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UNITED STATES OF AMERICA

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CR10 00296 JMS

UNITED STATES OF AMERICA,	)	CR. NO. _____
	)	
Plaintiff,	)	
	)	INDICTMENT
vs.	)	
	)	16 U.S.C. §§ 703(a), 707(a)
KAUAI ISLAND UTILITY CO-OP	)	16 U.S.C. §§ 1538(a),
	)	1540(b)
Defendant.	)	
	)	

INDICTMENT

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

At all times relevant to this Indictment:

The Defendant

1. KAUAI ISLAND UTILITY CO-OP. (hereafter "KIUC") is a not-for-profit cooperative association incorporated in Hawaii on or about November 6, 1999. On approximately November 1, 2002, KIUC purchased for approximately \$215 million the Kauai Electric

Division of the Citizens Communications Company, including its lines, poles, over 3,000 streetlights, and other facilities. KIUC retained most of Kauai Electric Division's management team and staff, including the President/Chief Executive Officer ("CEO"). KIUC is the successor in interest of the Kauai Electric Division (hereafter "KIUC's predecessor").

2. Between approximately November 1, 2002, and at least the end of fiscal year 2009, KIUC was solvent and had increased its equity from approximately zero to over 15%.

#### The Birds

3. The Newell's Townsend's shearwater (*Puffinus auricularis newelli*) (hereafter "Newell's shearwater") is a seabird native only to the Hawaiian Islands.

4. Most of the world's Newell's shearwaters nest in burrows on inland mountains on the island of Kauai.

5. Young Newell's shearwaters leave these mountain nests at night and make their first flight to the sea in September through December each year. Adult Newell's shearwaters fly at night between the ocean and these nesting areas from spring through fall of each year. Newell's shearwaters use mountain air currents or physical drop offs to become airborne and fly at speeds of up to 50 miles an hour. If a Newell's shearwater falls to the ground in a location without such air currents or drop offs, it is usually unable to regain flight.



6. The Newell's shearwater is a threatened species protected under the Endangered Species Act. Title 50, Code of Federal Regulations, Section 17.11. Since its designation as a threatened species in 1975, over 30,000 Newell's shearwaters have been rescued after falling to the ground. Between 1993 and 2008, the population of fledgling Newell's shearwaters is estimated to have fallen by more than 70%.

7. The Newell's shearwater and the Laysan albatross (*Diomedea immutabilis*) are migratory birds protected under the Migratory Bird Treaty Act. Title 50, Code of Federal Regulations, Section 10.13.

The Laws:

8. The Endangered Species Act (hereafter "ESA") makes it unlawful for any person to knowingly take any threatened species within the United States, without a permit to do so. Title 16, United States Code, Section 1538(a)(1)(G) and Title 50, Code of Federal Regulations, Section 17.31.

9. The term "take" in the ESA includes harass, harm, wound and kill. Title 16, United States Code, Section 1532(19). The term "harm" means an act that actually injures or kills wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns. The term "harass" includes an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such

an extent as to significantly disrupt normal behavioral patterns. Title 50, Code of Federal Regulations, Section 17.3.

10. The term "person" in the ESA includes a corporation, partnership, trust, association or any other private entity. Title 16, United States Code, Section 1532(13).

11. "Take" caused incidental to, and not as the purpose of, the carrying out of an otherwise legal activity may be authorized under certain conditions by an incidental take permit. Such a permit may be issued pursuant to the submission of a conservation plan, commonly referred to as a Habitat Conservation Plan, that supports a finding that, among other things, the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings. Title 16, United States Code, Section 1539(a).

12. The Migratory Bird Treaty Act (hereafter "MBTA") makes it unlawful for any person, at any time, by any means or in any manner, to take or kill any migratory bird without a permit or as otherwise provided by regulation. Title 16, United States Code, Sections 703(a), 707(a).

13. The term "take" in the MBTA includes kill or wound. Title 50, Code of Federal Regulations, Section 10.12.

14. The term "person" in the MBTA includes any individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires. Title 50, Code of Federal Regulations, Section 10.12.



