

Environment



Hawai'i

a monthly newsletter

Price: \$5.00

Good Fences Make Good ...

Habitat for palila. But three decades into a federal court decision requiring the state to protect the critical habitat needed for this endangered bird, good fences are in short supply. Most of the fencing, set up in the 1930s and 1940s, is nearing the end of its useful life. A new fence is expensive and years off.

Can the palila wait for the fences to be built, the sheep to be removed, and the mamane trees so necessary for its survival to grow to the point they are useful to the bird?

That question is front and center before the judge, the state, and the plaintiffs who are growing ever more worried that the bird may not last as long as it takes to protect its habitat. Teresa Dawson reports on the latest legal developments in our cover story. Patricia Tummons contributes an article on a closely related subject – the withdrawal of ranch lands for critical habitat.

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As We Start our 20th Year...

State, Environmentalists Argue Over Fencing As Palila Population Declines on Mauna Kea

Unless the fence is repaired, the birds don't have much of a chance, do they? The numbers look pretty terrible."

The comment came from U.S. District Judge Samuel King at a May hearing on a motion filed by Earthjustice to force the state Department of Land and Natural Resources to build a fence around Mauna Kea to protect the endangered palila (*Loxioides bailleui*), a Hawaiian honeycreeper.

It's been 30 years since King first ordered the state to remove feral ungulates from palila critical habitat, which consists of a 200 square kilometer ring of mamane and mamane-naio forest around the upper slopes of Mauna Kea. Today, large numbers of mouflon sheep still roam the mountain, destroying the seedlings of mamane trees, which palila need for food, shelter, and nesting.

Meanwhile, a recent study has shown that the palila's numbers are tanking.

Whether or not mouflon are directly responsible for the recent decline, everyone involved in the case agrees that ungulate eradication is key to the palila's recovery. But despite the state's eradication efforts, the sheep population continues to grow. So on March 23, on behalf of the palila, the Hawai'i Audubon Society, the National Audubon Society, and Alan C. Ziegler, Earthjustice attorneys Koalani Kaulukukui and David Henkin filed a motion in federal District Court to enforce King's 1979, 1987, and 1998 eradication orders.

"If this hearing does not conclude with a definite and binding commitment by the



The endangered palila feed mainly on seed pods of the mamane tree, which feral sheep continue to browse despite a 30-year-old court order to eradicate them.

state to see that the circum-Mauna Kea ungulate-proof fence is built by [mid-2011], and if the ungulates are not eradicated shortly thereafter (eradicated in the true sense of the word, not the state's shibai representation of it), then I feel strongly that we will not get this opportunity again," wrote Big Island conservation scientist Rick Warshauer in an email to Earthjustice before the hearing. "Forestalling the needed and inevitable solution for saving the palila is not an acceptable alternative. Unfortunately, we have accepted this non-solution by the state for three decades, but should now seek a final solution."

But after holding two short hearings in mid-May, King denied—without prejudice—to page 8

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Hawai'i

Volume 20, No. 1

July 2009

NEW AND NOTEWORTHY

No New EIS for Kuilima: The Hawai'i Intermediate Court of Appeals has turned down an appeal by two environmental groups of a lower court decision that rejected requests for an updated environmental impact statement for the proposed expansion of the Kuilima resort, on O'ahu's North Shore.

Two years ago, in June 2007, the First Circuit Court decided that the City and County of Honolulu was not obligated to require an updated EIS for the expansion project, involving construction of three new hotels, renovation of the existing 18-hole golf course and installation of a new 18-hole course and clubhouse, more than 2,000 new condo units, a commercial complex, and an equestrian center, as well as necessary support infrastructure. The most recent EIS for the improvements was completed in 1985.

Work has stalled for most of the improvements, but in 2005, Kuilima filed with the city

an application to subdivide 744 acres. At that time, the city was asked by UNITE HERE! Local 5, representing hotel workers, and by a North Shore resident to demand that the developer prepare a supplemental EIS. The city replied that, because no time limit had been imposed on the project when it was approved, it could not require a supplemental EIS (or SEIS).

The two groups – Keep the North Shore Country and the Sierra Club, Hawai'i Chapter – sued, as did the union. The union dropped out in 2006, when a labor dispute it had with the hotel was settled. The circuit court rejected the plaintiffs' arguments that circumstances now were so changed from the circumstances at the time of initial approval that a new or supplemental EIS was warranted. The ICA agreed, finding that only a significant change in the project itself – and not a change in general conditions on the North Shore, such as traffic, population, or other development – would trigger the requirement for preparation of an SEIS.

"Plaintiffs confirmed in their answers to interrogatories that they had no specific evidence of a change in the project," the ICA noted. Judges Corinne K.A. Watanabe and Daniel R. Foley rejected as well the plaintiffs' argument that the subdivision application itself was an action triggering compliance with the state's environmental impact statement law, Chapter 343.

Keep the North Shore Country will be appealing to the Supreme Court, said spokesman Gil Riviere.

Thumbs Down on Koke'e Cabin Claim: The owners of leases of land at Koke'e State Park on Kaua'i have lost their appeal of a lower court decision. In May, the Intermediate Court of Appeals threw out their claim that the Kaua'i Circuit Court judge erred when she did not agree with them that they had a property interest in cabins at Koke'e. The state claimed that the cabins became property of the state when the leases terminated in 1985.

"[T]he state did not need to obtain plaintiffs' waiver of their constitutional right to just compensation before claiming the cabins on plaintiffs' leased lots because according to the unambiguous language of the 1985 leases – particularly the 'Surrender' provision – plaintiffs had no such constitutional right..." the ICA judges held. "The 'Surrender' provision of the 1965 leases, like the 'Surrender' provision of the 1985 leases, plainly reveals that incumbent lessees did not own the cabins at the end of the lease term."

Daniel G. Hempey, attorney for the cabin owners, says the plaintiffs will "definitely" be appealing to the state Supreme Court and, if need be, will put the case before a federal judge.

Superferry Appeal Rebuffed: In May, the Supreme Court denied the state's motion for reconsideration of the court's decision last March that the law allowing the Superferry to operate without preparation of an environmental impact statement was unconstitutional. The state had argued that even though one part of the law might be found unconstitutional, with that part "severed," the legal defect could be cured.

The Supreme Court didn't buy it. In a four-sentence order, the court stated: "It should be noted that the issues of severability raised in the [Department of Transportation's] motion for reconsideration and in the Hawai'i State Legislature's amicus curiae brief in support of the motion were the first time these issues were raised in this entire litigation. Neither DOT nor Superferry presented the argument of severability in defense of Act 2's constitutionality before the circuit court or before this court on appeal in its written briefs or in oral argument. As such, this argument is deemed waived."

Environment Hawai'i

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Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$50 individual; \$85 supporting; \$85 corporate and institutional. Send subscription inquiries, address changes, and all other correspondence to *Environment Hawai'i*, 72 Kapi'olani Street, Hilo, Hawai'i 96720. Telephone: 808 934-0115. Toll-free: 877-934-0130. E-mail: pattum@aloha.net
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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

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ISSN 1050-3285

*A publication of
Environment Hawai'i, Inc.*

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Quote of the Month

"Forestalling the needed and inevitable solution for saving the palila is not an acceptable alternative."

— Rick Warshauer

Major Environmental Bills Pass, But Lingle May Yet Veto Several

The 2009 Legislature closed up shop in May, but suspense lingers over what it has or will have accomplished. The deadline for the governor's veto is July 15, although she was to have submitted to the Legislature a list of bills she intends to veto by the end of June.

