attorney general, predetermining the outcome of this review. As stated in *Umberger*, an action is exempt from HEPA only if all four parts of the following test are met:

(1) it is within an exempt class promulgated by the Environmental Council in HAR § 11-200-8(a) or within an exemption category created by the agency itself pursuant to its authority under HAR § 11-200-8(d); (2) the relevant exemption category can be applied because the activity does not have a significant cumulative impact and it does not have a significant impact on a particularly sensitive environment, *see* HAR § 11-200-8(b); (3) the agency obtained the advice of other agencies or individuals having jurisdiction or expertise as to the propriety of the exemption, HAR § 11-200-8(a); and (4) the action will probably have minimal or no significant effects on the environment, HRS § 343-6(a)(2); *see also* HAR 11-200-8(b); *Sierra Club*, 115 Hawai'i at 315-16, 167 P.3d at 309-09.

140 Hawai'i at 524, 403 P.3d at 30. Because this four-part test cannot be met here, the exemption granted by the Attorney General was improper.¹⁷

First, none of the exemption categories apply to this lease. Although the DEA fails to specify the grounds for exemption, the Department's past policy and practice during annual renewal of the revocable permit is to exempt permits from HEPA pursuant to Exemption Class

¹⁷ Separate from the duties imposed by HEPA, the plain language of HRS § 171-58(c)(3) requires an environmental impact statement for water leases as a matter of law.

1, Item 51, promulgated by the Environmental Council on June 5, 2015.¹⁸ See, e.g., State of Hawai'i, Department of Land and Natural Resources, Land Division, Holdover of Revocable Permits for Water Use on the Islands of Hawai'i and Kauai, Exemption Notification (Dec. 14, 2018). However, this exemption category is inapplicable because a water lease does not involve the operation, repair or maintenance of existing structure, but rather the taking of water. Moreover, whether or not an existing diversion began before HRS chapter 343 was enacted, a new lease is a new action that must fully comply with HEPA. Indeed, none of the existing water diversions subject to the water lease requirements, including those maintained by KIUC, have ever undergone environmental review in any form. Therefore, the cited exemption does not apply here. *Umberger*, 140 Hawai'i at 524, 403 P.3d at 301; *Sierra Club*, 115 Hawai'i at 316, 167 P.3d at 309.

Second, assuming an exemption category applies, it could not be applied to this lease because of the significant cumulative effects of water diversion in the particularly sensitive environment of small, tributary streambeds. The long-term cumulative impacts of dewatering streams, such as has occurred at the Blue Hole diversion, have been universally established in numerous contested case proceedings before CWRM and the Board, and include loss of stream life, destruction of traditional and customary practices, and impairment of other public trust uses and values.

Third, as discussed above, this 65 year lease will have significant effects, including irrevocable commitment of a natural and cultural resource, and therefore fails under the fourth prong of the *Umberger* test.

The fact that an EA was prepared does not cure the improper exemption issued by the Attorney General. Because of the exemption, KIUC and its consultant SSFM had no incentive to fully and completely abide by the intent of HEPA, and the outcome of the EA was predetermined. This can be most clearly seen in the fact that the DEA serves primarily to justify KIUC's preferred alternative. As stated in the administrative rules: "Exemption notices, EAs, and EISs are meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." HAR § 11-200.1-1(c). Because this DEA serves no other purpose than to justify selection of KIUC's preferred alternative, it fails to satisfy HEPA.

¹⁸ Class 1 reads: "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing." Item 51 reads: "Permits, license, registrations, and rights-of entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing."

Ian C. Hirokawa
Department of Land and Natural Resources
January 7, 2020
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Thank you for your consideration of these comments.

Sincerely,



Leinā'ala L. Ley
Attorney

Enclosure

cc: SSFM International, Inc., jscheffel@ssfm.com
Kauai Island Utility Cooperative, dhuff@joulegroup.com



STATE OF HAWAII
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HRD 19-1445Q

November 7, 2019

Ian Hirokawa
Department of Land and Natural Resources, State of Hawai'i
1151 Punchbowl St., Rm. 220
Honolulu, HI 96813

Re: Comments on the Waiahi Hydropower Long-Term Water Lease—Draft Environmental Assessment (Anticipated Finding of No Significant Impact)
Wailua Ahupua'a, Puna Moku, Kaua'i Moku
Tax Map Keys: (4) 3-9-001:001; (4) 3-8-001:001, 002, and 003

Aloha mai kākou:

The Office of Hawaiian Affairs (OHA) has reviewed the draft environmental assessment (draft EA) for the above-titled project, which covers a 65-year water lease of stream water in Wailua, Kaua'i, and associated stream diversion works by the applicant, the Kauai Island Utility Cooperative (KIUC). The requested water lease will authorize KIUC to divert water from the North Fork of the Wailua River (also referred to as Wai'ale'ale Stream and the "Blue Hole" Diversion) of all amounts above 3.5 million gallons per day (mgd) at the diversion and from the Waikoko Stream of all amounts above 0.8 mgd at the diversion, along with associated permanent construction of diversion structures in the Wai'ale'ale and Waikoko stream channels to allow the aforementioned volumes to be diverted into the 'Ili'ili'ula North Intake Ditch System to feed the Waiahi Upper and Lower Hydropower Plants.

Background

In 2004, OHA objected to a prior request for a 65-year water lease from KIUC because, in part, KIUC and the Board of Land and Natural Resources (BLNR) did not consider the impacts on Native Hawaiian cultural practices and stream life. After OHA filed a contested case request to further the consideration of these issues, OHA and KIUC entered into a settlement in 2006, with terms set forth in a memorandum of agreement (MOA) that, among other things, required OHA and KIUC to agree upon the scopes of two studies—a cultural impact assessment and a study on the impacts of the diversions on stream life. Through further negotiations, OHA and KIUC reached agreements on the scopes of these stream life and cultural impact studies and along with other outstanding issues, followed by OHA withdrawing its contested case request in 2012.

In accordance with the 2006 MOA, KIUC produced a draft study on the diversions' impacts to stream life and submitted a draft report to OHA in 2013. Aided by information from Kaua'i community members knowledgeable about Wailua stream conditions, OHA provided its comments on the draft stream life impact report, which resulted in revisions to the report by KIUC's consultant. In 2017, KIUC produced a draft of its cultural impact assessment (CIA) and submitted its report to OHA. Again, aided by knowledgeable Kaua'i community members, OHA issued its comments on the 2017 CIA, noting several key shortcomings in the report as compared to the scope of work that had been agreed to by OHA and KIUC. Although OHA was not afforded an opportunity to review an updated CIA, both the stream life impact report and CIA are included as part of the draft EA as Appendices D and E, respectively.

In addition, OHA provided KIUC's consultant with pre-assessment consultation comments by letter dated August 28, 2018. In the 8/28/18 letter, OHA recommended that the draft EA consider both current and historic impacts of the water diversion and include the alternative of diverting less water than the preferred alternative, consistent with community input captured in the draft CIA.

Given the above, OHA offers its comments on the Waiahi Hydropower Long-Term Lease draft EA.

The Update to 2017 Cultural Impact Assessment provides minimal additional information and analysis

The *Update to 2017 Cultural Impact Assessment* (Appendix E) (hereinafter "Updated CIA") contains minimal additional information and analysis when compared to the 2017 draft CIA, which OHA had found "lacks components of the agreed upon scope of work for a study of cultural impacts from the Blue Hole Diversion and operation of the 'Ili'ili'ula North Wailua Ditch." Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017) (*see Attachment 1*). At no point did KIUC seek to amend the scope of work for the CIA as agreed to by OHA; therefore, OHA still relies upon the scope of work provided by KIUC's prior CIA contractor as the basis for its review of the Updated CIA.

Previously, OHA noted that the 2017 CIA did not include determinations on "the extent to which applicable resources including traditional and customary Native Hawaiian rights and practices will be affected or impacted by the project", nor did the 2017 CIA "[p]ropose viable action for mitigation, if applicable, to be taken for the purpose of reasonable protection and perpetuation of Native Hawaiian rights and customary practices if they are found to continue/exist in connection with any of the study project area." Both of these tasks were included in the scope of work for the CIA that had been agreed upon between OHA and KIUC.¹ These tasks are also fundamental inquiries in a *Ka Pa'akai* analysis for the BLNR in reviewing and potentially approving the proposed action. It therefore makes sense for this analysis to be part of project planning documents by the applicant, KIUC.

Unfortunately, such analyses are still absent from the Updated CIA. The Updated CIA includes new subsections that lists community members' identified "Impacts" and the "Proposed

¹ Native Kaua'i LLC, E Malii 'Ana: A proposal for your consideration (Sept. 21, 2011), Scope of Work nos. 6 and 7.

Actions” for each impact, but there are still no determinations on the extent to which traditional and customary rights and practices will be affected and no determinations on the viability of proposed mitigation actions. There are also no reasons provided for the selective adoption of certain proposed actions from the Updated CIA into the draft EA (such as procedures for inadvertent discoveries of iwi kupuna or cultural finds), but the rejection of other proposed actions (such as restoring at least half of the water to the North Fork or continued interactive consultation with Native Hawaiians whose cultural practices have been and will be impacted by the diversions).

The Updated CIA also lacks the additional community consultation called for by OHA in its 11/17/17 comment letter on the 2017 CIA, despite a purported reopening of consultation in November 2018. According to the Community Contact Table (Updated CIA, section 6.3), there appears to have been minimal additional community consultation, aside from a joint interview with Mr. Danny Hashimoto and Ms. Sabra Kauka. It is unclear what, if any, outreach or follow-up to other consulting parties occurred in this reopened consultation period, especially where the Community Contact Table documents numerous instances where the CIA contractor had been unable to engage in consultation in 2017 “due to time constraints.” Similarly, there appears to have been no attempt by the CIA contractor to conduct “huaka’i or cultural site excursions with selected Native Hawaiian kūpuna or elder informants, Kumu Hula or other experienced and seasoned cultural practitioners and experts who have firsthand knowledge of religious, spiritual, healing, gathering or subsistence practices”² aside from a site visit that had to be organized by consulting community members, also due to purported “time constraints” in 2017.

Alternatives Analysis Fails to Consider Reasonable and Previously Identified Alternatives

The alternatives analysis in the draft EA should minimally include reasonable alternatives, such as a shorter lease duration or smaller diversion volumes that leave stream water in its natural state. Such alternatives were previously suggested by OHA and community consulting parties to the CIA, but were not included in the draft EA, thereby hamstringing the staff of the Department of Land and Natural Resources in their review of the proposed action and the BLNR in its deliberations and review of its public trust responsibilities.

Mahalo for the opportunity to provide comments on the draft EA. Should you have any questions, please contact Everett Ohta, at (808) 594-01988 or everetto@oha.org.

‘O wau iho nō,



Sylvia M. Hussey, Ed.D.
Ka Pouhana Kūikawā, Interim Chief Executive Officer

SH:eo

Attachment: Letter from Dr. Kamana‘opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

² Id. Scope of Work no. 5.

Ian Hirokawa, DLNR

November 7, 2019

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C: Colette Machado, OHA Chairperson
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Attachment: Letter from Dr. Kamana'o pono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

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STATE OF HAWAII
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560 N. Nimitz Highway
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November 17, 2017

Brad Rockwell
Power Supply Manager
Kaua'i Island Utility Cooperative
brockwel@kiuc.coop

Re: Comments on "Draft Cultural Impact Assessment for Kaua'i Island Utility Cooperative Blue Hole Diversion Long-Term Lease Project, Wailua and Hanamā'ulu Ahupua'a, Līhu'e District, Kaua'i, TMKs: Multiple" prepared by Nicole Ishihara and Hallett H. Hammatt, Ph.D., Cultural Surveys Hawai'i

Aloha e Mr. Rockwell,

Pursuant to the November 9, 2006 Memorandum of Agreement Between Kaua'i Island Utility Cooperative (KIUC) and the Office of Hawaiian Affairs (OHA)¹ (hereinafter "2006 MOA"), OHA hereby submits its comments on the report, "Draft Cultural Impact Assessment for Kaua'i Island Utility Cooperative Blue Hole Diversion Long-Term Lease Project, Wailua and Hanamā'ulu Ahupua'a, Līhu'e District, Kaua'i, TMKs: Multiple" prepared by Nicole Ishihara and Hallett H. Hammatt, Ph.D., Cultural Surveys Hawai'i, submitted to OHA on October 19, 2017 (hereinafter "*Blue Hole CIA*").

As provided under the terms of the 2006 MOA, OHA sought the assistance of Kaua'i community members with personal knowledge of the Wailua and Hanamā'ulu ahupua'a and KIUC's diversion system to review the *Blue Hole CIA*. We recognize and mahalo those who have assisted through this process. In no way, however, should OHA's or any individual's participation or non-participation in this review be meant to foreclose a later opportunity to raise concerns or objections to the *Blue Hole CIA* or any future long-term lease application by KIUC.

The *Blue Hole CIA*, as currently drafted, lacks key components of the agreed upon scope of work for a study of cultural impacts from the Blue Hole Diversion and operation of the 'Ili'ili'ula North Wailua Ditch.

¹ The "Memorandum of Agreement Between Kaua'i Island Utility Cooperative and the Office of Hawaiian Affairs" represents a settlement of a contested case request related to KIUC's prior application for a 65-year lease to use water emanating from State lands and collected from Waikoko Stream and the North Fork of the Wailua River for the purpose of operating two KIUC hydroelectric power plants.

Attachment (cont.): Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

November 17, 2017

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As you are aware, under the 2006 MOA both KIUC and OHA were to agree upon the scope of work for a study of cultural impacts from the use of the Blue Hole Diversion, as well as a consultant to conduct the study. An agreement on the scope for a cultural impact study was one of seven conditions that needed to be met before OHA withdrew its request for a contested case hearing on KIUC's 2004 application to the Board of Land and Natural Resources for a 65-year lease of water rights for the use of the Blue Hole Diversion and 'Ili'ili'ula North Wailua Ditch.

Through negotiations, KIUC and OHA did reach an agreement on the scope of a study of cultural impacts, as set forth in a proposal by Native Kaua'i LLC, dated September 21, 2011 (hereinafter "*Scope of Work*"), and included as Appendix C to the "Stipulation for Withdrawal of Request for Contested Case Hearing" (hereinafter "*Stipulation*"). As noted in the *Stipulation*, the *Scope of Work* was the second attempt of KIUC and OHA to define the parameters of a study that would partially address OHA's concerns over the impacts to cultural resources and practices, after an initial study that described the cultural backdrop for the proposed lease was deemed inadequate by OHA. Accordingly, the *Scope of Work* represents the mutually agreed upon scope for a cultural impact study and must be used to evaluate the sufficiency of the recently completed *Blue Hole CIA*.

Although KIUC has kept OHA staff apprised of issues that necessitated a change in the consultant that prepared the *Blue Hole CIA*, this draft represents the first opportunity for OHA to review the *Blue Hole CIA* in its entirety, including the scope of work, background research, and analysis.²

We note that the scope of work for the *Blue Hole CIA* is far narrower than the September 21, 2011 *Scope of Work*. Section 1.3 of the *Blue Hole CIA* provides the scope of work for the report, as follows:

1. Examination of cultural and historical resources, including Land Commission documents, historic maps, and previous research reports with the specific purpose of identifying traditional Hawaiian activities including gathering of plant, animal, and other resources or agricultural pursuits as may be indicated in the historic record.
2. Review of previous archeology work at and near the subject parcel that may be relevant to reconstructions of traditional land use activities; and to the identification and description of cultural resources, practices, and beliefs associated with the parcel.
3. Preparation of a report that summarizes the results of these research activities and provides recommendations based on findings.

By contrast, the September 21, 2011 *Scope of Work* describes seven detailed consultative tasks that were to form the foundation for a cultural impact study. These seven tasks were

² OHA staff previously raised concerns about a proposal to conduct a CIA of limited scope. See E-mail from Everett Ohta, Esq., Counsel for Environmental Law and Native Rights, Office of Hawaiian Affairs, to Brad Rockwell, Power Supply Manager, Kaua'i Island Utility Cooperative (Dec. 20, 2016, 3:38 PM HST).

November 17, 2017

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agreed upon by OHA and KIUC, as required by the 2006 MOA. As described further below, the *Blue Hole CIA* falls short of the requirements set in the Scope of Work in many key areas and these deficiencies must be addressed prior to any action by KIUC to renew its application for a long-term lease from the State.

A. The *Blue Hole CIA* does not determine the extent of impacts to cultural resources and Native Hawaiian practices

The *Blue Hole CIA* does not make a determination on the extent to which the proposed lease will impact cultural resources and traditional and customary Native Hawaiian rights and practices, as provided in the *Scope of Work*.³ The discussion on the effect and impairment of applicable resources was summarized in a few sentences in Section 9.5 of the *Blue Hole CIA*, which described potential impacts from diverted stream flow, in general terms.⁴ Potential impacts to iwi kūpuna from project activities were similarly raised in general terms, using standard language common in many cultural impact assessments.

Although these identified impacts are unquestionably important, they fail to capture the full extent of the impacts to resources and cultural practices that are affected by an interruption in ma uka to ma kai stream flows resulting from the use and diversion of stream water at the North Fork of the Wailua River and Waikoko Stream. For example, many cultural practitioners stated that the diverted stream water, which originates from Wai‘ale‘ale, is itself sacred and used for ceremonial purposes (*Blue Hole CIA*, p.121). The *Blue Hole CIA* lacks a definitive statement of how the stream water resource and associated cultural practices will be affected by the proposed lease and water diversion that results in sections of the North Fork of the Wailua River being left dry. Similarly, the *Blue Hole CIA* does not make a determination on the *extent* to which the stream ecosystem, surrounding vegetation gathered for cultural practices, and subsistence resources will be affected by the proposed lease and water diversion; instead these issues are presented as mere concerns expressed by consulting parties. (*Blue Hole CIA*, p.122). These impacts should be analyzed in greater detail and compare the impacts from the diversion of water under the proposed water lease against a natural flow baseline, rather than merely using the historic diverted state to analyze associated impacts.

B. The *Blue Hole CIA* avoids discussing the viability of proposed mitigation actions to reduce the impacts to cultural resources and Native Hawaiian cultural practices

Similar to the deficiencies in determining the extent of impacts to cultural resources and practices, the *Blue Hole CIA* falls short in its discussion of viable mitigation actions, as

³ Task 6 under the *Scope of Work* states:

6. Determine the extent to which applicable resources including traditional and customary Native Hawaiian rights and practices will be affected or impaired by the project.

⁴ “Participants expressed their concern for low to no flow and the negative affects [sic] on water ecosystems *mauka* to *makai*; surrounding vegetation gathered for cultural practices; traditional subsistence gathering; and ceremonial purposes.” *Blue Hole CIA*, p.122.

Attachment (cont.): Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

November 17, 2017

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contemplated in the *Scope of Work*.⁵ Mitigation recommendations are also presented in Section 9.5, which recommends “that the community (kama’āina, kupuna, cultural practitioners, etc.) be consulted to reduce negative impacts on Hawaiian cultural beliefs, practices, and resources for long-term mitigation measures.” (*Blue Hole CIA*, p.122). The *Blue Hole CIA* also provides for procedures in the event that iwi kūpuna or cultural resources are inadvertently found during project construction.

While again recognizing the validity of these recommendations, the limited scope of the proposed mitigation measures glosses over the collective mana’o found throughout the *Blue Hole CIA*—that cultural resources and practices will be impacted by the proposed water lease and that these impacts can at least be partially mitigated by a reduction in historic diversions of stream water. In fact, the *Blue Hole CIA* noted that “[c]ommunity members suggested restoring at least half (50%) of the water back to North Fork.” But, rather than incorporating the restoration of stream flow into a concrete recommendation, the *Blue Hole CIA* recommends additional consultation, with no specifics about how or when such consultation should occur or what should be the subject of such discussions.⁶ We recommend that the *Blue Hole CIA* add specific recommendations related to stream restoration that will occur prior to a renewed lease application.

In addition to a recommendation regarding restoring stream flows, additional recommendations from consulting parties included stream flow monitoring and stream biota monitoring. Although such studies are components of the 2006 MOA between KIUC and OHA, they can nonetheless be reviewed in the *Blue Hole CIA* for their viability as mitigation measures.

C. Additional community consultation should occur and be incorporated into a revised *Blue Hole CIA*

In addition to the recommendation for consultation specifically on restoring stream flows, consultation for the *Blue Hole CIA* should be expanded to gather additional community mana’o about cultural resources and practices in the project area. Given the shift to a non-Kaua’i-based consultant for the *Blue Hole CIA*, additional efforts should have been made to connect with cultural practitioners and knowledgeable community members. Instead, the Community Contact Table (*Blue Hole CIA*, p.60-79) includes numerous examples where outreach to potential consultants did not occur “due to time constraints” or occurred only by letter. “Time constraints”

⁵ Task 7 of the *Scope of Work* states:

7. Propose viable action for mitigation, if applicable, to be taken for the purpose of reasonable protection and perpetuation of Native Hawaiian rights and customary practices if they are found to continue/exist in connection with any of the study project areas.

