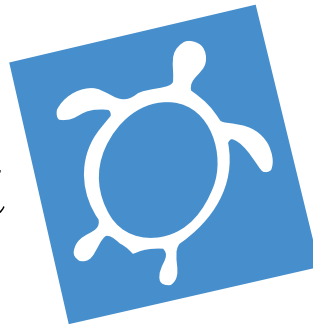


# Environment



# Hawai'i

*a monthly newsletter*

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## False Starts

If enthusiasm were a harbinger of success, there's no telling what the newly appointed 'aha kiole might achieve. Before its members were even appointed by the governor, they'd met, named an executive director, and devised a budget. Before being sworn in, they'd won ratification of their plans from a group of Hawaiian elders.

Before their first official meeting, they had their request for a \$200,000-plus budget pending before the state procurement officer — who finally pulled the brakes on this runaway train.

Why did the 'aha kiole get as far as it did, as fast as it did? The state agency charged with overseeing it, the Department of Land and Natural Resources, is strapped already to keep up with its statutory responsibilities and probably had little time to devote to managing this new project, especially when the people involved had such a clear notion of what they wanted to do.

Now that the momentum has slowed, the process can start over again. This time, perhaps, with meaningful public oversight and input.

## 'Aha Kiole Committee Tramples Over Public Process in Selecting Contractor

For more than a year, environmental and native Hawaiian activists have accused the Ho'ohanohano I Na Kupuna Puwalu series — bankrolled largely by the federal Western Pacific Fishery Management Council — of being a front for the council's efforts to influence state policy.

The Association of Hawaiian Civic Clubs (AOHCC), however, which helped organize the five puwalu (meetings) throughout 2006 and 2007, has disputed such accusations. Association representatives have stated in news reports that although its ocean resources committee chair, Leimana DaMate, was hired by the council to organize the puwalu, the idea to bring together traditional Hawaiian farmers and fishermen from around the state to discuss the management of the state's resources originated with the association.

Whatever the motivating force behind the puwalu, the series of meetings eventually led to state legislation and to the signing last year of Act 212. The purpose of the act

is to start the process of creating an 'aha moku (island) council system to foster "best practices" based on regional resources and indigenous management methods. To help the Legislature carry out that purpose, the act provided for establishment of an 'aha kiole advisory committee, a group of eight island representatives that was to be selected by Governor Lingle from a list of nominees provided by the AOHCC.

In the months since Lingle signed Act 212, even though the committee has yet to receive a penny of its \$220,000 two-year appropriation, it has managed to flout public procedures and confuse both the public and itself over what the act actually says.

More than one month before Lingle even appointed the 'aha kiole advisory committee members, DaMate was requesting funds to start the committee's work and sending draft budget documents, which included a salary for her, to the state Department of Land and Natural Resources.

In an October 26, 2007, letter to DaMate, DLNR director Laura Thielen tried to explain a few things. First, she noted, the governor had to officially select the eight 'aha kiole members before any appropriations could be released.

"Although you notified us at our meeting of September 24, 2007, that you had been selected its director based on those nominated for

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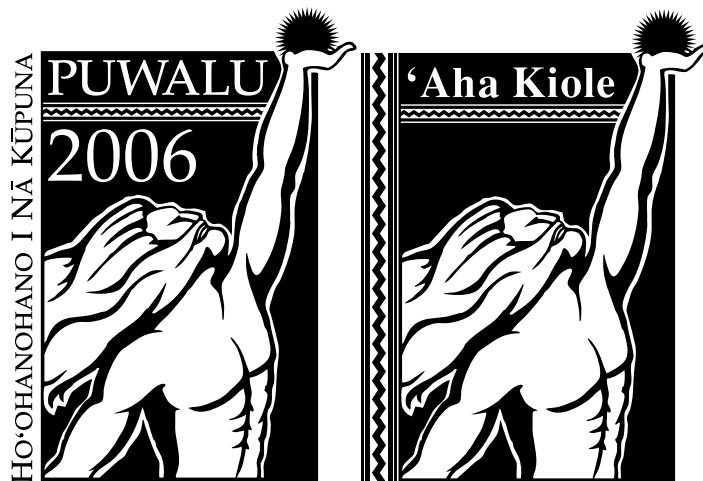
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The logo design for the puwalu series (on the left) is nearly identical to that being used by the 'aha kiole advisory committee.

