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Down on the Farm

Protecting important agricultural lands in Hawai'i has been a constitutional mandate for a quarter century. Three years ago, the Legislature enacted a law intended to push the goal forward. Yet despite universal agreement on the need to act, controversy over how to achieve such protections, and at what cost to the public such protections should be bought, continues to stall progress.

Teresa Dawson examines the issues in our cover story.

Other articles in this issue look at two important decisions by the Supreme Court on water disputes on Moloka'i, and what these mean for the state Water Commission; Dawson provides an update on the controversial Kona Kai Ola project at Honokohau and Patricia Tummons follows up on the strange case of Venu Pasupuleti and Megasoft.

Finally, we welcome back to these pages Emma Yuen, who has returned to her beloved islands after four years at Stanford University. Her column begins on page 8.

IN THIS ISSUE

State Designation of Important Ag Lands Hinges on Passage of Incentives Package

For two days early last October, the Kohala Center, a sustainability think tank, sponsored what it called a food security summit at the Sheraton Keauhou Bay Resort and Spa. At times, though, it seemed more like an old-fashioned revival meeting.

Throughout the summit, various speakers announced that the state was ripe for major changes to its agriculture industry. And judging by the exuberant applause that greeted every speaker who condemned genetically engineered crops, most of those present had a very specific vision of Hawai'i's agricultural future: No biotech crops, less industrial agriculture, and more organic. The summit, titled, "How Can Hawai'i Feed Itself," was attended by about 300 (mostly Big Island) farmers, landowners, government agency representatives, educators, food sellers, and members of the public.

"We're on a wave, a tsunami, a tipping point. Whatever you want to call it, we're there," speaker Diane Ley, deputy director of research and development for Hawai'i County, said during her talk. William Steiner, dean of the University of Hawai'i-Hilo's College of Agriculture, Forestry, and Natural Resource Management added that Hawai'i has been brought to a tipping point by climate change, geopolitical turmoil, and economic upheavals, and with nearly all of our food and energy coming from out of state, Hawai'i needed to find ways to be more self-sufficient.

"We may be subject to the will of others and we don't know who those others will be," he said.

Despite the shared overall vision of "wholesome food grown on wholesome land by wholesome people," as Peter Simmons of Kamehameha Schools put it, when it came down to specifics, consensus was hard to find. Some speakers, such as Steiner, pushed biofuel crops, while others spoke against them. And Simmons argued that there is a place in Hawai'i for GMO crops, as well as for "gentle-

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One of many plant nurseries spread throughout Waimanalo, O'ahu's vast agricultural lands.

Environment Hawai'i

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NEW AND NOTEWORTHY

PHOTO: FOREST AND KIM STARR

Strawberry guava

Good News on the Waiwi Front: One of the most pestiferous plants in Hawaiian forests is strawberry guava (also known as waiwi or *Psidium cattleianum*). Seeds from its toothsome fruits are easily spread by pigs, birds, and other animals, and when the seeds sprout, the resulting plants form dense, impenetrable thickets that crowd out natives.

Yet there is a bright spot in all this: unlike many other forest pest species whose seeds can remain viable in soil for years, strawberry guava seeds have a short half-life. If they don't germinate within six months, they probably never will, according to research by Amanda Uowolo and Julie Denslow, scientists with the U.S. Forest Service whose writeup of their work appears in the January 2008 edition of *Pacific Science*.

The findings, they note, have important implications for foresters trying to control strawberry guava: "Because most *P. cattleianum* seeds do not live beyond 3 months in the soil, chemical or mechanical control efforts would be most efficient and effective if conducted at least 3 months after the fruiting season."

And those efforts could be even more effective if combined with a leaf gall that has been proposed for use in Hawai'i and which suppresses fruit and seed production. "Our results suggest that a biocontrol agent that reduced … seed production would also rapidly deplete soil seed stocks, therefore increasing effectiveness of chemical and mechanical control," they conclude.

"Of course, strawberry guava also sprouts like crazy, so the seed bank isn't the whole story, but it's certainly a big part of it," Denslow told *Environment Hawai'i*.

Kaunakakai Wetland Study: Elsewhere in this issue, we discuss water disputes in Moloka'i, where many folks are concerned that increased well withdrawals will impact the health of fish and seaweed that have been an important part of residents' lifestyles for centuries. Because so many of Moloka'i's leeward streams are fed almost exclusively by springs, taking more water from upstream wells will inevitably reduce freshwater flowing into the nearshore areas.

But how much impact will there be?

The U.S. Geological Survey was asked this question, in connection with plans of Maui County and the U.S. Corps of Engineers to construct about 3 acres of wetlands near the mouth of Kaunakakai Stream as habitat for the endangered Hawaiian stilt (*Himantopus mexicanus knudseni*). Late last year, it released the results of its investigations, led by hydrologist Delwyn S. Oki, examining groundwater withdrawals under six different scenarios, ranging from the base case (with 2.123 million gallons a day taken from water sources feeding the stream) to 3.921 mgd, which would occur if all proposed withdrawals were permitted and developed.

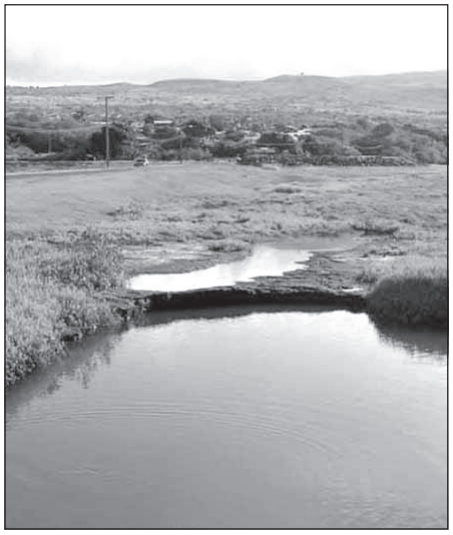

PHOTO: USGS

Area proposed for wetland restoration.

Using computer simulations, Oki found that withdrawals under scenarios 2 through 6 could reduce discharge in the area proposed for restoration by amounts ranging from 98,000 to 170,000 gallons a day. Actual reductions might well be less than that, he said, noting limitations of the modeling program used.

"The reduction of groundwater level near the habitat-restoration site also may reduce the wetted habitat area available to the native species," he wrote, depending on the slope of the ponds near their edges. "The salinity of groundwater discharging into the wetland area likely will increase by an unknown amount in response to increased withdrawals upgradient from the site," he said, adding that further work was needed to evaluate effects of this.

The study is online at *http://pubs.usgs.gov/sir/2007/5128/*.

Quote of the Month

"The count as it stands is zero for four... The consistent theme is, the [water] commission is not doing enough to safeguard the public trust."

— Attorney Isaac Moriwake

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Ag Lands from page 1

man farms," which was held in equally low regard by the crowd.

In any case, the state has recently taken initial steps to securing a sustainable agricultural industry by passing legislation to protect its important agricultural lands from the growing pressure to urbanize.

Important Agricultural Lands

Gentleman farms may "add to the mix of what we're doing," Simmons said at the summit, but "as far as gaming the system, I can't say I'm a fan of that." Simmons was referring to the longstanding practice of landowners trying to pass off residential developments on agricultural lands as farm operations. To protect the state's best agricultural land from this kind of abuse, which led to the controversial Hokuli'a court decision in 2003, the Legislature passed Act 183 in 2005. The act furthers directives laid out in a 1978 Hawai'i constitutional amendment that requires the state to "protect agricultural lands, to promote diversified agriculture, increase self sufficiency and to assure the availability of agriculturally suitable lands."

