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Watering Holes

Golf course holes, that is. On Lana'i, the method of keeping greens green has been the subject of litigation for more than a decade.

The recent Land Use Commission decision on the matter has settled one issue, allowing Castle & Cooke to continue using groundwater to irrigate its golf course, but the LUC missed the opportunity to require a study that would confirm that its decision was in keeping with protecting the limited resource that is Lana'i's high-level aquifer.

Apart from the issue of golf-course irrigation, there's the profligate consumption of water by Castle & Cooke's Manele Bay development on the island.

Teresa Dawson provides coverage of this difficult and little publicized dispute in our cover story.

Inside, we report on two aspects of beach movement – accretion (addressed in a recent ruling of the Intermediate Court of Appeals) – and loss (taken up by the Board of Land and Natural Resources).

IN THIS ISSUE

LUC Ruling Allows Golf Course To Use High-Level Aquifer Water

Whether or not Castle & Cooke Resorts illegally used potable water to irrigate its Manele golf course is now moot, much to the relief of Castle & Cooke Resorts, LLC, and to the chagrin of the citizens' group Lanaians for Sensible Growth (LSG).

On January 8, after more than 15 years of litigation that reached as high as the Hawai'i Supreme Court, the state Land Use Commission unanimously, without discussion, and, some say, hastily, voted to adopt Castle & Cooke's July 2007 proposal to modify Condition 10 of its 1991 boundary amendment, which the company allegedly violated when it began using brackish water from the island's high-level aquifer to water its golf course. The commission completely ignored a competing motion from the state Office of Planning.

How will this ruling affect the future of Lana'i's modest freshwater aquifer? Depending on whether or not LSG appeals the decision, which had not been officially released by press time, it means that Castle & Cooke may, for now, continue to lavish water on its Manele golf course. But should there be a drop in the aquifer's recharge from fog drip, or overuse of certain wells, or additional construction in the Manele area without a corresponding reduction in the rate of water use, the state Commission on Water Resource Management would likely step in, according to an official with the agency.

But for now, he said, the aquifer does not appear to be in danger.

Caught in the Act

The dispute over Lana'i's high-level aquifer revolves around promises Manele golf course developer Lana'i Resort Partners made during the process of redistricting 139 acres of agricultural and rural land to the Urban District, as well as the language used in Condition 10 of the LUC's 1991 Decision

to page 6

PHOTO: ALAN MURAKAMI

In the middle of a sunny day in 2007, sprinklers water the lawns at Castle & Cooke Resorts' Manele Bay Hotel, while the Land Use Commission discusses whether the company illegally irrigated its golf course with potable water.

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NEW AND NOTEWORTHY

Service Sued Over Kaua'i Listings: WildEarth Guardians is suing the U.S. Fish and Wildlife Service over its failure to place 48 species of plants and animals of Kaua'i on its endangered species list. According to the lawsuit, filed January 4 in Honolulu, the service missed a deadline of October 21 for the listing.

All 48 species – 45 plants, two birds, and a picture-wing fly – had been proposed for listing on October 21, 2008, under the Bush administration.

According to WildEarth Guardians, Secretary of Interior Ken Salazar added just two species to the endangered list in 2009, matching "the all-time lows set under the Bush administration." The group, headquartered in Santa Fe, noted that Salazar had dismissed concerns about the low rate in an interview given to the Associated Press on New Year's Eve. Salazar told the AP that he does not consider important "the number counting of how many species have we listed and how many we have not."

Local Fish and Wildlife Service spokesman Ken Foote said that the delay in the listing was merely the result of some last-minute hang-ups, and that formal listing was expected to be published in the Federal Register by the end of January. After a species is listed, the Fish and Wildlife Service must develop a recovery plan within five years.

False Killer Whales Get Respect: Similar litigation brought on behalf of the small population of false killer whales that inhabit waters close to the Main Hawaiian Islands has brought tangible results. Last month, the National Marine Fisheries Service announced that it was forming a Take Reduction Team to formulate ways to reduce the harm to the animals caused by the operations of longline fishing vessels.

Establishment of the team was the goal of the litigation filed by Earthjustice on behalf of Hui Malama I Kohola, the Center for Biological Diversity, and Turtle Island Restoration Network.

Belly Up in Waikoloa: What began with a bang has ended, three years later, with a whimper on the steps of the Hilo court house. In March 2007, a development company called Metric-Passco purchased about 45 acres of urban-zoned but undeveloped land in Waikoloa Village, on the Big Island, for nearly $20 million. The company prepared an environmental assessment for its project, which included a 200-room hotel, a business park with nearly an acre of office space, a shopping mall, 300 multifamily homes and 150 units for seniors.

Within months of the final EA being published, in January 2009, the developer was in default to its major creditor, the Building for America Fund III LLC, a Delaware company with offices in Glendale, California. The total amount of interest and principal owed on the note amounted to more than $15 million at the time the foreclosure suit was filed last June.

For several months, both parties were in talks to arrive at some agreement, and an initial foreclosure auction, set for December 9, was delayed so the talks could continue.

By January 7, it was all over. The property was auctioned on the court house steps, with BFAF III the sole bidder. If the court approves the sale, the creditor will take possession of the land for $10 million, or roughly half of the purchase price in 2007.

The Trashing of Important Ag Land: Land belonging to Alexander & Baldwin on Kaua'i was the first to be classified by the Land Use Commission as Important Agricultural Land under the provisions of a law passed in 2008 intended to protect and promote farming opportunities in the state. But no sooner was the designation of 3,773 acres in place last March than the County of Kaua'i pushed part of the acreage to the top of its list of preferred sites for a future landfill.

The site was selected by a 15-member advisory committee, which deliberated while the LUC process was ongoing. When the committee's recommendation was announced last August, proposing to use 127 acres of the designated land near Kalaheo as the site of the county's next landfill, the community rose up in anger.

Kaua'i Coffee Company, an A&B subsidiary that occupies the proposed landfill site and surrounding lands, has objected, saying that the landfill would harm its image and put its product at a competitive disadvantage. A&B spokesman Tom Shigemoto told the County Council in December that if the county wanted to take ownership of the land, it would have to be through unfriendly condemnation.

The next step for the county is preparation of an environmental impact statement. The county estimates that the existing landfill at Kalaheo will run out of room by 2017, at the latest. For a new site to be ready by that time, site selection should have been completed by the end of 2009, according to a timetable presented to the public by the county's consultant, R.M. Towill.

Quote of the Month

"I like people.
But I really like plants and animals."

— Sheila Conant, UH Department of Zoology

Environment Hawai'i
72 Kapi'olani Street
Hilo, Hawai'i 96720

Patricia Tummons, *Editor*
Teresa Dawson, *Staff Writer*
Susie Yong, *Office Administrator*

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Telephone: 808 934-0115. Toll-free: 877-934-0130.
E-mail:pattum@aloha.net
Web page: http://www.environment-hawaii.org

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Appellate Court Decision on Accreted Land Leaves State, Private Owners Seeking Clarity

A recent decision of the Intermediate Court of Appeals has not settled the law on ownership of accreted shore land in Hawai'i, but has rather set in motion heated debate on exactly what the court's decision means.

