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Ship Happens

It has taken eight years, but the dispute over damages arising from the grounding of the *Cape Flattery* is nearly at an end. And while $7.5 million may be an impressive sum at first glance, when compared to seemingly similar cases and to the government's initial bargaining position, it appears that the vessel owner's negotiators earned their keep, and a whole lot more.

The puzzle in all this is the puling fraction of the damages that the state will be receiving — roughly one two-hundredth of the total.

There is much more good, meaty reading in this month's issue — from the prospect of growing tobacco on state land, to the latest chapter in the 'Aina Le'a saga, the dispute over the ATST, and the bizarre hunting rules that hobble management of state natural area reserves.

We hope you'll agree that the journalistic enterprise you hold in your hands is one well worth supporting. When you renew your subscription, please consider making an additional donation as well. Small or large, we welcome your gifts.

$7.5 Million in Damages Assessed Over Grounding of Freighter in 2005

Eight years ago, on February 2, 2005, a 555-foot-long freighter ran aground on the reef outside Barber's Point harbor.

Over the next nine days, a team of workers hastily put together by the Coast Guard, the ship's owners, and the state offloaded the cargo of cement in the holds of the *Cape Flattery* and drained its fuel tanks. On February 11, the vessel was pulled free of the reef.

No substantial amounts of fuel spilled, although some of the cement ended up in the water as a result of what has been described as an "uncontrolled release" during the offloading process. Still more coral was destroyed by anchors and by tow lines as tugs attempted to coax the ship off the reef. The continuous grinding of the freighter on the reef for nearly a week also wrought substantial harm.

It took nearly eight years, but in December, the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and the state of Hawai'i reached a settlement with the vessel's owners to compensate for the damage to natural resources.

Under its terms, Cape Flattery Limited, the Hong Kong company that owned the vessel at the time, and Pacific Basin (HK) Limited, its operator, agree to pay a total of $7.5 million in damages.

The bulk of that — $5,881,180 — is to go to the Department of Interior, which is to use the money to design, implement, permit, monitor, and oversee restoration projects to address damages to the coral reef and associated resources. Interior will also receive $56,679 as reimbursement for the natural resource damages sustained during the grounding.

NOAA is to get $1,524,137 as reimbursement for damages to resources under its jurisdiction.

The state of Hawai'i will receive $38,004 as its portion of the settlement.

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PHOTO: ALEX MOOMAW, U.S. COAST GUARD

As a crane offloads the grounded *Cape Flattery*, clouds of cement dust from its hold escape into the air and sea.

Environment Hawai'i

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NEW AND NOTEWORTHY

Dead in the Water: *Queen's Treasure* — the 65-foot luxury catamaran custom-built for Ka'anapali Tours, LLC — won't be plying the Ka'anapali coast any time soon.

On December 21, U.S. District Judge Leslie Kobayashi issued an order vacating the jury trial, set for January 8, on a complaint KTL filed against the state Department of Land and Natural Resources, three of its staff, and the Board of Land and Natural Resources. The complaint sought to force the DLNR to allow KTL to sail *Queen's Treasure* under its permit with the department's Division of Boating and Ocean Recreation.

Years ago, in a messy, convoluted, and possibly illegal transaction, KTL acquired a one-of-a-kind permit that appeared to allow the company to operate either a monohull or multihull vessel in waters off Ka'anapali. This was despite the fact that multihull (catamaran) permits for Ka'anapali are subject to a waiting list, and KTL was not at the top of the list at the time.

When, in 2011, DOBOR prevented KTL from making *Queen's Treasure* its vessel of record, the company sued, noting that the division had repeatedly renewed the permit.

In January 2012, Judge Kobayashi denied KTL's motion for a preliminary injunction against the DLNR that would allow *Queen's Treasure* to operate pending the outcome of the jury trial. In her order, she found that DOBOR did not have to honor the terms of an erroneously issued permit. (DOBOR has since allowed the permit to expire.)

In the months that followed, the state parties sought a summary judgment on the case and sought to remove the DOBOR staffers, in their individual capacities, as defendants.

Kobayashi heard arguments on the state's motions on December 10. Later that month, she granted the motions, at least with regard to KTL's state law claims and the state's claim that the DOBOR staffers have immunity from prosecution for performing their official duties.

The latter decision, she wrote, "precludes any claim for damages, leaving only prospective injunctive relief as to the state Defendants. These claims, however, are MOOT because the Court cannot grant the relief requested because the Plaintiff no longer has the permit at issue."

Kobayashi withheld opining on KTL's allegation that the state defendants retaliated against the company by refusing to renew the permit. KTL "never amended the complaint to include claims based on the non-renewal," she wrote, adding that KTL could file such claims in a separate action.

For more on this case, read our February 2012 cover story, "Permitting Missteps Threaten to Unravel Commercial Boating Regime at Ka'anapali," and our March New & Noteworthy column. Both are available at *www.environment-hawaii.org.*

Mud Fine Upheld: On December 21, the Intermediate Court of Appeals affirmed a 5th Circuit Court denial of Pila'a 400, LLC's appeal of a $4 million fine imposed by the state Board of Land and Natural Resources for damages to Pila'a Bay resulting from a 2001 mudslide.

The ICA found Pila'a 400's arguments unclear, misplaced, inadequate or just plain wrong. Contrary to the company's claims, the Land Board had provided adequate notice of the scope of the contested case hearing that resulted in the fine, the board's findings were clear, it had the authority to impose the fine, and a federal consent decree addressing Clean Water Act violations stemming from the mudslide did not bar the Land Board from pursuing its own damages, the ICA found.

In his concurring opinion, acting associate judge and former Land Board chair Mike Wilson expanded on the court's finding that the board may consider intrinsic value when calculating damages to the state's natural resources. Pila'a 400, owned by James Pflueger, had argued that the Land Board couldn't.

Wilson admitted that something like natural beauty "is not susceptible to valuation based on price in the marketplace," adding, "The value of Hawai'i's forests is not the market value of its board feet. The value of Hawai'i's coral reefs is different from the value of its harvest."

Still, state law empowers the Land Board to consider "any factor it deems appropriate" in imposing fines and seeking damages, including "the loss of the natural resource to its natural habitat and environment and the cost of restoration or replacement," he wrote.

Quote of the Month

"I think for this particular development, given the crossover and given the evolution of it, ... the county needed to do something more than it did."

— Judge Elizabeth Strance

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Kaua'i Tobacco Proposal Divides Agribusiness Development Board

To grow tobacco on public lands or not? That was the question at last month's Agribusiness Development Corporation board meeting, where a local high-end cigar maker proposed testing his tobacco crops on three acres of the agency's land in Kekaha, Kaua'i.

Although the majority of the board members in attendance supported the idea, a motion to issue LBD Coffee, LLC, a revocable permit failed to get the required number of votes. Business ties with the company prevented ADC board chair Marissa Sandblom and member Paula Hegele from voting on the item. And board member William Tam thought the idea was simply ludicrous.

"Tobacco causes cancer. The state spends an enormous amount of money trying to prevent people from smoking," Tam said.