Regardless of the final outcome, the list of measures passed by the Legislature that have a substantial impact on the state's land, water, and other natural resources is a long one this year. For those that have neither been signed nor vetoed, Governor Linda Lingle must indicate by June 29 those bills she is considering vetoing. July 15 is the final day for action to be taken on bills passed during the regular session. Any bill not signed or vetoed by this day will automatically become law without the governor's signature. If the Legislature intends to override a governor's veto, it must do so before noon on this day.



Land

Mauna Kea Authority

One of the most closely followed measures of the 2009 session was **House Bill 1174**, which would give the University of Hawai'i the ability to manage, through rules, the summit area of Mauna Kea, which the university leases from the state for scientific purposes (i.e., telescopes).

Supporters – university personnel, business organizations, and labor unions, for the most part – were passionate in their belief that the bill was needed to allow for proper management of the area that includes the science reserve, Hale Pohaku (the support facilities for astronomers at the 9,000-foot elevation), and the roadway that connects them. Opponents were equally passionate, expressing fears that the university would make the summit a “gated community” for astronomers and that it would not be sufficiently protective of natural and cultural resources.

As passed by the Legislature, the measure allows the Board of Regents to charge fees for the use of land and university facilities on Mauna Kea; gives it authority to regulate public and commercial activities on lands under the university's jurisdiction; and sets up a special fund, financed by rents from leases and permits and from fines. With respect to the current administrative rules of the Department of Land and Natural Re-

sources – rules governing commercial tours, among other things – the university is instructed to “strive for consistency” with existing rules relating to forest reserves and natural area reserves.

Energy Crops on State Land

Last December, holders of leases on state lands in Hamakua were shocked to discover that the Board of Land and Natural Resources had taken action – “in principle” – that they feared could result in their leases being terminated and land they occupied being given over to producers of crops intended to be used as fuel. At the same time, a slew of parties that said they would have sought the lease if they had only known the lands were available, and were upset at not having had a chance at them. (For details, see the cover story in the January 2009 edition of *Environment Hawai'i*.)

In response, **Senate Bill 50** was introduced to limit the circumstances under which the Land Board can lease lands to producers of energy crops. It allows the Land Board to lease lands to renewable energy producers only after a public hearing that gives all potential renewable energy producers notice of the opportunity and describes the types of information the board has to consider before awarding such a lease. In addition, current lessees on state lands cannot have their leases terminated involuntarily in order to have the land leased for a biofuel crop.



Resource Management

Conveyance Tax Allocation

The Legislature approved – but the governor did not – changes in the way the state conveyance tax is charged and allocated. **House Bill 1741** imposes temporary cuts in the shares of the conveyance tax that support the Rental Housing Trust Fund and the Natural Area Reserve Fund. Starting with the current fiscal year (which began July 1), the Rental Housing Trust Fund will receive 25 percent of revenues (instead of 30), while the NAR Fund portion will drop to 20 percent (from 25). The cuts are set to expire June 30, 2012.

An early version of the bill would have suspended payments into the Land Conservation Fund, which receives 10 percent of the total conveyance tax revenues, and would

have imposed far more drastic cuts to the rental housing and natural area funds. Testimony in opposition was strong, however, both from conservation groups and from groups representing low-income renters.

The final bill provides for cuts that are less Draconian and for a shorter period than the original measure. In addition, it contains steep increases in the conveyance tax paid on transfers of more expensive residential property, with the most expensive rate — \$1.25 per \$100 — reserved for sales of second homes costing \$10 million or more. The rate on properties selling for less than \$600,000 was unchanged.

Still, the tax increase was the reason given by Governor Lingle for vetoing the measure. “This bill is objectionable because it would discourage investments, adversely impact land transactions to promote business and housing development, and further slow our economic recovery by extracting money out of the pockets of families and businesses,” she wrote in her veto message.

The governor's veto was overridden, and the measure is now **Act 59** of the 2009 Legislature.

Manta Rays, 'Opihi

Two bills – **HB 366** and **SB 1** – impose limits on the take of two aquatic species. The first bans the capture of manta rays in state waters (unless authorized by a DLNR permit). The second bans the take of 'opihī, the popular delicacy, on O'ahu, while establishing closed seasons for 'opihī harvesting on other islands. Nearly all the testimony offered on the ban was supportive. The DLNR, however, opposed the bill, reminding the Legislature that in 2002, it handed over to the department authority to develop rules for fisheries management, which up to that point had been largely regulated by statute. At that time, DLNR administrator Laura Thielen stated in her testimony on SB 1, “the Department argued in favor, and the Legislature agreed, that the creation of regulations for such matters as minimum sizes, seasons, bag limits, etc., were better handled through the administrative rule process.” Thielen's request that the DLNR be allowed to “continue its efforts to promulgate these proposals through administrative rules” fell on deaf ears.

Thielen expressed much the same concerns in her testimony on the manta ray bill, saying her department appreciated the sentiments, but “believes it to be duplicative of efforts already underway via the administrative rule process.” She noted that a proposed rule to protect manta rays,

sharks and certain other marine species had already been discussed and endorsed by the West Hawai'i Fisheries Council. As with the 'opihi bill, however, Thielen's concerns carried little weight with the Legislature.

Aside from the DLNR's concerns, the bill faced no opposition whatsoever. One testifier noted that in 2006, House Resolution 30 urged the DLNR to take action to protect manta rays within one year. Since then, he wrote, there has been no progress. The director of the Kona-based Manta Pacific Research Foundation, Jan McLaughlin, told legislators that a 2002 survey of Kona dive and snorkel tour operators found that the lure of seeing manta rays swim brought the operators \$2.5 million a year in revenue, with a more recent survey suggesting the value could be 20 percent higher.

Air Pollution

It seemed like a motherhood-and-apple-pie measure: eliminate a 4,000-ton-a-year cap on fees companies have to pay for each ton of pollutant they spew into the atmosphere. The fees collected from holders of air-pollution permits are used to pay costs associated with enforcing the state's clean-air regulations, including salaries of employees of the Department of Health's Clean Air Branch. Who could possibly be opposed to a measure that would end an inequity in current law and, at the same time, bring in *more* revenue to a cash-strapped state?

The state, that's who. Chiyome Fukino, director of the state Department of Health, testified that "this measure has merit, however, given the current economy, it would not be prudent to pursue enactment at this time." Fukino said that passage of the bill would raise about \$230,000 in additional fees, nearly all of which would come from operation of the Hawaiian Electric Company's Kahe plant, on the Wai'anae coast. Supporting testimony came from the Sierra Club and the Blue Planet Foundation, both of which noted that the existing law "provides an incentive for large polluters" to continue polluting.

Governor Lingle allowed the measure to become law (Act 42) without her signature. Increased fees "will almost certainly be passed on to the consumer through higher electric utility rates," she wrote in her statement of concern. "This bill attempts to address renewable energy goals through punitive measures that adversely impact our residents... In these difficult economic times, we cannot continue to operate government programs and services by burdening consumers with higher taxes and fees."



Renewable Energy, Climate Change, Sustainability

Self Sufficiency

House Bill 1271 sets up a task force to recommend ways in which Hawai'i can meet its own energy and food needs. That's a bit of a yawn. But the bill gets interesting when it proposes an increase — to \$1.05 from a nickel — in the tax on each barrel of petroleum product sold to retailers or other end users. Of that, 5 cents is to go to the Environmental Response Revolving Fund (which responds to oil spills); 55 cents is to go to the Energy Security Special Fund; 10 cents is to be deposited into the Energy Systems Development Special Fund; and 35 cents is to go to the Agricultural Development and Food Security Special Fund established by the bill.

Many of those who testified in support of raising the tax pushed for one that would be nearly five times as great — \$5 a barrel — describing the proposed \$1.05 tax as hopelessly inadequate.

The Lingle administration pulled out all stops in opposing the measure. Among those urging the Legislature to hold it were Linda Smith from the governor's office and the heads of the departments of Agriculture; Taxation; Budget and Finance; Health; and Business, Economic Development and Tourism.