By January 11, less than two weeks of the court's release of the decision (December 30), the state of Hawai'i was asking for clarification and the private parties who brought the original lawsuit were seeking reconsideration.

Ironically, vagueness over the meaning of a lower court ruling was the very thing that caused the initial appeal to the ICA.

Given the high stakes at the heart of the matter – nothing less than the state's claimed right to own, and the public's right to enjoy, beach property that has accreted in front of private land – the vigorous pursuit of clarity is hardly surprising.

A 'Public Trust Mandate'…

In 2003, the state Legislature passed and the governor signed a bill that became known as Act 73. This law denied private property owners the right to claim as their own any land that had accreted between their seaward boundary and the high-water mark. Eighteen years earlier, the state had, through Act 221, limited beachfront property owners' rights to accreted land by stating that before any such land could be formally claimed, landowners would have to demonstrate that the accretion was "permanent," which, under Act 221, meant that it had to have been present at least 20 years.

In 2005, several owners of property on Portlock Road in East O'ahu, fronting Maunalua Bay, challenged Act 73, stating that it amounted to an unconstitutional "taking" and asking the court for injunctive relief, which would have effectively required the state to continue processing any applications to register title to accreted lands.

Judge Eden Hifo of the First Circuit Court agreed with the property owners in a preliminary ruling that Act 73 "represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land." In her order of May 3, 2006, however, she did not provide the injunctive relief sought.

Hifo also stated that Act 221 "did not alter the common law of Hawai'i with respect to the ownership of accreted land," which, she continued, "belongs to the littoral landowner," whether or not the landowner had registered title to it.

Essentially, Hifo left it to the state to decide whether to enforce the law (and compensate landowners for their losses) or simply walk away from Act 73.

Thereafter the state, with the concurrence of the private landowners, filed its interlocutory appeal, which sought clarification on the central question of whether Act 73 did, indeed, amount to a taking.

A key part of the state's argument is the classification of accreted lands into three classes: those existing before Act 221; those existing from 1985 (when Act 221 was passed) to May 19, 2003 (when Act 73 took effect); and those that might come into existence after that date. Lands in the first class were not affected by either Act 221 or Act 73, the state noted. In addition, there was no taking involved in Act 73, the state argued, since under Act 221, logically, with accreted lands required to be present at least 20 years, no accreted lands could have come into being in the 18 years between passage of Act 221 and Act 73. With no such lands in existence, the idea that owners of adjoining lands could have suffered a taking was not legally defensible, the state argued.

"Act 73 did not take away any existing right or ability of littoral landowners to utilize, or otherwise control or assert dominion over, Class II accretions," the state argued in its appeal. "It merely took away their hope that sometime in the future they might have control over those accretions if and when the accretions stayed in existence for 20 years."

As for the third category of accreted land – that which occurred after May 19, 2003 – the state had every right to deny adjoining landowners the right to claim that as their private property, the state argued. Act 73 had no effect on the landowners' main parcel of land, the state argued, but only interfered with the littoral landowners' "hope of future control" over accretions. The fact that such hope was dashed "cannot amount to a direct appropriation of property rights," the state said in its appeal.

In addition, the state noted, the plaintiffs in the case "did not even purchase their beachfront land before the passage of Act 73," so "they could not have had any [investment-backed] expectations as to ever using" accreted lands.

In any event, the state's argument went, the public's interest in using these lands was enshrined in the "public trust constitutional mandate of Article XI, Section 1" of the Hawai'i Constitution, which says that "all public natural resources are held in trust by the state for the benefit of the people."

… Or a Common Law Right

The landowners' position, as set forth by attorneys Paul Alston and Laura Couch, is that common law protects the rights of littoral property owners to claim accreted shore lands.

Act 73 took away those rights, they argued, by fixing the seaward boundary "of virtually every oceanfront parcel … as of May 19, 2003." Judge Hifo's ruling, the plaintiffs said, requires the state to pay for this taking and, until it does, the state is enjoined from enforcing Act 73.

"No one in this action is suggesting that the state should not increase the size of public beaches by expanding them into areas mauka of the shoreline," the plaintiffs wrote in their brief to the ICA. "Large public beaches are wonderful; they bring much happiness to Hawai'i's citizens and tourists, alike. However, private landowners are under no obligation to donate their private property for the cause. If the state wishes to increase the width of public beaches it can surely do so, but not without compensating private landowners."

"Hawai'i common law has always recognized littoral landowners' vested rights to accretion above the high water mark… Act 73, in contrast, said all existing and future accretion was (and would forever be) state land. By doing this without paying compensation to the littoral owners, the state went too far," the plaintiffs claimed.

Contrary to what the state had argued, Hawai'i law never required littoral landowners to formalize their ownership of accreted lands; "Instead, the 'high water mark' has always been the controlling boundary," the plaintiffs argued in their reply to the state's appeal.

As to the state's argument that the claimed losses are only potential and speculative, that is "way off the mark," the plaintiffs' attorneys write. "The rights lost by Act 73 are not a mere possibility; in effect, Act 73 rewrites all littoral owners' deeds so their shorefront boundaries are not ma ke kai [along the water] (or its equivalent) but fixed lines. The accretion rights lost are present and immediate whether the accre-

State Dings Beachfront Landowner For Encroaching, but 'Legal,' Wall

It is well established in Hawai'i that the high wash of the waves determines the boundary between public and private land. And given the ruling late last year by the state Intermediate Court of Appeals, it appears that the state, at least for now, can expand its ownership whether beaches are eroding or accreting.

But in instances where erosion causes legally built structures to cut into or fall under the high wash of the waves, it's still a bit unclear how far the state will go to claim its property.

On January 8, the state Board of Land and Natural Resources granted two non-exclusive, 55-year easements to Brian Vinson to accommodate his seawall in 'Ewa, O'ahu that recently had been found to be encroaching nearly 500 square feet onto state land.

The Department of Land and Natural Resources' Land Division recommended that the board approve the easements and impose a fine of $2,000 ($1,000 for each of the two lots on which the wall sits) for the unauthorized encroachment.

In his testimony to the board, Vinson complained about the Land Division's additional recommendation that he post "public property" signs on the wall. He said endangered Hawaiian monk seals sometimes leaned against the wall and he worried that the signs might somehow injure the seals. He also objected to the fine.

"These improvements were built in 1962 or 1964, long before I was even born. The shoreline high-water mark was set in 1967. There was no violation noted at that point. These properties were built with permits. No violation was picked up until this point when the shoreline inspector went out. I don't think it's fair to fine me since I owned the property for little more than a year," he said.

With regard to the signage requirement, Land Division administrator Morris Atta explained that it is a standard requirement for shoreline easements, meant to inform members of the public that they can use that portion of the wall that lies on public property.