# Environment Hawai'i



Volume 18, No. 9

March 2008

## NEW AND NOTEWORTHY

**No Greenbacks for Greenhouse Panel:** Lately, Governor Lingle has stressed the importance of Hawai'i turning to "clean energy" and reducing its reliance on fossil fuels. In remarks to the international climate change summit in Honolulu last month, for example, she chatted up her administration's initiatives on renewable energy and mentioned how she signed the Global Warming Solutions Act, "which mandates that statewide greenhouse gas emissions be reduced to 1990 levels by the year 2020."

"Only two other states, California and New Jersey, have similar laws," she told the delegates.

What Lingle didn't mention is that she has so far refused to release the funds that are needed to make that legislation work. The state Greenhouse Gas Emissions Reduction Task Force, which is charged with developing the baseline data required for complying with the statute,

needs to retain consultants as soon as possible to do this, under the task force's work plan.

Last November, the Department of Business, Economic Development and Tourism put in a request to the governor's office for release of the \$200,000 in funds the Legislature appropriated for its work in the 2007-08 fiscal year.

But according to Estrella Seese, the energy economist with DBEDT who is the chief staff person for the task force, "We haven't received the governor's approval to release the funds. We're still waiting."

**A Setback for Del Monte:** Some 30 years after a catastrophic spill at Kunia, O'ahu, of a fumigant used on pineapple fields, Del Monte's efforts to have its insurers pay the costs of clean-up have come to an end – in state court, at least. On December 26, the Hawai'i Supreme Court issued its opinion in an appeal of a lower court order filed in 2001, which determined that Del Monte's insurers were responsible for indemnifying and defending the company in the Environmental Protection Agency's investigation of the spill, which eventually led to the site being placed on the federal Superfund list of contaminated sites.

Del Monte Fresh Produce (Hawai'i), Inc., a successor to the Del Monte Corp. that owned the site when the spill occurred, argued that it should be covered by insurance policies, even when those policies, issued to Del Monte Corp., contained clauses preventing them from being

assigned to other entities. The lower court sided with Del Monte Fresh, but the Supreme Court found that "liability insurers have the same rights as individuals to limit their liability, and to impose whatever conditions they please on their obligation," so long as it is consistent with law and public policy. The case was remanded to the lower court, "with instructions to enter summary judgment" in favor of the insurers.

**A Clarification – and Apology:** In the article appearing on pages 6 and 7 of the December 2007 issue of *Environment Hawai'i* ("USGS Seeks Temporary Releases for Study of Instream Values"), Delwyn Oki of the U.S. Geological Survey was identified as a witness for Hui O Na Wai Eha and Maui Tomorrow in a contested case being heard by the Commission on Water Resource Management. Although Oki was called as a witness by those parties, he has clarified that he is not testifying in support of any particular party nor does the USGS have any vested interest in the outcome of the contested-case proceeding.

"I am testifying in the contested case as a representative of the U.S. Geological Survey because we have information that we feel may be relevant to the case and because it is part of the overall mission of the U.S. Geological Survey to provide information and understanding needed for the best use and management of the nation's water resources for the benefit of the people of the United States," Oki stated in an email to *Environment Hawai'i*. He added that the USGS is conducting a study of the diverted streams in West Maui to provide information that may be useful for establishing instream flow standards, although the U.S. Geological Survey will not be involved in recommending instream flow standards.

Also, we apologize to Mr. Oki for misspelling his name in the article.

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### Quote of the Month

*"How do you protect yourself  
against stupidity? ... You can't."*

— **Ed Robinson,**  
*dive tour operator*

## B O A R D T A L K

## Board Determines Conservation Needs Trump Demand for Kapahulu Parking

The critical need for parking in Kapahulu just couldn't beat the need to replenish the coffers of the Department of Land and Natural Resources' dwindling Land Development Special Fund, which is the sole source of funding for the Land Division, the Office of Conservation and Coastal Lands, and several other vital programs.

On February 8, the Land Board voted four-to-one to auction a 24,500-square-foot lot in Kapahulu for commercial use. The upset price, or minimum bid, was set at \$180,000 a year. Because the property is not ceded land, the income generated goes into the DLNR's Land Development Special Fund instead of the state general fund.

