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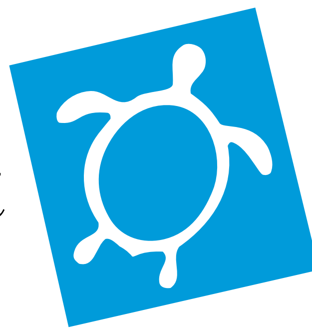
Environment  Hawai'i

a monthly newsletter

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The One That Got Away

When the feds were giving fishers payouts for their lost fishing grounds in the Northwestern Hawaiian Islands, bottomfish fishers scored well, as did lobster fishermen who hadn't visited the area in years.

But others who regularly trolled the same waters were left high and dry – and are now suing in federal court. Their complaints allege broken promises, unequal treatment, and all-round general shabby treatment by the agency that regulates fishing in federal waters. Their story is the lead-in to our extended coverage of the Western Pacific Fishery Management Council's latest actions.

In this issue, we also review some of the more significant legislation that made it into law this year and we report on the scolding the Agribusiness Development Corporation received from Sen. Donovan Dela Cruz.

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Fishermen Seek Belated Compensation For Exclusion from Marine Monuments

Two commercial fishermen who say they were displaced by the establishment of marine national monuments in the Northwestern Hawaiian Islands (NWHI) and Pacific Remote Island Areas (PRIAs) are finally speaking out against the disbursement of millions of dollars in compensation to former NWHI lobster fishers who had been banned from the area several years before either monument was created.

They, too, should have been compensated, they argue. But according to federal attorneys, their arguments have come too late.

In 2007, Congress appropriated $6.7 million to compensate NWHI bottomfish and lobster fishers who were going to be displaced when commercial fishing ended in the monument on June 15, 2011. Most of that money, $4.3 million, went to 15 former lobster fishers in late 2009/early 2010. None of it went to Joseph Dettling, a commercial fisher and pelagic troller who had fished the NWHI since the 1990s under a state permit.

Although the appropriation was narrowly construed to compensate bottomfish and lobster fishers only, Dettling argues in court documents that National Oceanic and Atmospheric Administration staff told him he could be compensated for being shut out of the Papahanaumokuakea Marine National Monument. He also argues NOAA staff made similar assurances regarding the establishment in 2009 of the Pacific Remote Island Areas monument, where he and fellow commercial fisher and pelagic troller Robert Cabos had long fished.

On June 14, 2011, they sued NOAA and the U.S. Department of Commerce in U.S. District Court for $2.4 million. A hearing had been scheduled for August 7, but attorneys for the parties have agreed to reschedule.

Dettling and Cabos argue they are entitled to compensation for damages caused by the establishment of the Papahanaumokuakea monument and the PRIA monument, both of which prohibit commercial fishing.

Dettling seeks $1.2 million in compensation for lost fishing grounds in the NWHI and $300,000 for the PRIAs, which include Palmyra and Johnston atolls and Kingman reef. Cabos seeks $900,000 for lost grounds in the PRIAs.

Compensating fishermen displaced by federal fishing regulations is nothing new. Over the past several years, with court-mandated closures and the establishment of the NWHI Coral Reef Ecosystem Reserve in 2000 and the Papahanaumokuakea monument in 2006, the National Marine Fisheries Service has doled out more than $12 million in disaster relief to federally permitted NWHI fishers and Hawai'i longliners. And at the Western Pacific Fishery Management Council's meeting in June, executive director Kitty Simonds suggested that the governor of American Samoa could make compensation of displaced fishermen "part of the package," if and when the Fagatele Bay National Marine Sanctuary is expanded.

Dettling and Cabos appear to have fallen through the cracks, and their exclusion, they argue, has been intentional.

The Run-Around

Shortly before President George W. Bush established the NWHI monument in June 2006, the Western Pacific Fishery Management Council (Wespac) was in the process of setting a cap (180,000 pounds) and issuing permits for non-longline catches in what would have been the NWHI National Marine Sanctuary. At the time, bottomfishers and commercial pelagic trollers were allowed to fish in the waters of the NWHI Coral Reef

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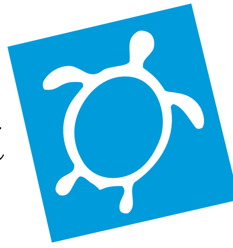
Environment  Hawai'i

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NEW AND NOTEWORTHY

Waikaku'u Subdivision OK'd: The Hawai'i County Board of Appeals has given the green light to a planned 14-lot subdivision in an old-growth 'ohi'a forest in South Kona. At its July 13 meeting, the board voted 6-0 (with one recusal) to deny the appeal of Richard and Patricia Missler of the planning director's approval of the subdivision.

In a statement, Patricia Missler said she and her husband believed that they had presented evidence and testimony during the five hearings of this contested case showing that Planning Director Bobbi-Jean Leithead-Todd's decision was "in fact erroneous, illegal, capricious, and an abuse of discretion." She indicated that they are considering an appeal of the board's decision to Circuit Court.

In the meantime, County Council member Brenda Ford has introduced a measure that would allow the county to purchase the land through its Open Space Council.

"We do not want to stop our fight to protect this jewel," Patricia Missler said. "Thousand-year-old trees are worth fighting for."

One issue that was raised by the Misslers' attorney, Michael Matsukawa, was a possible conflict of interest involving board member Dwayne Yoshina and Kenneth Goodenow, one of the attorneys who played a role in representing the landowners. Goodenow participated in the contested case hearing through the end of March, when he left the Carlsmith Ball firm to campaign for a seat on the County Council. A report in *West Hawai'i Today* stated that Yoshina was "consulting on Goodenow's campaign."

In a July 9 letter to the Board of Appeals chairman, Rodney Watanabe, Matsukawa stated that the relationship appeared to run up against the section of the County Charter intended to discourage conflicts of interest: "It shall constitute a conflict of interest for … officers of the county to … [engage] in any … transaction or activity … which might reasonably tend to be incompatible with the proper discharge of their official duties or to impair their independence of judgment in the performance of their official duties."

ATST Recommendations: The hearing officer in the protracted contested case hearing over the proposed construction of the Advanced Technology Solar Telescope on Haleakala has recommended that the state Board of Land and Natural Resources issue a Conservation District Use Permit (CDUP) for the project.

RENDERING: NATIONAL SOLAR OBSERVATORY

A rendering of the ATST at the Reber site.

On July 16, hearing officer Lane Ishida — the third to be appointed to the case — submitted his proposed findings of fact, conclusions of law, and decision and order to the Land Board. That same day, the Land Board issued a minute order giving parties to the contested case — the University of Hawai'i (the applicant) and Kilakila 'O Haleakala (the petitioner) — until August 23 to file their exceptions. The board has scheduled oral arguments for September 14 at 1 p.m. in Honolulu.

Ishida recommended that, as a condition of the CDUP, the university submit grading and construction plans to the Land Board chair or designated representative for approval. He also recommended that most of the mitigation set forth in the project's environmental impact state be incorporated into the CDUP and that the permit state that it does not convey any vested rights or exclusive privilege.

To protect traditional and customary rights, Ishida recommended that the permit require the university to allow access to two ahu, "to the extent feasible and safe," during and after construction of the ATST.

The original hearing officer in the case, Steven Jacobson, was discharged earlier this year by the Land Board, which found that his communication with the university regarding political pressure to expedite a decision was illegal.