Act 183 establishes a process for designating the state's important agricultural lands (IAL). To make sure those protected lands are put to good use, the act requires the Legislature to approve an incentive package intended to make farming a more viable enterprise. Once IAL are designated, any decisions of the state Land Use Commission or a county council on district boundary amendments or zoning changes involving IAL must be approved by a two-thirds vote. Under the act, the LUC may designate important agricultural lands in response to a petition for a declaratory ruling filed by a farmer or landowner or to proposed maps and recommendations from the various counties.

Each county council must approve maps of proposed IAL on their respective islands. Those maps must then be submitted for approval to the Land Use Commission, but not before the effective date of the incentive package that the Legislature approves. Once the LUC approves the maps, the IAL designations will take effect three years after incentives and protections for IAL and agricultural viability are enacted.

While a petitioner may opt to designate all of its lands, the counties are limited to designating no more than 50 percent of a landowner's property as IAL. According to people familiar with the legislation, this limitation was a last-minute addition that undermines the intent of the act and the need to protect contiguous blocks of land. The Hawai'i Chapter of the Sierra Club noted on its website, "The final bill…contained an 11th-hour amendment – inserted at the behest of large landowners – which prohibits the state from designating more than 50% of any landowner's farmland as 'important' unless they request it be designated as such. The Sierra Club believes that the final bill falls far short of what was envisioned by the state constitution and will fail to provide adequate protection for Hawai'i's important farmlands."

Neither the Hawai'i Farm Bureau Federation nor the Land Use Research Foundation, which often represents the interests of large landowners before the Legislature, responded to inquiries about the 50 percent limitation by press time. However, the measure undoubtedly gives LURF's constituents who want to develop their ag lands more flexibility. For example, in its 2006 annual report, Alexander & Baldwin notes that of its 59,320 acres of agricultural or pasture lands and 29,270 acres of conservation lands 8,700 acres have "urban potential."

Incentives

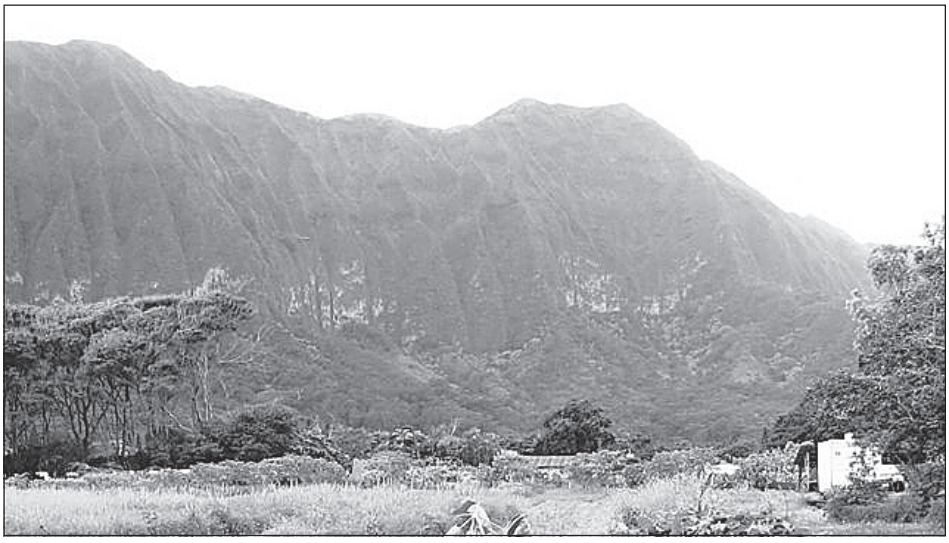
Despite what some may see as the law's shortcomings, many in the agriculture industry are still eager to get the designation process underway. It took more than 20 years to enact laws aimed at fulfilling the constitutional mandate, and at the pace things are going now, it will be years before the state's important agricultural lands achieve that designation. In the meantime, new housing developments continue to be proposed for actively used ag lands.

Last year was the first chance that the Legislature had to adopt an incentives package, but it failed to do so. After two years of research and discussions with large landowner and agriculture community representatives, the state Department of Agriculture submitted to the Legislature last year a final report on an incentives package, which must be approved by the Legislature before the state IAL designation process can even begin. The department recommended the following "crop neutral" incentives:

◆ **Important Agricultural Land Infrastructure Tax Credit**: A business using important agricultural lands could claim a 100 percent infrastructure tax credit for expenditures such as roads or utilities, distributed power generation facilities, agricultural processing facilities, water wells, reservoirs, dams, water storage, water pipelines, irrigation systems, agricultural housing for laborers, and equipment costs. The tax credit would be available for ten years. Potential costs to the state for this tax credit were estimated to be $28.1 million in the sixth year after legislative approval.

◆ **Agribusiness Investment Tax Credit**: A qualified agribusiness could deduct 100 percent of just about any IAL-related expense from its net income tax liability over five years. The cost of operating expenses and farm production expenses, including fertilizer, seeds, livestock, gas, labor, supplies, repairs, land rent, and property taxes, among other things, could be deducted. The maximum deduction would be $2.5 million, and any credit would be spread out over five years, with 50 percent taken in the year the investment was made, 20 percent taken in the following year, and then 10 percent taken in the third, fourth, and fifth years. Estimated costs to the state: $50 million in the sixth year after legislative approval.

◆ **IAL Exclusion to Income and General Excise Tax**: This incentive would allow landowners to exclude any rental income from IAL from their gross income. If the landowner



In addition to landscape plants, papayas (in foreground), bananas, and other food crops are grown on agricultural lands tucked away in the foothills of Waimanalo.

provided an affordable lease to its farmer lessee, it would also be eligible for a GET exemption for 20 years or more, depending on the term of the lease.

◆ **Water for Important Agricultural Lands**: This proposal was aimed at guiding the state Commission on Water Resource Management in determining water sources for IAL. Although it is unclear exactly what the incentive would be, the report states, "Changes proposed in the Water Code serve to emphasize the constitutional status of Important Agricultural Lands and the need to recognize this status whenever water issues are being considered."

◆ **Guaranty Loan Program**: The state Department of Budget and Finance would administer this program under which a landowner or landowner association could obtain loans. A private lending institution would qualify the applicant as an eligible IAL borrower and submit a loan package to the director of finance.

◆ **Air Permit Processing Priority**: This incentive would simply require the state Department of Health to establish a procedure for giving agricultural processing facilities priority in the department's review of permit applications and renewals.

The estimated costs per year for these incentives range from $15.5 million in the first year to $82.5 million in year six. In its report, the DOA wrote, "Future producers of biodiesel and ethanol fuel stocks will find [the incentives] as beneficial as producers of Hawai'i's current crops. However, they are specifically targeted to commercial scale producers."

Although several bills were introduced in the 2007 legislative session to achieve these incentives, none was approved. Other bills proposed different incentives, including the ability to construct worker housing on IAL.

Summit organizer Nancy Redfeather criticized the bills that had been proposed for being too generous.

"It was a DOA-Farm Bureau package trying to appease large landowners who attended [planning] meetings. It was financially foolish," she says, adding, "Of course you have to compensate them [landowners]….but the taxpayer picks up everything and they get to pay no property taxes?"

