

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
ISLAND POWER COMPANY, INC.) DOCKET NO. SP87-366
For a Special Permit to Establish)
a Hydroelectric Powerplant and)
Related Uses on Approximately 69.3)
Acres of Land Within the Agricul-)
tural District at Wailua, Kauai,)
Tax Map Key Number: 3-9-02: portion)
1, portion 12, portion 20, portion)
24, portion 25, and portion 31)

LAND USE COMMISSION
STATE OF HAWAII
Nov 23 8 37 AM '87

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

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FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

Island Power Company, Inc. (hereinafter "Petitioner") initiated this proceeding pursuant to Section 205-6, Hawaii Revised Statutes, as amended, and Subchapter 12 of the Hawaii Land Use Commission Rules. The Land Use Commission (hereinafter the "Commission") having considered the entire record on this matter, hereby makes the following findings of fact, conclusions of law and decision and order:

FINDINGS OF FACT

Procedural Matters

1. The Petitioner filed the Special Permit application with the County of Kauai Planning Department (the "Planning Department") on June 4, 1987. The Kauai Planning Commission conducted a public hearing on August 12, 1987. David Boynton testified as a public witness.

Description of the Property and
Summary of Proposed Use

2. Petitioner proposes to construct and operate a hydroelectric power plant on the Wailua River South Fork on approximately 69.3 acres of land within the State Land Use Agricultural District. Improvements will consist of a diversion dam measuring 400 feet long by 23 feet high, a power house and installation of a 4,950 feet long penstock (pipeline for conveying water) from the dam to the power house and transmission lines from the power house to the Lydgate Electric Substation. Petitioner also proposes modifications to an existing diversion structure of the Stable Storm Ditch located at Wailua River North Fork.

3. The proposed hydroelectric power plant impacts lands in the State Land Use Agricultural and Conservation Districts. A Conservation District Use Permit ("CDUP") for improvements located in the Conservation District was approved by the Board of Land and Natural Resources on August 8, 1986.

Portions of the proposed power plant located within the Conservation District include: the power house and tailrace facilities, portions of the penstock, portions of the electrical transmission line, the north fork diversion structure, and access roadways.

4. Components of the proposed power plant that are located in the State Land Use Agricultural District

(hereinafter the "Property") and subject to this Special Permit request are as follows:

<u>Item</u>	<u>Description of Improvements</u>	<u>Tax Map Keys Affected</u>
A	CONCRETE DAM	3-9-02: portion 1, portion 20, portion 31
B	DIVERSION IMPOUNDMENT - Approx. 35 acres of surface water area to maximum pool level of 274.5 feet above mean sea level within existing flood plain of South Fork of Wailua River	3-9-02: portion 1, portion 20, portion 31
C	PENSTOCK - being a strip of land 50 ft. wide, 25 ft. on either side of centerline	3-9-02: portion 1
D	ELECTRIC TRANSMISSION LINE - being a 50-ft.-wide strip of land, 25 ft. on either side of centerline	3-9-02: portion 12, portion 20, portion 24, portion 25
E	ROADWAYS - access to various components of project	3-9-02: portion 12, portion 20, portion 24, portion 25, portion 31

5. The Property is owned by the State of Hawaii and leased to Lihue Plantation Co., Ltd.

6. The proposed project will utilize stream flows from the North Fork and the South Fork of the Wailua River to generate hydroelectric power. Water will be diverted from the North Fork into the South Fork by using the existing Stable Storm Ditch diversion and canal system operated by Lihue Plantation Company, Ltd.

7. The diversion dam and intake structure will be constructed approximately 1,000 feet upstream from the Wailua Falls. The diversion dam will create a 35-acre pool submerging lands mostly with steep slopes or flood plain areas not being used for agricultural purposes. Approximately 8.3 acres of the impoundment are currently in sugarcane cultivation.

