

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

December 9, 2022

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Hawaii Island and Kauai

Continuation of Revocable Permits for Water Use on the Islands of Hawaii and  
Kauai. See **Exhibit A** for list of Revocable Permits.

LEGAL AUTHORITY:

Sections 171-55, Hawaii Revised Statutes (HRS), as amended.

HRS CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

In accordance with the Exemption List for the Department of Land and Natural Resources, reviewed and concurred by the Environmental Council on November 10, 2020, the subject action is exempt from the preparation of an environmental assessment pursuant to General Exemption Type 1, “Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing.”, Part 1, Item 44, “Permits, licenses, registrations and rights-of-entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing.” See Exemption Notice attached.

BACKGROUND

The current submittal seeks approval for the continuation of revocable permits for water use on the islands of Hawaii and Kauai for the year 2023 on a temporary basis that will allow the applicants to continue to work in good faith with the Department to complete the requirements of the water leasing process. The submittal also includes a status update and discussion of water permits/lease applications by island, including any staff recommendations to the Board.

DISCUSSION

HAWAII ISLAND

For the island of Hawaii, approval is requested to continue five water permits. RP S-7463, is issued to Hawaii Electric Light Co., Inc. (HELCO) for hydroelectric power generation purposes on the Wailuku River in South Hilo, Hawaii. The permit requires all water used under the permit

to be returned to the Wailuku River at convenient points. The hydroelectric facility and various water dispositions to allow it to operate have been in place for many decades. At its meeting on August 12, 2022 under agenda item D-2, the Board approved the sale of a license at public auction for the non-consumptive use of water from the Wailuku River, Island of Hawaii, for hydroelectric generation purposes and accepted the proposed Wailuku Watershed Management Plan. The Board received both oral and written testimony from the Department of Hawaiian Home Lands (DHHL). During the meeting, DHHL verbally requested a contested case. Following an executive session, the Board voted to deny the request for contested case and proceeded to approve staff's recommendation. On August 22, 2022, the Department received DHHL's written request for contested case. Once the contested case is resolved<sup>1</sup>, staff will proceed with the public auction. The staff submittal approved by the Board can be accessed at the following link:

<https://dlnr.hawaii.gov/wp-content/uploads/2022/08/D-2.pdf>

The other four revocable permits are located in Ka'u, Hawai'i, and the permittees are smaller diversified agriculture users. Previously, Hawaiian Agricultural and Hutchinson Sugar Company, both subsidiaries of C. Brewer & Co., Ltd., developed a system of tunnels, flumes and ditches in Ka'u in the 1900s, using the water primarily for fluming sugarcane and for wash water in the mills. Beginning in the late 1990s, some of the tunnels and transportation systems were converted to provide water to farmsteads and diversified crop endeavors. Diversified agriculture, livestock pasturage, orchard and field crops have expanded within the Ka'u District since that time.

The five revocable permits are as follows:

1. RP S-7054 to Kapapala Ranch for watering livestock purposes.
2. RP S-7267 to Wood Valley Water & Farm Co-op for public drinking water, irrigation and watering livestock purposes.
3. RP S-7426 to Kuahiwi Contractors, Inc. for watering livestock purposes.
4. RP S-7432 to Edmund C. Olson, Trustee of the Edmund C. Olson Trust No. 2 for irrigation and watering livestock purposes.
5. RP S-7918 to Ka'u Mahi, LLC for ancillary agricultural and irrigation purposes.

Upon the completion of the public auction for the Wailuku River hydropower water license, staff intends to work with these permittees on bringing these dispositions to public auction. The outstanding requirements are the development of the watershed management plan, determination of the upset rent by appraisal and compliance with Chapter 343, HRS.

As part of its approval for 2022, the Board authorized the adjustment of revocable permit rent to account for CPI. The 2022 revocable permit rents are as follows:

1. RP S-7054 (Kapapala Ranch)

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<sup>1</sup> Staffs' recommendation that the Board deny DHHL's request for contested case is pending before the Board today.

