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

August 24, 2012

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

Kauai

Withdrawal of Request for Contested Case Hearing by the Office of Hawaiian Affairs Regarding Agenda Item D-26, December 10, 2004 Meeting; Sale of 65-year Lease at Public Auction of Water Rights for the Use of the 'Blue Hole' Diversion and Portions of a Water Transmission System, Lihue-Koloa Forest Reserve (Wailua Section), Wailua, Lihue, Kauai, Tax Map Key No(s). (4) 3-9-001:001 & (4) 3-8-001:001 for Hydropower Generation, Non-Polluting and Non-Consumptive Use.

BACKGROUND

At the Board's meeting on December 10, 2004, under Agenda D-26, the Kauai Island Utility Cooperative ("KIUC") requested the Board to grant authorization for a sale of a water lease by public auction. A copy of the submittal is attached as Exhibit 1. The lease would provide for the use of water emanating from the "Blue Hole" diversion as well as a portion of an existing government-owned water transmission infrastructure system. KIUC sought to obtain a long term lease for hydropower generation through their Upper and Lower Lihue Hydropower Plants. Previously, KIUC had conducted these activities under Revocable Permit No. S-7340.

As the item was heard by the Board, requests for contested cases were received from the Office of Hawaiian Affairs ("OHA") and the Native Hawaiian Legal Corporation on behalf of Life of the Land. A copy of the Board minutes pertaining to this item is attached as Exhibit 2. As result, the Board ceased accepting testimony on the item and took no action regarding the item. No written petitions for contested case were found in Land Division files from either OHA or Life of the Land and no action has been taken by the Board to grant or deny the request for contested case.

Subsequently, OHA and KIUC entered into a memorandum of agreement whereby OHA agreed to withdraw their request for a contested case hearing if KIUC conducted specified studies in connection with the use of the surface water. KIUC has now completed the tasks necessary for OHA to withdraw its request for contested case hearing under the MOA. OHA and KIUC executed a stipulation memorializing the progress regarding their memorandum of agreement and OHA's withdrawal of their request for a contested case hearing. A copy of the stipulation excluding the exhibits is attached as Exhibit 3.

This matter is brought before the Board solely as an informational briefing, and the Board is not requested to take any action. Once the required studies as outlined in the stipulation are completed to the satisfaction of the parties, the matter will be brought before the Board in order to seek approval for an appropriate disposition.

Respectfully Submitted,

Ian C. Hirokawa
Project Development Specialist

APPROVED FOR SUBMITTAL;

William J. Aila, Jr., Chairperson

EXHIBIT 1

D-26

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

December 10, 2004

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

PSF No.: 03KD-276

KAUAI

Sale of 65-year Lease at Public Auction of Water Rights for the Use of the "Blue Hole" Diversion and Portions of a Water Transmission System, Lihue-Koloa Forest Reserve (Wailua Section), Wailua, Lihue, Kauai, Tax Map Key No(s). (4) 3-9-1:01 & (4) 3-8-01:1 for Hydropower Generation, Non-Polluting and Non-Consumptive Use.

APPLICANT:

The law firm of Oshima Chun Fong & Chung, LLP, on behalf of Kauai Island Utility Cooperative ("KIUC"), a Hawaii non-profit corporation, whose business address is 4463 Pahee Street, Lihue, Hawaii 96766, .

LEGAL REFERENCE:

Section 171-58, Hawaii Revised Statutes ("HRS"), as amended.

LOCATION AND AREA:

Portion of Government lands and waters of Lihue-Koloa Forest Reserve (Wailua Section), Wailua, Lihue, Kauai, Hawaii, Tax Map Key 3-9-1:1, specifically identified as the Iliiliula North Wailua Ditch including the "Blue Hole" diversion, as shown on the attached map labeled Exhibit A.

Existing water transportation infrastructure system at the Blue Hole Diversion including a non-exclusive easement for access, maintenance and repair of the existing system.

ZONING:

State Land Use District: Conservation
County of Kauai CZO: None

EXHIBIT " 1 "

ITEM D-26

No action
~~APPROVED~~ BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
December 10, 2004

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: YES

CURRENT USE STATUS:

On December 13, 2002, the Board of Land and Natural Resources ("Board") approved a revocable permit (Revocable Permit No. S-7340) for KIUC that allowed KIUC to use water from the Blue Hole Diversion and a portion of state-owned water transmission system for its Upper and Lower Lihue Hydropower plants. Revocable Permit No. S-7340 was renewed by the Board in December 2003 and is currently effective until December 31, 2004.

CHARACTER OF USE:

To divert, take, draw off, conduct away and dispose of government-owned water emanating from the "Blue Hole" diversion and the use, operation, repair and maintenance of a portion of an existing government-owned water transmission infrastructure system, including access roads for hydropower generation for KIUC's Upper and Lower Lihue Hydropower Plants, located on Tax Map Key No. 3-8-01:1 (4th Division).

The use of water from the "Blue Hole" diversion is a non-polluting and non-consumptive water use under section 171-58(c), HRS.

TERM OF LEASE:

65 years.

COMMENCEMENT DATE:

The first day of the month following the date of sale.

MINIMUM UPSET ANNUAL RENT:

To be determined by staff or independent appraisal establishing fair market rent, subject to review and approval by the Chairperson.

METHOD OF PAYMENT:

Semi-annual payments, in advance.

RENTAL REOPENINGS:

At the end of 20th and 40th years of the lease term, by staff or independent appraisal.

PERFORMANCE BOND:

Twice the annual rental amount.

CHAPTER 343—ENVIRONMENTAL ASSESSMENT:

Pursuant to section 11-200-8(a)(1), Hawaii Administrative Rules ("HAR") relating to Exempt Classes of Action of the Environmental Impact Statement Rules, the action is exempt from Chapter 343 compliance. Section 11-200-8(a)(1), HAR, exempts: "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."

DCCA VERIFICATION:

Place of business registration confirmed:	YES
Registered business name confirmed:	YES
Applicant in good standing confirmed:	YES

REMARKS:

HISTORY. General Lease No. S-3827 to the East Kauai Water Company was a 30-year lease allowing the lessee to divert, store, take, draw off, conduct away and dispose of government-owned water. The lease also allowed for the use, operation and maintenance of the aqueduct system. This lease expired in May 1995.

GL S-3827 in its original form covered an extensive water collection, delivery and distribution system including the drainage basins of Wailua, Kapaa, Anahola and Hanalei. In broad terms, the system was divided into three sections, the Anahola-Kealia section, the central Wailua-Kapaa section, and the Hanamaulu-Lihue section. All of the water provided by the East Kauai water system was used to irrigate sugar cane cultivated by Lihue Plantation Company. Over time, many portions of the system have fallen out of active use as sugar operations scaled down, then finally closed. For all intents and purposes, active and in-demand portions of the original East Kauai Water Company system under the control of the DLNR are now limited to the Wailua-Kapaa and Hanamaulu-Lihue sections. See Exhibit B, Map of the Water Transmission System.

Currently, the East Kauai Water Users Cooperative ("EKWUC"), (a duly formed and recognized State agricultural cooperative created for the purpose of operating private agricultural water systems on Kauai), was issued Revocable Permit No. S-7310, which is for the Wailua-Kapaa portion of the system plus the Kalepa portion of the Lihue-Hanamaulu section.

KIUC, the applicant for this action, is applying for a 65-year long-term lease for the use of the remainder portion of the existing Lihue-Hanamaulu section of the system. Specifically, the request is to obtain permission to purchase water and to use the diversion and portions of a transmission ditch (Iliiliula North Wailua ditch) including water collected from Waikoko Stream which combined are commonly known as the Blue Hole diversion, which is the most mauka diversion of the North Fork of the Wailua River and to use such access roads and areas needed for the operation, repair and maintenance of the system.

In December 2002, the Board approved a revocable permit to KIUC for the use of the Portion of Government lands and waters of Lihue-Koloa Forest Reserve (Wailua Section), Wailua, Lihue, Kauai, Hawaii, Tax Map Key 3-9-1:1, specifically identified as the Iliiliula North Wailua Ditch including the "Blue Hole" diversion, as shown on the attached map labeled Exhibit A and for existing water transportation infrastructure system at the Blue Hole Diversion including use for access, maintenance and repair of the existing system. The revocable permit was renewed in December 2003 and is currently effective until December 2004. KIUC is in compliance with all conditions under the revocable permit.

In April 2004, KIUC obtained Concurrent Resolution from the Legislature for this use of water at the Upper and Lower Lihue Hydroelectric Plants by lease. See Exhibit C, a copy of the 2004 Concurrent Resolution.

In June 2004 following up on earlier requests, KIUC requested that it be issued a 65-year long term lease for its non-consumptive use of water for hydropower purposes at its Upper and Lower Lihue plants.

KIUC'S INTEREST IN THE SYSTEM. KIUC is interested in using what has been historically a part of an agricultural irrigation system, to power two hydroelectric plants (800 KW and 500 KW nameplate capacity) obtained from AMFAC that were used to generate power for Lihue Plantation consumption and now are part of the KIUC electric grid. An important source of water needed to power the hydroelectric plants come from the Blue Hole diversion. The conveyance of these plants to KIUC by AMFAC was part of a settlement agreement concerning satisfaction by AMFAC of their power production contract with KIUC at the Lihue Mill. Because optimum operation of the hydroelectric plants depends upon continued access to water from the Blue Hole diversion, KIUC is the applicant for this long-term lease. KIUC's proposed use is a non-polluting and non-consumptive beneficial instream use as described in Hawaii Revised Statutes Sections 171-58(c) and 174C-3.

NEWCOMB'S SNAIL. The Newcomb's snail is listed as a threatened species under the Federal Endangered Species Act. When KIUC's revocable permit was being issued, the Aquatic Resources Division had raised concerns that the hydropower plants may adversely affected areas that may be designated as critical habitat of the Newcomb's snail. In its February 2004 report, the U.S. Fish and Wildlife Service has confirmed that the ditch system does not contain the constituent elements necessary for the snail and thus

excluded the same from the critical habitat boundaries. Based on the extensive review of this matter by the U.S. Fish and Wildlife Service, the agency charged with designating critical habitat of threatened and endangered species, it has been determined that the continuing use of the diversion will not adversely affect the Newcomb's snail.

DROUGHT CONDITIONS. The EKWUC raised the concern that during drought periods, KIUC's use of the water would deplete the water available to the EKWUC. It should be noted that KIUC's use is non-consumptive and would not affect the water going downstream to the EKWUC's portion of the ditch. However, in compliance with a condition in its revocable permit, KIUC did submit a drought plan for review by the Department of Land and Natural Resources on April 21, 2004. See Exhibit D, a copy of the proposed KIUC Drought Plan. Staff believes that this plan should address the concerns of the EKWUC during drought conditions.

CONTINUED USE OF LIHUE LAND COMPANY (LLC) PORTION OF HANAMAULU DITCH. After the water exits KIUC's two hydroelectric power plants, it travels through a portion of the Hanamaulu ditch system that is owned by the LLC to the State lands. The December 2002 board submittal authorized the Chairperson to enter into a water transmission agreement with LLC. The December submittal provided that any water transmission fees charged by LLC should be borne by the EKWUC. In the most recent discussions with LLC, Staff feels that an agreement can be worked out with LLC. Staff notes that the EKWUC was in agreement to bear the costs of the delivery of the water through the LLC portion of Hanamaulu ditch back to State lands in an August 2004 letter. See Exhibit E, August Letter from the EKWUC. Staff believes that some agreement with LLC will be done in the near future but does not believe that the processing of this long-term lease request should be delayed until an agreement can be worked out with LLC and the EKWUC. Staff confirms that KIUC's use of water is non-consumptive and should not affect the amount of water currently available to the EKWUC.

LEGAL REQUIREMENTS. For the issuance of a lease of water rights for non-consumptive use under section 171-58, HRS, the process involves board approval, prior approval by the Governor and Legislature by concurrent resolution, public auction and certain qualifications for applicants to bid at public auction. Under section 171-58(c), bidders must demonstrate that: (1) they met the requirements of chapters 343 and 183C, HRS, including any exemptions from those chapters, (2) water is used in non-polluting ways, and (3) the water use is non-consumptive, i.e. not affecting the volume or quality of the water or biota in the stream.

Section 171-58, HRS, also requires: (1) the Department to notify the Department of Hawaiian Home Lands of its intent to execute a new lease and to develop a reservation of water rights sufficient to support current and future homestead needs, (2) a covenant to provide surplus water at the same price as the lease plus proportionate share of actual costs for irrigated pasture, crop farming, pen feeding operations, or raising of grain and forage crops as determined by the Board, and (3) develop a watershed protection plan in conjunction with the Department on a watershed management plan for the lease area.

