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Farmland Favors

The sale of the Galbraith Estate land to the state is a welcome event, and all parties involved should take a well-deserved bow.

That said, it isn't clear why the farmers displaced by the Ho'opili development should get first crack at the land under the control of the Agribusiness Development Corporation. Yes, the developer, D.R. Horton-Schuler Homes, did make a modest payment that helped seal the deal. But for that investment, is the return in proportion?

Nothing illegal or dishonest, we hope – just one of the results of having the ADC able to avoid the level-playing-field bid procedures that bind other state agencies.

Also in this issue: A review of the latest measures to protect false killer whales, a report on the hearing officer's findings in the Thirty Meter Telescope contested case, an update on last month's cover article, and our regular Board Talk column, discussing recent actions of the Board of Land and Natural Resources.

IN THIS ISSUE

ADC Gives Ho'opili Farmers First Shot At Large Chunk of Former Galbraith Land

Nearly half of former Galbraith Estate land now owned by the state Agribusiness Development Corporation may wind up being leased to agriculture operations displaced by the 1,500-acre Ho'opili development of D.R. Horton-Schuler Homes, LLC, in East Kapolei, O'ahu.

Last month, the Trust for Public Land purchased 1,732 acres in North O'ahu from the estate for $25 million. The TPL then transferred roughly 1,200 acres to the ADC, which had contributed $13 million to the sale. The remaining 500 acres went to the Office of Hawaiian Affairs, which paid $3 million. (The City and County of Honolulu and the U.S. Army Garrison together contributed more than $8 million but received no land.)

The ADC board has agreed to give D.R. Horton "designees" first crack at 500 of its 1,200 acres, in consideration of a total of $1 million that the company is putting in. At its November 28 meeting, the ADC board unanimously approved a memorandum of understanding with D.R. Horton outlining the deal.

Under the MOU, the developer promised to contribute up to $500,000 in "gap funding" to TPL for the Galbraith land purchase. Horton will pay the remainder ($1 million minus the initial contribution) to the ADC once the City and County of Honolulu approves a small-lot residential subdivision for the Ho'opili project area.

The ADC agreed to give Horton — "for the benefit of its designee" — a first right of refusal and right of first offer for the 500 acres, the MOU states. What's more, the rent and lease term for those 500 acres will be "mutually agreed upon by the ADC board and the lessee(s)." (Because the ADC's lands are not considered public lands under Hawai'i Revised Statutes, leases may be directly negotiated and are not subject to market rent or term limits.)

Based on the discussion at the ADC board meeting, members appeared to have had little choice but to agree to the MOU, which had not been discussed at any previous meeting.

"This is one of the pieces of the puzzle to finish to get the money so we can close" the sale, ADC executive director James Nakatani told the ADC board at the November meeting.

"Can we get an explanation?" board member William Tam asked. (Tam is the water deputy for the state Department of Land and Natural Resources and also sits on TPL's advisory board.)

TPL executive director Lea Hong said that she hoped to close the sale by December 10 and needed to have all of the money in escrow in less than a week.

The MOU is an attempt to accommodate farmers that will be displaced by the Ho'opili development. In June, the state Land Use Commission approved Horton's boundary amendment petition to remove its 1,500 acres from the Agriculture District and place them in the Urban District. Although the LUC decision and order (D&O) requires Horton to reserve 159 acres in Ho'opili for commercial farming, that's not nearly enough land for the current agricultural tenants — Aloun Farm, Inc.; Sugarland Farms, Inc. (owned by former ADC board member Larry Jefts); and Syngenta Seeds, Inc. Aloun Farms leases 1,100 acres at Ho'opili, a portion of which is subleased to Fat Law's Farm, Inc.

During the LUC's contested case hearing

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Environment Hawai'i

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NEW AND NOTEWORTHY

Nominee Lists — Still Secret: The terms of two members of the state Commission on Water Resource Management end on June 30. That means that, this session, the Legislature must approve someone to replace Neal Fujiwara, who is finishing up his second and final term. It must also either approve a second term for commissioner Sumner Erdman or find someone else.

Last session, activists from the native Hawaiian and environmental communities — and their attorneys — vehemently protested the governor's decision to nominate Maui appraiser Ted Yamamura to the commission, arguing that the administration had passed over more qualified applicants. Yamamura's opponents also criticized the secrecy surrounding the Water Commission's nomination process.

Under the current process, a nominating committee meets in private and submits a confidential list of the best applicants to fill vacancies on the commission. The governor picks one and the Senate either approves or disapproves.

In April, *Environment Hawai'i* requested from the governor's office the list of nominees for the two Water Commission seats that were vacant at the beginning of the legislative session. The office rejected our request, citing a 1991 Office of Information Practices opinion that disclosing the list would result in a "clearly unwarranted invasion of privacy under section 92F-130(1)" of Hawai'i Revised Statutes.

Noting that the OIP issued a subsequent opinion in 2003 that disclosing the lists of nominees to fill Ethics Commission and judicial vacancies does not violate 92F-13(1), *EH* asked the OIP on August 21 whether the denial of our request was legal. We also asked for the OIP's assistance in obtaining the list.

On August 22, OIP staff attorney Carlotta Amerino informed *EH* that the office had opened a file on our request. Last month, Amerino told us that her office would not likely issue an advisory opinion before the end of this legislative session because it is busy working on older opinion requests.

Snail Savior: Hawai'i's rarest native snails now have a full-time, dedicated defender in David Sischo, the sole staff member of the Department of Land and Natural Resources' new Snail Extinction Prevention (SEP) program. Modeled after the DLNR's successful Plant Extinction Prevention Program, which focuses on protecting a short list of the state's rarest plants, the snail program aims to keep endangered Hawaiian tree snails from going extinct.

"We're on the verge of losing a lot of species," Sischo said at a recent meeting of the Natural Area Reserves System Commission. Although the situation is rather depressing, there are still a lot of snails to conserve, he said. The idea behind the SEP program is to create "little life boats" for the snails until science comes up with a solution for predator control.

One of the main predators of native snails is the rosy wolf snail (*Euglandina rosea*). Because slug poison can't be used near trees containing native snails, for now the wolf snails are controlled mainly by "getting on your hands and knees and squashing them," Sischo said. Although he has no staff to assist him, he does work with volunteers.

Brenden Holland of the University of Hawai'i's Tree Snail Conservation Lab has been studying Euglandina's prey preferences in the hopes of developing effective attractant traps that, as Sischo said, will "lure them into a pit of doom."

Sischo says Euglandina, which eat slugs, may be following them up into trees containing native Achatinella snails.

Quote of the Month

"Making the enforcement easy and efficient is the only way we can do it."

— Land Board chair William Aila on the temporary ban of vessels from Kealakekua Bay

A Clarification: In our December *Board Talk* column, we noted that the state Department of Land and Natural Resources was requiring landowners to pay hundreds of thousand of dollars for shoreline easements covering encroachments created by erosion. According to DLNR staff, those types of easements actually haven't been that expensive, but have perhaps run into the tens of thousands of dollars.

The most expensive easements, those that have cost more than $100,000, have been for structures originally built on or near state land.

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Lawsuits Yield Settlements To Boost Protection for False Killer Whales

If false killer whales could read, recent notices in the *Federal Register* would have had them keeping the midnight oil burning. For the most part, they probably would have liked what they read.

On November 28, the National Marine Fisheries Service posted a 25-page rule finding that the Main Hawaiian Islands insular population of the animals (*Pseudorca crassidens*) was a distinct population segment and entitled to treatment as an endangered species under the Federal Endangered Species Act.