The New Hampshire-based LBD Coffee, whose subsidiaries grow tobacco and organic coffee, wants to expand its tobacco production to broaden the taste profile of its cigars, company owner Les Drent told the board. Kekaha also has better light conditions and is relatively dry, he said, adding that the recent heavy rains at his farm in Kapa'a "totally shut down" operations there.

> *"I didn't come to you. I don't honestly need this."* ***— Les Drent, LBD Coffee, LLC***

Should the proposed small, two-year pilot project in Kekaha prove successful, the company would seek a license for 40 acres, which would allow for crop rotation, Drent said.

Regarding Tam's cancer concern, Drent said he felt premium cigars posed less of a health risk than other tobacco products. Drent also noted that LBD is already growing tobacco on state land under a long-term lease issued several years ago by the Board of Land and Natural Resources and transferred to the Department of Agriculture in 2011.

Tam, however, insisted that public resources should never be used for growing something that poses such a health risk.

"I will oppose this and take it up with the Department of Agriculture why this lease was issued. ... I encourage you to look for another line of business. It's not personal," Tam said.

Hegele, whose Maui winery store sells the cigars from LBD's Kaua'i Cigar Company, said she does not consider the cigars a "tobacco cigarette product."

"[Drent] has an extremely high-end product [with] great packaging," she said. "It's not a convenience product. ... It is a gift, a high-end, locally significant product." (The cigars on the Kaua'i Cigar Company's website sell for more than $10 apiece.)

Drent noted that former U.S. Rep. (now Sen.) Mazie Hirono and Rep. Colleen Hanabusa supported recent legislation that would have exempted premium cigars from regulation by the Food and Drug Administration.

When Tam reiterated his opposition, Drent pointed out that his proposal was merely in response to an ADC solicitation.

"I didn't come to you," Drent said. "I don't honestly need this."

"Then go with a private landowner," Tam responded.

Drent's associate Roberto Rodrigo, a biochemist, argued that "everything is linked to cancer." Any fermentable crop — corn, potatoes, etc. — creates alcohol and alcohol is linked to cancer, Rodrigo said.

"I'm not arguing those," Tam said, adding that it was the board's responsibility, not Rodrigo's, to set policies.

ADC executive director James Nakatani said when he was the DOA director several years ago, whenever tobacco proposals came up, "we would just drop it." Since then, however, the state Department of Land and Natural Resources issued a lease to LBD for four acres in Kapa'a where the company is now growing tobacco. However, when the Land Board approved the transfer of the lease to LBD and two other individuals in 2007, the DLNR's cursory staff report to the board mentioned only that LBD grew coffee on the island.

"If they are growing tobacco on state lands now, how do we say no?" Nakatani asked the board. "I'm looking at this objectively. ... The government still supports tobacco. I don't know how you say no to this."

He added that the pilot project would only be for two years.

Tam, however, argued that whatever the Land Board did is irrelevant and repeated that he was going to take the matter up with the DOA.

But he was alone in his objections. ADC board member David Reitow said the ADC's job wasn't to pass moral judgment on anybody, but to put farmers on the land. He made a motion to issue LBD a one-year revocable permit that could possibly be extended. Board member Patrick Kobayashi seconded the motion, but with just two other board members voting in favor, the motion failed and the matter was deferred.

ADC Board Supports Intent To Buy Whitmore Village Lands

Last year, state Sen. Donovan Dela Cruz criticized the ADC board for not taking better advantage of its relative freedom from state bureaucracy and challenged it to help bring his Whitmore Village Agricultural Development Plan to life.

Board members said they liked the plan to turn Whitmore Village into O'ahu's agricultural hub, but were noncommittal. They said such a feat — which included acquiring roughly 2,000 of acres of farmland along with a packing and processing facility — would take a lot of work and they weren't sure whether they had enough staff to pull it off.

But that hasn't stopped ADC executive director James Nakatani from working toward buying two of the components identified in the Whitmore Village plan: the processing facility and lands with access to irrigation water. (He's also seeking legislative approval this session to hire another staff member.)

For the past few months, he has been negotiating with Castle & Cooke to purchase a 24-acre parcel for whose purchase the 2012 Legislature appropriated $3.6 million. He's also been working with the Trust for Public Land on buying the adjacent 456 acres, owned by Dole Foods, which has access to Kaukonahua Stream. Last year, the Legislature appropriated $750,000 to investigate the possibility of using the stream to irrigate the lands recently acquired from Galbraith Estate.

Christmas trees and flowers are currently grown on the Dole land, which also has office buildings and a parking area for trucks that were once part of the processing facility on Castle & Cooke's land.

Dole wants more than $10 million for the 456 acres, according to TPL executive director Lea Hong. She said she's getting her own appraisal and is tentatively seeking $5 million from the military, $4 million from the City

and County of Honolulu, and $1.146 million from the state Legacy Land program.

Last year, the Legacy Land commission recommended providing at least $600,000 for the project. The city's Clean Water and Natural Lands Commission recommended contributing $1 million to 2 million.

Should TPL succeed in acquiring the land, the organization would transfer it to the ADC. At the ADC's board meeting last month, board member William Tam asked when that might occur.

Hong said if all the funding came through, the sale would not close until some time in 2014.

"How far along are we in due diligence?" Tam asked.

Hong said she had not yet conducted an initial environmental survey.

"If we can agree on a price, then maybe I'll spend money on an environmental survey," she said.

Nakatani asked the board for its blessing to continue negotiations for both parcels. "I want to make sure everybody's on board with this project. ... Lea's project also," he said.

With the understanding that it was only supporting the intent to buy the lands, the board authorized its staff to negotiate the acquisitions, which would be subject to due diligence.

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Church Seeks ADC's Help Farming Kunia Ag Land

To board member William Tam, the memorandum of understanding offered by New Hope Leeward Church seemed to commit the ADC to testifying in favor of land use changes that are needed for the church to build on the 203 acres in Kunia it plans to buy from Nihonkai Lease Co. Ltd.

> *"Are we supposed to testify for a land use change?"* ***— William Tam, ADC board***

The land used to belong to the Robinson Estate and was part of the O'ahu Sugar Company. When Nihonkai bought it in the 1980s for $5.875 million, it intended to develop a golf course, according to state documents. It never obtained the necessary zoning changes.

In the 1990s, Nihonkai leased the entire parcel to Alec and Mike Sou of Aloun Farms. More recently, Halms Enterprises, Inc., has subleased some of the land, growing ti leaves, taro, cucumbers, tomatoes, green beans, and other vegetables. The crops receive 0.48 million gallons a day of Waiahole Ditch water under a permit from the state Commission on Water Resource Management.

Now New Hope Leeward Church wants to relocate there and is seeking to buy the property, currently valued at $11 million. The church will need to rezone about a quarter of the lot so it can build its facilities. Under the MOU as originally proposed by New Hope, in consideration of the church's commitment to keep 155 acres in farming, the ADC would agree to publicly support the church's overall plans for the area, including the entitlements.

"Are we supposed to testify for a land use change? I'm a little concerned about what our obligations are," Tam said.