⁶ Given the number of consulting parties that raised stream restoration as a mitigation measure, it is unclear how much additional consultation is needed before stream restoration can become a recommended mitigation measure.

Attachment (cont.): Letter from Dr. Kamana‘opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

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was also cited as a reason why a community meeting and site visit needed to be organized by consulting community members rather than Cultural Surveys Hawai‘i.⁷

The *Scope of Work* outlined a much more personal and holistic process than what was documented in the *Blue Hole CIA*.⁸ Although specified in task 3 of the *Scope of Work*, there is no mention of other field studies to the Upper and Lower Waiahi Hydropower Plants, ‘Ili‘ili‘ula Stream, Waiahi Stream, Waiaka Stream, or other water sources relevant to the study. Similarly, there is no discussion of field studies of Wai‘ale‘ale or the Alaka‘i watershed, nor a discussion of water resource pathways following discharge from the Waiahi Hydropower Plants. An overview of the water discharge pathways is particularly relevant to understanding which streams may have segments that are similarly affected by diversions that collect water as part of the ‘Ili‘ili‘ula North Wailua Ditch.

Additional efforts should also be made to follow-up with some of the identified consulting parties, given the emphasis on oral interviews in task 5 of the *Scope of Work*. A reliance on firm consultation deadlines places the burden of a compressed timeline on consulting parties, when any claimed urgency was really caused by issues between KIUC and the original CIA consultant. Consultation on cultural impacts should not now be cut short when the *Scope of Work* has been in place since 2011.

⁷ See *Blue Hole CIA*, p.70 (“CSH invited Ms. Kallai to participate in the CIA and expressed that there would be no public meetings with OHA or KIUC due to time constraints, however, CSH offered to meet with a small *hui* (group) for an interview if Ms. Kallai organized it.”).

⁸ Tasks 3 and 5 of the *Scope of Work* state:

3. *Field Studies of all project areas will be conducted at locations including, but not limited to: Upper and Lower Waiahi Hydropower Plants; Waikoko, ‘Ili‘ili‘ula, Waiahi, Waiaka and other additional water sources that contributed to the hydropower project being studied. A special pilgrimage coupled with the opportunity to conduct progressive field studies of the principal water sources at the summit of Wai‘ale‘ale and the Alaka‘i watershed will also be included in the CIA. It is of our expert opinion and intuitive knowledge that it is necessary to approach and carry out this work with a holistic understanding of the various water resources and the integral relationships that begin at the summit. We also intend to track and analyze the primary and collective water resources to its final ocean-ward destinations following discharge from the Waiahi Hydropower Plants.*

...

5. *Conduct oral interviews with persons knowledgeable about the historic and traditional practices in the project area and region. Such information may be obtained through individual, group and community meetings, as well as huaka‘i or cultural site excursions with selected Native Hawaiian kūpuna or elder informants, Kumu Hula or other experienced and seasoned cultural practitioners and experts who have firsthand knowledge of religious, spiritual, healing, gathering, or subsistence practices.*

Attachment (cont.): Letter from Dr. Kamana'opono Crabbe, Ph.D., OHA Ka Pouhana, to Brad Rockwell, KIUC Power Supply Manager (Nov. 17, 2017).

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D. Land Commission Awards and other documents should be used to identify the scope of traditional gathering and agricultural practices.

The *Blue Hole CIA* contains substantial sections dedicated to mo'olelo, ka'ao, historic documents, maps, and past archaeological reports. However, the *Blue Hole CIA* does little to use these documents to identify the scope of traditional Native Hawaiian gathering and agricultural activities in the study areas, as provided in the *Scope of Work*.⁹ Through OHA staffs' review of LCA documents from the ahupua'a of Wailua and Hanamā'ulu, numerous parcels were found to contain reference to lo'i kalo and kula lands, which can collectively help in understanding the historic reliance on and distribution of freshwater systems in the area. The loko i'a of Debora Kapule could also be described in further detail, given that these fishponds were clearly fed by freshwater. The 'auwai and lo'i identified in the *Folk and Ida* (1981) reconnaissance study could be combined with information from the LCA documents to describe the distribution of freshwater systems in the area, based on available information.

Mahalo nui loa for the opportunity to provide comments on the draft *Blue Hole CIA*. Should you have any questions regarding this letter, please contact Everett Ohta (everetto@oha.org) or Wahine'aipōhaku Tong (natashja@oha.org).

'O wau iho nō me ka 'oia 'i'o,



Kamana'opono M. Crabbe, Ph.D.
Ka Pouhana, Chief Executive Officer

KC;eo/wt

C: Collette Machado, OHA Chairperson
Dan Ahuna, OHA Kaua'i Trustee
Kaliko Santos, OHA Kaua'i Community Outreach Coordinator
Yvonne Izu, Esq. (YIzu@moriharagroup.com)
Nicole Ishihara, Cultural Surveys Hawai'i (NIshihara@culturalsurveys.com)

⁹ Tasks 1 and 2 of the *Scope of Work* state:

1. Complete a thorough study and research of historical documents, Land Commission Awards, and historic maps with the specific purpose of identifying traditional Hawaiian activities including gathering of plant, animal and other resources or agricultural pursuits including the extent to which traditional and customary Native Hawaiian rights are exercised in any of the study areas.
2. Conduct in-depth research and examinations of archaic and historic period Hawaiian chants, mo'o 'ōlelo or oral traditions, Hawaiian language newspapers and historical documents for any references related to or associated with the study project areas. This has proven to be exceptionally valuable in understanding Native Hawaiian perceptions, use and relationships that are held in high esteem with land environments and natural resources.

From: kfertello@gmail.com
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Letter of support for state park lot 56 (SP0191) on Kaua'i
Date: Thursday, December 9, 2021 8:20:04 AM

To whom this may concern, the DLNR Board members,

Although I no longer live on Kauai, the issue of extending the lease on Kaua'i's Waineke property in Koke'e (State Parks Lot 56/Kaua'i) to the Hawaii Conference Foundation is of great importance to me. I strongly urge you to grant the 15-year lease extension.

The Waineke Lodge is embedded in my wonderful memories of church camps, youth group activities, personal retreats, and family gatherings for many, many years. My sister even married on the property in an intimate and beautiful ceremony over 40 years ago, and we had a precious weekend family reunion there in 2008 before my dad passed away a few years later. My other family members who live on Kaua'i still enjoy the usage of this special place from time to time.

I love that the property has always been available to people on Kauai at a reasonable rate and has blessed the community in so many ways and for so many reasons. It has also been maintained well by people very committed to taking care of the property and respectful of the land.

Thank you very much for considering this concern!

Sincerely,
Kathy Fertello
206-790-6926
Kfertello@gmail.com

Sent from my iPhone

From: [Peleke Flores](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 11:22:49 PM

Aloha Board Members,

My name is Peleke Flores a Kanaka Maoli from Waimea Kaua'i. I am involved in many different aina based restoration efforts and cultural education with our Kaua'i Community.

I humbly request to please DO NOT RENEW Kaua'i Island Utility Cooperatives Permit to continue to divert water from our precious and historical water ways of Wai'ale'ale and Waikoko. Below are some resources that I found, besides my own thoughts above, that should give some background to why.

"It's been nearly three years since the siphon break that shut down diversions from Wai'ale'ale and Waikoko Streams. Despite no significant need for the water, Kaua'i Island Utility Cooperative (KIUC) has again filed a request to renew its Revocable Permit (RP) 7340 for the continued diversion of Wai'ale'ale and Waikoko Streams.

KIUC has never been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity.

Now, the stream water cannot reach the Waiahi hydro plants.

Since the siphon break in June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This history shows that KIUC does *not* need water from these streams for electricity. The Board of Land Natural Resources (BLNR) *must* deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

BACKGROUND

Water is a valued resource throughout Hawai'i. Wai'ale'ale and Waikoko streams on Kaua'i are uniquely important because of their

cultural and conservation significance. The classic oli komo or hula admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, describes the Wai'ale'ale area and the fresh water's foundational role as a physical and spiritual life force in Hawai'i. Additionally, these two streams are accessible to the public to use and enjoy in the forest reserve above Loop Road, unlike many of Wailua's other streams located on private lands owned by Grove Farm and other large landowners.

For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

KIUC currently has a draft environmental assessment pending before the BLNR for a **60-year lease of water** from Wai'ale'ale and Waikoko, but they continue to be given annual permits to divert the water without any environmental review. Even with this request to lock in its water diversions for decades, KIUC has not provided the BLNR with any information about how much water it receives from streams located further down the ditch on Grove Farm lands. KIUC has also failed to provide further information on why the water from Grove Farm lands is not enough to meet their hydro power needs."

Please hear our plea. This is not the best route for sustainable energy nor our water and natural resources.

Mahalo nui loa for your time!

From: [Marie Françoise](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 8:53:04 PM

Aloha.

My name is Marie Françoise Weber and I am writing to testify for Agenda Item D02 in regards to KIUC's file to renew its RP 7340 for continued diversion of Wai'ale'ale and Waikoko streams. These are very sacred and culturally important places. These are also important public access streams when so much of the public water sources have become privatized. The Hawai'i Constitution requires that BLNR protect Hawaiian rights as trustees to the public. This requires BLNR to ensure the public has their priority rights to Wai'ale'ale and Waikoko streams above KIUC.

In order for KIUC to be authorized private use of water, the diversion needs to be proven to meet a reasonable-beneficial use. When there has been an admission by KIUC that the water will be unable to reach the hydro plants due to a break in the ditch system, it becomes clear that this resource has not and will not be needed. This is also evident by the meager %1 or less even in a high production year that these two springs bring to KIUC. It is a negligible fraction compared to what it will take away from the landscape as well as the community. Thank you for choosing wisely.

From: [Madeleine Greczyn](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda item d-2
Date: Wednesday, December 8, 2021 6:27:48 PM

Aloha,

I am writing in testimony that I am AGAINST KUIC diverting the water from the Wai'ale'ale and/or Waikoko streams. It is unlawful for anyone to wake water without an actual realized need for it.

Thank you,

Madeleine greczyn

Sent from my iPhone

From: [Logan Hamilton](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:44:41 AM

Aloha,

I am a concerned citizen who wants to point out that under Hawai'i's public trust doctrine no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable beneficial use. The BLNR is a trustee for the public. The KIUC doesn't have priority rights to the Wai'ale'ale and Waikoko streams. The public does. There should be no water banking. The KIUC has admitted that the stream water from Wai'ale'ale and Waikoko can't reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340. Lastly, 1% is not a good trade. The electricity from the Waiahi hydro plant accounts for less than 1% of KIUC's power generation and water from the Wai'ale'ale and Waikoko account for only a fraction of this percentage point.

Thank you for your consideration on this matter,

Logan Hamilton



December 8, 2021

Board of Directors:

Board of Land and Natural Resources (BLNR)
Attn: Board Members
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Gary L. Hooser
President

Andrea N. Brower
Ikaika M. Hussey
Co-Vice Presidents

Kim Coco Iwamoto
Treasurer

Re: Agenda Item D-2, Renewal of RP 7340

Aloha Members of the Board of Land and Natural Resources,
On behalf of the Hawai'i Alliance for Progressive Action (HAPA) we respectfully request that the Board deny Kaua'i Island Utility Cooperative (KIUC)'s request for the renewal of RP 7340.

Paul Achitoff

Walter Ritte Jr.

Kaleikoa Ka'eo

Michael Miranda

Pua Rossi-Fukino

Karen Shishido

Leslie Malulani Shizue Miki

To legally authorize private use of stream water, whether by revocable permit or long-term lease, the Board must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC admitted that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system.

KIUC has not been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity. Now, the stream water cannot reach the Waiahi hydro plants.

Since the siphon break in June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This history shows that KIUC does not need water from these streams for electricity.

The BLNR must deny RP 7340 in order to uphold Hawai'i's public trust doctrine.

KIUC has failed to meet its burden under the public trust doctrine to show the lack of a feasible alternative. The Board can only authorize diversion of water from Wai'ale'ale and Waikoko after fully analyzing whether KIUC must take water from public lands.

Water is a valued resource throughout Hawai'i. Wai'ale'ale and Waikoko streams on Kaua'i are uniquely important because of their cultural and conservation significance.

The classic oli komo or hula admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, describes the Wai'ale'ale area and the fresh water's foundational role as a physical and spiritual life force in Hawai'i. Additionally, these two streams are accessible to the public to use and enjoy in the forest reserve above Loop Road, unlike many of Wailua's other streams located on private lands owned by Grove Farm and other large landowners.

For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

Wai'ale'ale and Waikoko Streams are sacred resources for the community, island, and the Hawaiian people and lāhui. The proposed permit unjustly allows KIUC to take most of the base flows from these sacred streams. For a stream of such cultural and environmental significance, in a conservation district, the bar must be set higher.

The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

It is important to note that of those historically testifying in favor of the ongoing diversion of the majority baseflow, most parties represent a financial interest in downstream diversions for commercial use.

We request that the board exercise its statutory responsibility to protect the public trust and therefore deny the renewal of RP 7340.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anne Frederick', written in a cursive style.

Anne Frederick, Executive Director
Hawai'i Alliance for Progressive Action

From: [Debbie Lee-Jackson](#)
To: [DLNR.BLNR.Testimony](#)
Cc: [Debbie Lee-Jackson](#)
Subject: [EXTERNAL] Fwd: Testimony-Agenda Item D-2
Date: Thursday, December 9, 2021 8:48:15 AM

Attached

----- Forwarded message -----

From: **Debbie Lee-Jackson** <debbie.leejackson@gmail.com>

Date: Thu, Dec 9, 2021, 8:47 AM

Subject: Testimony-Agenda Item D-2

To: Debbie Lee-Jackson <debbie.leejackson@gmail.com>

Cc: Debbie Lee-Jackson <debbie.leejackson@gmail.com>

Attached

From: [Brenda Jose](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2 - Testimony from Brenda Jose, Kekaha, Hawaii
Date: Wednesday, December 8, 2021 8:34:24 PM

Aloha BLNR Members,

My name is Brenda Jose and I am a life-long resident of Elepaio Road, Kekaha. I'd like to submit testimony regarding KIUC's request to renew its Revocable Permit (RP) 7340 for the diversion of Wai'ale'ale and Waikoko Streams and urge you to deny their request and demand that a complete environmental assessment is conducted for yours and the public's review.

The public trust is being jeopardized and I am particularly concerned with the lack of community involvement and awareness regarding this extremely important matter. Please, please, please consider being proactive instead of reactive. These sacred lands deserve our utmost attention and diligence to do what is right by protecting these water resources and preventing any and all violation of Hawai'i's public trust doctrine.

Mahalo,
Brenda Kehaulani Sialana Jose

From: [Noelani JOSSELIN](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 12:19:00 AM

Water is not needed to be diverted for electricity on Kauai. Kauai Island Utility Cooperative has been providing electricity without this water all this time. Save Wai'ale'ale stream and Waikoko stream.

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Sophronia Noelani Josselin

From: [Jo Amsterdam](#)
To: [DLNR.BLNR.Testimony](#); [Bridget Hammerquist](#)
Cc: [Hawai'i Alliance for Progressive Action](#)
Subject: [EXTERNAL] Agenda Item D-2 Restoring the Waters of Wai"aleale and Waikoko
Date: Wednesday, December 8, 2021 8:29:27 PM

Aloha,

Please do not renew the lease for this diversion since there is no real need for this water. Electricity has not been produced for over two years, I understand. Under Hawaii's public trust doctrine no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable beneficial use.

I believe the flow should be returned to it's natural one. This will enable all the wildlife to return to the steams and more abundant food for island gatherers would be available. More solar and storage will be our best way for energy gathering here. Mahalo for your consideration, sincerely Jo Amsterdam Kalaheo

From: [Hope Kallai](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Please use my second testimony
Date: Thursday, December 9, 2021 9:02:49 AM

From: Hope Kallai
Sent: Thursday, December 9, 2021 8:57 AM
To: Ferreira, Darlene S <darlene.s.ferreira@hawaii.gov>
Subject: Please use my second testimony

Aloha e Darlene - Could you please use my second email testimony? There's spelling errors in the first one. Let me know if you have any questions. Mahalo, Hope

FYI: this one...

2021 Dec. 9

Suzanne Case, Chair
Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813
808-587-0400
blnr.testimony@hawaii.gov

Re: Dec. 10, 2021 BLNR Agenda Item D-2
Revocable Permit D-2

Aloha e Madame Chair and BLNR Members:

Revoke Revocable Permit 7340 as Upper Waiahi Hydropower Plant has not produced hydropower from RP 7340 waters in over 3 years.

Please revoke Revocable Permit 7340 as the waters from Wai`ale`ale and Waikoko have not produced hydropower in over 3 years at Upper Waiahi Hydropower Plant because the ditch has not been repaired. Renewing this permit would be nothing more than water banking, which is not a public trust purpose. This water should be left in its natural state, for the benefit of generations to come, not to be banked and still considered for a 65-year water lease. There is no beneficial use to renew this permit.

Upper Waiahi Hydropower Plant is not necessary for overnight power production as the contribution is minimal considering recent renewable/battery options.

For years, this Board has been told that the Waiahi Hydropower plants were necessary to provide overnight power. Wai`ale`ale (North Fork Wailua) and Waikoko Streams are diverted to the Upper Waiahi Hydropower plant, along with `Ili`ili`ula and some unknown-named streams. The upgraded Upper Waiahi hydro can produce 0.7 MW of power at peak capacity. Only 55% of that power is from the permit waters of Wai`ale`ale and Waikoko. The remaining 45% is from `Ili`ili`ula and other streams. The permit waters of Wai`ale`ale and Waikoko can only generate about 0.38 MW daily or 0.19 MW overnight, at peak capacity, when they are working.

Since KIUC's original lease application and 20-year revocable month-to-month permit, KIUC has expanded their renewable portfolio and overnight storage capacity with battery banks and now receive national annual awards for amount of stored overnight wathours at 3000KWh per customer:

Energy storage earns more awards for KIUC

By [The Garden Island](#) | Monday, August 12, 2019, 12:05 a.m.

LIHUE — Kauai Island Utility Cooperative led the nation again in 2018 for interconnection of energy storage watts per customer, and ranked second in annual energy storage capacity, according to the Smart Electric Power Alliance. In 2018, KIUC posted more than 3,000 watt hours per customer, Wh/C, nearly six times more than the next ranked utility: Sterling Municipal Light Department in Massachusetts. This is the second year running that KIUC topped the list of storage watts per customer. In 2019, the Lawai Solar Power Plant went online with 28 MW of solar power and 100 MWh of storage, a 5-hour battery energy storage

system.

AES Lawai Solar is a 28.2 MW DC Solar Power Plant making solar power available at night for the island of Kauai. This type of power plant produces cheap, clean energy and uses batteries to deliver power when it is most valuable, instead of just when the sun shines. The new solar power plant is vital to decarbonizing the island grids of Hawaii.

KIUC has even greater power production projects planned with a West Kauai Energy Project of solar and pump storage hydropower. In the WKEP public presentation Mr. Bissell states (<https://www.kiuc.coop/kiuc-and-aes-join-forces-first-ever-solar-pumped-storage-hydro-project>):

When operational, the solar array will contribute up to 35 megawatts directly to the grid and will store up to 240 megawatt hours for dispatch during evening peak. The hydro resources are expected to produce 24 megawatts on average daily, which includes 12 hours of storage to be used overnight.

KIUC has completed two solar-plus-storage renewable projects in partnership with AES: a 20- megawatt (MW) facility in Lāwa'i and a 14 MW facility at the Pacific Missile Range Facility.

CFO Dave Bissell stated (<https://www.kiuc.coop/kiuc-and-aes-join-forces-first-ever-solar-pumped-storage-hydro-project>):

Now, KIUC will be able to serve up to 40 percent of evening peak power with stored solar energy, President and CEO David Bissell said in a statement.....

When WKEP becomes fully operational, it will meet 40% of nighttime energy needs, significantly offsetting fossil fuel consumption. When we count the contribution of WKEP, 80% of our nighttime energy needs and 100% of our daytime energy needs will be met by a combination of renewable resources.

Existing KIUC battery storage:

Lawai AES solar 100 MWh

PMRF AES solar 70 MWh

Kapaia 52 MWh

Many other sources of overnight power now exist with much greater capacity than the 0.19 MW of hydropower produced by the overnight waters of Wai'ale'ale and Waikoko and storage capacity will soon double when WKEP goes online.. Lower Waiahi hydropower plant is still available for overnight power. Upper Waiahi and the waters of Wai'ale'ale and Waikoko are not necessary. There is 1,000 times more MWh already stored than Upper Waiahi's 0.19 MW of overnight power. 80% of Kauai's overnight power needs are met. Revoke RP 7340 as overnight power needs are no longer a priority.

Upper Waiahi is not the cheapest source of power on Kauai.