15. At no time did KIUC or its predecessor have a permit authorizing any takings of any threatened or migratory birds.

Knowledge

16. Since at least 1979 it has been publicly documented that some Newell's shearwaters collide with utility structures, including power lines. Any such collision may kill, wound, and/or otherwise harm or harass the bird, including causing it to fall to the ground where it may be killed by a car or a predator, or die of starvation.

17. It also has been publicly documented since at least 1979 that young Newell's shearwaters are attracted to bright lights. Such attraction often causes them to circle the lights, including but not limited to streetlights operated by KIUC on its power line poles, thus flying more passes across any nearby power lines and increasing the number of collisions with the power lines. This attraction also may cause the birds to fly into the light or other obstacles near the light, or to fly around the lights until they fall to the ground exhausted. A study published in 1985 showed that modifying or shielding lights so that they shine only downward, not horizontally or upward, significantly reduced this attraction.

18. In approximately March 1992, a citizen's lawsuit was brought under the ESA against KIUC's predecessor for alleged taking of seabirds, including specifically Newell's shearwaters. Also in approximately March 1992, KIUC's predecessor entered into a consent

decree resolving that lawsuit. Pursuant to the consent decree, the parties agreed to have a study conducted by an advisory panel of scientists, entitled "The Causes and Prevention of 'Fall Out' of Kauai's Seabirds." The study was to include an assessment of the impact, if any, of utility structures on Kauai's seabirds and recommendations on how to eliminate and mitigate the adverse effects, if any, of utility structures.

19. After Hurricane Iniki struck Kauai on approximately September 11, 1992, KIUC's predecessor re-built much of its power grid by stringing power lines on poles in a vertical array rather than in a horizontal configuration. Members of the advisory panel of scientists voiced concerns at the time of the re-building that this vertical, net-like, configuration would increase collisions between Newell's shearwaters and power lines. KIUC's predecessor also replaced streetlights destroyed by Hurricane Iniki with unshielded lights.

20. In December 1995, a two-volume study of Kauai's seabirds, including particularly the Newell's shearwater, was published and provided to KIUC's predecessor pursuant to the 1992 consent decree. Approximately 95% of the fifty downed birds analyzed in the report were discovered within 20 meters of power lines owned and operated by KIUC's predecessor, and subsequently by KIUC. The study concluded in part that during the period 1980 - 1993, "utility structures" on Kauai were responsible for the deaths of between 122 and 350 Newell's shearwaters each year.



21. The scientific advisory panel publicly concluded, based on the 1995 study results, that, "[i]t has been confirmed that birds are hitting utility structures and dying." It further concluded that "estimates of downing and mortalities . . . [are] high enough to cause concern about their effects on the population." The 1995 study also concluded that "Summer mortality is correlated with power line arrays where many lines are greater than 15.2 meters high and particularly where they cross major river valleys serving as flyways." The study noted that birds are disoriented by outdoor lights and fall or collide with structures in their path, and that autumn fallout is correlated with lighting.

22. The study recommended the following actions, among others, to reduce take of seabirds: (1) position wires horizontally rather than as a vertical array on poles; (2) use poles no more than 15 meters high where birds are present; (3) reroute power lines so that they are protected by bridges and tall trees; (4) explore effectiveness of marker balls and bird diverters; (5) bury power lines that cross key flyways, and; (6) shield streetlights. In the ensuing approximately seven years, KIUC's predecessor did not reposition existing wires, did not lower any existing poles, did not reroute any existing power lines so that they were protected by bridges or tall trees, did not bury any power lines, and failed to shield approximately 700 (or 23%), of its over 3,000 lights, including lights located in identified hot spots for seabirds. Some attempt was made to try bird diverters but it was

abandoned. KIUC's predecessor installed some marker balls.

23. In 1998, another study was published regarding power lines and seabirds on Kauai. The study recommended, among other things, that lines be arrayed horizontally, that large trees be planted to shield lines, and that lines currently located at river mouths on the coast be moved inland a few hundred meters. Neither KIUC nor its predecessor undertook any of these actions until October 2007 when it reconfigured a single stretch of line.

24. On approximately June 28, 2001, the U.S. Fish and Wildlife Service (hereafter "USFWS") sent a letter to KIUC's predecessor urging it, with specific references to relevant studies, to apply for an incidental take permit under the ESA for its takings of seabirds.