To avoid speculation and potential water banking of the state's water rights, the public auction will be limited to qualified bidders. Bidders must demonstrate that they have a legal right to access and use the Upper and Lower Lihue Hydropower plants, TMK Nos. 3-8-01:1 (4th Division) for hydropower purposes.

COMMENTS FROM DEPARTMENT OF HAWAIIAN HOME LANDS ("DHHL"): Comments from the DHHL are attached as Exhibit F and are summarized in relevant part below:

DHHL believes that this request is premature and recommends an extension of the revocable permit in the alternative, for the following reasons:

- A covenant to establish a watershed management plan or a watershed management plan has not been approved by the Board.

Comments: Contrary to DHHL's interpretation of Section 171-58(e), HRS, a covenant to establish a watershed management plan need only be included in the water lease. Section 171-58(e), HRS, states in pertinent part, "[a]ny new lease of water rights shall contain a covenant that requires the lessee and the department of land and natural resources to jointly develop and implement a watershed management plan. The board shall not approve any new lease of water rights without the foregoing covenant or a watershed management plan."

- DHHL needs more time to determine the amount of water to reserve to sufficiently support its current and future homestead needs.

Comments: DHHL's inability to provide precise amounts for its water reserve needs at this time should not delay the approval for this lease because we are recommending the amount of the reservation be left subject to subsequent determination by DHHL based on its newly devised Kauai Island Plan.

- The Department currently lacks a mechanism for establishing DHHL's reserved amount of water. The only mechanism for reserving water is set forth in Section 174C-49(d), HRS, and reserves that function to the Commission on Water Resource Management.

Comments: The authority of the Commission on Water Resource Management to establish water reserves under Section 174C-49(d), HRS, does not address the issue of reserving water rights in agreements. Water rights can be reserved between contracting parties by including a reservation of water reserve rights in the lease agreement. Further, staff believes the intent of the reservation is to ensure water is available for DHHL homesteads and is distinguishable from the Commission on Water Resource Management's authority to allocate water resources.

- Lessee has not met its burden to show that its use of the water will account for, protect, and not interfere with the reservation of water for DHHL, as a public trust use.

Comments: DHHL's assertion that its public trust use of the water resources is not being addressed is premature because the lease document is intended to deal with those issues through the watershed management plan and the reservation of water reserves for DHHL.

- Questions regarding the rights of LLC as a possible riparian landowner of the water system below the hydroelectric plants remain.

Comments: Staff is currently pursuing a water transmission agreement with LLC and EKWUC to address DHHL's concerns regarding LLC's obligation to provide water through the portions of the water system within its boundaries, after leaving the hydroelectric plants. Since the issues arising below the hydroelectric plants are outside of the control of any prospective lessee, staff believes that approval of this request should not be contingent upon the resolution of those issues.

- DHHL's Kauai Island Plan anticipates the development of the second largest DHHL community on the island over the next 20 years that includes 651 residential units, a 12-acre school/park, 50 units of kupuna housing and day-care center, and a regional commercial and social service center. DHHL is also planning to establish a district office and 99-acre agricultural community in the area. DHHL questions whether the water quality will be affected by the use of the water by the hydroelectric plants and indicates that a watershed management plan could address those concerns.

Comments: The nonconsumptive and nonpolluting nature of the water use by the hydroelectric plants should not affect the volume or quality of water available to downstream users. As acknowledged by DHHL, however, any water quality issues that may exist can be addressed in the watershed management plan that is contemplated by the lease.

- The appraised value of the water should be re-evaluated based on a change in use from consumptive agricultural use to industrial use.

Comments: The rent charged under the lease will be based on an appraisal that establishes fair market value by considering all of the appropriate factors concerning the nature and volume of the use of water.

PUBLIC BENEFIT. Staff believes that promoting the continued operation of hydroelectric power plants on Kauai will serve a critical public purpose by supporting clean alternative energy production that will contribute to meeting the State's renewable portfolio standards set forth in Section 269-92, HRS. Additionally, issuing the water lease will ensure the continuous operation of the hydropower plants in an efficient and cost effective manner by

enabling the plant operators to obtain funding for capital improvements that include the maintenance and repair of aging structures and equipment. Supporting the uninterrupted operation of the hydropower plants provides significant and tangible benefits to the general population of Kauai, as an important part of the power grid for that island.

RECOMMENDATION:

That the Board:

A. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

B. Find that, allowing the use of water from the Blue Hole diversion for purposes of continuing the operation of the Upper and Lower Hydropower plants that currently serve the general population of Kauai with electrical power, provides significant and tangible benefits to the public and is in the public interest.

C. Authorize the sale of a water lease by public auction for the use of water located on TMK No. 3-8-01:1 (4th Division) as shown on the attached map labeled Exhibit A, from the Blue Hole diversion, including a portion of the state owned ditch system and such roadways and access over state lands for the operation, maintenance, and repair of the system under the terms and conditions cited above, which are by this reference incorporated herein, and subject further to the following:

1. The standard terms and conditions of the most current applicable water lease form, as may be amended from time to time.

2. Reservation of water rights for Department of Hawaiian Home Lands sufficient to support current and future homesteaders in the lease area.

3. The lessee shall record and report monthly water use from the surface water diversions in accordance with Section 13-168-7 HAR.

4. The State reserves the right to withdraw water from the water lease to meet the following requirements as the State in its sole discretion may determine:

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

5. A covenant that requires the lessee and the Department to jointly develop and implement a watershed management plan for the lease area, as prescribed by the

Board. At a minimum, the watershed management plan shall require the prevention of the degradation of surface and ground water quality to the extent that degradation can be avoided using reasonable management practices.

6. The amount of water diverted into the ditch system at Blue Hole on an annual basis shall not exceed the average annual amount diverted as measured for the period from 1992 to 2003.

7. Prior to any expansion or modification of any diversion works applicable to this project, lessee shall document all proposed modifications to the hydropower plant and diversion works and submit such documentation to the Commission on Water Resource Management to determine whether Commission approvals would be necessary.

8. Governor Approval obtained prior to the issuance of the lease.

9. Review and approval by the Department of the Attorney General.

10. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

D. Declare that it is in the State's best interests to have its water returned to State land for irrigation purposes after its initial diversion for hydroelectric purposes, as previously existed when the prior lessee managed the system. In view of the fact that the return of the water to State lands principally benefits members of the EKWUC, the costs of the delivery of the water through the LLC portion of Hanamaulu ditch back to State lands shall be borne by the EKWUC members. All applicable delivery costs to the EKWUC members, by LLC, shall be for the upkeep of the delivery system, not for the water.

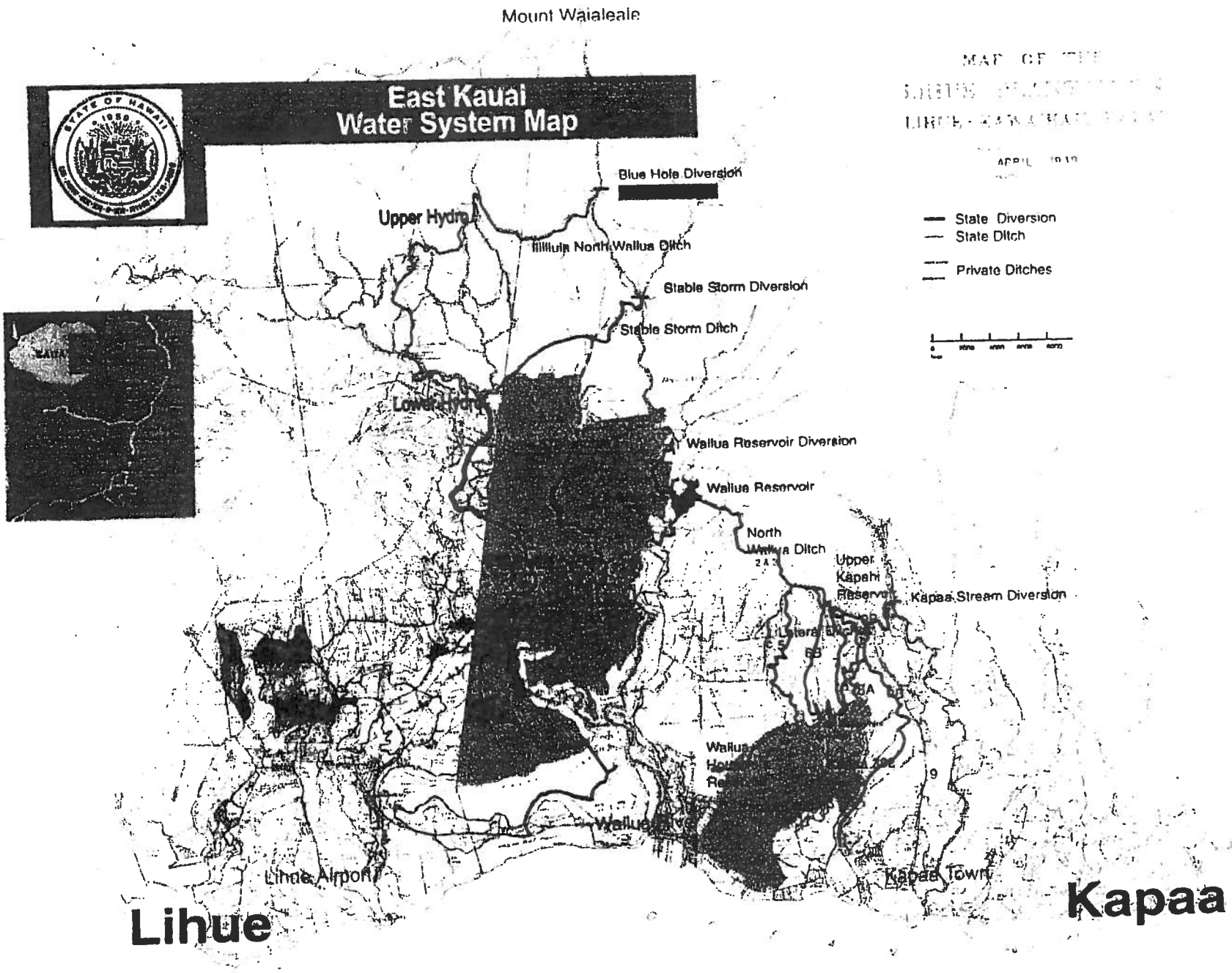
Respectfully Submitted,

Morris M. Atta
Special Projects Coordinator

APPROVED FOR SUBMITTAL:

for Peter T. Young, Chairperson

EXHIBIT A


East Kauai
Water System Map
Mount Waialeale
Blue Hole Diversion
Upper Hydro
Stable Storm Diversion
Stable Storm Ditch
Lower Hydro
Wailua Reservoir Diversion
Wailua Reservoir
North
Upper
Kapahi
Reservoir
Kapaa Stream Diversion
Wailua
Lihue Airport
Kapaa Town
Lihue
Kapaa
State Diversion
State Ditch
Private Ditches