Quote of the Month

"It's sort of like termites in your house.
You let it go little by little,
but eventually, you're going
to have to deal with it."

— Jeffrey Polovina, fisheries scientist, on climate change

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LEGISLATURE

New Laws, But Few Protections For Environment, Natural Resources

The 2012 Legislature may not have passed any real blockbuster environmental bills, but several that did find their way into law represent important developments (or setbacks) for the long-term quality of the state's natural resources and environmental health.

Here's a short synopsis of several that represent the best and worst of the Legislature's actions this year:

A Ban on Transport of Deer That Makes Little Sense

Prompted by the presence of a substantial population of axis deer on the Big Island of Hawai'i and the recognition that existing law had no provision to stop further introductions, Senate Bill 3001 was introduced to make the practice illegal. Sponsors included Big Island senators Gil Kahele, Josh Green, and Malama Solomon.

As introduced, the bill would have applied to any "live game mammal." However, after a hearing before the House Water, Land, and Ocean Resources Committee, chaired by Big Island Representative Jerry L. Chang, it was amended to apply merely to feral deer – which were further defined to mean animals that were not captured. In later hearings, this change was opposed in testimony from a number of different organizations, including the Coordinating Group on Alien Pest Species (CGAPS), the O'ahu Invasive Species Committee, and The Nature Conservancy of Hawai'i. As OISC noted, the amended bill "says that only un-captured deer are prohibited from being moved. This essentially allows a person [to] capture deer on one island and release it on another – thereby starting a new feral population."

In other words, so long as a deer is captured, anyone possessing it cannot be charged under this new law, since the animal is now, by definition, not feral. Thus, anyone who is caught transporting a deer from, say, Maui to the Big Island cannot be convicted of transporting a wild or feral deer, since the deer being transported would presumably have to be in captivity for the duration of the transport.

In the unlikely event that anyone is caught red-handed (it is virtually impossible to imagine how this would occur), they would face penalties far more severe than those for other wildlife violations. First-time offenders face a mandatory fine of not less than $10,000 "and payment of any costs incurred in the eradication of any deer and the deer's progeny… or by imprisonment of not more than one year, or both." Second-time violators are to be fined at least $15,000, pay for eradication costs, and face up to a year's imprisonment as well. Third or subsequent violations are to be penalized with a minimum $25,000 fine, payment of eradication costs, and possible imprisonment of up to a year.

Despite the patently absurd language on captive animals, the bill underwent no further substantial amendments. It was signed by Governor Neil Abercrombie on June 21, becoming Act 144 of the 2012 Legislature.

Axis deer

No Citizen-Suit Provision For Habitat Conservation Violations

As with the bill intended to ban inter-island transport of game mammals, Senate Bill 2378 started off with a proposal to beef up enforcement of resource-protection provisions. By the time it made it to the governor's desk, however, it represented a giant step backward.

As introduced, Senate Bill 2277 (sponsors were Mike Gabbard and Maile Shimabukuro) would have done primarily two things. First, it would have added a cost-recovery provision to the citizen-suit provision of the state law addressing protection of endangered species (Chapter 195D, Hawai'i Revised Statutes) and would have made such legal action possible against a person as well as state or county agencies. Second, it would have removed the sunset date on the ability of the Board of Land and Natural Resources to adopt habitat conservation plans. (At the time of the bill's introduction, the Land Board's power to adopt such plans would have expired June 30.)

The bill was welcomed by Land Board chairman William Aila, who suggested an amendment that would have added a further section, allowing parties to challenge the adoption of a habitat conservation plan (HCP) through the contested-case hearing process. The changes were supported by Earthjustice attorney David Henkin, who noted that his organization had worked with Aila's department as well as the state attorney general in drafting the proposed language.

Testimony in support of the bill was submitted also by the Sierra Club, Conservation Council for Hawai'i, and Life of the Land.

The Land Use Research Foundation of Hawai'i, the Pacific Resource Partnership, and the Hawai'i Farm Bureau all supported removal of the sunset provision for habitat conservation plans, but strenuously objected to any expansion of the citizen-suit provision.

Not surprisingly, the cost-recovery language was dropped like a hot potato almost immediately as the bill made its way through the committee hearing process. When the Senate Committee on Judiciary and Labor

heard the bill, it approved including language proposed by Aila concerning contested-case challenges to HCPs, but then removed the existing provision in Chapter 195D (195D-27) that allowed citizens to petition for a contested-case hearing on alleged violations to HCPs. The committee, chaired by Clayton Hee, explained in its report that this procedure "is unworkable."

As the bill made it through the House, the deletions proposed by Hee's committee stood, but the added language allowing for contested-case challenges to HCPs was removed. In its final form, therefore, the measure, far from strengthening the enforceability of HCPs, weakens it by taking away from citizens their ability to enforce HCPs through the contested-case procedure and denies them the opportunity to challenge their adoption in the first place.

Only the language that rolled back the sunset date on the Land Board's power to adopt HCPs remained; under what is now Act 145, this will expire June 29, 2017.

Maui County Gets OK For Vacation Rentals On Agricultural Lands

Senate Bill 2341 (sponsored by Kalani English) initially opened the door to vacation rentals of up to 30 days on land throughout the state's Agricultural District, even in the highly productive class A and B lands. It also would have deleted the requirement that any agricultural tourism operations be associated with a working farm or ranch.

DOA administrator Russell Kokubun opposed the measure, warning it "will cause the proliferation of vacation rentals and related uses and activities that are presently not permissible within the Agricultural District."

"It will cause agricultural land values to rise," he continued, "not because of their agricultural utility, but because of their value for vacation rental use. Inflated land values, in turn, will make entry into farming and continuation of existing farms difficult and less attractive. Nuisance complaints about agricultural activities (noise, dust, odors) by non-agricultural visitors in overnight accommodations are likely to increase."

The City and County of Honolulu's Department of Planning and Permitting opposed the bill ("The language could be interpreted to refer to hotels," wrote DPP director David Tanoue). The Office of Planning also weighed in with objections (Jesse Souki, OP director, noted the bill was contrary to "the Administration's New Day Plan to stimulate an agricultural renaissance in Hawai'i that would increase production and consumption of locally produced foods and increase food and energy security for the islands").

Maui County Council Member Don Couch submitted email testimony (via his county email account) as an individual favoring the measure.

The Hawai'i Farm Bureau Federation partly supported the bill, provided that overnight accommodations in association with bona fide ag operations be governed by county ordinance.

Glenn Martinez, president of Hawai'i Farmers Union United, director of Hawai'i Aquaculture and Aquaponics Association, and owner of Olomana Gardens, a certified organic farm, recommended that the length of allowed stays be increased to 180 days, so long as the visits were related to "approved and accepted programs for farm interns such as the international and American WWOOFer program (World Wide Opportunities on Organic Farms)."

Round Two of the Senate hearings opened with a proposed restriction of stays to 21 days. This wasn't good enough for Kokubun, who raised questions about how the measure could be enforced and who also noted that the link between ag activities and tourism was still missing. The OP also registered its objections once more.

But Andrew Rayner of the Hana Business Council weighed in by email, favoring the measure and saying that the prohibition on short-term stays on Ag lands only served "to increase public employment and multiply the compliance hurdles for small business people." A dozen or so Maui residents (many from the Hana area) expressed similar views.