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tion is existing (and previously unrecorded) or may occur some day in the future."

The state had pointed out that littoral owners would not lose their access to the water since, as members of the public, they, too, would have every right to cross accreted lands to get to the beach. But the plaintiffs' attorneys put a different spin on this: "The right to 'future' accretion is a key component of Appellees' property rights because it ensures littoral landowners they will remain littoral landowners… It is no mystery why property along the beach is usually the most expensive on the market; it is adjacent to the shoreline. Property which is near the beach but interrupted by a park, public restroom, lifeguard station or shower is not as valuable as land directly on the shoreline."

Filing amicus briefs with the ICA were the Pacific Legal Foundation, represented by Robert H. Thomas, advocating for private property rights, and Hawai'i's Thousand Friends, represented by Carl Christensen, which suggested that the court was free to determine that the landowners had no vested right to future land accretions.

The ICA Opinion

"It is true that under Hawai'i common law, land accreted to oceanfront property belongs to the oceanfront property owner," the Intermediate Court of Appeals found. However, it continued, the very first chapter of Hawai'i Revised Statutes gives the Legislature and the courts the power to override common law. It goes on to note that the Hawai'i Supreme Court has upheld the power of the Legislature to "change or entirely abrogate common law rules," although in so doing, it "may not violate a constitutional provision."

So what of the plaintiffs' claims to have a constitutionally protected private property right to accreted lands?

On this question, the ICA seems to have divided its consideration into two parts: the issue with respect to existing accretions, and that with respect to future accretions.

With respect to future accretions, the ICA seemed to agree with the state: "Any claims that plaintiffs may have to future accretions are purely speculative," the ICA wrote. "Plaintiffs have no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation."

(It disagreed with the state, however, over the effect of Act 221 – the 1985 law – on landowners' rights to accreted land. While the act set forth standards for registering title to accreted lands, the ICA noted, it "did not change the Supreme Court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached. Act 221 also did not provide that all accreted land above the high-water mark was public or state land until the littoral owner proves that the accretion was natural and permanent.")

With respect to existing accretions, the ICA determined, "Act 73 permanently divested a littoral owner of his or her ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of Act 73… and, therefore, Act 73 effectuated a taking of such accretions."

The ICA remanded the case back to Hifo, with instructions that she determine whether the plaintiffs have existing accreted lands and, if so, to assess the damages they incurred as a result of Act 73.

Muddy Waters

In its motion for clarification, the state asked the ICA to affirm the state's position that the takings effected by Act 73 apply only to what the state called Class II accreted land (that which accreted between June 4, 1985 and May 19, 2003).

In the plaintiffs' motion for reconsideration, the court is asked to look at the case in light of a fresh-off-the-press ruling from the 9th U.S. Circuit Court of Appeals. This new, "previously uncited, Ninth Circuit Case law both undermines the cases underpinning the [ICA] opinion and supports [plaintiffs'] argument that 'boundary fixing' cases are constitutionally distinct from cases, such as those cited in the opinion, in which the interference with future accretion involves the government exercising its rights as owner of submerged lands," the plaintiffs' attorneys write.

They also dispute the court's findings that the public trust doctrine as well as HRS 1-1 can diminish littoral owners' rights to future accretions; the court's finding that nothing in the record shows the plaintiffs had existing accreted lands; and the court's comments on the propriety of Judge Hifo's decision to accept the case as a class-action lawsuit.

On January 20, the ICA denied both motions. ***— Patricia Tummons***

Regarding the fine, at-large Land Board member David Goode explained that the amount is also standard for encroachments and because two properties are involved, the fine was doubled. He added that for Vinson, as a shoreline property owner, "it's probably something you weren't aware of, but should have been. It should have been disclosed. It's a possibility with any shoreline property with seawalls. The makai boundary can change...and these fines would be forthcoming."

As beaches erode and shorelines begin to overlap with private property, the state may fine landowners and seek easements for encroachments that are created.

When Big Island Land Board member Robert Pacheco asked whether fines were standard for walls that have been in place as long as Vinson's, board chair Laura Thielen said that regardless of when a wall was built, once it encroaches on state property, it has been board policy to fine the landowner.

"[P]art of it is to just say that there is a consequence when encroachments are built upon state property. A lot of times, property transfers over time and Realtors and property owners have a due diligence responsibility to check on the structures prior to purchasing, and in some cases that doesn't happen. But as these are discovered, it's been the board's practice and policy to impose [a fine]," she said, adding that fines may be higher for deliberate and flagrant encroachments.

Vinson pointed out that the wall wasn't built as a seawall; it was just a perimeter wall around the property and the shoreline has since eroded. He said that given the property's history, he believed when he bought the land that the improvements were grandfathered in.

To this, Atta said, "The legitimacy of the structure has always been an issue for the purposes of a certified shoreline going forward. But...because of the fact that the shoreline is moving over time, the policy that was put forth from the board was that all encroachments would be fined because it was a trespass onto state property and we would treat all of these encroachments the same.

"Clearly, there will be instances where legitimate, permitted structures would at some point in time, with the movement of shorelines and rising of sea levels, become encroachments on state land.... At some point in time, the board came to a position that our shorelines are a mess – there are literally hundreds of these encroachments out there – and we need to deal with it and somebody has to pay for the removal or correction of these problems."

Thielen added that there is some confusion about the term "illegal encroachment" in reference to the structure in this case. She also seemed to believe that the fine was, essentially, rent for being able to keep an "unauthorized" structure on state land, "recognizing cases where the shoreline is migrating up."

Atta clarified that an easement from the Land Board would legitimize the encroachment from now on, but the fine "is for the existence of the encroachment up until now, that it's been allowed to remain there, arguably, to the detriment of the public because it's now state land and the public has not had the benefit of accessing that land. If you were to look at it from the public access standpoint, something needs to be done about this structure... Whether it's just a perception or legal title, the public has been denied access to that portion of the state's land. That's where the concept of a fine came in. The issue of whether an easement should be granted or whether the structure should be removed was given to OCCL to assess. If OCCL felt that it would be more harm to remove it the decision would normally be to allow it to remain, but they would have to pay for it because it's on state land." In this case, Vinson will have to make a one-time rental payment to be determined by an appraiser.

Goode asked Atta what would happen, if, 20 years from now, Vinson had to do a new shoreline certification and, as a result of subsidence and sea level rise, inspectors found his wall to be extending twice as far onto state land.

"What happens then? Do we fine him again?" he asked.

"Hypothetically, yes," Atta said, "and that's something that's not been addressed. The shoreline laws are obviously really complex and really complicated. This issue of the creation of encroachments by natural processes and movement of the shoreline has always been a really tough nut for us to deal with because it not only affects encroachment issues, but subdivision issues that come into play...." (The certified shoreline never determines the seaward property boundary, but it is used as a tool in things like subdivisions or erosion claims, to determine the boundary, according to a shoreline certification expert with the DLNR.)