The very next day, NMFS published 27 pages of new rules regulating the interaction of false killer whales, no matter whether they're part of the MHI population, with Hawai'i-based longline fishing vessels under the authority of the Marine Mammal Protection Act.

In both instances, publication of the rules settled federal lawsuits.

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The Endangered Species Suit

Whenever a petition to list a species as endangered is brought to the Fish and Wildlife Service or the National Marine Fisheries Service, the responsible agency must first determine, within 90 days, whether the petition has merit.

NMFS agreed that the Natural Resources Defense Council's petition to list the insular population of false killer whales as endangered, filed in November 2009, warranted a status review, which started with a *Federal Register* notice on January 5, 2010. Thirty days later the public-comment period on the petition closed. On November 17, NMFS issued its proposed rule to grant the Hawaiian insular population status as an endangered species.

And then – nothing. At least not until after the lawsuit was filed on May 22, 2012, pointing out that under the ESA, the final ruling was supposed to have been issued within one year of the proposed rule – i.e., November 17 2011.

A month later, however, NMFS was pulled in a different direction. On June 25, Kitty Simonds, executive director of the Western Pacific Fishery Management Council (Wespac), wrote Lance Smith, the regulatory branch chief of the Protected Resources Division within NMFS' Pacific Islands Regional Office. Simonds asked Smith to "consider substantial new scientific information regarding false killer whales prior to making the final determination" on the NRDC's petition.

Simonds was referring to results of the 2010 Hawaiian Cetacean Ecosystem Assessment Survey (HICEAS), which found an insular population of false killer whales inhabited waters around the Northwestern Hawaiian Islands. At the time of the NRDC petition, the Main Hawaiian Islands population of false killer whales was thought to be unique inasmuch as no other population of the species was known to have movements restricted to waters so close to an island group. Simonds now was suggesting that the MHI population wasn't so unique after all, and, what's more, there was the possibility that it was not "restricted to waters around the MHI and that the insular population may be a combination of the MHI and NWHI populations, resulting in a much higher population than previously thought."

By September, attorneys with the Department of Justice had worked out a settlement agreement with NRDC, calling for NMFS to publish a final rule on the false killer whale petition by December 11. On September 19, Judge Robert L. Wilkins signed off on the agreement.

But there was one more hurdle. On September 18, NMFS announced it would be re-evaluating the "distinct population segment" determination "in light of newly available information." For 15 days, it would be receiving public comment pertaining to the new information.

A Second Bite…

For the most part, the letters NMFS received during the short comment period were predictable.

Simonds, writing again on behalf of the council, stated that NMFS had appeared to find "behavioral and ecological factors to be critical" in the determination that the MHI population was a distinct population segment, with genetic evidence secondary. Given the new information about the NWHI population and its behavior, she said, "the council therefore believes that … the Hawaiian insular population no longer meets the discreteness and significance criteria."

The Hawai'i Longline Association, through its attorney Ryan Steen at Stoel Rives LLP, disputed NMFS' finding that the MHI population had undergone a substantial decline over the last 20 years. A 1989 study had overestimated the population at the time, it claimed, while a 2009 survey that resulted in a population estimate of 635 false killer whales (most believed to be insular) had been discounted. (The 2009 survey is generally regarded as having counted many animals more than once, possibly because they were attracted to the survey vessels.)

But the comments from William Aila, chair of the state of Hawai'i's Department of Land and Natural Resources, were strikingly different from those that the state had submitted in 2011, during the first round of public comment. Back then, Aila had said that if the population was found to be endangered, "the department will work with the NMFS to insure that activities under the department's jurisdiction are in compliance with the requirements of the Endangered Species Act." He went on to note that such a finding "would have a profound effect on our programs," especially with respect to kaka and shortline fisheries.

PHOTO: ROBIN BAIRD

False killer whales in waters off Kaua'i.

On October 3, 2012, however, Aila signed off on a letter that challenged the "new science" and urged NMFS "to consider that all except one of these papers are not yet externally peer-reviewed and published."

"We have some concerns," he continued. "In general, the [mitochondrial] DNA analysis may not be appropriate. The genetic analysis in general may be compromised by pseudoreplication. The effective population size estimates include an analysis of convergence that is not statistically appropriate based on our consultation with the author of the statistical program used for this analysis." Aila then

requested NMFS "to discuss these issues with our experts," who "have specific analytical suggestions that we are happy to share."

What happened?

In the time between the first and second letters from the DLNR, Sarah Courbis had been hired as the state's "operations coordinator" with the Hawaiian Islands Humpback Whale National Marine Sanctuary. Courbis, who wrote her doctoral dissertation on pantropical spotted dolphins, made no mention of the practical issues raised by Aila in his earlier letter. Instead, in the October letter and later exchanges with NMFS staff, she delved into the finer points of statistical sampling techniques, DNA analysis, micro-satellites and alleles. In one email to NMFS, Courbis defended her criticisms of the conclusions contained in the new studies by describing them as "technical suggestions like any reviewer would make. There is no political agenda."

(To review the detailed responses of NMFS to these criticisms, see the *Federal Register* notice of November 28. That and other information and documents on this subject are also available at: *http://www.fpir.noaa.gov/PRD/prd_false_killer_whale.html)*

Discrete, Significant

In making a decision on the petition, NMFS gave heavy weight to the conclusions of a biological review team (BRT) of eight scientists that it had convened to consider the petition: three from the Pacific Islands Fisheries Science Center in Honolulu, two from the Northwest FSC, two from the Southwest FSC, and one from the Alaska FSC.

When the team reviewed the new studies, it found – as it had in 2010 – that "the MHI insular population of false killer whales continues to meet the discreteness and significance thresholds to be considered a [distinct population segment]" under the Endangered Species Act. In fact, it determined that "all factors taken together increased confidence and strengthened the significance finding."

As for the discreteness determination, it reported that it "found strong support for discreteness based on behavioral factors." The MHI insular false killer whales "are markedly separated from other false killer whales based on behavioral factors," the BRT found. "In particular, MHI insular false killer whales form a tight social network."

The final rule published by NMFS was not based on the BRT finding alone, but also on "peer review, public comments, … and other available published and unpublished information" as well as consultation with "species and other individuals" familiar with the insular population.

"Based on this review … we conclude that the MHI insular false killer whale meets the discreteness and significance criteria for a DPS… We also agree with the BRT's assessment of possible threats and their current and/or future risk to the MHI insular DPS. The greatest threats … are small population effects and hooking, entanglement, or acts of prohibited take by fishermen."

The final rule was to take effect on December 28.

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Marine Mammal Protection Act

The November 28 rule gave endangered species protection to fewer than 150 animals that are estimated to constitute the entire population of Main Hawaiian Islands false killer whales. The November 29 rule is intended to offer protections to all false killer whales that range in waters fished by the Hawai'i-based longline fleet.

The lawsuit that prompted NFMS to take action under the Marine Mammal Protection Act was filed last June – the most recent in a series of lawsuits dating back to 2003 that Earthjustice has brought against the agency on behalf of the animals.

In 2010, in response to one of the lawsuits, NMFS convened a take reduction team charged with devising approaches that would reduce the interactions, or "takes," of false killer whales by the longline fleet. The team, made up of representatives of academic institutions, government agencies, conservation organizations, and industry, came up with a proposed rule that NMFS put out for public comment in July 2011.