Ron Weidenbach, president of the Hawai'i Aquaculture and Aquaponics Association, said his group "strongly supports the intent" of the bill (contrary to Martinez's earlier testimony). Council member Couch again endorsed the measure "as an individual member of the Maui County Council." He was joined by the Hawai'i Association of Realtors and the Realtors' Association of Maui. An unlikely supporter was found in the Windward Ahupua'a Alliance, with its president, Shannon Wood, saying Hawai'i needed to have alternative accommodations, such as "small footprint inns out in the country."

The Sierra Club, Hawai'i's Thousand Friends, Keep it Kailua, and a handful of individuals made up a weak choir of dissent.

On March 30, the bill underwent its final public hearing. By this time, it had been revised so that the short-term stays would be allowed in only counties with populations of between 250,000 and 500,000 people, and then, only when the county had adopted ordinances governing the activity.

Kokubun was not appeased, even though, as he (and others) pointed out, with the population restriction inserted into this draft, the bill applied to exactly no county in the state. He went on to note that in 2006, when the Legislature passed a bill allowing certain types of agricultural tourism, it "specified in detail the content of the county ordinances, and in addition to that, enabled the counties to require an environmental assessment as a condition to any proposed agricultural tourism use and activity…. We believe the addition of overnight accommodations dramatically alters the concept of agricultural tourism as originally intended, and if not carefully regulated, may cause the agricultural tourism activity to be the primary, rather than secondary, use of the agricultural land."

In the end, the conference committee reported out a measure that applied only to a county "that includes at least three islands" and which has adopted ordinances regulating agricultural tourism activities. The effort to disengage tourism from "bona fide agricultural activities" failed, so any permitted short-term ag stays now must be in association with an active farm operation.

On June 25, Governor Abercrombie informed the Legislature of his intent to veto the bill. But on July 10, with no veto by then, the bill became Act 329 of the 2012 Legislature.

Clarification On Claims To Accreted Lands

Back in 2003, the Legislature passed Act 73, which changed the definition of public lands to include oceanfront land that had accreted in front of private property. In 2005, landowners who wanted to claim such land as their own filed a class-action lawsuit, contending that Act 73 represented an unconstitutional taking. The Hawai'i Intermediate Court of Appeals generally agreed with the landowners in 2009, finding that the act was a taking insofar as it applied to privately owned land that had accreted before May 20, 2003 (when the law took effect), but that it did not represent a taking with regard to any land that may have accreted after that date.

House Bill 2591 was introduced (by Speaker Calvin Say, by request – presumably of the Department of Attorney General) to clarify Act 73, asserting that the state is owner of all lands accreted after May 20,

2003, and not making any claims to land accreted before that.

It seems as though few people disagreed with the intent of the bill, which was one of the few to make it across the finish line – as Act 56 – without any meaningful changes.

(*Environment Hawai'i* reported on the decision of the Intermediate Court of Appeals in our February 2010 edition: "Appellate Court Decision on Accreted Land Leaves State, Landowners Seeking Clarity.")

Easing the Way For Geothermal Development

Senate Bill 3003 (eight sponsors, including Kahele, Green, Solomon, and Donovan Dela Cruz), is an effort to streamline efforts to explore for and develop the state's geothermal resources. As originally written, it would have exempted exploratory drilling for geothermal resources from any need to comply with Chapter 343, the state's environmental disclosure law (requiring preparation of environmental assessments or environmental impact statements). That provision was stricken during the course of Senate hearings.

The bill – now known as Act 97 – amends the state Conservation District law (Chapter 183C) to make both geothermal exploration and geothermal development permissible uses in all subzones of the state Conservation District. The state Land Use Law (Chapter 205) is also amended to allow geothermal resources exploration and development in the three other categories of land use (Agricultural, Rural, and Urban). The earlier requirement (in the now-repealed Section 205-2) that these activities only occur in designated geothermal resource subzones is eliminated.

Testimony generally in support was presented by the departments of Land and Natural Resources and Business, Economic Development, and Tourism. In its comments on the bill, however, the University of Hawai'i's Environmental Center expressed its surprise that "this sweeping legislative proposal does not reference any research findings or policy analyses that explain why it might be useful to exempt geothermal resource exploration and development from the existing processes for land use designation and environmental review."

Two decades ago, geothermal development on the Big Island was vigorously opposed by many Native Hawaiian groups. This year, several prominent Native Hawaiians spoke out strongly in favor of the bill specifically and geothermal development generally. Patricia Brandt, testifying on behalf of Innovations Development Group ("a Hawai'i based renewable energy development corporation owned by Native Hawaiians," she stated), said the bill was "badly needed in order to facilitate the immediate expansion of the state's geothermal public trust assets." Mililani Trask, representing Indigenous Consultants, LLC, repeated Brandt's testimony, almost word for word, on the need for the measure.

The Sierra Club, alone among environmental groups, submitted testimony in opposition. Exploration could hardly be considered a "minor" use of land, wrote its executive director, Robert Harris, since staging alone could "require the clear cutting of approximately one acre of land."

"In addition," he wrote, "roads might need to be built to allow for the trucks to transport the large drilling bits to the exploration area (reportedly around 55 meters long). In sensitive, pristine forests this type of excavation plainly is not 'minor'."

"Moreover," he continued, "there is a potential to contaminate the aquifer. To the extent that drilling penetrates drinking water resources, it is worthwhile to ensure the potential risks are examined and considered before approving the project."

The Office of Hawaiian Affairs also opposed the bill, objecting to the blanket categorization of geothermal exploration and development as permissible uses in all Conservation District subzones. A number of individuals testified, almost all opposed.

A 'Clarification' Of Last Year's SMA Law

In 2011, the Legislature passed a bill that was intended to ensure that any Special Management Area permits required for coastal developments were processed and issued before final subdivision approval is granted by the counties.

That measure, Act 153 of the 2011 Legislature, excluded "final subdivision approval" from the list of actions that would be considered as "development." As introduced, Senate Bill 2335 (now Act 239) would have changed that to "tentative or preliminary subdivision approval." Sponsors in the Senate included Maui Sen. Kalani English.

The Office of Hawaiian Affairs, The League of Women Voters, the Sierra Club, and many others opposed the bill. The most vigorous opponent was Thorne Abbott, an SMA specialist and planner with Maui County, testifying in his private capacity. Abbott pointed out the unique way in which Maui processes subdivision applications: Maui, he noted, automatically approves preliminary subdivision applications, whereas the other counties automatically approve final subdivision applications.

Former Hawai'i County planning director Chris Yuen also testified in opposition, stating that the bill would "complicate and confuse the processing of subdivision applications in the SMA." The bill, he went on to say, excludes initial subdivision approval from the need to obtain an SMA permit. But the SMA process may itself result in the project being denied or "in conditions that are inconsistent with the tentative approval, which would mean the project would have to get a new tentative approval… So the effort of the applicant and the reviewing county agency in the tentative approval would be wasted."

"If the intent of the bill is to exempt subdivisions from needing SMA approval," Yuen continued, "the language of SB2335 does not do that, and it would be a terrible mistake to exempt subdivisions from SMA permits. Subdivisions can have major environmental impacts and the permit process can result in public benefit. To take just one example, many public accesses to the shoreline have been obtained as a result of SMA permit conditions on subdivisions."