8. A buried pipeline (penstock) varying in diameter from 96 inches to 84 inches and approximately 4,950 feet long will convey water from the diversion dam to a powerhouse approximately 1.5 miles downstream from the Wailua Falls. The flow will then be discharged from the powerhouse and returned to the natural channel of the Wailua River.

9. Petitioner proposes to maintain a minimum flow in Wailua River of 9,700,560 gallons per day or 15 cubic feet per second (cfs) to preserve the existing aquatic resources and the visual characteristics of Wailua Falls. Petitioner requires a minimum of 30 cfs to operate the power plant economically. When flows in the South Fork become less than 45 cfs, it will bypass the diversion dam and flow down the natural channel over Wailua Falls. All flows in excess of 380 cfs will also bypass the diversion dam.

10. In order to maintain the historic and existing diversion practices of Lihue Plantation Company, no new provisions will be added for any minimum bypass flows at the Stable Storm Ditch diversion. However, flows in excess of 100

cfs will bypass this diversion and will remain in the North Fork of the Wailua River.

~~11. A new transmission line approximately 2.2 miles in~~
length will be constructed to interconnect the project with Kauai Electric facilities at the existing Lydgate Substation. The power will be sold to Kauai Electric which will in turn distribute it to their customers.

12. The project will cost approximately 9 million dollars and will generate about 17.5 million kilowatt hours (KWH) of electricity per year (equivalent to about 6% of electricity generated by Kauai Electric in 1986).

State and County Plans and Programs

13. The Property is located in the State Land Use Agricultural District.

14. The County General Plan for the area is Open/Agriculture and the zoning is Agriculture/Open.

15. The Property is not located within the County Special Management Area.

Summary of Agency Concerns

16. The County Public Works Department indicated that the proposed dam will be constructed across a floodway and that County Ordinance No. 416 prohibits construction of structures in the floodway. However, since the dam will not present any threat to surrounding property, the project will be exempt from the requirements of Ordinance No. 416.

17. The State Health Department indicated that the Petitioner should comply with air and water pollution ~~mitigative measures.~~

18. In its approval of the CDUP for the portion of the project within the Conservation District, the Department of Land and Natural Resources (DLNR) imposed six conditions requiring Petitioner to 1) conduct a baseline study of the stream habitat, 2) set up an automatic flow recorder, 3) maintain a minimum 15 cfs conservation flow, 4) limit plant operation to times when the flow in the South Fork is between 45 and 380 cfs, 5) cease operation if DLNR determine impacts to be unacceptable, and 6) obtain approval for the location of the stream flow devices from the DLNR.

Impacts to the Environment

19. The Final Environmental Impact Statement for this project was accepted on May 21, 1986 by the DLNR for the CDUP.

20. Petitioner believes that no impacts to residences in the vicinity are foreseen because the nearest residential cluster is located over a mile away.

21. Approximately 5 acres of prime agricultural lands, meaning lands with a Land Study Bureau Master Productivity rating of "A" or "B", and currently in sugarcane cultivation will be temporarily disturbed by the installation of the penstock. After installation the penstock will be completely buried and the land will be restored to its former use for sugarcane cultivation.

An area of 8.3 acres will be removed from cane production by the impoundment but these lands are not designated "A" or "B" by the Land Study Bureau and are not considered by the County of Kauai as prime agricultural land.

Petitioner will fully compensate the Lihue Plantation for damages to crops caused by the construction of the project.

22. The proposed transmission line from the powerhouse to the existing Lydgate Power Station will cross over cultivated sugarcane lands. Potential conflicts could arise with harvest fires in the area of the power lines. Generally, a minimum of 35 feet height clearance is recommended by plantations to avoid conflicts with their operations. Petitioner proposes to resolve this with Lihue Plantation prior to construction.

23. Construction of the project will result in short-term impacts to stream water quality such as increased sedimentation and turbidity in the waters of both the project area and further downstream. Petitioner will comply with the State Health Department's dust and erosion control requirements to minimize these short-term impacts.