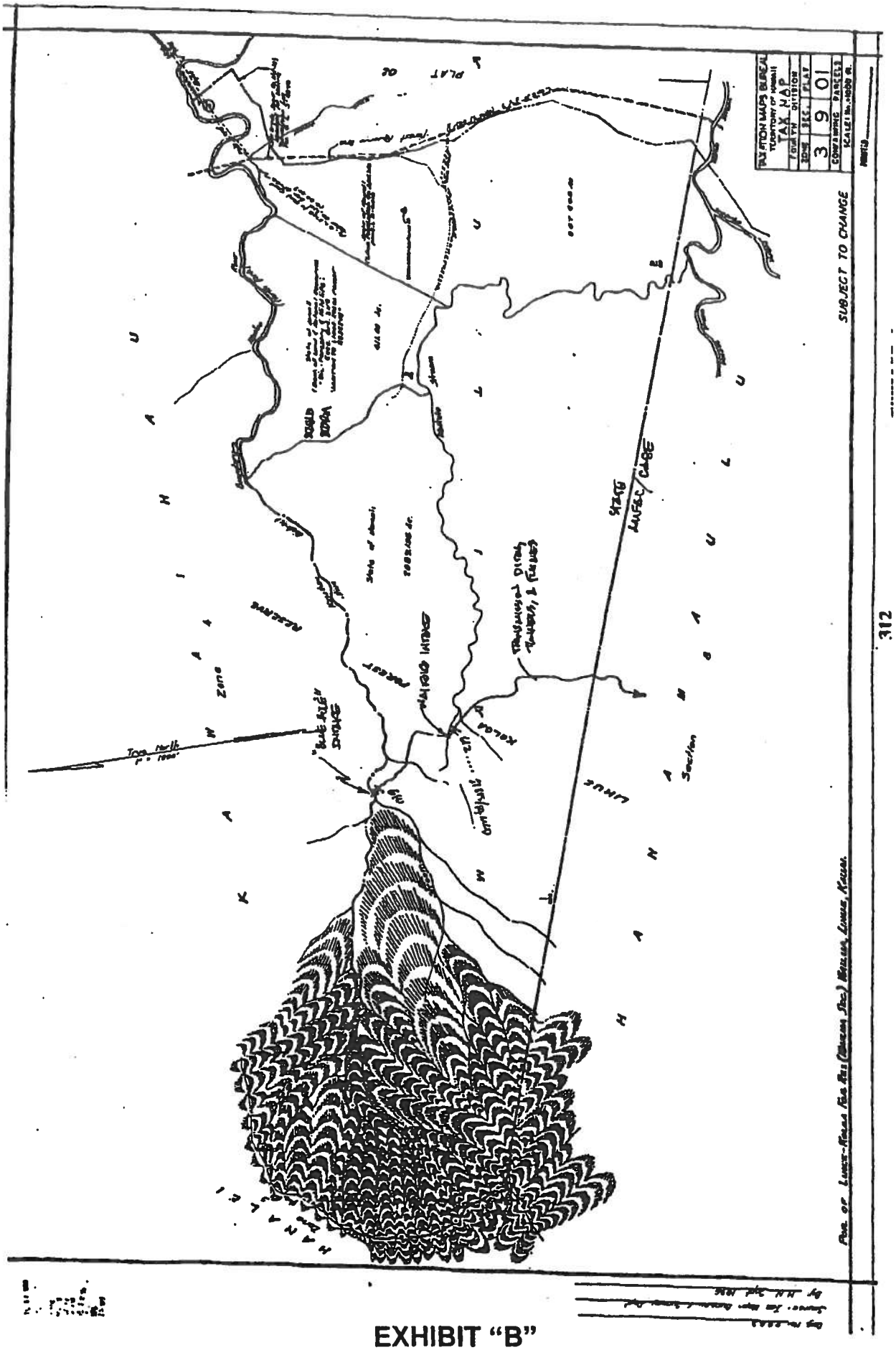

TAX MAP
3 9 01
SUBJECT TO CHANGE
PLAT OF
STATE LINE
LINUE
Section
Zone
KOLOA
PAREST
RESERVE
HANALEI
312

EXHIBIT "B"

HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

RECEIVED
'04 MAY 17 A10 :41
DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

May 11, 2004

Mr. Peter T. Young
Chair
Board of Land & Natural Resources
P.O. Box 621
Honolulu, HI 96809

Dear Mr. Young:

I transmit herewith a copy of House Concurrent Resolution No. 124 HD1, which was adopted by the House of Representatives and the Senate of the Twenty-Second Legislature of the State of Hawaii, Regular Session of 2004.

Sincerely,

Patricia Mau-Shimizu
Chief Clerk
House of Representatives

RECEIVED
LAND DIVISION
2004 MAY 18 A 9:37
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

EXHIBIT C

HOUSE OF REPRESENTATIVES
TWENTY-SECOND LEGISLATURE, 2004
STATE OF HAWAII

H.C.R. NO. 124 H.D. 1

HOUSE CONCURRENT RESOLUTION

AUTHORIZING THE ISSUANCE OF A LEASE OF WATER RIGHTS FOR THE USE OF THE "BLUE HOLE" DIVERSION AND PORTIONS OF A WATER TRANSMISSION SYSTEM LOCATED IN THE WAILUA SECTION OF THE LIHUE-KOLOA FOREST RESERVE FOR HYDROPOWER PRODUCTION PURPOSES.

WHEREAS, General Lease No. S-3827 was a 30-year lease allowing the East Kauai Water Company to divert, store, take, draw off, conduct away, and dispose of government-owned water used by Lihue Plantation Company for agricultural irrigation and hydropower generation; and

WHEREAS, General Lease No. S-3827 covered an extensive water collection, delivery, and distribution system that was divided into three sections: Anahola-Kealia section, central Wailua-Kapaa section, and Hanamaulu-Lihue section; and

WHEREAS, Citizens Communications Company, Kauai Electric Division (KE) was conveyed two hydroelectric power plants that were used to generate power for the Lihue Plantation operation; and

WHEREAS, the hydroelectric power plants rely on water from diversions on the North Fork of the Wailua River and Waikoko Stream known collectively as the "blue hole" diversion (diversion); and

WHEREAS, the two hydroelectric power plants' use of the water is a nonconsumptive use, because the water is used to generate hydroelectric power and then is returned to the system; and

WHEREAS, in 2001, KE requested a 65-year lease of water rights to the diversion from the Department of Land and Natural Resources (DLNR); and

I do hereby certify that the within document is a full, true and correct copy of the original on file in this office.

Chief Clerk
House of Representatives
State of Hawaii

WHEREAS, in 2002, KE was sold to the Kauai Island Utility Cooperative (KIUC), a nonprofit cooperative electric company; and

WHEREAS, KIUC continues to operate the two hydroelectric power plants that supply electricity to the KIUC system; and

WHEREAS, in 2002 and 2003, the Board of Land and Natural Resources approved a revocable permit for KIUC to have continued use of the water at the diversion; and

WHEREAS, KIUC continues to seek a long-term lease of water rights from DLNR for the continued use of water at the diversion; and

WHEREAS, the security of a long-term lease would provide the financial justification for the capital expenditure required to refurbish the hydroelectric power plants and to perform the required maintenance and repairs that would continue and enhance the power production of the facilities; it would also provide sufficient, reliable electricity to meet the needs of the cooperative members of Kauai on a long-term basis; and

WHEREAS, section 171-58(c), Hawaii Revised Statues (HRS), requires prior approval of the Governor and prior authorization of the Legislature by concurrent resolution to issue a lease of water rights for nonconsumptive purposes; now, therefore

BE IT RESOLVED by the House of Representatives of the Twenty-second Legislature of the State of Hawaii, Regular Session of 2004, the Senate concurring, that KIUC adequately satisfy those conditions stipulated by the Board of Land and Natural Resources in its current revocable permit and resolve issues such as emergency water allocation before the issuance of a lease; and

BE IT FURTHER RESOLVED that the Board of Land and Natural Resources is hereby authorized to issue a lease of water rights to KIUC for the use of the "blue hole" diversion and portions of a water transmission system located in the Wailua section of the Lihue-Koloa forest reserve (Tax Map Key No. 3-9-01:1) for hydropower production purposes pursuant to section 171-58, HRS; and

BE IT FURTHER RESOLVED that a certified copy of this Concurrent Resolution be transmitted to the Chairperson of the Board of Land and Natural Resources.

Proposed Allocation of Water During Low Flow Periods Among the Diversions From the North Fork of the Wailua River at Blue Hole, the Stable Storm Ditch, and Wailua Reservoir

Prepared for:

Kauai Island Utility Cooperative
4463 Pahee Street - Suite 1
Lihue, Kauai, Hawaii 96766

Prepared by:

Tom Nance Water Resource Engineering
680 Ala Moana Boulevard - Suite 406
Honolulu, Hawaii 96813

April 20, 2004

EXHIBIT D

Table of Contents

	Page
Introduction	1
Overview of the System of Plantation Diversions	1
Blue Hole Diversion	1
Stable Storm Ditch	1
Diversion to the Wailua Reservoir	1
Basic Premises of the Recommended Low Flow Allocation Plan	8
Recommended Low Flow Allocation Plan	11

List of Figures

No.	Title	Page
1	Schematic of the Ditch Diversions in the Wailua River Basin	2
2	Monthly Average Flows at USGS Gage 610, the Blue Hole Diversion, for 1932 to 1985	3
3	Duration-Discharge Curve for USGS Gage 610, the Blue Hole Diversion, for 1932 to 1985	4
4	Monthly Average Flows at USGS Gage 620, the Stable Storm Ditch, for 1937 to 2000	5
5	Duration-Discharge Curve for USGS Gage 620, the Stable Storm Ditch, for 1937 to 2000	6
6	Water Availability at the Elevation of the 485-Foot Diversion to the Wailua Reservoir (Without Input of the Hanalei Tunnel)	7
7	Monthly Average Flows at USGS Gage 690, the Wailua Ditch, for 1937 to 2000	9
8	Duration-Discharge Curve for USGS Gage 690, the Wailua Ditch, for 1936 to 2000	10

List of Tables

No.	Title	Page
1	Water Availability at Diversion Points on the North Fork of the Wailua River During the Droughts of 1953 and 1984	12

Introduction

Condition 23.b of DLNR's Revocable Permit No. S-7340 requires Kauai Island Utility Cooperative (KIUC) to provide data and recommendations on the allocation of water from the North Fork of the Wailua River among competing uses during periods of low flow. Although not specifically stated, the allocation would presumably between KIUC's use of water for hydropower generation and agricultural irrigation on State lands previously leased to and irrigated by Lihue Plantation (LPCO). Assuming this to be the case, this memo and its attachments contain data and a recommended allocation plan to meet the requirements of Condition 23.b.

Overview of the System of Plantation Diversions

Historically, LPCO diverted water from the North Fork at three locations: into the Iliiliula-North Wailua Ditch at 1105-foot elevation at a location commonly referred to as "Blue Hole"; at 710-foot elevation into the Stable Storm Ditch; and at 480-foot elevation for delivery into the 240 million gallon (MG) Wailua Reservoir. The locations of these diversions are identified on Figure 1 and are characterized in the paragraphs following.

Blue Hole Diversion. At the 1105-foot elevation of the diversion, the stream's contributing watershed is 1.77 square miles. The amount of water diverted into the Iliiliula-North Wailua Ditch at this location was measured at USGS Gage 610 for 53 years from 1932 to 1985. Over this period, the average diverted was 12.1 million gallons per day (MGD). Its within-year variability, expressed in mean monthly flowrates, is depicted on Figure 2. Figure 3 is a duration-discharge curve for the 53 years of record. Water availability at this location has been relatively consistent within each year and from year to year. Water diverted at Blue Hole, together with amounts added from Waikoko and Iliiliula Streams and other minor intakes, was and continues to be used for electric power generation at the Upper and Lower Lihue hydropower plants now owned and operated by KIUC. The diversion from Waikoko Stream, as at Blue Hole, is on State land. All of the other diversions are on Grove Farm land.

Stable Storm Ditch. Historically, water available at the 710-foot elevation of the Stable Storm Ditch intake consisted of: streamflow at 1105-foot elevation which was not captured at the Blue Hole diversion; streamflow from the 3.21-square mile contributing watershed below the Blue Hole diversion; and water imported into this basin via the Hanalei Tunnel. The input from the Hanalei Tunnel was measured at USGS Gage 1000 from 1932 to 1985 and averaged 17.4 MGD over this period. Sometime after the gage was discontinued, importation to the basin via the tunnel also ended.

The 6000-foot long Stable Storm Ditch was used by LPCO to move water from the North Fork to the South Fork to supplement the irrigation supply for lands on the south side of the South Fork. The amount diverted, which was measured at USGS Gage 620, averaged 5.9 MGD from 1936 through year 2000. However, since its use was as a supplemental source of irrigation supply, the amount diverted was highly variable. It ranged from a high of 45 MGD to extended periods when no flow was diverted (Figures 4 and 5). The year of its greatest use, 1953, was among the driest years of record.

Diversion to the Wailua Reservoir. Diversion from the North Fork at 485-foot elevation into the Wailua Reservoir was done to supply sugarcane fields to the north of the Wailua River basin. The amount of water available at the point of diversion consisted of: water in the North Fork which was not diverted at the Stable Storm Ditch (this is essentially the amount measured at former USGS Gage 630 at 650-foot elevation); water from the 6.3-square mile East Branch of the North Fork watershed as measured by USGS Gage 680 at 500-foot elevation; and water originating on the 1.67-square mile watershed between USGS Gages 630 and 680 and the point of diversion at 485 feet. Historically, these sources averaged in excess of 78 MGD. Removing the input of the Hanalei Tunnel, the within-basin average streamflow at the point of diversion exceeded 60 MGD over the period of record. Its within-year variability is illustrated as monthly averages on Figure 6.