\$45.47 per month or \$8.97 per million gallons (whichever is greater)

2. RP S-7267 (Wood Valley Water & Farm Co-op)  
\$45.47 per month or \$7.34 per million gallons (whichever is greater)
3. RP S-7426 (Kuahiwi Contractors, Inc.)  
\$105.48 per month
4. RP S-7432 (Edmund C. Olson, Trustee of the Edmund C. Olson Trust No. 2)  
\$45.47 per month or \$6.73 per million gallons (whichever is greater)
5. RP S-7463 (HELCO)  
\$2,066.80 per month
6. RP S-7918 (Ka'u Mahi)  
\$44.92 per month

Adjusted for CPI calculated from November 2021 to October 2022, the 2023 rents are as follows:

1. RP S-7054 (Kapapala Ranch)  
\$48.75 per month or \$9.62 per million gallons (whichever is greater)
2. RP S-7267 (Wood Valley Water & Farm Co-op)  
\$48.75 per month or \$7.87 per million gallons (whichever is greater)
3. RP S-7426 (Kuahiwi Contractors, Inc.)  
\$113.09 per month
4. RP S-7432 (Edmund C. Olson, Trustee of the Edmund C. Olson Trust No. 2)  
\$48.75 per month or \$7.22 per million gallons (whichever is greater)
5. RP S-7463 (HELCO)  
\$2,215.99 per month
6. RP S-7918 (Ka'u Mahi)  
\$48.16 per month

#### KAUA'I

The Board is requested to approve the continuation of one of two current revocable permits. RP S-7088 to Jeffrey S. Lindner allows for the use of water from State land in Kawaihau, Kaua'i, specifically from Moloa'a Well No. 1. Portions of this water are delivered to users that cannot be accommodated by the County of Kaua'i and the Moloa'a Irrigation Cooperative (MIC), as well as used by Mr. Lindner on his private property. The MIC provides water for both irrigation and domestic use. The water system has been designated as a public water system by the Hawai'i Department of Health Safe Drinking Water Branch, requiring the water to be treated prior to



reaching the MIC and other users. Staff understands that Mr. Lindner is currently in discussions with DHHL regarding access to water for their nearby lands and has reached out to the Division of Forestry and Wildlife (DOFAW) to begin development of the watershed management plan.

RP S-7340 was issued in 2003 to Kaua'i Island Utility Cooperative (KIUC) for water diverted from the North Fork Wailua River and the Waikoko Stream to operate two hydroelectric plants. Over the years members of the public have written to the Department expressing their concerns with this permit, and the Board has denied requests for contested cases for the 2021 and 2022 permit renewals. In addition, the amended interim instream flow standards (IIFS) proposed by Commission on Water Resource Management (CWRM) staff for the Wai'ale'ale and Waikoko streams are also subject to a contested case.

KIUC stated that no water is currently being diverted at North Fork River and Waikoko Stream due to damage to the diversions which occurred in 2019 and the power plants are not in operation. Since KIUC does not intend to conduct repair work until they can obtain a long-term license via public auction, KIUC has requested that the permit not be continued. Instead, they have requested an alternative disposition for access and to maintain the current infrastructure, without the right to divert and use water, to address public health and safety issues. Given the outstanding issues with this permit, staff believes that this would be an appropriate temporary action and will work with KIUC on an appropriate disposition. KIUC's written request is attached as **Exhibit B**.

Finally, as part of its approval for 2022, the Board authorized the adjustment of revocable permit rent to account for CPI. The 2022 revocable permit rent is as follows:

1. RP S-7088 (Lindner) \$350.81 per month

Adjusted for CPI calculated from November 2021 to October 2022, the 2023 rent is as follows:

1. RP S-7088 (Lindner) \$376.13 per month

Therefore, staff recommends that the Board approve the continuation of the water use revocable permit S-7088 to Jeffrey S. Lindner, at the rental amounts as noted above.