Attempts by *Environment Hawai'i* to get responses from the Farm Bureau and LURF by press time were not successful.

At the end of last year's session, state Sen. Jill Tokuda, vice chair of the Committee on Water, Land, Agriculture and Hawaiian Affairs, says that she asked farmers and landowners who had testified on the bills to "go back in the interim and look at the incentives on the table." She says that the Hawai'i Farm Bureau Federation worked with the Land Use Research Foundation and brought back "a refined and complete package."

The package again includes tax incentives, breaks on GET and income taxes, a loan guaranty program, and permitting incentives. It also addresses workforce housing.

Tokuda adds, "The Farm Bureau does want to take a look at water. Is water for important agricultural lands [also] a public trust priority? We're looking at the state Water Plan and making sure IAL water is factored in."

The loan guaranty program and requirements to speed up government permitting for IAL projects are "key to developing processing facilities that will allow farmers to use more of their harvest and cut down on waste," she says.

Whether the package can be approved this year remains to be seen. "At the end of the day, we have to look at the fiscal impact [and] the revenue stream is not looking so good," Tokuda says.

Big Island Kona County Farm Bureau president Nancy Pisicchio, who helped frame Act 183 and participated in discussions on the first incentive package, hopes the Legislature can come up with some incentives soon. If the state designation process somehow fails to result in adequate protections, however, Pisicchio seems to take comfort in Hawai'i County's efforts to protect ag lands. In 2001, Hawai'i County took it upon itself to incorporate the designation of important agricultural lands into its General Plan update, which was approved by the County Council a few months before the state legislation passed.

"If Act 183 kicks in, land may not end up in the state IAL, but the county may be more restrictive. If they [county officials] have the political will…it doesn't matter what the state designation is….My feeling is there is probably more genuine intent to protect resources than there ever has been in this county," she says.

How Hawai'i County's IAL designation will mesh with the state designation process – especially considering the 50 percent limitation – remains to be seen. County Planning Director Chris Yuen, who has been very critical of the 50 percent clause, notes that state IAL lands must be evaluated under several criteria that were still being written when the county adopted its General Plan.

"We would work through what we have. We can't simply [offer the county designation to the state] without demonstrating we looked at the criteria," Yuen says.

'For the people and by the people'

While the DOA tried to stay neutral in its incentives package, some of the speakers at last October's food security summit clearly wanted more emphasis on local food production and sustainability.

At the summit, UH-Hilo's Steiner floated several ideas, including allowing residents to deduct the cost of foods grown in Hawai'i from their taxes, establishing a sustainable agriculture section within the state Department of Agriculture, providing tax incentives to grocery stores for marketing local foods, and establishing a $20 million sustainable ag fund from taxes on GMO researchers, a three-year tax pardon for all new farmers, and an energy tax credit to farmers who use biofuels, among other things.

While many of his ideas drew praise from the crowd, the state's actions so far suggest that it's not ready to start favoring one kind of farming over another.

Consider, for example, the actions of the state Board of Land and Natural Resources. Last June, the board approved several projects under its Legacy Land Conservation program, which was created by the Legislature the same year Act 183 became law. Under the program, a portion of conveyance taxes are directed into a Land Conservation Fund. Landowners or counties may then apply for those funds to purchase lands, including agricultural and conservation easements, that are deemed valuable to the state.

One of those projects was approved over the objections of the Land Conservation Commission, which evaluates and makes recommendations to the board. The project, which had been approved by the Legislature in 2006, involved a $1.1 million appropriation of Land Conservation funds for the purchase of an agricultural easement on 108 acres owned by the Hawai'i Agricultural Research Center on O'ahu in Kunia. The property is currently used for crop research, but the easement was sought to prevent the land from being converted to non-agricultural use.

The state Agribusiness Development Corporation had secured $1.77 million from the federal Farm and Ranchland Protection Program to acquire the easement, but needed state matching funds to complete the transaction.

A month before the Land Board's vote, as ADC executive director Alfredo Lee explained the project to the Land Conservation Commission, the issue of HARC's involvement in GMO research came up. While some commissioners seemed fine with the fact that HARC conducts genetic engineering research, others were steadfastly against providing money to such an enterprise.

According to the May meeting minutes, commissioner Wesley Kaiwi Nui Yoon said that a vote against the project might deter the expansion of GMO agribusiness in

Hawai'i. Commission chair Dale Bonar, however, felt that "the more support the commission can give to protecting agricultural lands, the better," the minutes state. The ADC's Lee added, "Agriculture may change, and GMOs are one continuing project that ADC is looking at, however, protecting the land permanently is the issue in question, and if it does not happen today, it may not be here tomorrow."

In the end, however, the project did not win the commission's approval. Two commissioners voted for it, three voted against it, and two abstained. After the vote, commissioner Chip Fletcher, who had noted that "we're rescued every day by Matson [container ships]" said his vision of agriculture for Hawai'i was something that is "for the people and by the people" and that he was concerned about the pollution associated with industrial agriculture.

To this, Bonar asked whether the commissioners planned to vote down any agricultural project that was not organic. Fletcher responded that it was the first year that projects were being approved and that "tough choices had to be made." Commissioner Karen Young, who had abstained from the vote because of her involvement in organic agriculture, added that she might change her mind about such proposals in the future if safeguards or "ways to do research that are wholesome and pesticide-free are established," the minutes state.

Despite the commission's vote, the project was forwarded to the Land Board, which voted its approval. Since then, the commission has approved two more agricultural projects. Last December, the commission approved a request to provide $737,300 to the Wai'anae Community Re-development Corp. to buy 11 acres in Lualualei Valley. The property, once the site of an old chicken farm, would expand the non-profit corporation's MA'O Organic Farms. The second project involves the purchase of 196 acres of the 212-acre Kawaikapu Ranch in east Moloka'i. Ke 'Aupuni Lokahi, Inc. (Moloka'i Enterprise Community) has proposed using $937,500 of Land Conservation funds, $312,500 in federal grant money, and a $38,500 donation from current owners Gregory and Tracy Gordon to purchase the property.

Regardless of what decisions are being made by state agencies, Redfeather says, "The real world goes on anyway and there is a momentum for healthier, more self-reliant agriculture… These issues will still go forward at the grassroots level." Without a strong diversified agriculture policy advocate, however, it will be very difficult to effect changes, she admits. ***— Teresa Dawson***

Supreme Court Remands Moloka'i Cases To Water Commission, Finding Error

The state Commission on Water Resource Management would seem to have a hard time getting things right. Twice the Supreme Court has remanded back to the commission its decisions on the Waiahole ditch contested case, and a third appeal in that case is pending before the court. In 2004, the court rebuffed the commission in a decision it made over a well-drilling permit on Moloka'i. Then late last year, the Supreme Court tossed back to the commission its decision on a contested case that gave water use permits to Kukui Moloka'i, Inc., for resort development.

The history of reversals is clearly on view in the court's most recent ruling, which liberally quotes from its past decisions overturning Water Commission actions. As Isaac Moriwake, an attorney with Earthjustice, said, "writing the decisions now is kind of like making sausage for the court. Anymore, they just have to cut and paste from their previous decisions."

The most recent case decided by the Supreme Court goes back all the way to December 15, 1993, when KMI submitted an application to use 2 million gallons of water a day (mgd) at Kualapu'u and Kaluako'i resort. The water was to be taken from a well (Well 17) on land that KMI had acquired in October of that year.