At the board's meeting, many Kapahulu residents, business owners, and elected officials testified against auctioning the property for unrestricted commercial use and asked that the use of the parcel be limited to commercial parking.

"Displacement of the 60 or so existing parking stalls at 548 Kapahulu Avenue will cause a ripple effect, forcing business patrons who currently use the lot to seek street parking in the residential area, thus displacing area residents who need to use street parking to accommodate a second family vehicle," state Rep. Scott Nishimoto wrote in a letter to the board.

The Land Division's Keith Chun and state Sen. Les Ihara presented conflicting data on how much revenue the site would generate as a commercial parking operation. Chun said it would be less than \$10,000 a year, while Ihara said it was closer to \$85,000 a year.

Nishimoto asked the board to defer the matter for two weeks to allow the community to provide more information on the profitability of commercial parking on the site.

"Deferring two weeks is not going to make or break this," he said. Although Hawai'i Land Board member Rob Pacheco agreed and made a motion to defer a vote on the item, the motion failed.

"If there was someone who wanted to do parking, they would have come forward and we would not be here at this point," Maui Land Board member Jerry Edlao said. The Land Board has been planning to auction the property for commercial use since 2004, but had to wait until the Honolulu City Council rezoned the property. Now that the property

has been rezoned, the DLNR's Chun is eager to get things moving, as are several other division heads whose work is supported by the special fund.

Kaua'i Land Board member Ron Agor echoed Edlao's sentiments and added, "I only think a deferral will show the difference between \$80,000 [a year for commercial parking] and [the current upset rent of] \$180,000, and I'm going to go with \$180,000."

Edlao's motion to approve Chun's recommendation to auction the property for commercial use passed with Pacheco dissenting.



### Volcanic Hazards Force Closure Of Kahauale'a Natural Reserve

Fires, fissures, and volcanic fumes are just some of the hazards that led to the Land Board's February 8 vote to keep the Kahauale'a Natural Area Reserve closed to the public until July, 25, 2009. Last July, following recommendations from the Hawai'i Civil Defense agency and the U.S. Geological Survey's Hawai'i Volcano Observatory, the Department of Land and Natural Resources closed the NAR after volcanic activity from Kilauea Volcano's Pu'u O'o vent opened a series of fissures in what had become a popular hiking and hunting area.

The eight-mile trail that runs through the reserve saw increasing use by visitors in recent years, a report by the DLNR's Division of Forestry and Wildlife states. The report notes that visitor guidebooks, such as *Hawai'i: The Big Island Revealed*, encourage people to use the trail to access Pu'u O'o. Judging by testimony from Hawai'i Island NAR manager Lisa Hadway, public use of the area has become a problem.

"There have been 26 rescues in the area in the last four years," Hadway told the Land Board last month. Hawai'i Land Board member Rob Pacheco, who runs a hiking tour company, added that the reserve has been a problem for a while because people barred from accessing Pu'u O'o from Hawai'i Volcanoes National Park were using the NAR instead.

"You couldn't really access Pu'u O'o legally going out there. The national park boundary was closed," he said.

Hadway said that based on previous eruptive events and analogies to others, the volcanic activity is expected to last a while. Should the danger end before July 2009, she said, the department would come back to the Land Board to lift the closure.

Before the Land Board unanimously approved DOFAW's recommendation to close the NAR and to authorize the Land Board chair to sign an agreement with the volcano observatory to monitor the lava flow, chair Laura Thielen recommended that the department work with the hotel and rental car industries to spread the word about volcanic hazards.

Hadway had testified that despite posting warning signs and erecting a fence across the trail, "We know people are getting in because we've had various rescues since the closure [last year]."

Deputy attorney general Linda Chow assured the board that her office would work with NARS staff to ensure that signs in the reserve adequately describe the hazards and penalties for entering the reserve.