By law, the agency was to have issued a final rule before the year ran out. When that had not happened by last June, Earthjustice once more went to court on behalf of plaintiffs Turtle Island Restoration Network and Center for Biological Diversity.

In mid-October, a settlement agreement was worked out, which called for NMFS to publish by November 30 the final rule for a take reduction plan to reduce the incidental injury to false killer whales by commercial fishing vessels.

One day before the deadline, the final rule appeared in the *Federal Register.*

Weaker Hooks, Stronger Lines

A key element of the plan involves a change in the gear used by longline vessels. By February 27, all boats are to use only circle hooks with a maximum wire diameter of 4.5 mm (.18 inches). The leaders and branch lines to which the hooks are attached are to be at least 2 mm in diameter. Any other material used in construction of a leader or branch line has to have a minimum breaking strength of 400 pounds.

The idea behind the changes is that they will allow animals a better chance of escape with minimal injury in the event they become hooked. The weaker circle hooks should, in theory, allow the animals to pull themselves off the hooks more easily. The stronger leader and branch lines will remain attached to the main line in the event the false killer whales tug against them, thus avoiding a situation where animals swim away trailing lines that could eventually lead to their injury.

Originally, the take reduction team considered requiring even thinner hooks (4.0 mm or 4.2 mm). To allay concerns of fishers that this would reduce their catch of large fish, trials were conducted in October-December 2010, which found no impact at all on the catch. But when NMFS learned that the standard hook in the fleet was even larger than 4.5 mm, it relaxed the proposed standard to just 4.5 mm.

"The team's consensus recommendation was that while 'standard' circle hooks … alone will likely help reduce M&SI [mortality and serious injury] compared to tuna and J hooks, weaker than standard circle hooks … would provide even greater conservation benefits …. [W]hile we agree with the team's findings, NMFS will require a fleet-wide shift to 4.5 mm wire diameter for circle hooks, so as to achieve a comparable reduction in hook wire diameter based on the corrected information."

Expanded Exclusion Zones

The take reduction plan also calls for making changes to the areas where commercial longliners can fish. Until the new rule took effect, longline vessels had to fish outside of what was known as the Main Hawaiian Islands Longline Fishing Prohibited Area – essentially, a polygon described by straight lines running from a series of geographic coordinates, extending from 75 to 100 miles from shore. A kind of narrow belt circling around the northern part of this zone was seasonally opened (from February 1 to September 30 of each year).

The new rule revises the exclusion zone by doing away with the area where fishing was seasonally allowed. "This regulation," NMFS says, "makes it clear that the entire Longline Fishing Prohibited Area around the MHI … is important for false killer whale conservation. It is anticipated that this closure will substantially reduce the risk that the deep- and shallow-set longline fisheries" – tuna and swordfish fisheries, respectively – "pose to the Hawai'i Insular stock of false killer whales… It is also expected to eliminate incidental M&SI

of the Hawai'i Pelagic stock of false killer whales by longline fisheries in that area."

A new "southern exclusion zone" – extending 200 miles, out to the boundaries of the U.S. Exclusive Economic Zone – is established as well. If the number of observed mortalities and serious injuries of false killer whales reaches a certain level, this area also will be closed to longline fishing vessels.

Exactly when that closure trigger is to be pulled is to be determined by a complicated formula set forth in the final rule. Basically, it is a function of the number of observed incidents that are thought to result in a false killer whale being killed or sustaining serious injury, the area where the injury occurred, and the current estimate of the so-called "potential biological removal" (PBR) that the false killer whale population can withstand.

If the PBR remains at the level of 9.1 animals a year, where it now stands, then the trigger is pulled once the number of observed instances of mortality or serious injury to false killer whales by tuna-fishing (deep-set longline) boats fishing inside the EEZ hits two.

If the PBR changes, then the threshold for closure of the southern exclusion zone is reached when the number of observed M&SI inside the EEZ, when extrapolated to the whole fleet (based on the percentage of observer coverage) exceeds PBR. The current trigger value of two will remain valid, the rule states, until a new trigger value is published in the *Federal Register*.

Pelagic vs. Insular

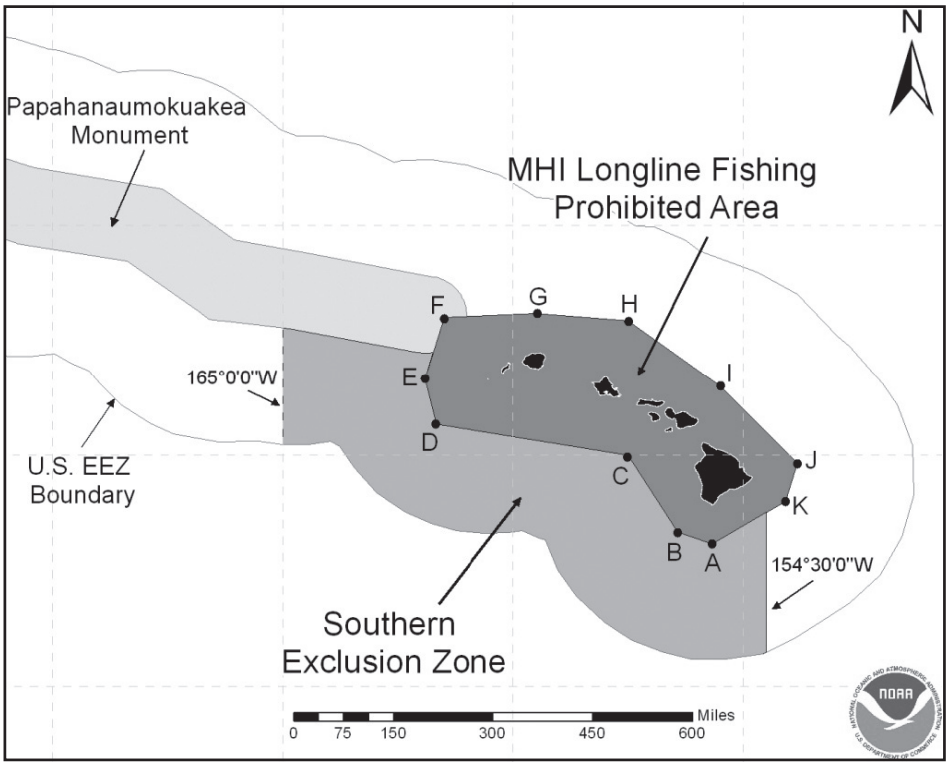
The closure of the southern exclusion zone (SEZ) may help the Main Hawaiian Islands insular stock of false killer whales, especially those that stray into the zone where they overlap with the range of the pelagic stock. However, NMFS says, "the trigger [for closure of the SEZ] applies only to the Hawai'i Pelagic stock … given the stock's strategic status and the location of the closure…. For the purposes of implementing SEZ measures, any false killer whale incidentally taken inside the U.S. EEZ around Hawai'i is assumed to be part of the Hawai'i Pelagic stock."

Also, not just any interaction with a false killer whale counts toward the trigger tally. According to the rule, "only observed serious injuries or mortalities would be counted," with an "expedited process for serious injury determination" being set forth in the rule as well.

At the point that the trigger is reached, NMFS is to publish a notice announcing closure of the exclusion to begin within 15 days of the notice. The zone will remain closed for the rest of the calendar year.

If additional false killer whales are seriously injured or killed even after the zone is closed, then NMFS is to convene the take reduction team "to discuss the circumstances of the event and consider the effectiveness of the SEZ closure and the overall" take reduction plan, the rule states.

If the SEZ had been closed during any part of the previous year, then more stringent measures are to be taken. Again, NMFS is to close the SEZ and convene the take reduction team.



