



May 1, 2024

Mr. Dean Uyeno  
Acting Deputy Director  
Commission on Water Resource Management  
1151 Punchbowl Street, #227  
Honolulu, HI 96813

Re: Waimea Mediation Agreement, Phase One Interim Instream Flow Standard (IIFS)

Aloha Mr. Uyeno,

We appreciate this opportunity to provide a summary of Kaua'i Island Utility Cooperative's (KIUC) efforts to bring to closure its obligations related to Phase One of the Waimea Mediation Agreement (WMA).

KIUC participated in the mediation process because of its interest in developing a renewable energy project in West Kaua'i utilizing existing ditch infrastructure and reservoirs. Through the WMA, KIUC agreed to implement modifications on Kōke'e Ditch diversions necessary to ensure the Phase One interim instream flow standard (IIFS) could be met. In return, the WMA provided the following to KIUC:

- The option to continue due diligence for the renewable energy project;
- Deadlines for the Department of Hawaiian Home Lands (DHHL) and the Agribusiness Development Corporation (ADC) rights on entry or license with a 65-year lease option, allowing KIUC to construct and operate the renewable energy project; and
- Agreement by all the parties for 11 million gallons per day (MGD) rolling average of water to be diverted for DHHL's water reservation and the renewable energy project, and allowing any water above and beyond the Phase Two IIFS to be diverted for the renewable energy project.

KIUC's Phase One modification responsibilities are outlined in the Agreement in Section B. Modifications of the Diversions (third paragraph) as follows:

"KIUC will modify all diversions in the Kōke'e Ditch necessary to ensure the stream flow provided for in this agreement as follows: KIUC will file with the Commission and any other pertinent regulatory agency its modification plans within one hundred thirty-five (135) days of the approval of this agreement by the Commission. Work on the modifications will begin within forty-five (45) days

of approval of the modification plans or any other approval required by the modification proposal, whichever comes last.”

Due to delays in discussions with ADC and DHHL, KIUC was granted a one-time extension from July 17, 2017 to August 22, 2017 to reach understandings as outlined in WMA Section C. with ADC and DHHL, and a one-time extension from July 27, 2017 to September 21, 2017 to exercise the option to withdraw from the WMA before having to proceed with Kōke'e diversion modification plans. Agreements were reached with DHHL and ADC by August 22, 2017, and KIUC proceeded with Kōke'e diversion modification plans.

**KIUC's first modification plan was submitted to CWRM staff and WMA parties on September 1, 2017, followed shortly thereafter by the submission of KIUC's first stream gaging plan on September 6, 2017. These plans were reviewed and discussed with CWRM staff, all the WMA parties, and other relevant landowners (DLNR State Parks and Division of Forestry and Wildlife).**

After receiving comments on the first set of plans, KIUC submitted revised modification plans to CWRM staff and WMA parties on September 29, 2017, and the revised stream gaging plan on October 1, 2017. These revised sets of plans were subsequently reviewed and discussed with CWRM staff, WMA parties and other relevant landowners. Comments were received through March 2018 and incorporated into a revised set of plans that were submitted to CWRM staff and all the WMA parties on April 2, 2018. **The revised set of plans of April 2018 were reviewed and discussed with CWRM staff and WMA parties in a WMA meeting on April 25<sup>th</sup>, and KIUC received verbal approval in May 2018 to proceed with this set of plans.**

In June 2018 KIUC initiated consultation with all the regulatory agencies potentially having jurisdiction over some aspect of the project and KIUC submitted requests for permit determinations and a HRS 343 determination to Office of Coastal and Conservation Lands (OCCL) and CWRM. In June 2018, CWRM Deputy Director Jeff Pearson also submitted to State Historic Preservation Division (SHPD) a request to initiate HRS 6E review and consultation.