This Board was also told that Waiahi Hydro is one of KIUC's cheapest sources of power. That was before the siphon break with a million-dollar repair tab that has not been included in the cost per kilowatt hour. The costs of the Environmental Assessment, Contested Case and lease preparation fees have not been included in the kilowatt hour estimate. New renewable power projects are coming in with lower production rates. KIUC's financial gains should have no bearing on public trust decisions. The cost of having this ditch in the upper forest reserve is great. Access is complicated and the cost of maintaining a 5-mile rainforest ditch is huge. Lower Waiahi operates with unpermitted water from the North Intake Ditch, much shorter to maintain, and not in the public forest. AES Lawai power is produced at .11 kwh. Upper Waiahi's production costs are now unknown due to repair costs.

KIUC is not in compliance with RP 7340 repair conditions.

KIUC has failed to repair and maintain this ditch system for over 3 years, contrary to conditions of the 2003 original RP 7340:

Condition 8: Repair and maintain all buildings or other improvements no or hereafter part of the Water Resources.

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

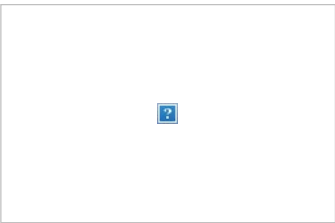
Condition 13. At all times with respect to the Water Resources, use due care for public health and safety.

This permit should be revoked because KIUC has failed to maintain the state-owned ditch system or provide repair estimates or timelines for over 3 years. Deferring the maintenance for over three years has caused a great deal more erosion and raised repair costs considerably. Why has this Board never been given pictures and repair estimates during the past 2 RP renewals for a broken state ditch? Any water flowing out of this broken pipe has been wasted for the past 3 years.

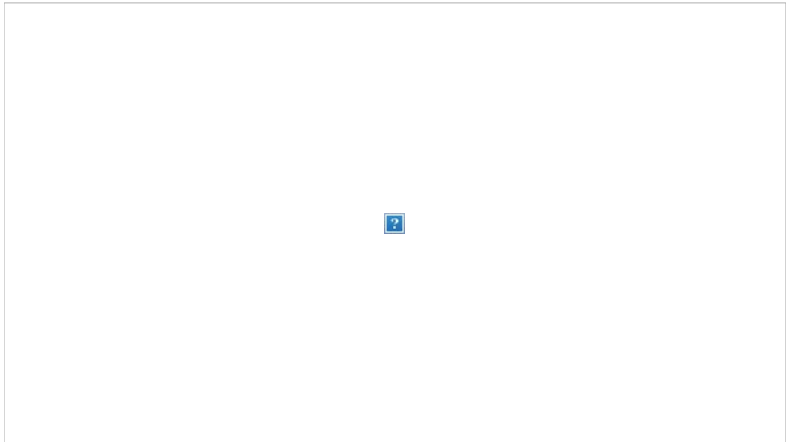
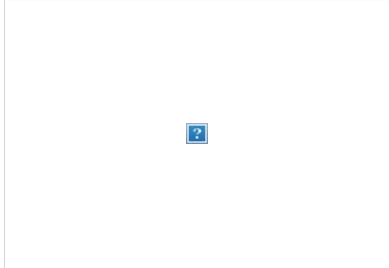
KIUC is not in compliance with streamflow restoration of Waikoko and with streamflow monitoring requirements.

CWRM's recommendation for the duration of the Contested Case proceedings on the Wailua IIFS, that 1.6 mgd was

available for diversion at Waikoko, the remainder to remain in Waikoko Stream, as explained in slides from KIUC's Wailua-Kapaa Neighborhood Association meeting powerpoint (<https://www.kiuc.coop/sites/default/files/documents/presentations/WKNA%20Waiahi%20Hydro%20informational%20update%202.23.2019%20FINA.pdf>).

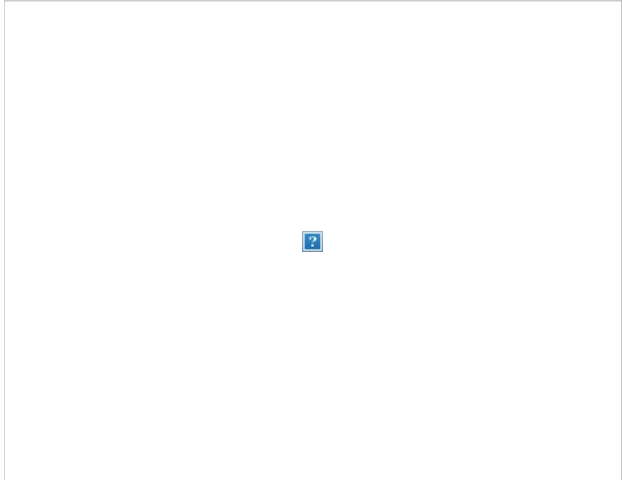


(<https://www.kiuc.coop/sites/default/files/documents/presentations/WKNA%20Waiahi%20Hydro%20informational%20update%202.23.2019%20FINA.pdf>).

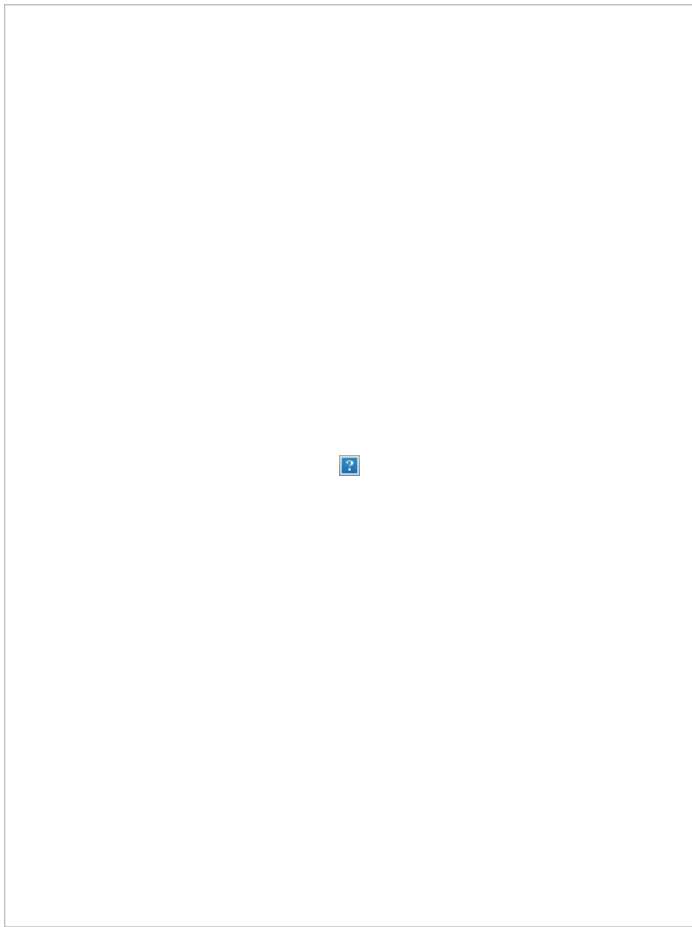


KIUC has a mistaken idea that

ditchflow is the same as streamflow.

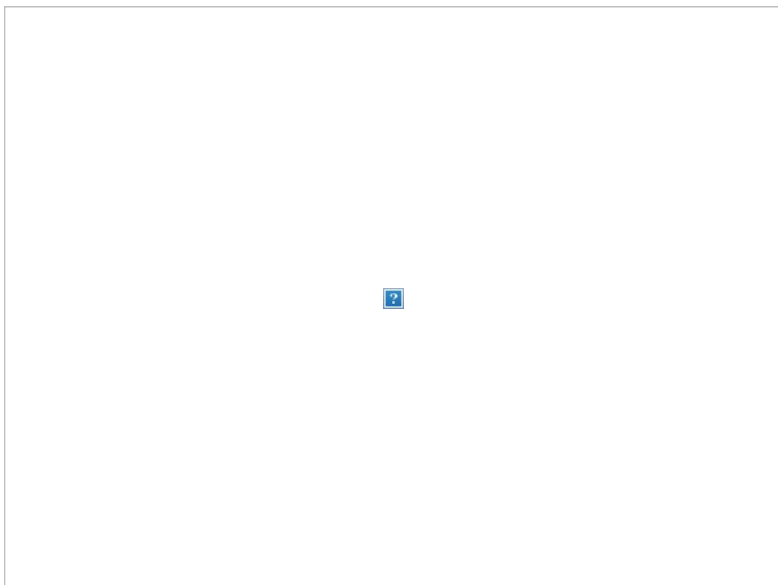


Diverting 100% of the baseflow of Waikoko Stream and returning it after 100' dry feet is not "Stream Restoration" as KIUC presented. There is supposed to be no diversion of Waikoko Stream since 2019.



This is the dry Waikoko Stream channel below the KIUC dam in May, 2019. There is not 1.6 mgd in this stream. KIUC continues to divert 100% of baseflow, leaving Waikoko Stream dry for 100' between Waikoko Dam and where the water enters the stream from the throwout sluice.

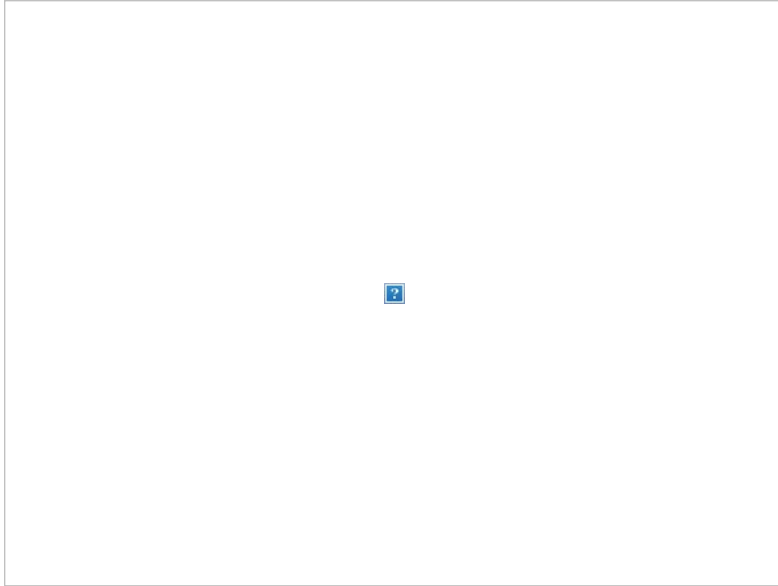
This is the KIUC dam at Waikoko Stream. The only flow is through the small leak.



This is no stream flow restored to Waikoko Stream. KIUC is in violation of steamflow restoration

requirements at Waikoko Stream as there is no baseflow. KIUC was previously told by USFWS to sandbag the ditch to cut off ditchflow for gaging purposes. Diversion into the throwout needs to cease and flow restored over the KIUC dam and ditch structure in Waikoko Stream. Sandbag the ditch - rocks, dam boards, screw valve - whatever it takes to keep Waikoko stream wet.

Waikoko Stream at North Wailua/`Ili`ili`ula ditch, not 1.6 mgd.

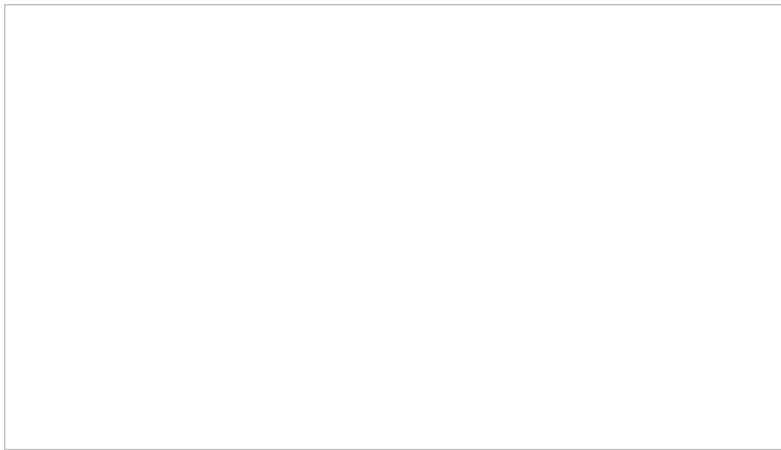


In Staff Submittal B-2 on Wailua IIFS, CWRM Staff required periodic measurements on Waikoko Stream to assess the IIFS and continuous monitoring at the USGS gage on Waikoko.

MONITORING

Staff shall maintain a continuous gaging station on Wai`ale`ale Stream to monitor compliance with the interim IFS and make periodic measurements on Waikoko Stream to assess the attainability of the interim IFS. IUUC will maintain continuous monitoring stations on the `Ili`ili`ula-North Wailua Ditch at the former USGS gaging stations at the Wai`ale`ale Stream diversion and Waikoko diversion as well as tailrace monitoring for each of the hydropower plants.

KIUC posts Waikoko Combined Ditch flow on their website (https://kiuc.coop/sites/default/files/documents/NFW%20and%20Waikoko%20Diversion%20Records%202019_3.pdf), but it is impossible to extrapolate stream flow by combined ditch flow or even to know what stream waters are combined. There is no Waikoko Stream flow data, only "Combined Ditch flow" for a 9 month period in 2019. Nothing for 2020.



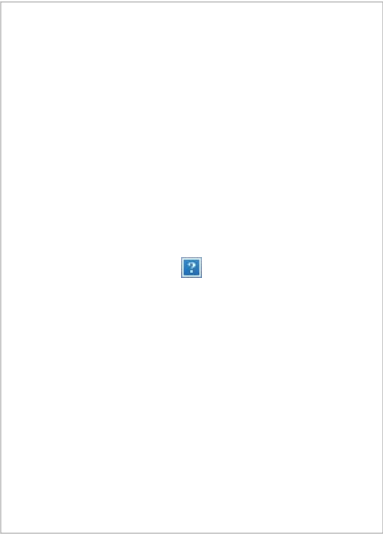
This is problematic in that in last 2 RP renewals, KIUC reported no ditch diversion of Wai`ale`ale and Waikoko Streams since at least June 2019. This graph shows ditchflow when there should be none and a 14 mgd redline, for an unknown reason. And no Waikoko Stream data.

This year's staff submittal states no diversion of Wai`ale`ale and Waikoko streams. This should not mean "only dry for the 100' between dam and throwout." KIUC must maintain the hydrologic continuity of Waikoko Stream with a permanently wetted stream channel able to support fish migration.

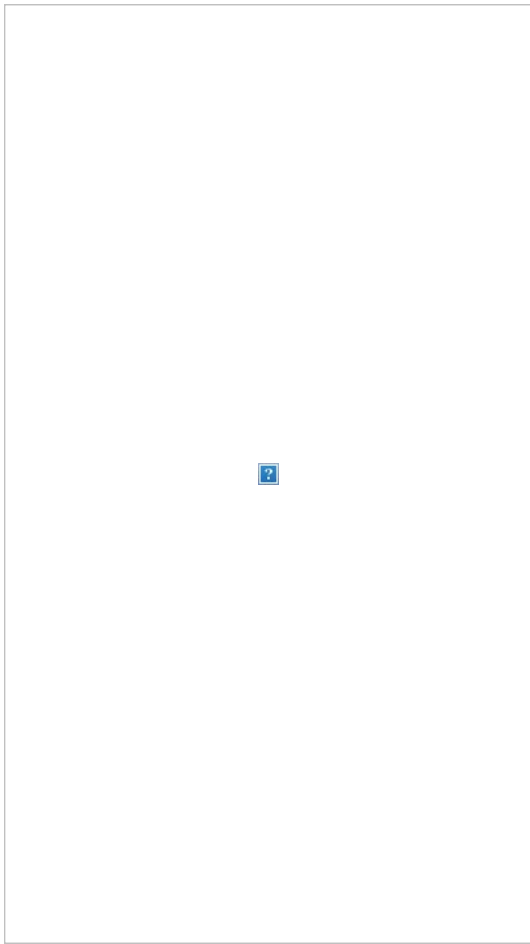
Power production at Lower Waiahi Hydropower Plant has not been restricted due to the North Wailua/Ili`ili`ula Ditch. Revoking RP 7340 will not impact operations any differently than the past 3 years.

There are great public trust benefits to restoring the flow of the headwaters of Wai`ale`ale and Waikoko. There are no public trust benefits to enabling this broken ditch permit to be renewed.

There is great public trust benefit to the cessation of this ditch in the headwaters of the most sacred Wai`ale`ale rainforest. The diversion of Wai`ale`ale and Waikoko are the only diversions in the Lihue Forest Reserve. There is no priority reason for this power production to drain our forest water resources. This power can be replaced by truly



renewable sources.



2012 MOU condition of a Cultural Impact Assessment accepted by OHA has not been met.

OHA rejected two Cultural Impact reports as incomplete and requested a supplemental report as part of a Stipulation for Withdrawal of Request for a Contested Case Hearing in 2012. The recent CIA prepared by Cultural Surveys Hawaii was rejected as failing to consider impacts to Native Hawaiians, the whole purpose of the report. A Supplemental Report was presented to DLNR but not to OHA. This Supplemental Report also fails to consider impacts to Native Hawaiians and cultural practitioners. It only considers impacts to the invasive albizia trees if the diversion is pau. KIUC has failed to consider the real impacts on Native Hawaiians of the continual diversion of their most sacred waters, even after "vandalism." Please revoke RP 7340 as dewatering the rainforest has great negative spiritual, cultural, and environmental impacts.

This forest is too fragile and precious for this ditch to continue.

Thank you for revoking Revocable Permit 7340.

Hope Hamilton Kallai
POB 655
Kilauea, HI 96754
lokahipath2@live.com

From: [Tom Kanahele](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2: RP S-7340
Date: Wednesday, December 8, 2021 7:42:36 PM

To BLNR/DLNR/CWRM/Chairman Case,

I am a resident of Hanapepe, Kauai, and I am kanaka oiwi. I adamantly oppose the renewal of RP 7340 to KIUC. REVOKE the permit!

The damming, diverting, energy-extraction, and selling of these waters is violence and genocide against my people. These processes have (and continue to) damage our watersheds and diminish our populations of endemic plants and animals. The various "studies" that attempt to show "low or no impact" to the environment are perhaps obtained by paying puppeted surveyors. My people know the truth because we walk the forests and streams daily and KNOW them. Endangered fish and shrimp are chopped up by the hydro operation. Entire stream beds of flora and fauna have been decimated by extensive stream-drying diversions. And for WHAT? For KIUC and Grove Farms (and their "down-stream" corporate friends like A&B, McBryde, Robinson Family Partners) to be able to plan a "rich" future for the non-indigenous sugar-empire-descendants on Kauai: a grand future of more hotels, more foreign "infrastructure," more tourist capacity, more imports, more imported plastic for the over-filled landfills.

The waters of Wai'ale'ale are sacred to ALL kanaka oiwi, not just to those on Kauai. The evidence of this is found in hundreds of our oli, our mele, our hula, and our mo'olelo. These waters should NEVER have been diverted, polluted, and enslaved the way that they were. The fact that this taking of sacred waters continues is damning proof that the "50th state" is still supporting and encouraging colonial values of exploitation and genocide. It is shameful behavior.

Do not renew RP 7340. 'A'ole. Revoke it NOW.

Kealii Kanahele
Hanapepe Kauai

From: [Alison Lewis](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2: KIUC RP-S-7340
Date: Wednesday, December 8, 2021 7:55:36 PM

Dec 8, 2021

To BLNR/DLNR/CWRM/Chairman Case,

I am a resident of Hanapepe, Kauai. I adamantly oppose the renewal of RP 7340 to KIUC.

The damming, diverting, selling of these waters directly violates the deep cultural beliefs of the indiginous peoples of Kauai, damages the health of a fragile forest ecosystem, AND directly violates state water protection laws. This permit is a long-term skirt-around of the laws (using exclusions to the law that were intended for short term "bridging" needs alone). State water protection laws were put in place by the VOTING CITIZENSHIP, through valid, lengthy legislative process, and DLNR is the agency responsible for UPHOLDING the law, rather than this helping of corporations (or deceptively-named "cooperatives") to EVADE the law.

Renewing revocable permit 7340 will financially benefit the corporations of Grove Farms and KIUC. The Chairman of DLNR is a close family relative of the leaders of these corporate entities and it is well within the realm of logic to predict that she also would benefit from their windfall gain in this endeavor.

The citizens of Kauai do NOT want KIUC hydropower. It satisfies an insignificant amount of the island's needs and it comes at the expense of endangering the environment and violating the indiginous people's rights.

Renewing this permit is WASTEFUL, FRAUDULENT, IRRESPONSIBLE, DISRESPECTFUL, colonialist behavior. The repeated renewing of the permit violates citizen civil rights in order to profit corporations and persons in positions of government power.

Do not renew RP 7340. Revoke this permit now.