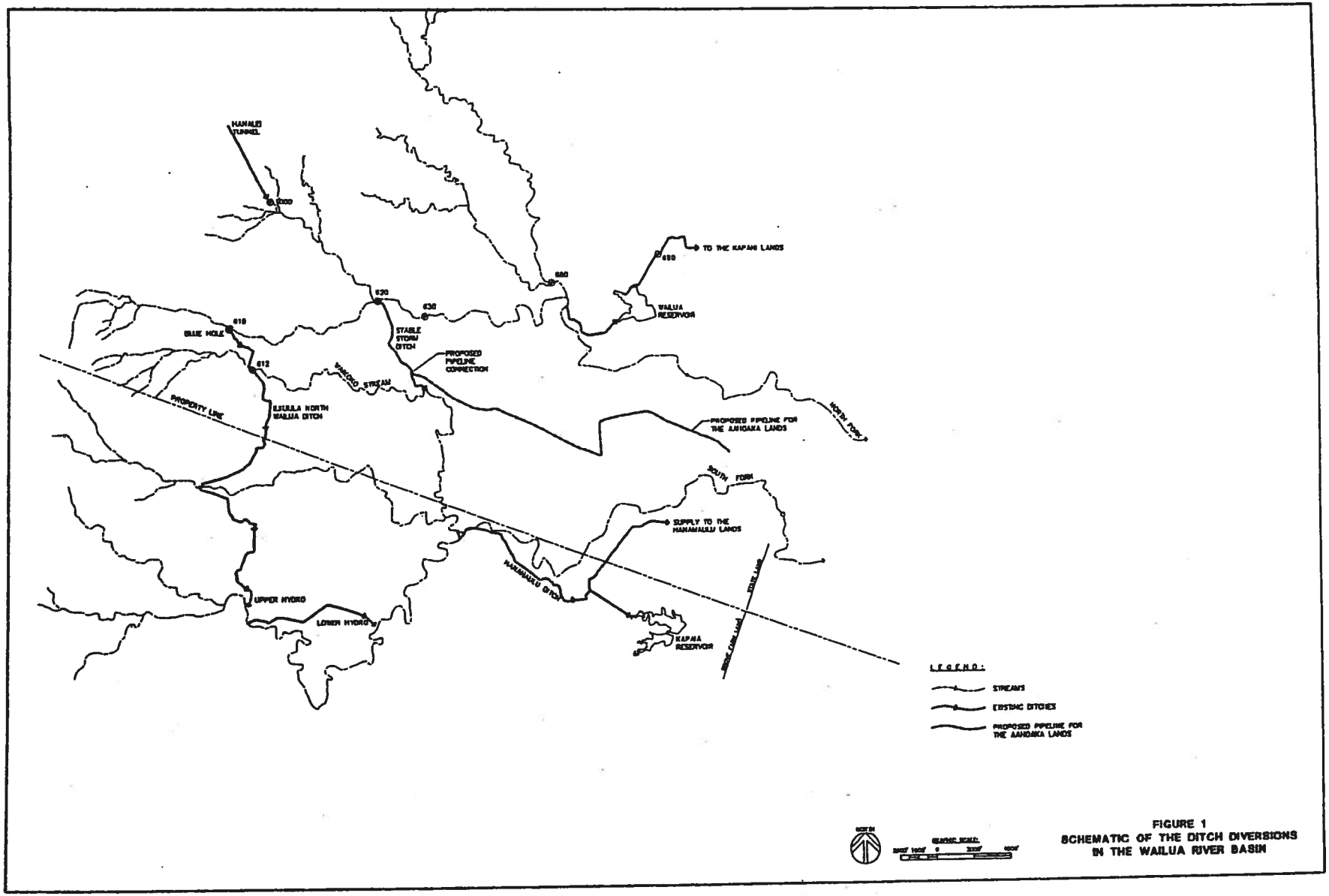


FIGURE 1
SCHEMATIC OF THE DITCH DIVERSIONS
IN THE WAILUA RIVER BASIN

FIGURE 2. MONTHLY AVERAGE FLOWS AT USGS GAGE 610,
THE BLUE HOLE DIVERSION, FOR 1932 TO 1985

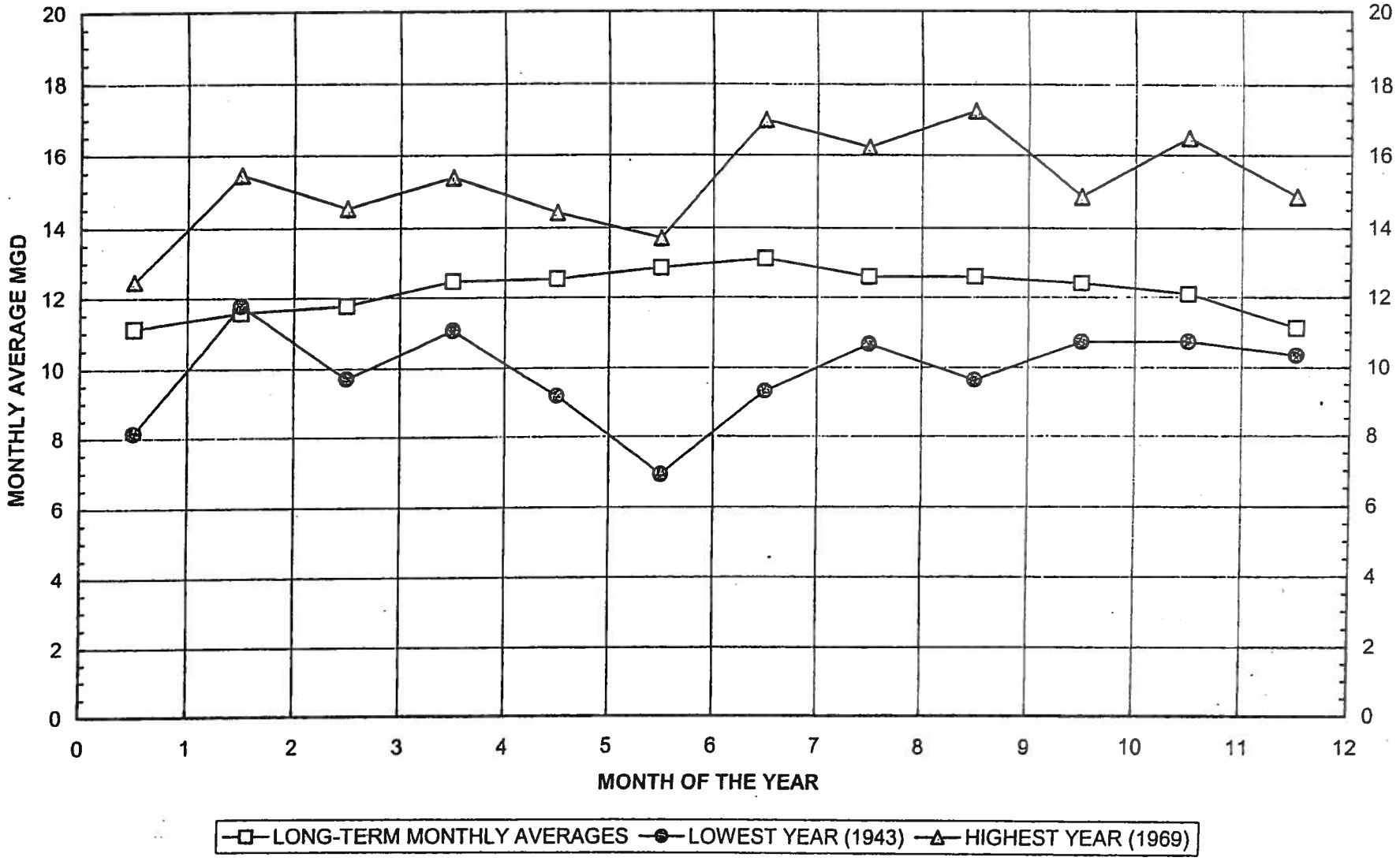


FIGURE 3. DURATION-DISCHARGE CURVE FOR USGS GAGE 610, THE BLUE HOLE DIVERSION, FOR 1932 TO 1985

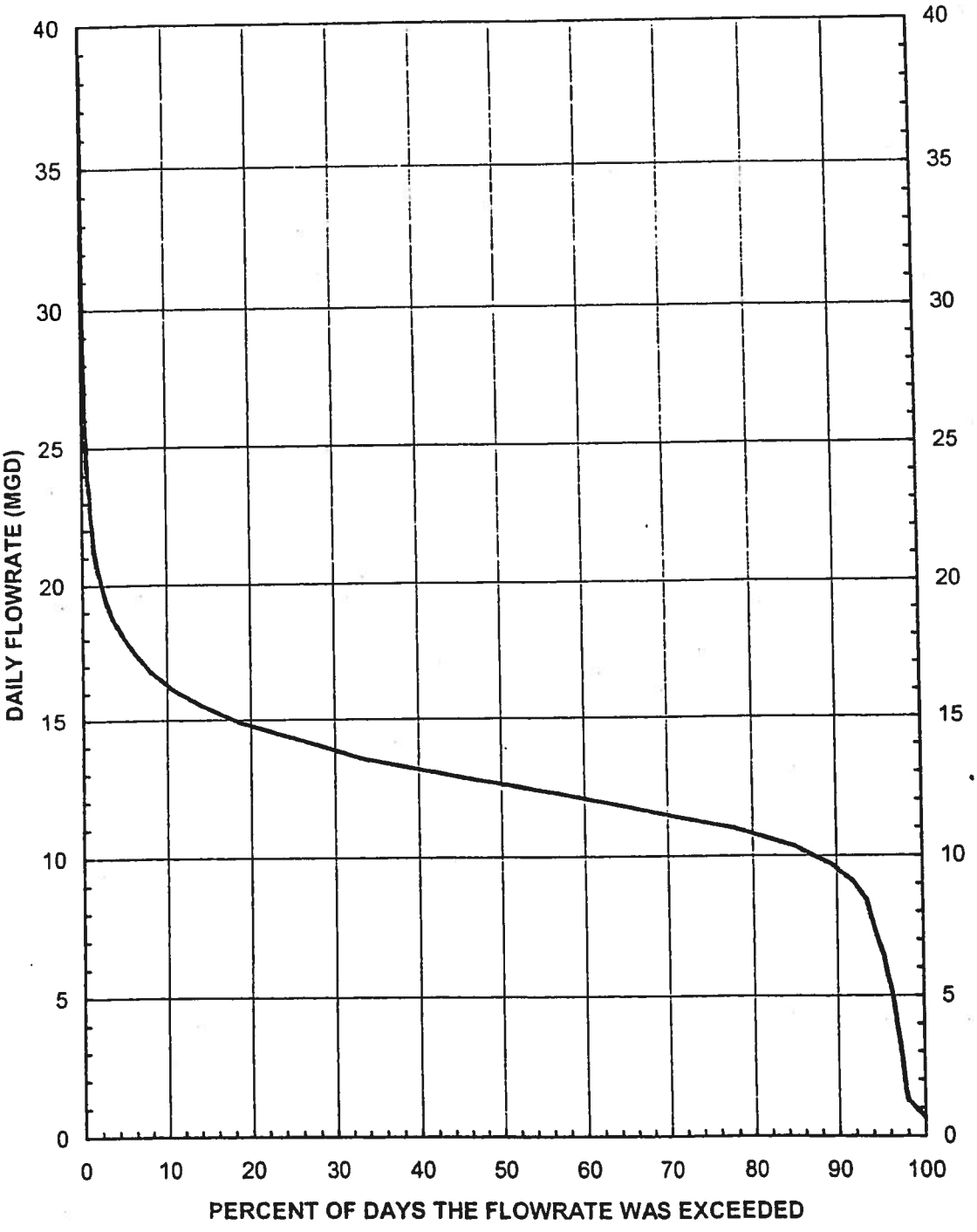


FIGURE 4. MONTHLY AVERAGE FLOWS AT USGS GAGE 620,
THE STABLE STORM DITCH, FOR 1937 TO 2000

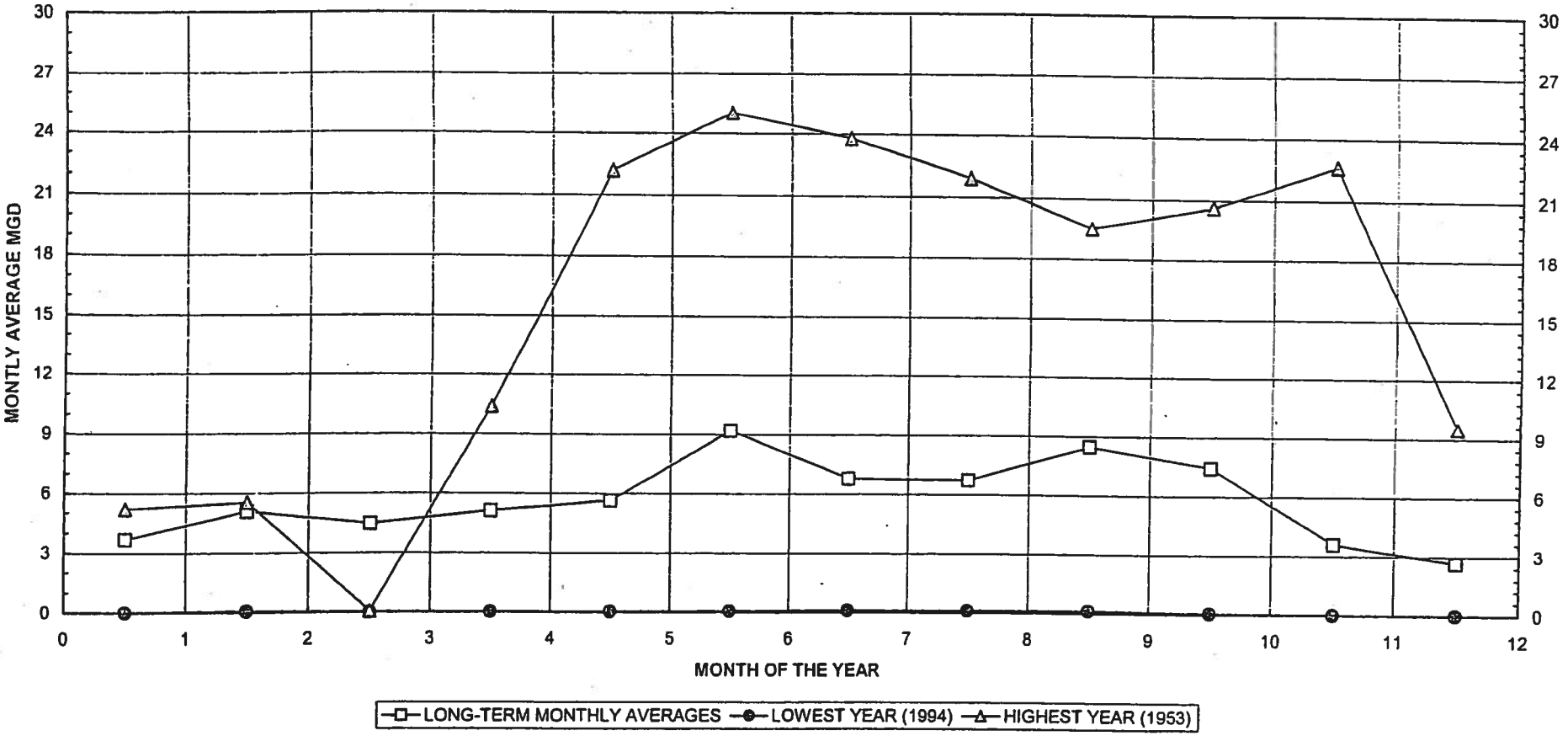


FIGURE 5. DURATION-DISCHARGE CURVE FOR USGS GAGE 620, THE STABLE STORM DITCH, FOR 1937 TO 2000

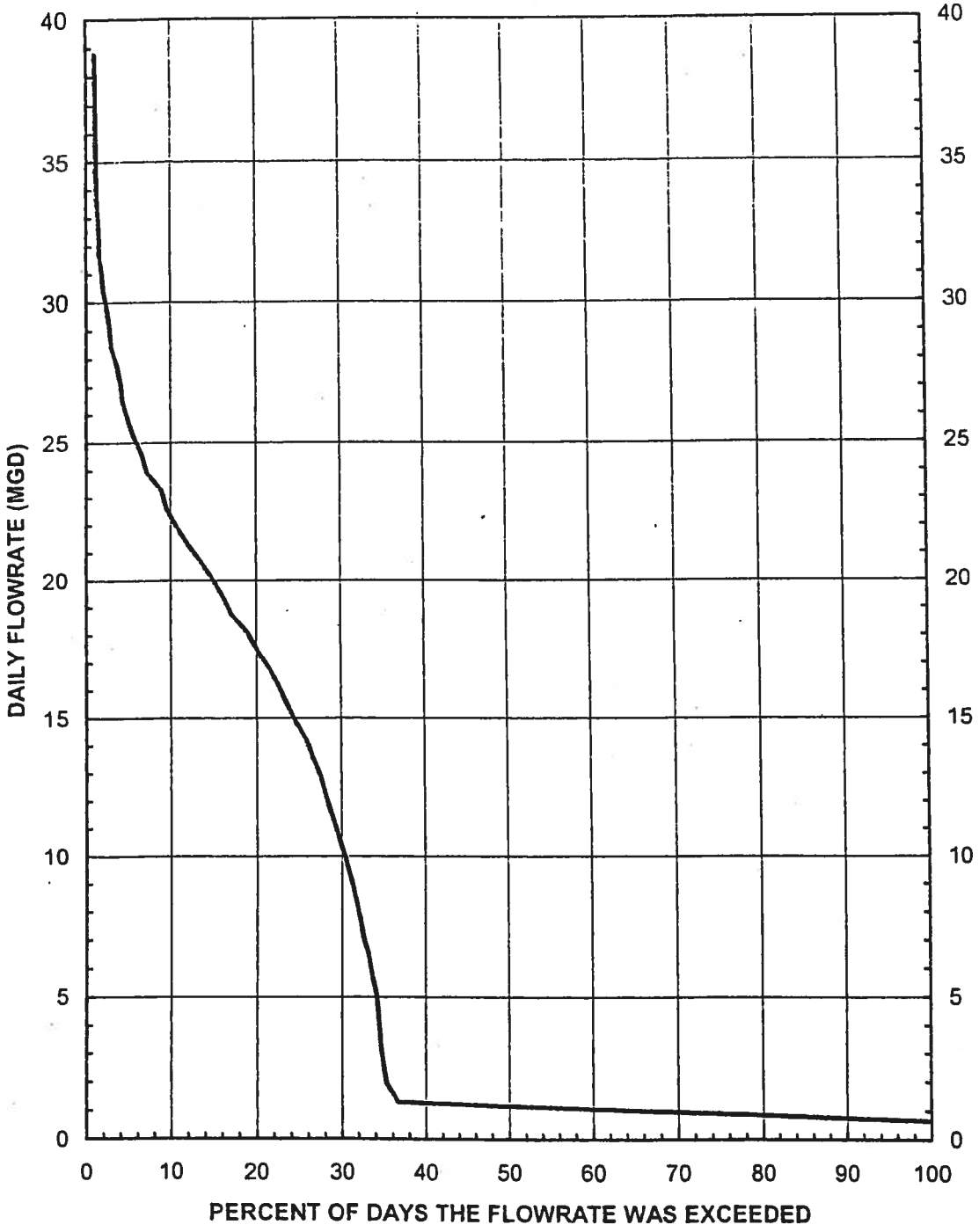
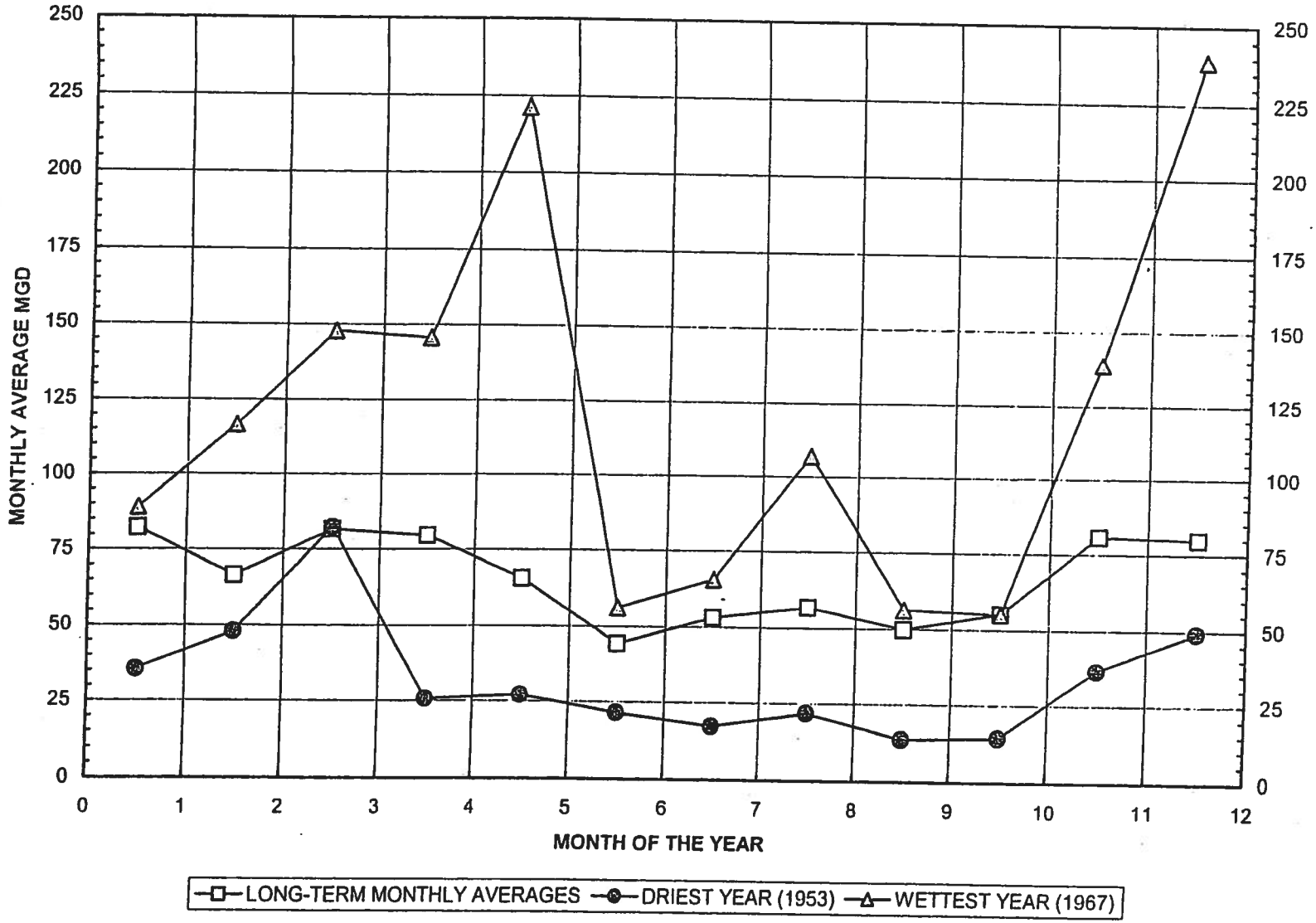


FIGURE 6. WATER AVAILABILITY AT THE ELEVATION OF THE 485-FOOT DIVERSION TO THE WAILUA RESERVOIR (WITHOUT INPUT OF THE HANALEI TUNNEL)



Although the amount diverted into the 240 MG Wailua Reservoir was not measured, outflow from the reservoir has been recorded at USGS Gage No. 690 since 1936. Since that time, the reservoir's outflow has averaged 10.3 MGD, a small fraction of the available supply at the point of diversion. Within-year variability and the duration-discharge curve of the gaging record are illustrated on Figures 7 and 8.

Basic Premises of the Recommended Low Flow Allocation Plan

1. Past records of stream and ditch flowrates as measured at the USGS gaging stations are assumed to be representative of available flows at various points of diversion.

2. The allocation plan addresses water sharing between KIUC's use for hydropower and agricultural irrigation on State lands during periods when the available supply is insufficient for both uses. As the data reviewed above suggests, such occurrences will be relatively infrequent.