(The MOU also included an odd provision regarding public disclosure. It stated, "ADC and NHL agree that, if either of them wishes to disclose this MOU to any third parties, including without limitation, any news organization, governmental entity or through any press releases, the party wishing to make such announcement shall first advise the other party of its intent, as well as of the content of the announcement it intends to make and shall give the other party not less than three business days to comment on the proposed announcement.")

Church representative Abel Malczon said the commitment to publicly support the church's plans primarily referred to press releases.

Under the MOU, the ADC would also take the lead in developing plans for how to best achieve a variety of objectives, including food sustainability for local residents, agricultural education for farmers, and appropriate crop diversification.

"We're not farmers. We don't claim to be farmers. But we do have a deep desire to see the lands used for farming ... to provide food for the less fortunate. We can make a difference in the state if the land is used correctly," Malczon said.

Tam said he liked the project, but was worried about committing to publicly support the church's development plans, especially since the ADC and the church haven't yet agreed on what to do with the 155-acre "agricultural harvest area."

"I'd be happy to say 'we agree to work together' rather than 'we publicly support,'" he said.

In the end, the board approved an amended version of the MOU that addressed Tam's concern. ***—Teresa Dawson***

Flattery from page 1

The consent agreement was signed last September by the attorney for the owner and operator of the vessel. The deputy attorney general representing the state affixed her signature on December 17. The senior attorney for the environment and natural resources division of the Department of Justice was the last to endorse the agreement, on December 18.

Three days later it was lodged with the Federal District Court in Honolulu.

A 'Pulverized' Reef

The assessment of damages followed years of study by federal and state biologists. In the end, they determined that some 19 acres of reef, at depths up to 100 feet, had been damaged or destroyed as the ship's hull "pulverized" the reef, as FWS biologist Mike Molina and NOAA scientist Gerry Davis described it in one presentation. Estimates of the damaged area in 2005 ranged as high as 34 acres, according to a NOAA report.

The total number of coral colonies destroyed has been estimated at one million.

Actions to minimize the harm began almost immediately. Divers from several government agencies attempted to reattach pieces of coral that had been broken in the grounding. More than 800 coral colonies were cemented to about 100 "bases," and divers righted more than 400 colonies that had been knocked over. In total, Davis and Molina estimated the emergency restoration stabilized less than one percent of the damaged area. The damage was extensively documented by all parties and was rigorously re-surveyed two years ago. Recent follow-up visits have shown that the reef is recovering naturally at expected rates, says NOAA reef restoration expert Matthew Parry.

Reduced Damages

By 2008, with settlement discussions among the parties continuing to occur, the federal government indicated that the damages could run as high as $15 million.

That disclosure apparently prompted Cape Flattery to sue the company it had hired to salvage the vessel and remove it from the reef, Titan Marine LLC. According to Molina's and Davis's presentation, the ship's removal caused much more damage than the initial grounding.

Through its "gross negligence" and the use of submerged rather than floating tow lines, Titan Marine had caused the damage to the reef to be much greater than it otherwise would have been, the ship's attorneys contended. Invoking a clause in the

contract, Titan sought to have the dispute arbitrated, but in a decision eventually upheld in the 9th U.S. Circuit Court of Appeals, arbitration was denied. (The dispute over arbitration was appealed to the U.S. Supreme Court, which denied Titan's request for review last April. To judge from the number of parties filing amicus briefs – representing bankers, salvage companies, law professors, and professional arbitrators – interest in the dispute was high. The original lawsuit is still being litigated in Federal District Court in Honolulu.)

Cape Flattery eventually agreed to the reduced amount of $7.5 million. By that time, the company had a good indication of how high damages could run. In February 2011, the U.S. Navy agreed to pay the state $8.5 million for damages caused when the *USS Port Royal* grounded off the Honolulu International Airport's reef runway in 2009. The amount was in addition to the $6.5 million the Navy had already spent on restoration activities, which included reattaching 5,400 coral colonies. In that case, the damaged area was roughly half the area damaged by *Cape Flattery*.

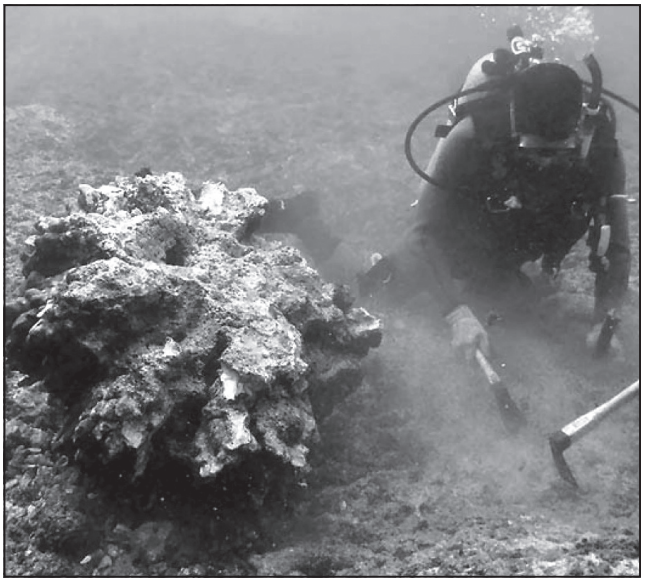

PHOTO: NOAA

Divers cemented more than 800 coral colonies to bases like this one.

Whether $5.8 million will be enough to fully restore the damaged reef — if that is even possible — remains to be seen. "The area is essentially healing itself," Parry says. Even so, his office plans to release a draft restoration plan for public comment once an approved consent decree is filed with the court. NOAA will also likely hold public meetings on the plan.

Dave Gulko, a coral reef ecologist with the DLNR's Division of Aquatic Resources, says that his division lacks the money and staff to monitor the site, and is very concerned about an invasive seaweed (*Avrainvillea amadelpha*) making use of the damaged area.

When ships ground, they create a kind of vacant parking lot on the sea floor where invasive algae can move in, says Parry, whose agency is also worried about *Avrainvillea*. So far, *Avrainvillea* densities in the damaged area aren't any higher than in the surrounding areas, he says.

Jurisdiction

In the *Port Royal* case and many other reef damage cases, the state Department of Land and Natural Resources has been the lead — if not sole — enforcement agency involved. In addition to the *Port Royal* settlement, the Board of Land and Natural Resources has imposed hundreds of thousands of dollars in fines for damages caused by vessel groundings in recent years.

In the *Cape Flattery* case, however, because much of the damage resulted from responses to a substantial threat of an oil spill, NOAA, FWS, DLNR, and the state Department of Health agreed to pursue enforcement actions under the Oil Pollution Act of 1990 and applicable state law, a NOAA webpage on the incident states. (Federal agencies also took the lead in responding to the 2010 Barber's Point grounding of the 734-foot *Voge Trader*. The Liberian-flagged coal carrier damaged a little less than an acre of coral. In 2011, the Land Board issued NOAA a permit to conduct restoration activities.)

Under the Oil Pollution Act, owners and operators of vessels that pose a threat of an oil discharge into navigable waters are liable for natural resource damages, including the cost of assessing those damages.