The closure is to remain in effect until NMFS, together with the take reduction team, determines that the deep-set longline fleet's interactions with false killer whales are reduced to levels that do not threaten the pelagic stock's survival.

A Challenge to Authority

In comments on the proposed rule, the Hawai'i Longline Association argued that NMFS had no authority to create requirements with respect to interactions with false killer whales outside the EEZ. "HLA states that whether interactions increase or decrease on the high seas has no bearing on whether the U.S. EEZ [potential biological removal] is being exceeded," NMFS said in characterizing HLA's comments.

"NMFS disagrees," the *Federal Register* notice states. The Marine Mammal Protection Act "broadly prohibits the taking of any marine mammal on the high seas by a person or vessel subject to the jurisdiction of the United States, unless such taking is otherwise authorized under MMPA."

The HLA also objected to NMFS' policy for determining whether injuries were serious or not. "NMFS' national policy for distinguishing serious from non-serious injuries … was finalized and has been in effect since January 27, 2012, and is outside the scope of this rulemaking," NMFS stated.

Earthjustice commented on the proposed rule, saying it doesn't address the MMPA's long-term goal of reducing incidental M&SI to levels approaching zero within five years. NMFS responded by stating that the take reduction plan "contains measures to reduce the number and severity of incidental interactions… NMFS will continue to work with the team … and, in consultation with the team, will monitor [the take reduction plan] to determine whether it meets the MMPA's short- and long-term take reduction goals."

Earthjustice and the Humane Society of the United States also "expressed particular concern regarding the Hawai'i shortline fishery, and the potential that longline fishermen may switch to shortline fishing to avoid having to comply with regulations affecting the longline fisheries."

In responding, NMFS stated that "regulation of the shortline fishery is outside the scope of this rule. The shortline fishery is believed to operate with very few participants and with low levels of landings." If there is a switch to more shortline fishing, NMFS said, it will work with the state to monitor the shortline fishing effort, "particularly during any closure of the SEZ."

— Patricia Tummons

Galbraith from page 1

on the boundary amendment, all 1,700 acres of the Galbraith land, the state Department of Agriculture's proposed 150-acre Kunia Agriculture Park, and a 400-acre Department of Land and Natural Resources parcel, also in Kunia, were identified as possible relocation sites for Ho'opili farmers.

But according to Brian Kau, administrator for the DOA's Agricultural Resource Management Division, his department has no plans to lease the park to Ho'opili tenants. The park is still in the master-planning phase, he said, adding that anyone wanting a spot in the park would have to apply for one. He added that he doesn't know yet whether the 400-acre DLNR parcel will be transferred to the DOA.

At the ADC meeting, Horton vice president Cameron Nekota said the MOU is an effort to give 'Ewa farmers an opportunity.

ADC board member and Department of Business, Economic Development and Tourism deputy director Mary Alice Evans asked Jesse Souki, director of the state Office of Planning, whether the deal made sense. The Office of Planning represented the state before the LUC in the Ho'opili case.

"This wasn't in the D&O to make the contribution, but it does help," Souki said.

Nekota added, "Whoever the farmer is that's going to go there will have to work out their own lease with ADC. We're basically giving farmers potentially in Ho'opili a chance to negotiate. They get the opportunity."

The ADC's Ivan Kawamoto says the Galbraith lands will likely serve both large and small farmers, with small lots ranging from five to ten acres. The larger lots would be 50 acres or greater.

Whether the Ho'opili farmers will be able to grow the same types of crops they've been growing remains to be seen. Aloun Farms grows a wide range of common fruits and vegetables, as well as several Asian specialties in the dry, hot Central O'ahu plain. Aloun's sublessee is one of the state's largest basil growers.

The climatic conditions are quite different in Wahiawa.

"In the winter, the Galbraith land is wetter and cooler," Kawamoto says, adding that the former Ho'opili farmers will have to test which crops grow best there.

For now, the Galbraith lands will be irrigated using well water, but the ADC has expressed interest in using wastewater from a nearby treatment plant that has been treated to R-1 levels. (R-1 recycled wastewater can be used to irrigate any food crops, according to state Department of Health guidelines.)

The Wahiawa Wastewater Treatment Plant currently discharges about 1.6 million gallons a day of R-1 quality treated wastewater into the Wahiawa Reservoir (also known as Lake Wilson). Although the water is treated to R-1 levels, the DOH has not certified the Wahiawa facility as an R-1 wastewater treatment plant because it lacks alternative disposal options or emergency storage to prevent accidental discharges of untreated wastewater into Lake Wilson.

The City and County of Honolulu has indicated it would like to redirect its effluent from the lake to a distribution system serving various users, but is a long way from developing the necessary infrastructure and partnerships. In the meantime, the Legislature last year appropriated $750,000 for the planning and design of an irrigation system, including a reservoir, to pump water from the north fork of Kaukonahua Stream — which feeds Lake Wilson — to irrigate the Galbraith lands.

Solar Greenhouses Proposed For Galbraith Lands

A company that builds greenhouses topped with solar panels wants the ADC to chip in nearly $400,000 for a "study" of what it would take to develop a viable project on the ADC's newly purchased Galbraith Estate lands in Wahiawa, O'ahu.

But it's much more than a simple study, according to representatives from France's Akuo Energy, which specializes in renewable energy development. At the ADC board's November meeting, they said that by the end of the study, the company would have the finances and plans in place to fully implement a project.

"They're willing to help us with Galbraith," ADC executive director James Nakatani told the board, adding that the partnership idea originated with the state Department of Business, Economic Development and Tourism.

"The energy infrastructure helps finance the ag infrastructure," said Akuo project development manager Hans Royal of his company's solar greenhouses. The company, which has an office in Chicago, has already built greenhouse projects on several French islands.

On Reunion Island, in the Indian Ocean, Akuo developed five acres of greenhouses that generate 1 megawatt of power. The greenhouses produce lilies and anthuriums, which generate sales of about $500,000 a year.

"Pretty much everything can be grown in [the greenhouses]," said Akuo COO Jean Lemaire.

For the Galbraith land, Akuo needs to study the most viable and marketable crops, determine water requirements and what to do with the electricity generated, and design a greenhouse that will meet the area's needs.

"You all understand the cost of water. At Galbraith or Kunia, if you're pumping [water], some things are just not feasible because of the cost of energy," Akuo engineering manager Doug Krause told the board. "We know the history of the water rights pretty well. We think we can find water to Galbraith by leveraging these different parts so ADC benefits."

DBEDT deputy director and ADC board member Mary Alice Evans called the project promising, but recommended that the study examine the state's important agricultural lands (IAL) law, which limits the amount of land in the Agriculture District that can be covered by a solar array to 10 percent. She added that the company should also explore the cost of a power purchase agreement with Hawaiian Electric Company, should it wish to sell power.

Royal said he was aware of the IAL law and that because of the limitation, the company was proposing an initial project of five to 15 acres. He added that Akuo will study utility interconnection needs, but that selling electricity to HECO "is not the only possibility." He later suggested that the project could supply electricity to a proposed processing facility on 24 acres of land the state plans to purchase in nearby Whitmore Village.

To proceed with the study, which Royal said would take six to eight months to complete, Akuo has proposed that the ADC shoulder half of the $710,000 cost.

"Why so long?" asked ADC board member Alan Takemoto, noting that the company has already developed similar projects elsewhere. "If we could give you five acres, couldn't you give us an estimate in three months?"