A summary of the permitting process is outlined below:

- July 2018 – Permit determination received from CWRM
- February 2019 – Permit determination from OCCL including a finding that modification and gaging plan is exempt from HRS 343
- September 2019 – Revised permit determination from CWRM
- April 2020 – Permit determination received from US Army Corps of Engineers (USACE)
- April 2019 – Site Plan application submitted to OCCL
- May 2019 – Second request to initiate 6E submitted to SHPD
- May 2019 – Nationwide 46 permit application submitted to USACE (Department of Health consultation included, separate permit application required)

- June 2019 – Stream Channel Alteration (SCAP) application submitted to CWRM (based on first CWRM permit determination)
- January 2020 – SCAP and Stream Diversion Works (SDWP) applications submitted to CWRM (based on second CWRM permit determination)
- December 2020 – 401 application submitted to Department of Health (two-year permit)
- April 2020 – Nationwide 46 permit issued by USACE (two-year permit)
- September 2020 - SCAP and SDWP issued by CWRM (two-year permits)
- February 2021 – 401 issued by DOH
- March 2022 – 6E determination from SHDP
- March 2022 – Site Plan Approval issued by OCCL
- March 2022 – Request for easements submitted to DLNR Land Division
- March 2022 – Submitted to USACE request to extend Nationwide 46 for two more years
- February 2023 – Submitted request to DOH to extend the 401 for two more years
- February 2023 – SCAP and SDWP permit applications submitted to CWRM to replace expired permits (ADC landowner signature received and submitted in March 2023, DLNR landowner signature received and submitted in October 2023)
- February 2023 – received approval for two-year extension to 401 from DOH
- October 2023 – received approval for two-year extension to Nationwide 46 from USACE
- February 2024 – SCAP issued by CWRM

Items remaining outstanding to date are the SDWP application submitted to CWRM in February 2023 and completed with landowners' signatures October 2023 and a Right of Entry from ADC to conduct the modifications<sup>1</sup>.

After a multi-year permitting process, in January 2024<sup>2</sup> KIUC was very close to receiving the final permits necessary to implement the plan. An action item for approval of two permit applications was placed on the January 30, 2024 CWRM meeting agenda. These were the last two permits necessary to implement KIUC's Phase One plan and the only remaining item to secure was a Right of Entry from ADC to conduct the modifications and install the gaging stations.

Since January of this year there has been an effort led by the Kekaha Agriculture Association (KAA), apparently supported by ADC and DHHL, to renegotiate the Phase One modifications. KIUC did not contemplate or agree to an undefined Phase One scope, and we believe renegotiating Phase One at this point is departing from the WMA and the spirit and intent of

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<sup>1</sup> The easement request from DLNR Land Division also remains outstanding, but changes to long term ownership of the infrastructure voids the necessity for this easement.

<sup>2</sup> In December 2023, KIUC announced that it would not pursue energy projects that would commence Phase Two obligations under the WMA which would involve KIUC assuming "significant responsibility for the infrastructure on the systems involved and making additional diversion modifications for Phase Two IIFS implementation ...".

KIUC's Phase One commitment<sup>3</sup>. At this point, KIUC had worked for almost six years on permitting plans approved by the mediation participants in 2017.

During the January 30, 2024 CWRM meeting, Commissioners requested that KIUC and KAA meet together and, with other parties to the WMA, come to an agreement on how to proceed with Phase One modifications.

Since that direction from the Water Commission, KIUC has met one-on-one with KAA on four separate occasions (February 6, March 19, April 4, and April 19), KIUC attended two WMA hydrology meetings scheduled by KAA (February 13 and 23), and the WMA parties met with CWRM staff on February 28, March 21, and April 9 in an effort to fulfill the Commission's request. Additionally, this matter was discussed by KIUC with ADC's executive director during a meeting ADC requested on April 10, 2024.

Discussions with KAA have indicated that they, for long term operational efficiencies, would prefer to have diversion modifications that are beyond the scope of KIUC's Phase One obligations. We are prepared to either proceed with diversion modification efforts consistent with our previously agreed to plans or, in the event that different designs are desired by KAA and other mediation parties, provide funding to KAA for the cost of the Phase One modifications commensurate with KIUC's commitment (i.e., ensuring Phase One IIFS can be implemented at the diversions).

KIUC estimates the cost of the Phase One modifications as intended and agreed to by all parties to be approximately \$500,000. We are not willing to fund ditch improvements above and beyond what is necessary to ensure that the Phase One IIFS can be maintained in the streams.

At the most recent meeting with KAA on April 19, counterproposals for consideration were proposed verbally by KAA. KIUC requested these options in writing and they were received on April 30. The counterproposal is significantly different from KIUC's proposed financial contribution and consensus has not been reached at this point.