Alison Lewis

Hanapepe Kauai

From: [Rachel Fleury](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:52:45 AM

To Whom It May Concern:

I offer my written testimony in strong opposition of BLNR renewing the permit for KIUC to divert water from Wai'ale'ale and Waikoko Streams. BLNR has the imperative to protect the precious natural resources of this island, and under Hawai'i's public trust doctrine, no one is authorized to take water without a legitimate, vetted claim for the necessity and reasonable-beneficial use. KIUC cannot provide such a claim.

Thank you for honoring your kuleana to protect these sacred waters in the public trust.

Sincerely,
Rachel Fleury
Moloa'a

From: [josh_mori](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 8:42:56 PM

Aloha BLNR

It is of the utmost importance that this vote ends in the denial of RP S-7340. The lack of evidence provided by KIUC to warrant a 60 year lease over our most important resource is reason enough for its denial. It does not surprise me that the BLNR is not up to date with many of Kaua'i's residence positions about KIUC and their lack of consistency and transparency with their "co-op" members. The green washing and water banking has to stop and our community is waking up and has been organizing against such corporate resource theft, this fight is no different. We have learning from our lāhui and their battles over the past 20 years and are up for the task. From their own admission, the west side of Kaua'i already out produces our need daily need through the existing solar power, this diversion is completely unnecessary. Beyond the fact that it is an abuse towards our native culture, ancestral places, and violates tenants of the Declaration on the Rights of Indigenous people as written by the United Nations. Mahalo for your time

Joshua Dean Iokua Ikaikaloa Mori
Farmer, Executive director, Coach, College Instructor, Cultural Practitioner, Husband and
Father in Waimea Kaua'i

--

Joshua Dean Iokua IkaikaLoa Mori, Owner
[Pākahi Academy/ IWIKUA](#)
808.652.2127

From: [Tamra Martin](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 7:13:25 AM

Aloha,

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Tamra Moriguchi

North Shore Hydrological Services

Matt Rosener, MS, PE, Principal

December 9, 2021

Submitted via E-mail to: blnr.testimony@hawaii.gov

Aloha Director Case and Members of the Board of Land and Natural Resources,

The following testimony is offered in opposition to renewal of KIUC Revocable Permit 7340. A year after I submitted my last comments on this permit, not much has changed, apparently. The ditch is still broken, repairs are pending, yet the diversion dams continue to affect streamflow and fish passage conditions in both Waialeale and Waikoko Streams, two Kauai waterways with significant restoration potential. I am still awaiting a response to my comments (submitted Jan. 7, 2020) on KIUC's Draft Environmental Assessment for their Waiahi hydropower operations after almost two years. And the adjustment of the Interim Instream Flow Standards for these streams has not yet happened, nor is there any clarity about when this process will resume. The situation appears to be stuck in a holding pattern.

I still have concerns that RP 7340 essentially acts as a shield for several other users who access waters diverted from Waialeale and Waikoko Streams after their use in KIUC's two Waiahi hydropower plants. As you know, water diverted from Waialeale Stream (aka the North Fork Wailua River) by KIUC is discharged into Waiahi Stream which is a large tributary of the South Fork Wailua River. Some unknown quantity of this water is then extracted from the river again and transferred out of the Wailua River basin through other ditch systems (e.g., Hanamaulu Ditch, Upper Lihue Ditch, Waiahi-Kuia Aqueduct). This second stage diversion is not carried out by KIUC, but by other entities for commercial uses without any permit from this board, because it occurs on private land. So, it would seem that KIUC's diversion of streamflow from Waialeale and Waikoko Streams to Waiahi Stream basically transfers control of public trust resources from the public to the private domain. Does RP 7340 cover these subsequent uses of the same water after KIUC discharges it from their power plants?

On a related note, I am also still concerned that the board's repeated approvals of this RP seem to be an endorsement of the long-term inter-basin water transfer that has sent countless volumes of water from the North Fork to the South Fork, and then from the Wailua River watershed south into several other drainage basins. There has never been an adequate analysis of how this removal of water from the watershed has affected (and is affecting) stream system ecology and sediment dynamics. Like the current KIUC proposal to divert water out of the Waimea River basin on Kauai's westside, where chronic downstream sedimentation is affecting instream habitat and channel capacity to convey floodwaters, no proper evaluation of the potential links between upstream inter-basin water transfers and downstream sedimentation has been undertaken for the Wailua River system. Observations of significant sediment accretion around the Wailua River Bridge over the past several years leads to the question of whether reducing or eliminating water diversion out of the watershed would allow for improved channel

North Shore Hydrological Services

Matt Rosener, MS, PE, Principal

maintenance throughout the drainage network. This is particularly important at the river mouth where the rising sea level is already affecting flood frequency on the lower Wailua River floodplain, and any unnatural sedimentation in the river channel will compound this effect.

I understand that the scope of RP 7340 is the diversion and use of Waialeale and Waikoko stream water for KIUC's hydropower operations only. However, I encourage you to consider the bigger picture of what is happening with surface waters in the Wailua River basin and the importance of this permit in that context. There are still too many questions and not enough information available to the public about where and how the waters diverted from Waialeale and Waikoko Streams are ultimately being utilized and discharged by the end users. Since KIUC cannot currently divert from the Waialeale or Waikoko stream sources because of the ditch damage, I encourage you to consider suspending RP 7340 until the Water Commission establishes new Interim Instream Flow Standards for these streams and KIUC resolves its long-term lease application. It would be prudent for KIUC to secure a lease before investing in the ditch repairs anyways.

Mahalo for your consideration,

A handwritten signature in black ink that reads "Matt Rosener". The signature is written in a cursive style and is positioned above a light gray rectangular background.

Hydrologist/Water Resource Engineer

From: [Toi Pua La`a](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] AGENDA ITEM D-2
Date: Wednesday, December 8, 2021 5:55:22 PM

I am unequivocally against the renewal of Revocable Permit #7340 for KIUC to divert waters from Waiàleale and Waikoko streams.

I kindly remind the BLNR is entrusted with protecting cultural and natural resources.

Water cannot be owned and must be protected, not for privatization and for profit usage. According to the Hawaii Public Trust Doctrine, water usage is protected.

KIUC does not need this water for Hydro-electric production; the water doesn't reach the Waiàhi water plant.

I, and my family, are Hawaiian Native, Kanaka Maoli; cultural practitioners and enjoyers of nature preserve. I implore you to deny the RP#7340. I speak on behalf of my family, which are not at leisure to email in opposition testimony.

Mahalo.
T. Pua La`a Norwood
Timoteo K. Hew Len

*Aloha ke kahi ke kahi.
Malama pono, malama kino.
E Ola!
(Love each other, one another.
Care for/Respect Righteousness, care/respect your body.
Live life in Health!)*

Pua La`a

Alo La`a ~ Danse Arts Yoga Studio
in Ching Young Village, Hanalei
5-5190 Kuhio Hwy., D-10
Hanalei, Hawaii 96714
Mobile: [808 652 9642](tel:8086529642) (YOGA)
alolaa108@gmail.com
www.alolaa.yoga

From: [Heather O'Donnell](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 12:05:54 AM

Aloha,

I am an East side resident urging the denial of KIUC's request for renewal of its revocable permit (RP S-7340) allowing for diversion of water from Waialeale and Waikoko streams.

KIUC has shown that it can operate just fine in the past 2.5 years since the siphon broke. At its maximum level of diversion, only 1% of electricity was generated by stream diversion. This amount does not show a justifiable need for this diversion. Diverting millions of gallons of stream water a day for less than 1% of the generated electricity makes no sense whatsoever.

KIUC has admitted that the stream water can't even reach the hydro plants due to the break in the ditch system. Therefore, the water can't be used for electricity generation and this permit must be denied.

I live in Kapahi and often go up by Loop Road and also paddle on the Wailua river. These are very special and sacred areas that need protection.

Water is a resource which belongs to all of us. The people of Kauai are depending on you to do the right thing and deny this permit.

Mahalo,
Heather O'Donnell

From: [Elizabeth Okinaka](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 9:07:10 AM

Aloha mahalo for your time. I would like to give testimony OPPOSING Agenda Item D-2, KIUC's revocable water permit (RP-7340).

I am a resident of Kauai and will personally be affected by the water diversion under the revocable permit. Stop the exploitation of our natural resources. Allowing this permit will pose a threat to Hawaiian rights and cultural practices. Native wildlife and fauna will also be affected.

These outdated Plantation Era water permits are a form of cultural genocide. Stop the diversion of sacred Wai- water is life and should be respected. Many of the streams we grew up swimming in are either dry or polluted in 2021.

Please do what's right and deny the revocable permit. Think about what we are leaving behind for future generations. Why allow diversion of millions of gallons for 1%.

KIUC, is not authorized to take water without an actual need for the water to meet a reasonable-beneficial use.

For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

KIUC has never been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity.

***Mahalo
Elizabeth Okinaka
E Ola Kakou Hawaii 501(C)(3)***

From: [Lana Olson](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:16:40 AM

To: Board of Land and Natural Resources

Re: **Agenda Item D-2**

Hearing: Friday, December 10th, 2021 9am.

Position: **Deny RP S-7340**

I am writing to request that you deny RP S-7340 to KIUC for the continued diversion of Wai'ale'ale and Waikoko streams on Kaua'i. These two streams are some of the few that are accessible to the public to use, despite Hawaii's public trust doctrine which provides for public access and common water rights. The BLNR is supposed to enforce that doctrine and protect the public's right to water. Approving this renewal is in violation of the public trust doctrine and KIUC has not needed or used this water since June 2019. There has been no accounting for or auditing of the water used and no demonstration of a reasonable beneficial use. The water has not reached the Waiahi hydro plants since the break in the ditch system and it has not been a problem for them as our power grid has seemed pretty stable since that break. Since KIUC has failed to provide information regarding the need for use, the amount used to date, and needs for future use, and since the recent diversion has clearly been wasted for the last 2.5 years, it seems clear that this permit should not be renewed and RP S-7340 should be denied per the public trust doctrine.

Respectfully,

Lana Olson
Princeville
DPH Precinct 14-1 President

From: [Cheri](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] "Agenda Item D-2"
Date: Wednesday, December 8, 2021 4:50:00 PM

1. **The BLNR is a trustee for the public:** The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

2. **No water banking:** To legally authorize private use of stream water — whether by revocable permit or long-term lease — the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC **admitted** that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.

3. **1% is not a good trade:** In a high production year, electricity from the Waiahi hydro plants accounts for less than 1% of KIUC's power generation, and water from Wai'ale'ale and Waikoko account for only a fraction of this percentage point. This tiny amount of hydropower is not worth diverting **millions of gallons of water per day** from Wai'ale'ale and Waikoko Streams. It has been proven that even without water from Wai'ale'ale and Waikoko, KIUC can keep the lights on as it has for the past 2 ½ years.

Please support our community over big business! i am doing my part by being full solar with no grid tie!
thank you considering my testimony against the waters being diverted!

Cheri Phillips
Kapaa HI

DECLARATION OF PUANANI ROGERS

I, Puanani Rogers, am a resident of the island of Kauai and my address is 4702 Mailihuna Rd. Kapaa, HI 96746 in the ahupua`a of Kealia, Puna district.

1. The following facts are offered and based on my own personal knowledge, oral history of my Kupuna, research on the internet and rely on spiritual guidance as well.

2. I am Kanaka Maoli, aka Hawaii National and indigenous to the Sovereign nation of the Hawaiian Kingdom, Ko Hawai`i Pae `Aina.

3. I have been a member of Friends of Maha`ulepu since 2014 and Kia`i Wai `o Wai`ale`ale since 2017. I am in strong support of our missions to restore and preserve natural stream flow. I offer this declaration as a member of Friends of Maha`ulepu and Kia`i Wai o Wai`ale`ale in support of our missions to preserve water, prevent waste and protect natural stream flow and aquifer recharge as well as to malama the aina affected and negatively impacted by the "Blue Hole diversions". RP7340, TMK(4) 3-9-1, diverts water and reduces flow that impacts our enjoyment of the streams, the cultural practices, hunting and gathering and the collection of water as ho`okupu, an offering and have carried the sacred waters from Wai`ale`ale's for ceremony as far away as the I`olani Palace.

4. Friends of Maha`ulepu and Kia`i Wai o Wai`ale`ale seeks to protect Kaua`i's natural and cultural resources, cultural practices, and the environment that these practices depend on for all communities on Kaua`i and for generations to come. Included in our mission is the preservation and restoration of stream flow, particularly in areas markedly damaged as the areas of the Wai`ale`ale and Waikoko stream diversions which prevents the natural enjoyment of the stream, impacting hunters, gathers and other cultural practices of our community which also includes the sacred historical practices and recognition of the Blue Hole as a sacred wahi pana.

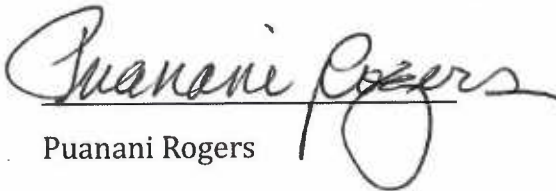
5. I am now 81 and when younger I hiked with my children to Wai`ale`ale regularly, participated in ceremony, festivals, hula practices, plant and sacred water gathering. I have and continue to use plants from Wai`ale`ale for medicinal purposes and hula adornments. For years, the dam diversions have been falling into greater and greater disrepair. Rebar and wire began sticking out of the dam making the crossing almost impossible. Today, I still connect with Wai`ale`ale Stream. We don't have to be there in

person to make the connection. I go to Poli`ahu Heiau to do ceremony, to chant and I am once again connected to Mt. Wai`ale`ale and her streams even though I can no longer go in person because of health issues. Many argue that we have to be there in person to exercise our cultural and traditional practices. That is not true. I still am deeply saddened when I consider the damage to those streams whether I'm there or not.

6. The renewal of RP7340 and the take of millions of gallons of water daily, which, for the past 18 months, have been totally wasted and have not been used by KIUC for hydro power production by their own reports, mandates that this water be restored to the streams and the dam diversions removed to stop the waste and destruction. This proves that the water isn't needed to run the hydro power plants. This is only an excuse to continue diverting the water. There's no more sugar production and the lease that was on these diversions, covered by RP7340, ended in 1999 by its own terms. There should never have been an RP after that. KIUC began operating these diversions in 2001 with no permits at all. KIUC is not meeting the terms of their lease, they face extensive repairs but thus far have not done them and the whole scheme of taking this water is a farce causing insult and injury to me and many on Kauai and an otherwise beautiful environment. Its wasted and should be dismantled.

7. I have personally walked the entire area and I have personally been to visit each of the Waiahi hydro power plants. I have read the KIUC data reported in their *Currents* magazine and am aware of the minimal power produced. Their operation causes so much damage to the environment and harm to our people, it does not make any sense to continue this travesty.

I, Puanani Rogers, declare the forgoing under penalty of perjury under the laws of the State of Hawaii. Executed this 18th day of December 2020.


Puanani Rogers

From: [Shannon Rudolph](#)
Subject: [EXTERNAL] No on RP #7340 / Wai'ale'ale & Waikoko
Date: Wednesday, December 8, 2021 8:53:18 PM

Aloha! Please vote no on the diversion of Wai'ale'ale and Waikoko Streams. History shows that KIUC does not need water from these streams for electricity. The Board of Land Natural Resources (BLNR) must deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine. Mahalo,
Shannon Rudolph 40 year Hawai'i resident

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How wonderful it is that nobody need wait a single moment before starting to improve the world. ~ Anne Frank

From: [Maggie Taurick](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 11:31:09 PM

I'd like to add my voice in favor of protecting the streams and holding the KIUC accountable for the damage they've been causing.

Thanks!

Sent from my iPhone

From: [James Trujillo](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2: Testimony to Deny RP 7340
Date: Thursday, December 9, 2021 8:22:06 AM

Mahalo for the opportunity to provide testimony on agenda item D2.

I am a Kaua'i resident and a member of KIUC since its inception in the early 2000's. As an environmentalist, I applaud my utility's effort to wean ourselves off of fossil fuels. Our renewable energy portfolio is impressive and helps Kaua'i transition off of dirty bunker fuel and move towards clean sources of reliable power.

With that said, I ask that you deny our coop's recent request for continued diversion of the waters of Wailua. These streams have rich cultural and environmental value and deserve protection and restoration.

Since June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This evidence demonstrates KIUC does *not* need water from these streams for electricity. The Board of Land Natural Resources (BLNR) *must* deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

I ask that you listen to the kupuna and Native Hawaiian cultural practitioners who ask for the return of the waters and the diversions of important natural resources. Please deny RP S-7340 for the benefit of the aina and future generations.

With respect and aloha,

James G Trujillo
PO Box 33
Kapa'a, HI
96746

From: [Bryceson Tugade](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 3:00:05 AM

Aloha ‘auhea ‘oukou!

My name is Bryceson G. Keali‘iwiwo‘oleikamaunaki‘eki‘e Tugade. I’m currently a Junior in the Sustainable Community Food Systems (SCFS) program at the University of Hawai‘i- West O‘ahu. I’m writing in regards to the restoration of the Wai‘ale‘ale and Waikoko waters, and a reminder that, *“the BLNR that under Hawai‘i’s public trust doctrine that no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable-beneficial use.”*

“Aia i hea ka wai a Kāne?”

As a trustee of the public, the BLNR is **required** as stated in the 1978 amendment to the Hawai‘i Constitution affirming that natural resources, including water, is based in the public trust, in which actions must benefit present and future generations.

However, to permit the private legal authorization of stream use, *“the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use.”* The Kaua‘i Island Utility Cooperative (KIUC) has **admitted** the Wai‘ale‘ale and Waikoko stream water does **not** reach the Waiahi hydro plant, due to a break in the ditch system. Furthermore, KIUC has **no use** for the water intended for electricity generation. In accordance with this sentiment, the BLNR must deny RP S-7340.

Lastly, the exchange diversion of **millions of gallons of water each day**, compared to the 1% output for KIUC’s power generation during a high productivity year, is not a viable trade.

Hawai‘i is put in a very precarious position, where we are to conserve and protect our finite resources, while also sustaining a growing population. In this, we are an example for the rest of the world. Given our pandemic riddled lives and in response to a warming planet, the redistribution of these streams will have an immensely positive impact. Although I have no such connection to these streams, I live near the recently contaminated waters at Kapūkakā (Red Hill). Our waters have such a profound impact on our lives, yet we often take it for granted. It is imperative that we as a people **must** recognize the importance of such a precious resource.

Me ka 'oia'i'o,

Bryceson G. Keali'iwiwo'oleikamaunaki'eki'e Tugade

From: [Sequoia](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2, meeting 12/10/2021
Date: Wednesday, December 8, 2021 10:14:58 PM

Aloha,

I thank you all for your commitment to protecting Hawaii: its land, water, and other natural resources.

I am concerned about KIUC's request to renew their Revocable Permit 7340 to continuing diverting Wai'ale'ale and Waikoko Streams. Have they demonstrated why they need this water, over and above what they get from Grove Farm, and why they need it even though they've apparently managed perfectly well without it since the siphon break in June 2019?

Please deny renewal of KIUC's RP 7340.

Sincerely,

Susan Wiener
Kalaheo HI

From: [Debbie Lee-Jackson](#)
To: [DLNR.BLNR.Testimony](#)
Cc: [Debbie Lee-Jackson](#)
Subject: [EXTERNAL] Fwd: Testimony-Agenda Item D-2
Date: Thursday, December 9, 2021 8:48:15 AM

Attached

----- Forwarded message -----

From: **Debbie Lee-Jackson** <debbie.leejackson@gmail.com>

Date: Thu, Dec 9, 2021, 8:47 AM

Subject: Testimony-Agenda Item D-2

To: Debbie Lee-Jackson <debbie.leejackson@gmail.com>

Cc: Debbie Lee-Jackson <debbie.leejackson@gmail.com>

Attached

From: [Ruta Jordans](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] RP S-7340
Date: Tuesday, December 7, 2021 4:35:35 PM

It has been almost three years since the siphon break that shut down diversions from Wai'ale'ale and Waikoko Streams. Despite no significant need for the water, Kaua'i Island Utility Cooperative (KIUC) has again filed a request to renew its Revocable Permit (RP) 7340 for the continued diversion of Wai'ale'ale and Waikoko Streams.

KIUC has never been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity. **Now, the stream water cannot reach the Waiahi hydro plants.**

Since the siphon break in June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This history shows that KIUC does **not** need water from these streams for electricity. The Board of Land Natural Resources (BLNR) **should** deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

Ruta Jordans
6345A Kipapa Road
Kapaa HI 96746

From: [Brenda Jose](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2 - Testimony from Brenda Jose, Kekaha, Hawaii
Date: Wednesday, December 8, 2021 8:34:24 PM

Aloha BLNR Members,

My name is Brenda Jose and I am a life-long resident of Elepaio Road, Kekaha. I'd like to submit testimony regarding KIUC's request to renew its Revocable Permit (RP) 7340 for the diversion of Wai'ale'ale and Waikoko Streams and urge you to deny their request and demand that a complete environmental assessment is conducted for yours and the public's review.