Lemaire doubted his company could address within three months all of the various issues associated with developing a project in the Galbraith area.

"This is an island-specific project. We've built projects in eight countries. No country is the same," he said. "Generally, where projects fail, [developers] go sometimes

quickly and because people forget key, critical things ... the financiers are not comfortable to invest. "

ADC board member William Tam thought even eight months was an incredibly ambitious deadline since the ADC does not yet have a plan for the Galbraith lands.

"We haven't done our planning. We need to ourselves figure out how we're going forward," he said, adding, "I'm not sure the ADC has ever engaged in paying for a study for a project that will be privately owned on state land. I like what you're doing, but there are a lot of details that may need to be worked out on our side."

Nakatani acknowledged the many moving parts and unknowns surrounding the development of the Galbraith lands, but said he was excited by the idea of using greenhouses to increase production in such a wet area.

"We have time to digest [the proposal]. It's not too early to start planning conceptually," he said.

"This is a fantastic opportunity," Tam said.

The board took no action on the proposal.

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KIUC, PLP at Impasse Over Hydropower Development

Can Pacific Light and Power's plan to upgrade irrigation infrastructure and develop hydropower in Kekaha succeed without a power purchase agreement from the Kaua'i Island Utility Cooperative?

At an ADC board meeting nearly a year ago, KIUC made it clear it had no interest in purchasing electricity generated by PLP because it wants to develop its own hydropower facilities using the ADC's Kekaha and Koke'e ditches.

According to PLP president Palo Luckett, his company has been unable to persuade the utility to change its position.

On November 28, Luckett briefed the ADC board on the status of PLP's plans to develop more than 11 megawatts of electricity along the two irrigation ditches. PLP plans to sell its power to the Kekaha Agriculture Association, which operates and maintains the irrigation infrastructure on the ADC's Kekaha lands under a memorandum of agreement. Any excess power would be sold to KIUC.

The ADC board voted in April 2011 to approve a 25-year license to PLP to build a biodigester, grow biofuels (guinea grass) to feed it, and build three hydropower plants in Kekaha. But a competing proposal by KIUC has since stalled PLP's hydropower project.

PLP has revised its Natural Resources Conservation Service soil conservation plan and has had consultants prepare environmental reports that will eventually be used as the basis for an environmental assessment for the hydropower project.

The company also has a letter of commitment indicating that Canada's Kruger Energy has agreed to fund and construct the hydro project.

ADC board member Mary Alice Evans, however, noted that the letter did not state how much money Kruger was promising.

"We weren't asked to provide an amount. It is approximately $10 million in equity financing," Luckett responded. (Luckett has said previously that the hydropower project will cost about $40 million.)

Ultimately, the company needs to resolve the impasse with KIUC. When asked by ADC board member William Tam what the next milestone for the company was, Luckett said it was "coming to an agreement with KIUC for uptake of power from KAA."

Several KIUC employees and board members attended the ADC meeting. None of them testified. ***— Teresa Dawson***

BOARD TALK

Land Board Adopts Policy to Protect Conservation Lands From PLDC Abuse

Cross Conservation District rules — and perhaps also the Coastal Zone Management Act — off the list of land use laws that the Public Land Development Corporation is exempt from.

On December 14, the state Board of Land and Natural Resources adopted a policy requiring PLDC projects to obtain a Conservation District Use Permit (CDUP) for any land it proposes to use that lies within the state Conservation District. Without one, the Land Board will not lease land or transfer development rights to the PLDC.

The policy did not start out that way. The Department of Land and Natural Resources' Land Division, apparently on behalf of PLDC staff, originally recommended that the PLDC not receive land or development rights to lands in the protective, limited, and resource subzones of the Conservation District, "except upon express waiver by the Board where the proposed project is either intended to protect natural resources or to create a great benefit for the general public." (The division had also recommended that the Land Board not transfer any lands in fee to the PLDC or any development rights to lands in Koke'e State Park for the purpose of developing a hotel.)

PLDC executive director Lloyd Haraguchi called the recommendations a "bold step" that would relieve some of the concerns expressed by the public about Conservation District land, the sale of public lands, and the development of a hotel at Koke'e.

"We fully support the recommendation," Haraguchi said.

On December 10, attorney David Kimo Frankel of the Native Hawaiian Legal Corporation submitted testimony to the Land Board opposing the recommendation regarding Conservation District lands.

Frankel noted that currently, uses in the Conservation District must meet eight crite-

For Further Reading

Environment Hawai'i has published the following articles on the subject of ADC lands at Kekaha available on our website *www.environment-hawaii.org.*

- "Biofuels Company Courts State Agribusiness Agency," July 2012;
- "Kaua'i Utility Bursts Pipe Dream of Independent Hydropower Firm," April 2012;
- "Kaua'i Hydropower Company Seeks Accord with Agribusiness Development Corporation," November 2011;
- "Agribusiness Development Corporation Grapples with Conflicts Over Diverted Water in Kekaha," May 2011;
- "Energy Projects Dominate Discussion Before State Agribusiness Board," March 2011;
- "Agribusiness Committee May Reconsider Biofuels Project at Kekaha," January 2011;
- "Agribusiness Subcommittee Approves Renewable Energy Project at Kekaha," October 2010.

ria set forth in Hawai'i Administrative Rule 13-5-30(c). Among other things, the proposed land use must be consistent with the purpose of the Conservation District and the objectives of the subzone on which the land use will occur, and it must comply with the provisions and guidelines contained in the state's Coastal Zone Management Act (Chapter 205A, Hawai'i Revised Statutes) where applicable.

Under the Land Division's recommendation, "[i]nstead of these rigorous eight criteria, any land in the Conservation District could be used for any purpose by the PLDC so long as it would 'create a great benefit for the general public.' This subjective and, therefore, standardless standard provides no guidance and allows for unfettered decisionmaking."

"This proposal seeks to create the appearance that Conservation District lands are being protected when they are not," Frankel wrote. "Furthermore, as your staff can and should tell you, there are many portions of the general subzone [of the Conservation District] that contain valuable natural and cultural resources that are as deserving of protection as those in other subzones."

At the Land Board's meeting, Big Island member Rob Pacheco asked Haraguchi for an example of what a "great benefit for the general public" would be.

"The benefit to the public would be parks we could improve, beaches," Haraguchi said.

DLNR director and Land Board chair William Aila explained that the exception was added to the recommendation in case "some useful project came up."

"People who are mistrusting that to mean that's just a way out for a secret project, there's no secret project," he said, adding that the Land Board always has the ability to add additional conditions based on public input.

Even so, at-large board member Sam Gon said the exception was unnecessary and just "muddies the waters."

"It generates the appearance of a loophole," he said. He recommended that the Land Board instead grant exceptions to projects that are intended to protect natural resources "or otherwise would qualify for a CDUP."

Land Board member David Goode asked Haraguchi whether the PLDC board had reviewed and supported the recommendations.

When Haraguchi responded that it had, Goode suggested that the PLDC board could act on the recommendations, as well.

"We could," Haraguchi replied, but "the title holders are the true drivers of the bus. This provides you an opportunity to do this. It's helpful and would answer some of the concerns."

During public testimony, Sierra Club, Hawai'i Chapter, executive director Robert Harris reiterated some of the concerns Frankel had raised.

Harris recommended the Land Board adopt a policy not to transfer Conservation District lands or development rights to the PLDC unless projects are consistent with the eight criteria.