Atta continued, "Until either the law changes, case law changes, or the Legislature changes how we treat the shoreline and ownership issues...given our current regulatory structure, we have to treat each new encroachment before us as a brand new encroachment. Obviously, we wouldn't charge for those portions we previously dealt with, an easement or whatever, but if an additional encroachment is created by rising sea levels, under the current law, that's how we have to deal with it."

> *"This issue of the creation of encroachments by natural processes and movement of the shoreline has always been a really tough nut for us to deal with..."* ***— Morris Atta, Land Division administrator***

(As a matter of practice, however, the state does not always rush in to claim ownership of "private" lands that now fall within the high wash of the waves, i.e. Lanikai on the island of O'ahu or Kapoho on the Big Island.)

When Pacheco asked whether the structure would revert to private ownership if natural accretion extended the shoreline seaward, Thielen mentioned, but did not elaborate on, the state Legislature's 2003 change to the state's accretion laws and the recent state ICA decision. (See article on Page 3.)

As a show of sympathy to Vinson's plight, the board chose to cut his fine in half.

— T.D.

Lana'i from page 1

and Order approving the company's petition.

Company representatives stated at the time that no water from the high-level aquifer would be used on its golf course and that it would develop alternative sources of irrigation. The LUC's Condition 10 prohibited the company from irrigating the golf course with potable water from Lana'i's high-level aquifer. The aquifer is the island's main source of drinking water and has a sustainable yield of 6 million gallons a day (3 mgd each from the Leeward and Windward sections). Condition 10 required the company to develop alternative, non-potable sources of water, e.g. reclaimed effluent.

Within a year of the LUC's decision, Lana'i Resort Partners began watering the golf course with more than 500,000 gallons per day (gpd) of brackish water from the high-level aquifer, prompting Lanaians for Sensible Growth, as well as the LUC and Maui County, to cry foul.

In its defense, Lana'i Resort explained that when some of its representatives had promised not to use "high-level aquifer water" they really meant "potable water." The company also said it was well known during the commission's proceedings that it intended to use brackish Wells 1 and 9, which are located in the high-level aquifer. Unswayed, the LUC issued in October 1993 an order to show cause why the 139 acres should not revert to their prior classification in light of the apparent violation of Condition 10. After holding hearings on the matter, the LUC issued an order in 1996 requiring the company to immediately cease and desist using water from the high-level aquifer for golf course irrigation.

In 2004, however, the Hawai'i Supreme Court found that the LUC had erred in its decision, noting that regardless of what the LUC had intended, the language used in Condition 10 does not prohibit the use of any high-level aquifer water, just the aquifer's potable water. Because the LUC had not clearly defined "potable" in its 1996 decision, the court remanded that issue back to the commission.

In 2006, the LUC held hearings on the definition of potable, but halted them before Lanaians for Sensible Growth could present its case. Settlement discussions followed and failed. But instead of resuming hearings on the alleged violation, the LUC veered in another direction, choosing instead to hold hearings on motions filed in mid-2007 by the state Office of Planning (OP) and Castle & Cooke to modify Condition 10.

Petitions to Modify

In its motion, filed on behalf of Castle & Cooke by attorney Bruce Lamon, the company proposed replacing the language in Condition 10 with language prohibiting potable water from the high-level aquifer from being used for irrigation of the golf course, driving range and other associated landscaping. The company would also be prohibited from using more than 650,000 gpd of non-potable water or "such other reasonable withdrawal as may be determined by the Maui County Council" for golf-course-related irrigation.

Castle & Cooke also proposed including language defining potable water as "surface water or groundwater containing less than [250] milligrams per liter chlorides and which can be disinfected to satisfy standards set forth in the State of Hawai'i Department of Health rules chapter 20 entitled 'potable water systems' and maximum contaminant level goals and national drinking water contaminants." This language, Castle & Cooke's petition stated, was substantially identical to the requirements of the Maui County Code at the time and reflected the status quo over the previous 14 years.

Finally, Castle & Cooke proposed dissolving the LUC's 1996 cease and desist order, which would moot the remand proceedings.

The OP's motion was a bit more complicated, calling for a variety of conditions, including chloride testing, adherence to county golf course ordinances, and irrigation restrictions depending on overall groundwater use, among other things.

More than two years passed without any hearings on these motions, but on December 15, 2009, the Office of Planning drastically revised its motion based on recent changes to the Maui County Code.

The revised motion recommended prohibiting the irrigation of the Manele Golf Course with ground water if the chloride concentration at the well head is less than 250 mg/l for three consecutive water report periods, until the chloride levels in the affected well rise above 250 mg/l for three consecutive water report periods. The total amount of ground water used to irrigate the course should not exceed 650,000 gpd, the motion said.

And by January 2, 2012, the OP recommended, Castle & Cooke must submit to the commission an analysis of well efficiency, an audit of the transmission system, and an updated ground water model.

The Maui County Code, the OP explained, had previously prohibited Castle & Cooke from using water with a chloride level below 250 mg/l to irrigate the golf course. But last September, the County Council repealed that prohibition and instead prohibited water which met DOH drinking water standards from being used on "new golf courses." Because the code no longer defines what counts as non-potable water, the OP continued, it "does not give 'fair warning of the conduct the government prohibits or requires.'"

With regard to LSG's efforts, OP director Abbey Seth Mayer also argued in the motion that reverting the 139 acres to the Agricultural and Rural districts would provide no effective relief to the aquifer. He wrote, "One might argue that the [1991] Decision and Order should not be amended, and further hearings should be held to ultimately result in the reversion of the Petition Area to its original...classification. But with the exception of possibly three holes of the golf course, the original classification of the petition area was rural. Golf courses, golf driving ranges, and golf-related facilities are allowed in the rural district. Although [Castle & Cooke] may be inconvenienced in reconfiguring three of the golf course holes, reversion of the property is likely to merely eliminate the various protections, mitigation measures, and conditions contained in the 1991 Decision and Order, and will not stop the continued operation of at least 15 holes in the existing Manele Golf Course or the use of approximately 650,000 gpd of water from the high-level aquifer."

> *"In essence: look forward, not back."*
> ***— Abbey Seth Mayer, Office of Planning***

Mayer explained that the recommended system audit and model update would address community concerns that Lana'i's water distribution system is inefficient and antiquated and that new information suggests that the golf course irrigation is affecting or might some day affect the availability of water for domestic use.

The Commission on Water Resource Management published the most recent model study in 1996. It concluded that withdrawing 650,000 gpd from Castle & Cooke's Wells 1 and 9 would have a relatively small impact on upslope wells and, in

any event, such an impact would be difficult to differentiate from natural water level changes.

A new study using more recent data and newer methods is necessary to determine whether the 1996 findings are still valid, Mayer wrote.