In its final form, the measure, intended to clarify the 2011 act, now excludes from the definition of development "Final subdivision approval: provided that in counties that may automatically approve tentative subdivision applications as a ministerial act within a fixed time of the submission of a preliminary plat map, unless the director takes specific action, a special management area use permit if required shall be processed concurrently with an application for tentative subdivision approval or after tentative subdivision approval and before final subdivision approval." Yep, it's now very, very clear.

Other Measures

Inter-Island Cable System:
Act 165 (Senate Bill 2785) sets forth a framework for the selection of a cable company to lay an undersea cable that will contribute to an inter-island electrical grid. It was introduced by Senate President Shan Tsutsui by request.

$250,000 for Space Tourism:
Act 101 (Senate Bill 112) appropriates $250,000 to be used by DBEDT to obtain a "spaceport license" from the Federal Aviation Administration. "Space tourism is a potential billion dollar global industry that could significantly increase state revenues, provide new aerospace

jobs, and rejuvenate economic development in the Kalaeloa area ['Ewa, O'ahu]," the bill, introduced by Will Espero, states in its findings section. "The Federal Aviation Administration is expected to issue a limited number of spaceport licenses and the legislature finds that it is crucial to position Hawai'i for that economic activity."

The measure sailed through to passage with few amendments and just one "concerned citizen" testifying in opposition.

That lone dissenter was Penny Levin of Maui. "You're kidding, right?" is how she opened her testimony. "This is a boondoggle from the Lingle administration that has already wasted our money and will continue to do so. In the budget shortage we've got now, this shouldn't even be on the table."

$162,540 for Quarantine Patrol:
Act 128 (House Bill 1943, introduced by Big Island representative Clift Tsuji) will allow the state to match funds provided by the federal Office of Insular Affairs to restore the detector-dog patrols for the brown tree snake and other potentially invasive species. The funds are to support one inspector/detector-dog trainer and three inspector-detector dog handlers.

$30,000 for Bee Hive Research:
Act 129 (House Bill 2100, another Tsuji bill) gives $5,000 to each of the counties and $10,000 to the University of Hawai'i at Hilo to conduct research into bee hives, specifically looking into the small hive beetle. "Loss of bee hives is a threat to the agricultural economy on all islands because bees are necessary to pollinate many crops," the measure states in its findings section. "Accordingly, there is a need for the University of Hawai'i system to further research bee hives statewide."

Legacy Land Revisions:
Act 284 (Senate Bill 2785, sponsored by Dela Cruz and others) may have set a record when it comes to testimony in opposition. Of the dozens of parties testifying at its first hearing before the joint Senate committees on Water, Land and Housing, and Agriculture, exactly one – the Hawai'i Farm Bureau Federation – supported it. (The ADC was unopposed to its passage, but said it deferred to the positions of the DLNR and DOA, both of which were strongly opposed. Russell Kokubun, DOA administrator, characterized the proposal as a "counter-productive limitation.") The bill, as initially drafted, would have restricted use of the Legacy Land funds to projects proposed by four state agencies: the departments of Land and Natural Resources and Agriculture; the Agribusiness Development Corporation; and the Public Land Development Corporation. It also would have allowed Legacy Land funds (derived from part of the state conveyance tax on real-estate transactions) to be used for unspecified "regulatory functions."

The bill was revamped in later versions, allowing non-profit land conservation organizations (such as The Nature Conservancy, the Trust for Public Land, and the Hawaiian Islands Land Trust) to continue to participate in the Legacy Land program. The provision allowing expenditures for regulation was dropped.

In its final form, the measure makes it a requirement (not an option, as in the pre-existing law) for the Land Board, which approves expenditure of Legacy Land funds, to obtain an easement in favor of the board that restricts future use of the land to conservation or agricultural purposes. But then it adds new language that gives the board the authority to exempt the requirement for an easement: "The board may grant an exemption for any required easement under this section," it states. ***— Patricia Tummons***

Wespac from page 1

Ecosystem Reserve. Lobster fishers were not, since the fishery was closed at the time the reserve was established. But after the monument designation, Dettling claims, he found it impossible to access monument waters. The NMFS did not issue him a fishing permit until 2010.

Immediately after the monument was established, Dettling and Cabos tried to get NOAA to adjust its boundaries to free up one of their best fishing spots, Buoy One, located 34 miles north of Nihoa Island.

According to their complaint, NOAA staff told Dettling in August 2006 that because he lacked a federal permit, he could no longer fish in monument waters and that he would be arrested if he tried to do so. NOAA then advised him of his right to file a claim for compensation for the loss of traditional fishing grounds, which he did on September 17, 2006, in an email to former NMFS Pacific Island Regional Office administrator William Robinson. It was also addressed to monument administrator 'Aulani Wilhelm and copied to then Western Pacific Fishery Management Council staffer Jarad Makaiau.

Dettling claims he was told by NOAA staff that Congress was appropriating funds for displaced fishermen.

In an April 2007 letter, in response to his claim, NOAA's William Hogarth informed Dettling that the monument's proclamation actually allowed him to fish in the monument until June 15, 2011, under his state permit and that, consequently, there was no fishery failure to complain of, the lawsuit states. Even so, Dettling claims NOAA continued to threaten to arrest him if he fished in the monument.

Odd Men Out

Congress finally appropriated funds in 2007 to compensate fishermen displaced by the Papahanumokuakea monument, but it was limited to federally permitted NWHI bottomfish and lobster fishers. The way the compensation was structured, permittees were not required to file claims for damages. Instead, as part of a capacity reduction program, the NMFS paid bottomfish fishers who relinquished their permits the economic value of those permits. If they chose to keep their permits, they could fish until the monument became closed to commercial fishing on June 15, 2011. NWHI lobster permit holders, who had been prohibited from fishing in the NWHI since before the establishment of the NWHI Coral Reef Ecosystem Reserve, were simply paid when they turned over their permits.

The NMFS published draft and final procedures for the program in 2009 and completed distribution of the funds in February 2010.

Dettling, who apparently had not been following the process, did not find out about the compensation until May 2010. His attorney, Harvey Nakamoto, says Dettling found out about the payment by talking to other fishermen. And when he did, court filings suggest he misunderstood what those funds were intended for. (The complaint incorrectly states that the 2008 appropriation was dispersed to fishermen displaced by the proclamations establishing the Papahanaumokuakea and PRIA monuments.)

"To plaintiff Joe Dettling's surprise, federal permitted lobster fishermen who had their quota set at zero approximately 15 years ago and who already had received funds for being displaced in the past, were once again receiving additional funds," their complaint states.

An amended complaint adds, "Until the May 2010 disbursement of Congressional funds, Dettling believed that he would be compensated for the loss of his traditional fishing grounds as NOAA had promised."

When Dettling and Cabos complained that they were wrongfully excluded from

compensation, NOAA employees initially told them it was an accident and assured them they would seek additional funds from Congress, the lawsuit states. In 2008 and 2009, Wespac asked the NMFS and the U.S. Secretary of Commerce to seek more funds for fishermen displaced by the monuments, but nothing came of it.

Tired of "empty assurances," Dettling and Cabos submitted to NOAA on January 7, 2011, claims for a total of $1.2 million in property damages resulting from their exclusion from the PRIA monument. Dettling submitted a separate claim on February 14, 2011, for $1.2 million in property damages resulting from the loss of his NWHI fishing grounds.