The agricultural development fund is to be used (subject to legislative appropriation) for grants to farmers; acquisition of agricultural lands or processing facilities; farm improvements; equipment purchases; research; promotion and marketing of agricultural products; and other activities "intended to increase agricultural production or processing that may lead to reduced importation of food, fodder, or feed from outside the state."

In addition, the bill appropriates \$1 million for control of the varroa mite affecting honeybees; \$2 million for pest inspection, quarantine, eradication, and other responses to the spread of pest species; \$1.2 million to expand the food safety program of the Department of Agriculture; \$2.6 million for "livestock revitalization;" \$900,000 for improvements to the Lower Hamakua Ditch on the Big Island; \$1.1 million for an agricultural water main in upcountry Maui; \$1.5 million to build the Kealahou pipeline in upcountry Maui; and \$200,000 for the planning phase of the state Agricultural Water Use and Development Plan.

The bill establishes a clean energy program within the Department of Business and Economic Development, funded by roughly \$400,000 from the state Energy Security Special Fund. It also sets up a Renewable Energy Branch within the department and appropriates \$119,280 to pay for the position of the branch chief.

The governor had not signed the bill at press time; given the opposition evident during the several legislative hearings on the bill, a veto would seem likely.

Expedited Permits

Last year, the Legislature passed a bill to push along the often sluggish process of obtaining permits for the siting of renewable energy facilities. **House Bill 590** tweaks that by inserting new triggers for automatic approval.

Favoring the changes were the Department of Business, Economic Development and Tourism, Castle & Cooke (the moving force behind the 2008 legislation), and the Land Use Research Foundation of Hawai'i, although the second two wanted to see an "and" changed to an "or," further liberalizing the automatic approval conditions. Opposing testimony came from the Sierra Club.

Global Warming

To deal with the local impacts of global warming, the Legislature passed **Senate Bill 266**, which establishes a climate change task force, under the administrative umbrella of the Office of Planning. Tasks for the new body include monitoring the effects of global warming on natural resources, residents, the visitor industry, commerce, buildings and infrastructure, health, and native species. It is also to estimate costs of the adverse effects of climate change and rising sea levels and to make recommendations to the legislature to mitigate or address such changes.

The task force is to have 17 members: one each from the state departments of Health, Transportation, Land and Natural Resources, and Defense; one from the Office of Planning; one from each of the four counties; three appointed by the president of the Senate; three appointed by the speaker of the House; one from the Center for Island Climate Adaptation and Policy at the University of Hawai'i at Manoa; and one from the Joint Institute for Marine and Atmospheric Research.

The task force's mission is large—but it was given only a limited time in which to accomplish its ambitious charge. The legislation establishes a sunset date of June 30, 2011 for the task force.

—P.T.

Space Tourism Gets a Boost from Legislature

For two legislators, their proudest moment in the 2009 legislative session came with passage of a bill giving the Department of Business, Economic Development and Tourism half a million dollars to buy a spaceport license from the Federal Aviation Administration. Half is to come from the state's Airport Revenue Fund, the rest is to be drawn from the Tourism Special Fund.

Sen. Will Espero told the *Honolulu Weekly* that passage of the measure, **House Bill 994**, "was the most important economic development issue of this session." Rep. Gene Ward told the *Weekly* that the bill provided "the single biggest boost to our future economy... Hawai'i will no longer be the same because of this bill." So enthusiastic was Ward, in fact, that he posted his thoughts on the subject in a video available on YouTube.

The measure was supported by the Office of Aerospace Development, an arm of DBEDT. OAD's director, Jim Crisafulli, has described the scenario he envisions for space tourism in Hawai'i. Tourists from, say, Hokkaido will take a hybrid business plane (powered on takeoff and landing like any other, but capable of getting to suborbital space through the use of rockets once the plane is well above the Earth). The flight to Honolulu will take less than an hour, he says. Once in Honolulu, the tourists will train for a week at Kalaeloa, preparing for their weightless ride. "Then they'll be flown to the Kona airport, stay overnight one night, and then on the return, they will fly up to 62 miles and have this space experience, roughly about 4

minutes of which will actually be weightless," Crisafulli says. (Crisafulli's description of the way the space-tourist industry would work can also be found on YouTube, where he is interviewed by Gene Ward in "A Word with Ward," a talk-show formatted video.)

According to Crisafulli, no modifications will be needed to Hawai'i airports to accommodate the space travelers. "The launch facility is just a commercial airport," he says. Because of this and the fact that most Hawai'i airports are near the ocean, thus reducing safety considerations, Hawai'i can more easily obtain a license from the FAA, Crisafulli says, using the programmatic environmental impact statement the agency prepared for sub-orbital commercial flights.

Just how attractive is the space-tourism scenario?

In his testimony on the bill, DBEDT director Ted Liu stated that space tourism in Hawai'i could generate "approximately \$200 million in annual gross revenues from user fees." That, he said, was based on the business projections of Rocketplane Global, "one of several companies that have approached our state to request permission to launch these types of vehicles from Hawai'i as early as 2011." Rocketplane Global had also proposed developing a "terrestrial space-themed education and training center" at Kalaeloa, Liu said.

No one mentioned just how expensive the "space experience," as Crisafulli described it, would be. But Virgin Galactic is selling rides on its spaceplane for \$100,000 a pop.

Rocketplane Global is advertising rides at the truly stratospheric rate of \$250,000 per passenger.

In further support of the aerospace industry, the Legislature passed **Senate Bill 537**, establishing an Aerospace Advisory Committee. The 16 members are to "advise and assist the legislature and state agencies in monitoring, assessing, and promoting aerospace development statewide."

Six members are to come from the aerospace industry (three representing state aerospace interests, the other three representing the larger industry). One member is to be an investment banker. Each of the economic development boards of the four counties is given a seat, as is the state Department of Education. The University of Hawai'i system has three seats (one from the Manoa campus, one from the Hilo campus, and another one representing the statewide community college system). The last seat will be occupied by the chairman, "who shall have experience, knowledge, and expertise in space-related activities and development in the global and state aerospace industry." DBEDT is to provide administrative support. — P.T.



For More Information

Ward's video on HB 944 may be found at: <http://www.youtube.com/watch?v=K3vU64RCghs>.

The video in which Crisafulli describes the space-tourism scenario may be found at: http://www.youtube.com/watch?v=xwTtxcRW8g&feature=channel_page

'One of the Dreams of my Childhood...'

What follows is a partial transcription of remarks made by Rep. Gene Ward in a YouTube video about Hawai'i space tourism.

Today is April 30, 2009. And today is a historic day. Hawai'i will never be the same after passage of House Bill 994. House Bill 994 creates Hawai'i as a spaceport. It has immense implications for the future of tourism.

We're already the center of *normal* tourism, where people come and go, but now the tourism we're talking about is *space* related. Number 1, it's space travel with weightlessness that we will have here in a matter of years, I would say probably two or three years at the most.... A tourist's dream – one of the

dreams of my childhood, in fact. ...

But the more exciting thing for tourism, in addition to the weightlessness, is the ability for rocket planes to take off normally and land normally, but again after they get up two miles, they shoot their rocket engine and then they trajectory, as in a rocket plane, above the earth's atmosphere, and then re-enter, for example, from Hawai'i to Hokkaido, that's Japan, just north of Tokyo, forty-five minutes. Honolulu International, Sapporo, Hokkaido – forty-five minutes. With passage of this bill, it's not only for

the fun for the tourists, but it's for the economic growth of this state....

Hawai'i will never be the same for people's motivation to come here or, when they come and go, down the line in a number of years, when we actually have rocket launches. Normal takeoff and landing, so there's no environmental difficulties. But they're going to be able to go through, above the earth, and then back into the atmosphere, at a tremendous saving of time and, hopefully, money, even though right now it's still experimental....