25. On approximately March 29, 2002, the USFWS again urged KIUC's predecessor, in writing, to initiate the process to obtain an incidental take permit and to initiate an interim conservation strategy "without delay."

26. On approximately May 23, 2002, the CEO of KIUC's predecessor, and subsequently of KIUC, sent a letter to the USFWS in which he acknowledged that Newell's shearwaters "have been subject to 'fallout' due to light attraction and collisions with structures, including electrical power lines."

27. On October 29, 2002, at the initiative of the USFWS, KIUC's predecessor signed a Memorandum of Agreement (hereafter "the 2002 MOA") with the USFWS. The 2002 MOA was expressly binding on



KIUC upon its anticipated acquisition of KIUC's predecessor, which occurred three days later. The 2002 MOA was intended to assist KIUC in minimizing and mitigating its takings of the Newell's shearwater and another seabird, and to facilitate its submission of a Habitat Conservation Plan ("HCP") and acquisition of an incidental take permit.

28. The 2002 MOA expressly anticipated that the HCP would be completed by May 1, 2004. The 2002 MOA provided that during the term of the MOA the USFWS would exercise its discretionary authority and not prioritize an enforcement referral for any unauthorized incidental take of such birds by the utility unless it committed a material breach of the 2002 MOA.

29. The 2002 MOA specified certain Interim Conservation Measures to be taken by KIUC and its predecessor while work on the incidental take permit was ongoing. The measures included inventorying and shielding all remaining unshielded lights, installing marker balls on key lines, and conducting certain on-the-ground management actions intended to offset take by KIUC facilities during the period covered by the 2002 MOA.

30. The 2002 MOA acknowledged the existence of seven power line locations (referred to as "hot spots") known to be heavily used by Newell's shearwaters and other seabirds. These seven hot spots included Wailua at the Wailua River valley, Kealia at the Kapa'a Stream valley, Ele'ele at the Hanapepe River valley, and Waimea at the Waimea River valley. KIUC has failed to modify

any of the lines across these locations, except for a stretch of line at Kealia that it reconfigured in October 2007. However, it did shield affiliated streetlights and place a total of 5 marker balls on three of the lines pursuant to express requirements of the 2002 MOA.

31. By approximately June 2003, KIUC, pursuant to the requirements of the 2002 MOA, had identified some 700 unshielded lights out of its approximately 3,049 streetlights, and shielded them.

32. Pursuant to the 2002 MOA, KIUC's consultants identified three of the hot spots as still posing risks to seabirds after the required light shielding was complete: (1) the area on the west side of Kuhio Highway adjacent to Kealia Beach; (2) Wailua Stream at the Mouth of the Wailua Valley; and (3) Ele'ele along Kaumualii Highway. In approximately May 2003, pursuant to the 2002 MOA, KIUC installed a total of five marker balls on these lines.

33. On or about June 1, 2004, the 2002 MOA expired following a thirty-day extension proposed by the USFWS and agreed to by KIUC. As of June 1, 2004, KIUC had not submitted an HCP or incidental take permit application and had not conducted any mitigation actions, except that in the fall of 2003 it funded for the first time the Save Our Shearwater ("SOS") program. For over 20 years the SOS program had been paid for and run by the State of Hawaii to rescue downed seabirds, including those downed by KIUC's



structures. In addition to helping to minimize KIUC's takings, this program, when funded by KIUC, also may have mitigated some of KIUC's takings to the extent that it rescued birds downed from causes other than KIUC's facilities.

34. On or about October 11, 2004, witnesses observed one live Newell's shearwater collide with a KIUC power line near Kilauea Park and fall to the ground. The bird was recovered and found to be injured. KIUC was notified of this witnessed collision by December 8, 2004.

35. Between approximately October 13, 2004, and October 19, 2004, two live and one dead Newell's shearwaters were found downed near an array of KIUC power lines that cross the Wailua River valley, and were reported to KIUC through the SOS program.

36. On or about November 26, 2004, one dead Newell's shearwater was found downed near power lines in the Waimea River valley, and reported to KIUC through the SOS program.