The public trust is being jeopardized and I am particularly concerned with the lack of community involvement and awareness regarding this extremely important matter. Please, please, please consider being proactive instead of reactive. These sacred lands deserve our utmost attention and diligence to do what is right by protecting these water resources and preventing any and all violation of Hawai'i's public trust doctrine.

Mahalo,
Brenda Kehaulani Sialana Jose

From: [Noelani JOSSELIN](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 12:19:00 AM

Water is not needed to be diverted for electricity on Kauai. Kauai Island Utility Cooperative has been providing electricity without this water all this time. Save Wai'ale'ale stream and Waikoko stream.

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Sophronia Noelani Josselin

From: [Kailana moa-eli](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda item D-2
Date: Wednesday, December 8, 2021 2:10:40 AM

Aloha,

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Kailana moa-eli

[Sent from Yahoo Mail on Android](#)

From: [Jo Amsterdam](#)
To: [DLNR.BLNR.Testimony](#); [Bridget Hammerquist](#)
Cc: [Hawai'i Alliance for Progressive Action](#)
Subject: [EXTERNAL] Agenda Item D-2 Restoring the Waters of Wai"aleale and Waikoko
Date: Wednesday, December 8, 2021 8:29:27 PM

Aloha,

Please do not renew the lease for this diversion since there is no real need for this water. Electricity has not been produced for over two years, I understand. Under Hawaii's public trust doctrine no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable beneficial use.

I believe the flow should be returned to it's natural one. This will enable all the wildlife to return to the steams and more abundant food for island gatherers would be available. More solar and storage will be our best way for energy gathering here. Mahalo for your consideration, sincerely Jo Amsterdam Kalaheo

From: [Hope Kallai](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Please use my second testimony
Date: Thursday, December 9, 2021 9:02:49 AM

From: Hope Kallai
Sent: Thursday, December 9, 2021 8:57 AM
To: Ferreira, Darlene S <darlene.s.ferreira@hawaii.gov>
Subject: Please use my second testimony

Aloha e Darlene - Could you please use my second email testimony? There's spelling errors in the first one. Let me know if you have any questions. Mahalo, Hope

FYI: this one...

2021 Dec. 9

Suzanne Case, Chair
Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, HI 96813
808-587-0400
blnr.testimony@hawaii.gov

Re: Dec. 10, 2021 BLNR Agenda Item D-2
Revocable Permit D-2

Aloha e Madame Chair and BLNR Members:

Revoke Revocable Permit 7340 as Upper Waiahi Hydropower Plant has not produced hydropower from RP 7340 waters in over 3 years.

Please revoke Revocable Permit 7340 as the waters from Wai`ale`ale and Waikoko have not produced hydropower in over 3 years at Upper Waiahi Hydropower Plant because the ditch has not been repaired. Renewing this permit would be nothing more than water banking, which is not a public trust purpose. This water should be left in its natural state, for the benefit of generations to come, not to be banked and still considered for a 65-year water lease. There is no beneficial use to renew this permit.

Upper Waiahi Hydropower Plant is not necessary for overnight power production as the contribution is minimal considering recent renewable/battery options.

For years, this Board has been told that the Waiahi Hydropower plants were necessary to provide overnight power. Wai`ale`ale (North Fork Wailua) and Waikoko Streams are diverted to the Upper Waiahi Hydropower plant, along with `Ili`ili`ula and some unknown-named streams. The upgraded Upper Waiahi hydro can produce 0.7 MW of power at peak capacity. Only 55% of that power is from the permit waters of Wai`ale`ale and Waikoko. The remaining 45% is from `Ili`ili`ula and other streams. The permit waters of Wai`ale`ale and Waikoko can only generate about 0.38 MW daily or 0.19 MW overnight, at peak capacity, when they are working.

Since KIUC's original lease application and 20-year revocable month-to-month permit, KIUC has expanded their renewable portfolio and overnight storage capacity with battery banks and now receive national annual awards for amount of stored overnight wathours at 3000KWh per customer:

Energy storage earns more awards for KIUC

By [The Garden Island](#) | Monday, August 12, 2019, 12:05 a.m.

LIHUE — Kauai Island Utility Cooperative led the nation again in 2018 for interconnection of energy storage watts per customer, and ranked second in annual energy storage capacity, according to the Smart Electric Power Alliance. In 2018, KIUC posted more than 3,000 watt hours per customer, Wh/C, nearly six times more than the next ranked utility: Sterling Municipal Light Department in Massachusetts. This is the second year running that KIUC topped the list of storage watts per customer. In 2019, the Lawai Solar Power Plant went online with 28 MW of solar power and 100 MWh of storage, a 5-hour battery energy storage

system.

AES Lawai Solar is a 28.2 MW DC Solar Power Plant making solar power available at night for the island of Kauai. This type of power plant produces cheap, clean energy and uses batteries to deliver power when it is most valuable, instead of just when the sun shines. The new solar power plant is vital to decarbonizing the island grids of Hawaii.

KIUC has even greater power production projects planned with a West Kauai Energy Project of solar and pump storage hydropower. In the WKEP public presentation Mr. Bissell states (<https://www.kiuc.coop/kiuc-and-aes-join-forces-first-ever-solar-pumped-storage-hydro-project>):

When operational, the solar array will contribute up to 35 megawatts directly to the grid and will store up to 240 megawatt hours for dispatch during evening peak. The hydro resources are expected to produce 24 megawatts on average daily, which includes 12 hours of storage to be used overnight.

KIUC has completed two solar-plus-storage renewable projects in partnership with AES: a 20- megawatt (MW) facility in Lāwa'i and a 14 MW facility at the Pacific Missile Range Facility.

CFO Dave Bissell stated (<https://www.kiuc.coop/kiuc-and-aes-join-forces-first-ever-solar-pumped-storage-hydro-project>):

Now, KIUC will be able to serve up to 40 percent of evening peak power with stored solar energy, President and CEO David Bissell said in a statement.....

When WKEP becomes fully operational, it will meet 40% of nighttime energy needs, significantly offsetting fossil fuel consumption. When we count the contribution of WKEP, 80% of our nighttime energy needs and 100% of our daytime energy needs will be met by a combination of renewable resources.

Existing KIUC battery storage:

Lawai AES solar 100 MWh

PMRF AES solar 70 MWh

Kapaia 52 MWh

Many other sources of overnight power now exist with much greater capacity than the 0.19 MW of hydropower produced by the overnight waters of Wai'ale'ale and Waikoko and storage capacity will soon double when WKEP goes online.. Lower Waiahi hydropower plant is still available for overnight power. Upper Waiahi and the waters of Wai'ale'ale and Waikoko are not necessary. There is 1,000 times more MWh already stored than Upper Waiahi's 0.19 MW of overnight power. 80% of Kauai's overnight power needs are met. Revoke RP 7340 as overnight power needs are no longer a priority.

Upper Waiahi is not the cheapest source of power on Kauai.

This Board was also told that Waiahi Hydro is one of KIUC's cheapest sources of power. That was before the siphon break with a million-dollar repair tab that has not been included in the cost per kilowatt hour. The costs of the Environmental Assessment, Contested Case and lease preparation fees have not been included in the kilowatt hour estimate. New renewable power projects are coming in with lower production rates. KIUC's financial gains should have no bearing on public trust decisions. The cost of having this ditch in the upper forest reserve is great. Access is complicated and the cost of maintaining a 5-mile rainforest ditch is huge. Lower Waiahi operates with unpermitted water from the North Intake Ditch, much shorter to maintain, and not in the public forest. AES Lawai power is produced at .11 kwh. Upper Waiahi's production costs are now unknown due to repair costs.

KIUC is not in compliance with RP 7340 repair conditions.

KIUC has failed to repair and maintain this ditch system for over 3 years, contrary to conditions of the 2003 original RP 7340:

Condition 8: Repair and maintain all buildings or other improvements no or hereafter part of the Water Resources.

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

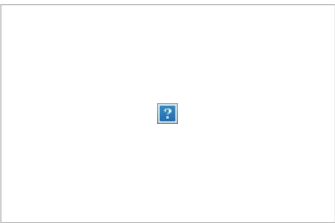
Condition 13. At all times with respect to the Water Resources, use due care for public health and safety.

This permit should be revoked because KIUC has failed to maintain the state-owned ditch system or provide repair estimates or timelines for over 3 years. Deferring the maintenance for over three years has caused a great deal more erosion and raised repair costs considerably. Why has this Board never been given pictures and repair estimates during the past 2 RP renewals for a broken state ditch? Any water flowing out of this broken pipe has been wasted for the past 3 years.

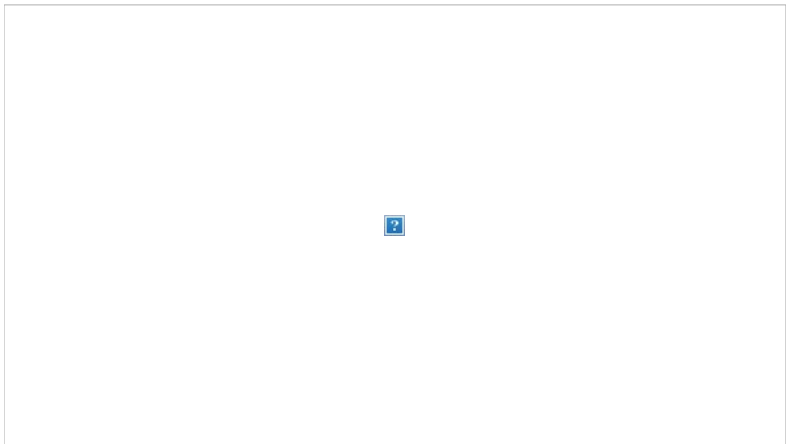
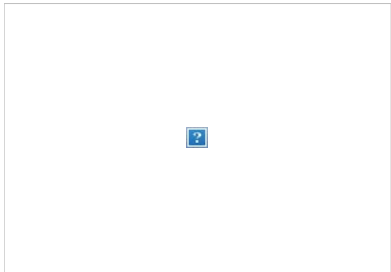
KIUC is not in compliance with streamflow restoration of Waikoko and with streamflow monitoring requirements.

CWRM's recommendation for the duration of the Contested Case proceedings on the Wailua IIFS, that 1.6 mgd was

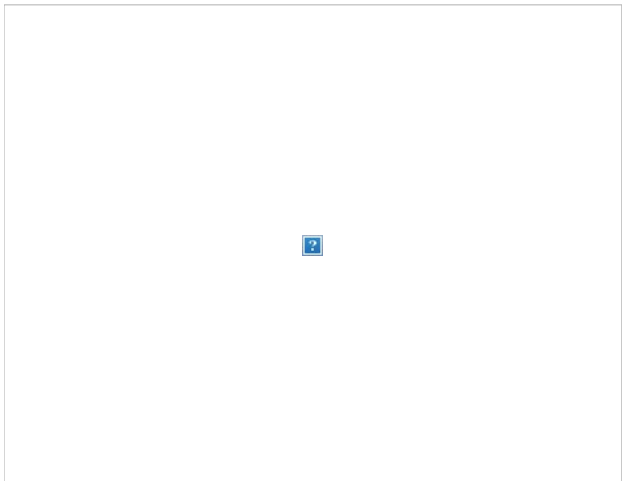
available for diversion at Waikoko, the remainder to remain in Waikoko Stream, as explained in slides from KIUC's Wailua-Kapaa Neighborhood Association meeting powerpoint (<https://www.kiuc.coop/sites/default/files/documents/presentations/WKNA%20Waiahi%20Hydro%20informational%20update%202.23.2019%20FINA.pdf>).



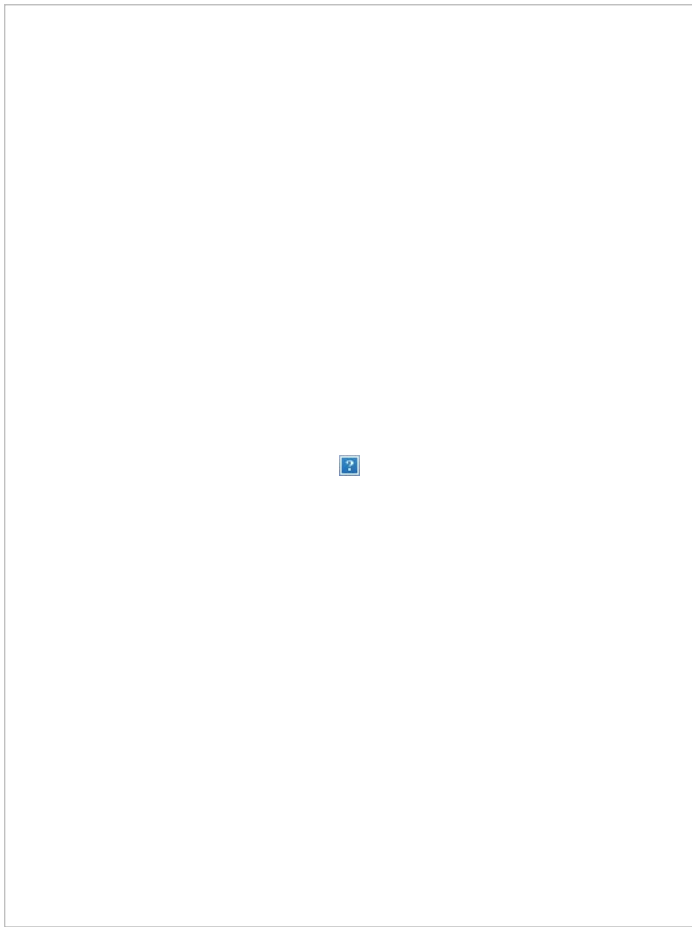
(<https://www.kiuc.coop/sites/default/files/documents/presentations/WKNA%20Waiahi%20Hydro%20informational%20update%202.23.2019%20FINA.pdf>).



KIUC has a mistaken idea that ditchflow is the same as streamflow.

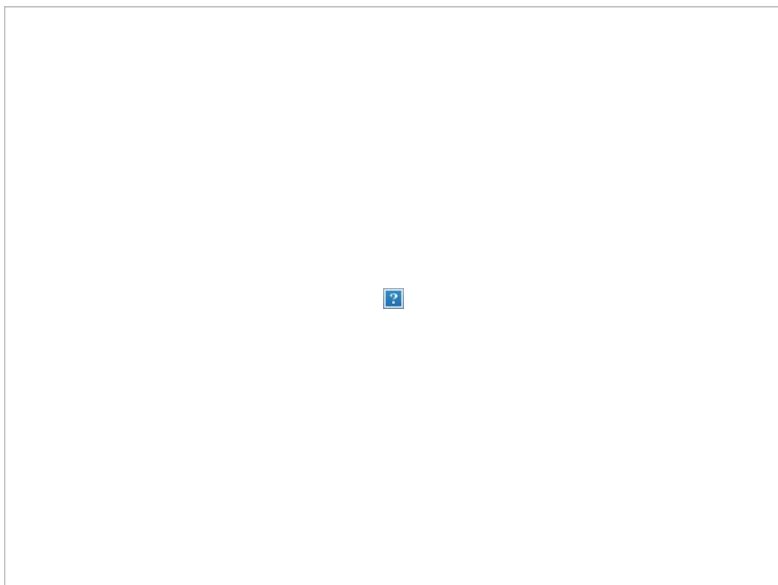


Diverting 100% of the baseflow of Waikoko Stream and returning it after 100' dry feet is not "Stream Restoration" as KIUC presented. There is supposed to be no diversion of Waikoko Stream since 2019.



This is the dry Waikoko Stream channel below the KIUC dam in May, 2019. There is not 1.6 mgd in this stream. KIUC continues to divert 100% of baseflow, leaving Waikoko Stream dry for 100' between Waikoko Dam and where the water enters the stream from the throwout sluice.

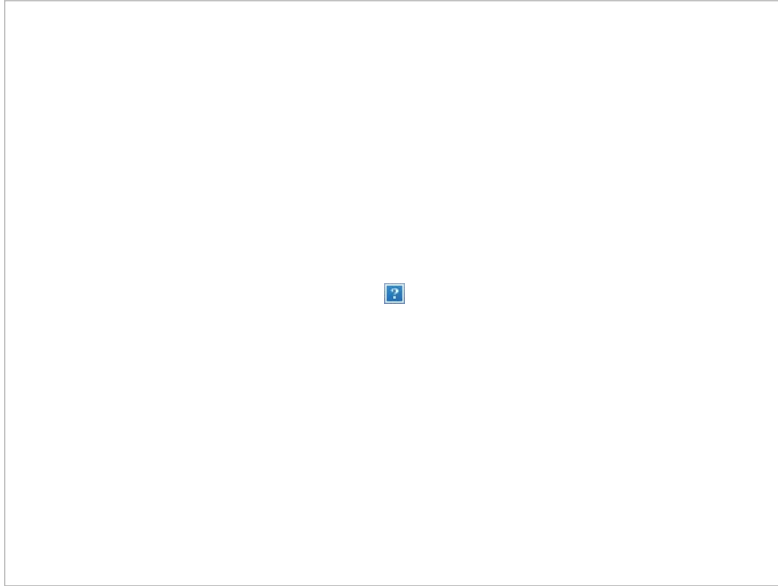
This is the KIUC dam at Waikoko Stream. The only flow is through the small leak.



This is no stream flow restored to Waikoko Stream. KIUC is in violation of steamflow restoration

requirements at Waikoko Stream as there is no baseflow. KIUC was previously told by USFWS to sandbag the ditch to cut off ditchflow for gaging purposes. Diversion into the throwout needs to cease and flow restored over the KIUC dam and ditch structure in Waikoko Stream. Sandbag the ditch - rocks, dam boards, screw valve - whatever it takes to keep Waikoko stream wet.

Waikoko Stream at North Wailua/`Ili`ili`ula ditch, not 1.6 mgd.

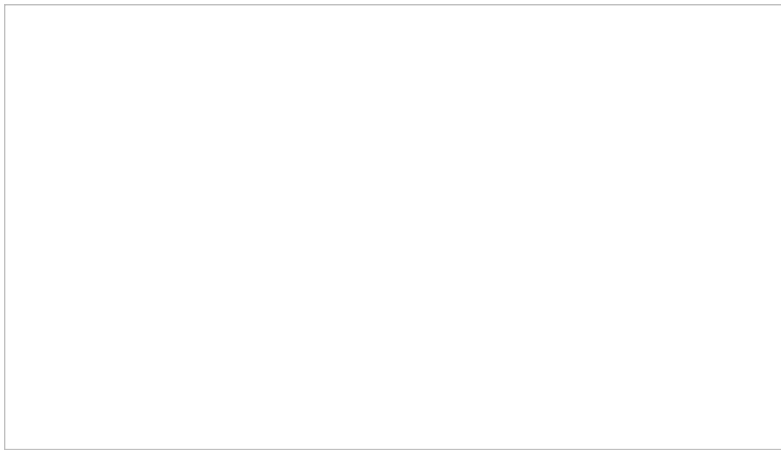


In Staff Submittal B-2 on Wailua IIFS, CWRM Staff required periodic measurements on Waikoko Stream to assess the IIFS and continuous monitoring at the USGS gage on Waikoko.

MONITORING

Staff shall maintain a continuous gaging station on Wai`ale`ale Stream to monitor compliance with the interim IFS and make periodic measurements on Waikoko Stream to assess the attainability of the interim IFS. IUUC will maintain continuous monitoring stations on the `Ili`ili`ula-North Wailua Ditch at the former USGS gaging stations at the Wai`ale`ale Stream diversion and Waikoko diversion as well as tailrace monitoring for each of the hydropower plants.

KIUC posts Waikoko Combined Ditch flow on their website (https://kiuc.coop/sites/default/files/documents/NFW%20and%20Waikoko%20Diversion%20Records%202019_3.pdf), but it is impossible to extrapolate stream flow by combined ditch flow or even to know what stream waters are combined. There is no Waikoko Stream flow data, only "Combined Ditch flow" for a 9 month period in 2019. Nothing for 2020.



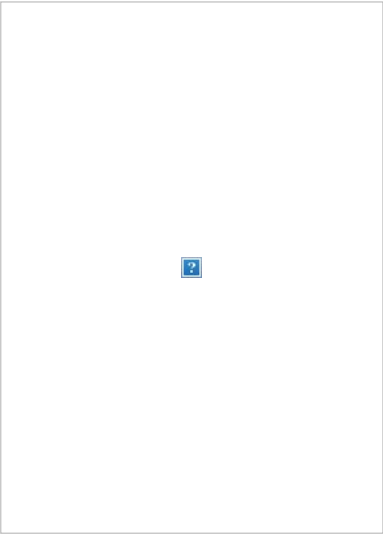
This is problematic in that in last 2 RP renewals, KIUC reported no ditch diversion of Wai`ale`ale and Waikoko Streams since at least June 2019. This graph shows ditchflow when there should be none and a 14 mgd redline, for an unknown reason. And no Waikoko Stream data.