"After receiving this information, the parties can then move to amend the interim chloride standard based upon objective facts and a sound record.... [I]t will be a much wiser use of resources for the LUC and all of the parties than re-opening lengthy evidentiary hearings whose aim is determining the thought processes of a Commission that deliberated nearly 20 years ago, especially considering that reversion provides no effective relief. In essence: look forward, not back," he wrote.

Backlash

Both LSG and Castle & Cooke opposed the OP's recommendations. LSG, represented by Native Hawaiian Legal Corporation attorney Alan Murakami, argued in its motion in opposition that the LUC's consideration of the proposal ignores the Supreme Court's mandate, and that, in any case, the OP has no basis to file a motion, since it was not a petitioner in the case. LSG added that the OP's proposed revision to Condition 10 would "unjustifiably continue to compromise the sustainability of the high-level aquifer."

Castle & Cooke was concerned that the OP's conditions would allow the dispute over Condition 10 to drag on. Both of the 2007 motions sought to moot the litigation by defining potable for the purposes of Condition 10, the company wrote. "Castle & Cooke therefore views with alarm the revised motion submitted by OP on December 15, 2009 (which proposes for Castle & Cooke to bear the expense of a water analysis, audit and study update, whereafter within two years the parties may come back to the LUC for further modifications to Conditions 10). While the OP's motion proposes an 'interim' definition of potable (less than 250 mg/l), it is a temporary solution that invites continued and never-ending debate on redefining a standard for use of water that Castle & Cooke originally relied upon in investing hundreds of millions of dollars in development of the Manele Bay Golf Course, the Manele Bay Hotel, and the Manele residences within the Manele project district."

'The sky is not falling'

According to Murakami, there are three reasons why water levels in some of the potable wells are declining: they are being over-pumped, more water from the makai brackish wells is being used, and the recharge is not occurring at a rate as fast as it used to.

The motion from the OP suggested that the LUC should require a new study to determine the actual effects, both past and ongoing, of Castle & Cooke's golf course wells on the high-level aquifer over the past 16 or so years. The company, however, argues that current data show there is no reason to curtail water use.

> *"There is some leakage between compartments within the aquifer, but the amount is unknown and unknowable."* ***— Charley Ice, Water Commission***

"The sky is not falling," Lamon wrote in Castle & Cooke's memorandum opposing the OP's revised motion. "The latest variation on LSG's refrain of gloom and doom is based on recent 'revelations' and 'stunning news' in the October 19, 2009, County of Maui draft Water Use and Development Plan [which describes gradually declining water levels and exorbitant water use in the Manele area]. This, on close examination, consists entirely of LSG's demonstrably false speculation that irrigating the golf course is 'likely deteriorating conditions' in potable water wells."

Lamon disputed LSG claims that an 80-foot drop in the pump level of Well 8 – a potable water well – over the last 13 years is the result of golf course irrigation. He wrote that water levels in Well 8 and Well 6 (another potable well) have been dropping since they were first put into use in the 1990s. What's more, he wrote, the water level in Well 3 – located between the makai golf course wells and the mauka potable wells – is higher than the water level in the makai wells.

"For Palawai [where the course is located] irrigation pumpage to have an effect on Wells 6 and 8, the water level in Well 3 would have to be drawn to a level below the levels in Wells 6 and 8," he wrote. He added that the water level in Well 6 has recovered and stabilized since pumping of that well was reduced in late 2008.

"This demonstrates that its pumping rate, and not that of the Palawai wells, controls its water level response," Lamon wrote.

According to the Water Commission's Charles Ice, a geologist who monitors the use of Lana'i's wells, Lamon is correct.

Ice notes that lowering the pump in Well 8 by 80 feet was necessary because high-level aquifers, by their very nature, don't recharge as quickly as basal aquifers and the well was being used a lot. Because water is compartmentalized by dikes and is not free-flowing, as it is in basal aquifers, "it takes longer to bounce back" from pumping, Ice says.

With regard to Murakami's concern that golf course irrigation is affecting the potable mauka wells, Ice says, "We just don't see that connection at all.... There is some leakage between compartments within the aquifer, but the amount is unknown and unknowable."

While the Water Commission seems comfortable holding off on designating Lana'i as a groundwater management area, which would force all water uses to be permitted, Murakami says that one of the most important criteria for designation – pumping of 90 percent of the sustainable yield – is perhaps too high.

"You can't do that with a small aquifer like Lana'i," he said. "Potable levels are falling; the recharge is not the same." (According to a November 2008 presentation to the Lana'i Planning Commission by the University of Hawai'i at Hilo's Jim Juvik, however, the Lana'i forest is collecting about as much water today as it was in the 1950s.)

Future Use

Although water use has not reached "actionable" levels in the eyes of the Water Commission and others, there are problems, to be sure. The rate of water use in the Manele Project District, for example, is, by most accounts, excessive.

The October 2009 draft Water Use Development and Protection plan notes that a 1997 allocation agreement among members of the Lana'i Water Working Group limited total potable and brackish water use for the Manele Project District to 1.03 mgd. Even so, "demand in Manele exceeds the agreed-upon allocation. Metered demand in 2008 was 1,082,999 gpd. Pumped demand was 1,626,573 gpd. To date, only 16 single family units of 282 units permitted under the Project District ordinance have been built and are consuming water. Thus, the project is not even close to full build-out."

Murakami adds that the Manele area accounts for two-thirds to three-fourths of all of the water used on the island, and, at 29.21 percent has the highest percentage of unaccounted for water use. According to the draft plan, the average customer in Lana'i City uses 221 gpd, while in Manele, it's 3,700 gpd (2,800 of which is for irrigation).

"And the projection is, they'll be using a lot more," Ice says, adding that the rate of use at Manele is "far above what they said is an appropriate standard to use." (Maui County has a single family unit standard of 600 gpd.)

In addition to the extraordinarily high water use, the distribution of that use among the aquifer's wells leaves something to be desired. According to the Water Commission's numerical groundwater model for Lana'i, many more wells are necessary to achieve the sustainable yield of 6 mgd, "assuming that long term recharge conditions in the regions above 2,000 feet remain stable."

> *"The sky is not falling."*
> ***— Bruce Lamon, Castle & Cooke attorney***

The draft WUDPP notes that in setting the sustainable yield, the model assumed water would be pumped from 13 sources, but is now only spread among six or seven.

"More than 85 percent of 2008 water withdrawals on Lana'i, 1,913,310 out of 2,241,222 gpd, came from the Leeward aquifer. All near-term plans...to develop water are also in the Leeward aquifer. The only pumping well in the Windward aquifer is Well 6....It is unlikely that more pumpage could be distributed to this well, because water levels are already declining," the plan states.

Given the current use of wells, Ice says he is concerned that a single high-level well will be pumped for a long period of time and not be given a chance to rest. "Rather than try to use all different wells, [users] try to rely on those that they need right away, pressing them against what they can handle," he says.

