Volume 25, Number 7 January 2015

Environment Hawai'i
a monthly newsletter

Price: $5.00

Hooked, Long-lined, And Sinking

The population of Pacific bigeye tuna continues to decline, and the agency that is the official steward of that stock seems constitutionally incapable of acting.

In our cover story, reporter Teresa Dawson, back from attending the meeting of the Western and Central Pacific Fisheries Commission in Samoa, lays out the grim lines that divide the commission's members.

Meanwhile, the United States, whose delegation would have observers believe it leads the way in self-imposed conservation measures, seems to resort to smoke and mirrors in setting new rules to allow the WCPFC quotas on longlining to be circumvented. The court case challenging such rules is the subject of a second feature article in this issue.

We report this month as well on the recent Hawai'i Supreme Court decision in the 'Aina Le'a case and the complicated background of companies involved in obtaining a pipeline for biofuels in Hilo.

To one and all, we wish a healthy, safe, and happy new year!

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'Money Games' Thwart Overhaul Of Bigeye Tuna Protection Measure

At the Western and Central Pacific Fisheries Management Commission (WCPFC) meeting last month in Apia, Samoa, the griping was constant and everywhere. In the hallways, at lunch tables, during tea breaks, on the shuttle rides back to hotels …

"The name should be changed to Western and Central Pacific *Money Games*," one distraught attendee was heard saying to another. Indeed, the general unwillingness of commission members to suffer any more economic losses from measures aimed at conserving bigeye tuna stocks repeatedly halted negotiations throughout the week.

By the meeting's close, the commission had passed not a single measure to reduce catches of bigeye tuna, a stock whose spawning biomass is now reported to be just 16 percent of its original, un-fished level. What's more, the commission also failed to adopt a measure to reduce any disproportionate burden its current tropical tuna conservation and management measure, CMM 2013-01, has on small island developing states (SIDS). That means a planned five-month closure of purse seine fishing around fish aggregating devices (FADS) in waters surrounding commission member countries will not go into effect this year or the next.

And without the five-month FAD closure, CMM 2013-01 will fail to return bigeye spawning capacity to anything approaching a sustainable level and the stock will continue to decline, according to scientific modeling done for the commission.

At the meeting's close, incoming commission chair Rhea Moss-Christian lamented the lack of progress that had been made. (Moss-Christian took over the meeting in the middle of the last day because outgoing chair Charles Karnella had scheduled an early flight home.)

"It is unfortunate we are on the last day and we haven't resolved a lot of issues," she said before suggesting that commission members try to reach some middle ground before the commission meets again at the end of the year in Bali, Indonesia.

She said addressing the tropical tuna issue was really the commission's main task.

"I note there is a measure of disappointment and" — for those hoping to avoid greater quota cuts — "mild satisfaction. I don't think it's something the commission should feel comfortable with," she said.

Bubba Cook of the World Wildlife Fund, speaking on behalf of his organization, the Pew Charitable Trusts, and Greenpeace, had harsher words.

Commission members cannot continue to engage in intractable posturing, he said, pointing out that they had also failed to reach agreement on proposed measures to increase protections for Pacific albacore, to improve the commission's compliance system, or to establish a harvest regime that would eventually include stock-specific target reference points triggering certain actions if they were exceeded.

The harvest regime proposal was merely "a plan to develop a plan," but even that appeared to be too much of a commitment for some members, he continued.

"If we can't agree on something that simple, maybe there is no hope in the process," he said.

Although the commission did manage to approve a measure to increase protections for severely overfished Pacific bluefin tuna, Cook took issue with one member state (the United States), which had pointed to that as an accomplishment.

"It's really hard to call that a success," Cook said. If it takes driving a stock down to four percent of its original spawning biomass for the commission to act, maybe it should suspend further meetings and wait until other

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NEW AND NOTEWORTHY

Aerial Hunting Lawsuit: In 2012, the Hawai'i County Council, bowing to hunter pressure, passed a law that prohibits the killing of animals from the air. The following year, a federal judge ruled that the state of Hawai'i, which is under a federal court order to remove sheep and goats from palila critical habitat on Mauna Kea, did not have to comply with that law and could continue to hunt from helicopters.

That ruling, however, only pertained to aerial hunting in palila critical habitat, and left the state Department of Land and Natural Resources and its contractors vulnerable to prosecution under the Hawai'i County ordinance.

In November, the DLNR filed a lawsuit in 3rd Circuit Court, asking the court to issue a ruling finding that state employees and contractors conducting aerial hunts to protect other important natural areas are similarly exempt from prosecution under not just the county ordinance, but also a state law, passed in 2010, that bans aerial hunts except when ordered by a court or to carry out "emergency animal disease control."

According to the lawsuit, in February 2013, the state attempted to negotiate an agreement with Hawai'i County prosecutors that would immunize state employees and state contractors engaged in aerial hunts outside of palila critical habitat from prosecution under both the county and state laws. No agreement was reached, it goes on to say, and as a result, the lawsuit was filed.

On December 17, before a courtroom packed with hunters, Judge Glenn Hara dismissed the lawsuit.

… Meanwhile, Palila Decline: Even if the state had prevailed in its lawsuit against the county, even if it can find the funds needed to continue aerial hunts in palila critical habitat, newly published research suggests that the state's approach to ungulate control won't be sufficient to reverse or even slow the decline of the palila.

In a paper that appears in the November 2014 edition of the journal *Arctic, Antarctic, and Alpine Research,* a team of scientists and wildlife managers led by Paul Banko report that since a landmark federal court ruling in 1979 requiring the state to eradicate sheep and goats from palila critical habitat (PCH) high on Mauna Kea, the population of ungulates has ballooned. In 2000, for example, the report's authors estimate that the total number of sheep in PCH was somewhere between 2,000 and 4,000. By 2012, it ranged between 10,000 and 14,000.

Sheep are not the only threat to the palila. "Annual population estimates of palila were significantly related to drought severity," the authors write, "and drought has been the main proximate factor driving population decline in the palila since 2000. Mamane seed production is sharply reduced during drought, explaining the palila's decline. Even so, the ultimate factor eroding carrying capacity has been long-term browsing by sheep."

What's more, restoration of palila critical habitat seems to be low on the list of management priorities, they write. "Activities occurring frequently in PCH are game hunting, all-terrain and four-wheel-drive vehicle touring, enduro dirt bike racing, ecotourism, cultural gathering and observance, scientific research, and wildlife management. Helicopters also transit the air space over PCH for tourism and military high-elevation flight training. Our analyses suggest that palila recovery has not been the highest priority in this mixed management regime."

"The palila population is rapidly and unambiguously trending toward extinction," the authors conclude, "but measures to reverse the decline have been slow to develop and their effectiveness has been diluted by conflicting management priorities and unsupportive policies…. If the palila joins the long list of other extinct Hawaiian forest birds, it will not be due to a lack of understanding of its threats or uncertainty about the actions needed for its protection."

Quote of the Month

"If the palila joins the long list of other extinct Hawaiian forest birds, it will not be due to a lack of understanding of its threats or uncertainty about the actions needed for its protection."

— Paul Banko, et al.

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Palila

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Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are $65 individual; $100 non-profits, libraries; $130 corporate. Send subscription inquiries, address changes, and all other correspondence to *Environment Hawai'i*, 190 Keawe Street, Suite 29, Hilo, Hawai'i 96720.
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Twitter: Envhawaii

Environment Hawai'i is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: For Color Publishing

ISSN 1050-3285

A publication of Environment Hawai'i, Inc.