However, "[w]e don't get damages per se. [The damages assessed] are really to rehabilitate the resource," state deputy attorney general Kathleen Ho says. That's why the state's portion of the settlement is so small. It merely reflects the costs the state incurred, she says.

The settlement, if approved, doesn't preclude the state from pursuing damages for the natural resource impacts, but it's unlikely to happen because all claims usually are required to be brought in a single action, Ho says.

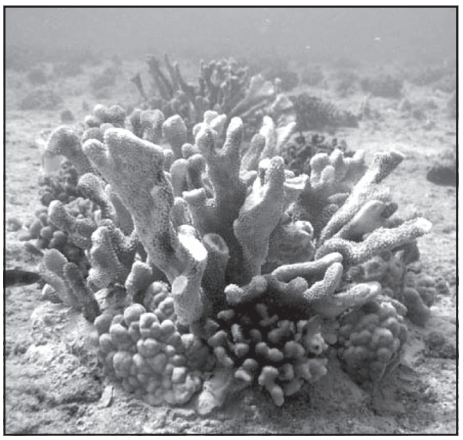

PHOTO: NOAA

An example of tow line damage.

Whether or not NOAA and/or the state will pursue a similar case against the owners and operators of the *Voge Trader* remains to be seen. Parry says negotiations regarding a restoration plan and settlement agreement are still ongoing. So far, the parties involved agree on the type of restoration that needs to occur, but not on the scale, he says.

"We haven't figured out what the settlement is going to look like. ... the flavor of it," Parry says. And that includes whether the settlement will be made under the Oil Pollution Act or state law or both.

Ho said she thought someone in her office was looking into the *Voge Trader* grounding, but could not say whether a state case was in the works.

In any case, "if the company wants to do restoration themselves ... the settlement will look very different" from the *Cape Flattery* consent decree, Parry says.

Gulko says the DAR is trying to amend its rules to make it easier to pursue enforcement actions against those who ground boats and damage coral. He expects the proposed rule changes to come before the Land Board in the next month for approval to go out to public hearings.

The *Cape Flattery*, *Port Royal*, and *Voge Trader* groundings, among others, were the impetus behind some of the changes, he says.

"We're trying to address what we've documented as some of the things responsible for large-scale coral damages in the state," he says.

Public Comment

On January 8, the Department of Justice published notice of the draft settlement in the *Federal Register,* opening a 30-day comment period. The full consent decree is available online at: *http://www.usdoj.gov/enrd/Consent_Decrees.html.*

— Patricia Tummons and Teresa Dawson

Hawai'i County Wants to Reconsider Approval of Final EIS for 'Aina Le'a

Hawai'i County wants a do-over.

That, at least, is what it has told Judge Elizabeth Strance of the 3rd Circuit Court, who is hearing a challenge to the county's acceptance of a final environmental impact statement prepared for the Villages of 'Aina Le'a. The project is proposed for about 1,000 acres in West Hawai'i, just mauka of the Mauna Lani resort.

The Mauna Lani Resort Association, represented by attorney Randy Vitousek, argues that the EIS was flawed procedurally and substantively: procedurally, since it described a project with a different scope, ownership, and configuration than the one outlined in the EIS preparation notice, and substantively, since it represents an improper and illegal effort to segment the planned development of a much larger area. It is asking the court to invalidate the EIS and enjoin the developer from any further work at the site.

During a court hearing on December 3, Judge Strance expressed dismay over the county's failure to take a hard look at the applicant's statements in the EIS. Less than two weeks later, on December 13, county deputy corporation counsel William V. Brilhante Jr., filed a motion asking the court to remand the matter to the Planning Department, in light of "new" evidence that it did not have when it accepted the final EIS in November 2010.

According to Brilhante's brief, the final EIS should have included the Joint Development Agreement (JDA) between developer DW 'Aina Le'a Development, LLC, and Bridge 'Aina Le'a, LLC, which owns most of the area proposed for development as well as some 2,000 acres in the Agricultural District surrounding it. The FEIS did include as an appendix a purchase agreement between the two parties that referred to the JDA, but the JDA itself was not included.

Now that the county has seen the development agreement, Brilhante argues, the county wants to reconsider its acceptance of the EIS. The JDA "clearly brings into question the continued or ongoing relationship between DW and Bridge," Brilhante's motion states. As described by him, the JDA provides for modifications to the master plan and it references "coordinated development" of land in both the Urban District and the Agricultural District.

"Unfortunately, a copy of the JDA was never attached to [the purchase agreement] in the FEIS, and was never submitted to the county," Brilhante states. "Not until December 11, 2012, following numerous request [sic] by legal counsel for the county, was a copy of the executed JDA provided to the county."

In light of this "new" evidence, he goes on to say, "the county hereby request [sic] the court to remand this case back to the county" so it can require the applicant to comply with state rules regarding environmental impact statements.

Jerel Yamamoto, attorney for DW 'Aina Le'a Development and Relco Corp., which holds a major stake in the developer, asked the court for the same remedy as the county, "if the court finds deficiencies in the FEIS."

Belated Curiosity

Until December 3, however, no one at the county seemed to show much interest in the content of the JDA, a point Judge Strance noted in the course of the hearing.

"Candidly, Mr. Brilhante, … both the county and DW 'Aina have taken the position that the joint development agreement is irrelevant," she stated. "And yet, if at the time of the application or during the course of the application, agreements were reached for the development of the three thousand acres, what was the obligation of the county to evaluate … whether the project was … part of something bigger?...."

"[I]t begs the question … which is, what is Bridge doing? And what is the relationship of DW 'Aina to Bridge? And is DW 'Aina there to facilitate approval of a reduced project in order … for Bridge to complete the development of the remaining three thousand acres?"

Brilhante as much as admitted he had no knowledge of the scope of the JDA, prompting this sardonic response from Strance:

"So it is the county's position that you see who's the applicant, and then you put on blinders, like a horse walking down a path, where you don't look beyond the blinders to figure out what the impact is?"

According to the brief filed by DW 'Aina Le'a's attorneys on December 14, the county requested the JDA only on December 11. Although Brilhante has stated in his brief that the JDA should have been made a part of the EIS, a public record, when *Environment Hawai'i* asked to see the agreement, he did not release it. The document was obtained via legal discovery, he said, and was a private agreement between Bridge and DW 'Aina Le'a. Although, "yes, it should have been made a part of the EIS," he said, it was not his to disclose at this point. In 2010, when the Planning Department accepted the EIS without the JDA, "it was an oversight not to request this," he added. *Environment Hawai'i* was seeking to obtain the agreement by means of a formal request under the state Uniform Information Practices Act. It had not been provided by press time.

The County's Obligation

Brilhante and Yamamoto attempted to downplay the role of Bridge and its plans for the surrounding 2,000 acres in the Agricultural District, but Judge Strance was having none of it. When she was considering the various motions for summary judgment in advance of the December hearing, she said, "I actually sat down with the agreements and maps and started color-coding the rights reserved in certain lots, and it really is quite a bit of crossover," she said. "And it's not clear what it means. And you know, issues about water and groundwater out on that part of the island, I think, are significant, long-term considerations. And if it really is part and parcel of this development, then the environmental impact statement needs to say what it is….