#### Public Trust Doctrine and Carmichael Analysis

Title to water resources is held in trust by the State for the benefit of its people. Pursuant to *In re Water Use Permits*, 94 Hawaii 97, 9 P.3d 409 (2000) (*Waiāhole I*), and *In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i 401, 83 P.3d 664 (2004) the Hawai'i Supreme Court has identified four public trust purposes with respect to water:

1. Maintenance of waters in their natural state;
2. Domestic water use of the general public, particularly drinking water;
3. The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and

#### 4. Reservations for Hawaiian home lands.

In addition, the Courts have indicated that the “dual mandate” of the public trust not only calls for the protection of water resources, but also requires the Board to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state. *Waiāhole I*, 94 Hawai'i at 139, 141, 9 P.3d at 451, 453 (“The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, including agriculture.”). In order to satisfy its public trust obligations, the Board must balance the proposed use of water against the foregoing public trust purposes, as well as competing uses.

Of these four purposes, domestic water use is implicated in two of the current revocable permits: S-7088 to Mr. Lindner, and S-7267 to Wood Valley Water and Farm Cooperative. The remaining revocable permits are for agricultural use or hydroelectric power generation. In addition to its public trust duties, the Board also has a constitutional duty to promote diversified agriculture. With respect to the agricultural use of water, the Hawai'i Constitution provides:

*The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.*

Hawai'i Constitution, Article XI, Section 3.

*The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.*

Hawai'i Constitution, Article XI, Section 10.

Pursuant to the Hawaii Supreme Court's ruling in *Carmichael v. Board of Land and Natural Resources*, the Board may allow the revocable permits to continue on a month-to-month basis for additional one-year periods. However, a decision by the Board to continue the subject revocable permits must demonstrate that such a decision is made in consideration of the “best interests of the State”, as required in section 171-55, Hawaii Revised Statutes (HRS),<sup>2</sup> which states:

“Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will **serve the best interests of the State**, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board

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<sup>2</sup> The Court noted that the Board may continue revocable permits for the temporary use of water pursuant to Section 171-55, HRS.

may allow the permit to continue on a month-to-month basis for additional one year periods.”

(Emphasis added.)

In staff's view, making irrigation water available to farmers and ranchers supports the long-term viability and security of local agricultural operations, and is both in the best interest of the State and critical to the State's compliance with the constitutional mandates of Article XI. It also allows for the local production of food, supporting the goal of food sustainability and food security for Hawai'i. It may also translate into lower prices for consumers when produce does not have to be shipped to Hawai'i from outside of the state. Any tension between identified public trust uses of water and the constitutional mandates above will be resolved in the process of issuing water leases, because Section 171-58, HRS, requires the joint development of a water reservation to support current and future DHHL homestead needs.

For the agricultural users on the island of Hawai'i, the only apparent alternative would be to leave the water in its natural state, with no diversion. However, the amount of water diverted is minimal, especially in comparison to the available amount of water. The permittees collectively use less than 1 mgd, against a sustainable yield of the source aquifer at over 100 mgd. Furthermore, the Ka'u permittees are diverting groundwater, not surface water. Also, the permittees are working in good faith to convert their revocable permits to long term leases. In view of these considerations, staff believes that allowing the revocable permits to continue on a temporary basis in support of the State's agricultural goals is consistent with the public trust.

The hydroelectric use of water allows utility companies to provide clean energy to domestic and commercial users and furthers the State's renewable energy goals set forth in Act 95, Session Laws of Hawaii 2015. This method of energy production also supports Hawaii's Clean Energy Initiative, which sets goals for the state to achieve 100 percent clean energy by 2045 coming from locally generated renewable sources. Although hydroelectric projects are not an identified public trust use of State waters, the public trust concerns will be addressed by the completion of the requirements under Section 171-58, HRS.

The use of water under RP S-7463<sup>3</sup> is non-consumptive, which returns the diverted water to the same stream source from which it was drawn. The Board has already approved the public auction in this matter and staff intends to move forward with the public auction process pending the resolution of DHHL's contested case request. In view of these considerations, staff believes that allowing the revocable permits to continue on a temporary basis in support of the State's renewable energy goals until the public auction is completed and a long-term license is executed is in the best interest of the State and consistent with the public trust.