Supreme Court Rejects Most Findings Of Lower Court in 'Aina Le'a Appeal

On November 27, 1987, the Signal Puako Corporation filed a petition with the state Land Use Commission, seeking to place into the Urban land use district just over 1,000 acres in South Kohala between the newly minted village of Waikoloa and the four-year-old Mauna Lani resort on the coast.

Twenty-six years and 363 days later, on November 25, 2014, the Hawai'i Supreme Court issued a ruling in litigation over that petition, finding that the Land Use Commission violated state law and failed to follow its own rules when, in 2011, it reverted the land back to the Agricultural District. On the potentially more damaging charges concerning violation of constitutional rights, the state prevailed.

The case has now been thrown back into the lap of Judge Elizabeth Strance of the 3rd Circuit Court, "for further proceedings consistent with this opinion." At press time, no hearing had yet been scheduled.

A Convoluted History

The history of the redistricting petition is anything but straightforward.

In 1989, the LUC put the land into the Urban District, approving Signal Puako's plan to provide "a complete support community for employees of the various resorts" along the Kohala coast. Up to 30 percent of the housing units were to be affordable to families earning up to 120 percent of the county median income, while 30 percent were to be affordable to families earning from 120 to 140 percent of the median.

Almost as soon as the LUC approved the redistricting, Signal sold most of its interest to Nansay Hawai'i.

In 1991, a Nansay subsidiary, Puako Hawai'i Properties, sought to amend the conditions, such that now the development would move from being a support community with onsite affordable housing to being more upscale, with affordable housing – 1,000 units or 60 percent of the total housing units constructed, whichever is higher – being provided either offsite or on-site.

Nansay, which had a number of Hawai'i projects, collapsed when the Japanese bubble burst in the mid 1990s. A California real-estate investment firm, Kennedy-Wilson, purchased the mortgage and, in 1998, foreclosed on Nansay. Kennedy-Wilson, in turn, conveyed the land in 1999 to Bridge Puako, a subsidiary of Bridge Capital, an international investment banking firm now based in the Commonwealth of the Northern Mariana Islands.

In 2005, Bridge Puako, which by this time had changed its name to Bridge 'Aina Le'a, found the affordable housing conditions onerous and petitioned the LUC for relief. That was granted, on condition that 20 percent of the planned residential units, or no fewer than 385, qualify as "affordable" under county guidelines. Bridge had by now identified a development partner, Cole Capital/Westwood Development Group, and it advised the LUC that it would have no trouble completing the affordable housing requirement by 2008. In a gesture of generosity its members probably came to regret, the LUC gave the Bridge five years – until November 17, 2010.

In 2007, Cole Capital/Westwood was no longer involved. Instead, Bridge announced a new partner, DW 'Aina Le'a, LLC. According to an environmental impact statement preparation notice issued in the fall of that year, the project now would include up to five golf courses, a lodge, around 2,400 dwellings (including the required affordable housing), 863 agricultural lots (on the surrounding Agricultural acreage), and a variety of commercial uses. Although the plans outlined in this document diverged in several important ways from the conditions set by the LUC, neither Bridge nor DWAL requested LUC approval of the new plans.

Show Cause

Less than a year following the EIS preparation notice, LUC members began to suspect there was little chance that the affordable housing would be completed by November 2010. In September 2008, the commission voted to issue an Order to Show Cause to be served on Bridge, demanding that it explain to the LUC why the petition land should not be reverted to the Agricultural District. The formal OSC was approved on December 9. Longtime observers of the LUC could not recall another time in the near half century of the agency's existence when it had taken such a measure.

Deliberations on the OSC occurred over the next few months. In June 2009, the commission voted to approve a request from DWAL that it stay any decision and order on the show-cause order. In August, the commission voted to vacate the order, on condition that by March 31, 2010, at least 16 of the affordable units would be completed.

Some six weeks after that deadline passed, the LUC visited the site. They found one eight-unit building – one of 54 planned – mostly complete. One unit had been staged and was being used to market "reservations" to potential buyers. Four more buildings were in various stages of construction.

The model unit had electricity, running water, and functioning toilets – but the sewage flowed into an unpermitted cesspool, the water came from a tank, and the electricity was from generators. Access was over rough gravel roads, and the intersection leading to the property from Queen Ka'ahumanu Highway was still unimproved.

In a progress report provided to the LUC the following month, DW 'Aina Le'a said it had "completed" two buildings: "These buildings have completed exteriors and interiors. The electrical and plumbing for the units … is completed and ready to hook up." The LUC condition, it went on to say, "did not require that DW obtain certificates of occupancy."

On July 1, 2010, the commission voted to keep the order to show cause pending, with a further hearing scheduled within two months. It also determined that the so-called "condition precedent" for rescission of the order to show cause – the requirement to complete 16 units of affordable housing by March 31 – had not been met.

In late August, DWAL asked the commission to extend the deadline for construction of the affordable housing and amend several other conditions of the project as well. And on November 12, four days before the next scheduled LUC meeting and five days before the absolute deadline for the affordable housing condition had to be met, Bridge asked the LUC to adopt an order that would keep it from acting on the show-cause order at the next scheduled meeting.

As it happened, the LUC did not vote on the order when it next met, but it did at its meeting on January 20, 2011. Then the commission, on a five-to-three vote, reverted the property to the Agricultural District. After three more months of deliberation, on April 25, it adopted the findings of fact, conclusions of law, and decision and order that effected the reversion. The findings laid out in painful detail the litany of broken promises made by Bridge and DWAL representatives since 2005. Among other things, the LUC noted that, "On November 18, 2010, in response to questioning by the commission, co-petitioner DW 'Aina Le'a represented that condominium documents had not been submitted, the package wastewater treatment plant had not been delivered and plans not submitted to the state

Department of Health for review and approval, no application had been made to the Public Utilities Commission for approval of wastewater or water utilities, no plans for landscaping had been submitted for review and approval by the County, and co-petitioner DW Lea [sic] had not authorized anything to facilitate the construction of the intersection to provide access to the property."

The Litigation Begins

Almost immediately, both Bridge and DWAL appealed the reversion in Circuit Court. Bridge filed in 1st Circuit and DWAL in 3rd, with both cases consolidated in the 3rd Circuit.

Both Bridge and 'Aina Le'a argued that the LUC violated both its governing statutes and its agency rules in that the reversion process did not follow the same procedure as is required of all redistricting petitions; that their constitutional rights to equal protection under the law had been violated; and that their due process rights were violated. Bridge also claimed that the existing county zoning, which permitted the anticipated urban development, amounted to "zoning estoppel" and blocked LUC efforts to revert the land; that the affordable housing condition was unconstitutional; and that the LUC's action was not supported by the record. DWAL, for its part, similarly argued that the LUC had no statutory authority to enforce the affordable housing condition; that "equitable estoppel" kept the LUC from reverting the property since DW possessed vested property rights; and that the reversion was an unconstitutional taking.

In June 2012, Judge Strance issued a final ruling that basically found in favor of Bridge and 'Aina Le'a on all counts. Although the LUC had the authority to redistrict land, she found, counties alone had the responsibility to enforce land use conditions.

Strance also agreed with Bridge and DWAL that the LUC should have followed the rigorous procedures required of all petitioners for boundary amendments and that the reversion vote should have required the same minimum number of affirmative votes – six – as is required for approval of such petitions.