In 1992, the commission had designated the entire island of Moloka'i as a water management area, which meant that applications for water use had to be filed within a 12-month period – or by July 15, 1993. After extensive discussions of the matter, in 1995, the commission authorized an "interim use" of 871,420 gallons per day. KMI's appeal of the matter was dismissed.

A year later, KMI sought to increase the authorized amount to 1.169 mgd, but the commission disagreed. Hearings officer Peter Adler then presided over a contested case, which included not only KMI as a party, but also the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, two Hawaiians, Georgina Kuahuia and Judy Caparida, and others.

On December 19, 2001, the commission awarded KMI an existing use permit for 936,000 gallons a day, plus a permit for proposed uses of 82,000 gallons a day, subject to conditions intended to protect the Kualapu'u aquifer from saltwater intrusion.

Within a month, DHHL, OHA, and Caparida and Kuahuia had filed appeals to the Supreme Court, which hears appeals of Water Commission decisions.

DHHL's Reservations

One of the issues on appeal was how much deference the commission should have given to the Department of Hawaiian Home Lands' reservation of 2.905 million gallons a day of water from the Kualapu'u aquifer. Under the state constitution, the DHHL has the right to reserve sufficient water to serve its lands, and the parties opposed to KMI had argued that this should be regarded by the commission as an existing legal use. The court basically agreed with the commission on this point, saying that it is "by no means categorically precluded from approving uses which may compromise DHHL's reservation," if the decision is made with openness, diligence, and foresight "commensurate with the high priority these rights command."

Yet the court agreed with the DHHL that the commission did not give "even minimal scrutiny" to KMI's request to divert water for private commercial use. The court's opinion, authored by Justice Paula Nakayama, notes that the commission's own staff recommended against awarding KMI the 82,000 increment for new uses on the basis that it would concentrate pumpage in one area of the aquifer and risk increasing levels of salinity. DHHL had had its own request to increase pumpage denied for this reason.

"Inasmuch as KMI's well is … contributing to the concentrated pumpage, we are compelled to wonder why the commission did not similarly toll KMI's request for new use," the court wrote. "We do not suggest that the commission did not have a valid reason for its conclusion or that the commission was absolutely barred from reaching its result. Rather, the commission has simply failed to explain the rationale behind the disparate treatment." Thus, the court remanded this issue "for additional findings of fact and conclusions of law."

No Alternatives

Another point raised by DHHL was the failure of the commission to consider the feasibility of alternative sources of water for KMI's requested uses. "The record confirms DHHL's allegation, and that omission requires us to vacate KMI's permits," the court found.

Reversals at Supreme Court Raise Question: Is Water Commission on the Right Track?

"The count as it stands is zero for four," said Isaac Moriwake, an attorney with the environmental law firm of Earthjustice. Moriwake made the comment in reference to the track record racked up by the state Commission on Water Resource Management in appeals of its decisions to the Hawai'i Supreme Court.

"The consistent theme is, the commission is not doing enough to safeguard the public trust," Moriwake added. "These four cases make clear the framework the commission is supposed to follow. It's a demanding task, but it's not impossible. It does require vision and commitment. The commission just has to get out there and do its constitutionally, statutorily mandated mission."

Moriwake's views are shared by several others who follow the commission's work closely. In interviews with *Environment Hawai'i,* nearly all expressed frustration with the agency's inaction and delays on numerous pending petitions and its failure to protect what one described as the state's "most precious resource."

Ken Kawahara, appointed recently to be executive director of the commission (and deputy director of the Department of Land and Natural Resources), said that he was trying to arrange to have the attorney general's office brief commissioners on the meaning and impact of the latest Supreme Court decision.

No Priorities, No Action

"They just don't get it," said Alan Murakami of the Native Hawaiian Legal Corporation, a firm that has represented Hawaiian claimants before the commission on many occasions.

"We have had a petition to amend instream flow standards for 27 streams along the East Maui coast pending since June 2001," he said. "And the commission has done absolutely nothing about it. In fact, for several years, the staff apparently lost the petition. It didn't even show up on its website until after we asked about it."

"It could be a lack of staff," Murakami said, "but when you don't have any set priorities, you don't get action."

The commission has amended interim instream flow standards for just two streams, he noted: Waiahole on O'ahu, as a result of the long (and still ongoing) contested case hearing, and Waiakamilo in East Maui – "after the Board of Land and Natural Resources grudgingly gave relief to our clients," Murakami added.

As the court noted in practically every decision, he said, "the commission's role is supposed to be much more affirmative than what they've interpreted it to be over all these years – not only with regulatory functions, but also with planning functions."

"The state water plan is supposed to be at the base of every regulatory function," he said. "Without a plan, you can't start with anything, you have no goals to direct where you are going, and you end up making ad hoc decisions without any plan in mind." Revisions to the state Water Plan, which was adopted by the commission in 1990, have been a work in progress by commission staff for more than a decade.

"So nothing happens. They plan, they strategize, they meet, they publicize, and then nothing happens," Murakami said.

Lessons Unlearned

Another source, who asked that he not be identified, made a similar observation.

"What are the commission members doing?" he asked. "Are they listening to contested cases, or just coming to meetings every

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"Here, the commission entered no FOFs [findings of fact] or COLs [conclusions of law] as to the existence or feasibility of any alternative sources of water whatsoever," the court said. "Indeed, the commission appears to have reserved consideration of feasible alternative sources of water until after the permit has been granted." One of the conditions of approval was that within two years of the permits being issued, KMI was to prepare a study of the feasibility of using non-potable water for golf-course irrigation.

The post-hoc review of alternative sources, the court said, "is fundamentally at odds with the commission's public trust duties. The feasibility of a new source of non-potable water … should have been considered prior to the granting of KMI's permit, not after the fact. The commission cannot fairly balance competing interests in a scarce public trust resource if it renders its decision prior to evaluating the availability of alternative sources of water. Thus, KMI's failure to demonstrate the absence of practicable alternatives should have terminated the inquiry."

Untimely Application

As mentioned earlier, the KMI application was submitted five months after the deadline for water use applications had passed. Although the commission had determined that there was just cause for the late filing, DHHL argued that it was unlawful for it to do so. According to the DHHL, the determination was barred for two reasons. First, the December 15, 1993 filing, couldn't be for an existing use, since the application did not amend an earlier, timely application. Second, the DHHL argued, as of May 27, 1993, seven months before the KMI filing, the commission lost its ability to accept late applications for "just cause." (By statute, the court explained in a footnote, the commission cannot accept late applications "more than five years after the effective date of rules" implementing the law. Since the rules took effect May 27, 1988, late applications became inadmissible after May 27, 1993.)

The court agreed with the DHHL, stating that "the commission should have strictly applied the statutory deadline for existing use permit applications," just as it did in the earlier Waiahole case. "Therefore, we vacate the commission's decision and order to the extent that it grants KMI a permit for existing uses," the court said. "If, on remand, KMI wishes to 'revive' this expired uses, it must apply for a [new] permit… as the uses are now presumed abandoned."

Unconsidered Closure

About 440,000 gallons of the existing-use permit and 24,000 gallons of the permit for proposed uses were to be used, KMI said, on the Kaluako'i golf course and hotel, both closed for some years now.