37. Beginning in approximately 2003 and continuing until at least 2007, a consultant for KIUC compiled and maintained a database through the SOS program recording downed birds that were variously collected since about 1978 and, where available, the locations where they were found, including near and under power lines and related structures.

38. On approximately December 20, 2004, KIUC entered into a second Memorandum of Agreement with the USFWS (hereafter "2004 MOA") in which it agreed to take certain actions to mitigate

its takings of Newell's shearwaters, primarily operating the SOS program and contributing some funds for a limited predator control program. The 2004 MOA again provided that, during the term of the MOA, the USFWS would exercise its discretionary authority and not prioritize an enforcement referral for any unauthorized incidental take of such birds by KIUC unless it committed a material breach of the 2004 MOA.

39. KIUC, through its Chairman of the Board of Directors and others, had knowledge no later than approximately April 2005, that the Avian Power Line Interaction Committee, a utility industry group, had published Avian Protection Plan Guidelines for the development and implementation of compliance plans to assist utilities in avoiding bird collisions and electrocutions and thus avoid violations of the MBTA, ESA and other bird-related statutes. These guidelines incorporated by reference two previous guidance documents, "Mitigating Bird Collisions with Power Lines: The State of the Art in 1994" and "Suggested Practices for Raptor Protection on Power Lines: The State of the Art in 1996." These industry guidelines dictate that "[m]odification of existing facilities is necessary when dead and/or injured protected birds are found, where high-risk lines are identified, or concerns of legal compliance are at issue."

40. On or about May 16, 2005, one dead Newell's shearwater was found downed near KIUC powerlines in the Waimea River valley, and reported to KIUC through the SOS program.



41. On or about June 1, 2006, the 2004 MOA expired without KIUC having submitted a final HCP or an application for an incidental take permit.

42. In approximately November 2006, KIUC stated in writing to the USFWS, for purposes of estimating the take that would need to be authorized by an incidental take permit, that, in 2005 alone, its electrical lines and associated structures resulted in the take of 31 to 88 Newell's Shearwaters. KIUC further estimated the take caused by KIUC power lines during 1980 -1993 at 122 to 350 birds per year.

43. In early 2007, KIUC began to modify and shield lights at its Port Allen facility following: (1) a 2003 notification from USFWS that the lights presented a threat to Newell's shearwaters; (2) a 2005 notification that Newell's shearwaters had been observed circling KIUC lights at the Port Allen Facility; (3) KIUC's previously unfulfilled August 2005 commitment to the USFWS to take corrective action regarding those lights; and, (4) the discovery in October 2006 of approximately ten Newell's shearwaters downed at or near KIUC's Port Allen facility.

44. On approximately June 29, 2007, KIUC issued a press release announcing that it had been notified on March 16, 2007, that it was the target of a federal investigation into the killing of protected seabirds.

45. In approximately October 2007, KIUC reconfigured a single stretch of power line across Kealia at the Kapa'a Stream

valley from a vertical to a horizontal array to reduce its takings. This location was part of one of the hot spots identified in the 1995 study that recommended horizontal rather than vertical line configurations at such hot spots. This action, the belated modification of lights at Port Allen, and continuing to fund the SOS program are the only minimization actions KIUC has taken since the expiration of the second MOA in June 2006.

46. Although additional mitigation activities were identified for KIUC, including on-the-ground colony management to improve reproduction numbers, KIUC has declined to take any further mitigation actions since the expiration of the second MOA in June 2006.

47. On approximately October 31, 2007, KIUC submitted a final long-term (50 year) HCP and an incidental take permit application in which it estimated that in 2006 KIUC structures took between 88 and 147 Newell's shearwaters. In early 2008, the USFWS informed KIUC that the incidental take permit application failed to meet issuance criteria in at least three areas.

48. On approximately August 3, 2009, KIUC submitted a draft short-term (5 year) HCP and an incidental take permit application in which it requested a permit authorizing the takings of up to 180 Newell's shearwaters each year (125 non-lethal takings and 55 deaths). On approximately September 9, 2009, the USFWS informed KIUC that, among other issues, the proposed mitigation would not fully mitigate the anticipated takings.