A Two-Year Extension for the 'Aha Kiole Committee

Act 212 of the 2007 Legislature set up the 'Aha kiole advisory committee as a first step toward developing a resource management system that would incorporate Native Hawaiian traditions. In the two years since then, the committee has been embroiled in controversy over its ties to the embattled Western Pacific Fishery Management Council, a lack of transparency in its deliberations, questions over funding, and actions it has taken that overstep the limits of its jurisdiction. Under Act 212, the committee was to finish its work by June 30 of this year and the next phase of the process was to start.

But with the deadline fast approaching, the committee members balked at dissolving. Several bills considered in the 2009 Legislature proposed moving forward with the process of establishing elected 'aha ahupua'a councils, but in the end, the wishes of the 'aha kiole committee prevailed. **Senate Bill 1108** passed, extending the life of the committee to June 30, 2011.

Among those opposing the extension were KAHEA: The Hawaiian-Environmental Alliance, the Office of Hawaiian Affairs (which proposed several changes to the structure of the committee, should its life be extended) and several individuals. Favoring it were members of the committee itself and several chapters of the Association of Hawaiian Civic Clubs, including the Princess Ka'iulani chapter, whose president is none other than Leimana DaMate—who also serves as administrator of the 'aha kiole committee. The Department of Land and Natural Resources, charged with administrative oversight of the committee, took no position, but did ask that the legislators “understand that given the budgetary cuts the department has had to absorb this fiscal year and further cuts proposed in the Executive Biennium Budget request, the Department’s personnel and fiscal resources are being spread thin,” with departmental priorities already suffering.

Despite the strong testimony opposing the measure, the Legislature approved the time extension, agreeing with committee members that they needed more time to complete their mission under Act 212. (*Environment Hawai'i* has reported extensively on the 'aha kiole committee; our most recent reports appeared in the April 2009 edition.)

Governor Linda Lingle allowed the measure to become law without her signature. In her statement of concern, she identified two

areas in which the bill was problematic:

“First, it fails to address the need for a larger cross-section of the native Hawaiian community to be represented on the membership...

There are many groups and individuals in the Native Hawaiian community who care deeply about the preservation and restoration of our ecosystems. It is unfortunate that the membership has come from only one portion of that community.” Also, Lingle said, she was concerned about the positions taken by the committee on issues “that appear to be outside the scope of its intended jurisdiction,” referring apparently to the committee voicing opposition to a marine reserve in waters around the Commonwealth of the Northern Mariana Islands.

Follow the Funds

The Legislature had appropriated roughly \$220,000 to support the 'aha kiole committee's work, but Governor Lingle has not released any of the funds. Still, the committee has managed to hold meetings around the islands (more than 100, according to its report to the Legislature) and has a very spiffy, professionally designed webpage (www.ahakiole.org).

So, where is the money coming from?

While committee members have said they've spent several thousand dollars of their own money to cover costs, it's unclear what its total costs have been. Given the close links between the Western Pacific Fishery Management Council and DaMate, the council, with its multi-million dollar budget, is the most likely source of additional funds. The council supports a Regional Ecosystem Advisory Committee (REAC), which closely follows the 'aha kiole committee's work.

The nature of the committee's support was another issue raised in Lingle's statement of concern. After noting that the bill did not include an appropriation, she wrote, “I believe it is incumbent upon the Legislature to review the sources of support the 'aha kiole advisory committee has used and determine

if those sources have compromised the independence or objectivity of the committee.”

Adding weight to the suspicion of outside funding is a recent request for proposals published by the council, seeking “Hawaiian cultural ocean and ecosystem principles project coordinator(s)” for the islands of Hawai'i, O'ahu, Kaua'i-Ni'ihau, and Moloka'i-Lana'i. (No coordinator was sought for the island of Maui.) For Hawai'i island, the coordinator is to “initiate meetings... with island communities to promote effective ecosystem management of natural resources within

the council's authority.” For Moloka'i-Lana'i, the coordinator is to “develop their own community based natural resource management plan.” The O'ahu project coordinator is to advise the council “on the value and advisability of a conference to be held on O'ahu that will discuss and make recommendations on the process to engage communities in community-based ocean natural resource management.” Finally, the Kaua'i-Ni'ihau coordinator is to be a “liaison between Kaua'i fishing community and Ni'ihau community to establish a workable, reasonable solution on fishing in the Ni'ihau waters.”

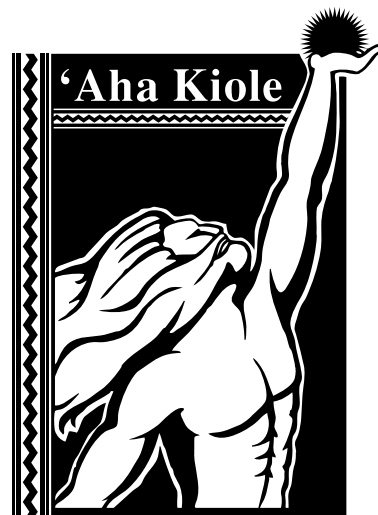
According to Charles Ka'ai'ai, the council's indigenous community coordinator, “the ecosystem coordinators were budgeted in the Coral Reef award from NOAA [the National Oceanic and Atmospheric Administration].” Originally, the council's grant called for just one coordinator in Hawai'i, Ka'ai'ai said in an email to *Environment Hawai'i*, “but the work required to complete the tasks were broad and detailed, requiring contracting someone or an organization with specific skills, capabilities and social capital.”

Sixteen applications were received in response to an RFP issued in 2008, Ka'ai'ai said, but none of the respondents filled the requirements for the position.

“Before going out for more applications, it was decided to ask if it would be acceptable to divide this position into four or five discrete projects so project coordinators could complete the tasks called for in the grant,” he continued. “We developed four projects that would address the award conditions, serve the council's need and benefit communities based on the requests for assistance that the council receives as part of our public outreach process.”

The deadline for responding to the RFP was June 15.

—P.T.



Ranchers Who Lost Land to Palila Seek Extra Compensation from State

To judge by the testimony submitted, **Senate Bill 1345**, calling for holders of leases of state lands to be compensated if any acreage is withdrawn, was one of the less controversial measures taken up by the 2009 Legislature. Only the Department of Land and Natural Resources voiced opposition to the bill in hearings by several committees of the House and Senate. All the other testimony—all of it from ranchers and cattlemen's groups—was strongly in support.

Yet once the bill was sent to Governor Linda Lingle, SB 1345 suddenly generated fierce interest among environmental and conservation groups, who worry it could set a bad precedent and, what's more, undermine the state's ability to exercise responsible stewardship over public lands.

The bill calls for the state to compensate lessees for the "loss of reasonably anticipated income associated with the withdrawn leased land," to reimburse lessees "for any insurance costs associated with the withdrawn land, and, at the lessee's request, to extend the lease for 'not more than the number of years remaining in the original lease.'"

What prompted the bill was the dissatisfaction of four ranchers with terms under which conservation easements were placed over some 6,500 acres of high-altitude Mauna Kea lands that had been included in their leases. The easements are called for in a 1999 agreement involving state and federal agencies that sets forth mitigation measures to offset the loss of habitat for the endangered palila (*Loxioides bailleui*) caused by the re-routing of the cross-island Saddle Road.

The ranchers are called out specifically in the findings section of the bill: "The purpose of this Act is to prevent similar situations as the Saddle Road withdrawal from occurring in the future."