On February 24, 2011, Russell Craig, chief of the Department of Commerce's Office of General Counsel, informed Rory Soares Toomey, Dettling's and Cabos's attorney, that the claims he filed on their behalf were not torts pursuable under the Federal Tort Claims Act (FTCA) and that they were also barred by the act's two-year statute of limitations.

Toomey subsequently filed a complaint for damages in U.S. District Court on June 14, 2011.

"At all relevant times, plaintiffs were the most outspoken critics of NOAA's actions within the national monuments. ... NOAA intentionally harmed Dettling and Cabos when they failed to compensate them for their claims based upon NOAA's blatant dislike of Dettling and Cabos," the complaint states.

Too Little, Too Late

With regard to claims related to the PRIA monument, NOAA's counsel Edric Ching and Florence Nakakuni stated in their April 10 motion to dismiss that the court lacks jurisdiction. First, they say, the claims Dettling and Cabos filed with NOAA came one day after the two-year deadline to file (the proclamation establishing the PRIA monument was dated January 6, 2009; their claims were filed January 7, 2011). Second, Ching and Nakakuni argue, statements that NOAA employees may have made are not actionable under the FTCA. Finally, the plaintiffs failed to name the United States of America as a defendant as required by the FTCA.

Ching and Nakakuni addressed the claims regarding the NWHI closure in a footnote:

"It is unclear if plaintiffs included this information for informational purposes or as bases for their respective causes of action," they wrote, noting that no FTCA administrative claims were filed regarding the executive order establishing the NWHI Coral Reef Ecosystem Reserve or the proclamation for the Papahanumokuakea Marine National Monument. (Dettling's February 14, 2011 claim merely details his effort to get a NWHI non-longline pelagic permit. He lists May 2010 as his date of injury.) What's more, the preserves were established in 2001 and 2006, respectively.

"[H]ence, any claims based on these executive actions are well beyond the period permitted for the presentation of a FTCA administrative claim," they wrote.

On June 8, attorneys for Dettling and Cabos filed a motion to amend their complaint. In addition to adding the United States to their list of defendants, they proposed to file their claims under the Administrative Procedure Act (which has a six-year statute of limitations), as well as the FTCA.

Nakamoto, who recently joined Toomey in representing Dettling and Cabos, told *Environment Hawai‘i* that NOAA counsel has agreed to allow them to amend their complaint.

North Pacific Catches May Drop As a Result of Climate Changes

Fishermen in the North Pacific could find their hauls shrinking over the next century, and it won't be due to overfishing alone. It'll be from climate change.

"It's sort of like termites in your house. You let it go little by little, but eventually you're going to have to deal with it," says Jeffrey Polovina of the National Marine Fisheries Service's Pacific Islands Fisheries Science Center (PIFSC).

Rising sea surface temperatures and weakening winds reduce the deep nutrients that mix into the surface ocean in the North Pacific. This may decrease phytoplankton densities, which may, in turn, reduce abundance of large pelagic fish in most of the North Pacific. These deep nutrients eventually come to the surface in the eastern Pacific California Current ecosystem, where they may increase phytoplankton and fish abundance. All of this is according to a study by Polovina and PIFSC's Phoebe Woodworth, Julia Blanchard of the University of Sheffield, and John Dunne of the National Oceanic and Atmospheric Administration's Geophysical Dynamics Laboratory.

The researchers coupled a food web model with a climate change model that assumes carbon dioxide levels will reach 850 parts per million by 2100, which generally reflects the world's current trajectory. They determined that densities of large phytoplankton throughout the North Pacific may decrease, particularly along the perimeter of the central North Pacific centered on Hawai‘i. By the end of the century, large phytoplankton density is expected to decrease 61-83 percent along the perimeter, and 15-38 percent within the region, as well as in adjacent temperate and equatorial upwelling regions.

"A decline in large phytoplankton reduces the amount of energy available to larger size classes of consumers, thus limiting the number of large fish the ecosystem can sustain," states a summary of the study by the PIFSC. As a result, they found, large fish abundance and catch may decrease 52-77 percent in boundary areas and up to 38 percent in interior areas.

While the overall outlook for the North Pacific seems rather bleak, the California Current region that hugs the west coast is projected to see phytoplankton density grow by 32 percent and fish abundance and catch grow by 43 percent by the end of the century.

"While this work only examined seven regions in the North Pacific, it showed a strong relationship between projected changes in the phytoplankton community and the abundance and catch of large fish over the 21st century," the summary states. But it also cautions that only one climate model was used in this study and further work should include various climate models.

Paul Dalzell, senior scientist with the Western Pacific Fishery Management Council, says Polovina's work is interesting in that it looks at both the top and the bottom of the food chain. But, he adds, it's just one model. Another model, SEAPODYM, suggests that bigeye tuna abundance would shift eastward with ocean warming. That would be a benefit to fisheries here, he says.

In any case, fisheries are always dynamic, he says. "Fishermen will adapt to whatever circumstances prevail," he says, adding that where climate change is at the root of stock decline, "there's nothing we can do about it."

Most pelagic tuna stocks globally are already either fully or over exploited. In the 1990s, annual landings of various tuna species harvested from the Western and Central Pacific totaled more than one million metric tons, which had a dockside value of $1.5 billion, according to Wespac. Hawai‘i landings of pelagic species generate average revenues of about $60 million a year.

Polovina says he hasn't received any feedback from fishermen or fisheries managers. Dalzell says its unlikely many, if any, fishermen have read Polovina's study.

"This has a time scale of changes over the century. Fishers and manager look at things from a year-to-year basis. That's one of the issues in trying to get managers to think about climate change. It's a slow, but persistent

trend," Polovina says. "Eventually, target yields will have to adjust to this underlying trend."

Council Argues NWHI Whales May Be Part of Insular Stock

Should the Northwestern Hawaiian Islands population of false killer whales be considered a part of the insular population around the Main Hawaiian Islands?

Wespac and fishermen say yes. And if the NMFS agrees, any fishing restrictions imposed to protect the whales may be less stringent than if the agency makes a finding that the populations are separate.

In September 2009, the Natural Resources Defense Council petitioned the NMFS to list Hawai'i's insular population as an endangered distinct population segment (DPS). The whales historically numbered around 769, with a lower limit of 470, but over the past few decades, the population has dwindled to fewer than 200.

Reasons for the decline are unknown, but the NMFS has determined that reduced prey from overfishing, injury and mortality from fishing gear, contamination, climate change, and noise from sonar and seismic exploration threaten the species' survival.

The most recent population estimate is 161 individuals. Such low numbers represent "a dramatic departure from historic abundance," the NRDC has argued in court filings. In November 2010, the NMFS agreed and found that the insular population was in danger of extinction. The agency issued a proposed rule to list it as endangered, but failed to issue a final rule by November 2011, its deadline under the Endangered Species Act. On May 22, the NRDC sued the NMFS in U.S. District Court to force the agency to make a decision.

To sway the NMFS from listing the population as endangered, Wespac executive director Kitty Simonds recently asked Lance Smith, head of the NMFS's protected resources division in the Pacific, to consider claims that the council is putting forward before he issues a final decision:

- The NWHI stock — which is made up of 552 individuals — is more closely related, genetically, to the insular stock than are false killer whales found in Mexico, Panama, American Samoa, and even Hawai'i's pelagic waters. "It is uncertain whether the genetic divergence between the NWHI and MHI populations are discrete enough compared to other populations in the Pacific to warrant a separate DPS determination under the ESA," Simonds wrote in a June 25 letter to Smith.
- The NWHI stock is behaviorally similar to the Hawaiian insular stock in that NWHI whale movements are restricted mostly to nearshore areas.
- NWHI whales, like the insular ones, appear to live in the same unique ecological setting: island-associated waters.