"I think for this particular development, given the crossover and given the evolution of it, I think that the county needed to do something more than it did. When I read through … the county's brief, and the constant focus on the applicant, the image that came to mind was a workhorse in a field, and you put the blinders on the workhorse to get the field plowed. And so does the county really have an obligation to look outside of that? And I think that it does."

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Ownership

Who exactly owns the property that is proposed for development?

Judge Strance expressed confusion on this point.

"I have some questions," she stated in the December 3 hearing. "One of the material disagreements of fact, it appears that the final environmental impact statement says that DW 'Aina owns one thousand ninety-two acres. And" – addressing Vitousek – "you argue in your brief that that's in fact not true. DW 'Aina owns about sixty acres."

"They don't own any," Vitousek replied. "That sixty acres is owned by 'Aina Le'a, LLC, and eight hundred and eighty-nine individuals."

Strance then posed the same question to

Brilhante, who attempted to defer the question to attorneys for DW 'Aina Le'a. Strance wouldn't allow it. "Well, you're the representative of the county," she told Brilhante. "Who's the owner of the property?"

Brilhante stated that when the application came in, it stated that DW owned all the thousand-plus acres that the development would cover. "Now," he added, "what happened from that point in time to where we are now, the county is not really aware. … [W]hat they may have done is, they may have sold ownership interest, or they may have put out ownership interest in the project to independent investors… I'm not sure what transpired."

Strance pressed the point: "But do you disagree that the county has an independent obligation to evaluate who the applicant is?"

Brilhante insisted that, at the time the application came in, that is exactly what the county did.

Strance: "Well, I'm not talking even about the application. If it was at the time of the application, and it changed by the time the final statement came out, then that – does the county have an obligation to make that correction or see that correction is made in the final environmental impact statement?"

Brilhante acknowledged that this was "a legitimate issue that, you know, at this time I'm not able to answer that correctly or clearly…. I'm not sure what the ownership interest [was] at the time that the final EIS was published … I'm not sure."

Any doubts about who owns what – whether it's Bridge, DW 'Aina Le'a, the 900 or so Asian investors, or a subsidiary of DW 'Aina Le'a called 'Aina Le'a, Inc. (ALI) – were clarified in a December 31 filing with the Securities and Exchange Commission.

According to that filing, by the publicly traded 'Aina Le'a Inc., "other than the … 61.37 acres" – where some 400 affordable units are being built – "the remaining property comprising The Villages of 'Aina Le'a is currently owned by an unrelated entity, Bridge 'Aina Le'a, LLC."

The filing goes on to state that last June, DW 'Aina Le'a, which is described as the "majority shareholder" in 'Aina Le'a, Inc., assigned to ALI its option to purchase the 1,000 acres of Urban District land where the development proposed in the EIS is to be built.

Of the 61.37-acre parcel now being developed with the affordable housing, even that is not owned outright by either ALI or DW 'Aina Le'a. Rather, a land trust that holds the shares owned by Asian investors owns 58.4 percent of that parcel.

Finally, the SEC filing describes a somewhat different development on the 1,000-acre Urban land than that described in the EIS. According to the SEC filing, the development will include "construction of a medical campus, an executive office campus, a golf facility for internationally televised golf tournaments, luxury and local community shopping, an entertainment center, and 1,945 luxury home sites."

In the EIS, no mention is made of a medical campus or executive office campus. In addition, the total number of market-rate housing units and lots comes to 1,837 (1,047 multi-family residences and 790 lots for single-family houses).

Another PUD

The lawsuit, which was filed in January 2011, has gained some urgency given the Planning Department's approval last June of a planned unit development (PUD) proposed for about 23 acres on the 61-acre parcel owned by 'Aina Le'a and its many Asian investors.

In July, the Mauna Lani Resort Association appealed that approval to the County of Hawai'i Board of Appeals. One of the reasons for the appeal is the pending lawsuit challenging the EIS for the larger project. "The Planning Department should not consider the pending application [for the PUD] until the challenge to the EIS is resolved," Vitousek wrote to Leithead-Todd in October.

Since then, the Board of Appeals has not held any hearings on the resort association's appeal, pending the outcome of the litigation in 3rd Circuit Court.

A Golf Course Lost?

From the earliest petitions with the state Land Use Commission, golf has been an important part of the various proposed developments. The first petition, from Signal Puako, outlined six "villages," each centered around a golf course. The most recent plan, outlined in the EIS, calls for just one golf course, which would be built pursuant to a Use Permit approved by the county Planning Commission in 1991.

But that permit appears to have expired more than a year ago.

When originally approved in 1991, the permit allowed Nansay Hawai'i to build six golf courses on the 3,000 acres it owned. The time frame for initiating construction was short: final plan approval for the first three golf courses was to be in hand within 18 months of the permit's issuance (December 1991), with construction to begin within a year of final plan approval.

In September 1996, after a series of delays and time extensions, the Use Permit was amended to give the landowner 15 more years in which to complete construction of the first three golf courses.

One condition of the original permit that was not affected by the 1996 amendments was the requirement for "an annual progress report" to be submitted on the anniversary date of the permit. This condition – Number 20 – "shall remain in effect until all of the conditions of approval have been complied with."

In Planning Department files, the most recent annual report was dated April 28, 2006.

Condition 21 of the permit allows for time extensions, but none has been requested. It also provides that, "should any of the conditions not be met or substantially complied with in a timely fashion, the [Planning] Director shall initiate procedures to revoke the permit." ***— Patricia Tummons***

For Further Reading

The following articles, all available on the Archives page of our website, *www.environment-hawaii.org,* provide extensive background on the 'Aina Le'a development:

- " 'Aina Le'a Appeal," *New & Noteworthy* item, September 2012;
- "Whatever Happened to … The 'Aina Le'a Development?" May 2012;
- "Lawsuits Fly over 'Aina Le'a Reversion," May 2011;
- "LUC Takes Another Step Forward in Reversion to Ag of 'Aina Le'a Land," April 2011;
- "A Frustrated LUC Orders Reversion to Agriculture of 'Aina Le'a Land," February 2011;
- "More Promises from Developer as 'Aina Le'a Fails to Meet Deadline," December 2010;
- " 'Aina Le'a Seeks Two-Year Extension of Deadline for Affordable Housing," October 2010;
- " 'Aina Le'a Faces Compliance Hearing," August 2010;
- "Office of Planning: 'Aina Le'a Project Has Not Met, Cannot Meet LUC Deadlines," June 2010;
- "Some Progress Reported at Kohala Site That Won Reprieve from LUC," March 2010.

Access to the archives is free for paid-up subscribers. Others may purchase a two-day archive pass for $10. (If you are currently a subscriber but have not signed up for online access, please call our office or email us at *ptummons@gmail.com.*)

Kohala Development On Ag Land Skirts Rezoning, Redistricting Process

While development of the Villages of 'Aina Le'a is mired in proceedings before state and federal courts as well as the Hawai'i County Board of Appeals, a gated residential development on agricultural land just a short distance away seems to have sped toward final Planning Department approval in mere months.