24. Petitioner believes the project will not adversely affect the environment below the Stable Storm Diversion on the North Fork because historic water diversion practices for agricultural purposes have already degraded the aquatic ecosystem directly downstream and existing aquatic resources

have been dependent on flows from the East Branch, North Fork downstream of the diversion structure.

Impacts to Wailua Falls Scenic Resource

25. Petitioner states that the proposed project will be designed to release a minimum flow of 15 cfs in the natural channel and onto the Wailua Falls. The history of stream flow measurements taken at the U.S.G.S. gauge No. 1606000 between 1911-1984 indicates that flows of 15 cfs or less occurred over the Wailua Falls, under natural conditions, 44% of the time or about 161 days of the year. As the project will divert flows from the North Fork into the South Fork, the frequency of low flows of 15 cfs or less will be reduced to 19% of the time or 70 days of each year.

Petitioner believes that the 15 cfs minimum bypass flow will maintain the scenic and visual qualities of the Wailua Falls.

Conformance With Special Permit Tests

26. The proposed use is not contrary to the objectives sought to be accomplished by the Land Use Laws and Regulations since certain portions of the project are on lands that are vacant and unsuited for agriculture. In addition, prime agricultural lands (lands rated "A" or "B" by the Land Study Bureau Master Productivity Rating System) that are disrupted during construction will be restored to their former use for sugarcane cultivation.

27. The desired use will not adversely affect surrounding properties.

28. The proposed use would not unreasonably burden public agencies to provide infrastructure improvements.

29. Although no unusual trends or conditions have arisen in this area since the district boundaries were established, the proposed project is in response to the State's Energy Functional Plans which promotes a shift from petroleum to indigenous renewable resources for the production of energy.

30. Portions of lands upon which the proposed use is sought are unsuited for uses permitted within the District and any prime agricultural lands that are disturbed during construction of the project will be restored to their former use for agricultural purposes.

Planning Commission Recommendation

At its meeting held on August 12, 1987, the Planning Commission voted to recommend approval of the above Special Permit, subject to the following conditions:

- "1. Requirements and conditions of the U.S. Army Corps of Engineers, State Department of Land and Natural Resources, Health Department, County Public Works Department shall be complied with and resolved with the respective agency(ies).
- "2. To minimize visual impacts as viewed from the Wailua Falls, the penstock shall be completely

shielded from public views during construction. The penstock shall also be completely buried as represented by the applicant.

- "3. Mass grading, grubbing or removal of vegetation, that will be visible from the Wailua Falls lookout shall not be allowed.
- "4. Results of the baseline study and post-project studies as required of the applicant by the Board of Land and Natural Resources shall also be submitted to the Planning Department.
- "5. The Planning Commission shall reserve the right to modify or impose further conditions to this permit should unacceptable impacts, as determined by the Planning Commission to the scenic quality of the Wailua Falls. (sic)
- "6. As represented by the applicant, all prime ag (sic) lands disturbed by the project shall be restored to its (sic) former use and condition.
- "7. Public access to the dam and reservoir shall be provided for recreational purposes. Details for such an access will be resolved between the applicant and Lihue Plantation Company either through an easement, license or permit system.
- "8. The applicant is advised that prior to and/or during construction and use, additional government

agency conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agency(ies)."

CONCLUSIONS OF LAW

The proposed use is an "unusual and reasonable" use as defined in Chapter 205-6, Hawaii Revised Statutes and the proposed use is not contrary to the objectives sought to be accomplished by the State Land Use Law to preserve, protect and encourage development of lands in the State for those uses to which they are best suited in the interest of the public health and welfare.