OHA, Caparida and Kuahuia argued that the commission should have taken this closure into account, asserting "that a hotel and golf course that has been closed for many months with no announced reopening date does not present a reasonable-beneficial use," as is required under the state Water Code. The commission argued, on the other hand, that its role was limited to determining what its past water use was, as of July 15, 1992, rather than at the time the contested case hearing occurred. In addition, the commission and KMI said that because the permits give KMI four years to put the water to the

On the Web: The Water Commission must file an annual report to the Legislature on the status of its efforts to identify and protect important streams. The most recent report, prepared in November 2007, is available online: *http://www.hawaii.gov/dlnr/cwrm/reports/CW2008_IDofRivers.pdf*

The report includes a status report on some of the issues mentioned in this article.

few weeks?" He noted that in recent months, the commission agendas have been "incredibly thin," adding: "Drilling permits should be handled by the director. The commission should be addressing policy."

With respect to the Supreme Court decisions, the commissioners "didn't learn the lessons of Waiahole," he said. "They haven't taken seriously the fact that the language in the Water Code says what it says. They think they can finesse it."

In the case of the two Moloka'i cases, the commissioners simply adopted the recommended findings of the hearings officers. "There's an understandable tendency to accept the hearing officers' reports somewhat uncritically. That's just a reality," he said. "So there's a reluctance to re-examine the entire record and rewrite portions of the findings."

The Water Commission staff "has been pretty good," he added, "but at the commission level, because the issues are so complex, commissioners just haven't delved into the technical working of the code. It requires a lot of very careful reading, and they just haven't done it."

The consequences are costly – to the parties who first go through the years-long contested case process, and then through even more years of appeals to the Supreme Court, which has its own inscrutable timetable. As one attorney noted, both the Moloka'i cases decided by the court were brought before it at roughly the same time, yet one was decided more than three years before the other.

"If we have to go through a decade of litigation in every important case, that's not going to work," said Moriwake. "It's clear that when the Legislature created this agency, they said, 'we don't want a crisis management agency, we want a forward-looking agency that plans well ahead of time, before these crises arise.' The Supreme Court in the original Waiahole case recognized the commission as the 'primary guardian' of public rights under the public trust, which demands 'openness, diligence and foresight commensurate with the high priority these rights command.'"

"In 2004," said one commission observer, "Waiahole II was remanded. And now Waiahole is on its third appeal to the court. To think that this thing has been going on since 1993 – 15 years now, and it's still not resolved completely! It does not send a good message as far as whether the commission can fulfill its mission of efficiently and effectively managing our most precious resource."

But Kawahara, the commission's executive director, is hopeful. "A lot of these things took place before I came on board," Kawahara said "I'm doing research right now, to understand what went on. Just from an initial review, it seems a lot of the actions taken by the commission were consistent, and at the time the decisions were made, the commission didn't have the benefit of knowing what the Supreme Court's opinion would be.

"If the commission knew then what they know now, possibly they could have come to different decisions," he said. "The important thing is to try to learn where there was a difference in opinion" between the court and the commission, "and in future actions, make sure those lessons are learned."

— Patricia Tummons

stated use, there was no error.

In addressing this point, Nakayama quoted from the court's decision in the first Waiahole case: "the commission must not relegate itself to the role of a mere umpire passively calling balls and strikes for the adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process." The commission failed to do so in this case, prompting the court to vacate the commission's decision and remand the permit for proposed uses.

Burden of Proof

Caparida and Kuahuia raised the argument that the commission improperly put the burden of showing harm to native rights and practitioners onto the Hawaiians, relieving KMI from any burden of proof. In the contested case hearing, the two had raised concerns that pumping Well 17 could harm the nearshore marine environment and thus affect their gathering rights. The commission concluded, however, that there was no evidence to suggest that the KMI allocation would "in any way diminish access for traditional and customary native Hawaiian practices in the project area, shoreline, or nearshore areas."

That conclusion, however, "erroneously shifted the burden of proof to Caparida and Kuahuia," the court found. "Accordingly, we hold that the commission failed to adhere to the proper burden of proof standard to maintain the protection of native Hawaiians traditional and customary gathering rights in discharging its public trust obligation."

Rejected Claims

Although the overall effect of the court's ruling was what the challengers had hoped for, along the way, the court tossed out some of their arguments.

First to be dismissed was DHHL's claim that the sustainable yield used by the commission in its deliberations was in error. The commission used a figure of 5.0 million gallons a day of sustainable yield for the Kualapu'u aquifer. The DHHL argued that the figure could be as low as 3.2 mgd. The court, however, agreed with KMI and the commission: "[T]he sustainable yield was set by rulemaking procedure, and …any challenge to the accuracy of the sustainable yield must be made by a petition to amend or modify the sustainable yield… [I]t would be inappropriate for the commission to reevaluate the sustainable yield in a permit application proceeding."

The court also rejected DHHL's claim that the commission should have taken into account evidence that KMI had violated the state's safe drinking water law. "Despite evidence in the record that KMI failed to comply with the SDWA [Safe Drinking Water Act], we hold that neither the [Water] Code nor the public trust preclude the commission from allocating water to KMI."

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The Wai'ola Decision

Many of the same parties and issues were involved in the case that came before the Supreme Court appealing the commission's decision, in December 1998, on an application of Moloka'i Ranch, Ltd., and a subsidiary, Wai'ola o Moloka'i, Inc., a

EMMA'S COLUMN

Getting Lost Among the Cliffs of Moloka'i

Emma Yuen at the end of the Pepe'opae boardwalk. In the background are Pelekunu and Wailau valleys.

Ahhh, to be thigh-deep in mud again. After years of school in urban California, I was finally back in my own native habitat – hiking in a Hawaiian forest. Being in the mainland for so long was quite an adjustment for me, as I left my most precious friends – the 'io that soars above Honokanenui valley, the sand at Waipi'o beach, my humble surf spot at Hakalau beach park. I also left behind the "nature girl" nickname and had to change my identity as I lived in a world where I strangely never had even a speck of dirt on me or any cuts and scratches from rock hopping or walking through bushes. Even the northern California redwood forests that I would often visit seemed rather clean compared to what I was used to on the rainy side of the Big Island.

But I was getting plenty dirty and scratched up now. Three friends and I were hiking in Pepe'opae bog, from the summit of Moloka'i, following a ridge of Pelekunu valley, and finally down a narrow fin into the beach at Pelekunu on the north shore. Normally we would have kayaked in, but this was winter when the surf is high and there are dangerous winds, so we decided to hike. On the map, the distance between our starting and ending points was only three miles, so I guessed we would be in Pelekunu by nighttime. We weren't sure there was a trail, though, and most of the locals we told about the trip seemed pretty unhappy with our choice of hikes.

The fellow who gave us a ride to Waikolu valley lookout advised us to take a left at a junction in the trail to the lookout over Pelekunu valley. Following his advice, we found some blue tagging leading from the end of the board walk and we followed the tagging for over an hour until a view cleared and we gasped to see…we were back overlooking Waikolu valley. We had slugged through muck almost all the way back to our starting point, over to the wrong valley! After some frustration and pointing at our ancient map, we tried to retrace our steps, only to find that there were blue tagged trails leading *everywhere.* We were completely lost and we had the first argument I ever had living in Hawai'i where we could not agree which way was *mauka* and where was *makai*. The forest was one of the most pristine I had ever been in, with every exposed surface covered in deep moss and ferns, and with few distinguishing characteristics, so we went around in circles for an hour until we finally found our way back to the boardwalk.