To bring this matter to a close as quickly as possible and to allow diversion modifications to proceed, we propose delivering the following by May 10, 2024:

- A payment to KAA (or ADC if preferred) in the amount of \$500,000
- Sending to KAA KIUC's Phase One engineering drawings, surveys and studies

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<sup>3</sup> The plans for diversion modifications were reviewed years earlier by parties to the agreement and status updates were provided by KIUC on permitting progress regularly to the WMA working group at almost all meetings since 2018. At no time was there any mention of the need to modify the plans to incorporate additional features or suggestions of necessary changes to the design KIUC had submitted for the Phase One modifications.

- Submitting a request to USACE to transfer KIUC's Nationwide permit to KAA for processing (USACE estimated 30 days to process and approve)

Prior to or concurrent with delivery of these items, WMA parties would provide written acknowledgement that this action satisfies KIUC's Phase One commitment, which would conclude KIUC's participation in the WMA.

Please let us know whether this potential agreement is satisfactory, or if any further information is requested.

Sincerely,



David Bissell  
President and Chief Executive Officer

cc (via email): Andrew Choy, DHHL  
Jonathan Scheuer, DHHL  
Cherie-Noelle K. Kaanana, DHHL  
Elena Bryant, Earthjustice  
Isaac Moriwake, Earthjustice  
Doug Codiga, KAA  
Joshua Uyehara, KAA  
Michael Faye, KAA  
Wendy Gady, ADC  
Lyle Roe, ADC  
Delanie Prescott-Tate, ADC  
Jordan Inafuku, McCorriston Miller Mukai MacKinnon, LLP  
Dawn Huff, Joule Group

JOSH GREEN, M.D.  
GOVERNOR

SYLVIA LUKE  
LT. GOVERNOR



WENDY GADY  
EXECUTIVE DIRECTOR

STATE OF HAWAII  
**AGRIBUSINESS DEVELOPMENT CORPORATION**  
HUI HO'OU LU AINA MAHIAI

TESTIMONY OF WENDY L. GADY  
EXECUTIVE DIRECTOR  
AGRIBUSINESS DEVELOPMENT CORPORATION

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

Tuesday, May 21, 2024  
9:00 a.m.

REGARDING MEETING AGENDA ITEM C-2  
RELATING TO UPDATE ON IMPLEMENTATION OF  
WAIMEA WATERSHED AGREEMENT, WAIMEA, KAUAI

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Chair Chang, Acting Deputy Director Uyeno, and Members of the  
Commission:

Thank you for the opportunity to provide testimony before the Commission on Water Resource Management (Commission) regarding agenda item C-2 relating to the update on Kauai Island Utility Cooperative's (KIUC) stream diversion work permit application. As the State agency responsible for the Kokee Ditch under Governor's Executive Order No. 4287, the Agribusiness Development Corporation (ADC) withdraws its prior request to defer or deny the permit application and respectfully ***requests that the Commission approve the permit application.***

ADC provided testimony to the Commission at the January 30, 2024 meeting requesting that the Commission defer or deny the permit application due to potential impacts to the Kokee Ditch (Ditch) and system users, including the Hawaii Department of Hawaiian Homelands. The Parties to the Waimea Watershed Agreement (WWA) still do not fully understand the impacts from the announced termination of the West Kauai Energy Project.

The Commission temporarily deferred action on the permit application to allow ADC, KAA, and KIUC to reach agreement on an amended scope of ditch modifications, and funding from KIUC that would: (1) allow ADC and KAA to construct the amended modifications; and (2) allow KIUC to be released from their obligations and liability under the WWA. Ultimately, ADC, KAA, and KIUC could not reach consensus on an appropriate level of funding that would allow ADC and KAA to accept responsibility and liability for KIUC's obligations under the WWA.

The original Phase 1 modifications as proposed by KIUC and verbally approved by Commission staff in May 2018 *are not* ADC's preferred design, however, in the absence of agreement with KIUC on an appropriate level of funding, and as there is already an approved plan in place for diversion modification that was approved by the Commission that would ensure the various stream IIFSs are met, ADC withdraws its prior request to defer or deny the permit application and respectfully ***requests that the Commission approve the permit application*** to allow KIUC to fulfill their obligations as envisioned under the WWA without further delay<sup>1</sup>.