This year's staff submittal states no diversion of Wai`ale`ale and Waikoko streams. This should not mean "only dry for the 100' between dam and throwout." KIUC must maintain the hydrologic continuity of Waikoko Stream with a permanently wetted stream channel able to support fish migration.

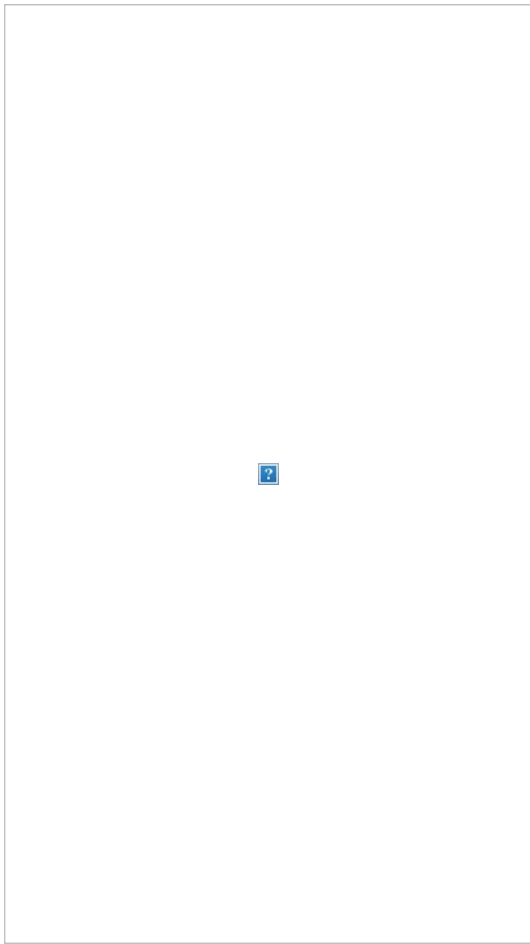
Power production at Lower Waiahi Hydropower Plant has not been restricted due to the North Wailua/Ili`ili`ula Ditch. Revoking RP 7340 will not impact operations any differently than the past 3 years.

There are great public trust benefits to restoring the flow of the headwaters of Wai`ale`ale and Waikoko. There are no public trust benefits to enabling this broken ditch permit to be renewed.

There is great public trust benefit to the cessation of this ditch in the headwaters of the most sacred Wai`ale`ale rainforest. The diversion of Wai`ale`ale and Waikoko are the only diversions in the Lihue Forest Reserve. There is no priority reason for this power production to drain our forest water resources. This power can be replaced by truly



renewable sources.



2012 MOU condition of a Cultural Impact Assessment accepted by OHA has not been met.

OHA rejected two Cultural Impact reports as incomplete and requested a supplemental report as part of a Stipulation for Withdrawal of Request for a Contested Case Hearing in 2012. The recent CIA prepared by Cultural Surveys Hawaii was rejected as failing to consider impacts to Native Hawaiians, the whole purpose of the report. A Supplemental Report was presented to DLNR but not to OHA. This Supplemental Report also fails to consider impacts to Native Hawaiians and cultural practitioners. It only considers impacts to the invasive albizia trees if the diversion is pau. KIUC has failed to consider the real impacts on Native Hawaiians of the continual diversion of their most sacred waters, even after "vandalism." Please revoke RP 7340 as dewatering the rainforest has great negative spiritual, cultural, and environmental impacts.

This forest is too fragile and precious for this ditch to continue.

Thank you for revoking Revocable Permit 7340.

Hope Hamilton Kallai
POB 655
Kilauea, HI 96754
lokahipath2@live.com

From: [Tom Kanahele](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2: RP S-7340
Date: Wednesday, December 8, 2021 7:42:36 PM

To BLNR/DLNR/CWRM/Chairman Case,

I am a resident of Hanapepe, Kauai, and I am kanaka oiwi. I adamantly oppose the renewal of RP 7340 to KIUC. REVOKE the permit!

The damming, diverting, energy-extraction, and selling of these waters is violence and genocide against my people. These processes have (and continue to) damage our watersheds and diminish our populations of endemic plants and animals. The various "studies" that attempt to show "low or no impact" to the environment are perhaps obtained by paying puppeted surveyors. My people know the truth because we walk the forests and streams daily and KNOW them. Endangered fish and shrimp are chopped up by the hydro operation. Entire stream beds of flora and fauna have been decimated by extensive stream-drying diversions. And for WHAT? For KIUC and Grove Farms (and their "down-stream" corporate friends like A&B, McBryde, Robinson Family Partners) to be able to plan a "rich" future for the non-indigenous sugar-empire-descendants on Kauai: a grand future of more hotels, more foreign "infrastructure," more tourist capacity, more imports, more imported plastic for the over-filled landfills.

The waters of Wai'ale'ale are sacred to ALL kanaka oiwi, not just to those on Kauai. The evidence of this is found in hundreds of our oli, our mele, our hula, and our mo'olelo. These waters should NEVER have been diverted, polluted, and enslaved the way that they were. The fact that this taking of sacred waters continues is damning proof that the "50th state" is still supporting and encouraging colonial values of exploitation and genocide. It is shameful behavior.

Do not renew RP 7340. 'A'ole. Revoke it NOW.

Kealii Kanahele
Hanapepe Kauai

From: [Kanani P](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Tuesday, December 7, 2021 4:33:27 PM

Aloha,

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Kanani P.

From: [Marcia Kauai](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Deny RP-7340
Date: Tuesday, December 7, 2021 1:53:56 PM

Aloha Kakou -

KIUC **admits** that stream water from Wai'ale'ale and Waikiki cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the Board must deny RP-7340.

From: [Maelani Lee](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2 (I oppose renewal of KIUC's REVOCABLE Permit)
Date: Tuesday, December 7, 2021 3:42:15 PM

Aloha,

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Maelani Lee
PO BOX 1054
Waianae, HI 96792
(808)369-5383

From: [Alison Lewis](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2: KIUC RP-S-7340
Date: Wednesday, December 8, 2021 7:55:36 PM

Dec 8, 2021

To BLNR/DLNR/CWRM/Chairman Case,

I am a resident of Hanapepe, Kauai. I adamantly oppose the renewal of RP 7340 to KIUC.

The damming, diverting, selling of these waters directly violates the deep cultural beliefs of the indiginous peoples of Kauai, damages the health of a fragile forest ecosystem, AND directly violates state water protection laws. This permit is a long-term skirt-around of the laws (using exclusions to the law that were intended for short term "bridging" needs alone). State water protection laws were put in place by the VOTING CITIZENSHIP, through valid, lengthy legislative process, and DLNR is the agency responsible for UPHOLDING the law, rather than this helping of corporations (or deceptively-named "cooperatives") to EVADE the law.

Renewing revocable permit 7340 will financially benefit the corporations of Grove Farms and KIUC. The Chairman of DLNR is a close family relative of the leaders of these corporate entities and it is well within the realm of logic to predict that she also would benefit from their windfall gain in this endeavor.

The citizens of Kauai do NOT want KIUC hydropower. It satisfies an insignificant amount of the island's needs and it comes at the expense of endangering the environment and violating the indiginous people's rights.

Renewing this permit is WASTEFUL, FRAUDULENT, IRRESPONSIBLE, DISRESPECTFUL, colonialist behavior. The repeated renewing of the permit violates citizen civil rights in order to profit corporations and persons in positions of government power.

Do not renew RP 7340. Revoke this permit now.

Alison Lewis

Hanapepe Kauai

December 8, 2021

Addressees

Re: December 10, 2021 BLNR Meeting, Item D-2, RP S-7088 (Lindner)

Dear Chairperson Case and Board Members:

We write to you on behalf of Jeffrey Lindner and Moloaa Water Company¹ (collectively, "Lindner") with regard to (1) the holdover/continuation of revocable permit no RP S-7088 (Lindner) (the "Permit"), Item D-2 for the Board's December 10, 2021 meeting, and (2) to update the Board regarding the history and current status of Lindner's long term water lease application.

Regarding the former, Staff recommends continuation of the Permit based on resolution of the dispute between Moloaa Irrigation Cooperative (MIC) and Lindner regarding relocation of MIC's water meter. We informed Staff that the new water meter had been installed without the consent of or negotiation with Lindner. Staff considers the water meter issue resolved and recommends that the permit be continued accordingly. We appreciate Staffs' and the Board's understanding on this issue.

Regarding the second issue, we would like to convey to the Board a brief history of Lindner's long term water lease application and the current actions being taken to move the application process forward. On July 1, 2016, Act 126 became law, amending Section 171-58, HRS. The amended section provided in part:

Where an application has been made for a lease under this section to continue a previously authorized disposition of water rights, a holdover may be authorized annually until the pending application for the disposition of water rights is finally resolved or for a total of three consecutive one-year holdovers, whichever occurs sooner; provided that the total period of the holdover for any applicant shall not exceed three years; provided further that the holdover is consistent with the public trust doctrine

By letter dated July 20, 2016, Land Division notified its current water permit holders on Kauai of the enactment of Act 126 and asked them to submit applications for water leases if they intended to seek a holdover of their water permits.

¹ Lindner (through) MWC owns the water facilities serving three separate water tanks: (1) the Kauai Department of Water ("DOW") water tank, (2) the Moloaa Farms LLC water tank, and (3) the Moloaa Hui farmers water tank that is managed (but not owned) by MIC. The water meter serving the Moloaa Hui tank is currently located on Moloaa Farms LLC's property, an entity owned and controlled by Lindner.

In response to the Land Division's letter, Lindner first submitted a request for water lease on August 31, 2016.² On September 12, 2016, the Land Division responded that they have received Lindner's request for a water lease and that they have assigned reference number PSF#16KD-115 to better process the request.³ On September 20, 2016, the Land Division acknowledged receipt of Lindner's "application for a water lease from a source on the subject State lands".⁴ In that same letter, the Land Division stated that because Lindner water use is consumptive, it can only be issued by public auction after authorization by the BLNR. Before the Land Division could present a request to the Board for a public auction of a water lease, Lindner needed to comply with the following requirements of Section 171-58, Hawai'i Revised Statutes (HRS):

1. Unless determined by the Chairperson or Board to be exempt under applicable laws and rules, complete an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as appropriate, under Chapter 343, HRS, regarding your client's current and proposed use of the water;
2. Coordinate with our Division of Forestry and Wildlife to develop a watershed management plan;
3. Contact the Office of Conservation and Coastal Lands (OCCL) to determine whether a conservation district use application is required for the water lease; and
4. Coordinate with the Department of Hawaiian Home Lands to develop a reservation of water rights in favor of its beneficiaries sufficient to support current and future homestead needs.

Exhibit C.

In December, 2018, Lindner coordinated with Staff to set up a site visit to evaluate the infrastructure and the ongoing need for long term water lease. On March 1, 2019, representatives from Land Division, DOFAW, the Attorney General's office, and DHHL met with Lindner and conducted a site inspection. Since that time, communication has broken down and Lindner's application has languished. Recently, Lindner, through counsel, has reinitiated communications with the Land Division, DOFAW, and DHHL regarding the above stated requirements. With no discernable progress having being made on the lease application since the March 2019 site visit, in November 2021, counsel for Lindner contacted Staff at Land Division who stated that the application could not be brought before the Board until Lindner worked out issues with DOFAW regarding creating a water management plan and DHHL regarding a water reservation agreement.

In December 2021, counsel contacted staff at DOFAW, who confirmed that progress had not been made on a watershed management plan. DOFAW staff responded that Lindner did not need to hire a consultant to develop a watershed management plan, and that staff would begin drafting one and get back to Lindner in a month. Counsel also contacted staff at DHHL who replied that they would reach out to their

² Exhibit A, Lindner's Application for Water Lease and Cover Letter by Yvonne Y. Izu from Morihara Lau & Fong, dated, August 31, 2016.

³ Exhibit B, DLNR Land Division response to Lindner Application for Water Lease by Audrey Bonilla, Acting Land Agent, dated September 12, 2016.

⁴ Exhibit C, DLNR Land division acknowledgement of Lindner Application for Water Lease by Russel Y. Tsuji, Administrator, dated September 20, 2016.

representatives who attended the site visit and would follow up thereafter. Counsel has yet to hear back from DHHL.

We appreciate the cooperation shown by the DLNR, DHHL, and the Board, and look forward to keeping lines of communication open and progressing towards a mutually agreeable resolution on this matter.

Very truly yours,

G. Kikaha Chee

KC:

MORIHARA LAU & FONG LLP

A LIMITED LIABILITY LAW PARTNERSHIP

August 31, 2016

Ms. Suzanne Case, Chairperson
and Members of the Board of Land and Natural Resources
1151 Punchbowl Street
Honolulu, Hawai'i 96813

Mr. Marvin Mikasa
Kauai District Land Agent
3060 Eiwa Street, Room 205A
Lihue, Hawai'i 96766

Re: Request for Long-Term Water Lease for State Well No. 1020-02

Dear Chair Case, Board Members, and Mr. Mikasa:

Morihara Lau & Fong LLP represents Mr. Jeffrey Lindner and submits the enclosed application on his behalf. Mr. Lindner's request is for a 65-year water lease for the continued use and operation of State Well No. 1020-02, hereafter referred to as the Moloaa Well.

The Moloaa Well and approximately 125 acres of land under and surrounding the Moloaa Well, is currently encumbered by Revocable Permit No. S-7088 ("RP S-7088") issued to Mr. Lindner. RP S-7088 was originally approved by the Board of Land and Natural Resources ("Board") on August 8, 1997 (but with an effective date of October 1, 1996) and has been annually renewed since then. It was last renewed by the Board on December 11, 2015.

Subject to resolving the issue with the State Department of Health described below, Mr. Lindner wants to continue to have the use of the Moloaa Well on terms comparable to those contained in RP S-7088.

In addition to the information contained in the application form, please consider the following in making your decision on Mr. Lindner's request for a long-term water lease.

Background

The Moloaa Well was constructed decades ago and used by Lihue Plantation for sugar cane irrigation. A water lease (S-3828) from the State to Lihue Plantation had expired

Ms. Suzanne Case, Chairperson,
and Members of the Board of Land and Natural Resources
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Page 2

in 1994 and was replaced by Revocable Permit No. S-6825. While Lihue Plantation was operating the Moloaa Well, it entered into agreements to provide water from the Moloaa Well to the County of Kauai Department of Water ("DOW"), Meadow Gold Dairies, and the Moloaa Farmers Cooperative.

In 1996, due to the closure of the plantation, Lihue Plantation notified the State of its intention to cancel RP S-6825 effective October 1, 1996. Mr. Lindner, who had acquired surrounding land from Lihue Plantation, was willing to take over the operation and maintenance of the Moloaa Well and to assume the obligations to provide water to DOW, Meadow Gold Dairies, and the Moloaa Farmers Cooperative. Thus, the Board approved the issuance of RP S-7088, effective October 1, 1996, with the condition that Mr. Lindner continue to provide water to these three entities.¹

When the Board first approved RP S-7088, the County indicated that it was conducting a study regarding the acquisition of the Moloaa Well. Since that time, the County, from time to time, has expressed interest in acquiring the well,² but Mr. Lindner is not aware of any serious negotiations in this regard having taken place to date. Mr. Lindner continues to provide DOW with water from the Moloaa Well.

Since 1996, Meadow Gold closed down its dairy operation in Moloaa, and, therefore, no water from the Moloaa Well is currently being used for that purpose.

Mr. Lindner's obligation to provided water to the Moloaa Farmers has been superseded by an agreement to provide water from the Moloaa Well to the Moloaa Irrigation Cooperative ("MIC"), an agricultural cooperative.

Department of Health Issue

When Mr. Lindner assumed Lihue Plantation's obligation to provide water to the Moloaa Farmers Cooperative in 1996, water from the Moloaa Well was used for agricultural irrigation purposes only. Since that time, some members of MIC have constructed homes on their lots, and, because DOW does not provide water service to these homes, the residents have used Moloaa Well water for domestic purposes.

Mr. Lindner provides bulk water to MIC at a master meter, and MIC distributes the water to its members thereafter. Mr. Lindner has no control over distribution to individual members of MIC and has no say in how MIC or its members utilize the water. MIC or its

¹ Mr. Lindner also acquired the fee interest underlying the former Meadow Gold lands.

² In December 2005, DOW submitted a written request for the State to turn over management and control of the Moloaa Well to DOW by Executive Order ("EO"). We are not aware of any action being taken on this request.

Ms. Suzanne Case, Chairperson,
and Members of the Board of Land and Natural Resources
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Page 3

individual members have been responsible for ensuring the potable water quality of the water used in their households, and have not relied upon Mr. Lindner to treat the Moloaa Well water for domestic purposes.³

In September, 2015, however, the State Department of Health (“DOH”) Safe Drinking Water Branch, notified Mr. Lindner and the Department of Land and Natural Resources (“DLNR”) (as the owner of the well), that DOH would begin regulating the Moloaa water system (including the Moloaa Well and transmission lines) as a public water system, making it subject to Safe Drinking Water regulations. These regulations, to date, have required water testing, published notifications to MIC members and the installation of chlorination equipment, all at Mr. Lindner’s expense.

Mr. Lindner has tried to convince DOH that he should not be held responsible for providing MIC with water that meets safe drinking water standards, but that the standards should be applied from MIC’s side of the master meter. To date, however, Mr. Lindner has not prevailed on this issue.

When Mr. Lindner agreed to assume Lihue Plantation’s obligations to provide water to DOW, Meadow Gold Dairies and the Farmers Cooperative, there was no expectation that the obligation would include the treatment of water for potable purposes. Mr. Lindner is concerned about the ongoing costs of, and the potential liabilities associated with, being a purveyor of potable water.

Moreover, the Hawai`i Public Utilities Commission (“HPUC”) determined that Mr. Lindner was not subject to regulation as a public utility in large part because he was only providing “bulk” water subject to the terms of RP S-7088. Should the DOH determination stand, it is probable that the HPUC will determine that Mr. Linder is providing service to individual MIC members and, thus, no longer exempt from HPUC regulation.

Mr. Linder is not prepared at this time to take on the responsibilities of being a regulated utility and a purveyor of potable water. There continue to be discussions between Mr. Linder and DOH. However, if DOH persists in subjecting Mr. Linder’s operation of the Moloaa Well to Safe Drinking Water regulations, Mr. Linder may, at a later date, withdraw this application for a long-term water lease.

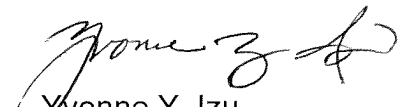
³ Similarly, Mr. Lindner provides “raw” water to DOW, and DOW is responsible for treating the water to potable standards.

Ms. Suzanne Case, Chairperson,
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Conclusion

Although there are uncertainties regarding the outcome of discussions with DOH, Mr. Lindner, at this time, would appreciate the processing of his application for a long-term water lease for the Moloaa Well. Should you have any questions relating to this application, please do not hesitate to contact me at 808-526-2888 or yizu@moriharagroup.com.

Very truly yours,



Yvonne Y. Izu
Attorney for Jeffrey Lindner

Enclosure

Cc: Jeffrey Lindner
Ian Kagimoto

State of Hawaii
Department of Land and Natural Resources

Land Division

REQUEST FOR STATE LANDS (Direct Negotiation) – APPLICATION FORM

This Application Form is for persons requesting State lands for the following categories:

- Right to temporarily enter onto State lands for a specific purposes
- Access, utility or other easements to private property
 - Month-to-month revocable permit where an auction is prohibited
 - Direct lease to eleemosynary organizations, public utilities, etc.
- Purchase of remnant
 - Land patent in confirmation of Land Commission Award
 - Land license

Please note the following important points:

1) Statutorily, directly negotiated leases and permits can only be issued in certain situations. In most cases, you must compete for the use of State lands through the public auction process. If you are interested in bidding on State leases through the auction process, please contact the District Branch staff in your county to obtain further information.

2) Persons who have had, during the five years preceding a previous sale, lease, license, permit or easement cancelled for failure to satisfy the terms and conditions are not eligible to purchase or lease public lands.

3) The use of State lands triggers the environmental assessment requirements of Chapter 343, HRS. Please contact the Office of Environmental Quality Control for their opinion of whether an environmental assessment is required and the process to be followed. Phone number: (808) 586-4185. Website: <http://hawaii.gov/health/environmental/oeqc/index.html>

4) You are responsible for contacting the appropriate agencies to verify that your proposed project has complied with all applicable zoning and permitting laws and regulations (e.g., State Land Use classification, Special Management Area, County General Plan, etc.).

5) You will be responsible for paying processing fees. If you are granted a disposition, you will be required to obtain insurance, among other requirements.