3. Water diverted from the North Fork for agricultural irrigation may be used on the following three areas:

   - Kapahi Lands. Lands to the north of the Wailua River basin which were historically supplied from the Wailua Reservoir via the Wailua Ditch are referred to herein as the Kapahi lands.

   - Hanamaulu Lands. State lands on the south side of the South Fork are referred to herein as the Hanamaulu lands. Historically, LPCO irrigated approximately 950 acres of these lands via the Hanamaulu Ditch. This ditch has the capability of returning water that was diverted from State lands at Blue Hole and Waikoko for hydropower back to the State lands in Hanamaulu. This route is shown schematically on Figure 1.

   - Aahoaka Lands. There are about 2200 acres of cultivable State land between the North and South Forks. The lower 1300 acres were farmed by LPCO without irrigation and the upper 900 acres have never been used for agriculture. These lands are referred to herein as the Aahoaka lands. The July 2001 "Study of East Kauai Water Systems on State of Hawaii Lands" prepared by ITC Water Management for DLNR's Land Division proposes a pipeline connection off the Stable Storm Ditch to supply these lands. It recommends the system be sized for a peak irrigation use of 6.5 MGD (4000 GPD/acre for the lower 1300 acres and 1000 GPD/acre for the upper 900 acres). The ITC-proposed pipeline from the Stable Storm Ditch to serve the Aahoaka lands is shown schematically on Figure 1.