Strance concluded that the long time that the LUC took between the initial order to show cause and the final vote on the order violated LUC rules, which set forth time frames for action. "[I]nstead of following these statues and rules, the LUC implemented a rolling and continuing OSC procedure that not only extended far beyond the 365-day period required [by rule], but also ignored the required procedures, and created new procedures that were not already established," she wrote.

The due-process and constitutional rights of Bridge and DWAL were violated, Strance found, and the LUC order was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." She agreed with them that their equal protection rights had been violated, with the LUC treating Bridge and DWAL "differently, and less favorably, than other petitioners in cases involving facts and circumstances substantially similar."

She stopped short of addressing the "zoning estoppel" or vested rights claims by DWAL and Bridge, writing: "The court finds it unnecessary to address this issue because the procedures utilized by the LUC fell short of the necessary procedure and violated various constitutional and statutory provisions. Furthermore, the court has not been able to adequately evaluate those claims based on the evidence and record presented to the court."

Appeal

The Land Use Commission sought to have the appeal skip the Intermediate Court of Appeals and be heard before the state Supreme Court, a request the justices granted.

The justices agreed with Strance that the LUC did not follow the correct process for reversion in this case, since Bridge and DWAL had "substantially commenced use of the property." However, they added, "To the extent DW and Bridge argue that the LUC must comply with the general requirements [for redistricting] anytime it seeks to revert property, they are mistaken."

"The express language of HRS § 205-4(g) and its legislative history establish that the LUC may revert property without following those [redistricting] procedures, provided that the petitioner has not substantially commenced use of the property in accordance with its representations. In such a situation, the original reclassification is simply voided."

In the 'Aina Le'a case, "the circuit court correctly concluded that the LUC erred in reverting the property to agricultural use without complying with the requirements of HRS § 205-4 because, by the time the LUC reverted the property, DW and Bridge had substantially commenced use of the land in accordance with their representations," the Supreme Court ruled.

The LUC also took a hit for not defining what it meant by having the 16 units "completed" by the March 2010 deadline. The justices noted that in August 2009, DWAL president, Robert Wessels, had informed the LUC that the townhouses would be completed before they would be connected to sewer, water, or electricity. "The LUC failed to state with 'ascertainable certainty' that in addition to completing the physical townhouse structures, certificates of occupancy were also required" by the March 31 deadline, the high court wrote. "Thus, to the extent the LUC kept the OSC pending because '[S]ixteen affordable units have been constructed, but no certificates of occupancy have been obtained,' it erred in doing so."

Finally, the justices agreed with Strance that the LUC erred by not resolving the OSC within 365 days: "The circuit court concluded that the OSC had to be resolved by December 9, 2009, i.e., 365 days after the initial OSC was issued… The LUC's findings of fact and

Photos from May 2010 LUC site visit.

Left to right: An artist's rendering of a completed structure for Villages of 'Aina Le'a; an unfinished building at the 'Aina Le'a site; the 'Aina Le'a construction site.

conclusions of law were not filed until April 25, 2011. Although the LUC had rescinded the OSC on September 28, 2009, that rescission was conditioned upon the completion of sixteen affordable housing units by March 31, 2010. On July 26, 2010, the LUC entered an order finding that the condition precedent was not satisfied, and that the OSC remained pending. Thus, the OSC was not resolved until April 25, 2011, well beyond the 365 days allowed" by statute.

And that is where the concurrence with Strance ends.

Rebuffs

When DWAL and Bridge attorneys were arguing that their clients' constitutional rights to due process and equal protection were violated, they relied heavily on other LUC dockets that, they said, demonstrated the extent to which the LUC had singled out 'Aina Le'a for harsher treatment.

Over the objections of the state's attorneys, Judge Strance had allowed Bridge and DWAL to put into the record dockets from six other redistricting petitions – a decision the LUC appealed. "Specifically, the LUC argues that the circuit court erred in allowing 9,917 pages of documents from the dockets of six other cases before the LUC to be included in the record. To the extent these specific documents were not before the LUC, the LUC is correct that the circuit court erred in denying its motion to strike," the high court found.

Although both Bridge and LUC had cited these cases in arguments to the LUC, at no time did they "present documents from those other cases to the LUC to consider…. Also, they did not move to supplement the record on appeal once the case was in the circuit court and did not request that the circuit court take judicial notice of the dockets."

Strance's rulings on the question of constitutional rights violations were struck down as well.

The justices noted that customarily they would not make a ruling on a constitutional issue if a question before the court could be resolved by referring to statute. But in this case, they wrote, "Bridge has a suit pending against the LUC and its commissioners in federal court, raising many of the same issues presented in the instant appeal. The federal district court stayed that case pending resolution of this appeal… The LUC filed an appeal and Bridge a cross-appeal from the [federal] district court's order… The United States Court of Appeals for the Ninth Circuit heard oral argument on the cross-appeals on June 10, 2014, and thereafter issued an order withdrawing submission of the appeal, pending our decision in this case. In the interest of judicial economy, we therefore also consider the constitutional claims decided by the circuit court."

The circuit court was within its rights to consider the claims, the Supreme Court found – contrary to the objection made by state attorneys. But it erred when it concluded that there was any violation of constitutional rights.

Strance determined that the LUC had denied Bridge and DWAL their "rights to a meaningful opportunity to be heard" in LUC proceedings. But the Supreme Court determined that "both Bridge and DW had notice and meaningful opportunity to be heard before the LUC reverted the property. With respect to notice, as early as September 2008, Bridge was aware that the LUC was considering issuing an OSC. The LUC issued the written OSC on December 9, 2008. This was two months *before* DW had obtained any interest in the property. Both Bridge and DW therefore plainly had notice that the LUC might revert the property."

"With respect to a meaningful opportunity to be heard," the Supreme Court ruling goes on to say, "Bridge presented testimony … during hearings on January 9, 2009, and April 30, 2009… [A]fter the LUC voted to revert the property, it did not issue a written order effecting the reversion. In fact, the LUC stayed entry of its decision and order and allowed DW to present evidence during a hearing on June 5, 2009. DW also presented additional testimony during a hearing on August 27, 2009. After the March 31, 2010 deadline for the completion of the sixteen units had passed, DW was again heard by the LUC during a hearing on July 1, 2010. The LUC held subsequent hearings on November 18, 2010, January 20, 2011, March 10, 2011, April 8, 2011, April 21, 2011, and May 13, 2011. Bridge and DW were each represented by counsel during all of these subsequent hearings."

'Good Reason to be Wary'

In her ruling, Strance stated that the LUC's final order "was by its terms arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Although she was quoting language from an earlier state Supreme Court opinion, the justices found, "the facts of this case do not support such a conclusion."

At this point, near the end of the 78-page ruling, the justices provide a short recap of the history of the LUC docket, noting that by the time the LUC issued its show-cause order in December 2008, "the land had changed hands numerous times and the LUC had amended the original reclassification order on multiple occasions. Moreover, … by the end of 2008, the landowners had done little to develop the property in accordance with representations made to the LUC. Given this history, the LUC was understandably wary of representations being made by Bridge and DW that they would be able to satisfy the 1991 order's conditions, as amended in 2005. Nevertheless, Bridge and DW repeatedly assured the LUC that they would be able to complete the affordable housing units by November 2010. As it turned out, however, Bridge and DW did not comply with numerous other repre-

For Further Reading

Environment Hawai'i has published numerous articles on the 'Aina Le'a case over the last few years. Here is an abridged list:

- "Judge Halts Work at 'Aina Le'a and Orders Supplemental EIS," March 2013;
- "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;
- "Office of Planning: 'Aina Le'a Project Has Not Met, Cannot Meet LUC Deadlines;" June 2010;
- "Under New Management, 'Aina Le'a Is Given Yet Another Chance by LUC," October 2009;
- "After Years of Delay, LUC Revokes Entitlements for Bridge 'Aina Le'a," June 2009;
- "Bridge 'Aina Le'a Gets Drubbing from the Land Use Commission," March 2009;
- "2 Decades and Counting: Golf 'Villages' at Puako Are Still a Work in Progress," March 2008.