Thank you for your consideration of our testimony.

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<sup>1</sup> ADC acknowledges that there will be no decision making under agenda item C-2 and that this testimony is provided to the Commission for purposes of update.

May 20, 2024

Mr. David Bissell  
President and Chief Executive Officer  
Kaua'i Island Utility Cooperative  
4463 Pahe'e Street, Suite 1  
Lihu'e, Kaua'i, HI 96766-2000

Re: Waimea Watershed Agreement, Phase One Modifications

Dear Mr. Bissell,

Following the January 30, 2024 Commission on Water Resource Management (CWRM) meeting, at which the Commission requested that the Kaua'i Island Utility Cooperative (KIUC) and the Kekaha Agriculture Association (KAA) meet together and, with other parties to the Waimea Watershed Agreement (WWA), come to an agreement on how to proceed with the Phase One modifications, KAA presented a comprehensive plan for permanent diversion modifications to the parties. This plan, which would supersede KIUC's temporary Phase One modifications and involves installing mechanical gates to maintain levels of flow in the ditch and ensure water remains in the streams, was deemed operationally acceptable by the Department of Hawaiian Home Lands (DHHL), the Agribusiness Development Corporation (ADC), and Po'ai Wai Ola/West Kaua'i Watershed Alliance (PWO). The plan was presented to KIUC on April 19, 2024. The permanent infrastructural improvements, which are equivalent to KIUC's temporary Phase One modifications, encompass 5 mechanical gates and 10 monitoring points (see Exhibit 1). For reference, Exhibit 2 summarizes the scope of KIUC's temporary Phase One modifications.

KAA also prepared a cost estimate for its permanent modifications to the diversions and made a comparable estimate of the cost of implementing KIUC's temporary modifications (see Exhibit 3). The cost estimates were provided to KIUC in writing on April 30, 2024, and during a meeting on May 13, 2024 KIUC confirmed that it had no up-to-date cost estimates for its proposed modifications.

In a letter to the Commission, dated May 1, 2024, KIUC proposed making a payment of \$500,000 to KAA, to release KIUC from further responsibility of making the temporary Phase One modifications and from the WWA. KAA presented a proposal for implementing the limited modifications that this funding would allow to DHHL, ADC and PWO on May 10, 2024 (see Exhibit 4). All parties expressed skepticism about the appropriateness of KIUC's proposed financial contribution and concerns regarding the uncertainty and timing of KAA and/or ADC securing funding to complete the remaining modifications. In light of the above, KAA is not able to accept the offered settlement terms.

If KIUC is required to build the temporary Phase One modifications as applied for and agreed by the parties in 2018, we estimate the cost would be about \$2 million. KAA's permanent Phase



One modifications would cost about \$1.6 million. We request that KIUC consider making a financial contribution sufficient for the parties to agree to a settlement as an alternative to KIUC building the 2018 Phase One modifications. Based on our detailed cost estimates, we believe that there remains ample leeway for a settlement that will result in lower environmental impact, timely construction of more functional and serviceable infrastructure for the remaining stakeholders of the system, and substantially lower in cost than proceeding with the original 2018 design.

Sincerely,

/s/ Joshua Uyehara

Joshua Uyehara

President Kekaha Agriculture Association

cc (via email)