This time we went *right* at the junction, and found the Pelekunu lookout shortly after. It is one of the most beautiful sights in Hawai'i, yet so often covered in clouds. Even in the late afternoon, however, we saw clearly into the deep valley, the sheer cliff of Lanipuni at the opposite ridge, and the outstretched branching streams cutting through the ridges. Even the "wall of tears", which is the waterfall-scarred back ampitheater of Wailau valley, was lit up in the diminishing sunlight.

We followed a fence line that served as our muddy trail until dark. Then, we found a clearing in the thick forest and camped as we overlooked the valley slowly filling with mist under the moon.

The last of our water was gone at break-

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water utility, to drill a well and take some 1.25 million gallons of water a day from the Kamiloloa aquifer. One million gallons of that was to accommodate future development, including a small industrial park and what was described as low-impact tourism. Bringing the appeal were the DHHL, OHA, a group of seven Hawaiians (including Caparida), called the Kahae intervenors, which claimed an interest in the land within the Kamiloloa aquifer system, and a group of three Hawaiians, collectively the Ritte intervenors, who claimed an interest in traditional gathering rights.

The DHHL argued that the allotment of water to Wai'ola impacted its water reservations in the Kualapu'u aquifer, but the commission held that the reservations did not warrant the same level of protection as an existing use and, moreover, were "aquifer specific" – that is, only applications for water from the Kualapu'u aquifer could impact the DHHL water reservations.

"Although we agree that [the commission's Hawai'i Administrative Rules] denominate aquifer-specific reservations of water to DHHL," the court found, "we hold that such a limitation for purposes of water resource management does not divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers. … To hold otherwise would cripple DHHL's ability to contest proposed uses in adjacent aquifers that could significantly diminish its ability to utilize its reservations in the future simply because the proposed use was outside the Kualapu'u aquifer; such an interpretation defies not only legal but scientific logic."

The court did not agree that a reservation was equivalent to existing legal use. Yet, foreshadowing its decision in the Kukui Moloka'i case, it did underscore the need for the commission to give serious consideration to the impact of its decisions on DHHL reservations. Quoting its own decision in the first Waiahole appeal, the court found that the "reservation of water is an essential mechanism by which to effectuate the state's public trust duty 'to ensure the continued availability and existence of its water resources for present and future generations.'"

Since the commission did not address the DHHL's concerns in its findings of fact and conclusions of law, "it violated its public trust duty to protect DHHL's reservation rights."

Shifting Burdens

As in the Kukui Moloka'i case, one of the issues involved where the burden should lie in producing evidence of an impact, or lack of impact, to the public trust or other rights that would result from the permit. DHHL and the Ritte appellants claimed that the burden lies with the applicant, and that the commission failed to require it to fulfill that burden.

The court agreed. The commission's findings "supporting its conclusion that the proposed use would not interfere with DHHL's

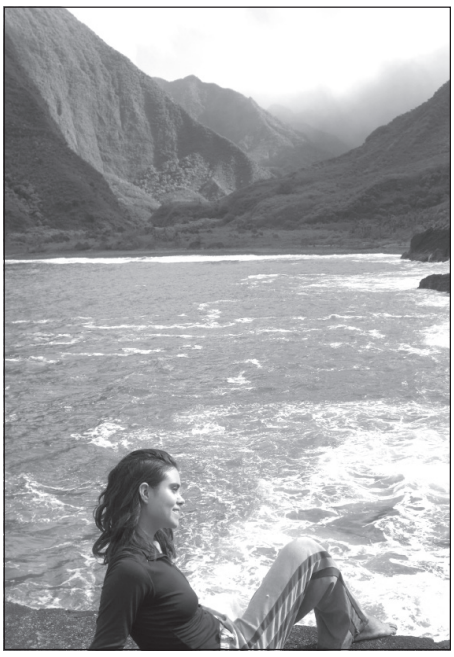
fast, but we only had a mile to hike so I did not worry about running out of water. I figured we would be down at the shore at Pelekunu by lunch, after descending Manuahi ridgeline, which at most places is so narrow that there is less than 10 feet between the cliffs, which fall 2,000 feet on each side. Falling off was never a problem, though, because the ridge was overgrown with uluhe ferns, with tendrils that would trip and wrap around us like an ever-unfolding cage. Sometimes, it was faster to lie down and roll on our bellies along the ridge to flatten the ferns than try to trudge through them, so down we slithered at a snail's pace. The view from the ridge looked right into Pelekunu valley with its three spring waterfalls that seep down from the middle of the cliff, and to our left was the mysterious hanging valley of Waiaho'okalo. Gentle rain came from the sea and a rainbow alighted right before us on the ridge. With only cliffs dropping away to each side, the two ends of the rainbow reached down through the empty air into almost a complete circle as it straddled the ridge in front of us, unlike anything I had ever seen before.

I was overcome by the beauty of the hike and walked in a daze, but some of my friends were realizing that they were very thirsty as noon passed. Suddenly, my boyfriend, irritated by the hindering uluhe, fell into something wet. The puddle was actually a blessing, because although it was little more than a stagnant pig wallow, we could filter it and we rushed to fill our bottles again. It was an especially lucky find because we would not make it down to Pelekunu that night either, and had another dry camp along the narrow ridge.

A rainbow arcs over a ridge of Pelekunu Valley

As we sat in a spot overlooking the highest sea cliffs in the world, Pelekunu, and the coastline towards the long finger of Kalaupapa, I knew I was infinitely blessed to be sitting there, overlooking the view. But my friends' conversations strayed from remarking about the vast sea view to discussing frequent flyer miles and television shows. I was amazed and offended that anyone could be making small talk at such a sacred place, and felt like acting like an old preacher and yelling "Blasphemy!" and pounding my fist. Nature brings me to a deeper state of mind that I rarely reach in my day-to-day life, which seems like a mundane dim dream when I am far out in the wild. There, I feel as if I am connected to the essence of my life, with no future or past, but only the bliss that emanates from me as I sit there, enclosed by cliffs. For the sunrise I climbed back to that spot to be alone and silent.

Finally, the next morning we made it down to the sea, where I lay in the sun, feeling tiny under the towering walls of the valley that seem immensely powerful. I melted into rocky shore and sea spray, so thankful to be complete again, reunited with Hawai'i. ***— Emma Yuen***



PHOTOS: EMMA YUEN

Looking back at Pelekunu Valley from the west side of Pelekunu Bay.

rights… failed to address whether MR-Wai'ola had adduced sufficient evidence with respect to the impact of the proposed use on DHHL's reservation in Kualapu'u," the court found, adding that, in fact, the commission seemed to have foisted the burden onto DHHL, "which is contrary to this court's well-settled interpretation of an applicant's burden."

Unprotected Rights

OHA and the Hawaiian intervenors argued that the commission failed to give due consideration to potential harm that the Wai'ola withdrawals would have on their customary rights by reducing the amount of freshwater flowing into the nearshore area. Among other things, they argued, they were not given the opportunity to impeach one of the key witnesses for Wai'ola, Steve Dollar, by confronting him with contradictory testimony he had presented in another contested case.

In its decision, the commission had determined that "no evidence was presented that the drilling of the well would affect the exercise of traditional and customary native Hawaiian rights."

But the court disagreed, finding that that conclusion "was unsupported by any clearly articulated [finding of fact]." The court went on to find that the commission's designated hearings officer erred by not allowing Dollar to be confronted with statements he had made that could have impeached his credibility.