All articles are available on the Archives page of our website, http://www.environment-hawaii.org. Access is free to current subscribers. Others may purchase a two-day access pass.

Conservation Groups Challenge NMFS Rule That Lifts Bigeye Catch Limit for Longliners

A federal rule that, for all intents and purposes, does away with bigeye tuna catch limits for the Hawai'i longline fleet is being challenged in U.S. District Court.

The lawsuit, filed November 20, was brought by Earthjustice on behalf of three conservation groups: Conservation Council for Hawai'i, the Center for Biological Diversity, and Turtle Island Restoration Network. It asks the court to find that the National Marine Fisheries Service, the U.S. Department of Commerce, and Secretary of Commerce Penny Pritzker violated an international treaty and the Administrative Procedure Act by adopting a rule on October 28 sanctioning a new system of bigeye quota allocation. In effect, the rule increases by as much as 3,000 metric tons a year the amount of bigeye tuna that Hawai'i longline vessels may bring into port in Honolulu. This amount is almost as much as what is allowed to the fleet under a quota system established by the international Western and Central Pacific Fisheries Commission. (For 2014, the quota was 3,763 metric tons. In 2015 and 2016, it is 3,554 MT, and it declines to 3,345 MT in 2017.)

"NMFS's purpose in adopting the rule was to enable the Hawai'i-based deep-set longline fleet to continue fishing for bigeye after it reaches the catch limit for U.S.-flagged longline vessels set forth" in the WCPFC conservation and management measure for tropical tunas, writes Earthjustice attorney David Henkin in the complaint.

The "quota shifting rule," as Earthjustice calls it, runs counter to the obligation the United States and all other members of the WCPFC have to ensure that the effectiveness of the commission's conservation measures "is not undermined by a transfer of longline fishing effort or capacity to other areas within the Convention Area," the lawsuit says. Most of the catch of bigeye that lands in Honolulu is caught in waters under the commission's jurisdiction.

The rule establishes an annual quota for each of the three U.S.-flagged territories in the Pacific: American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. Then it allows each of these territories to allocate up to half of that amount to the Hawai'i fleet. Initially set at 2,000 MT a year, the quota is to be adjusted annually.

"First, the Quota Shifting Rule invents out of whole cloth separate catch limits for each U.S. Pacific territory, above and beyond the 3,763-metric-ton quota for all U.S.-flagged longline vessels… The rule then purports to authorize each territory to enter into an agreement to allocate to the Hawai'i-based deep-set longline fleet (which targets tuna, including bigeye) up to 1,000 metric tons of its fictional 2,000-metric-ton quota."

Since the U.S. Pacific territories "collectively catch far fewer than 1,000 metric tons of bigeye tuna per year," the new rule "allows for a substantial net increase in fishing effort by U.S. vessels, undermining international efforts to end overfishing of bigeye tuna," the complaint says.

In fact, the new rule reflects a practice that has been in place since 2011. Each year, as the Hawai'i longliners approach their annual quota of Western Pacific bigeye, NMFS begins to allocate the catch for the remainder of the year to one of the territories – whichever one has signed an agreement for that year with the Hawai'i Longline Association. The HLA pays a certain amount to the territory, which is to be deposited into a fund that is to finance improvement in fisheries management in the area. (Under the Magnuson-Stevens Act, the funds for each of the territories are controlled by the Western Pacific Fishery Management Council, or Wespac.)

What is different this year, and which is called out in the lawsuit, is the language in the WCPFC conservation and management measure (CMM) for tropical tunas. Until last year, the CMM that governed catches of bigeye did allow for separate catch limits for the U.S. territories and the United States proper. However, the CMM that was adopted in December 2013, the lawsuit notes, does not establish separate longline catch limits for the territories. "Instead, CMM 2013-01 provides that 'attribution of catch and effort shall be to the flag state' and establishes a single bigeye catch limit for all U.S.-flagged longline vessels, including both Hawai'i-based longline vessels and any longline vessels from the U.S. Pacific territories."

A Different Reading

In the rule published by NMFS on October 28, NMFS seems to acknowledge that the U.S. territories are not given individual catch limits in CMM 2013-01. That measure, NMFS states in responding to comments on the draft rule, "does not establish an individual limit on the amount of bigeye tuna that may be harvested annually in the WCPFC Convention Area by Small Island Developing States (SIDS) and participating territories (PTs) of the WCPFC, including American Samoa, Guam, and the CNMI." However, it goes on to say, "to allow for the limited transfer of quota from the U.S. territories" to the Hawai'i longliners, NMFS "is establishing 2,000-MT limits for each territory. These overall limits … will help ensure sustainability of the stock."

But Henkin of Earthjustice argues that establishing such limits flies in the face of the WCPFC measure.

"Paragraph 5 of CMM 2013-01 expressly states that, for purposes of the longline catch limits … 'attribution of catch and effort shall be to the flag state' (except in cases involving charter arrangements, which are not at issue here)," Henkin said in an email to *Environment Hawai'i.* "Vessels from the U.S. Pacific Territories fly the U.S. flag, so under this rule, their catch is attributed to the United States."

"Notably, CMM 2008-01" – the previous

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sentations made to the LUC. Thus, although Bridge and DW may disagree with the process that ultimately resulted in the reversion, the LUC's conduct was not 'arbitrary and unreasonable,' given the long history of unfulfilled promises made in connection with the development of this property. In these circumstances, the circuit court erred in concluding the LUC violated Bridge's and DW's substantive due process rights."

The justices also throw out the claim that the LUC violated DWAL's and Bridge's constitutional right to equal protection under the law. "DW argues that it was treated differently than others who were similarly situated," they write. "Neither DW nor Bridge, however, have demonstrated that they were treated differently than other similarly situated developers because the documents from the LUC cases involving the other developers were not properly included in the record on appeal."

Even if they had been able to demonstrate different treatment, the justices go on to say, "their equal protection argument still fails because they did not establish that the LUC was without a rational basis… Given the long history of this property and the LUC's dealings with the landowners over the course of many years, we cannot say it was irrational for the LUC to exercise its broad discretion by imposing a completion deadline. Again, the LUC had good reason to be wary of any assurances being offered by Bridge and DW, given the history of the project."

— Patricia Tummons

WCPFC measure regulating bigeye catches – "did not have this flag-based attribution rule," Henkin wrote.

In the 2013 conservation measure, there is no provision made for individual longline quotas for the territories. Rather, Paragraph 7 of the measure states: "Unless otherwise stated, nothing in this measure shall prejudice the rights and obligations of those small island developing State Members and Participating Territories" – this would include the U.S. island territories – "seeking to develop their domestic fisheries."

The Current Agreement

Under the new rule, November 28 is the deadline by which the HLA and its cooperating territory must submit for NMFS approval the agreement they have worked out. That date is no accident: in recent years, the Hawai'i fleet has come dangerously close to meeting its 3,763-MT quota just as the high season for ahi is ramping up.