Dean Uyeno, CWRM

Ayron Strauch, CWRM

Dawn Huff, Joule Group

Jordan Inafuku, McCorriston Miller Mukai MacKinnon, LLP

Wendy Gady, ADC

Mark Takemoto, ADC

Lyle Roe, ADC

Delanie Prescott-Tate, ADC

Jonathan Scheuer, DHHL

Andrew Choy, DHHL

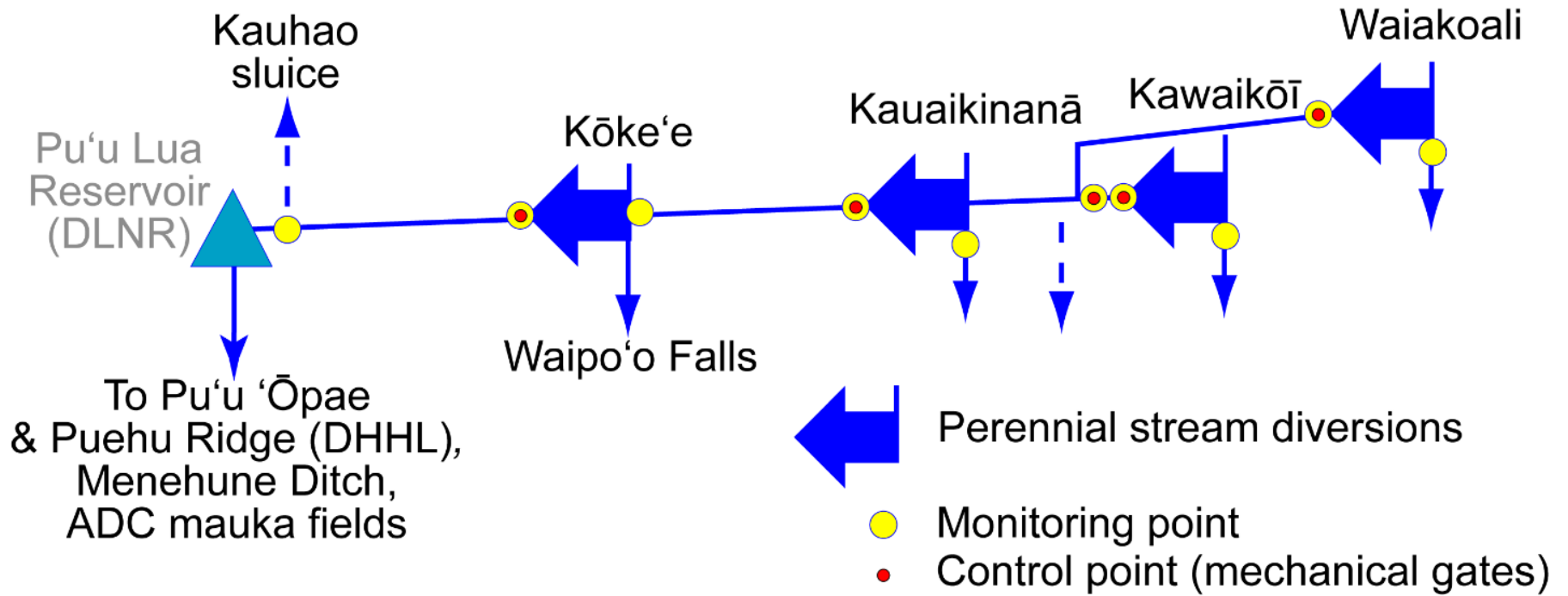
Cherie-Noelle K. Kaanana DHHL

Isaac Moriwake, Earthjustice

Elena Bryant, Earthjustice

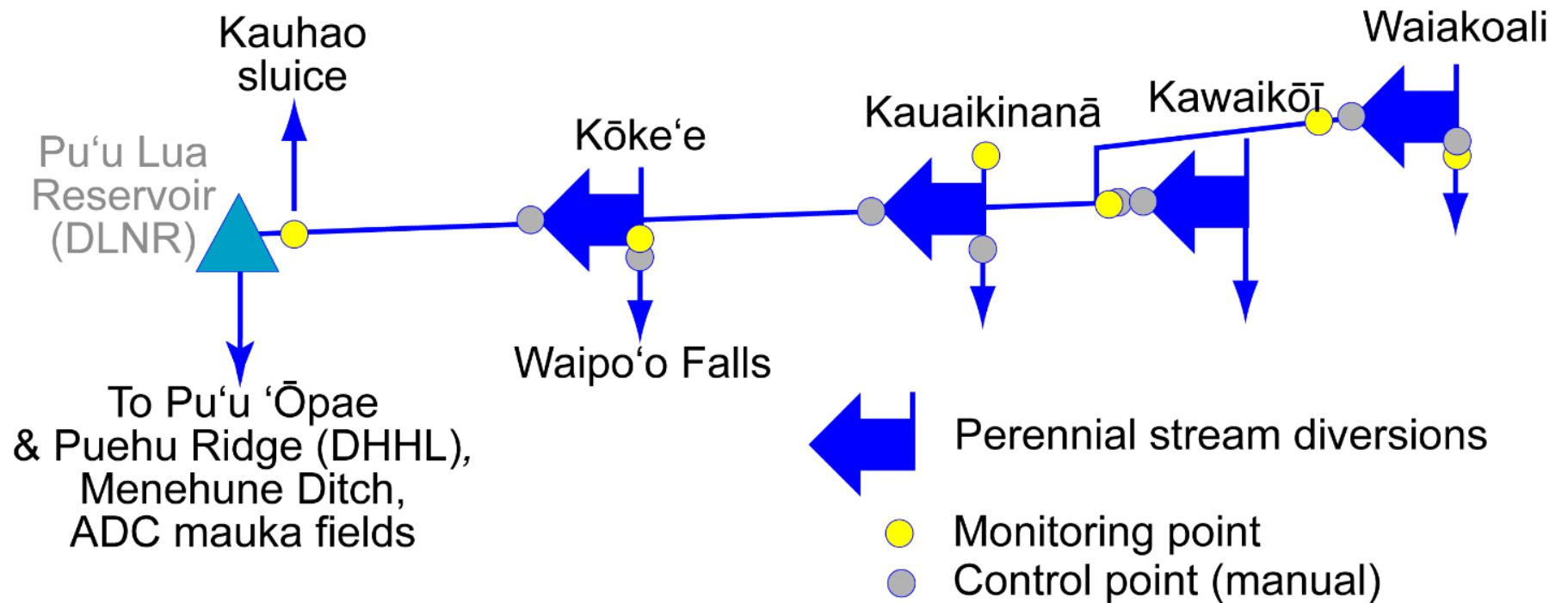
# EXHIBIT 1

## Kekaha Agriculture Association, Scope of Permanent Modifications



## EXHIBIT 2

### Kaua'i Island Utility Cooperative, Scope of Temporary Modifications



**EXHIBIT 3 - Summary cost comparison between KIUC 2018 Phase 1 design and KAA Alternative Design**

<b>Location / Cost Category</b>	<b>Modification</b>	<b>2018 KIUC P1*</b>	<b>KAA Alternative*</b>	<b>Notes</b>
Waiakoali	Monitoring	\$ 109,246	\$ 49,387	
	Control**	\$ 49,354	\$ 125,544	
	Other	\$ 23,829	\$ 68,937	
	<b>Location subtotal</b>	<b>\$ 182,428</b>	<b>\$ 243,868</b>	
Kawaikōi	Monitoring	\$ 63,792	\$ 33,375	
	Control**	\$ 100,929	\$ 256,073	
	Other	\$ 365,764	\$ 153,893	KIUC design's coffer dam not in KAA design
	<b>Location subtotal</b>	<b>\$ 530,485</b>	<b>\$ 443,342</b>	