ORDER

IT IS HEREBY ORDERED that Special Permit Number 87-366 filed by Island Power Company, Inc. to establish a hydroelectric power plant on approximately 69.3 acres, situate within the State Land Use Agricultural District at Koloa, Kauai, Tax Map Key Numbers 3-9-02: Portion 1, Portion 12, Portion 20, Portion 24, Portion 25, and Portion 31, be approved subject to the following conditions as recommend by the Kauai Planning Commission and as amended by the Land Use Commission:

1. Requirements and conditions of the U.S. Army Corps of Engineers, State Department of Land and Natural Resources, Health Department, County Public Works Department shall be complied with and resolved with the respective agency(ies).

2. In order to minimize visual impacts as viewed from the Wailua Falls, the penstock shall be completely shielded

from public views during construction. The penstock shall also be completely buried as represented by the applicant.

3. Mass grading, grubbing or removal of vegetation, that will be visible from the Wailua Falls lookout shall not be allowed.

4. Results of the baseline study and post-project studies as required of the applicant by the Board of Land and Natural Resources shall also be submitted to the Planning Department.

5. The Planning Commission shall reserve the right to modify or impose further conditions to this permit should unacceptable impacts, as determined by the Planning Commission, occur to the scenic quality of the Wailua Falls. Such modification or imposition of further conditions to this permit shall be subject to LUC approval.

6. As represented by the applicant, all prime agricultural lands disturbed by the project shall be restored to their former use and condition except 8.3 acres of agricultural land which will be submerged.

7. Public access to the dam and reservoir shall be provided for recreational purposes. Details for such an access will be resolved between the applicant and Lihue Plantation Company either through an easement, license or permit system.

8. The applicant is advised that prior to and/or during construction and use, additional government agency

conditions may be imposed. It shall be the applicant's responsibility to resolve those conditions with the respective agency(ies).

9. That the project be completed and operating within two years of the approval of the Special Use Permit.

10. That the Petitioner indemnify and hold harmless the State of Hawaii and all of its agencies or employees from any lawsuit or legal action arising directly or indirectly out of the design, construction and use of the project, including the dam and transmission lines, whether the use be for generation and conveyance of electrical power or for recreational use by members of the public.

DOCKET NO. SP87-366 - ISLAND POWER COMPANY, INC.

Done at Honolulu, Hawaii, this 23rd day of November 1987

per motions on September 29, 1987 and November 16, 1987.

LAND USE COMMISSION
STATE OF HAWAII

By *J. P. Tachian*
TEOFILO PHIL TACBIAN
Chairman and Commissioner

By *Frederick P. Whittemore*
FREDERICK P. WHITTEMORE
Vice Chairman and Commissioner

By *[Signature]*
RICHARD B. F. CHOY
Commissioner

By *Sharon R. Himeno*
SHARON R. HIMENO
Commissioner

By *Robert S. Tamaye*
ROBERT S. TAMAYE
Commissioner

By *Toru Suzui*
TORU SUZUI
Commissioner

By *Lawrence F. Chun*
LAWRENCE F. CHUN
Commissioner

By *Everett L. Cuskaden*
EVERETT L. CUSKADEN
Commissioner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law, and Decision and Order was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by certified mail:

CERT. TOM H. SHIGEMOTO, Planning Director
County of Kauai
Planning Department
4280 Rice Street
Lihue, Kauai, Hawaii 96766

CERT. JEFF BURT, President
Island Power Company, Inc.
P. O. Box 625
Kalaheo, Kauai, Hawaii 96741

DATED: Honolulu, Hawaii, this 23rd day of November 1987.



ESTHER UEDA
Executive Officer

SP87-366 - ISLAND POWER COMPANY, INC.

A copy of the Land Use Commission's Decision and
~~Order was served by regular mail to the following on~~
November 23, 1987.

REAL PROPERTY DIVISION
County of Kauai
4193 Hardy Street
Lihue, Kauai, Hawaii 96766

LORNA NISHIMITSU, ESQ.
County Attorney
Office of the County Attorney
4396 Rice Street
Lihue, Kauai, Hawaii 96766