The project calls for development of 144 two-acre house lots on 811 acres of land in the state Agricultural District, a few hundred feet north of the northern boundary of land owned by Bridge 'Aina Le'a, LLC. County zoning provides for a minimum of five acres per lot, but, by being permitted as a Planned Unit Development, the smaller lots can be clustered into one portion of the land, with a remainder lot of about 364 acres being kept in open space on the northern portion of the land. In addition to the house lots, the developer proposes constructing a solar farm covering about three acres in the northwestern corner of the property.

The sole member of the development entity, 1010 Puako LLC, is David Patmoi of Maui. In 2010, the company received tentative approval for a subdivision of 142 five-acre lots on the property. In early 2012, the nature of the project changed to a Planned Unit Development, with the clustered two-acre lots.

Approval of the project, for which no environmental impact statement or assessment was prepared, was granted on December 18 by the county planning director, B.J. Leithead-Todd.

Historic Site Survey

As part of the minimal review for planned unit developments, the county Planning Department sought comments from several state and county agencies, including the State Historic Preservation Division (SHPD), an arm of the Department of Land and Natural Resources.

In comments on the application, SHPD archaeological branch chief Theresa Donham wrote, "A review of our records indicates that there are known archaeological sites within the limits of this project area," documented in a limited 1994 report on a corridor for a water line. Another limited survey in 2010 identified five historic sites, Donham continued.

"In August 2011, SHPD reviewed a subdivision application for this project and requested that an archaeological inventory survey should be conducted if additional archaeological remains are present in the project area and if so to outline an appropriate course of mitigation for the sites. We recommend that the inventory survey be completed before the final plat approval in order to allow for the creation of historic preservation easements if significant historic properties are identified."

The application indicated that field work for an archaeological survey had been completed in 2012 and that no sites were found that would impede the development as proposed. However, Donham wrote, "No report documenting this referenced survey has been submitted to SHPD and we have not been afforded the opportunity to comment on site significance assessments or treatment recommendations for this area."

"Further," she continued, "our office has received information from the Ala Kahakai National Historic Trail that a historic trail runs through this property, and it does not appear that this trail is accounted for on the conceptual development plan."

Donham concluded with a request that the county take no action on the permit until SHPD was given the opportunity to review and approve a report that details the findings of the 2012 survey. Also, she asked that the county consult with representatives of the Ala Kahakai National Historic Trail and the DLNR's Na Ala Hele trail program.

In Leithead-Todd's letter of approval, however, there is no requirement that there be further consultation with SHPD or other offices about the possible presence of archaeological sites. While there is a catch-all condition that the requirements of consulted agencies be complied with as recounted in summaries contained in the county's approval letter, the SHPD letter, with its recommendations and requests, contains no requirements as such.

Assurances

William Moore, the planning consultant who submitted the PUD application on behalf of 1010 Puako, was asked whether the developer would prepare the survey requested by Donham.

In an email, Moore noted that a year before the PUD application was filed, 1010 Puako "secured Tentative Subdivision Approval for a 142 lot subdivision for the subject area," with each lot averaging about five acres. The developer then "applied for the PUD knowing that if the PUD was denied, they could proceed with the five-acre subdivision," Moore continued.

As a condition of the earlier subdivision approval, the developer was required to "conduct an archaeological inventory survey for review and comment" by the DLNR, Moore wrote. As part of the "background submittal" to the county for the PUD, he continued, the developer had committed to receiving "final approval of the completed survey and report … from the State Historic Preservation Office prior to the commencement of any ground-disturbing activities."

"Accordingly, while not a specific condition of the PUD approval, 1010 Puako, LLC, fully understands that it will be required to secure approval of the Archaeological Inventory Survey prior to final subdivision approval for its proposed development," Moore stated.

Water

In its November 13 comments on the application, the Mauna Lani Resort Association raised the issue of the impact of the well that 1010 Puako is proposing to use for irrigation as well as a feed stock for desalination plants to provide water for domestic purposes.

"Pumpage in excess of the safely developable long-term supply of groundwater … will likely result in salinity increases in nearby wells," including those used by the resort, wrote attorney Randy Vitousek on behalf of the MLRA.

The county Department of Water Supply voiced similar concerns for its well two miles to the east "The applicant should confirm that the proposed private well will not adversely impact the department's deep well that is being used to service its existing customers," the DWS wrote. The Planning Department, however, did not require any such confirmation.

On December 6, Vitousek, writing again on behalf of the resort association, informed the planning director that the property had been listed for sale. "The listing and its related website both reinforce and intensify the association's concerns regarding the project" in five areas, including domestic water.

"The comment letter [of November 13] noted that the applicant failed to provide a specific and concrete plan to develop a permanent water system," Vitousek wrote. The real estate listing and a related website "describe the project's water source as requiring the installation of a 'reverse osmosis treatment system on each lot,' " he continued. "The attempt to sell the subject property and to require that many critical utilities be constructed and maintained by individual lot

State Supreme Court Reviews Whether ATST Permit Decision Was Appealable

It's been several years since the state Board of Land and Natural Resources would stop public testimony at once and refrain from voting on a matter the instant anyone requested a contested case hearing.

"If the board acted like it used to ... it would make everyone's life easier," Native Hawaiian Legal Corporation attorney David Kimo Frankel told the state Supreme Court on December 20. That day, the court heard oral arguments on Kilakila 'O Haleakala's appeal of the board's granting in 2010 of a Conservation District Use Permit for the construction of the Advanced Technology Solar Telescope on the summit of Haleakala.

Justice Simeon Acoba, at least, seemed to agree with Frankel, who represents Kilakila.

"To be frank, it seems unreasonable to decide the merits of an issue before a contested case hearing" is held, he said at one point.

Whether the rest of the court agrees remains to be seen. If it does, the Land Board may have to change the way it conducts itself once it receives requests for a contested case. And the University of Hawai'i's permit for the $300 million project could be at risk.

Dual Appeals

In December 2010, the Land Board approved the university's request for a CDUP to build the 142-foot-high ATST. Kilakila had requested a contested case hearing months earlier, but to no avail.

During that same meeting, Kilakila representatives again requested a contested case. After the board's vote, Kilakila followed up with the required written petition, which must be filed within 10 days of the board's meeting.

Within days of filing the petition, Kilakila also filed an appeal in 1st Circuit Court, which, among other things, asked for a contested case hearing.

On February 11, 2011, the Land Board authorized the appointment of a hearing officer to conduct a contested case. Shortly after the board's decision, the court orally dismissed Kilakila's appeal on the grounds that it lacked jurisdiction to hear an appeal before the conclusion of a contested case hearing. The court later issued a written decision on March 29.

On April 21, Kilakila appealed the 1st Circuit Court's ruling.

While Kilakila's request sat with the Intermediate Court of Appeals, contested case hearing officer Steven Jacobson presided over a contested case hearing in July and August and issued his recommendation to the Land Board last March. But an email he sent to university attorneys inquiring whether or not it was behind what he felt was inappropriate pressure from the offices of then-U.S. Senator Daniel Inouye and Gov. Neil Abercrombie led the Land Board to remove Jacobson from the case and dismiss his recommendations.