All applications must be complete to be considered for processing. Please submit two copies of the completed application form to the District Branch office in your county:

Oahu District Branch

1151 Punchbowl Street, Room 220

Honolulu, Hawaii 96813

Phone: (808) 587-0433; Fax: (808) 587-0455

Maui District Branch

54 High Street, Room 101

Wailuku, Hawaii 96793

Phone: (808) 984-8103; Fax: (808) 984-8111

Hawaii District Branch

75 Aupuni Street, Room 204

Hilo, Hawaii 96720

Phone: (808) 974-6203; Fax: (808) 974-6222

Kauai District Branch

3060 Eiwa Street, Room 205A

Lihue, Hawaii 96766

Phone: (808) 274-3491; Fax: (808) 241-3537

STATE OF HAWAII
DEPARTMENT OF LAND & NATURAL RESOURCES

REQUEST FOR STATE LANDS
APPLICATION FORM

For DLNR use only:

Date of request:

Date request recvd:

Date request no. issued

Request number

Land Code:

Unit Code:

Status: Future

Type of Request:

Assigned Land Agent:

I. APPLICANT

Should a land disposition result from your application, the following information will be used in the preparation of the legal documents. Therefore, please include all applicable, full legal names and addresses, one for each person/entity (attach additional sheets as necessary). If title is held by a trust, please include the trustee(s) name(s) and full description of the trust (e.g., *George D. Smith, Trustee of the George D. Smith Revocable Living Trust dated June 1, 2001*).

Applicant name(s): Lindner Jeffrey
Last name First Name

Mailing address: P.O. Box 518
No. and Street

Anahola Hawaii 96703
City State Zip Code

Phone numbers: (808) 822-0518 () (808) 652-2911
Work Home Cellular

() ()
Pager Fax E-mail address

Signature: _____

Date: _____

Applicant intends to hold title as:

- | | | |
|--|--|--|
| <input checked="" type="checkbox"/> Individual | <input type="checkbox"/> Corporation | <input type="checkbox"/> Partnership |
| <input type="checkbox"/> Husband and Wife | <input type="checkbox"/> Limited Liability Corporation | <input type="checkbox"/> Limited Partnership |
| <input type="checkbox"/> Trust | <input type="checkbox"/> Non-Profit Corporation | <input type="checkbox"/> Association |
| <input type="checkbox"/> Joint Venture | <input type="checkbox"/> Limited Liability Partnership | |

() Other (specify):

For individual or husband and wife, type of tenancy:

(x) Tenant in Severalty () Tenants in Common () Joint Tenants () Tenants by the Entirety

For individual, marital status:

() Single () Widow/widower () Married – spouse of:

For partnership or corporation, state of incorporation: _____

II. AGENT

If you have an attorney, consultant or other person processing this request for you, please include the following information.

Agent name: Morihara Lau & Fong LLP, Attn: Yvonne Y. Izu
Last name First Name

Agent address: 841 Bishop Street, Suite 400
No. and Street

Honolulu Hawai'i 96813
City State Zip Code

Phone numbers: 808-526-2888 () ()
Work Home Cellular

() () vizu@moriharagroup.com
Pager Fax E-mail address

III. TYPE OF REQUEST

- () Right-of-entry (right to temporarily enter onto State lands for a specific purpose)
- () Grant of easement (access, utility, seawall, etc.)
- () Month-to-month revocable permit
- () Direct lease (eleemosynary organizations, public utilities, government, renewable energy producers, etc.)
- () Purchase of remnant
- () Land patent in confirmation of a Land Commission Award
- () Land license
- (x) Water lease pursuant to HRS Section 171-58

Is this request being made to resolve an encroachment or other violation? () Yes (x) No

If yes, explain.

IV. LOCATION AND AREA

If your request pertains to a specific parcel, please specify below:

Island: () Oahu (x) Kauai () Molokai
() Hawaii () Maui

Town: Moloaa Tax Map Key: 4-9-001; por. 001

Area: approx. 125 acres, including Moloaa Well Site and Transmission Facilities
acres/sq.ft. (circle one)

County Zoning:

State Land Use: (x) Agricultural () Rural
() Conservation () Urban

Is property located in a Special Management Area?

() Yes (x) No

V. USE

Identify the specific uses intended.

(x) Agriculture () Easement - Access
() Business/Commercial () Easement - Utility
() Industrial () Easement - Seawall
() Pasture
(x) Other (specify): provide bulk water to County Dept. of Water and Moloaa Hui Lands, Inc.

A. Fully describe your proposed use of the public lands and/or water:

Use and operation of Moloaa Well (State Well No. 1020-002) and transmission facilities for agricultural purposes and provide water to County Department of Water and to Moloaa Irrigation Cooperative

B. Attach a location map showing a preliminary sketch or plot plan of your proposed project in relation to the tax maps.

C. Describe any improvements you intend to place on the land and their approximate value:

None

D. If constructing improvements, attach a Plan of Development showing improvements to be constructed and their location on the public lands including a *timeframe for construction*.

E. Is it your opinion that an environmental assessment is required? () Yes (x) No

If no, identify exemption: Exemption Class 1, #47

If yes, describe completion of EA:

F. Describe what other permits or approvals are required for this use and whether you have obtained such permits or approvals:

None

VI. OTHER

A. If you are applying for a revocable permit for any type of use, you are required to provide the following information:

1) Describe your qualifications and experience in running this type of operation; and

2) Describe your long-term intentions for this operation. (Note: Revocable permits are temporary and may be revoked at any time.)

B. If you are applying for a revocable permit for pasture or agricultural use, you are required to complete Attachment A.

C. If you are applying for a water lease, you are required to provide the following information relating to the statutory criteria for issuance of a water lease:

1) Will your use of water cause any pollution? No. Explain: The water is used for normal agricultural irrigation. Water is also provided to the County Department of Water, which treats the water for household uses. Water is also provided to the Moloaa Irrigation Cooperative which uses it for agricultural irrigation and also treats the water for domestic purposes.

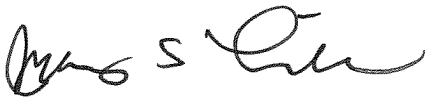
2) Will your use of water be consumptive or non-consumptive? Consumptive. Explain: The water is used for normal agricultural irrigation. Water is also provided to the County Department of Water, which treats the water for household uses. Water is also provided to Moloaa Irrigation Cooperative, which uses it for agricultural irrigation and also treats the water for domestic purposes.

- 3) If your use of water will be non-consumptive, will the water you use be returned to the same stream or other body of water from which it was drawn? Explain. N/A
- 4) If your use of water will be non-consumptive, will your use of the water affect the volume and quantity of water or biota in the stream or other body of water? Explain. N/A
- 5) Will any part of the requested water lease involve lands in the conservation district? No. If yes, provide the status of any conservation district use application you have applied for?

VII. CERTIFICATION

I/We hereby certify that the statements and information contained in this application, including all attachments, are true and accurate to the best of my/our knowledge and understand that if any statements are shown to be false or misrepresented, this application may be rejected or my/our lease/permit/agreement may be cancelled.

X
Printed Name JEFFREY S LINDNER

Signature 

X
Printed Name

Signature

Date August 31, 2016

Reason for closing:

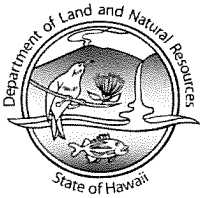
Approved by DLA:

Date request closed:

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

3060 Eiwa Street, Room 208
Lihue, Hawaii 96766
PHONE: (808) 274-3491
FAX: (808) 241-3535

September 12, 2016

Ref. No.: PSF#16KD-115

Author: LD-AB

JEFFREY S. LINDNER
C/O YVONNE Y. IZU
MORIHARA LAU & FONG LLP
841 BISHOP STREET, SUITE 400
HONOLULU, HI 96813

Dear Ms. Izu:

Subject: Request for Water Lease; Por. Moloa'a Forest Reserve, Papa, Moloa'a,
Kawaihau, Kauai, TMK: (4) 4-9-001:por. 001

We have received your request for a Water Lease.

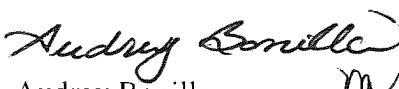
We have assigned the reference number noted at the top righthand corner of this letter. Use of this number will allow for more efficient processing of your request. Therefore, please use this number in all correspondence on this matter.

Marvin Mikasa has been assigned to process this request. Please feel free to contact him with any questions you may have.

We will be in contact with you regarding this request after our internal review of your request is conducted.

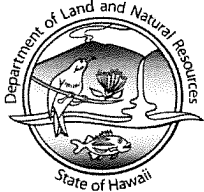
If you have any questions, please feel free to contact Marvin Mikasa at 274-3491. Thank you.

Sincerely,


Audrey Bonilla,
Acting Land Agent

cc: Central Files
District Files

EXHIBIT B



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

September 20, 2016

PSF No.: 16KD-115

Yvonne Y. Izu, Esq.
Moriwara Lau & Fong LLP
400 Davies Pacific Center
841 Bishop Street
Honolulu, HI 96813

**Subject: Jeffrey S. Lindner Application for Water Lease on State Lands
at Kawaihau, Kauai, Tax Map Key: (4) 4-9-001:001**

Dear Ms. Izu:

We acknowledge receipt of your client's application for a water lease from a source located on the subject State lands. As you note in the application, your client's use of water is consumptive. A water lease for consumptive use can only be issued by public auction after authorization by the Board of Land and Natural Resources (Board). To enable us to present a request to the Board to conduct a public auction of a water lease, your client will first need to comply with the following requirements of Section 171-58, Hawaii Revised Statutes (HRS):

1. Unless determined by the Chairperson or Board to be exempt under applicable laws and rules, complete an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as appropriate, under Chapter 343, HRS, regarding your client's current and proposed use of the water;¹
2. Coordinate with our Division of Forestry and Wildlife to develop a watershed management plan;
3. Contact the Office of Conservation and Coastal Lands (OCCL) to determine whether a conservation district use application is required for the water lease;² and

¹ Your client's application indicates that the requested water lease is exempt from the preparation of an EA/EIS under the exemption class for "Leases of state land involving negligible or no expansion or change of use beyond that previously existing." We will need your client to substantiate the exemption, providing a history of its use of the water and a timeline of the installation of any infrastructure improvements for the water system.

² Although your client's application indicates the water source is located in the agricultural district, our research shows it is in the conservation district. The use may be non-conforming, but this is something you will need to verify with OCCL.

4. Coordinate with the Department of Hawaiian Home Lands to develop a reservation of water rights in favor of its beneficiaries sufficient to support current and future homestead needs.

Once your client has satisfied these requirements, the staff submittal for authorization to conduct the public auction will be prepared and presented to the Board at a public meeting.

Please note that under Act 126, Session Laws of Hawaii 2016, your client's current Revocable Permit No. S-7088 for use of the water can only be held over for three consecutive years while you pursue the application requirements for a water lease.³ Accordingly, we recommend that your client begin work on the lease requirements as soon as possible and diligently pursue them to conclusion.

If you have any questions, please contact Assistant Administrator Kevin Moore at (808) 587-0426. Thank you.

Very truly yours,



Russell Y. Tsuji
Administrator

cc: Land Board Member
Mr. Jeffrey S. Lindner
District Files

³ We anticipate taking a request to the Board for the holdover of current water revocable permits before the end of 2016.

From: [Rachel Fleury](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:52:45 AM

To Whom It May Concern:

I offer my written testimony in strong opposition of BLNR renewing the permit for KIUC to divert water from Wai'ale'ale and Waikoko Streams. BLNR has the imperative to protect the precious natural resources of this island, and under Hawai'i's public trust doctrine, no one is authorized to take water without a legitimate, vetted claim for the necessity and reasonable-beneficial use. KIUC cannot provide such a claim.

Thank you for honoring your kuleana to protect these sacred waters in the public trust.

Sincerely,
Rachel Fleury
Moloa'a

From: [josh_mori](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 8:42:56 PM

Aloha BLNR

It is of the utmost importance that this vote ends in the denial of RP S-7340. The lack of evidence provided by KIUC to warrant a 60 year lease over our most important resource is reason enough for its denial. It does not surprise me that the BLNR is not up to date with many of Kaua'i's residence positions about KIUC and their lack of consistency and transparency with their "co-op" members. The green washing and water banking has to stop and our community is waking up and has been organizing against such corporate resource theft, this fight is no different. We have learning from our lāhui and their battles over the past 20 years and are up for the task. From their own admission, the west side of Kaua'i already out produces our need daily need through the existing solar power, this diversion is completely unnecessary. Beyond the fact that it is an abuse towards our native culture, ancestral places, and violates tenants of the Declaration on the Rights of Indigenous people as written by the United Nations. Mahalo for your time

Joshua Dean Iokua Ikaikaloa Mori
Farmer, Executive director, Coach, College Instructor, Cultural Practitioner, Husband and
Father in Waimea Kaua'i

--

Joshua Dean Iokua IkaikaLoa Mori, Owner
[Pākahi Academy/ IWIKUA](#)
808.652.2127

From: [Tamra Martin](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 7:13:25 AM

Aloha,

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Tamra Moriguchi

North Shore Hydrological Services

Matt Rosener, MS, PE, Principal

December 9, 2021

Submitted via E-mail to: blnr.testimony@hawaii.gov

Aloha Director Case and Members of the Board of Land and Natural Resources,

The following testimony is offered in opposition to renewal of KIUC Revocable Permit 7340. A year after I submitted my last comments on this permit, not much has changed, apparently. The ditch is still broken, repairs are pending, yet the diversion dams continue to affect streamflow and fish passage conditions in both Waialeale and Waikoko Streams, two Kauai waterways with significant restoration potential. I am still awaiting a response to my comments (submitted Jan. 7, 2020) on KIUC's Draft Environmental Assessment for their Waiahi hydropower operations after almost two years. And the adjustment of the Interim Instream Flow Standards for these streams has not yet happened, nor is there any clarity about when this process will resume. The situation appears to be stuck in a holding pattern.

I still have concerns that RP 7340 essentially acts as a shield for several other users who access waters diverted from Waialeale and Waikoko Streams after their use in KIUC's two Waiahi hydropower plants. As you know, water diverted from Waialeale Stream (aka the North Fork Wailua River) by KIUC is discharged into Waiahi Stream which is a large tributary of the South Fork Wailua River. Some unknown quantity of this water is then extracted from the river again and transferred out of the Wailua River basin through other ditch systems (e.g., Hanamaulu Ditch, Upper Lihue Ditch, Waiahi-Kuia Aqueduct). This second stage diversion is not carried out by KIUC, but by other entities for commercial uses without any permit from this board, because it occurs on private land. So, it would seem that KIUC's diversion of streamflow from Waialeale and Waikoko Streams to Waiahi Stream basically transfers control of public trust resources from the public to the private domain. Does RP 7340 cover these subsequent uses of the same water after KIUC discharges it from their power plants?

On a related note, I am also still concerned that the board's repeated approvals of this RP seem to be an endorsement of the long-term inter-basin water transfer that has sent countless volumes of water from the North Fork to the South Fork, and then from the Wailua River watershed south into several other drainage basins. There has never been an adequate analysis of how this removal of water from the watershed has affected (and is affecting) stream system ecology and sediment dynamics. Like the current KIUC proposal to divert water out of the Waimea River basin on Kauai's westside, where chronic downstream sedimentation is affecting instream habitat and channel capacity to convey floodwaters, no proper evaluation of the potential links between upstream inter-basin water transfers and downstream sedimentation has been undertaken for the Wailua River system. Observations of significant sediment accretion around the Wailua River Bridge over the past several years leads to the question of whether reducing or eliminating water diversion out of the watershed would allow for improved channel

North Shore Hydrological Services

Matt Rosener, MS, PE, Principal

maintenance throughout the drainage network. This is particularly important at the river mouth where the rising sea level is already affecting flood frequency on the lower Wailua River floodplain, and any unnatural sedimentation in the river channel will compound this effect.

I understand that the scope of RP 7340 is the diversion and use of Waialeale and Waikoko stream water for KIUC's hydropower operations only. However, I encourage you to consider the bigger picture of what is happening with surface waters in the Wailua River basin and the importance of this permit in that context. There are still too many questions and not enough information available to the public about where and how the waters diverted from Waialeale and Waikoko Streams are ultimately being utilized and discharged by the end users. Since KIUC cannot currently divert from the Waialeale or Waikoko stream sources because of the ditch damage, I encourage you to consider suspending RP 7340 until the Water Commission establishes new Interim Instream Flow Standards for these streams and KIUC resolves its long-term lease application. It would be prudent for KIUC to secure a lease before investing in the ditch repairs anyways.

Mahalo for your consideration,

A handwritten signature in black ink that reads "Matt Rosener". The signature is written in a cursive style and is positioned above a light gray rectangular background.

Hydrologist/Water Resource Engineer

From: [Toi Pua La`a](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] AGENDA ITEM D-2
Date: Wednesday, December 8, 2021 5:55:22 PM

I am unequivocally against the renewal of Revocable Permit #7340 for KIUC to divert waters from Waiàleale and Waikoko streams.

I kindly remind the BLNR is entrusted with protecting cultural and natural resources.

Water cannot be owned and must be protected, not for privatization and for profit usage. According to the Hawaii Public Trust Doctrine, water usage is protected.

KIUC does not need this water for Hydro-electric production; the water doesn't reach the Waiàhi water plant.

I, and my family, are Hawaiian Native, Kanaka Maoli; cultural practitioners and enjoyers of nature preserve. I implore you to deny the RP#7340. I speak on behalf of my family, which are not at leisure to email in opposition testimony.

Mahalo.
T. Pua La`a Norwood
Timoteo K. Hew Len

*Aloha ke kahi ke kahi.
Malama pono, malama kino.
E Ola!
(Love each other, one another.
Care for/Respect Righteousness, care/respect your body.
Live life in Health!)*

Pua La`a

Alo La`a ~ Danse Arts Yoga Studio
in Ching Young Village, Hanalei
5-5190 Kuhio Hwy., D-10
Hanalei, Hawaii 96714
Mobile: [808 652 9642](tel:8086529642) (YOGA)
alolaa108@gmail.com
www.alolaa.yoga

From: [Heather O'Donnell](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 12:05:54 AM

Aloha,

I am an East side resident urging the denial of KIUC's request for renewal of its revocable permit (RP S-7340) allowing for diversion of water from Waialeale and Waikoko streams.

KIUC has shown that it can operate just fine in the past 2.5 years since the siphon broke. At its maximum level of diversion, only 1% of electricity was generated by stream diversion. This amount does not show a justifiable need for this diversion. Diverting millions of gallons of stream water a day for less than 1% of the generated electricity makes no sense whatsoever.

KIUC has admitted that the stream water can't even reach the hydro plants due to the break in the ditch system. Therefore, the water can't be used for electricity generation and this permit must be denied.

I live in Kapahi and often go up by Loop Road and also paddle on the Wailua river. These are very special and sacred areas that need protection.

Water is a resource which belongs to all of us. The people of Kauai are depending on you to do the right thing and deny this permit.

Mahalo,
Heather O'Donnell

From: [Elizabeth Okinaka](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 9:07:10 AM

Aloha mahalo for your time. I would like to give testimony OPPOSING Agenda Item D-2, KIUC's revocable water permit (RP-7340).

I am a resident of Kauai and will personally be affected by the water diversion under the revocable permit. Stop the exploitation of our natural resources. Allowing this permit will pose a threat to Hawaiian rights and cultural practices. Native wildlife and fauna will also be affected.

These outdated Plantation Era water permits are a form of cultural genocide. Stop the diversion of sacred Wai- water is life and should be respected. Many of the streams we grew up swimming in are either dry or polluted in 2021.

Please do what's right and deny the revocable permit. Think about what we are leaving behind for future generations. Why allow diversion of millions of gallons for 1%.

KIUC, is not authorized to take water without an actual need for the water to meet a reasonable-beneficial use.

For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

KIUC has never been able to demonstrate a justifiable need for the water from the Wai'ale'ale and Waikoko systems. Even at maximum diversions, these plantation-era hydro plants were claimed to account for less than 1% of KIUC's electricity.

***Mahalo
Elizabeth Okinaka
E Ola Kakou Hawaii 501(C)(3)***

From: [Lana Olson](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 8:16:40 AM

To: Board of Land and Natural Resources

Re: **Agenda Item D-2**

Hearing: Friday, December 10th, 2021 9am.

Position: **Deny RP S-7340**

I am writing to request that you deny RP S-7340 to KIUC for the continued diversion of Wai'ale'ale and Waikoko streams on Kaua'i. These two streams are some of the few that are accessible to the public to use, despite Hawaii's public trust doctrine which provides for public access and common water rights. The BLNR is supposed to enforce that doctrine and protect the public's right to water. Approving this renewal is in violation of the public trust doctrine and KIUC has not needed or used this water since June 2019. There has been no accounting for or auditing of the water used and no demonstration of a reasonable beneficial use. The water has not reached the Waiahi hydro plants since the break in the ditch system and it has not been a problem for them as our power grid has seemed pretty stable since that break. Since KIUC has failed to provide information regarding the need for use, the amount used to date, and needs for future use, and since the recent diversion has clearly been wasted for the last 2.5 years, it seems clear that this permit should not be renewed and RP S-7340 should be denied per the public trust doctrine.