In 2013, the HLA signed on with the Commonwealth of the Northern Mariana Islands, agreeing to buy 1,000 tons of its quota for three years. For 2013, payment was to have been $150,000; for 2014, $175,000; and for 2015, $200,000.

In September 2014, the agreement was amended to reflect the anticipated new federal rule, a draft of which had been published in January 2014. Although the new rule states that the quota set at 2,000 metric tons is to be reviewed annually and adjusted to reflect the conservation status of bigeye tuna – now in an overfished state by any standard – the agreement makes no mention of any adjustment.

About the only indication that HLA and the territory recognize that there may be a crisis in bigeye management comes at the end of the "Recitals" section of the agreement: "In executing this Agreement, the parties considered and accounted for recent and anticipated harvest on the bigeye tuna stock that is the subject of this Agreement."

Michael Tosatto, administrator of NMFS' Pacific Islands Regional Office in Honolulu, said that NMFS had approved the agreement for 2014. "We did receive such an arrangement and determined that it met the requirements of the regulations," he stated in an email to *Environment Hawai'i.*

But what about the failure of the agreement to account for any annual adjustment of the territorial quota? "It is important to remember that the NMFS [regulations] are the meaningful document," Tosatto said. "A 2,000 ton limit and 1,000 tons available for such arrangements is established for 2014. There will be annual decisions on both these points by NMFS…. Next year, new limit decisions will guide the availability." ***— Patricia Tummons***

For Further Reading

Environment Hawai'i has published several articles on this practice of "quota shifting." See:

- "Hawai'i Longliners' Bigeye Tuna Limit Jumps 80 Percent Under Proposed Rule," April 2014;
- "Up to 17 Percent of Bigeye Catch in Hawai'i Is Logged to Territories," April 2014;
- "NMFS Ignores Letter of the Law in Extending Bigeye Quota Exemption," August 2013;
- "Federal Law Gives Hawai'i Longliners Free Rein to Ignore International Quota," January 2012.

Wespac Responds to Article on its Push To Reduce Size of Pacific Islands Monument

The following letter was received from the Western Pacific Fishery Management Council's communications officer, Sylvia Spalding. We reprint it in its entirety.

In its December 2014 issue, *Environment Hawaii* published an article on the Western Pacific Regional Fishery Management Council's meeting with officials from the White House on September 9, 2014, in Washington, D.C., to discuss the President's plans to expand the Pacific Remote Islands Marine National Monument boundaries. There are several incorrect statements in the article.

The article intimates that the Council was engaged in improper lobbying. However, lobbying restrictions applicable to fishery management councils, as set forth in OMB circulars and 50 CFR 600.227, apply to contacts with Congress, not with the Executive Branch. It is surprising to see criticism of a situation where White House officials requested information from the fishery management council when that information would help them better under stand the impact of their proposed conservation decisions on local communities and thus contribute to better informed decisions.

The Council was invited by the White House to participate in this meeting, and the meeting was consistent with the Magnuson-Stevens Fishery Conservation and Management Act. By attending the Council was being responsive to the White House's request and doing the job it was appointed to do.

The article also reports on the cost and duration of the hotel stay in DC and the cost to produce briefing material for the meeting. These expenses were appropriate. Council members traveled from Hawai'i, American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). Flight time from the CNMI to D.C. averages 20 to 24 hours and crosses 15 time zones. Flight time from American Samoa averages 25 to 29 hours and crosses six time zones and the equator. Travel and accommodations reflect these factors. The cost of the briefing booklet was unanticipated but necessary when the Council learned that the meeting site was not equipped for PowerPoints. These costs included photocopying and binding expenses at the local FedEx.

The article also implies that Ed Watmaura, Ricardo DeRosa, Pierre Kleiber, Makani Christensen, Neil Kanemoto, Bob Fram, Roy Morioka, Tony Costa, Brooks Takenaka, Frank Farm and Steven Lee attended the September meeting with White House officials. None of them did.

Author's Response:

With regard to the matter of lobbying, the Magnuson-Stevens Act prohibits fishery management councils from using taxpayer funds to lobby legislative bodies unless specifically invited to do so. Given the White House invitation, noted in our article, what the council did does not violate the MSA.

We were wrong in the list of attendees at the meeting. The names we provided testified at a meeting sponsored by NOAA and the U.S. Fish and Wildlife Service the previous month. Those attending the White House meeting, in addition to the individuals whose way was paid by taxpayers, were Sean Martin, former council chair, and Svein Fougner, formerly a NMFS manager and now consultant to the Hawai'i Longline Association. We apologize for the error.

We appreciate the opportunity to correct the record.

WCPFC continued from page 1

stocks reach a critical state, so as to force the commission to do something, he said.

"Until then, we continue to waste everyone's time," he said.

Potential for Success

Last year, when the commission's scientific committee released its assessment suggesting that the Western and Central Pacific bigeye tuna stock had likely become overfished, several conservation groups called for strong and swift action to be taken at the commission's December meeting.

Greenpeace called for a ban on all FAD fishing, a reduction in both longline and purse seine quotas, and the closure to tuna fishing of all high seas pockets, among other things. (The high seas pockets are areas of international water completely surrounded by territorial waters.) The Pew Charitable Trusts focused more on CMM 2013-01's ineffective FAD closure requirement. Despite the required four-month FAD closure last year, purse seine catches of bigeye reached an all-time high. Pew suggested that the commission replace the FAD closure provisions with FAD set limits that, according to scientific advice, would reduce fishing mortality by 36 percent compared to 2008-2011 average levels.

But by the time the commission met in December, it had received only a single proposal to amend CMM 2013-01. A group of eight commission member countries called the Parties to the Nauru Agreement, or PNA, had submitted a joint proposal with Tokelau that called for a broad range of management measures, including a limit on the number of FADS that can be deployed annually and a ban on night-setting during months when FADS are not to be used.

When it came time to discuss amending CMM 2013-01, the United States and the European Union both argued that since it was adopted just a year ago, more time should be allowed to see if it will effectively reduce fishing mortality.

A month before the commission meeting, its scientific committee issued a paper exploring the likelihood that CMM 2013-01, unamended, would increase bigeye spawning biomass to an acceptable level. In short, the committee found that maybe the measure could succeed, but it couldn't say for sure.

One of the main problems with assessing the measure is that its " 'either/or' choices, exemptions, or exclusions and decisions yet to be made" make it impossible to predict future levels of purse seine effort and longline catch, the committee states.

For example, when it comes to purse seine fishing on FADS, countries have a choice of increasing the number of months vessels can't fish on FADS or reducing the number of FAD sets they make.

"There are a number of outcomes in terms of actual future catch-and-effort levels. We have made hopefully sensible assumptions, but there is obviously no certainty that they are correct," the committee states.

Still, the committee report offers some hope: Based on recruitment rates from the past few years, CMM 2013-01 could potentially reduce the risk of overfishing bigeye to an "acceptable" four percent. At the WCPFC meeting, committee scientist John Hampton clarified that this scenario assumed that by the end of 2017, the five-month FAD closure predicted in CMM 2013-01 would be in effect.

Disproportionate Burden

The problem with pinning the success of CMM 2013-01 on the five-month FAD closure is that the measure includes a loophole that could prevent the extension of FAD closures beyond four months. Basically, it states, if the commission fails to pass a measure addressing the disproportionate burden that SIDS are shouldering as a result of the provisions within CMM 2013-01, the five-month FAD closure won't happen. SIDS, many of whose economies rely heavily on the sale of fishing access rights to foreign purse seine vessels, have argued that CMM 2013-01's limits on FAD fishing by those vessels imposes an unfair economic burden.