These points "suggest that the Hawaiian insular false killer whale DPS may not be restricted to waters around the MHI and that the insular population may be a combination of the MHI and NWHI populations, resulting in a much higher population than previously thought," she wrote.

What's more, a combined population of 713 individuals would likely have a much higher potential biological removal (PBR) level than the current insular population. The PBR level reflects what NMFS believes is a maximum number of animals, not including natural mortalities, that can be safely removed from a stock. Under the NMFS's proposed take reduction plan, the insular population has a PBR level of 0.61 whales.

At the council's meeting in June, new member McGrew Rice, from Kona, also suggested that the NMFS include the NWHI stock in the insular population.

To false killer whale expert Robin Baird, yes, the NWHI and MHI insular stocks are the most closely related genetically, and they're both island-associated. NWHI whales have even been found in waters off the main Hawaiian island of Kaua'i. But that doesn't necessarily mean they are part of the MHI insular stock, he told *Environment Hawai'i*.

Baird points to southern and northern resident killer whale populations found along the west coast of North America. Both are listed as DPS, even though their ranges overlap by hundreds of kilometers.

They are socially isolated and have different genetics and habitat ranges, Baird says.

"They've been clearly recognized as two distinct populations. There's never been any suggestion they be lumped. That would be contrary to all the science," he says.

The NWHI and MHI insular populations of false killer whales are not only genetically distinct from each other, there have been no photo identification matches between the two stocks, which is further evidence that they are socially isolated, he says.

Whether or not the genetic differences between the populations are great enough to warrant listing as a DPS is a decision the NMFS will have to make, he says, adding that he believes there would have to be much lower levels of genetic difference for them to be considered a single population.

He notes that the NMFS has designated separate stocks of bottlenose and spinner dolphins based on genetic differentiation of a similar magnitude. In addition to considering genetic differences, the NMFS considers a variety of things, such as the significance of a population, when deciding whether or not to designate a DPS, he says.

New Assessment Of Pelagic Population Of False Killer Whales

At the council's June meeting, member and Hawai'i Longline Association president Sean Martin wanted to know how the NMFS planned to incorporate new abundance estimates of Hawai'i's pelagic false killer whales into the take reduction plan, which is months overdue and based on an old, much lower, population estimate.

"I don't have a good answer for that," NMFS's Lance Smith responded.

PHOTO: EARTHJUSTICE

False killer whale caught on a longline.

The fact that the plan was based on a much lower population estimate means that Hawai‘i-based deep-set longliners, which mainly fish for bigeye tuna, may have to fish under much stricter conditions that could potentially cost them millions of dollars.

The new stock estimate, released in June, is based on visual line-transect detections during a Hawaiian Islands Cetacean and Ecosystem Survey (HICEAS) in 2010. NMFS scientists are still analyzing acoustic data collected during the survey. The last HICEAS survey, done in 2002, produced a population estimate of 484 individuals. The NMFS now estimates there are 1,503, although the agency admits in its report that the estimate "can be considered positively biased to an unknown extent due to the effect of vessel attraction."

Even so, the council's advisory plan team recommended that the NMFS triple its proposed PBR number for the pelagic stock. As part of its take reduction plan, the NMFS has proposed a PBR level for pelagic Hawaiian false killer whales of 2.5. The level is based on the old estimate of 484 individuals. Under the proposed plan, if the deep-set longline fishery takes two or three whales, it must close for the rest of the year. (Whether the fishery would close after two or three individuals were taken would depend on the percentage of observer coverage.)

Tripling the proposed PBR level would mean the fishery could take 7.5 whales a year, which is roughly the fishery's estimated annual take from 2004 to 2008.

"For years, the longline industry said the estimate of 484 false killer whales was inaccurate. ... The Hawai‘i longline industry doesn't likely have an effect" on the whale population, said Michael Goto, a representative of the Hawai‘i longline industry. (Goto has recently been appointed to the council to replace Martin.)

Whether or how the NMFS can incorporate the new estimate and the sentiments of the council and fishermen into the final take reduction plan is unclear, since the comment period on the draft plan ended on October 17 of last year. Final action was expected in January.

The draft take reduction plan proposed PBR numbers for the insular, pelagic, and Palmyra Atoll stocks of false killer whales. It also proposed gear requirements (i.e., weak circle hooks), longline prohibited areas, and training in marine mammal handling and release, among other things.

Frustrated with the delay, Earthjustice, on behalf of the Center for Biological Diversity and the Turtle Island Restoration Network, filed a complaint in U.S. District Court on June 25 seeking to force the NMFS into "promptly issuing a final take reduction plan for Hawai‘i's false killer whales and implementing regulations."

Circle Hooks

If and when the NMFS requires longliners to use weak circle hooks to protect the whales, Hawai‘i's bigeye tuna fishery may lose some of its catch as a result, some fishers worry. The hooks are one of the main management measures identified in the NMFS draft take reduction plan. It's thought that the hooks will be weak enough for the whales to shake loose from, but strong enough to hold most of the tuna. Although trials conducted in the fall of 2010 found no significant difference in catch with the weak hooks, they weren't tested in the spring, when the largest bigeye are usually caught.

To provide an estimate of revenue losses that might occur if large tunas are also able to shake free of the weak circle hooks, Keith Bigelow of the PIFSC has developed a chart based on the economic value and catch percentage attributed to "marker fish." Bigelow defines marker fish as those weighing 45 kg (about 100 pounds) or more.

Annual bigeye tuna revenue in Hawai‘i averages $38.9 million, roughly two-thirds of which come from marker fish. Marker tuna make up about a third of bigeye catches.

While the potential reduction in catch rates due to weak hooks is currently unknown, Wespac has recommended that the trials be re-run to assess potential tuna escapement when the biggest fish are caught.

Based on Bigelow's chart, if longliners catch 30 percent fewer marker fish as a result of weak hooks, the total economic revenue for the fleet would decline by about 19 percent, or nearly $8 million.

Council Suggests Removal Of Bottomfish Reserves in Federal Waters

Some see the state's bottomfish restricted fishing areas (BRFAs) as insurance against miscalculations and a buffer against overfishing. Others, namely the Western Pacific Fishery Management Council and many local bottomfishers, see them as unnecessary, and anathema to a sustainable fishery.

At the council's June meeting, it reaffirmed the main Hawaiian Islands bottomfish annual catch limit (ACL) and annual catch target of 325,000 pounds for the 2012-2013 bottomfish season, which begins on September 1. With that target, there's less than a 40 percent chance of overfishing bottomfish stocks, based on a NMFS model that ignored any influence the state's bottomfish preserves might have.

Because the ACL poses such a low risk of overfishing, and because the scientist studying the efficacy of the BRFAs has said he needs five more years of monitoring, the council recommended that the portion of the reserves lying in federal waters be eliminated.

Fishermen are concerned that they are being double-regulated with the ACLs and the BRFAs, council member McGrew Rice said.

"If we're going to have a catch limit, it's extremely unfair to have protected areas," council chair Manny Duenas added. Fishermen need to move around to avoid overfishing certain spots and BRFAs limit their ability to do that, according to Maui bottomfish fisher Layne Nakagawa.