Respectfully,

Lana Olson
Princeville
DPH Precinct 14-1 President

From: [Sandee Pa](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Opposition testimony to Wai'ale'ale & Waikoko water diversion
Date: Wednesday, December 8, 2021 10:00:09 AM

Water is not needed to be diverted for electricity on Kauai. Kauai Island Utility Cooperative has been providing electricity without this water all this time. Save Wai'ale'ale stream and Waikoko stream.

BLNR.testimony@hawaii.gov

Subject : Agenda Item D-2

Aloha,

I am sending in this written testimony to request that BLNR deny KIUC's RP S-7340 and stop unneeded diversion of Kaua'i waters. I oppose this permit.

Mahalo,
Kapohuolahaina Pa

From: [Sylvia Partridge](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Tuesday, December 7, 2021 7:09:48 PM

Aloha,

Re: Against a 60 year lease grant to KIUC
for diversion of water from Wai‘ale‘ale and Waikoko
Streams.

KIUC has not provided the BLNR with any information about how much water it receives from streams located further down the ditch on Grove Farm lands. And has also failed to provide further information on why the water from Gove Farm lands is not enough to meet their hydro power needs, especially since it has been enough for the last 2 1/2 years, without any diversion from Wai‘ale‘ale and Waikoko..

The public has priority rights to this water and I hope you will support the natural and full stream life, public recreation and beauty rather than the constant and unnecessary diversion by KIUC now that KIUC has such alternative and effective sources of electricity.

Sylvia Partridge
3800 Kamehameha Rd., # 22
Princeville HI 96722
sylpartridge@yahoo.com

From: [Regina Peterson](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda item D-2
Date: Tuesday, December 7, 2021 4:04:00 PM

Aloha, I am sending in this written testimony to request that blnr deny KIUC's RP S-7340 and stop unneeded diversion of Kauai's waters. I oppose this permit.

Mahalo,
Regina N Peterson

From: [Cheri](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] "Agenda Item D-2"
Date: Wednesday, December 8, 2021 4:50:00 PM

1. **The BLNR is a trustee for the public:** The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

2. **No water banking:** To legally authorize private use of stream water — whether by revocable permit or long-term lease — the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC **admitted** that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.

3. **1% is not a good trade:** In a high production year, electricity from the Waiahi hydro plants accounts for less than 1% of KIUC's power generation, and water from Wai'ale'ale and Waikoko account for only a fraction of this percentage point. This tiny amount of hydropower is not worth diverting **millions of gallons of water per day** from Wai'ale'ale and Waikoko Streams. It has been proven that even without water from Wai'ale'ale and Waikoko, KIUC can keep the lights on as it has for the past 2 ½ years.

Please support our community over big business! i am doing my part by being full solar with no grid tie!
thank you considering my testimony against the waters being diverted!

Cheri Phillips
Kapaa HI

From: [Sherry Pollock](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D2
Date: Wednesday, December 8, 2021 11:05:06 AM

Dear BLNR Officials,

Since the siphon break in June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This history shows that KIUC does **not** need water from these streams for electricity. The Board of Land Natural Resources (BLNR) **must** deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

The BLNR is a trustee for the public: The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

No water banking: To legally authorize private use of stream water -- whether by revocable permit or long-term lease -- the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC **admitted** that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.

1% is not a good trade: In a high production year, electricity from the Waiahi hydro plants accounts for less than 1% of KIUC's power generation, and water from Wai'ale'ale and Waikoko account for only a fraction of this percentage point. This tiny amount of hydropower is not worth diverting **millions of gallons of water per day** from Wai'ale'ale and Waikoko Streams. It has been proven that even without water from Wai'ale'ale and Waikoko, KIUC can keep the lights on as it has for the past 2 1/2 years.

Our water is such a precious resource, and needs to be for the people, not big business interests! Please do the pono thing!

Mahalo,

Sherry Pollock

DECLARATION OF PUANANI ROGERS

I, Puanani Rogers, am a resident of the island of Kauai and my address is 4702 Mailihuna Rd. Kapaa, HI 96746 in the ahupua`a of Kealia, Puna district.

1. The following facts are offered and based on my own personal knowledge, oral history of my Kupuna, research on the internet and rely on spiritual guidance as well.

2. I am Kanaka Maoli, aka Hawaii National and indigenous to the Sovereign nation of the Hawaiian Kingdom, Ko Hawai`i Pae `Aina.

3. I have been a member of Friends of Maha`ulepu since 2014 and Kia`i Wai `o Wai`ale`ale since 2017. I am in strong support of our missions to restore and preserve natural stream flow. I offer this declaration as a member of Friends of Maha`ulepu and Kia`i Wai o Wai`ale`ale in support of our missions to preserve water, prevent waste and protect natural stream flow and aquifer recharge as well as to malama the aina affected and negatively impacted by the "Blue Hole diversions". RP7340, TMK(4) 3-9-1, diverts water and reduces flow that impacts our enjoyment of the streams, the cultural practices, hunting and gathering and the collection of water as ho`okupu, an offering and have carried the sacred waters from Wai`ale`ale's for ceremony as far away as the I`olani Palace.

4. Friends of Maha`ulepu and Kia`i Wai o Wai`ale`ale seeks to protect Kaua`i's natural and cultural resources, cultural practices, and the environment that these practices depend on for all communities on Kaua`i and for generations to come. Included in our mission is the preservation and restoration of stream flow, particularly in areas markedly damaged as the areas of the Wai`ale`ale and Waikoko stream diversions which prevents the natural enjoyment of the stream, impacting hunters, gathers and other cultural practices of our community which also includes the sacred historical practices and recognition of the Blue Hole as a sacred wahi pana.

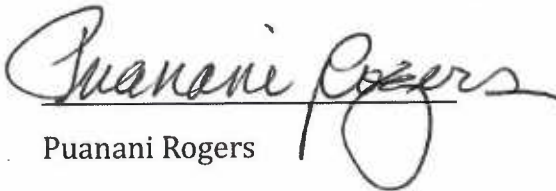
5. I am now 81 and when younger I hiked with my children to Wai`ale`ale regularly, participated in ceremony, festivals, hula practices, plant and sacred water gathering. I have and continue to use plants from Wai`ale`ale for medicinal purposes and hula adornments. For years, the dam diversions have been falling into greater and greater disrepair. Rebar and wire began sticking out of the dam making the crossing almost impossible. Today, I still connect with Wai`ale`ale Stream. We don't have to be there in

person to make the connection. I go to Poli`ahu Heiau to do ceremony, to chant and I am once again connected to Mt. Wai`ale`ale and her streams even though I can no longer go in person because of health issues. Many argue that we have to be there in person to exercise our cultural and traditional practices. That is not true. I still am deeply saddened when I consider the damage to those streams whether I'm there or not.

6. The renewal of RP7340 and the take of millions of gallons of water daily, which, for the past 18 months, have been totally wasted and have not been used by KIUC for hydro power production by their own reports, mandates that this water be restored to the streams and the dam diversions removed to stop the waste and destruction. This proves that the water isn't needed to run the hydro power plants. This is only an excuse to continue diverting the water. There's no more sugar production and the lease that was on these diversions, covered by RP7340, ended in 1999 by its own terms. There should never have been an RP after that. KIUC began operating these diversions in 2001 with no permits at all. KIUC is not meeting the terms of their lease, they face extensive repairs but thus far have not done them and the whole scheme of taking this water is a farce causing insult and injury to me and many on Kauai and an otherwise beautiful environment. Its wasted and should be dismantled.

7. I have personally walked the entire area and I have personally been to visit each of the Waiahi hydro power plants. I have read the KIUC data reported in their *Currents* magazine and am aware of the minimal power produced. Their operation causes so much damage to the environment and harm to our people, it does not make any sense to continue this travesty.

I, Puanani Rogers, declare the forgoing under penalty of perjury under the laws of the State of Hawaii. Executed this 18th day of December 2020.


Puanani Rogers

From: [Puanani Rogers](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Fw: Testimony in strong opposition of the renewal of RP 7340
Date: Wednesday, December 8, 2021 9:05:55 AM

Aloha,

My name is Puanani Rogers, I reside in the ahupua`a o Kealia o Kauai. I am an 82 year old Kanaka maoli wahine kupun and I, as well as numerous others of our Kauai community, are enraged as we had to bear the criminal and abusive actions of KIUC and the theft of our water with their diversions of our streams for over 65 years and more, and using their hydropower plant as an excuse. The plant is a folly, it produces less than 1% of Kauai's power and should be dismantled. The water diversions must be stopped immediately and all streams returned to their natural flow.

Shame! Shame! Shame!

By permitting the continuous taking of an unsustainable amount of water from Wai`ale`ale and Waikoko Streams, KIUC is actively harming natural ecosystems, decreasing the streamflow to near nothing, and violating Kanaka Maoli cultural practices of our natural environment that is seen as an act of CULTURAL GENOCIDE..

I respectfully request that this Board exercise its responsibility to protect our precious public trust of our water and DENY the renewal of RP 7340 until KIUC shows that they are able to meet the Board's conditions and show some honesty and integrity and admit their wrongs...our people deserve that!

For the protection of our precious island resource; water is life, I place my signature to this testimony!
Deny RP-S 7340, to protect the future of our `aina and our future generations.

Mahalo for doing what is pono!

Pua Nani Rogers
4702 Maillahuna Road
Kapa`a, HI 96746
(808) 652-1249
Kealia Ahupua`a o Kauai

From: [Shannon Rudolph](#)
Subject: [EXTERNAL] No on RP #7340 / Wai'ale'ale & Waikoko
Date: Wednesday, December 8, 2021 8:53:18 PM

Aloha! Please vote no on the diversion of Wai'ale'ale and Waikoko Streams. History shows that KIUC does not need water from these streams for electricity. The Board of Land Natural Resources (BLNR) must deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine. Mahalo,
Shannon Rudolph 40 year Hawai'i resident

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How wonderful it is that nobody need wait a single moment before starting to improve the world. ~ Anne Frank

From: STEW DEHT
To: DLNR, BLNR, Testimony
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 4:05:24 PM

Dear BLNR,

Historically, BLNR has issued month-to-month revocable permits for water diversions, which allowed diverters to avoid more rigorous review for a long-term lease. In 2015, a state court held that BLNR's use of revocable permits violates the law. Subsequently, the legislature amended the lease statute to allow continued use of revocable permits for three successive one-year periods, to allow diverters to prepare long-term lease applications, including EIS studies and watershed management plans. The statute also requires that BLNR ensure existing diversions comply with the public trust doctrine. When the statute expires this year, all diverters will be required to complete long-term lease applications.

To date, BLNR has failed to ensure that KIUC's diversions comply with the law. When BLNR renewed the permit last year it mandated that KIUC make a proposal for the partial restoration of flow, and make progress on its watershed management plan. However, BLNR's staff submittal recommends approval of KIUC's revocable permit without any showing that progress has been made on the restoration of water or the completion of a watershed management plan. Further, BLNR has never required KIUC to begin the preparation of an EIS on the diversions in order to satisfy the long-term lease requirements.

Restoration of the Wai'ale'ale and Waikoko streams is of special concern because the Wai'ale'ale and broader Wailua area is revered in Hawaiian culture for its spiritual significance. The classic 'oli komo or hula admission chant of Kūnihi ka Mauna, which recounts a part of the Pele and Hi'iaka saga, names the Wai'ale'ale area and describes fresh water's foundational role as a physical and spiritual life force in Hawai'i. The streams also support the endangered Newcomb's snail and a variety of indigenous native plant and animal life.

Please deny KIUC's request for the renewal of RP 7340 because the diverter has failed to meet its burden under the public trust doctrine to quantify its actual water use needs and show the lack of feasible mitigation and alternatives. BLNR can only authorize the diversion of water from Wai'ale'ale and Waikoko after fully analyzing whether KIUC must take water from public lands. There was also no environmental review, therefore should be massively fined and held accountable to restore Kama'i's waters.

Wai'ale'ale and Waikoko Streams are sacred resources for the community, island, and the Hawaiian people and lāhui. The proposed permit amount of 7.4 mg unjustly allows KIUC to take most of the base flows from these sacred streams. For a stream of such cultural and environmental significance in a conservation district, the bar must be set higher.

KIUC has not shown any progress on the watershed management plan as required by BLNR at last year's meeting. Any permit for water should be explicitly conditioned upon concrete progress toward the long-term lease requirements, including compliance with the public trust doctrine.

The hydroelectricity generated by the diversions of Wai'ale'ale and Waikoko Streams accounts for less than 1.5% of KIUC's electric use. This small amount of hydropower is not worth the diversions of millions of gallons per day from Wai'ale'ale and Waikoko Streams. KIUC should consider other, more environmentally sustainable, and culturally responsible ways to meet this tiny fraction of its power needs.

Sincerely,

From: [Michal Stover](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Restore the Waters of Wai'ale'ale and Waikoko!
Date: Wednesday, December 8, 2021 7:59:16 AM

I respectfully request that the Board of Land and Natural Resources deny Kaua'i Island Utility Cooperative's Revocable Permit RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does.

To legally authorize private use of stream water — whether by revocable permit or long-term lease — the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use. KIUC admitted that stream water from Wai'ale'ale and Waikoko cannot reach the Waiahi hydro plants because of a break in the ditch system. Because KIUC does not need this water for electricity generation, the BLNR must deny RP S-7340.

Thank you.

Michal Stover
Kīlauea, Kaua'i, Hawai'i

From: [Maggie Taurick](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Wednesday, December 8, 2021 11:31:09 PM

I'd like to add my voice in favor of protecting the streams and holding the KIUC accountable for the damage they've been causing.

Thanks!

Sent from my iPhone

From: [James Trujillo](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2: Testimony to Deny RP 7340
Date: Thursday, December 9, 2021 8:22:06 AM

Mahalo for the opportunity to provide testimony on agenda item D2.

I am a Kaua'i resident and a member of KIUC since its inception in the early 2000's. As an environmentalist, I applaud my utility's effort to wean ourselves off of fossil fuels. Our renewable energy portfolio is impressive and helps Kaua'i transition off of dirty bunker fuel and move towards clean sources of reliable power.

With that said, I ask that you deny our coop's recent request for continued diversion of the waters of Wailua. These streams have rich cultural and environmental value and deserve protection and restoration.

Since June 2019, KIUC has met Kaua'i's electricity needs without using any water from Wai'ale'ale and Waikoko streams. This evidence demonstrates KIUC does *not* need water from these streams for electricity. The Board of Land Natural Resources (BLNR) *must* deny RP S-7340 in order to prevent violating Hawai'i's public trust doctrine.

I ask that you listen to the kupuna and Native Hawaiian cultural practitioners who ask for the return of the waters and the diversions of important natural resources. Please deny RP S-7340 for the benefit of the aina and future generations.

With respect and aloha,

James G Trujillo
PO Box 33
Kapa'a, HI
96746

From: [Bryceson Tugade](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Thursday, December 9, 2021 3:00:05 AM

Aloha ‘auhea ‘oukou!

My name is Bryceson G. Keali‘iwiwo‘oleikamaunaki‘eki‘e Tugade. I’m currently a Junior in the Sustainable Community Food Systems (SCFS) program at the University of Hawai‘i- West O‘ahu. I’m writing in regards to the restoration of the Wai‘ale‘ale and Waikoko waters, and a reminder that, *“the BLNR that under Hawai‘i’s public trust doctrine that no one, not even KIUC, is authorized to take water without an actual need for the water to meet a reasonable-beneficial use.”*

“Aia i hea ka wai a Kāne?”

As a trustee of the public, the BLNR is **required** as stated in the 1978 amendment to the Hawai‘i Constitution affirming that natural resources, including water, is based in the public trust, in which actions must benefit present and future generations.

However, to permit the private legal authorization of stream use, *“the BLNR must first determine that the diverter needs the water to meet a reasonable-beneficial use.”* The Kaua‘i Island Utility Cooperative (KIUC) has **admitted** the Wai‘ale‘ale and Waikoko stream water does **not** reach the Waiahi hydro plant, due to a break in the ditch system. Furthermore, KIUC has **no use** for the water intended for electricity generation. In accordance with this sentiment, the BLNR must deny RP S-7340.

Lastly, the exchange diversion of **millions of gallons of water each day**, compared to the 1% output for KIUC’s power generation during a high productivity year, is not a viable trade.

Hawai‘i is put in a very precarious position, where we are to conserve and protect our finite resources, while also sustaining a growing population. In this, we are an example for the rest of the world. Given our pandemic riddled lives and in response to a warming planet, the redistribution of these streams will have an immensely positive impact. Although I have no such connection to these streams, I live near the recently contaminated waters at Kapūkakī (Red Hill). Our waters have such a profound impact on our lives, yet we often take it for granted. It is imperative that we as a people **must** recognize the importance of such a precious resource.

Me ka 'oia'i'o,

Bryceson G. Keali'iwiwo'oleikamaunaki'eki'e Tugade

From: [Maria Walker](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda item D-2
Date: Wednesday, December 8, 2021 9:57:57 AM

Aloha Board Members,

I am writing to you today to urge you to deny RP S-7340, KIUC's request for a renewal of their revocable permit to divert water from Wai'ale'ale and Waikoko streams.

As you are aware, you have been charged by the Hawai'i Constitution with the most important responsibility in our government: upholding the public trust by protecting Hawai'i's natural resources so that they may be of benefit to all the people of Hawai'i, and managed for all the future generations to come. It is a violation of the public trust to ever grant a permit without both a full environmental assessment, and clear proof that the permit request will be of substantial benefit to the public.

KIUC has done an admirable job of supplying our residents with dependable electric power for the last two and a half years without using any water from Wai'ale'ale and Waikoko streams, because of a breakdown in the ditch system. This proves that the diversions from these streams are not necessary for the generation of hydropower at the Waiahi hydro plant. The Waiahi plant currently produces less than 1% of KIUC's total power generation. This is an insignificant amount of power compared to diverting millions of gallons of water annually from Wai'ale'ale and Waikoko, which impacts flora and fauna within the stream and the riparian zone. Both streams are within the greater area of Wailua and have great historical and cultural significance in Kaua'i past and present. These two streams are some of the only streams in the watershed that are accessible to the public, rather than being on private land. For these reasons, I believe it is important to preserve Wai'ale'ale and Waikoko as they are, with no diversions taken from them.

I would also like to point out that it is critically important for the BLNR to make it abundantly clear to all potential permit applicants that they must first accomplish their full due diligence by completing full environmental impact reports and proving that the water requested is necessary to accomplish important goals that will benefit all the people of Kaua'i.

I live in Kapahi, and frequently enjoy hiking and swimming in the Loop Road area, so I can attest to the beauty of this watershed and its importance to recreational and cultural practice uses for our residents. I believe you all understand that fresh water is the most precious resource for Kaua'i, and must be cared for as a foundation of the public trust to sustain our land and future generations. You each have been given a sacred responsibility to protect our natural resources, so I ask you to deny this permit and let Waikoko and Wai'ale'ale streams flow naturally for the benefit of our environment and our people.

Mahalo for hearing my testimony,
Maria Walker
1728 Hulu Rd.
Kapa'a, HI 96746

From: [Dawn Webster](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2
Date: Tuesday, December 7, 2021 7:32:43 PM

I write to ask that BLNR fulfill its duty to protect the public interest in relation to its right to access to water.

We are living through an unfolding disaster relative to Red Hill on Oahu and the poisoning of the water that the people of this island rely on for daily living. I don't live on Kaua'i but I feel moved to write in solidarity.

KIUC does not have priority rights to Wai'ale'ale and Waikoko streams. The public does. It has been amply demonstrated that KIUC does not need the water from these streams for electricity generation.

The Hawai'i Constitution requires that the BLNR protect Hawaiian rights and cultural practices, native stream life, public recreation, aesthetic enjoyment, and the stream itself before authorizing off-stream water diversions. For years, KIUC has taken water from these streams with little to no oversight from the BLNR. They have also failed to hold themselves accountable to the public.

It's time BLNR acted to protect the public interest and restore Wai'ale'ale and Waikoko streams on Kaua'i. Their cultural and conservation significance also warrants better oversight from BLNR. The BLNR must deny RP S-7340.

Mahalo nui.

Dawn Morais Webster

Dawn Morais Webster Ph.D.

*1, Keahole Place, #3501, Honolulu, HI 96825
808-383-7581*

From: [Sequoia](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Agenda Item D-2, meeting 12/10/2021
Date: Wednesday, December 8, 2021 10:14:58 PM

Aloha,

I thank you all for your commitment to protecting Hawaii: its land, water, and other natural resources.

I am concerned about KIUC's request to renew their Revocable Permit 7340 to continuing diverting Wai'ale'ale and Waikoko Streams. Have they demonstrated why they need this water, over and above what they get from Grove Farm, and why they need it even though they've apparently managed perfectly well without it since the siphon break in June 2019?

Please deny renewal of KIUC's RP 7340.

Sincerely,

Susan Wiener
Kalaheo HI