49. On or about December 29, 2009, a Laysan albatross on which there was a leg band, was electrocuted on KIUC power lines, causing a small power outage. KIUC staff found the bird and documented the electrocution, but did not notify authorities. KIUC has not modified or taken any action regarding the lines or poles found to be associated with this documented electrocution and does not have an Avian Protection Plan.

Takes - Power Lines at or near Kealia Beach

50. Between approximately June 9, 2005, and July 9, 2005, at least one live and four dead Newell's shearwaters were found downed near an array of KIUC power lines at Kealia Beach. KIUC's consultant was notified of these takings via electronic mail on or about June 22, 2005.

51. On or about August 5, 2006, one dead Newell's shearwater was found downed near KIUC power lines inland of Donkey Beach, near Kealia Beach

52. Between approximately October 15, 2006, and October 17, 2006, two dead Newell's shearwaters were found downed near KIUC power lines at Kealia Beach.

53. On or about May 18, 2007, one dead Newell's shearwater was found downed near an array of KIUC power lines at Kealia Beach.

54. On or about June 17, 2007, one dead Newell's shearwater was found downed near an array of KIUC power lines at Kealia Beach.

55. On or about June 27, 2007, one dead Newell's shearwater was found downed in the vicinity of an array of KIUC power lines at Kealia Beach.

56. On or about August 5, 2007, one dead Newell's shearwater was found downed near KIUC power lines inland of Donkey Beach, near Kealia Beach.

57. On or about August 16, 2007, one dead Newell's shearwater was found downed in the vicinity of an array of KIUC power lines at Kealia Beach.

58. On or about September 6, 2007, one dead Newell's shearwater was found downed near KIUC power lines inland of Donkey Beach, near Kealia Beach.

Takes - Power Lines in the Wailua River Valley

59. On or about July 3, 2005, one dead Newell's shearwater was found downed near an array of KIUC power lines that cross the Wailua River valley.

60. On or about October 21, 2006, one dead Newell's shearwater was found downed near an array of KIUC power lines that cross the Wailua River valley.

61. On or about June 16, 2007, one dead Newell's shearwater was found downed near an array of KIUC power lines that cross the Wailua River valley.

62. On or about October 18, 2009, one dead Newell's shearwater was found downed near an array of KIUC power lines that cross the Wailua River valley.



Takes - Power Lines Near Ele'ele

63. On or about July 16, 2005, one dead Newell's shearwater was found downed near a KIUC power line pole in Ele'ele.

64. On or about October 21, 2006, a witness observed a live Newell's shearwater collide with a KIUC power line near Hanapepe Stadium just southwest of Ele'ele and fall to the ground. The bird was recovered and found to be unfit for flight at that time.

65. On or about October 21, 2006, one live Newell's shearwater was found downed near KIUC power lines just southwest of Ele'ele.

66. On or about June 29, 2007, one dead Newell's shearwater was found downed near a KIUC power line pole in Ele'ele.

67. On or about July 18, 2007, one dead Newell's shearwater was found downed near KIUC power lines in Ele'ele.

68. On or about August 13, 2007, one dead Newell's shearwater was found downed near KIUC power lines in Ele'ele.

69. On or about October 19, 2007, one dead Newell's shearwater was found downed near KIUC power lines just east of Ele'ele.

Takes - Power Lines in the Waimea River Valley

70. On or about October 30, 2005, two dead Newell's shearwaters were found downed near KIUC powerlines in the Waimea River valley.

Takes - Power Lines in Kapa'a

71. On or about October 19, 2005, one dead and one live Newell's shearwaters were found downed near KIUC powerlines near Kapa'a Park.

72. Between approximately October 13, 2006, and October 20, 2006, six dead Newell's shearwaters were found downed near KIUC power lines in Kapa'a.

73. On or about October 21, 2009, one dead Newell's shearwater was found downed near a power pole in Kapa'a.

Takes - Power Lines across from Kauai Community College

74. On or about October 22, 2006, one dead Newell's shearwater was found downed near a power pole on the Kaumualii Highway across from Kauai Community College.

75. On or about October 17, 2009, one dead Newell's shearwater was found downed near a power pole on Kaumualii Highway across from Kauai Community College.