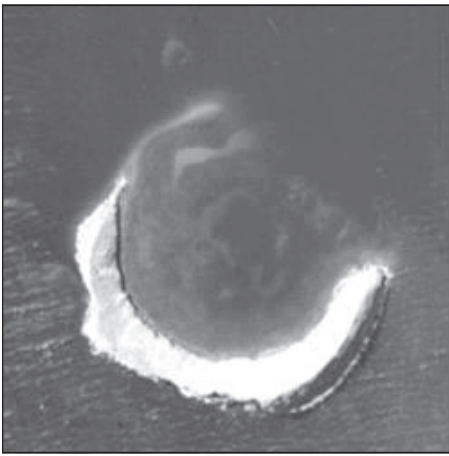
### Molokini Damages To Include At Least \$550,000 Fine, Permit Suspension

The largest dive operation on Maui will receive the second largest fine for coral damage ever levied by the state Board of Land and Natural Resources. At its January 25 meeting, the board instructed the Department of Land and Natural Resources to negotiate a settlement with Maui Snorkel Charters, Inc. (MSC) for violations stemming from the sinking of one of the company's boats at Molokini atoll in the fall of 2006.

That settlement, the Land Board decided, must include a permit suspension and payment of no less than \$550,000 in fines and \$10,000 in administrative costs. Also, the DLNR's Division of Aquatic Resources was ordered to brief the board on the settlement's status in one month.

The board made its decision after a lengthy executive session in which members discussed a recent proposal by MSC to pay \$500,000 in fines into a "Molokini Conservation Fund" over a 10-year period, instead of more substantial penalties proposed by the DAR. In its report to the Land Board, the DAR had recommended suspending MSC's commercial operating permit for one year. If the board wished to impose fines as well, the DAR stated that based on its calculation of





Molokini atoll

PHOTO: NOAA

damaged coral specimens, the board could fine MSC up to \$672,618 (\$661,000 for damaging or killing 661 coral specimens plus \$10,618 in administrative costs).

When MSC proposed its alternative to the Land Board, DAR administrator Dan Polhemus said he felt it was a reasonable compromise and urged the board to impose a fine that was collectable and could be used to benefit the resource.

Several snorkel tour operators testified that the proposed fine would put Maui Snorkel Charters out of business, and they praised the company's marine conservation efforts over the years.

"This is a responsible operator. This is not going to happen again," said Jim Coon of the Ocean Tourism Coalition.

Some board members expressed doubts. In its report to the board, DAR recounted the events that led to the coral damage. Disagreements between the boat's captain and an onshore mechanic over whether the boat needed a tow may have squandered opportunities to save the ship. Also, it appeared that a hole was later deliberately punched into the hull so that it would sink to the bottom.

Dive tour operator Ed Robinson testified that much of what went wrong back in 2006 could be blamed on stupidity. "How do you protect yourself against stupidity? .... You can't."

To which board member Sam Gon responded, "Yes, you can. [Molokini] is an MLCD [Marine Life Conservation District] and you can end all commercial use."

Jeff Strahn, general manager and co-owner of Maui Snorkel Charters, apologized for his company's actions and asked the board to "at least give us an opportunity to make it right."

In the end, the board reduced the fine amount, but decided to also suspend the company's permit for an unspecified amount of time. Strahn testified before the board's vote that a permit suspension of one year may

as well be a revocation, since the business would not likely survive.



## Board Denies Permit For Hulakai Surf Contest

When the state bought 40 acres along the Mahai'ula coastline in 1993, the land, now part of Kekaha Kai State Park, was intended to be a wilderness park. So when the DLNR's Division of State Parks issued a permit last year for a surfing contest/fundraiser to benefit the Make-A-Wish Foundation, the contest's large tents and sponsor banners, the trucks on the beach, and the jet skis in the water, among other things, rubbed many community members the wrong way.

When promoters of the Annual Hulakai Longboard Surf Classic contest applied for another permit to hold a Make-a-Wish Foundation surf contest at Mahai'ula in February, dozens of people sent testimony to Land Board members asking that the permit be denied.

In an email to State Parks administrator Dan Quinn, Kona resident Andrew MacIsaac wrote, "The permit to allow a surf contest run by those interested in promoting their commercial interests is not in the interest of the public use of the park. Whether the contest itself is a money maker or a donator is irrelevant; it promotes the commercial interest of the operation and its sponsors and therefore is part and parcel of the commercial activity of both."

The appearance of commercial use also concerned Land Board members Rob Pacheco, Sam Gon, and Tim Johns.

"If the contest appears to be a commercial venture that, at the end of it, writes a check to Make-a-Wish, then that's something I want to know about before we make our decision," Johns said.