The fact that the current well system has apparently neither been managed nor configured for sustainable use is one of LSG's reasons for seeking an end to the use of brackish wells for irrigation. In some of his filings to the LUC, Murakami argued that contaminant-free water with less than 250 mg/l (or parts per million or ppm) chlorides should not be the standard of potable water. He noted that the United Nations World Health Organization has a guideline of 500 parts per million, and Maui County has for years used at least two wells in its municipal drinking water system that pump water with chloride levels higher than 400 ppm.

"Moreover, as is commonplace in other areas, where municipal water agencies have stretched potable water supplies by blending water below and above 250 ppm, there is no reason why the water from Wells 1 and 9 [which have chloride levels 325 ppm and 450 ppm, respectively] couldn't be similarly blended to achieve the EPA standard," he wrote in his most recent memorandum, adding that the county's September decision to repeal the chloride standard is evidence that the county agrees with his interpretation of potability, "after years of denying it."

While Lamon countered in his motion that Murakami's argument effectively erases the distinction between potable and non-potable, Ice concedes that, in the long-term, should climate change or other factors reduce the ability of the Lana'i watershed to recharge the high-level aquifer, the use of its brackish wells for golf course irrigation would become a concern.

As Juvik told the Lana'i Planning Commission in 2008, climate change may severely affect Lana'i's high-level aquifer.

"I have no documentation that says [the cloud base is] getting higher here in Lana'i....But I can say that there is concern about change all over the world and that we should be concerned about it here.... [I]f the cloud belt rises 200, 300, or 400 feet, is that going to affect West Maui very much? No. Maybe they go from 400 inches of rain down to 300 inches of rain. That's not much difference. But here, if you go from 40 inches of rain and a lot of fog to 30 inches of rain and not much fog, you're going to feel it super big," he said.

Aftermath

In the days following the LUC's decision, LSG members Robin Kaye and Butch Gima both complained to the local newspapers about how the vote went down.

"It was democracy at its worst: a powerful bureaucratic government entity treating a community rudely and with disrespect," Kaye wrote in a letter to *The Maui News*.

He criticized the commission for scheduling a little more than three hours to hear argument and public testimony from more than a dozen members of the community. He also found fault with the behavior of some of the commissioners.

"You could clearly see some commissioners weren't paying attention," he told *Environment Hawai'i*.

After an executive session, Kaye wrote, "They come back, and while the four attorneys are pleading their views, many of the LUC commissioners are either playing with their cell phones, nodding off, or checking their watches...[Murakami] provided the closing argument, and the community watched as he was forced to rush through his presentation — all while many of the commissioners were noticeably collecting their papers and getting ready to depart....

"Just two of the seven commissioners ask a couple of questions. There is no discussion of the case at hand — NONE. Commissioner [Lisa] Judge – the one who arrived about 30 minutes late – then reads what was clearly a previously written, long, complicated, multi-part motion, and the commission unanimously agrees... leaving many Lanaians to suspect that it had been composed before the hearing even began. The LUC then quickly left – on a Castle & Cooke bus."

When asked about the LUC's decision, commissioner Judge told *Environment Hawai'i* that she had been advised by attorneys not to comment because it was still a pending matter. ***— Teresa Dawson***

For Further Reading

These articles, available on our website (*wwww.environment-hawaii.org*), provide more background on the dispute over Lana'i high-level water. Full access is available to current subscribers only; others may purchase a two-day pass for $10.

February 1994
- "Dispute over Water Pits Dole Food against State, County, Lana'i Citizens"
- "High-Level Aquifer Is at Heart of Dispute"
- "LUC Record Provides Slim Support for Company's Present-Day Claims"

December 2007
- "LUC to Vet Potable Water Issues Surrounding Manele Golf Course"

BOARD TALK

Predator-proof Fence to Protect Ka'ena's Native Plants, Animals

The fence is an opportunity to give back to organisms we stomped on," University of Hawai'i zoology professor Sheila Conant told the state Board of Land and Natural Resources at its meeting last month. At that meeting, the Department of Land and Natural Resources' Division of Forestry and Wildlife recommended approving a right-of-entry to allow for the construction of a 600-meter predator-proof fence across nearly 60 acres at the Ka'ena Point Natural Area Reserve and State Park.

The fence would protect Ka'ena's seabird colonies, 11 species of endangered plants, and monk seals from a wide range of predatory mammals, including mice, rats, mongooses, dogs, and cats. Part of the Ka'ena Point Ecosystem Restoration Project, which is a partnership between the Department of Land and Natural Resources, the U.S. Fish and Wildlife Service, and the Hawai'i chapter of The Wildlife Society, the fence would be the first of its kind in Hawai'i (apart from a small experimental version on the island of Hawai'i).

Ka'ena Point is one of the largest Laysan albatross colonies in the Main Hawaiian Islands.

After hours of testimony, which overwhelmingly favored the fence, the Land Board voted unanimously to approve the right-of-entry. One member of the public, however, Huang-Chi Kuo, requested a contested case hearing. Kuo argued that the fence may actually increase the ant population at Ka'ena, citing studies of offshore islets where ant populations exploded and seabird numbers dropped after rats were eradicated.

Summer Nemeth, whose contested case hearing request opposing a multi-agency agreement for the project was denied months earlier, also testified against the fence, saying it was culturally inappropriate, because Ka'ena is where souls leap into the next world and is rife with burials.

"The birds aren't native or endangered. The population is doing well. Shouldn't we just leave it at that?" she said, referring to the fact that the seabirds at Ka'ena — albatross and shearwaters — are migratory. With regard to the endangered Hawaiian monk seals that use Ka'ena as a pupping site, she didn't seem to think a fence would do much to help them. "The last time I checked, those animals swim all over the place," she said.

In reply to the fence critics, University of Hawai'i botany professor David Duffy explained that no data exist to support the idea that rats control ants.

"Each island appears to be different in its response to ant control. I wouldn't bet the ranch on ant futures," he said. Regarding albatrosses, he noted that sea level is rising in the Northwest Hawaiian Islands and a one-meter rise would submerge the habitat for many birds there.

"Places like Ka'ena Point will be important," he said.

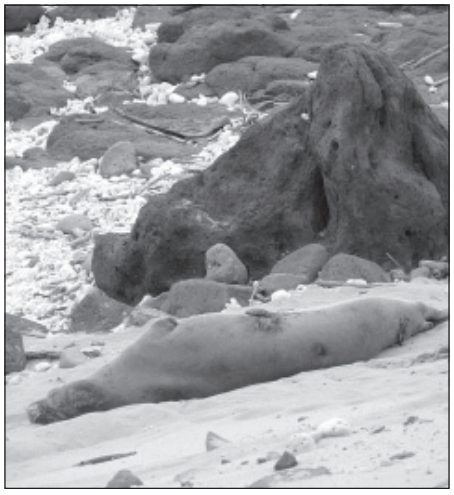
Conant, who participated in one of the studies Kuo cited, said that the fence is not intended to control ants at Ka'ena Point. She added that many species of birds went extinct with the colonization of Hawaiians. Also, she noted that more plastic is found in the bellies of albatross at Kure and Laysan atolls in the Northwestern Hawaiian Islands than in birds at Ka'ena.