Furthermore, staff notes that all but one of the permits subject to this action except one involved the use of groundwater well below the sustainable yield of the aquifer. The single permit that involves the use of surface water is of a non-consumptive nature. Therefore, staff believes that any impact of the permits to other public trust uses of water is minimal.

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<sup>3</sup> HELCO's water RP at Wailuku River mentioned above.

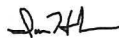
involves the use of surface water is of a non-consumptive nature. Therefore, staff believes that any impact of the permits to other public trust uses of water is minimal.

Finally, continuation of the revocable permits pursuant to staff's recommendations would be consistent with legal requirements that they be temporary and under such conditions and rent which serve the best interest of the State. All of the permittees have taken steps to convert their permits to long term leases, including working with the Department and DHHL regarding DHHL's water reservations, seeking or obtaining an IIFS determination from CWRM, and complying with Chapter 343, HRS, including conducting environmental studies where appropriate.

RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed dispositions as provided by Chapter 343, HRS, and Chapter 11-200.1, HAR, these projects will probably have minimal or no significant effect on the environment and are therefore exempt from the preparation of an environmental assessment;
2. Find that the continuation of the revocable permits listed in Exhibit A is consistent with the public trust doctrine;
3. Based on the testimony and facts presented, find that approving the revocable permits, under the conditions and rent forth herein, would serve the best interests of the State;
4. Subject to the terms and conditions noted in this submittal, approve the continuation of the subject revocable permits listed in Exhibit A at the rent set forth above on a month-to-month basis effective January 1, 2023, for another one-year period through December 31, 2023.


Respectfully Submitted,



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Ian Hirokawa  
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



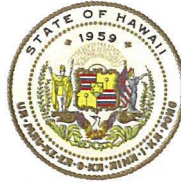
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Suzanne D. Case, Chairperson

RT



DAVID Y. IGE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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**SUZANNE D. CASE**  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**ROBERT K. MASUDA**  
FIRST DEPUTY

**M. KALEO MANUEL**  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
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CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**EXEMPTION NOTIFICATION**

Regarding the preparation of an environmental assessment pursuant to Chapter 343, Hawaii Revised Statutes (HRS), and Chapter 11-200.1, Hawaii Administrative Rules (HAR):

**Project Title:** Holdover/Continuation of Revocable Permits for Water Use on the Islands of Hawai'i and Kaua'i

**Project Location:** Hawai'i Island and Kaua'i

**Project Description:** Revocable permits for interim water use.

**Chap. 343 Trigger(s):** Use of State Water (Land)

**Exemption Class No. and Description:** In accordance with HAR § 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on November 10, 2020, the subject request is exempt from the preparation of an environmental assessment pursuant to General Exemption Type 1 that states, "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing," and Item 44 that states, "Permits, licenses, registrations, and rights-of-entry issues by the Department that are routine in nature, involving negligible impacts beyond that previously existing."

**Cumulative Impact of Planned Successive Actions in Same Place Significant:** No, this action applies only to pre-existing diversions, and will not serve to authorize any new diversions of water beyond that currently occurring.

**Action May Have Significant Impact on Particularly Sensitive Environment:** No. Revocable permits are temporary in nature. All of the permits except one involved the use of groundwater well below the sustainable yield. The single permit for the use of surface water is of a non-consumptive nature.

**Analysis:** The Hawaii Supreme Court has determined that pursuant to Section 171-55, HRS the Board may issue a temporary permit in the interim while a permittee pursues a long-term water lease. The proposed use under the revocable permits will involve negligible or no expansion or change of use beyond that previously existing.