University of Hawai‘i oceanographer Jeff Drazen, who has been studying the BRFAs since 2007 using remotely operated cameras, told the council he has found that larger fish occupy the reserves, and in some reserves, bottomfish are more abundant. These results are based on an analysis of data from only one year, and it will take more time to determine whether the BRFAs are benefitting the stock, he added.

Council members were not impressed. Rice suggested that fishermen could assist Drazen in identifying the best study areas, and Duenas had concerns about the kind of bait used to attract fish to the cameras.

Duenas asked Drazen how long he needed to establish credibility of the information he was providing.

"That's dictated by the life history of the species. They're slow-growing. Increased sampling would help, but ... we can't change the fish. I'm thinking 10 years. We're five years into it," he said. Poaching in the BRFAs complicates things, he added. "One of the major concerns is enforcement."

Nakagawa testified that researchers have found no evidence so far that fish are spawning in the BRFAs. "I'm 110 percent opposed to BRFAs," he said.

Fisherman Roy Morioka, a former council chair and consultant to the council, added that Drazen's findings are no surprise. "The BRFAs were selected because there were more fish and larger fish - so, duh!" he said.

For council executive director Kitty Simonds, five more years of research was too long. "BRFAs are not part of the federal management plan," she said, and went on to recommend they be removed from federal waters.

When it came time to vote, Francis Oishi, a biologist with the state Division of Aquatic

Resources, opposed the idea because removing the BRFAs in federal waters could compromise the research done so far. NMFS Pacific Islands Regional Office director Mike Tosatto agreed.

Oishi also pointed out that under the state constitution, the state claims ownership of the archepelagic waters surrounding the islands. That includes waters beyond three miles, which is generally considered to be where state jurisdiction ends.

Most of the BRFAs lie within the three-mile limit, but a few, including the one around Penguin Banks, extend into what are considered federal waters.

When the state revised its reserve system more than a decade ago, some reserves were removed and others were added or expanded.

"I'm not sure if anyone sat down and did the math of how much is in what are considered federal waters," Oishi told *Environment Hawai'i.*

"If you ask me, the state owns it," he says, adding that the state is bound by its constitution to protect those waters and the resources therein.

Across the nation, state jurisdiction over archepelagic waters beyond the three-mile limit is a longstanding issue. And where it's been adjudicated, states have lost, Oishi says. Still, some states, such as Georgia, have jurisdiction over waters beyond three miles.

Despite Oishi's and Tosatto's opposition, the council voted to direct its staff to work with the state on removing the BRFAs from federal waters.

"The Council will work with the State of Hawai'i and NMFS to develop a research plan for the remaining BFRAs in State waters, incorporating existing information and new technologies being developed," the council stated in a press release.

To Oishi, the council's actions don't require changes to the BRFA system and were merely recommendations to the state.

Council Would Give Territories Ability To Assign Tuna Quotas

The council voted to give American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands the authority to allocate their bigeye catch or fishing effort limits set by the Western and Central Pacific Fisheries Commission (WCPFC) through arrangements with U.S. vessels that are operating under permits issued pursuant to the council's Pelagic Fishery Ecosystem Plan.

Under the council's proposal, the territories could assign up to 1,000 metric tons of their annual WCPFC bigeye allocation to U.S. vessels managed under the PFEP. Council staff had initially proposed allowing the territories to assign up to 750 metric tons of their bigeye allocation of 2,000 metric tons. Council member and bigeye longline fisherman Sean Martin, however, asked that staff replace that recommendation with the full amount — 2,000 metric tons. This would provide the maximum economic benefit for the territories, he said. Council members from American Samoa, however, expressed concern about keeping some of that allocation for tuna cannery boats.

"One-thousand metric tons would be a lot more palatable, in the spirit of conservation," council chair Manny Duenas said.

If approved by the NMFS, the arrangements will allow the Hawai'i-based longliners to continue to fish after they reach the U.S. longline quota of 3,763 metric tons. Federal legislation allowed Hawai'i boats with arrangements with American Samoa to continue fishing last year after the quota was reached, but that legislation expires at the end of the year.

"The council will review the limits annually so they are consistent with WCPFC conservation and management measures and provisions for small island developing states and participating territories, which include the U.S. Territories," a council press release states.

The WCPFC is scheduled to meet in December in Manila, where it is expected to adopt a revised conservation management measure for tropical tunas.

An Infraction In the NWHI

NOAA's Pacific Islands enforcement office is investigating a recent U.S. longline vessel incursion into the Papahanaumokuakea Marine National Monument. NOAA vessel monitoring system (VMS) technicians and the Coast Guard identified a vessel operating in the monument on May 1. On May 2, a Coast Guard plane caught the vessel retrieving fishing gear in the monument and advised it to cease fishing in the closed area. Despite the warning, the vessel was detected in the monument the next day. NOAA's Office of Law Enforcement then ordered the vessel back to port in Honolulu.

82 Coral Species

The Center for Biological Diversity's petition to list coral species throughout the Indo-Pacific and Caribbean as endangered has been a hot topic at the council. Many of the coral species are found in waters around Guam and the Commonwealth of the Northern Marianas. A handful are found in Hawaiian waters.

At the council's June meeting, chair Manny Duenas criticized the proposal and suggested it was a ruse simply to get mitigation money from the federal government.

"It's an injustice against coastal communities," he told PIRO's Lance Smith, adding, "If you want to be Custer, there's always Little Big Horn."

A council member from American Samoa added, "It's like NGOs are sending a message to the world to control global warming or they'll keep petitioning. ... [I]t prevents dialogue on a real issue."

"At the same time, [the listing] would increase federal government control of the coastal zones of the U.S. flagged Pacific Islands and further disenfranchise the rights of Pacific Islanders over their traditional reef fishing grounds and coral reefs," the council stated in a press release.

The comment period on the proposed listing ended July 31 and the NMFS is expected to issue a finding on December 1.

— Teresa Dawson

For Further Reading

Environment Hawai'i has published several articles (available at *www.environment-hawaii.org*) that will provide additional background.

- "Feds Disburse Nearly $6.4 Million in 'Relief' to NWHI Bottomfish, Lobster Fishers" (May 2010);
- "Council Seeks Monumental Payouts for Small, Even Non-Existent Fisheries" (December 2009);
- "$6.7M Earmark May Compensate NWHI Bottomfish, Lobster Permittees" (June 2008);
- "State to Dole Out Nearly $5 Million in Aid to Fishermen for Fisheries Research" (January 2007);
- "Some Funds Go to Underwrite Litigation Costs" (January 2007);
- "Northwestern Hawaiian Islands Research Subsidizes Commercial Bottomfishing Trips" (January 2007).

Senator Accuses Agribusiness Board Of Doing Nothing to Fulfill its Mission

Sen. Donovan Dela Cruz

Step up or get lost. That's basically what state Sen. Donovan Dela Cruz told board members of the state Agribusiness Development Corporation on July 11. That day, Dela Cruz outlined his vision to turn former plantation lands in central O'ahu into a thriving agricultural hub.

"If you guys aren't up to the challenge, that's fine. We can find someone else," he said.

He blew into the state Department of Agriculture Plant Quarantine Division's board room with his power point presentation, recounting the ADC's history and reminding board members of all of the agency's special powers to side-step the bureaucracy that bogs down other state agencies. ADC leases and licenses aren't restricted to any particular term or qualification process and they can be directly negotiated. Simply put, the ADC can put farmers on the land faster and easier than any other state department.