> *"The arguments put forward are not so straightforward in our opinion."*
>
> ***— Angela Martini, European Union***

Although the commission had held a workshop ahead of the December meeting to try to address the disproportionate burden issue, it had clearly not been resolved, given some of the discussion within the small working group on tropical tunas.

A report from the workshop noted that Tokelau, at least, suffers a loss of $400,000 a month for each month closed to FAD fishing. Even so, Russell Smith, head of the U.S. delegation, questioned whether enough information had been provided to quantify the actual burden on all SIDS.

"We still haven't answered the fundamental questions of disproportionate burden: What are the benefits, costs, across all CCMs? Which of the SIDS get impacts? That has to be quantified, then we have to figure out how to alleviate," he said.

The European Union's Angela Martini added, "Despite what is being said that it's so clear there is a disproportionate burden, I don't think we agree on that."

She noted that despite the claimed economic impacts of FAD closures, some SIDS suffered no loss in the number of fishing days they sold and, in fact, the price of those days had gone up.

"The price of a vessel day at the moment is so high, several parties are considering not buying those days. It has nothing to do with the [FAD] closure. … It's not like less days have been sold at less price. … The arguments put forward are not so straightforward in our opinion," she said.

She argued for the development of a methodology that assesses the actual burden SIDS endure as a result of CMMs, but discussions toward that end eventually led to a long, uncomfortable silence.

In fact, all attempts in the tropical tuna small working group to clarify limits on fleet capacity, to address the disproportionate burden issue, or to refine longline and purse seine fishing measures ended in one long silence after another.

Lackluster Effort

The tropical tuna small working group met three times during the course of the five-day WCPFC meeting. As one U.S. delegate put it, there seemed to be no appetite in the room for compromise. With negotiations repeatedly hitting dead ends, outgoing chair Charles Karnella halted the working group's discussions on the second to last day of the meeting.

Despite the apparent gridlock, though, some attendees believed more could have been achieved. If the commission had had two more days, then maybe more progress could have been made on tropical tunas, one delegate told *Environment Hawai'i*. And he was not alone in thinking that at least some of the limited progress was due to insufficient effort. As the days ticked by, Karnella noted repeatedly during the plenary that the commission was running out of time to decide on a revised topical tuna measure, yet he did not convene a working group for that agenda item until the middle of the week. And in the group's three meetings, some attendees said, Karnella seemed less inclined to facilitate discussion and more apt to leave the situation deadlocked.

On the final day, as some delegates started

again pointing fingers at one another for the failure to adopt a new tuna measure, one of Japan's main negotiators suggested that the entire commission was at fault.

"Last year, we had a five-day meeting, but we started the discussion [on tunas] one day before the meeting and we continued the meeting on the last day. Compared to last year's effort, this year, how much effort have we allocated for this discussion? Maybe only one or two days," he said. "It's not wise to criticize each other. It's *our* fault."

Indeed, when Karnella asked on the last day whether it would be worth reconvening the tropical tuna working group, no one spoke up.

A Bright Spot?

In the end, the only significant changes to CMM 2013-01 dealt with the provision of operational catch-and-effort data by six Asian countries that have consistently cited domestic restrictions as their reason for providing only aggregated catch data. Without operational data, many have said the commission is unable to create robust stock assessments.

Based on a proposal from the Forum Fisheries Agency (a consortium of Pacific island states), Japan, China, Taiwan (or Chinese Taipei), Korea, Indonesia, and the Philippines all agreed to start providing operational data. However, the agreement came with several conditions: The data would only be provided for fishing in waters south of 20 degrees North, or roughly the same latitude as Hawai'i, and would not include catch by artisanal, small-scale vessels. Also, the commission would keep the data confidential.

One of the more concerning conditions was one that gave a three-year grace period to any of the countries that had a "practical difficulty" in providing 2015 operational data. Such countries would have to supply the information only after domestic constraints were lifted. Indonesia's "grace period" would be indefinite.

The EU's Martini asked how a three-year grace period would help, given that CMM 2013-01 expires in 2017.

Japan's delegate said the condition was simply "the outcome of compromise of almost 22 members." He added that, actually, only very few countries will use the grace period.

Smith of the U.S. delegation acknowledged the measure as a step forward on the data issue, but stressed that it was, unfortunately, a small one.

"I'm hoping this is a temporary solution and we can continue to work to make the data provided … more robust and achieve this in a rapid fashion," he said.

Martini added, "To say the added value of this is very limited is an understatement."

However, she, along with the rest of the commission, supported the adoption of the measure.

♣♣♣

Limits to Longline Gear, Plans to Protect Sharks

Sharks received a bit more protection under a new measure approved by the commission. More might have been achieved but for resistance from certain countries that wish to continue shark finning.

The FFA had proposed in November a measure that would have required detailed catch reporting, compliance with international shark conservation measures, and the landing of sharks caught with their fins attached, among other things. However, after tough negotiations in small working groups at the WCPFC meeting, the FFA wound up putting forth a "very simplistic measure that would take us to the next level of the conservation of sharks in the Western and Central Pacific," said one delegate from Palau, an FFA member country.

The scaled-back measure has two parts. First, it prohibits longline vessels from using certain types of branch lines and leaders. Second, for longline fisheries that target sharks, the measure requires commission members to develop management plans that include specific authorizations to fish, such as a license and a catch limit or other measure to keep shark catches to acceptable levels. The plans must also demonstrate how fisheries avoid catch and maximize live release of severely depleted shark species such as silky and oceanic whitetip sharks.

All shark management plans must be ready for commission review and approval by its next meeting in December.

Angela Martini, the delegate for the European Union, lamented the fact that the original measure had been stripped of its stronger provisions. The EU had itself proposed a lengthy shark conservation measure that also sought to reduce shark finning, but, after the small working group discussions, chose not to push it.

"We were very much in favor of fins naturally attached. No exceptions," she said. "We support the adoption of this measure, but, once again, we express our disappointment with those countries that continue to oppose significant progress in the protection of shark species … especially particularly vulnerable sharks."

♣♣♣

Lack of Penalties Leads To Rampant Non-Compliance

Not only does WCPFC seem unable to adopt measures that will adequately protect tuna stocks, most of its members seem incapable of complying with the measures that are passed.

According to Alexa Cole, chair of the commission's Technical and Compliance Committee (TCC), only a handful of the more than three dozen commission members were deemed last year to be compliant: Canada, Mexico, Nauru, New Caledonia, Niue, Tonga and Tokelau. The rest, including the United States, would have been considered non-compliant, but now there seems to be another category: un-assessed.

At the WCPFC meeting, Japan, in particular, vehemently argued that it had complied with all of WCPFC's conservation measures. And because Japan simply refused to accept the commission assessment of it as non-compliant, the commission decided instead to consider it as merely "un-assessed," thus allowing the commission to approve the TCC compliance report.

That so few countries actually follow the commission's measures seemed to dishearten the Nauru delegation. One of its members suggested the commission should approach the rampant non-compliance issue.

"We try to get these things done properly. … It seems to me now the other group is more popular. I might be joining them next year. … Why do we do this process?" he asked.

Many have attributed the lax attitude toward compliance to the lack of penalties. When the commission created its compliance scheme, it bifurcated the process by passing an assessment framework, but not a penalty system.

The commission struggled to get a penalty scheme adopted at the December meeting, but it was difficult given that so many members have now been assessed as non-compliant.