4. It is assumed that irrigation supply for the State's Hanamaulu lands will continue to be supplied by the Hanamaulu Ditch by an agreement with Grove Farm. At a minimum, the available supply should be equivalent to the amount of water diverted by KIUC from State lands via the North Wailua Ditch and measured by KIUC at the site of former USGS Gage 612. Additional water deliveries may be available from Grove Farm.

5. The flow available for diversion into the Stable Storm Ditch for the Aahoaka lands can be reasonably approximated as the sum of flows measured at USGS Gages 620 and 630 less the Hanalei Tunnel import as measured at USGS Gage 1000.

6. The flow available at the diversion ditch to the Wailua Reservoir to irrigate the Kapahi lands is equal to or greater than the flow from the East Branch of the North Fork (USGS Gage 680) plus the amount not diverted into the Stable Storm Ditch as quantified in item 5 above.

FIGURE 7. MONTHLY AVERAGE FLOWS AT USGS GAGE 690,
THE WAILUA DITCH, FOR 1937 TO 2000

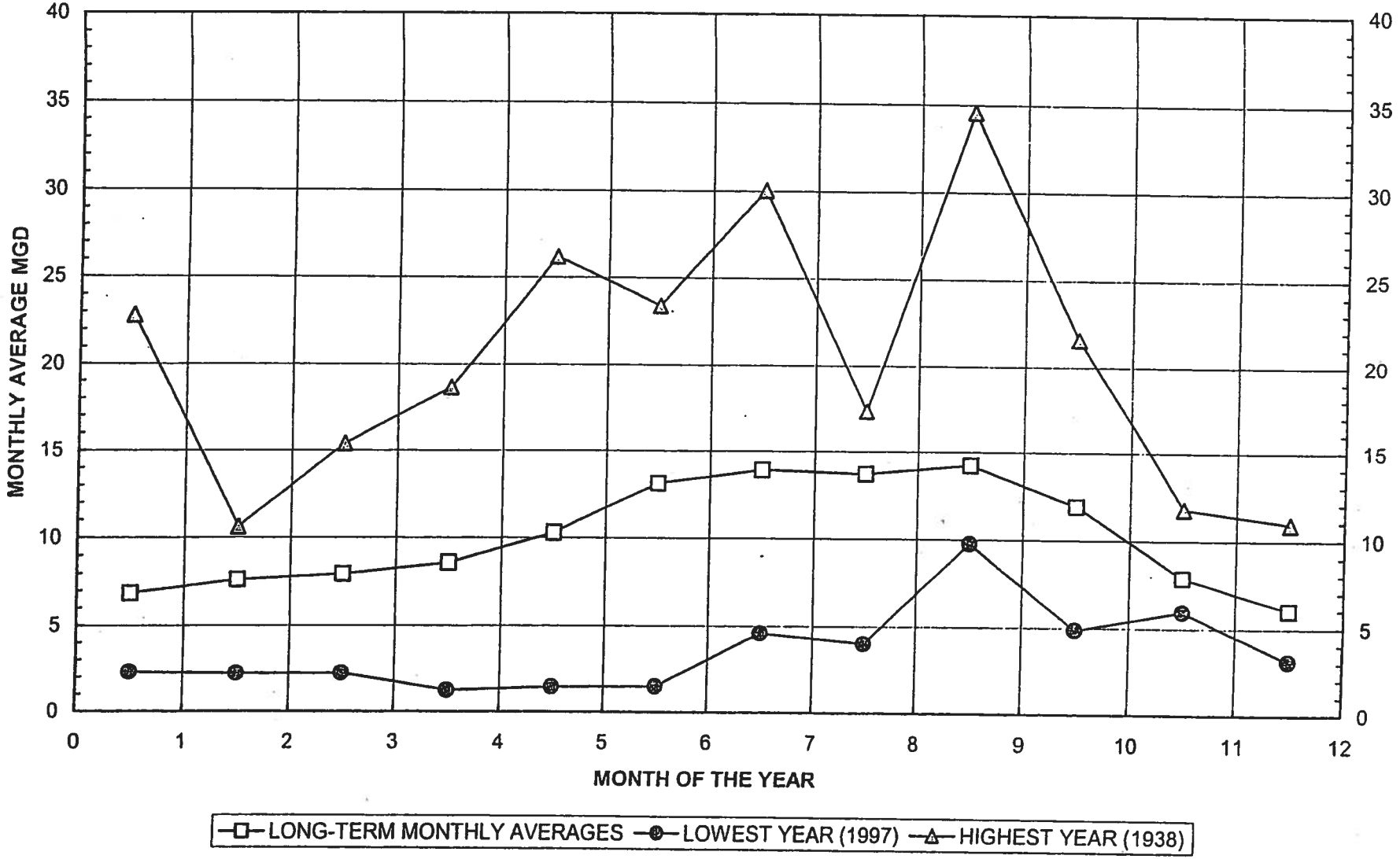
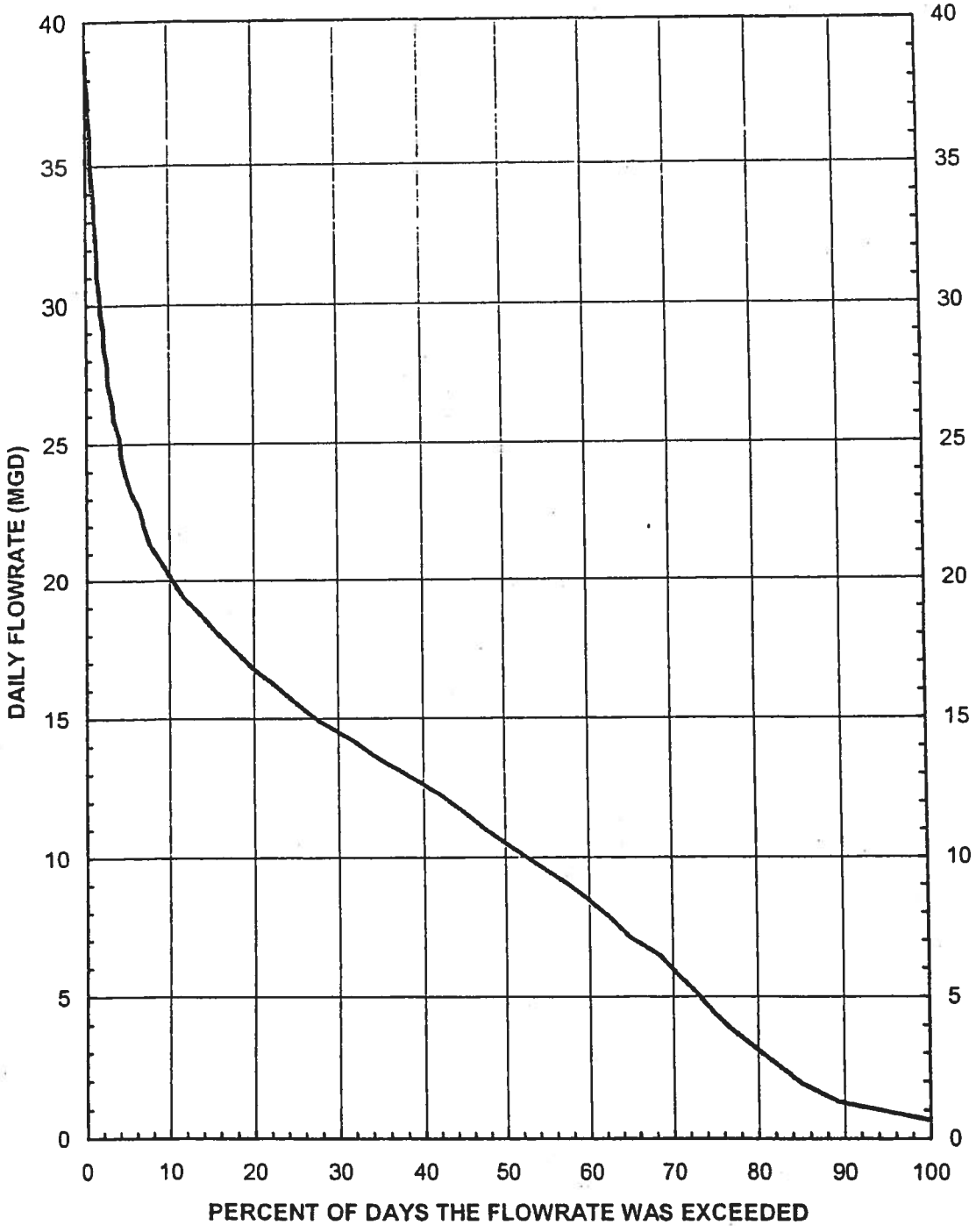


FIGURE 8. DURATION-DISCHARGE CURVE FOR USGS GAGE 690, THE WAILUA DITCH, FOR 1936 TO 2000



7. As a basis for developing the low flow allocation plan, monthly average flows provide a sufficient indication of water availability at the points of diversion. Using monthly averages avoids much more cumbersome computations using daily flow data.

8. The two driest periods of record were April through October of 1953 and December 1983 through October 1984. Water availability at the three points of diversion on the North Fork during these two drought periods are compiled on Table 1. These compilations indicate that if the full 6.5 MGD of irrigation use estimated by ITC for the Aahoaka lands existing during these low flow periods, there would have been several months during each drought when the full irrigation supply would have required a small reduction of the diversion for hydropower.

Recommended Low Flow Allocation Plan

Based on the foregoing analyses, the logistical impracticality of splitting the flow at the Blue Hole diversion between competing uses, and the infrequency of an actual shortage of irrigation supply occurring, the following drought-period allocation plan is recommended:

1. At a minimum, the supply to irrigate the State's Hanamaulu lands on the south side of the South Fork should be the amount diverted from State lands for hydropower generation as measured by KIUC at the former USGS Gaging Station No. 612 site and returned to these State lands by Grove Farm via the Hamakua Ditch.

2. If the supply required for actual agricultural use on any of the 2200 acres of the State's Aahoaka lands between the North and South Forks exceeds the available supply at the Stable Storm Ditch diversion, KIUC will, at the direction of the State, stop all diversion at Blue Hole until the supply deficiency no longer exists. For the purposes of this provision and based on the July 2001 ITC study, a deficiency shall mean that the available supply at USGS Gage 620 on the ditch is less than 4000 GPD times the number of acres being cultivated on the lower 1300 acres of the Aahoaka lands plus 1000 GPD times the number of acres being cultivated within the upper 900 acres of the Aahoaka lands. For this period of a deficient supply, water available for hydropower generation shall be the amount diverted from Waikoko Stream on State land and the system's other intakes on Grove Farm land.

3. Similarly, if the required supply for actual agricultural use on the Kapahi lands to the north of the Wailua Basin exceeds the available supply then KIUC will, at the direction of the State, stop all diversion from Blue Hole until the supply deficiency no longer exists. For the purposes of this provision, an irrigation supply deficit means that the combined supply from the 485-foot stream diversion and drafts from the Wailua Reservoir, as measured at USGS Gage 690 on the outflow ditch, exceeds 4000 GPD times the number of acres being cultivated within the area previously supplied by LPCO from this ditch system. Prior to the implementation of this drought allocation plan, the exact extent of the Kapahi lands shall be specified using LPCO field maps.

4. Maintenance of the Blue Hole intake will be the responsibility of KIUC. It shall be the State's obligation to maintain all other intakes and ditch systems so that the irrigation deficiency is due to an actual deficit of supply and not due to inefficient capture at the stream intakes or excessive losses in the ditch system due to inadequate maintenance.

East Kauai
Water Users' Cooperative
4334 Rice Street, Suite 202
Lihue, Kauai Hawaii 96766
Phone: 808-246-6962
Fax: 808-245-3277

RECEIVED
2004 AUG 10 P 3:38

August 9, 2004

TO: Mr. Morris Atta
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: **Ditch Easement Through LLC Land**

Aloha, Morris:

I'm enclosing a map of our system indicating the three separate portions of water conduit involved in transporting water from the Blue Hole diversion to Hanamaulu Ditch. Ideally, all three components would be part of an easement agreement with LLC.

The first component, to the left of the black line on the map indicating the boundary of LLC land and State Kalepa lands is the North Wailua Iliiliula Ditch on LLC Land (in black). This ditch feeds the two powerhouses.