Pacheco argued that what Harris was asking for is already in the discussion section of the Land Division's submittal. It states, "The restriction on the transfer of lands within the Conservation District may be waived on a case by case basis where the project is consistent with the purpose of the Conservation District [and] meets all of the requirements for the issuance of a [CDUP]."

"I don't see where this is skirting our rights over the Conservation District," Pacheco said.

Office of Hawaiian Affairs senior public policy advocate Jocelyn Doane echoed Frankel's and Harris's comments regarding the exception for Conservation District projects. She also pointed out that the transfer of DLNR lands in fee is already prohibited by Chapter 171C, which governs PLDC actions.

When it was Frankel's turn to testify, he first addressed the fact that, despite Haraguchi's comments, the PLDC had not adopted the policy recommendations — at least not at an open meeting.

Aila explained that the PLDC board members individually had seen the recommendations.

"That's a violation of the Sunshine Law. You cannot serially communicate," Frankel argued.

"That's not what we did," Aila said.

Regarding Pacheco's assertion that the DLNR staff submittal covers the concerns raised about the exception, Frankel said, "The key is what you adopt."

Wai'anae's Cynthia Rezentes added, "If we can't provide that criteria for what [great benefit for the general public] means, what are we passing through? ... If we have no criteria, [it means] anything I damn well please."

Land Board member Gon asked Haraguchi whether it would be fine if the exception for projects with a great public benefit was replaced with a requirement that projects be consistent with Conservation District rules.

"Yes, it would be," Haraguchi said.

Gon also preferred to have the policy apply to all Conservation District lands, not just those in certain subzones.

Pacheco was fine with including the general subzone under the policy, but expressed frustration with what he seemed to think was an unnecessary effort to protect Conservation District lands from inappropriate development.

"It's my understanding, for the PLDC to do anything it has to have approval from the landowner. So this idea that we're giving up the ability to make decisions over our lands, that's frustrating to me," he said, again pointing out that language in the discussion section of the Land Division's staff submittal

Gon said he understood Pacheco's frustration, but just wanted to make things explicit.

"What was stated [by the DLNR] obviously had some ambiguity in the eyes of the public," Gon said.

Pacheco moved to go in executive session to discuss legal issues. Upon returning, Gon moved that the Land Board adopt the following policies:

- The Land Board will not transfer land or any lands in fee to the PLDC.
- The Land Board will not transfer land or development rights for any Conservation District lands. However, waivers may be considered on a case-by-case basis if the PLDC successfully goes through the Conservation District permitting process and the project meets Conservation District rules.
- The Land Board will not transfer land or development rights for land within Koke'e State Park for the purpose of developing a hotel.

The motion was unanimously approved.

Kealakekua Bay Closes, Kayak Permits are Renewed

The state Department of Land and Natural Resources can't say whether Kealakekua Bay will be closed to non-U.S. Coast Guard registered vessels for one month — beginning this month — or four. The DLNR's Division of State Parks has said that it hopes to resume normal activities in the bay within 90 days, but the length of the closure will depend on how long it takes for the department of get control over the unauthorized commercial use and other illegal activities occurring at the Kealakekua Bay State Historical Park.

Beginning this month, however, the department will make monthly status reports to the Land Board, which may then adopt new management measures, if necessary.

Last year, the Land Board granted its chair, who is also the DLNR director, the authority to close all or portions of state parks. Although

the move applies to all state parks, Kealakekua Bay was clearly a target at the time.

During a November 30 briefing to the Land Board, State Parks staff explained that it needed to freeze for a few months all kayaking, stand-up paddling, etc., at the bay to address resource abuses at Ka'aawaloa flats, which contain significant archaeological sites, to curb rampant unauthorized commercial use, and to rein in alleged drug trafficking and extortion, among other things.

In the meantime, the division would work on developing an online permitting system to better track authorized uses.

"We do know how important kayaking is there to the local economy, but we haven't done a good job of protecting the resource," said Parks deputy administrator Curt Cottrell. "It's like a free-for-all."

Big Island Land Board member Rob Pacheco, a commercial eco-tour operator based in Kona, expressed concern about imposing an indefinite closure, noting that the area is very popular with local residents as well as tourists.

He stressed the economic importance of the tourism industry at Kealakekua and voiced concern over what a closure at high season for four months would do.

"What's the minimum that has to happen" to reopen the park, which includes the bay's waters, Pacheco asked.

"Illegal activities cease," answered Land Board chair William Aila. Cottrell added that in addition to getting an online permitting system set up, signs would also need to be installed at the park.

The three permitted kayak tour companies operating in the bay have expressed a willingness to cease their tours there for one month. Beyond that, however, they've asked the Land Board to allow some tours — perhaps half of what's allowed under their permits — to allow enforcement officials to get an idea of what normal operations will be like and to allow the tour companies to generate revenue.

"We are small businesses. ... We are willing to step aside for 30 days, no problem. But into the second month, we'll start to see a pinch in our savings," said tour operator Iwa Kalua at the Land Board's December 14 meeting.

At the meeting, the Land Board approved the renewal of Kalua's kayak tour permit, as well as those for Kona Boys, Inc., and Adventures in Paradise, LLC, but left it to Aila to determine when tours could resume. The board approved the permits on the condition that State Parks staff provide the board with monthly progress reports.

"We may have to come back for some adaptive management," Aila said. ***— T.D.***

Claims of TMT Foes Are Denied

The contested-case hearing officer has issued his findings on the Thirty Meter Telescope proposed to be built on Mauna Kea. The recommendations of attorney Paul Aoki, released on November 30, give the applicant University of Hawai'i-Hilo and the Thirty Meter Telescope Corp. pretty much everything they had sought.

By contrast, those opposed to the Conservation District Use Permit issued for the project — most of them Native Hawaiians, but also Deborah Ward, who was granted standing based on her recreational use of Mauna Kea and her interest in its natural history, flora, and fauna – probably found little comfort in Aoki's report.

Biological Resources

With respect to the flora, the university's expert, Dr. Clifford Smith, testified that the telescope site had a very low diversity and cover of plants such as algae, liverworts, mosses, and lichens. "All of the species are found at lower elevations … None of the lichen or moss species are unique to Hawai'i," Aoki wrote, having found Smith's testimony convincing.

As for the claim of harm to the celebrated wekiu bug by the construction or operation of the telescope, Aoki waved that away as well. Jesse Eiben, the entomologist who had studied the insect, gave testimony on behalf of the university that, in Aoki's view, put paid to such concerns. "It is highly unlikely that the substrate modification by construction activities … would have a significant impact on wekiu bug population," he wrote in his proposed findings of fact. "The limited number of wekiu bugs that are likely to be killed by TMT project activities is so small they could be replaced by one hour of normal wekiu bug propagation by the rest of the wekiu bug population above 13,000 feet."

Aoki took note of the dissenting views of the petitioners with respect to the mountain's natural resources, especially those of Ward. "The majority of Ms. Ward's written testimony focused on the wekiu bug," Aoki wrote. "Unlike Mr. Eiben, however, who was qualified as an expert entomologist with particular expertise in the wekiu bug, Ms. Ward is not an entomologist; her background is principally in horticulture."

Further, Aoki wrote, "the documents relied upon by Ms. Ward to support her concerns regarding the wekiu bug all date from 1996 or earlier. Mr. Eiben's research is more current, occurring over the last six years, including 2011."

Historic Sites

The claims the petitioners made with respect to Hawaiian sites were dismissed; the proposed site, Aoki found, avoided any legitimate prehistoric sites.