"Accordingly, the commission having failed adequately to discharge its public trust obligation to protect native Hawaiians' traditional and customary gathering rights, we have no choice but to vacate the commission's decision and to remand for further proceedings."The Water Commission has not acted on the court's remand order yet. According to an attorney involved in the case, the DHHL has been attempting to work out a settlement with Wai'ola and other parties. ***— P.T.***

Honokohau Marine Project Veers From Master Development Agreement

Late last year, Kona citizens opposed to the 500-acre marina project known as Kona Kai Ola — which proposes the expansion of Honokohau small boat harbor and the construction of roughly 1,500 hotel and timeshare units on raw coastal land north of Kailua-Kona — sent out frantic emails that the state Board of Land and Natural Resources was planning to decide on December 11 whether to "give the Jacoby marina resort project the go-ahead."

Nothing could have been further from the truth. In fact, the future of the proposed marina development known as Kona Kai Ola is in limbo.

Both the state Department of Land and Natural Resources and project developer Jacoby Development, Inc., have fallen behind on deadlines set forth in their November 2005 development agreement, and the current version of the project departs from the minimum size and boat slip requirements laid out in the agreement.

Last December, says DLNR project specialist Gavin Chun, the Board of Land and Natural Resources was to have been briefed on the project's various problems, but Jacoby representatives were not able to attend the meeting. He says the proposed briefing was probably what led people to think that the Land Board was granting Jacoby some kind of approval. As of mid-January, Chun had not rescheduled the briefing and without any word from Jacoby representatives, progress on the project has stalled.

One of the issues Chun planned to raise with the Land Board was the possible amendment of deadlines set forth in the development agreement. Under the agreement, Jacoby was to have submitted a preliminary master development plan to the Land Board or its chair by November 2006, which it did. The Land Board or its chair had three months to either grant its approval or submit objections. If the Land Board failed to meet that deadline, the preliminary MDP would be deemed to be accepted and Jacoby would then have about three years to obtain various entitlements, including various government approvals and Land Board approval of a final development plan, among other things. If it obtained all the necessary entitlements and permits in time, Jacoby would automatically obtain a lease from the Land Board for about 350 acres at Honokohau. If Jacoby failed to meet that deadline, the development agreement would expire.

Despite efforts to gather comments on the plan from the DLNR's various divisions by early February 2007, then-Land Board chair Peter Young did not submit his department's objections to the preliminary plan until April 20. Although it would seem that this meant the preliminary MDP was automatically approved, both parties seemed willing to let the deadlines slide. Under the development agreement, Jacoby had two months to respond to the DLNR's comments, but was given an extension by then-Land Board chair Allan Smith until August 21, 2007.

In reading the DLNR's comments on the project, it's easy to see why both parties found it difficult to meet their deadlines. In his April 20 letter to Jacoby, Young attached an 18-page memo from his staff listing more than 140 questions, comments, and objections. Among other things, the memo stated that the proposed basic marina facilities did not include all required facilities, the proposed phasing of the project seemed to depart from the requirements of the development agreement, the extent of the public's ability to use the marina facilities was unclear, and the company's boat traffic study indicated that the proposed 45-acre, 800-slip marina would cause boat traffic problems.

With regard to the 1,803 timeshare units proposed for the development, DLNR staff wrote, "It is not clear how much of an unmet demand for timeshares exists in the Kona market and whether the Kona market can absorb the number of timeshare developments being proposed."

On August 21, Jacoby submitted a modified MDP (along with master covenants, conditions, and restrictions and a core infrastructure plan) aimed at addressing comments from the DLNR and others. The new plan introduced a very different project based on the preferred alternative identified in Jacoby's final environmental impact statement for the project. The FEIS recommended the adoption of its Alternative 1, which reduced the 45-acre, 800-slip marina required under the development agreement to a 25-acre, 400-slip marina. In response to community concerns, Jacoby also reduced the 1,803 timeshare units and 700 hotel units initially proposed to 1,100 timeshare units and 400 hotel rooms.

The downsizing did not reduce the DLNR's concerns, and on October 19, Land Board chair Laura Thielen responded to the modified plan, attaching yet another long memo – 17 pages, this time – from the Land Division and Division of Boating and Ocean Recreation.

The memo repeated concerns that the proposed phasing of the project was not in line with the development agreement. It also weighed in on an ongoing dispute between Jacoby and the Hawai'i County Council and Planning Department over whether a General Plan amendment would be required. The county's Planning Department contends that the scale of the project requires a portion of the DLNR land to be reclassified to a Resort designation, something which it has recommended against. Jacoby representatives, however, have stated that the project could be built under the current designation, Urban Expansion, which allows for the building of hotels and timeshares.

"The development agreement contemplated that a County of Hawai'i General Plan amendment would be required and obtained to allow rezoning and SMA [Special Management Area] approvals that are required for development of the project. Subsequent to the execution of the development agreement, a General Plan amendment [changing the Open designation of some lands to Urban Expansion] was approved by the Hawai'i County Council. However, the County Planning Department has indicated the project is not consistent with the amended General Plan and that county rezoning and SMA approvals cannot be obtained without a further General Plan amendment," the memo stated.

Based on the county's position, the DLNR's Land Division wrote that Jacoby's list of discretionary entitlements and permits "does not include all required entitlements/permits, including the County of Hawai'i General Plan amendment." The division asked Jacoby to confirm whether the company planned to seek another General Plan amendment, "and if not, explain why no such amendment is required and how JDI can obtain the required zoning and SMA approvals in light of the Planning Department's position."

The Land Division also pointed out that Jacoby, which is required to pay the DLNR $101,500 a year in development fees, was delinquent in its payments. At the time, Jacoby owed the state $57,040, which Chun says was paid late last year. To date, Jacoby has received two notices of default in the last year.

In its comments, DOBOR stated that traffic congestion from the 400-slip marina would result in unsafe conditions unless the harbor channel was widened or an alternative channel was constructed. Although

Whatever Happened to. . . Venu Pasupuleti and Megasoft

Last May, *Environment Hawai'i* reported on the strange case of Venu Pasupuleti, a would-be wheeler-dealer from Ohio who was proposing to build a huge (4,000-employee) computing center on land owned by the state Natural Energy Laboratory of Hawai'i Authority (NELHA) in Kona.

In an illegal meeting in April, the NELHA board had actually approved Pasupuleti's plan, but, when the meeting had to be redone (to meet state public notice requirements), the board backed off, granting approval to a scaled-back plan on condition that Pasupuleti post a large bond and show he had resolved IRS liens on several of his failed companies in Ohio, among other things.

Since then, Pasupuleti has been arrested — not once, but twice. According to a spokesperson for the Hawai'i County Police Department, on July 9, he was arrested for first-degree theft. Two days later, he was arrested and charged with failure to return a rental car.

Uday Sinha of Ohio, hired last year by Pasupuleti to work at his Hawai'i company, called Megasoft, told *Environment Hawai'i* that Pasupuleti was continuing to attempt to drum up support in Honolulu for his project. Sinha, who left a secure, $93,000-a-year job on Pasupuleti's promise to pay him $170,000 a year, has since become disillusioned with Pasupuleti. Not only did he not receive any money from Pasupuleti (who promised payment would be forthcoming as soon as a committed investor ponied up), he is out more than $6,000 that he gave as a loan to Pasupuleti, plus all his travel expenses for two trips to the islands.