The second component is the South Fork of the Wailua River (in blue), which transports the water down to the Hanamaulu Ditch diversion.

The third component is the Hanamaulu Ditch itself (in green) until it enters the State lands.

I don't know if an easement can be created for the South Fork itself. There is established precedence that the ditch systems can include streams into which water is dumped and then rediverted later. In the State systems, such as the Coop's, the State does not have title to these sections of streams, but only on the ditches feeding and drawing from them.

We're hoping this easement can be done in a manner which establishes a single pathway for the water from Blue Hole to Hanamaulu Ditch. As you know, at this point, the AG's opinion is that once the water is dumped in the South Fork after the power houses, its ownership is unclear. There may be nothing to prevent LLC (or some future land owner) from claiming this water in the future and not supplying Hanamaulu Ditch.

It may even be necessary to adjust how the State looks at the Blue Hole diversion. At this point, KIUC is no longer responsible for the water once it

enters the South Fork. We have always held that the responsibility should end only when the water gets back to the State land. This is because we can't have an RP on the water when it leaves the powerhouse, or perhaps we can. The idea is to avoid giving the water to LLC. A suitable arrangement wouldn't necessarily involve any cost to KIUC, as we would pay for the maintenance of LLC's portion of Hanamaulu Ditch (which we do now).

The Blue Hole diversion has historically diverted water for agricultural purposes, and the powerhouses were incidental. Now, the water is being diverted for power and agriculture is incidental. When the diversion comes up for a long-term lease, as KIUC is pushing for, we think this issue will surface. It can be avoided if the KIUC lease includes the return of the water to agricultural use at the end.

I hope that helps in your general understanding of the issues.

Sincerely yours,

East Kauai Water Users' Cooperative

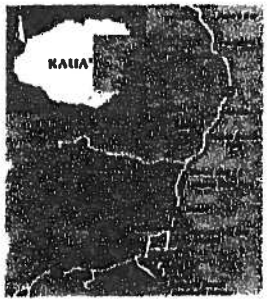
Rev. Swami Arumugam Katir

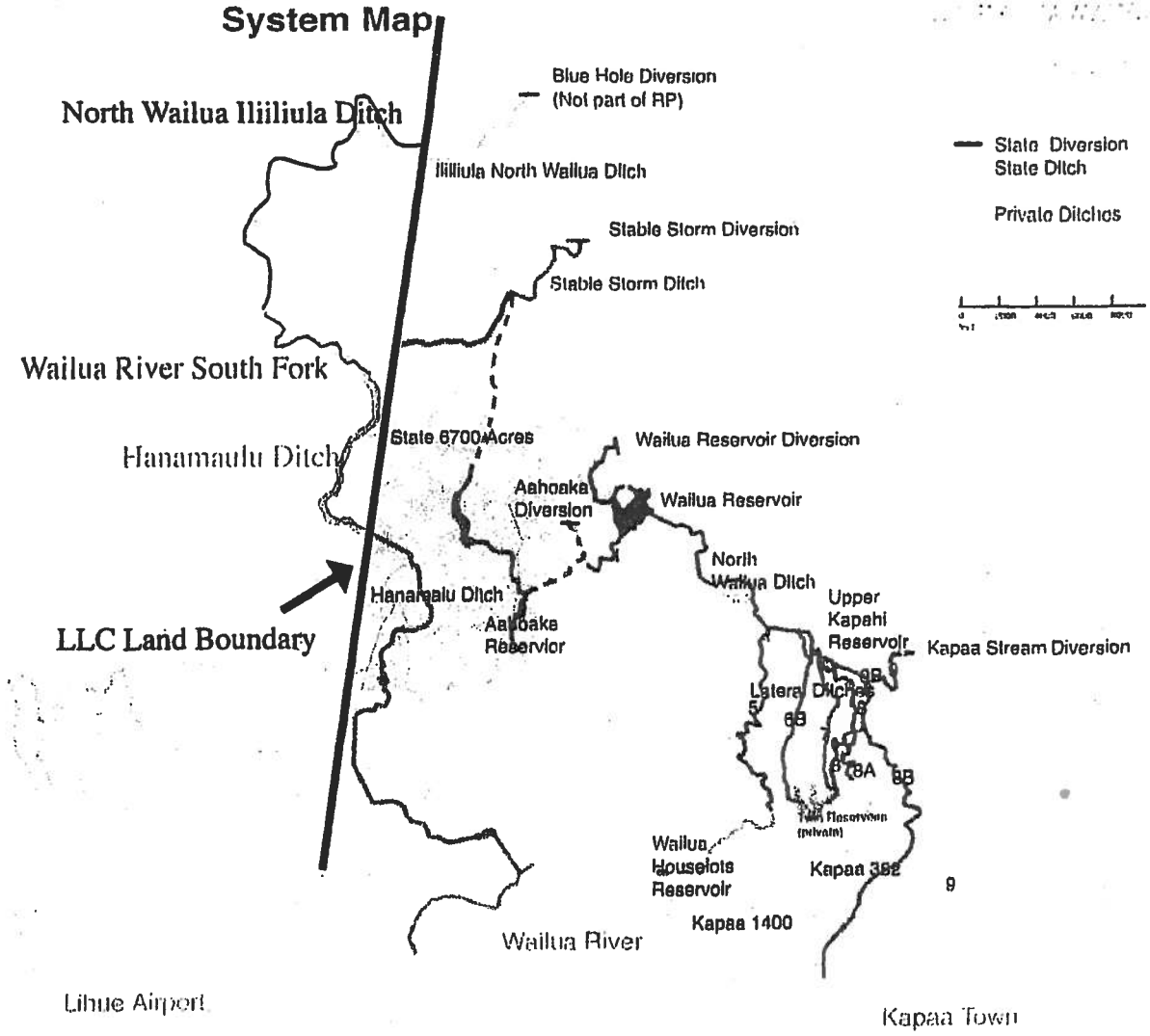
Rev. Swami Arumugam Katir

Mount Waialeale

EAST KAUAI WATER USERS' COOPERATIVE

East Kauai Water Users' Cooperative: System Map





Lihue

Kapaa

Post-it® Fax Note 7671	Date 12-1	# of pages ▶ 5
To Morris A.	From Rebecca A.	
Co./Dept.	Co.	
Phone #	Phone # 7-3952	
Fax # 587-0455	Fax #	

LINDA LINGLE
GOVERNOR
STATE OF HAWAII

STATE OF ...

DEPARTMENT OF HAWAIIAN HOME LANDS
P.O. BOX 1879
HONOLULU, HAWAII 96805

November 23, 2004

To: Peter T. Young, Chairperson
Board of Land and Natural Resources

From: Micah A. Kane, Chairman
Hawaiian Homes Commission

Subject: Notice of Intent to Execute a New Water Lease
Applicant: Kauai Island Utility Cooperative
Location: Wailua, Lihue, Kauai, Hawaii
Tax Map Key: (4) 3-9-1:01 & (4) 3-8-1:01

This is in response to your letter dated November 12, 2004 requesting testimony on a new 65-year water lease to Kauai Island Utility Cooperative (KIUC), a non-profit corporation, pursuant to Hawaii Revised Statutes (HRS) §171-13, -55, and 58. The application is for surface water diverted at the Iliiliula north Wailua Ditch including the "Blue Hole" diversion for a non-consumptive use at its two hydropower plants. KIUC is currently permitted to use water under a one-year Revocable Permit No. S-7340 first issued in December 2002. The water lease sought by KIUC would allow KIUC to continue to use the water for hydropower generation at its two hydroelectric plants for up to 65 years.

The Department of Hawaiian Home Lands (DHHL) believes that this request is premature and respectfully requests that the Board of Land and Natural Resources (Board) grant an extension of one year to Permit No. S-7340, rather than a 65-year lease, for the following reasons.

1. A watershed management plan has not been approved by the Board. Therefore, the Board must direct the department's staff to bring the matter back for further consideration after undertaking the higher level of scrutiny required by HRS §171-58 and other legal requirements.

EXHIBIT F

2. DHHL requests more time to determine the amount of water to reserve as we were given only a one week notice that this issue was before the Board.

3. Ch. 171-58, HRS is silent on how the Department of Land and Natural Resources (DLNR) will establish DHHL's reserved amount of water.

Section 171-58(e), HRS, requires that "any new lease of water rights shall contain a covenant that requires the lessee and the Department of Land and Natural Resources to jointly develop and implement a watershed management plan. The board shall not approve any new lease of water rights without the foregoing covenant or a watershed management plan." A covenant or watershed management plan has not been approved by the Board relevant to this submittal.

Section 171-58(g), HRS, requires that "the Department of Land and Natural Resources notify DHHL of its intent to issue a water lease and collaborate to develop a reservation of water rights sufficient to support current and future homestead needs. Any lease of water rights or renewal shall be subject to the rights of DHHL as provided by section 221 of the Hawaiian Homes Commission Act. DHHL was only recently informed that DLNR is considering a water lease, therefore, we have not adequately prepared our estimated water needs.

It is not clear how or where Ch. 171-58, HRS will reserve water. For example, The Water Code, Ch. 174C-49(d), HRS, states that the Water Commission "may reserve water by rule". DHHL has approved water reservations in three aquifers, none are on Kauai.

In the appeal from the Commission on Water Resource Management, the Hawaii Supreme Court stated in Waiola (2004), that DHHL's reservation is a protected public trust use. This court held, "that, while the state water resources trust acknowledges that private use for 'economic development' may produce important public benefits and that such benefits must figure into any balancing of competing interests in water," private commercial use is not a public trust purpose. (emphasis in original). The court further stated that "the planning and

allocation of water resources for purposes of economic development must account for the public trust and protect public trust uses to the extent feasible." Finally, Waiola stated that the Applicant for a water use has the burden of establishing that the proposed use will not interfere with DHHL's reservation. Since there is no water reserved in DHHL's favor and no means to reserve it, the Applicant has not met their legal burden to protect our reservation.

The area covered under this lease agreement is from the Blue Hole diversion to the hydropower plant. How DLNR will provide a reserved amount to our property located downstream is unknown. The DLNR submittal states that when AMFAC concluded the sale of its property, including land served by the Blue Hole diversion, to the Lihue Land Company (LLC), it failed to include in the conveyance, any reservation in favor of the State, ditch easements or right of way to guarantee that irrigation water will continue to flow through LLC property to State land at Kalepa, including DHHL land. DHHL is unaware that a conveyance document takes precedence over the public trust doctrine enunciated by the Waiahole and Waiola courts. Lihue Land Co., states that it may be riparian to the former ditch and that it may not be obligated to provide water to other, presumably riparian ditch/stream users located downstream. Further, LLC states that it will charge a fee to downstream landowners for maintenance of its private property as the water passes through. DHHL will not pay an upstream private landowner maintenance fees to utilize our reserved water rights.

In May 2004, DHHL finalized its Kauai Island Plan. This Plan provides recommendations for the future use of DHHL's 20,565 acres on Kauai. DHHL owns 526 acres in Wailua located downstream of KIUC's hydropower plant and diversion. There are 52 acres makai of Kuhio Highway and 474 acres on the mauka side of the highway. The property was previously in sugarcane production.

Wailua is a priority development area and will be the second largest DHHL community on the island. On the mauka side of the highway, the island plan proposes to construct 651 residential units, a 12-acre school/park, 50 units of kupuna housing and day-care center, with full-build expected over the

next 20 years. The makai area is planned to be a regional commercial and social service center. The commercial and community uses will accommodate residents and visitors to Kauai's east and north sides, generate income for DHHL, as well as provide jobs for our beneficiaries. The DHHL District Office is already planned for this area.

Some of DHHL's best agricultural land is located in Wailua. A 99-acre agricultural community is planned to take advantage of the existing ditch and fertile soil. The ditch is from the sugar plantation era and provides irrigation water through a tunnel in Kalepa Ridge, located downstream from the hydropower plant. Community groups have expressed interest in ditch use for taro loi. Most of the agricultural lands are located away from Kuhio Highway reflecting the community's desires to create opportunities for organic farming. Nearby, 52 acres are already in pasture use.

Bordering the ditch along the western side is designated a Special District in order to preserve and protect the water flowing through the property. A Special District is defined by DHHL as "environmentally or culturally sensitive. Lands in this category should be protected but also made available for certain community and commercial uses."

To provide water to our new residential subdivisions, agricultural, and commercial needs will require new wells and continued use of the ditch. It would be helpful to understand the water quality in the hydropower plants' outfall to determine its affect on our proposed uses and reservation. There is nothing in the record to show volume, temperature, silt, or chemical changes to the water as it flows through the plant. A watershed management plan could address these issues.