In her testimony, archaeologist Sara Collins, formerly with the Department of Land and Natural Resources' Historic Preservation Division, distinguished between historic properties, on the one hand – including shrines, adze quarry complexes and workshops, burials, stone markers or memorials, and the like – and, on the other, "find spots," sites that may superficially resemble historic properties but which are of recent origin. Several historic sites were found near the proposed TMT site or its access way, though none was closer than 200 feet. Two "find spots" were identified in the observatory area as well, but staff from the State Historic Preservation Division determined that one of them had been built within the last decade, while the other one was most likely a natural feature.

One of the petitioners, E. Kalani Flores, claimed in his closing arguments that find spots had been omitted from the TMT Conservation District Use Application.

Aoki was having none of it. "Mr. Flores's assertion … does not constitute evidence; and Petitioners have no competent or credible evidence to support this position."

Cultural Practices

Probably the thorniest issues confronting the hearing officer concerned cultural practices. Several of the petitioners claimed that the TMT would have a damaging impact on their ongoing cultural practices and their systems of belief.

"No cultural practices are known to be associated with a specific historic property that has been identified in or near the TMT Project site," Aoki found.

"In addition, because of their individual beliefs, for some individuals, the introduction of new elements associated with the TMT Project … would adversely affect the setting in which such [cultural] practices could take place … [but] this is not anticipated to result in a substantial effect on shrine construction, pilgrimage, prayer, and offerings in the [Mauna Kea Science Reserve]."

As to the claims of several of the petitioners that the construction project is contrary to

Rapid Decline of Lake Waiau Continues

From above, it looked like dregs in a coffee cup. Emerald green dregs. Green because the nutrients in the lake are so concentrated now that it's only 10 to 20 centimeters deep.

Lake Waiau, perhaps the most sacred water body in Hawaiian culture, is close to disappearing.

"We're losing this lake," Lisa Hadway told the Natural Area Reserve System Commission at its meeting in November. Hadway heads the Big Island branch of the NARS and has been watching with despair the lake's rapid decline in recent years.

At 13,000 feet above sea level, the lake sits within the Mauna Kea Ice Age NAR. Because of the lake's cultural significance, researchers with the University of Hawai'i at Hilo's Department of Geography and Environmental Studies have used various imaging techniques — from expensive LiDAR technology to a compilation of regular snapshots of the area — to monitor water levels and identify water sources, rather than entering the lake.

They've found that some of the lake's lowest levels ever are being recorded right now, UH-Hilo professor Donna Delparte said at last year's Hawai'i Conservation Conference in Honolulu. The lake is a small fraction of the size it was in October 1977, when Hawai'i experienced its last significant drought.

At the time of the conference, in early August, the lake was about four feet deep at its deepest point and most of the lake was less than one foot deep, she said. It had been twice the size in June, according to one of her maps.

By late November, the lake had shrunk even further. Groans and gasps filled the NARS Commission's meeting room when Hadway showed pictures of the decline since the summer.

"I was stunned when I saw that," Hadway said of the most current picture, showing little more than a large green puddle. "It's an El Niño year. If there's not a lot of snow ...," Hadway trailed off.

"Maybe we could rent a snow machine," commission member Sheila Conant said.

The UH-Hilo team is investigating whether the mountain has experienced similar drought periods and has invited the public to submit old photos of the lake area so it can develop a more detailed record.

"There's significant concern about what's happening to the lake and lake level," Delparte said at the conference.

The weekly column for September 13 written by USGS scientists at the Hawaiian volcano observatory notes that it's unclear exactly what is causing the lake's decline. The cause depends on whether the impermeable layer below the lake that prevents it from draining is made of permafrost or ash.

If it's permafrost, then the lake's decline could be a result of the permafrost melting.

"In this scenario, the lake would surely disappear as the permafrost continues to melt with increasing temperatures on Mauna Kea. The temperature increase is about three times faster than the global rate, and is observed at high elevations throughout Hawai'i," the scientists state.

The more likely scenario is that the lake is maintained by an ash layer and that the lake is simply evaporating as a result of rising temperatures and the current drought, they write.

"Although the rising temperatures do not bode well for the future of Lake Waiau, a winter season rich in storms will do much to replenish the lake, as well as provide us with magnificent views of the snow-capped volcano," they conclude.

A report for the 2012 Pacific Islands Regional Climate Assessment, released early last month, notes that the Hawaiian alpine ecosystems "are already beginning to show strong signs of increased drought and warmer temperatures, apparently related to increasing persistence of the trade wind inversion … since the 1990s." ***— T.D.***

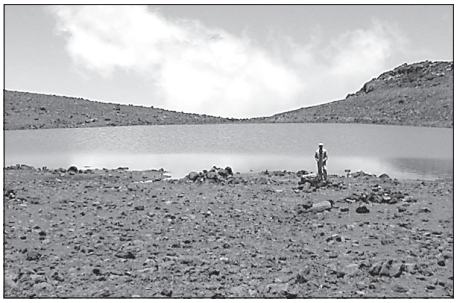

PHOTO: HAWAIIAN VOLCANO OBSERVATORY, USGS

USGS employee standing in front of Lake Waiau to show scale of the shallow lake. June 14, 2002.

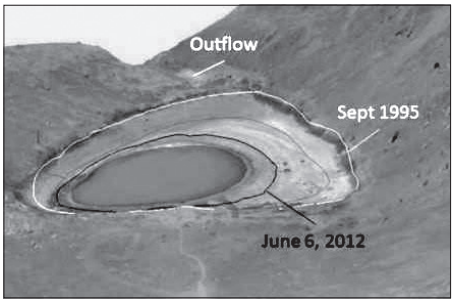

PHOTO: DONNA DELPARTE

This photo, taken in July, shows how much Lake Waiau had shrunk since June.

their beliefs, Aoki wrote, the petitioners themselves "also acknowledge that native Hawaiian cultural and religious practices are not codified… and some native Hawaiians … support the project and testified that it would have no impact on their cultural practices."

Already, Aoki continued, "the university and the TMT Corporation have … taken and have committed to take numerous measures to avoid and minimize direct and indirect impacts on cultural practices," including ongoing worker training and the selection of a site off the summit and away from known historic and traditional cultural properties.

Claims that important cultural viewplanes and lines of sight would be impaired by the telescope were dismissed. Aoki gave special attention to the arguments of Kealoha Pisciotta of Mauna Kea Ainana Hou that the TMT would interfere with the tracking of the "precession," which she described as "a 26,000 year cycle [that] is the measure of the wobble of the earth's axis, and the time it takes for this wobble to make a complete cycle." Tracking the wobble is vital to Hawaiian celestial navigation, she claimed, since the navigators need to know where the wobble is in order to locate pole stars.

"Ms. Pisciotta's testimony did not provide any facts to demonstrate that ancient Hawaiians had a traditional and customary practice of tracking the precession from Mauna Kea," Aoki wrote. "Perhaps even more significantly, she did not testify that she (or anyone else) has a modern practice in tracking the precession from Mauna Kea. And, she did not identify any way in which building the TMT Project would interfere with anyone trying to track the precession."

In any event, Aoki found credible the contrary testimony of Chad Baybayan, a Hawaiian navigator. "He explained that most of traditional naked eye navigation is done without seeing the pole star Polaris," Aoki wrote. "He further testified that according to his training and practice, traditional celestial navigation is not dependent on going to the summit of Mauna Kea and making observations from there."

Petitioner Paul Neves testified that irrespective of what could or could not be seen from the summit, "these are alignments not

of the eye but of the heart." "He emphasized," Aoki wrote, "that even if the TMT Observatory will not visually obstruct a viewplane, merely knowing that the Observatory is there will offend his beliefs."