Before the Land Board could appoint a new hearing officer, the university announced on April 20 that it would begin construction activities on May 4. After a brief hearing, the Land Board issued an order on May 2 limiting the university's activities to clearing an old site known as Reber Circle, as well as other unused facilities.

In June, the ICA affirmed the lower court's decision to dismiss the appeal since the contested case hearing process had not been completed (a decision Kilakila appealed to the Supreme Court). A few months later, Jacobson's replacement, Lane Ishida, issued his recommendations supporting the issuance of the CDUP.

The Land Board issued its findings of fact, conclusions of law, and decision and order on November 9. The board found that Kilakila's arguments regarding impacts to biological resources on the mountain were unsupported by the evidence presented. Instead, it found that implementing the terms of the various agreements and plans developed by the university (i.e., the Habitat Conservation Plan, Long Range Development Plan, and Programmatic Agreement) would adequately protect natural and cultural resources.

"The effect on, or impairment of, traditional cultural practices by the

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owners suggests that the applicant is attempting to maximize its profit while limiting its expenditures."

Asking price for the property, described in the listing as "810 magnificent acres with full ocean view," is $6 million.

Agricultural Use?

The resort association also challenged the appropriateness of the development on agriculturally zoned land, stating that it "is not an agricultural use under [Hawai'i Revised Statues Chapter] 205 or the Hawai'i County Zoning Code. The two-acre lots are not suitable for agricultural purposes and the development is more urban or rural in character than agricultural. … The applicant should be pursuing a district boundary amendment before the state Land Use Commission, not a PUD before the Planning Department."

In that same vein, the association also criticized the use of the PUD process to approve the development. "This is a major project in a previously undeveloped area," Vitousek wrote. "The PUD process is not intended to be utilized in this manner" and is rather intended "for projects of a smaller scope and with fewer potential impacts as the process provides limited opportunities for public participation in the development planning and impact mitigation processes."

In Vitousek's December letter, he repeats the concern over the inappropriate application of the PUD process to a large, undeveloped parcel in the Agricultural District. "The PUD process is not intended to and should not be used in this fashion" he writes. "The applicant boldly states on its website that '[h]aving successfully completed the necessary county approvals, 1010 Puako now has a clear path to entitlement.' The association urges the Planning Department to reject the PUD application and encourage the applicant to pursue the appropriate permitting processes."

The website, *http://puakoland.com*, also touts the project as "possibly the first sustainable development in Hawai'i," with "abundant sunshine and a well producing over 1.1 million gallons per day." There is no mention of the high chloride content of the water (420 to 440 parts per million, as opposed to potable water, where the EPA-recommended maximum is 250).

On January 16, the Mauna Lani Resort Association petitioned the county Board of Appeals, seeking a review of the PUD approval. No hearing date had been set as of press time. ***— P.T.***

astronomical facilities currently located on the ... site has, to a degree, already been mitigated by the construction and consecration of the east-facing ahu (shrine)," the decision states, adding that the construction of a third ahu, in addition to the implementation of measures in the university's various plans, "will reasonably protect the exercise of cultural practices in the [Haleakala Observatory] site and near the ATST Project."

Days after the board issued its decision, the Hawai'i Supreme Court granted Kilakila's request for a review of the ICA's decision.

Oral Arguments

Attorneys for the Land Board and the university argued that Kilakila's circuit court appeal was untimely, since it was filed before the Land Board had a chance to decide on Kilakila's petition for a contested case. What's more, they argue, the Land Board's decision following the contested case to grant the CDUP renders Kilakila's appeal moot.

During oral arguments, Frankel contended that the Land Board's December 2010 deliberations could be construed as a contested case hearing for the purposes of appeal. The permit affected the constitutional interests — the traditional and customary practices — of his client, he argued.

"The term contested case means different things in different contexts," he said. There are, of course, the formal contested case hearings that are spelled out in rules and statutes. Yet there are also 40 years of case law showing that citizens have a right to appeal a board's decision even when no formal contested case hearing has been held, he said.

To Acoba, the most important question was whether the BLNR should have issued a permit before holding a contested case hearing on the claims of Kilakila members that the telescope would negatively impact native Hawaiian traditions and practices.

"What would be the benefit of having a contested case hearing to decide whether a permit should be issued if the permit was already issued?" he asked.

"It becomes a post hoc rationalization of a decision that has already been made," Frankel replied.

When Acoba posed the same question to state deputy attorney general Linda Chow, she noted that the board's decision to issue the permit was not final, even though it allowed construction to proceed.

"To say that the board decision was final at the meeting, but the [DLNR's] rules provide that a written petition to be filed within 10 days after that would either indicate that the decision at the board meeting is not final or that the written petition is a nullity," she said.

Acoba then asked whether the permit states that the Land Board may rescind it if the outcome of a contested case is a determination that the permit should not have been issued.

"It does not say that," Chow said.

"So if the hearing takes a year, two years or whatever it takes ... it might have taken a long, long time and there's a valid permit out there that permitted development and construction?" Justice Richard Pollack asked.

"Yes," Chow said.

Attorney Lisa Munger, representing the university, later added that the permit does state that applicants shall comply with all rules, "including that there would be a contested case."

Given the university's attempt to start construction before the conclusion of the contested case, Chief Justice Mark Recktenwald immediately interjected.

"Just so I'm clear, is it your position, Ms. Munger, that once the request for a contested case hearing was approved, the university was precluded or prohibited from commencing with construction? ... You said 'subject to all legal requirements' and at that point, is it your concession that the university would not be able to proceed?"

Munger said that when the contested case was granted the university knew the permit was subject to the continuing jurisdiction of the Land Board, including the board's decisions on whether the university could proceed with construction. She later added that a Land Board minute order, issued after the university announced it would start construction, prohibited construction during the contested case proceeding. The board did, however, allow the university to start mitigation.

Munger noted that the minute order concluded that "any activity is done at the university's sole risk."

"So that meant they could go forward, it was just at their risk," Pollack said.

Given that the ATST's final environmental impact statement identified substantial cultural impacts that could not be mitigated, Acoba asked Munger whether it would have been more reasonable to hold the contested case hearing before the permit was issued.

"Wouldn't that be the reasonable time, so then you would be able to fashion the permit in order to adjust whatever conditions needed to be adjusted rather than to send out the conditions without the benefit of a contested case hearing and give that to the contractor?" he asked.

"I appreciate that that is one way it could be done," she replied, but added that, "in fact, it's quite different from the way it's done for every other environmental permit — air quality, water quality, solid and hazardous waste."

One reason for voting on a permit before deciding whether or not to grant a contested case is that "often you will not need a contested case if you know what the conditions are. The conditions matter," Munger said.

Frankel countered that the state Commission on Water Resource Management and the Land Use Commission conduct contested case hearings before making decisions. (However, this was not the case with the Water Commission's decision on the interim instream flow standards of several East Maui streams. Also, the LUC is required by statute to conduct contested case hearings on every redistricting petition that comes before it.)

Frankel also took issue with Munger's statements about the university's ability to start construction during the contested case hearing.