"I like people. But I really like plants and animals. Perhaps we could think of [the fence] as a sense of reparation," she said.

Regarding the fence's cultural impacts, practitioner William Aila, Jr., disputed Nemeth's claim that the fence would prevent souls from moving into the next world. He added, "Without the birds, there is no culture. You can't catch fish without the birds."

Before voting, board members said they were satisfied with the public outreach done by the department, and felt there was compelling testimony to approve the project.

At-large board member Samuel Gon added, "In reality, fences are very ephemeral things. I don't view this as the end-all. But unless we do things, all we'd be doing would be arguing about things...until they're gone."



Endangered Hawaiian monk seals use Ka'ena Point as a pupping site.

To the representatives of the Office of Hawaiian Affairs in the room, board chair Laura Thielen said that with regard to Hawaiian cultural issues, "groups need to have a different, safer environment — not the DNLR — to resolve things...We need help. We're not the appropriate party... We need to move beyond this head-butting."

When Nemeth interjected that she didn't think OHA was the appropriate agency, either, Thielen said, "The problem is, we certainly aren't."

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Board Delays Closing Steve's Ag Logging Case

This is a case with a rather long and tortuous history," deputy attorney general William Wynhoff told the Land Board at its January 8 meeting, referring to logging-related violations that occurred about a decade ago on state land in South Kona, on the island of Hawai'i.

In 2003, the Land Board fined Big Island logging company Steve's Ag Services and Wesley and Raymond McGee $1.1 million — a record fine at the time — for illegally logging about 200 koa and kolea trees and constructing roads on state land in the late 1990s. During the contested case hearing that followed, ownership of the alleged state land was called into question and the Land Board, upon the advice of its hearing officer and over the objections of its staff attorney, decided to dismiss the case in June 2005.

After further survey and review by the DLNR, the state filed a quiet title action in U.S. District Court in January 2007. According to a DLNR staff report, the loggers "vigorously contested the case," claiming that the state property was included in lands sold

An illegally cut koa tree in South Kona.

by Kahuku Ranch owner Damon Estate to the United States government and The Nature Conservancy. The parcel's adjacent owner, Yee Hop, Ltd., also claimed ownership.

On November 17, 2009. U.S. District Judge Samuel King ruled in favor of the state, and the loggers' attorney has since filed an appeal.

On January 8, the DLNR's Land Division recommended resolving the enforcement case by imposing a reduced fine of roughly $631,965, "considerably less than the maximum amount that might be assessed, which amounts would include a fine of $1,000 per tree and damages based on the amount grossed by loggers, $1,035,900."

Attorneys representing the loggers, however, asked for more time to prepare a response. Wynhoff told the Land Board that he didn't object to deferring the matter until the board meets again March 11. Big Island board member Rob Pacheco, however, opposed the delay.

"This has gone through contested case hearings and federal court rulings...We're basically finishing up here and I'm not comfortable waiting another two months," he said.

Over Pacheco's objection, the board voted to withdraw the matter, with the understanding that it would return to the board in March.

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Kona Fish Farm Transfers Lease

Kona Blue Water Farms, Inc., is selling its open-ocean fish farm in waters off North Kona to Keahole Point Fish, LLC, in order to expand its presence in the global seafood market. So at its January 8 meeting, the Land Board consented to the transfer of Kona Blue's 90-acre ocean lease.

Rob Parsons, representing the advocacy group Food & Water Watch, urged the board to defer the transfer. He said he worried about sustainability of the new company, as well as the transfer of the operation to a company that may be less interested than Kona Blue had been in local food security.

Parsons also said he was concerned that the farm's mortalities were being disposed of at sea, citing reports from whale researchers who had allegedly seen dead fish when they transit near the cages. He added that the farm has also had problems dealing with a skin and gill fluke that infest the caged kahala fish, requiring chemical treatment.

Marti Townsend of KAHEA: The Hawaiian-Environmental Alliance also strongly opposed the transfer of public trust resources and said she was disturbed about private control of ocean resources.

When Land Board member Samuel Gon asked Kona Blue's president Neil Sims about the skin and gill fluke and efforts to monitor any environmental consequences of the operation, Sims explained that the company does regular water quality and benthic substrate monitoring in accordance with its National Pollutant Discharge Elimination System Permit, issued through the state Department of Health. He added that both the company's state Conservation District Use Permit and NPDES permit require it to inform the DLNR Office of Conservation and Coastal Lands and DOH Clean Water Branch of diseases, pests or parasites. Sims said his company also monitors health of wild kahala and that while the penned fish do have a skin fluke, the wild fish don't seem to.

> *"I will fire any employee that disposes of fish in the ocean."*
> ***— Neil Sims, Kona Blue Water Farm***

Regarding the dead fish claim, he said, "We take very seriously the public trust. One of the CDUP conditions is that dead fish be disposed of in the landfill. It's not just a permit condition, it's common sense. If, indeed, there have been incidents of this, it sounds like rumor and innuendo... I will fire any employee that disposes of fish in the ocean. Maybe let's look at some third party validation and not go on hearsay."

With regard to Parsons' concerns about the new company, Sims said Kona Blue will continue to operate the fish hatchery that provides the farm's fingerlings and provide guidance on grow-out. It will also continue to conduct research to improve feed and fish health, and will sell and market the harvested fish as Kona Kampachi. Keahole Fish will merely be a third-party grower.

"How do we grow this industry to take Kona Kampachi from 500 tons a year to something that's going to have an impact on the global seafood supply?" Simms asked rhetorically. "We need a third-party grower. It allows the industry to grow without having to keep our hands all over the place."

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New NARS Additions And an Off-Roading Park

On January 8, the Land Board increased its protection of the state's forests when it expanded the Natural Area Reserves System, while also giving fans of off-road vehicles on O'ahu another legal place to ride. The board approved the addition of about 700 acres to East Maui's Kanaio Natural Area Reserve, and about 5,800 acres to the Kahauale'a NAR, on the island of Hawai'i. It also granted a month-to-month revocable permit to the Sand Island Off Highway Vehicle Association for management of a 30-acre off-road park in the 141-acre Sand Island State Recreational Area.

The DLNR staff report on the off-road park notes that ATVs and off-road motorcycles "have been observed by public and private land managers as an increasing use, creating public safety, environmental and trespass issues statewide." In 2005, an O'ahu group of off-roaders discussed with the DLNR the possibility of creating another legal place to ride, in addition to the North Shore's Kahuku Motocross Park. The 30-acre Sand Island site, which had been subject to years of illegal dumping, was selected.

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Army UXO Investigators Gain Access to Kulani

What does the military want with the now vacant Kulani Correctional Facility and the thousands of acres of forest surrounding it? That's the question on the minds of a handful of community activists and Big Island residents, now that the U.S. Army Corps of Engineers has decided to search a portion of the property for unexploded ordnance (also known as UXO).