Existing law provides that public land under lease "shall be subject to withdrawal by the board of land and natural resources at any time during the term of the lease with reasonable notice ... for public uses or purposes, including ... easements of all kinds." When land is withdrawn, lease rents are to be reduced in proportion to the value of the land withdrawn, and lessees are to be paid the "proportionate value" if legally permitted, permanent improvements are damaged or destroyed. If crops are taken, the Land Board is to pay the lessee the value of the crops. (See Section 171-37, paragraph 3, of Hawai'i Re-

vised Statutes, for the full text.)

Laura Thielen, DLNR administrator, was alone in her opposition to the bill. "The department's standard lease form already contains a provision requiring the state to lower rents in proportion to the reduction in leased area and compensate the lessee for improvements made unusable in the process of taking leased lands," she noted. "To require the department to pay the lessees' insurance costs and speculative income losses on top of the existing remedies could prove costly to the state. The department characterizes the income losses under the bill as speculative because the bill provides no framework for evaluating such claimed losses. The bill merely states that the department compensate a lessee for 'loss of reasonably anticipated income associated with the withdrawn leased land.' ... Further, the bill provides compensation for lost income as opposed to lost profits. A lessee should not be compensated for income without deducting the operating expenses required to generate that income. Finally on the compensation aspect of the bill, there is the potential for costly litigation resulting from a dispute between the state and a lessee over the calculation of losses resulting from the taking."

Thielen also noted that existing law already authorizes the Board of Land and Natural Resources "to grant lease extensions ... and make other modifications to the lease where the partial taking of leased land results in significant economic hardship to the lessee. ... The bill would allow the taking of even a small portion of land, for example 100 square feet for a utility easement on a 1,000-acre lease, would automatically qualify the lessee for an extension."

As the bill progressed through cross-over and into the House of Representatives, Thielen's testimony grew more impassioned and her arguments lengthier. On April 6, she told the House Committee on Finance, "An automatic extension in statute would go against all the provisions for fairness in the leasing of state land in Chapter 171, HRS [Hawai'i Revised Statutes]. When seeking public lands for private use, potential lessees are well aware of the benefits and drawbacks of leasing state lands as opposed to conducting their activities on private lands. First and foremost is the knowledge that those lands are public assets that must serve primarily the interests of the general public and the public

trust purposes, and secondarily the needs of a private user."

Mitigating Circumstances

To understand the bill's genesis, it is necessary to go back ten years, to 1999, when the heads of the state departments of Transportation and Land and Natural Resources signed a memorandum of understanding with representatives of five federal agencies (the Federal Highways Administration, or FHWA, the Military Traffic Management Command, the U.S. Army Garrison—Hawai'i, the Fish and Wildlife Service, and the U.S. Geological Survey's Biological Research Division). The MOU set forth the measures that each agency committed to undertake to mitigate the loss of palila habitat as a result of improvements to the Saddle Road. Part of the mitigation measures included setting aside so-called "replacement lands," areas that were or could be habitat for palila that could replace land lost to the road project.

The DLNR committed to two tasks with respect to the replacement lands: first, to assist the FHWA and the state DOT "in compensation negotiations with current lessees of the state replacement lands;" second, to "perform all administrative and right-of-way related work to ensure subdivision and transfer of the [palila critical habitat] replacement land parcels."

In 2001, the Legislature passed Act 236, instructing the DLNR to "expedite discussions" with representatives of the four ranches affected by the designation of the replacement lands: Parker Ranch, K.K. Ranch, S.C. Ranch, and Boteilho Hawai'i Enterprises. The department was to "identify and investigate all alternatives that will: (1) Fairly compensate the ranchers for losses suffered as a result of the withdrawal of any leased lands; and (2) Avoid providing exceptions to public land leasing policies." Act 236 also authorized the DLNR to allow lessees to use up to 10 percent of the land remaining in their lease for "alternative agricultural use" without increasing lease rent.

When it reported on the negotiations in January 2002, the DLNR told the Legislature that the ranchers would be eligible for reimbursement of "actual reasonable expenses for vacation of the property" as provided for in federal law, "as well as any required payment for improvements to the property."

Some of the ranchers "felt that compensation by DOT would not sufficiently address the actual damages," the report stated. Federal law "primarily views compensation for cattle on a salvage value basis and does not address the loss of future revenue from additional calves," it noted.

According to Dave Gedeon of the Federal Highways Administration, the ranchers could have received compensation for relocation and for improvements under federal law, but their expenses had to be documented. None of the ranchers could satisfy this requirement, he said.

In an effort to address the ranchers' concerns, the Land Board approved "in principle" lease extensions if ranchers needed longer lease terms as a condition of financing. "With these extensions," the DLNR report stated, "the lessees will have another 20 years to recoup those revenues lost due to the removal of the palila mitigation areas from grazing."

At the time of the report, all four leases were to expire within 10 years. "With the anticipation that the [Land] Board will grant lease extensions... the ranchers feel that the impact of the loss of the grazing areas to the palila mitigation requirement has been reasonably mitigated," the DLNR wrote. "Although not what they would consider ideal, they are accepting of the Board's actions."

A Slow Start

In November 2002, a 10-year easement over 6,542 acres of the land under lease to the ranchers on the north and west slopes of Mauna Kea was granted to the state Department of Transportation, for which the DOT paid the DLNR \$221,900. Under the original MOU, the state was to pay for installing an ungulate-proof perimeter fence around the replacement lands, but by 2003, it was clear that the state would not have the funds. In January 2004, the MOU was amended, so that now funds for fencing would be covered by the Federal Highways Administration.

The USGS would take over responsibility for controlling predators and alien species on the replacement lands. The DLNR would be responsible only for mowing for a period of five years.

It took years – and some \$2.6 million in federal highway funds – for the replacement lands to be fenced, however. And in the meantime, the ranchers were free to graze their cattle in the easement areas, rent-free.

SC Ranch, where the easement took 791 acres out of the 7,780 acres originally under lease, was notified in September 2005 that fencing was completed except for final gate installation. Still, the DLNR did not give the ranch "official notice" to remove all cattle until July 2006, with a deadline to get the cattle out by August 15, 2006. The annual lease rent for SC Ranch had been reduced by \$3,597 to adjust for the easement. Thus, to SC Ranch, the value of the use of state pasture lands for three years and eight months came to roughly \$13,200.

Boteilho Hawai'i Enterprises, whose lease covered 7,932.36 acres, saw its pre-easement annual rent of \$32,640 drop to \$23,470.77, to adjust for the 2,228 acres removed in the easement. It, too, was given an August 15, 2006 deadline for cattle removal from the easement area. The value of 3.67 years of free grazing on the easement lands in the Boteilho lease comes to \$33,650.

K.K. Ranch lost 2,123 acres to palila critical habitat, out of the 7,267 acres originally under lease. For that, it saw its annual lease rent reduced from \$30,000 to \$21,233, giving the easement lands a rental value of \$8,767 a year. K.K. Ranch also enjoyed the free use of

the easement lands for 3.67 years, for a total value of \$32,175.

Unlike the three previous leases, that held by Parker Ranch was on the western slope of Mauna Kea, adjoining existing palila critical habitat. Of the 1,739 acres under lease, 1,399 were placed in the conservation easement. For this lease, Parker Ranch saw its annual rent cut from \$9,125 to \$1,782. Again, the ranch was given an August 2006 deadline to have all cattle removed from the easement area. The use of 3.67 years of the easement area, rent-free, had a value of \$26,949 to Parker Ranch.

But the freeloading did not come to an end when the last fence was completed. According to DOFAW wildlife biologist David Leonard, "On Jason Moniz's ranch [K.K. Ranch], there have been cows on that easement persistently. Some of that was because the fence was damaged by very large storms, fences through the gullies washed out. But there also have been cases where the gates have been left open and cows come in on a pretty consistent basis."

The easements are to expire in 2012, when the Saddle Road mitigation agreement ends. What happens then?