Takes - Lighting at the Port Allen Facility

76. In approximately December 2003, KIUC was reminded by the USFWS that the unshielded lights at its Port Allen facility presented a threat to Newell's shearwaters.

77. After being informed of Newell's shearwaters observed circling KIUC lights at its Port Allen facility, KIUC agreed in approximately August 2005 to take corrective action regarding unshielded lights still being used at its Port Allen facility.



78. As of October 2006, KIUC had not accomplished the agreed-upon corrective action at the Port Allen facility. The physical modifications were not commenced until 2007.

79. Between approximately October 17, 2006, and October 25, 2006, approximately nine Newell's shearwaters were found downed at KIUC's Port Allen facility.

80. Between approximately October 29, 2008, and October 29, 2009, approximately six Newell's shearwaters were found downed at or near KIUC's Port Allen facility.

Takings - Other KIUC Power Lines and Lighted Facilities

81. On or about May 30, 2006, one dead Newell's shearwater was found downed near a power pole south of Anahola.

82. On or about October 15, 2007, one dead Newell's shearwater was found downed near a power pole just west of Puhi.

COUNTS ONE THROUGH NINE

83. Paragraphs 1 through 82 are incorporated herein by this reference.

84. On or about the dates set forth below, in the District of Hawaii, the defendant KAUAI ISLAND UTILITY COOPERATIVE, did knowingly and unlawfully, that is, without permission from the U.S. Department of the Interior, take a threatened species, specifically, at least one Newell's Townsend's shearwater (*Puffinus auricularis newelli*), as set forth below:

Count	Date	Location
1	June 1, 2005 - October 1, 2007	at or near Kealia Beach
2	July 1, 2005 - November 1, 2009	Wailua River valley
3	July 1, 2005 - November 1, 2007	near Ele'ele
4	October 1, 2005 - November 1, 2005	Waimea River valley
5	October 1, 2005 - November 1, 2009	Kapa'a
6	October 1, 2006 - November 1, 2009	Kaumualii highway across from Kauai Community College
7	October 1, 2006 - November 1, 2009	KIUC's Port Allen facility
8	May 30, 2006	near power pole #103, south of Anahola
9	October 15, 2007	near a power pole just west of Puhi

All in violation of Title 16, United States Code, §§ 1538(a)(1)(G) and 1540(b)(1) and Title 50, Code of Federal Regulations, § 17.31(c) and (a).

#### COUNTS TEN THROUGH NINETEEN

85. Paragraphs 1 through 82 are incorporated herein by this reference.

86. On or about the dates set forth below, in the District of Hawaii, the defendant KAUAI ISLAND UTILITY COOPERATIVE, did, without being permitted to do so as required by law, take migratory birds, specifically Newell's shearwaters (*Puffinus auricularis newelli*) and other species of migratory birds, as set forth below:



Count	Date	Species and Location
10	June 1, 2005 - October 1, 2007	at least one Newell's shearwater at or near Kealia Beach
11	July 1, 2005 - November 1, 2009	at least one Newell's shearwater at the Wailua River valley
12	July 1, 2005 - November 1, 2007	at least one Newell's shearwater near Ele'ele
13	October 1, 2005 - November 1, 2005	at least one Newell's shearwater at the Waimea River valley
14	October 1, 2005 - November 1, 2009	at least one Newell's shearwater in or near Kapa'a
15	October 1, 2006 - November 1, 2009	at least one Newell's shearwater near Kaumualii highway across from Kauai Community College
16	October 1, 2006 - November 1, 2009	at least one Newell's shearwater at KIUC's Port Allen facility
17	May 30, 2006	at least one Newell's shearwater near power pole #103, south of Anahola
18	October 15, 2007	at least one Newell's shearwater near a power pole just west of Puhi
19	December 29, 2009	one Laysan albatross

All in violation of 16 U.S.C. §§ 703(a), 707(a).

DATED: May 19, 2010, at Honolulu, Hawaii.

A TRUE BILL

/s/Foreperson

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FOREPERSON, GRAND JURY

IGNACIA MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

By: Elinor Colbourn  
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UNITED STATES OF AMERICA v. KAUAI ISLAND UTILITY CO-OP;  
Cr. No. \_\_\_\_\_  
INDICTMENT