Kat Brady of the Community Alliance on Prisons, who was a vocal opponent of the facility's closure, told the Land Board at its November meeting that the Army's decision to search for UXO raised red flags with her. Brady says she is skeptical about why the state

administration would close a good minimum security prison that provides millions of dollars worth of work to Hawai'i County, develops job skills for prisoners, and helps manage some of the state's best native forest at a time when more beds are needed. Why search the area now, after it's been populated for decades? she asked the Land Board. Although it was later revealed that the area to be searched was far removed from the facility itself, Brady remained skeptical.

News reports published late last year when the decision to close the facility was announced noted that the state Department of Public Safety, which manages the property, was developing a two-year Memorandum of Understanding with the Department of Defense to allow the site to be used for the Hawai'i National Guard's Youth Challenge Academy for at-risk teens. However, an email from Hawai'i County to the wife of the Kulani facility's former warden states that the department actually is seeking a 25-year commitment, which led Brady and others to suspect that the military has other plans for the area.

Brady, Kyle Kajihiro of the American Friends' Service Committee, Marti Townsend of KAHEA: The Hawaiian-Environmental Alliance, and two Big Island residents testified that there may be more to the Army's plans than meets the eye. Some of them asked the board to defer granting a right-of-entry until it finds out the DOD's full plan for the area, especially since, as Kajihiro testified, the future use of an area drives the level of remediation.

No one from the Army Corps of Engineers attended the Land Board meeting to answer questions. Without further proof of the claims made by several members of the public, the Land Board seemed loath to withhold approval of a mere right-of-entry, especially since DLNR Land Division administrator Morris Atta said that a delay may lead the Army to shift funds for a cleanup of Kulani elsewhere. The Corps has projects in the pipeline for decades to come, Atta noted.

"We were warned by the Corps, 'Don't hold up these projects because the money will be shifted to other priority sites,'" he said.

Land Board chair Laura Thielen added that she would hate to delay the UXO investigation/remediation and "see somebody out there stumble across anything and get hurt." Thielen also noted that any changes in the use of the land would have to receive Land Board approval.

Still, some board members shared the public's concerns about the future use of the area. The DLNR (as reported in the October 2009 issue of *Environment Hawai'i*) has begun investigating the possibility of adding most of the Kulani lands to the state Natural Area Reserves System, which includes the best examples of native ecosystems and unique geological sites in the state. At-large board member Samuel Gon, who is also the chief scientist for The Nature Conservancy of Hawai'i, said that because the correctional facility was a major partner in the Three-Mountain Alliance (a watershed partnership that has managed and protected the area's natural resources for several years), he was anxious to know how those lands would be managed after the facility closed at the end of November.

To help allay the concerns expressed by Gon and the public, Thielen suggested that the board follow a recommendation Townsend had made to include in its approval an affirmation that the board supports protecting the area's valuable natural resources. In the end, the board voted unanimously to approve the right-of-entry with a statement that the Land Board "recognize[s] the value of the native species forest and the importance of that to the state and the DLNR."

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Critic Contests Curatorship At Keolonahihi State Park

In 2007, Mikahala Roy and members of the Betty Kanuha Foundation together celebrated the reopening of the 30-acre Keolonahihi State Park to the public. The park had never really closed, but, because of a lack of funds, had become overgrown with weeds and littered with refuse. Taking matters into their own hands, community groups, including the Betty Kanuha Foundation and Na Kahu o Kalua o Kalani (to which Roy belongs), banded together to restore the culturally significant area.

"Honoring the area's role as a place where wisdom is passed from consecutive generations, its caretakers are inviting the community for the first time Saturday and Sunday into the complex to share in a cultural and educational event called Kakala o Kamoa," *West Hawai'i Today* reporter Lisa Huynh wrote in an article at the time.

Despite the improvements the groups had made, the DLNR's Division of State Parks was concerned about their ongoing clearing of the property and sought that year to establish a curatorship agreement with them. But in the years following the event, the groups seem to have reached an impasse over who the official curators should be.

At the Land Board's November meeting, Roy testified against a recommendation by the Department of Land and Natural Resources' Division of State Parks to enter into a three-year curatorship agreement with the Betty Kanuha Foundation. The foundation is a non-profit organization run by members of the Kanuha family and focuses mainly on educating the public, children especially, about Keolonahihi, which includes the Keakealaniwahine archaeological complex and is considered by many to be one of the most sacred Hawaiian cultural sites in the state.

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The Kanuha family includes lineal descendants of the area, and the fact that it has stepped forward as stewards pleased at-large Land Board member Samuel Gon. But Roy, who also has family ties to the area, argued that a non-profit organization cannot be allowed to represent the spirituality of such a sacred place. She added that the members of Na Kahu o Kalua o Kalani have long served as caretakers for the area, as well.

PHOTO: OFFICE OF MAUNA KEA MANAGEMENT

Mauna Kea

In response to Roy's concerns, Land Board chair Laura Thielen noted that the curatorship agreement, in acknowledgement of the various individuals and community groups with a stake in caring for the area, was specifically crafted to allow nearly anyone to sign onto the agreement. The agreement "recognizes the Betty C. Kanuha Foundation as a curator and gives families associated with Keolonahihi an opportunity to participate as volunteers and advisors," a State Parks report states.

Even so, Roy, who threatened to take her fight against the agreement to court, requested a contested case hearing.

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Judge Rules Against Opponents of Mauna Kea Management Plan

Groups opposing the Land Board's decision last April to approve the University of Hawai'i's Mauna Kea Comprehensive Management Plan (CMP) have lost their appeal in Third Circuit Court.

On December 29, Circuit Judge Glenn Hara granted the university's motion to dismiss the appeal, stating in his decision that the court lacked jurisdiction over the board's approval of the plan, as well as the board's denial of a contested case hearing requests filed by the plaintiffs, which include the group Mauna Kea Anaina Hou, the Royal Order of Kamehameha I, the Hawai'i chapter of the Sierra Club, KAHEA: The Hawaiian-Environmental Alliance, and Clarence Ching.

Hara's four-page decision cited a 2006 Hawai'i Supreme Court decision, which states "a contested case must have occurred before appellate jurisdiction may be exercised." The decision also states that if a circuit court lacks jurisdiction to hear an agency appeal, it can't rule on the denial of a contested case hearing, either.

Hara added that the plaintiffs failed to prove the board's approval of a plan adversely affected their rights, duties and privileges, and therefore did not show they were entitled to a contested case hearing.

"It may be that a future implementation of the CMP might trigger a requirement for a contested case, but the action of the BLNR in accepting and approving the CMP in and of itself does not do so," he wrote.

(For more background on this case, read the "Board Talk" column in our May 2009 issue, available free to subscribers at *www.environment-hawaii.org*.) **— *T.D.***

Mahalo

We Give Thanks for Our Many Generous Friends

The good news just keeps coming in from our fall fund-raising effort. Recent contributions have been made by these friends:

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