Jon Moon of Hulakai surf company testified that the event's sponsors post signs and give away their products to children, but added, "Everything we make goes to Make-a-Wish." He said the foundation also posted its own banner and handed out brochures at the last event, which raised money so that the daughter of a DLNR Division of Boating and Ocean Recreation employee could "go play in the snow."

Johns said that while he did not have any problem with the foundation, "It's more about the use of a state facility, a state park that was not intended for commercial-type use.... The question is, is it appropriate for a surf contest sponsored by a surfboard manufacturer at a wilderness park?"

"I understand the contribution and I appreciate the work that Make-a-Wish does, but I do have real concerns about this as a precedent," Pacheco added.

Maui member Jerry Edlao made a motion to approve the permit but directed Hulakai to find another place next year in a less sensitive area. The motion failed, with chair Laura Thielen and members Agor and Edlao voting in favor and members Pacheco, Johns, Taryn Schuman, and Gon voting in opposition.

After the board's vote, the applicants requested a contested case hearing on the matter.



## DLNR to Inspect Kaloko Dam Again

Days after Kaua'i's Kaloko dam broke in March 2006, killing seven people, DLNR staff conducted a cursory inspection of the area to assess whether the dam was in danger of deteriorating further. Although the area seemed stable in a visual inspection, the Land Board voted on January 25 to authorize its staff to conduct a second, more thorough, inspection, including topographic surveys and soil cores, among other things.

No one from the public testified on the matter, but a representative from the law firm McCorriston, Miller, Mukai, MacKinnon requested a contested case hearing later in the board's meeting. The firm represents Pflueger Partners, one of the Kaloko reservoir's owners and a party to a number of lawsuits that were filed in the aftermath of the collapse.

Although Pflueger Partners and reservoir co-owner Mary Lucas Trust provided access to the site for the first inspection, they have not done so for the second.

"They have not agreed to do so in connection with the Phase II, apparently because they are concerned about how the Phase II may be used in ongoing litigation concerning the loss of life and property destruction caused by the dam's partial failure. The dam and reservoir are operated by Kilauea Irrigation Company, Inc., under a Water Rights Agreement between it and the trust," a January DLNR report states.

Even so, the Dam and Reservoir Safety Act of 2007 "empowers the Board of Land and Natural Resources to enter upon private property of the dam or reservoir as may be necessary in making, at the owner's expense, any investigation or inspection authorized by Chapter 179D" of Hawai'i Revised Statutes. That law, relating to dams and reservoirs, was passed specifically in response to the Kaloko tragedy.

According to a November 2007 report based on the initial site inspection at Kaloko, a follow-up is necessary. The report concluded, "Although the Kaloko Reservoir dam appears to be stable at this time, a better knowledge of the dam structure is essential before a rational decision could be made about its stability and safety.... It is our opinion that an additional in-depth study and discussions regarding the stability of the Kaloko Reservoir dam structure is necessary before any reasonable professional judgment can be made."

At the January meeting, DLNR chief engineer Eric Hirano asked the board to approve enforcement of the state's right to enter private property to conduct surveys and authorize and direct the department, its agents and consultants to "utilize physical means of opening locked or other blocked access ways to the

**"We haven't solved the problem. When we went in there originally, it was really fast."**

**— Bill Wynhoff, deputy attorney general**

dam as deemed necessary, should the owner fail to provide access, authorize the chair, with the assistance of the Department of Attorney General, to collect from the landowners expenses of the Phase II investigation, and authorize the chair to initiate penalties, fines or other charges in accordance with Chapter 179D."

Deputy attorney general Bill Wynhoff said that the final Phase II report will be a public document.

Board member Johns asked whether the attorney general's office had determined whether, given the ongoing litigation, Chapter 179D might be tantamount to asking the landowner to abridge his right to avoid self-incrimination.

"If you already solved the public safety issue back then... what are you doing now? Are you overreaching for litigation advantage?" Johns asked.

Wynhoff responded that the statute had been reviewed by the AG's office and that, with regard to the public safety issue, "We haven't solved the problem. When we went in there originally, it was really fast."

Hirano said Phase II will require topographic surveys to calculate the slopes of the embankment, as well as soil samples. The consultant, Earth Tech, will also do a hydrologic analysis, he said.

Hirano also noted that there may be a stream that is feeding the reservoir that was not a registered diversion with the Commission on Water Resource Management.

The board unanimously approved Hirano's recommendations.