Kauaikinanā	Monitoring	\$ 104,369	\$ 43,975	
	Control**	\$ 40,451	\$ 122,125	
	Other	\$ 5,039	\$ 18,050	
	<b>Location subtotal</b>	<b>\$ 149,859</b>	<b>\$ 184,149</b>	
Kōke'e	Monitoring	\$ 76,718	\$ 59,850	
	Control**	\$ 5,204	\$ 124,437	
	Other	\$ 364,017	\$ 69,349	KIUC design's pipe across Kōke'e ditch not in KAA design
	<b>Location subtotal</b>	<b>\$ 445,940</b>	<b>\$ 253,636</b>	
USGS Puulua	Monitoring	\$ 41,662	\$ 37,413	
Design/Engineering		\$ 50,000	\$ 50,000	
<b>Total Direct Costs</b>		<b>\$ 1,400,375</b>	<b>\$ 1,212,406</b>	
GET (4.71%)		\$ 65,986	\$ 57,129	
Overhead (12%)		\$ 175,963	\$ 152,344	
Contingency (20%)		\$ 328,465	\$ 253,907	
<b>Total Additional Costs</b>		<b>\$ 570,414</b>	<b>\$ 463,380</b>	
<b>Total Estimated Cost</b>		<b>\$ 1,970,788</b>	<b>\$ 1,675,786</b>	

\* Costs as estimated by KAA. Estimates for KIUC design assume construction of the design approved by the parties in 2018

\*\* Generally KIUC's 2018 design incorporates manual control while KAA's alternative includes remotely operable controls

# EXHIBIT 4

## Scope of Modifications Allowable with Kaua'i Island Utility Cooperative's proposed financial contribution