Dela Cruz, who grew up in Central O'ahu, launched into his Whitmore Village Development Plan to revitalize current and former plantation lands there. He had pushed hard for it during the past legislative session via various bills. Some passed, others didn't. Still, his goal to "create some kind of synergy and scale" to allow young O'ahu farmers to pursue agriculture remained.

A major component of his plan, the use of more than 1,000 acres of Galbraith Estate land, falls under the ADC's purview. Or it will once the purchase from the Bank of Hawai'i, the estate's trustee, is finalized. In the next few months, the Trust for Public Land is expected to complete the $25 million purchase of 1,723 acres, 500 of which will then be transferred to the Office of Hawaiian Affairs. The remaining 1,223 acres will go to the ADC.

Dela Cruz has recommended that the ADC enter into a memorandum of agreement with OHA to transfer management of its 500-acre parcel, except for a five-acre archaeological site containing the Kukaniloko Birthstones, to the ADC.

"Once ADC takes possession of the Galbraith Estate, it will be able to offer long-term license agreements and public-private partnership contracts to a number of local farmers for the use of 50 to 200 acres each within the 1,723-acre plan," Dela Cruz writes in a summary of the Whitmore Village plan.

"Twelve-hundred acres is not enough," he told the ADC board. "We need access to water and infrastructure. We need to deal with food safety, marketing, distribution," he said, adding that he envisioned a co-op arrangement, "with ADC being the nucleus."

Dela Cruz had hoped to add 500 acres in Kunia, currently under the DOA's control, to the ADC's inventory, but legislation he had introduced supporting that transfer failed in the face of strong opposition from DOA director Russell Kokubun. Even so, Dela Cruz envisions farmers with ADC leases for the Kunia lands prepping the Galbraith Estate lands "so ADC can quickly jump-start the Whitmore Village Agricultural Development Plan."

> *"If you don't want to do the work, you shouldn't be part of the board."*
> ***— Sen. Donovan Dela Cruz***

Despite failing to bring the Kunia lands under ADC control, Dela Cruz succeeded in helping pass legislation (Act 106) to acquire Dole Food Co.'s 24-acre former processing and packaging plant in Whitmore Village for $3.6 million.

"We could create an ag industrial park," said Dela Cruz, who visited the site with ADC board member and former DOA director Letitia Uyehara.

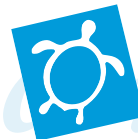
"If we were to do something like this, [it] would be a one-stop shop" for people to pick up products from farmers and for farmers to package their produce securely and safely.

Dela Cruz also asked for the ADC's help in acquiring 257 acres from Dole that have access to irrigation water from Lake Wilson. In fact, it includes the land under the lake. The land is worth $5.6 million and already supports two farmers, he said. As far as future tenants, he noted that Dole, which is already growing cacao on ten acres in Waialua, has said it would need 150 acres to grow enough to make it worth processing locally rather than in San Francisco.

The University of Hawai'i's College of Tropical Agriculture and Human Resources is also experimenting with growing blueberries and tea at Poamoho, which is 15 minutes away from Whitmore Village, he added.

When Dela Cruz finished, several board members expressed their support for his concept, but wondered how it would be accomplished.

ADC board member and Department of Land and Natural Resources water deputy William Tam noted that the ADC has only four staff members to tackle such an ambitious proposal.



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"Is there some thought to providing funds for more staff?" he asked.

"Not necessary," Dela Cruz responded. The ADC has the ability to enter in to public-private partnerships. Farmers can do a lot of the work on their own with the right foundation and incentives, he argued.

"Farmers say if they get a long-term lease, they can get loans to [make improvements]. You have to use your land as leverage," he said.

Tam, a former state deputy attorney general, then pointed out that negotiating arrangements with farmers, businesses, and other government agencies takes time.

"You can contract [it out]," Dela Cruz replied. "We see a lot of farmers that don't have that luxury of time. ... We have to become creative."

ADC member David Reitow said the Whitmore plan was nice concept but will require "an awful lot of work getting this from the ground up."

"If you don't want to do the work, you shouldn't be part of the board," Dela Cruz responded, then went on the attack. "The law gives you so many unique advantages. ... ADC does not even have a project to allow it to fulfill its mission. You haven't produced anything that the law allows you to produce." (With regard to Dela Cruz's last comment, he cites in his own Whitmore Village plan summary the ADC's partnership with Kauaʻi's Kekaha Agriculture Association to operate and maintain the vast plantation infrastructure as an example of the agency's power, flexibility, and agility.)

Dela Cruz pointed to his and his staff's efforts to produce the Whitmore Village Development Plan as an example of how to get things done.

"We haven't taken years to do this. We're not looking for excuses. We all drank the Kool-Aid [about food sustainability]. ... The governor really needs to talk to the DOA to get it to understand we need those [Kunia] lands. The state's taken a lot of hits because of Hoʻopili, and Koa Ridge," he said of recent decisions by the state Land Use Commission to place large swaths of agricultural land on Oʻahu in the Urban District.

Every time agricultural land is placed in an urban zone, people want to know what the state's plan is to get fallow land up and running, he continued. That, he argued, is the ADC's job.

Regarding the ADC's 2008 strategic plan, Dela Cruz asked, "What excuses does this board have that it hasn't updated its plan, its benchmarks, shown results? ... I'd hate to see the ADC become another bureaucracy."

When ADC board member Paula Hegele asked how many people are looking for land and how many partners the ADC will need to support the 1,700 acres, Dela Cruz said that's what she should work on with staff.

"A lot of the pieces are already done," he said, and his staff is working on doing more, like working with the Hawaiʻi Agriculture Foundation on applying for funds to purchase Dole's 257 acres.

"That's just us, not the ADC. That's why I don't want to hear any excuses. My office only has two people and we've been meeting with Dole, Castle and Cooke. We've been meeting with farmers," he said. "There are already opportunities for partnership."

When he finished, everyone in the room laughed a little when ADC board chair Marissa Sandblom thanked him for starting off the meeting.

"I'll be back," Dela Cruz promised. Dela Cruz is chair of the Senate Committee on Water, Land, and Housing. — ***T.D.***

Don't Miss *Our Big Bash!*

On Friday, August 24, from 6 to 9 p.m., Environment Hawaiʻi is throwing a party in Hilo to celebrate the start of our 23rd year of providing the state with hard-hitting, investigative environmental reporting.

Music? Jazz Brothers John Parker (bass) and Tom Sawicki (guitar) will be joined by vocalist Valerie Simpson as the evening begins.

Food? The groaning buffet tables will be catered by the ʻImiloa Astronomy Center dining room.

Intelligent Conversation? Jon Price of the University of Hawaiʻi-Hilo will enlighten and entertain as he discusses the importance of protecting Hawaiʻi's watersheds: "Why we are Waiwai: Hawaiʻi's Watershed Moment."

Art & More? Some of the Big Island's finest artists, crafts people, and merchants have donated items to be sold at our silent auction.

Cost is $60 per person, which includes a $20 tax-deductible donation. Seating is limited; reserve your place now. Or get together with friends and book a table for eight ($480). We'll accept reservations until August 16.

Call 877 934-0130 or email us at ptummons@gmail.com to hold your place.

See you there!