According to DOFAW biologist Scott Fretz, "it's always been our intention to set those aside as forest reserves.... We testified against [SB 1345] and also recommended that the governor veto it.... And we're hoping that she does.... [SB 1345] would really complicate setting aside the lands, since it would require us to pay an unknown sum to those lessees, which would completely change the cost-benefit scenario for those lands."

— **Patricia Tummons**

Palila from page 1

the motion on May 21, and gave the DLNR until mid-August to prove that it's making progress.

While DLNR wildlife biologists Scott Fretz and David Leonard agree with the plaintiffs that the entire mountain needs to be fenced and reforested and that the palila's recent slide warrants more aggressive management, they point out that the department has never had sufficient money to do what it needs to. Even so, Leonard, with the DLNR's Division of Forestry and Wildlife, says he believes the palila will live to see the benefits of the state's recovery efforts.

The likelihood that the palila population will continue its current trajectory is "relatively small," unless the birds get hit with "wild cards" like mosquito-borne disease or fire, he said.

Case History

In 1978, the plaintiffs filed their first lawsuit against the state, claiming that it was violating the Endangered Species Act by maintaining sheep and goats that were destroying palila critical habitat. A year later, judge King agreed and found that the state's game management on Mauna Kea constituted an unlawful taking of palila. He ordered the state to stop maintaining sheep and goat populations in the critical habitat area and eradicate them by July 31, 1981.

The state failed to meet the deadline. Shortly thereafter, a study showing that mouflon sheep posed as big a threat to mamane as did feral sheep and goats prompted the plaintiffs to seek an amendment to King's order to add mouflon and hybrid mouflon/feral sheep. King agreed and on January 27, 1987, ordered the state to remove all mouflon, hybrid, and feral sheep from the palila's critical habitat

within one year.

While it appeared that the state had eradicated goats by the deadline, the sheep persisted. According to court documents, the plaintiffs alleged that the state had relaxed its eradication efforts to appease hunters (the palila critical habitat and the DLNR's Mauna Kea Game Management Area largely overlap). Lacking funding and a helicopter rental contract, the documents state, the DLNR halted its staff hunting and aerial surveys in 1995. Surveys resumed in 1996, but staff hunting did not.

Although Earthjustice and the state signed an agreement that the state would resume aerial shooting in 1998, an October 8 letter from then-Governor Ben Cayetano halted it briefly.

Cayetano rescinded his letter ten days later and on October 30, 1998, the parties entered into another agreement – which

became an order with the court on November 10 – whereby the state would “use its best efforts to minimize migration of goats, feral sheep, mouflon sheep, and hybrid mouflon/feral sheep, into the critical habitat for the palila on Mauna Kea. Those efforts may include but shall not be limited to: maintenance, repair and upgrading of the forest reserve perimeter fencing, and periodic surveys to detect breaks in the fence.” The state would also continue an eradication effort using public hunting and aerial shooting.

Less than a year after signing the agreement, the DLNR, joining an appeal filed by a hunters' group to stay King's orders, asked the judge to allow it to maintain a sheep herd of 200 animals. At the time, Jon Giffin, who was then head of the Hawai'i Island branch of the DOFAW, testified that while sheep inhibited mamane growth in the 1970s and 1980s, “This trend has been reversed....[I]n the mid to late 1990s, it no longer appears that the sheep are an inhibiting factor to the mamane forest.”

The state's eradication efforts had allowed the forest to grow larger and denser, Giffin noted, but the vastness of the critical habitat, combined with the inaccessibility and dense vegetation of certain areas, made “it extremely difficult, if not impossible, to locate and kill all the sheep on Mauna Kea.”

He added that the 53 miles of fence, erected in the 1930s and 1940s, that belts the mamane forest were continuously damaged by vandals, washouts, falling trees, and cattle. What's more, he wrote, the denser forest had made the sheep, which had learned to hide from helicopters, harder to find and aerial shooting less effective.

King denied the state's and the hunters' requests on October 19, 1999.

In the years following King's last order, the state continued its eradication efforts through public hunting and aerial shooting, taking between about 150 to a few hundred sheep from Mauna Kea every six months. From the second half of 2006 to the first half of 2008, however, the number of sheep taken jumped to an average of more than 600 every six months.

At the same time the number of sheep taken from Mauna Kea was doubling, scientists with state and federal agencies had discovered that the core palila population, which occupies only five percent of the bird's original range, was declining.

Contraction

In May 2008, the Hawai'i Audubon Society published an article in its journal *'Elepaio* by Leonard of DOFAW and Paul Banko, Kevin

Brinck, Chris Farmer and Richard Camp of the U.S. Geological Survey Biological Resource Discipline. They showed that population counts over the previous five years suggested the bird's numbers were dropping rapidly in the core palila habitat on the western slope of Mauna Kea. Palila have all but disappeared from the eastern and southern slopes, and while a small sub-population of translocated and captive-bred birds have successfully bred on the northern slope, the article states, it is “not yet self-sustaining.”

Palila population estimates have fluctuated wildly since data collection first began in 1980 – with a high of nearly 7,000 in 1996 to



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a low of fewer than 2,000 in 1992 – but had never indicated any statistically significant decline until now.

“From 2003 to 2007, the estimated number of palila in the core population has declined by 58 percent,” the article states, adding that the 2008 population estimate indicated a continuing decline. In 2003, the palila population was estimated to be 5,354; by 2008, that estimate had dropped to 2,237.

“[I]f the trajectory continues without change, the species will be extinct by 2012,” the article states.

The decline of palila in the core and their apparent disappearance from the southern and eastern slopes “indicate that their dramatic range contraction may be continuing,” the article continues. “This reduction is unexpected given that [biologists in 1999] reported an improvement in palila habitat following the periodic removal of introduced ungulates. Other factors may be acting in concert with the current drought and the concomitant reduction in mamane seed production to produce the sharp population decline we describe here,” it states.

Although the authors said that the trend was troubling, since it seems to have no apparent cause, they concluded that curtailing the palila's known threats is a necessary – even if not sufficient – condition of

stopping the decline and preventing another Hawaiian bird species from going extinct.

In an interview with *Environment Hawai'i*, Banko added that palila recovery must address a variety of threats. For example, feral cats kill about 10-11 percent of palila chicks. “But it's like peeling an onion. If you don't peel that top layer, which is ungulates, [the rest] really doesn't matter,” he said. He added that the failure so far to establish new, self-sustaining populations by translocating palila from their core habitat or by releasing birds raised in captivity has shown that those techniques are not going to “save the day at the last minute.” Given the significant time and money required to make translocation and captive release work, he added, it's best not to let the population get to the point where those are the only options.

Fretz, DOFAW's wildlife program manager, told *Environment Hawai'i* that the article prompted his agency to redirect its focus on the palila's core habitat. Until recently, the division was spending most of its palila-related efforts setting up new habitat for the birds on parcels that had been set aside under a Saddle Road realignment mitigation agreement with the Federal Highways Administration, the U.S. Fish and Wildlife Service, and other federal agencies.

“It was a change for us,” Fretz says. “Five years ago, we assumed the population was stable...Mitigation was set up, the USGS [one of the parties to the Saddle Road agreement] was doing predator control. According to the recovery plan, we would establish a new population. Under the Saddle Road mitigation we put up a big fence and our strategy was to continue to control ungulates in the core habitat [on the western slope] and put a team on the north slope to plant mamane. The USGS would translocate birds and we would also do captive propagation. Five years later, we realized that for the fifth year there was a decline. The USGS ran out of money for predator control in the core so we expanded the size of our team there (from one person to five) and picked up predator control in the core.”