According to Sinha, Pasupuleti was telling prospective investors that the NELHA board had approved his project and the only bump standing between him and breaking ground was NELHA director Ron Baird's delay in signing the papers. To beef up his claims, Sinha said, Pasupuleti proudly showed prospective investors and employees (including Sinha) an article published last April in *The Honolulu Advertiser.* The article, by Sean Hao, stated that the NELHA board had given approval to Pasupuleti's request for a lease on 10 acres of NELHA land. (As stated earlier, that approval, at the illegal board meeting, was later amended with far more stringent – and as yet unmet – conditions.) Hao gave lots of play to Pasupuleti's description of his business plan and anticipated revenues.

PHOTO: HAWAI'I COUNTY POLICE DEPARTMENT

Police mug shot of Venu Pasupuleti

Pasupuleti reportedly told Sinha that the arrest on the rental-car charge was the result of a misunderstanding; he'd told the rental car company where to find the car, but they didn't pick it up, Pasupuleti told him. The first-degree theft charge apparently is the result of Pasupuleti not paying his bill at the Hilton Waikoloa Hotel, where he had rented 20 or so rooms in the name of his company. That charge has been referred to the county prosecutor's office, where it is pending.

The Defrauded Innkeeper

Last May, Sinha came to Hawai'i and met with Pasupuleti at the Hilton Waikoloa in one of several rooms Pasupuleti had rented to use as temporary offices for his business. At that time, Sinha said, Pasupuleti seemed to be on the up-and-up. He observed what seemed to be a telephone conference between Pasupuleti and a person who Pasupuleti said was with AT&T, with the discussion centering on providing routers and other internet service equipment.

When Sinha returned to Hawai'i in July, he was told by a student who had become a close confidante of Pasupuleti that they couldn't go back to the Hilton and that Pasupuleti himself was in jail. Sinha had to put up his own credit card to secure a room at another hotel.

Jacoby argued that widening the channel would allow more waves to penetrate the harbor, DOBOR wrote that that conclusion was not supported by any data.

By mid-January, the DLNR had received no response from Jacoby, and at this point, it is unclear how or whether the deadlines in the development agreement are still in effect. Despite the fact that the development agreement provides for automatic approval of the preliminary MDP if the Land Board fails (as it has) to meet any of its deadlines, Chun says that no approval of a preliminary MDP has been given. The agreement allows Jacoby three chances to get Land Board approval of its preliminary MDP before the agreement is terminated, and the company has already used up two.

Jacoby representative David Tarnas said he was still awaiting clarification on the issues from his bosses at press time. The DLNR's Chun says that amending the development agreement is one of the things that Jacoby wants to discuss with the Land Board. Without amendment, it's unclear how the project can proceed.

A September 21 letter to Chun from Jacoby consultant Oceanit states, "While it can be concluded that the 25-acre marina in Alternative 1 would be the preferred size, the DLNR agreement establishes the size of the marina at 45 acres and 800 slips. An amendment to the DLNR agreement is required in order to allow Alternative 1 to proceed. Hence, selection of Alternative 1 is an unresolved issue at this time." ***— T.D.***

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A source in the credit department at the Hilton Waikoloa confirmed that it was his hotel that was scammed by Pasupuleti. "I can't tell you the exact amount," he said, but he said it was "a rather substantial amount of money." Sinha had told *Environment Hawai'i* that the unpaid bill, for some 20 rooms that Pasupuleti had booked on behalf of Megasoft, came to roughly $160,000. The Hilton source acknowledged that Pasupuleti had booked a number of rooms for his corporation, "which failed to materialize due to, what I understand was, various red tape issues with the governor's office in getting proper clearances and subleases." When asked if the amount of the unpaid bill approached the $160,000 figure Sinha provided, the source said: "It was over $150,000 – maybe even more than $160,000."

"One thing I can tell you," he said, "he was very convincing, and was always very positive that he was receiving funding 'at any time' – always 'at any time.' Unfortunately, we can't do business on promises. Originally, he presented some letters of credit, et cetera, that were supposed to be security."

"He shouldn't have got into us as deep as he did," he continued. But owing to a series of crossed communications and other problems, Pasupuleti continued to occupy a number of rooms that, day after day, remained unoccupied. "The maids didn't report them vacant," he said, "because for them it was one less room to clean."

Megasoft "had all these rooms and were running up the bill for several weeks and nobody was telling anybody else," he said. "They were all empty."

An Unpaid UH Grant

In late 2006, Pasupuleti signed a contract with the University of Hawai'i, agreeing to pay $450,000 over the next three years to the College of Business Administration. The grant was to support research into "the emergent behavior of 'ultra-large-scale,' or ULS, systems from both computational and managerial perspectives," as described in a write-up of the grant published in the college's newsletter. Principal investigators were Rick Kazman and Hong-Mei Chen.

"I never received a dime" on the grant, Kazman told *Environment Hawai'i,* adding that he was "getting some flack from my college for not coming through with the promised funds."

"He fooled me," Kazman said of Pasupuleti.

Brokering the grant was a graduate student of Kazman's who had met Pasupuleti last winter at a cultural gathering. That student now rues the day he met Pasupuleti, he said in an interview with *Environment Hawai'i.* (He did not want to be identified.)

"I got in trouble because I introduced him to people," the student said. "He ruined my relations with so many people." According to the student, Pasupuleti had put more than $10,000 on the student's charge card without authorization. When Pasupuleti wrote a check to cover part of the amount, the student said, it bounced. "He told me there was some fund management that needed to be done," the student said, "and told me to be patient."

"I thought this was all real," he said, referring to Pasupuleti's grand plans. However, he added, for months now, Pasupuleti has not returned his calls or emails. In an effort to recover the funds he claims he is owed, in mid-January, the student filed a complaint in small claims court against Pasupuleti and his brother, Vijay, who lives in Ohio. Vijay Pasupuleti, the student said, has assisted his brother in his schemes.

Environment Hawai'i was able to confirm the identities of several other parties who were apparently stung by Pasupuleti. None wished to discuss their involvement with him or be publicly identified. They include an attorney, a public relations firm, and a California computer consultant.

And NELHA Waits

As for Pasupuleti's compliance with terms set by the NELHA board for occupying its site, deputy attorney general Bryan Yee told *Environment Hawai'i* that he had heard virtually nothing from Pasupuleti since the board took action last spring.

So where is Pasupuleti these days?

In Honolulu, where, according to Sinha, he is trying to sell investors on a scheme to develop a computing center on O'ahu. In late December, the receptionist at the Atkinson YMCA confirmed that Pasupuleti was staying there, in a $37-a-night room (with shower down the hall).

Despite his humble lodgings, Pasupuleti continues to swan about Honolulu, frequenting the watering holes of its movers and shakers. A recent newsletter of the Island Club welcomes him to its ranks. Just to join this exclusive group requires prior membership in the Plaza Club, the Waikiki Yacht Club, or the Mid-Pacific Country Club.

Efforts to obtain comment from Pasupuleti were unsuccessful by press time.

— Patricia Tummons

On the Web: For more on Megasoft, NELHA, and Pasupuleti, see the articles in the May 2007 issue of *Environment Hawai'i,* plus the EH-Xtra entry (in the EH-Xtra archives). All can be accessed from our home page, *www.environment-hawaii.org.* EH-Xtra articles may be viewed for free. Access to archived articles requires a current subscription or purchase, for $10, of a two-day pass.

The *Honolulu Advertiser* article is available on the newspaper's website archives for April 19, 2007: *http://the.honoluluadvertiser.com/article/2007/Apr/19/bz/FP704190348.html*

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