"I am amazed the university would have the audacity to suggest construction was not going to take place during midst of the contested case hearing. Here's their letter in the record, April 10, 2012: 'We are formally notifying the Department of Land and Natural Resources that construction activity will commence on Monday May 14, 2012.' That was their position. For them to say to you today 'no, no, no, we can't do construction ... until the contested case hearing is done' is absurd."

The evidence that the Land Board's decision was final is the university's ability to construct a 142-foot tall building, Frankel concluded. He then asked the Supreme Court to find that the Circuit Court had jurisdiction to hear the appeal and to instruct the Circuit Court to vacate December 2010 permit.

The Supreme Court had not issued a decision as of press time. Although Kilakila is again appealing the CDUP in 1st Circuit Court, the university has already started construction activities. So far, work has been limited to the December 3 removal of a concrete ring at Reber Circle, and the rearranging of boulders to create a barrier between the ATST site and the east-facing ahu constructed for native Hawaiian cultural practitioners. ***— T.D.***

Old Hunting Rules Hamper Ungulate Control in NARs


Black-tailed deer.

You might think managers of the reserves in Hawai'i's Natural Area Reserves System would have unfettered authorization to kill feral ungulates in the reserves' forests, which are supposed to be the state's best. You would be wrong.

"Kaua'i's seasons are ridiculous," said Patrick Conant at a meeting last November.

"I don't know how you can tell if you're legal," Marie Bruegmann added.

Conant and Bruegmann, both NARS commissioners, were referring to the Department of Land and Natural Resources' Division of Forestry and Wildlife's rather puzzling hunting rules for the island, which have reportedly hampered efforts of NARS staff from controlling wild deer in the 1,600-acre Ku'ia NAR on Kaua'i's North Shore.

Many NARs fall within DOFAW's game mammal hunting areas. And, like everyone else, NARS managers are subject to the division's hunting rules, which dictate what kinds of animals can be taken, what methods are permitted, whether permits are required, and how many animals can be taken and when. That means if the rules restrict hunting to weekends, NARS staff can't hunt during the work week.

Kaua'i's rules are by far the most complicated. The Hono O Na Pali NAR falls within hunting unit G, which has no bag limits and hunting — with bows and arrows only — can occur year-round. The Ku'ia NAR, on the other hand, falls into unit H, where hunting is allowed only on certain weekends and where hunters may take only one pig a day, one goat per rifle/muzzleloader permit, and/or one antlered black-tailed deer buck per hunter per license year. The hunting weekends vary depending on the hunting method used.

In Moloka'i's Pu'u Ali'i and Oloku'i NARs and Maui's Hanawi and West Maui (Kahakuloa section) NARs, hunters are limited to two goats and two pigs per day. Hunting is allowed on weekends and state holidays (except bird hunting days) year-round.

In all of the NARs on the island of Hawai'i, a hunter may take two pigs, one goat and one sheep a day, every day, year-round.

O'ahu is more restrictive, with public hunting allowed in the Pahole and Ka'ala NARs only on special hunts with DOFAW staff.

Two years ago, DOFAW proposed revisions to its game mammal hunting rules that would have helped NARS managers better protect forests from feral ungulates. Among other things, the new rules would have removed the O'ahu, Maui, and Moloka'i reserves from public hunting areas. They would also have lifted the bag limits in the Hawai'i Island reserves.

Kaua'i's hunting rules would have been streamlined a bit and the take levels would have increased from one ungulate per day per permit to two. Hunting in Ku'ia NAR still would have been restricted to weekends.

But the division never adopted the proposed revisions, and today, NARS staff must apply for an exemption from the hunting rules if they want to control ungulates in the off-season.

Although NARS staff can get exemptions to hunt out of season, "we try not to if we're using hunting as a main tool," says NARS program manager Randy Kennedy, adding that the division tries to let hunters take the animals first. On Hawai'i, for example, the NARs are so vast that staff wants hunters to help control ungulates, according to Lisa Hadway, head of the island's NARS program.

When or whether the game mammal hunting rules will be revised remains to be seen. *Environment Hawai'i* was not able to reach DOFAW administrator Roger Imoto.

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Heat Seekers

Whether or not the hunting rules change anytime soon, eradicating feral ungulates from protected areas may soon get a lot easier for natural resource managers.

The Department of Land and Natural Resources has included in its watershed protection initiative budget a request for $20,000 to purchase an infared rifle scope. The Nature Conservancy of Hawai'i has already begun are experimenting with the technology, produced by FLIR Systems, Inc.

"It's a game-changer," Trae Menard told the NARS Commission last November. Menard is a commissioner as well as TNCH's Kaua'i preserves manager.

At a recent state Senate hearing on invasive species control, Menard showed video taken by the scope, which clearly showed a pig running through the forest understory.

Even where aerial shooting is banned, Menard said the scopes are good for conducting censuses before and after ground hunts. Aerial hunting is allowed on Maui.

— T.D.

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In Memoriam:

Susie Yong, 1950-2013

Susie Yong, our longtime office administrator, has died. She passed away the night of January 10 at her home in Hilo. She had celebrated her 63rd birthday just three days earlier.

Her work at *Environment Hawai'i* was part-time, but no less valued for that. She also worked, full-time, as a manager at Abundant Life, a natural food store in downtown Hilo. In addition, she volunteered on the board of her condominium association and the Hilo Community Players, an amateur theater group.

Born in China, Susie was brought to the Boston area by her parents at an early age. Her mother died while Susie was a young child. Growing up, she helped out at her father's laundry. She never shied away from hard work and was diligent, honest, and gracious in everything she did.

Susie would sometimes speak of the many things she hoped to have time for in retirement: A trip to Paris, finding more time for her sketching, going back to China – all were on Susie's bucket list. She is survived by two daughters and three grandchildren, all living in Massachusetts. She had bought a ticket to visit them in March.

Those of you who have called our office may remember Susie as the ever-courteous and accommodating voice. She was also a first-class proofreader who, over the years, saved us from untold numbers of embarrassing goofs.

Everyone who knew Susie was absolutely sure that they were her very best friend. She was just that kind and loving.

We grieve for her loss.

Heartfelt Thanks

As we embark on a new year, we want to thank all our friends whose contributions made it possible for us to complete the one just ended. They include:

Andrea Anixt; John and Maile Bay; Alice and Robert Bechok; Andria Benner; Kate Berry; Beryl Blaich; John Broussard; Vickie Caraway; Cindy Carlisle and Baine Kerr; George Cattermole; Karl and Dora Chang; Henry Chapin; Carla Christensen and Tom Mader; Ray Clarke; Sara Collins; Conservation Council for Hawai'i;

Robert and Linda Dawson; Teresa Dawson; Julie Denslow; William Devick; Paula Dobbyn; Laurel Douglass; Eleanor Drey; Susan Dursin; Thomas Dye and Dore Sinclair; Anne Earhart; Jan Elliott; Don and Marjorie Erway; Don and Jean Evans; Cynthia Gillette-Wenner; Gail Grabowski; Michael and Carolyn Hadfield; Don Hall; Frank Hay; Christina Heliker; Richard Henderson; Stephen Hight; Lea Hong; Michael Howden; Lela Hubbard;

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