Back to Court

Researchers and resource managers weren't the only ones alarmed by the drop in palila numbers. Within a couple of months of publication of the *'Elepaio* article, Kaulukukui of Earthjustice began to hound

the DLNR to develop and implement a more aggressive recovery plan. At the time, the DLNR was in the process of acquiring a grant from the Honolulu office of the U.S. Fish and Wildlife Service, which had managed to scrape together some \$900,000 in discretionary funds to help pay for fencing palila critical habitat.

Under the grant, the state has until October 1 to come up with a plan for the money, but that was not soon enough, or good enough, for the plaintiffs in the case. And on March 23, they filed a motion to enforce the three previous eradication orders and to compel the state to construct, no later than June 1, 2011, an ungulate-proof fence around the perimeter of the critical habitat. In the late 1930s or early 1940s, they argued, Civilian Conservation Corps crews managed to erect the existing 53-mile fence in under 20 months. They added that the DLNR had let the fence fall into disrepair and had not inspected or maintained it for several years after the 1998 order.

Earthjustice also included in its filings a December 2008 declaration from Banko, who admitted that while it is impossible to nail down how various factors are contributing to the current population decline, those factors are probably "working in conjunction with the drought conditions that have prevailed over the last five years." Resource managers can't stop a drought, he continued, but its effects on palila can be mitigated.

"Our research has shown that while pod production during times of drought is reduced, mamane nevertheless continue to produce some pods," he said. "Thus, if more trees were available, there would be more pods and other food resources available in times of drought (as well as in times of normal rainfall). In other words, given that palila will have more to eat if there are more trees, it is possible to reduce the effects of drought (or other environmental factors that reduce the availability of mamane pods) by actively increasing the density of trees in the forest."

Banko added that sheep, sometimes traveling in herds of more than 100, have been seen "from the top to the bottom of palila habitat" and that they continue to browse the lower limbs of mamane trees and severely damage saplings and seedlings.

In his April 27 response, deputy attorney general Michael Lau blamed the spike in sheep numbers on a recent breach in the fence. In November 2008, DOFAW staff discovered that roughly 3,000 feet of fencing had been removed along the southern slope, behind the Army's Pohakuloa Training Area headquarters. Lau wrote that an Army representative had said it would start repairing the fence in the spring or summer of 2009 (that timeline has since become "fluid," according to

Leonard) and that DOFAW would increase its aerial hunts from two to four a year to get the sheep numbers down.

Lau also pointed out that the fence Earthjustice proposed would cost the state at least \$5,820,000, far more than the department can afford given the current economy and severe budget cuts. He added that the court's orders do not require a fence to be built and that although the state does plan to build one, it only has money to do a portion of it right now.

Finally, he noted that the forest on Mauna Kea continues to improve as a result of the state's eradication efforts and that even the state's palila experts admit that "there seems to be no overt cause for the decline..."

DOFAW administrator Paul Conry added in a declaration that his division's entire endangered species budget for 2009 is only \$3.2 million, plus about \$4-5 million in federal matching funds.

Twice in May, Kaulukukui, Henkin and Lau appeared before Judge King to discuss whether or not he should order the state to build a new perimeter fence around palila critical habitat. King seemed concerned about the palila's chances for survival and asked for specifics on what the Army planned to do about its 3,000-foot gap and what the state planned to do with its \$900,000 FWS grant.

DOFAW's pre-application for the grant includes a 10-year, \$10-12 million budget to restore palila habitat. Enclosing the entire critical habitat within the first five years would cost between \$5.8 million and \$6.8 million; aerial sheep control for the same time period would cost \$750,000. Ungulate eradication after the fence is built would cost about \$2-3 million, and predator control and fence repair for the entire 10-year period would cost \$2 million. According to Fretz, the \$900,000 from the FWS will be used to construct seven miles of fence.

While Lau argued that the DLNR has been "very reasonable" in its approach to controlling ungulates with limited funds, Kaulukukui countered that it could have done and can do better.

"Nothing...changes the fact that they may have gone out one time every six months [to inspect or maintain the fence]. There are downed portions of the fence all over the place. It's a sieve," she said, adding that construction of the partial fence the state has planned won't start until 2010 and has "no end in sight." Henkin added that it will take longer for the state to get the money for a perimeter fence if it does not have a deadline.

King, while alarmed at the drop in the number of palila, did not seem to feel the

same sense of urgency as the plaintiffs and their attorneys. At one point during the second hearing, King told Kaulukukui, "It looks like things are on the move [with the state]... Can't you wait until three, four, five, six months to see what they're doing?"

And in the end, King chose to wait and see, writing in his May 21 order denying Earthjustice's motion that he was not convinced that the state had breached its duty "to use... best efforts to minimize migration" of ungulates. To ensure that the state follows through with its plans for the fence, King scheduled a status conference for August 21.

What's next?

Whatever King ultimately decides about the fence, Banko says he's frustrated by the fact that palila management efforts never really gained momentum despite all the additional attention it has received, especially as a result of the influx of funds from the Saddle Road mitigation agreement, which expires in 2012."

"Everybody's agenda is absolutely full. It's not like people laughed it off," he says.

But according to the Conservation Council for Hawai'i, it was more than that. Mistakes were made. CCH pointed out in an action alert last year that biologists wanting to translocate or release birds were unable to access one of the Saddle Road conservation parcels, Pu'u Mali, for several years and that the fence around the other mitigation parcel, Ka'ohē, was not designed to exclude mouflon. The alert adds that the two parcels lacked funding from the Federal Highways Administration and a restoration plan.

"Clearly, more than 10 years are needed to reforest the two palila mitigation parcels and establish self-sustaining palila populations," the alert states.

To keep palila management efforts going, Leonard and Fretz say that the state is seeking funding from a variety of sources, including the American Bird Conservancy, federal stimulus money, Section 6 funds, the FWS, and the Natural Resources Conservation Service.

"We need to find a way to shake the money loose," Fretz says, adding that his staff is ready to do whatever it takes to save the palila. "What we lack is the money. I tell everybody that. Decisions about money that are made elsewhere [the Legislature and the administration], we have no control over those."

Earthjustice has argued that a court-imposed deadline for the fence might help the state get more funds from the Legislature, but according to Leonard, "a legal mandate is never a criterion I've seen in an RFP [request for proposals]."

— **Teresa Dawson**

Land Use Commission Grants A&B Petition For Important Agricultural Lands on Maui

On June 4, the state Land Use Commission unanimously approved a petition by Alexander & Baldwin, Inc. to designate more than 80 percent of its vast Maui fields as Important Agricultural Lands (IAL). While commissioners praised the company's dedication to protecting agricultural land on Maui – one member even teared up while expressing her joy – others involved in two ongoing, heated disputes over the water that serves those lands voiced concerns about how A&B plans to use its non-IAL agricultural lands. In addition, they raised the issue of how the designation might influence those disputes, since nearly anyone who incurs legitimate, IAL-related costs (including certain legal fees) can claim generous credits offsetting tax obligations to the state.

In its petition, A&B sought IAL designation for 27,104 acres in West and Central Maui, 87 percent of which is in sugarcane grown by H&CS, an A&B subsidiary. Six percent is used for seed corn, pasture, and pineapple, and the rest is made up of gulches or agricultural infrastructure.

Although state law allows owners of IAL to fast-track the urbanization of up to 15 percent of a given petition area, A&B waived its reclassification credits, just as it did with its first IAL petition, for roughly 3,000 acres in south Kaua'i.

At the commission's meeting, held at the Maui Prince Hotel in Makena, A&B attorney Ben Matsubara said that the Maui petition area represents 83 percent of the company's fee simple agricultural lands on Maui. Under the IAL law, counties may require IAL designation for a maximum of 50 percent of a private landowner's property. Despite A&B's proposal for far more than that, Maui County, as well as a couple of members of the public, expressed dismay that A&B did not include all of the 33,000 acres of agricultural lands that it owns.