"These types of emotional impacts described by Mr. Neves and other Petitioners are undoubtedly heartfelt," Aoki wrote, "but they are not the subject of Haw. Admin. R. § 13-5-3(c)(4)."

Harm to Hawaiians?

The petitioners brought forward two witnesses, Kawika Liu and Kehaulani Kauanui, who claimed the very construction of the TMT would inflict further harm to the Hawaiian population at large.

Aoki did not find their testimony convincing.

"Dr. Liu testified that his opinion is based on a hypothesis and that neither he nor anyone else has done the research necessary to validate his hypothesis about the potential effects of 'multi-generational trauma' on the health of native Hawaiians, or how such a hypothesis would relate, if at all, to telescopes on Mauna Kea," Aoki wrote.

"Dr. Kauanui based her opinions on the assumptions that the TMT Project will involve destruction of historical sites, archaeological sites, and burial grounds," Aoki continued. "Those assumptions are refuted by the facts adduced at the hearing. Dr. Kauanui also conceded that she is categorically opposed to all telescopes on Mauna Kea, that she formed her opinions long before the CDUA for the TMT Project was even filed, and that no matter where on Mauna Kea a telescope was located and what mitigation measures were employed, she would still view any telescope as unlawful desecration…. In other words, Dr. Kauanui's opinions disregard and are contrary to both the facts of the current Application and the applicable regulatory and legal framework."

Next Steps

The petitioners and the applicant were given until December 27 to submit any exceptions to the hearing officer's report. They then have until January 10 to file responsive briefs. On January 30, the Land Board will hear oral arguments at a special meeting to be held at 11 a.m. in the Hawai'i County Council chambers.

There is no time frame for the Land Board to make its final decision on the application. Not until that happens will the matter be ripe for appeal to Circuit Court, should the parties that do not prevail decide to follow that route. ***— Patricia Tummons***

Hawai'i County Sends Violation Notices To Builder Over Construction at 2 Sites

Over the last month, the County of Hawai'i Planning Department has taken several actions with respect to the projects of builder Scott Watson that were discussed in the December issue of *Environment Hawai'i.*

The 'Pepe'ekeo Palace'

On November 29, Hawai'i County Planning Director B.J. Leithead-Todd issued a Notice of Violation and Order to Watson as a result of unauthorized work being done at the property in Pepe'ekeo where he is building what he describes as the "Pepe'ekeo Palace."

The county inspector had visited the work site and found that the swimming pool was not being built in the location set forth on the approved plot plan. "The forms erected for the walls of the pool are located within the proposed tennis court that was considered a historic structure by the Department of Land and Natural Resources, State Historic Preservation Division," Leithead-Todd wrote.

Further, although the Planning Department had allowed Watson to build up to 20 feet from the property line, describing it as a "side yard setback" (as opposed to the 40-foot setback set forth in conveyance documents to accommodate shoreline access), Watson's construction encroached into even that minimal setback. The foundation for the dwelling was at 19 feet, the county inspector found. The "side yard open space requirement" of 14 feet was also breached. The so-called "grand lanai" extended three feet into the "side yard open space."

"Furthermore," Leithead-Todd wrote, "according to the construction documents, it shows an overhang projecting into the open space an additional 3 feet."

The "shoreline setback requirement" of 50 feet was breached as well, with the "column of the southeast corner of the grand lanai" located just 28 feet from the shoreline.

Watson also appears to have altered the shoreline itself, defined as the top of the pali running along the makai side of the property. "The south side top of pali appeared to be altered by additional fill material and was newly landscaped with vegetation which appears to extend onto the adjacent property… This new fill and

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vegetation also covered one of the historic concrete foundations on the south boundary," Leithead-Todd wrote.

Silt barriers were not in place, the construction work and temporary public access "may be encroaching onto the adjacent property," and a four-foot-high fence around the pool was added "without a review or approval from the Planning Director."

Watson was ordered to cease and desist all construction activities on the property and, by December 31, to, among other things:

- Submit a detailed survey map of the property, including the locations of all structures (including historic foundations and remains), footings, foundations, septic location, and all other improvements in relation to the property boundaries as well as the "existing public access easement" and the "temporary public access easement;"
- Relocate all structures to the agreed-upon setbacks;
- Obtain approval from the State Historic Preservation Division for relocation of the pool and for placing fill material over another historic concrete structure;
- "Obtain all appropriate authorizations and permits for all activity" on the private property located seaward of his lot;
- Submit an application for a Special Management Area Assessment for "the unpermitted uses, activities, and operations" on both his own lot and the privately owned seaward property.

"In view of the above [violations] and the recurring disregard for the rules governing uses, activities, and operations within the SMA and the shoreline setback area, as demonstrated by being repeatedly cited for similar violations over the past 10 years, you are ordered to pay a combined civil fine of $20,000," Leithead-Todd wrote.

The county appears to have been prompted to issue the violation notice, at least in part, by a letter from Theresa Donham, archaeology branch chief for the State Historic Preservation Division, an arm of the Department of Land and Natural Resources. Donham had written Leithead-Todd on November 20, stating that her agency had become aware that Watson was not in compliance "with the agreed-upon mitigation measures" to deal with the historic sites on the property.

"We therefore request that you issue a cease work order so that we can determine the extent of damage that has occurred to the preservation site and recommend revised mitigation measures," she wrote. The Planning Department's NOV and stop work order was issued nine days later.

The Stream Access

To get permits to build an enormous house in Pauka'a (now being marketed for $5.9 million), Watson agreed that the public would have access to Pauka'a Stream. The access is clearly described in plat maps. It is also appended to deed documents, where a metes-and-bounds description of the access to the stream is provided.

Yet, according to a source inside the Planning Department, the county administration is not so sure that the access is legitimate. In the mid-1980s, when the larger-lot subdivision was permitted, the County Council declined to accept the dedication of a trail to the stream, citing liability concerns. Now attorneys from the county's Office of Corporation Counsel are advising that the easement is unenforceable, this source says.

A call to the county planning director was not returned by press time.

The Heliport

On December 6, Leithead-Todd issued a Notice of Violation and Order to Watson concerning the heliport he constructed atop his clifftop mansion in Ninole, on the Hamakua Coast about 20 miles north of Hilo.

The letter makes reference to a YouTube video in which Watson and others are seen flying helicopters to the house and landing them on the clearly marked rooftop heliport and the driveway. Under Hawai'i County Code, heliports are prohibited in the state Agriculture District unless a special permit is obtained.

Watson also is in violation of the county's Special Management Area rules, because the application he filled out for the house "did not include a heliport."

Watson was ordered to cease and desist any further operations of the heliport and to inform the department that he had stopped operating it by January 9. He was also fined $500 for operating the heliport in the Agriculture District and $10,000 for the SMA violations.

As before, he was instructed to make payment "only by cash, cashier's check, or money order."

Correction

We erroneously reported in our December issue that part of Scott Watson's swimming pool and other improvements at Ninole may have encroached into the state Conservation District.

Under a declaratory ruling issued by the state Land Use Commission in 1999, the Conservation District boundary was shifted to the top of the cliff along the ocean boundary of Watson's property. If Watson did any work to clear vegetation along the cliff or caused debris to be dumped into that area, Conservation District regulations would apply.

However, the pool and paved areas in the area of his land adjoining the cliff do appear to be in the state Agriculture District, under the 1999 LUC ruling. ***— P.T.***