The compliance measure proposed by the commission's chair suggested that members determined to be high-priority non-compliant could face a loss of quota or access to data, among other things. In the end, the proposal failed.

For more on WCPFC, read our January 2014 pieces, "For Another Year, Pacific Bigeye Tuna Go Without Strong International Protection," and "As Commission Dithers, Tuna Decline" (editorial). Both and more are available on our website, *www.environment-hawaii.org.* ***—Teresa Dawson***

Land Board Gives Green Light To Big Island Biofuel Project

The state Board of Land and Natural Resources last month unanimously approved a 65-year pipeline easement to Summit Biofuel, LLC. The company plans to use the pipeline to move biofuels from cargo ships at the port of Hilo to a renovated tank farm nearby. The one-time rental payment recommend by the Department of Land and Natural Resources's Land Division has yet to be determined.

The pipeline and fuel tanks were used for years by Shell Oil, which completed work on the 10-inch-diameter asphalt cement pipeline and associated heating oil lines in 1963. In 1980, the company assigned its lease to Pauley Petroleum, which stopped paying lease rent to the state for the pipeline easement in 1993. (The asphalt tank site, meanwhile, was leased to Big Island Asphalt, and although it did not pay lease rent to the state, some reports suggest it may have continued to use the pipeline well into the 2000s.)

In 1998, the Land Board wrote off the unpaid balance of lease rent owed by Pauley Petroleum, now known as Hondo Oil & Gas. A few years later, the extension of the pipeline that ran from Pier 2 to Pier 3 was removed.

New Beginnings

Two years ago, Summit Biofuel owner Charles Barker III began investigating the possibility of refurbishing the tanks and pipeline to bring biofuels into Hilo. He set up two limited liability companies with the Department of Commerce and Consumer Affairs – Summit Biofuel, in March 2013, and Hoku Kai Biofuels, in May of that same year. Within a few months, he had begun talking with the state Department of Health about what might be required to bring the facility back into usable condition and in October 2013, Makawao Sugar Limited Partnership gave Hoku Kai Biofuels a deed to the property. Not until the end of December was financing in hand, apparently allowing Hoku Kai to give a mortgage in the amount of $2.3 million to the former owners, representing most of the $2.9 million sales price. Both deed and mortgage were recorded with the state Bureau of Conveyances on January 3, 2014.

Barker signed the documeents on behalf of Hoku Kai, but by April, he was out of the picture. According to a filing made on April 1 with the state Department of Commerce and Consumer Affairs, the three new principals of Hoku Kai Biofuels were Michael Petras, Kevin Gorman, and Hank Correa. The first two are affiliated with NextFuels, a mainland company that, according to its website, "has specialized in the logistics and marketing of biodiesel for over nine years." Before founding NextFuels, the website states, Petras was with Falck Bioenergy Singapore and developed palm plantations in Southeast Asia. Before that, he was president of Texas-based National Biofuels. Gorman's career followed a similar trajectory, with a stint at National Biofuels followed by a period at Falck Bioenergy Singapore.

Correa is a Big Island real estate broker based in Hilo, and, says Barker, his partner in Summit Biofuel. "There are two parts to Hoku Kai," he said. "One is NextFuels, the other is Summit. Hank is a member of Summit with me. He is my part of the company's voice. NextFuels is more the funding."

> *"We have a world purpose that transcends individual agendas."* **— Charles Barker III**

Who's On First?

The involvement of NextFuels in the project is mentioned on the company's website, where it states it has a "sphere of influence" in Hawai'i and that it has purchased the fuel tank facility. However, in documents submitted to the state, including the final environmental assessment and the filings of all the Hoku Kai-related companies, NextFuels is not mentioned.

Yet Barker readily acknowledges that NextFuels is providing much, if not all, the financing for the project, which, he told *Environment Hawai'i,* "transcended to a higher level of funding than I have the capacity for." And mention of NextFuels does appear, albeit almost cryptically, in a Phase I Environmental Site Assessment prepared in December 2013 by Environmental Science International. ESI interviewed several parties associated with the project, including Ricardo "Rick" Barbati. Barbati is the owner of the building in Hilo that Hoku Kai Biofuels and a host of associated companies use as their headquarters. He described his involvement with the project as "future owner – Summit/NextFuels merger to acquire property."

Still, Barker insisted in a phone interview, "NextFuels is only our funding partner. They're not Hoku Kai."

NextFuels' deep pockets may have been needed to purchase the tank farm, but the transfer of the property later last year could have have been covered by a charge card. In June, Hoku Kai conveyed the property to yet another entity, Lea Ha Ana 'Ole, LLC, for $1,001 (although the mortgage Hoku Kai had given to Makawao Sugar Plantation Limited Partnership still had not been released). Lea Ha Ana 'Ole is another limited liability company that Barker established in September 2013.

Interviewed by *Environment Hawai'i,* Barker insisted that Hoku Kai continued to remain the owner. The tank farm "wasn't sold in June," he said. Lea Ha Ana 'Ole "is just a holding company, for financial purposes. It [the tank site] is still owned by Hoku Kai."

Why was the land transferred at all? he was asked.

"It's just being held in trust until all the formal funding is completed, much like a trustee holds something," he answered. "It will revert to Hoku Kai once the funding is in place."

Palm Oil?

Given the apparently extensive backgrounds of the NextFuels principals in the trade of palm oil from Southeast Asia, Barker was asked if palm oil will be the eventual source of biofuel brought into the Hilo harbor.

His concept, he said, "was to have some capacity to bring non-fossil fuels in that are less expensive than fossil fuels." Palm oil, however, "is not a good fuel. A much preferred feedstock is canola, though there's not a lot available from the U.S. market – the Jones Act makes it cumbersome to bring in."

Canada is the "preferred source" of canola oil, he said, adding, "We will make sure any fuel we would supply would be properly sourced – no rain forest or inappropriate labor practices. We have a world purpose that transcends individual agendas."

When asked whether NextFuels would be bringing in palm oil, Barker acknowledged the NextFuels people "have a deciding vote. Yes, it's one of those things that happens. When you're faced with having to procure capital, the reality I suppose, of capital structure [is] those that have the money have the loudest voice. I maintain as substantial a presence as I can."

A Bio-mess

Barker has been involved in at least one other biofuel project in Hawai'i that, to date, has borne little fruit outside of the courtroom.

According to a complaint that Barker filed in the U.S. District Court in Honolulu, beginning around 2007, Barker applied to Hawai'i County for permits allowing construction and operation of a wood products facility at the Haina mill, once a part of Hamakua Sugar, near the town of Honoka'a. He states in his complaint that he arranged financing for this in 2008 with a loan of almost $5 million from a Pennsylvania company, Ambit Funding, LLC.

Less than a year later, Haina Properties, LLC, the company Barker had formed with Big Island logger Robert Barr, was in default, and Ambit foreclosed. Barker evidently believed he had a contract to buy back the mill from Ambit and devised a number of different scenarios, including a biomass energy plant, a company to market and sell stockpiled topsoil left over from plantation days (Kama'aina Earth Products), and, most ambitious of all, a plan to acquire the Hamakua Energy Partners power plant – if he could arrange nearly a quarter of a billion dollars for that scheme.

Barker moved forward with the project, getting the county to extend the deadline for performance on the permit and also getting the permit extended to cover the production of "biomass synthesis gas."