Maui planning director Jeffrey Hunt commended A&B for its petition and said he appreciated the company's voluntary waiver of land reclassification credits. However, regarding the thousands of acres of "gap lands" not included in the petition, he said, "We just want to put A&B and everyone on notice that we may protect those non-IAL lands through our General Plan update.... It's a nice application, but it could have been better." Hunt also asked the commission to include as a condition to the designation A&B's waiver of

reclassification credits.

Maui Tomorrow Foundation executive director Irene Bowie and the Sierra Club's Lucienne De Naie also questioned why several thousand acres, which they said were just as productive as any of the lands included in the petition, were left out. They noted that A&B had at one time proposed to develop those lands, which are located along the coast, at Ma'alaea, and at Hali'imaile.

Both women noted that the areas left out of the petition fall outside the county's urban growth boundaries. Bowie added that given two disputes currently before the state Commission on Water Resource Management over most of the water that feeds the petition area – the Na Wai 'Eha contested case hearing over surface water in West Maui and the 27 petitions to amend stream flows in East Maui – "the availability of water is in no way guaranteed."

Given the legal disputes between A&B and Maui residents who wish to see streams restored for natural, cultural, and kuleana uses, De Naie complained that the tax credits associated with IAL unfairly favor A&B and H&CS in the Na Wai 'Eha contested case hearing and the petitions to amend the standards for streams that feed the irrigation ditches of East Maui Irrigation Co., yet another A&B subsidiary.

Under the state's IAL incentives package, the state may issue up to \$7.5 million in IAL tax credits a year on a first-come, first-served basis. A single taxpayer may claim an IAL tax credit for qualified agricultural costs up to \$206,250 over three years. In the first year, a taxpayer may claim up to \$156,250 of qualified agricultural costs; in the second, up to \$37,500 of qualified costs may be claimed; and in the third, up to \$12,500. All of the qualified agricultural costs must have been incurred after July 1, 2008. (*Environment Hawai'i* previously reported that, according to the Department of Agriculture's deputy Duane Okamoto, only those with approved IAL petitions could receive the tax credits. Since then, however, Okamoto has deferred to the state Department of Taxation to decide who can claim those credits. According to Lynn Garcia of the Department of Taxation, any taxpayer who incurs qualified costs relating to IAL can claim credits.)

Under the law, qualified agricultural costs can include everything from expenditures for farming equipment to road repair to

agricultural housing. They may also include legal fees related to retaining sufficient water for agricultural activities, such as may be incurred in the CWRM cases. This, DeNaie said, creates an "un-level playing field."

Although the state Office of Planning had concerns about some of the lands that were included in the petition, it still supported the petition since those lands represented only a small percentage of the total area and the county did not oppose their inclusion.

In the end, the LUC unanimously approved the petition after touring the lands a day earlier. While A&B's representatives spent most of the tour showing off sugarcane fields and production techniques, the company's most recent SEC quarterly report suggests that it may be looking to farm crops other than sugarcane. A two-year drought that has hampered sugar production will likely result in H&CS posting significant operating losses in 2009, greater than those in 2008, the report states. "The Company recognizes that continuing large losses at its sugar operation are unacceptable and has implemented, and will continue to, actions to mitigate the losses, as well as to determine the ongoing viability of its sugar business and of alternative business models," according to the SEC filing. "Management changes made in the first quarter sharpen the company's focus on the plantation's financial performance and facilitate the review of strategic alternatives for the business, including the possibility of transitioning to a more energy-centric model. Other operating improvements and strategic alternatives also are under evaluation."



Commission Stays Decision To Revert Puako Land

A company that wants to push forward with development in West Hawai'i near the Mauna Lani resort has won a last chance to show why the LUC should not revert 1,060 acres from Urban back to the Agricultural District. The commission already voted on April 30 to revert the land, after Bridge 'Aina Le'a did not show to the commission's satisfaction that it could meet a November 2010 deadline to meet its affordable housing obligations. But another company – DW 'Aina Le'a – that has entered into a purchase agreement with Bridge but which does not yet hold title petitioned the LUC to stay its decision and allow the company to either intervene in or become a party to the case.

At the LUC's June 5 meeting, Robert Wessels, a principal in DW 'Aina Le'a, explained his company's plans and efforts to

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As we start our 20th year ...



With this issue, *Environment Hawai'i* launches its 20th year of publishing. Ever since our first issue, our goal has been to deliver articles about Hawai'i's precious natural resources and native species that provide sufficient detail to allow curious, intelligent readers to draw their own conclusions about the policies and approaches needed to protect them.

When we began, we sought to fill the gap that existed between what was needed in the way of environmental reporting and what was being provided by the newspapers and broadcast media. In the years since, that gap has grown into a broad chasm, as Hawai'i newspapers and other media have downsized. Even as sources of information and comment have expanded exponentially – with bloggers, media websites, and the like – local investigative journalism, especially in the field of the environment, has taken a serious hit.

At the same time, the need for serious reporting on environmental issues has grown ever more urgent, with Hawai'i's resources facing threats not only from actions and policies that derive from local or national government, but also from the changes that are reshaping environments on a global scale.

Even as we take pride in what we have accomplished these last 19 years, we are keenly aware that our ability to continue to publish is directly related to the support that we earn from our readers. We recognize that in these tough times, charitable donations must be made with more thoughtfulness and discretion than at any time in the past. Given this, we appreciate all the more any gift you can manage.

Won't you help us complete our second decade? You can donate online, at our website (www.environment-hawaii.org), by phone (call our toll-free number, 877 934-0130), or by sending a check (to Environment Hawai'i, 72 Kapi'olani Street, Hilo HI 96720).

meet the affordable housing deadline by simultaneously building multi-family townhouses and the infrastructure to support them.

"We have an obligation to deliver 385... affordable units by November 2010. The only way is we have contractors working on top of each other," he said, adding that the buildings will start to go up before the infrastructure work and that building pads will be put in as early as this November. Sixty to 80 units will be under construction at all times, and 35 to 40 units a month will be put on the market.

By June 2010, Wessels said, the mass grading should be done, with finish grading and surfacing done by mid-August.

Representatives from Hawai'i County testified that the county fully supported the project and wished to see it continue. They

could not, however, confirm that DW's timelines were realistic.

Hawai'i County planning director Bobbi Jean Leithead-Todd told the commission on April 30 that there was only a 50 percent chance that 385 units could be completed within 18 months. When commissioner Norman Lezy asked county planner Norman Hayashi what he thought the odds were now, given the new information Wessels had presented, Hayashi said only that, "hopefully, there will be affordable housing."

Unsatisfied, Lezy said, "I'm going to hold your feet to the fire. What's the likelihood that the deadline will be met and all certificates of occupancy will be issued?"

"I'm not able to answer that question," Hayashi said finally.

DW's ability to meet deadlines aside, deputy attorney general Bryan Yee, representing the state Office of Planning, argued against granting DW's petitions. He said that no rule allows the LUC to add a co-petitioner to a case *after* an order is made and that DW's

petition to intervene should be denied because its interest in the case is identical to Bridge's.

After weighing the arguments, the commission approved a motion by Lisa Judge to 1) direct the LUC to take under advisement DW's petition to be a co-petitioner/intervenor; 2) grant the motion to stay the April 30 decision; and 3) direct the commission's executive director to schedule a one-day hearing to allow Bridge to submit additional evidence on why the land should not revert to the Agricultural District. Judge added that Bridge could designate DW to be its representative at the hearing.

Kaua'i LUC member Thomas Contrades, the only commissioner to vote against the stay, questioned the commission's ability to approve DW 'Aina Le'a's petition since the company was not even a party to the case. He asked the commission's deputy attorney general to explain, in writing, the legality of the commission's vote.

— T.D.



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