Lastly, Article XII, Section 1 of the Hawaii State Constitution states that thirty percent of the state receipts derived from water licenses shall be transferred to the Native Hawaiian Rehabilitation Fund. Previously, the water was valued according to GL S-3847, a consumptive use of water to irrigate sugar cane. While KIUC's use may be non-consumptive, the diversion of water for industrial use is now the issue. If industrial is considered the "highest and best use" of the land,

then the appraised value of the water should reflect this. Please advise DHHL on the Board's appraisal of the water pursuant to the entitlement issues.

Thank you for the opportunity to testify. We look forward to working with the Board on this matter.

EXHIBIT 2

Written testimony was received from Reverend Swami Arumugam Katir, Beth Tokioka, the Limu Coalition, the Hanalei Watershed Hui, Carol Wilcox and Rex Johnson of the Hawaii Tourism Authority.

The Board amended the Recommendation Section by amending the rent to be $156 per year (or $13 per month) during an interim period until the irrigation system is set-aside to either the Department of Agriculture (DOA) or Agribusiness Development Corporation (ADC). Within the next three months, staff shall bring back to the Board a proposal to set aside the water system to either the DOA or ADC.

Approved as amended by the remaining Board members (Agor/Inouye).

Item D-26: Sale of 65-year Lease at Public Auction of Water Rights for the Use of the "Blue Hole" Diversion and Portions of a Water Transmission System, Lihue-Koloa Forest Reserve (Wailua Section), Wailua, Lihue, Kauai, TMK: (4) 3-9-01:01 & (4) 3-8-01:01 for Hydropower Generation, Non-Polluting and Non-Consumptive Use.

Member Johns recused himself.

Ms. Mamiya communicated at the December 2002, meeting the Kauai Island Utility Cooperative (KIUC) was issued a revocable permit which allowed them to use water from the Blue Hole Diversion and a portion of state-owned water transmission system for its Upper and Lower Lihue Hydropower plants. Also in April 2004, KIUC obtained Concurrent Resolution from the Legislature for their use of water at the Upper and Lower Lihue Hydroelectric Plants. Being that the submittal involves water rights for non-consumptive use, Ms. Mamiya pointed out under section 171-58, HRS the department is required to notify the Department of Hawaiian Home Lands (DHHL) of its intent to execute a lease and to develop a reservation of water rights sufficient to support current and future homestead needs. DHHL had some concerns about this issue but after consultation with staff and the applicant they've agreed that staff's submittal does not need to be held up due to their concerns. Ms. Mamiya recommended the Board authorize the sale of a water lease by public auction for the use of water located on TMK No. 3-8-01:1 (4th Division) from the Blue Hole Diversion, including a portion of the state owned ditch system and such roadways and access over state lands for the operation, maintenance, and repair of the system.

Alton Miyamoto, President and Chief Operating Officer of KIUC reminded the Board this process began in 2001 and since that time KIUC has been working towards today's submittal. Mr. Miyamoto went into the history of the existence of KIUC.

Gary Pierce of KIUC conducted a brief presentation of the physical layout of the hydroelectric plant, the Blue Hole Diversion system and the ditch. Mr. Pierce used a map and pictures to explain the diversion of the water. In his presentation, Mr. Pierce pointed

EXHIBIT "2"

out there is no consumptive use of the water, all of the water is released back into the Hanamaulu ditch.

Jonathan Scheuer, Policy Analyst for the Office of Hawaiian Affairs (OHA) spoke of three of their concerns: 1) the submittal errs in concluding the use is nonconsumptive; 2) staff errs in recommending that an Environmental Assessment not be prepared under Chapter 343, Hawaii Revised Statutes; and 3) the public trust doctrine, which does not only guide the action of the Commission on Water Resource, but all agencies when dealing with water and other public trust resources, places the burden on the Board and the applicant to affirmatively demonstrate that public trust purposes will be considered and the uses balanced. Based on the above concerns, Mr. Scheuer requested a contested case hearing on behalf of OHA.

Motion made at 12:25 p.m. by Member Agor and second by Member Inouye to move into Executive Session pursuant to Chapter 92-5 (4) to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities and liabilities.

Motion to move into Executive Session
Unanimously approved to move into Executive Session (Agor/Inouye).

The meeting resumed at 12:53 p.m.

Deputy Attorney General, William Wynhoff advised the Board to end all testimony relating to agenda item D-26 as a request has been made for a contested case hearing.

Moses Haia, an attorney for Native Hawaiian Legal Cooperation suggested the Board inform the public at the beginning of the meeting that if a contested case hearing is requested on an item, all testimony on this item will cease. Mr. Haia requested a contested case hearing on behalf of Life of the Land.

Linnel Nishioka, attorney for the applicant made it known she believes a request for a contested case hearing is not available for the disposition of a lease.

Written testimony was received from the Limu Coalition, the Hanalei Watershed, Carol Wilcox and Clyde Namuo of OHA.

Chairperson Young notified those wishing to request a contested case hearing that they will need to follow up their verbal request with a written request within ten (10) days.

No Action.

Item D-18: Re-Submittal – Sale of Reclaimed (Filled) Lands to Beth Clark, Trustee of the Big Surf Trust, Kailua-Kona, North Kona, Hawaii, TMK: (3) 7-5-05: seaward of Parcel 12.

EXHIBIT 3

STIPULATION FOR WITHDRAWAL OF REQUEST
FOR CONTESTED CASE HEARING

WHEREAS, on November 9, 2006, Kauai Island Utilities Cooperative ("KIUC") and The Office of Hawaiian Affairs ("OHA") fully executed a Memorandum of Agreement ("MOA") (attached hereto as Appendix A) relating to OHA's request for a contested case on KIUC's application to the Board of Land and Natural Resources ("BLNR") for a 65-year lease to use water from State lands and collected from Waikoko Stream and the North Fork of the Wailua River (collectively referred to as the "Blue Hole Diversion") for the purpose of continuing to operate two of KIUC's hydroelectric plants; and

WHEREAS, pursuant to the terms of the MOA, OHA agreed to withdraw its request for a contested case hearing, which was made on December 20, 2004, upon the occurrence of all of the events set forth below in italics; and, as described below, all such events have occurred:

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LAND DIVISION
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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

(1) *Following consultation with the Department of Land and Natural Resources' Division of Aquatic Resources, OHA and KIUC have mutually agreed on a stream biota study for the diversion located on the North Fork of the Wailua River that either (1) no further studies are needed, or (2) upon the scope an additional study and the consultant who will conduct such additional study. The purpose of this study will be to determine if any significant impacts are associated with that diversion on stream biota.*

The Department of Land and Natural Resources Division of Aquatic Resources ("DAR") has proposed a stream biota modeling study, as set forth in Appendix B, upon which OHA and KIUC have mutually agreed. OHA and KIUC further agree that Dr. James Parham, through the Bishop Museum, and SWCA Environmental Consultants ("SWCA") will conduct the study and that the results of the study shall be available to OHA, KIUC, and DAR.

(2) *OHA and KIUC have mutually agreed upon the scope of a study of cultural impacts relative to the Blue Hole Diversion and the consultant who will conduct such study.*

A Cultural Study relating to the Waiahi Hydropower Systems was prepared by L. Kēhaulani Kekua and A. Aikane Alapai of Native Kaua'i LLC in April 2010, which described the cultural backdrop, but did not adequately address or assess cultural impacts relative to the Blue Hole Diversion. OHA and KIUC have mutually agreed upon a supplemental

EXHIBIT "3"

study, the scope of which is set forth in Appendix C, and which shall be conducted by Native Kaua'i LLC.

(3) OHA and KIUC have mutually agreed upon a methodology for setting the lease rent for proposal to the Department and Board of Land and Natural Resources. Said methodology shall consider the instream value of the water had it not been diverted for hydropower generation and the cost benefits to KIUC members, including, but not limited to, OHA beneficiaries.

OHA and KIUC have mutually agreed to propose to the Department of Land and Natural Resources ("DLNR") and BLNR a methodology for setting the lease rent, as set forth in Appendix D, and described herein. Because negligible water quality impacts are involved in the non-consumptive use by KIUC, OHA and KIUC agree to applying fair market rental based on the rate charged by the East Kaua'i Water Users Cooperative or other gravity-fed, surface water system on Kaua'i that is used for agricultural purposes and discounting that rate by 95 percent because of the non-consumptive nature of the water use.

(4) OHA and KIUC have mutually agreed upon a short-term spot water quality monitoring program for the Upper and Lower Waiahi hydropower plants.

SWCA prepared a report entitled *Short-Term Biological Reconnaissance and Spot Water Quality Sampling in the Wailua River, Kauai*, dated August 2008, which is attached hereto as Appendix E. After consultation with DLNR Division of Aquatic Resources, OHA and KIUC agree that this report fulfills this requirement.

(5) OHA and KIUC mutually agreed upon the protocol and parameters of a long-term program for collection of stream water quality data.

After consultation with DLNR Division of Aquatic Resources, OHA and KIUC have mutually agreed on the long-term program for collection of stream water quality data as set forth in SWCA's July 2010 *Recommended Long-Term Water Quality Monitoring Plan, Wailua River, Kauai, Hawaii*, which is attached hereto as Appendix F.

(6) KIUC has provided OHA (existing) flow data available to KIUC on Waikoko Stream and the North Fork of the Wailua River.

KIUC has provided to OHA the flow data contained in Appendix G.

(7) OHA and KIUC have mutually agreed to seek proposed lease provisions that balance KIUC's business interests with OHA's fiduciary duties and OHA and KIUC have submitted to the DLNR, for proposal to the BLNR a proposed form of lease that includes provisions mutually agreed upon with respect to:

(i) A sixty-five-year lease term with provisions for renegotiation of lease terms upon either:

(a) significant changes in policy or economic conditions associated with the conveyance of relevant ceded lands to a federally-recognized Native Hawaiian Governing Entity, provided that renegotiation pursuant to such terms shall be initiated no later than ninety (90) days following the conveyance of the relevant ceded lands; or

(b) significant environmental or cultural changes, which, for purposes of this subparagraph shall mean changes in the environment or Native Hawaiian culture, or material changes in policy, which, if the lease were to be reviewed under such new policy or in light of such new information or understandings, would likely result in material changes to the terms of the lease; including, but not limited to, the mechanism and process for renegotiation of the lease terms;

(ii) A methodology for establishing the upset price (lease rent) at public auction of the lease; and

(iii) A long-term program for collection of stream water quality data.

OHA and KIUC have mutually agreed to propose to BLNR and DLNR a lease in the form set forth in Appendix H; and

WHEREAS, pursuant to the MOA, Section B, following OHA's withdrawal of its request for a contested case, and prior to a decision by BLNR to issue a lease, four (4) further steps are to occur; and

WHEREAS, subsection B(4) requires KIUC to "have joined the Kauai Watershed Alliance," but OHA and KIUC have investigated that possibility and learned that the Kaua'i Watershed Alliance ("KWA") only allows members who own more than one

thousand (1,000) acres of watershed, conservation-district-zoned land, which KIUC does not.

NOW, THEREFORE, pursuant to the foregoing, in accordance with the terms of the MOA, and with acknowledgement of both parties' cooperation in the matter, KIUC and OHA enter into this Stipulation for Withdrawal of Request for Contested Case Hearing ("Stipulation"). Concurrently, both parties waive the requirement for KIUC to join KWA prior to the issuance of a lease by BLNR.

This Stipulation may be executed in counterparts. Upon execution, this Stipulation shall be transmitted to the Chairperson of the BLNR and to DLNR's Land Division and shall serve as notice of OHA's withdrawal of its request for a contested case on KIUC's application for a 65-year lease of water collected at the Blue Hole Diversion.

OFFICE OF HAWAIIAN AFFAIRS

for KAMANA'OPONO CRABBE, Ph.D
Its Ka Pouhana and
Chief Executive Officer

Dated: June 29, 2012

KAUAI ISLAND UTILITIES COOPERATIVE

Name:

Its:

Dated: _____

APPROVED AS TO FORM:

ERNEST M. KIMOTO
Corporate Counsel
Date: June 29, 2012

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OFFICE OF HAWAIIAN AFFAIRS

for KAMANA'OPONO CRABBE, Ph.D
Its Ka Pouhana and
Chief Executive Officer

Dated: June 29, 2012

KAUAI ISLAND UTILITIES COOPERATIVE

Name: DAVID J. BISSELL

Its: President and
Chief Executive Officer

Dated: July 6, 2012

APPROVED AS TO FORM:

ERNEST M. KIMOTO
Corporate Counsel
Date: June 29, 2012