In late 2011, the joint venture that Barker had put together with a number of different mainland companies began showing signs of strain, with his partners making payments for various goods and services that Barker felt were unnecessary. What's more, they did not come up with the financing for the ambitious biomass energy projects that Barker had expected. In February 2012, Barker accused his backers of breach of contract, but a year later, he signed, "albeit with grave reservations," an agreement that gave his partners 87.5 percent ownership over the projects – on the condition that within two months, a new agreement would be produced more satisfactory to him.

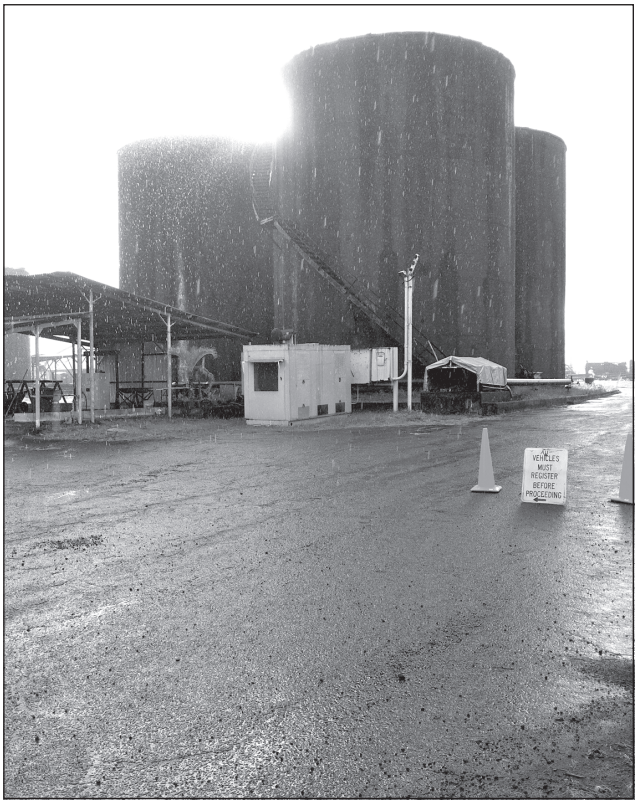
Although that new agreement never materialized, Barker says, he moved forward and was able to obtain an Israeli source of funds in the amount of more than $9 million, which would allow the group to repurchase the Haina mill, among other things.

The partners did not act on the offer and instead informed Barker they were pursuing other avenues of financing, he states in the complaint. Further, Barker says, he found out that they were working behind his back to move forward on the topsoil marketing plan and other ventures that Barker had come up with.

In May 2013, Barker, acting as his own attorney, sued his former associates. The initial complaint accused them of unprofessional contact, breach of fiduciary duty, violations of securities laws, fraud, misrepresentation, malfeasance, breach of conduct, theft, tortuous interference, violation of interstate commerce laws, and several other charges as well. He asked the court to award damages in excess of $29 million.

Judge Leslie E. Kobayashi dismissed the complaint but without prejudice, allowing Barker to file a second amended complaint. That, too, was dismissed without prejudice in May, with Barker being allowed to file yet another amended complaint by June 30.

Barker's third amended complaint, filed June 27, with 48 exhibits, was dismissed on October 24. Less than two weeks later, Barker filed a motion for reconsideration – and to disqualify Judge Kobayashi. "This Court cannot separate itself from it's [sic] earlier acquiescence to the Defendants [sic] tactic of trying to hide the essential evidentiary documents such as will resolve not only the above described individual defendant responsibility identification, but the specificity, dates, times, locations, method of communications, and documentation of each of the relevant events which have been, up to this date, described by Plaintiff to the greatest extent presently possible in the void of such documents," he claims.



The Hoku Kai tank farm near the port of Hilo

Andrew Odell, the Cades Schutte attorney representing the defendants, filed an objection to Barker's requests in late November. "Apparently," he wrote, "… Plaintiff's sole basis for seeking recusal of the Court in this matter is his perception that the Court is biased because it is ruling against him. … [T]hat is not a sufficient or proper basis to seek the Court's recusal."

Asked about this case, Barker said it would almost certainly end up before the 9th Circuit Court of Appeals. He indicated he was confident he would, in the end, prevail.

— P.T. and T.D.

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'Inappropriate' Proposal by Roehrig Draws Criticism, Fails Without Support

Except for a few questions from Land Board members about spill containment measures and ownership of the fuel storage facility, the easement to Summit Biofuel, LLC passed with very little discussion of the project itself. Debate focused mainly on a matter raised by Dan Purcell, a member of the public, regarding what he saw as inappropriate actions by Hawai'i island Land Board member Stanley Roehrig.

Almost immediately after the DLNR's Land Division had briefed the Land Board about the proposed easement, Roehrig — a paddler for the Keaukaha Canoe Club in Hilo since the 1980s, according to the DLNR's website, and a member of its board of directors, according to the Department of Commerce and Consumer Affairs — pushed Summit owner Charles Barker to do something to benefit the children who paddle in the area.

Roehrig said that Summit's facility is about 200 yards from a children's paddling program and that his canoe club had tried for 15 years to solicit support from businesses around the pier.

"It's not often issues come before the board where we have a say," Roehrig said, then asking Barker what the chances were of Summit helping the kids at Keiki Kai

"Without being inappropriate, I would like to have a condition on this [easement]," Roehrig said, suggesting that Summit be required to work with the community and a charitable organization to help the kids' paddling program.

Barker replied that he himself was a canoe paddler and expressed a willingness to help.

The only person to testify on the matter was Purcell, a member of the public who often attends Land Board meetings. Purcell expressed his concern about Roehrig's "continuous effort" to get applicants appearing before the Land Board to accept conditions regarding items of particular interest to him, "almost a quid pro quo."

"I've seen this in the past. [It's] always things he's particularly interested in or affects his part of the island," Purcell said. (Earlier in the Land Board's meeting, Roehrig had, in fact, pushed a representative from Hokukano Ranch to accept a condition on the conservation easement it was requesting that would require the ranch to allow non-profit groups — the Moku o Hawai'i Outrigger Canoe Racing Association, for example — to take koa logs from the property "at a nominal cost.")

Roehrig defended his actions, stating, "Part of my role as being a board member is to try to make an effort to make the community better." He added that he had no personal interest in any paddling program.

Although he said he accepted Purcell's criticism, he said he was sticking by his recommendation.

"I want to put a condition on this motion that the applicant will use reasonable efforts to provide eleemosynary assistance to keiki and makule paddling programs at Pali Kai. … If there is a spill, the first place it's going to go is the beach where these kids practice," Roehrig said.

His motion to amend the Land Division's recommendation went without a second.

Land Board member Chris Yuen, also from Hawai'i island, said that while he respected what Roehrig was trying to do, he thought the board would need to discuss with its deputy attorney general the appropriateness of requiring an applicant requesting a lease to make a charitable donation.

"I think you have a good justification for it, there's a lot of businesses we could put the arm on a little bit to make a charitable contribution, [but] at some point it's not appropriate. It's fine to encourage people. … I am concerned [about putting] this on as a requirement," Yuen said.

Board member Ulalia Woodside expressed similar concern, adding that there had not been a thorough discussion of what group and what activities should receive assistance.

Roehrig clarified that he didn't necessarily want Summit to make a financial donation, but that he just wanted the company "to help in some fashion."

"There's a nexus between the request and the program. If nobody's going to second it, my motion to amend is going to fail and I'll accept that," he said.

In the end, the Land Board approved the easement without Roehrig's proposed amendment. However, Barker on his own committed to supporting not just paddling programs but children's programs in general. ***— T.D.***

HAPPY NEW YEAR!