**Consulted Parties:** Commission of Water Resource Management, Division of Forestry and Wildlife.

**Recommendation:** That the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

**Revocable Permits for Water on Hawaii and Kauai**

<b>Permittee</b>	<b>Location</b>	<b>Proposed Use of Water</b>	<b>Consumptive or Non-consumptive</b>	<b>Notes</b>
HAWAII ELECTRIC LIGHT CO., INC. (RP7463)	South Hilo, Hawaii; (3) 2-6-009	Hydroelectric power generation.	Non-consumptive, except for system losses	Public auction by the Board at its meeting on August 12, 2022 under agenda item D2. DHHL requested a contested case.
KAPAPALA RANCH (RP7054)	Kau, Hawaii; (3) 9-8-1:3,9,10; 9-7-1:1	Watering livestock and wildlife.	Consumptive	Est. total water use from January 2022 through June 2022 = 3.296 million gallons. Average of 0.0183 mgd.
KUAHIWI CONTRACTORS, INC. (RP7426)	Kau, Hawaii; (3) 9-7-1:1,15	Watering livestock.	Consumptive	Est. total water use from January 2022 through May 2022 = 19.657 million gallons. Average of 0.131 mgd.
OLSON, TRUSTEE, EDMUND C. (RP7432)	Kau, Hawaii; (3) 9-6-6; 9-6-7; 9-6-8; 9-7-1	Irrigation and watering livestock.	Consumptive	Est. total water use from January 2022 through May 2022 = 135,104 gallons. Average of 0.0009 mgd.
WOOD VALLEY WATER & FARM COOPERATIVE (RP7267)	Kau, Hawaii; (3) 9-7-001:001	Public drinking water, irrigation and watering livestock.	Consumptive	Est. total water use from January 2022 through September 2022 = 6.732 million gallons. Average of 0.025 mgd.
KAU MAHI, LLC (RP7918)	Kau, Hawaii; (3) 9-6-006:010	Ancillary agricultural and irrigation.	Consumptive	
LINDNER, JEFFREY S. (RP7088)	Kawaihau, Kauai; (4) 4-9-001:001	County water supply and irrigation purposes.	Consumptive	No reporting requirement in permit but estimated average use is 0.15 mgd.

**EXHIBIT A**



October 25, 2022

Honorable Suzanne Case, Chair  
Board of Land and Natural Resources  
State of Hawai'i  
P. O. Box 621  
Honolulu, Hawai'i 96809

RE: Request access agreement for North Fork Wailua ongoing maintenance

Dear Chair Case and Board members:

Aloha and mahalo for your support of previous requests for renewal of Kaua'i Island Utility Cooperative's Revocable Permit No. 7340 (RP7340). By way of this letter, we are notifying you that we are not requesting renewal of this permit for 2022. Instead, we are requesting an access agreement for portions of the water transmission system located on State land as identified in RP7340: for purposes of maintenance only and no diversion.

The access agreement would allow KIUC to conduct maintenance activities in the area while continuing to pursue a long-term lease. Specifically, our intent is to maintain the diversions, ditch infrastructure and gaging equipment associated with RP7340 as reasonably practicable given road access limitations, extreme weather events, and other unforeseen variables. This will avoid or minimize further degradation of the system and improve public safety related issues that occur with degradation. Regular maintenance also helps to identify and address vandalism at the diversions and ensures that the headgates remain closed preventing diversion of water into the ditch system. Vandalism continues to be a problem at both diversions. As recently as last month, vandalism occurred at the North Fork diversion that involved the complete destruction of the gaging station installed in the ditch for purposes of monitoring ditch flow just down-ditch of the diversion.

Since the last renewal of RP7340 in November 2021, KIUC has not diverted water from North Fork Wailua River or Waikoko Stream, referred to collectively as "Blue Hole." As we have previously reported, in 2019 significant damage occurred in the transmission system downstream of the North Fork Wailua River and Waikoko Stream diversions and upstream of the 'Ili'ili'ula diversion. Because of the significant estimated cost of repairs, KIUC will not undertake the work prior to obtaining a long-term lease. KIUC continues to pursue a water lease pursuant to HRS Chapter 343 and HRS 171-58.

We would be happy to answer any questions you or the Board may have regarding this request. Mahalo for your consideration.

Best regards,

David Bissell  
President and Chief Executive Officer

Cc: Mr. Ian Hirokawa, DLNR  
Laurel Loo, McCorriston Miller Mukai MacKinnon LLP  
Dawn Huff, Joule Group

EXHIBIT B