## Eucalyptus Replaces Albizia In Planned Biomass Farm

Two months after the Land Board and several east Kaua'i farmers objected to a proposal to plant invasive albizia trees for use in a nearby energy plant, a revised project using different tree species was approved, in concept, by both groups.

At its January 11 meeting, the Land Board approved in principle the issuance of a revocable permit to Green Energy Team, LLC, for an estimated 1,000 acres of state land at Kalepa, Kaua'i, subject to the development of a co-existence plan with the farmers and ranchers already using the land. The board

also approved in principle the transfer of 6,700 acres of DLNR land at Kalepa, formerly leased to the Lihue Plantation Company, to the state Agribusiness Development Corporation. (In a separate item, it also approved the transfer of Hawai'i island's Ka'u irrigation system to the ADC.)

Last November, the DLNR's Land Division had recommended that the board approve a revocable permit to Green Energy for 2,160 acres at Kalepa, on which the company would plant albizia trees, which would be chipped and burned in a nearby plant. Problems quickly arose with permittees already on the land, and after several of them testified against the project in November (as did staff with the DLNR's Division of Forestry and Wildlife), the Land Board deferred the matter and ordered the Land Division and the ADC to work toward a solution with the existing permit holders and Green Energy.

By the Land Board's January 11 meeting, the parties had met three times and Green Energy had agreed to harvest existing albizia trees on state land for ten years and plant either *Eucalyptus urophylla* or *E. grandis* on just 1,000 or so acres of Kalepa lands. Most of the area's farmers and ranchers, collectively known as the Kalepa Coalition, agreed to help identify the most appropriate acreage for tree planting, and the DLNR had agreed to pursue transferring the entire agricultural area, totaling 6,700 acres, to the ADC. Once the terms and conditions of Green Energy's revocable permit and the transfer to ADC are worked out, both items will be brought to the Land Board for final approval. — **Teresa Dawson**

### *Aha Kiole from page 1*

consideration by the Governor, the Department needs the official selection of the eight 'aha kiole members by the Governor and a written document of your appointment by the 'aha kiole committee before we can request and release the Act's appropriation," Thielen wrote. "Additionally, the 'aha kiole committee would need to provide the Department with a written statement that it approves of the budget and workplan being submitted."

She noted that DaMate's draft budget included funds for an executive director position, with benefits. "While we agree with the notion that a great deal of work is proposed by Act 212," Thielen commented, "the Budget and Finance Department has indicated that the Act makes no specific provision for salary compensation, only for expenses."

What's more, Thielen wrote, the budget exceeded what Act 212 appropriated by \$22,968. Also, she said, budget amounts for contract services and other categories did not match up in the documents DaMate provided.

### *Confusion*

In reading the budget narrative DaMate sent to the DLNR, it seems that while she and other puwalu participants helped draft Act 212, they really didn't understand what it did.

"On June 27, 2007, Gov. Lingle signed into law Act 212 which creates the Aha Moku Councils," the narrative states. In a later section, it states, "An interim Aha Kiole Commission, per Act 212 would be put into place until the actual Aha Moku System can be further developed according to the Goals and Objectives listed. To achieve a successful outcome of developing the Aha Moku Systems, the interim Aha Kiole must adhere to the criteria for the position as described by the creators of the Act, the Ho'ohanohano I Na Kupuna Puwalu participants." The narrative also described the need to select an executive director for the Aha Moku system, a position whose description seemed tailored to fit DaMate.

The executive director would have to be someone "who is intimately involved with the islands and moku, has participated in all of the Ho'ohanohano I Na Kupuna Puwalu Series and is committed to the success of the short and long term goals and objectives of the System [to] be put in place," the budget narrative states.

In an interview with *Environment*

Hawai'i, Thielen explained that Act 212 established the 'aha kiole advisory committee to explore the possibility of creating an 'aha moku system. However, the committee members that had been appointed seemed to think that they were the 'aha moku commission itself," she said.

A close reading of the act confirms Thielen's views. The committee, which will dissolve on June 30, 2009, is tasked with the following responsibilities:

- ◆ Explore, examine, and derive best practice models for the creation of an 'aha moku council system.

- ◆ Engage in discussions with and participate in meetings and events held statewide to gain a perspective and develop a consensus on establishing an 'aha moku

*"The state is proceeding with place-based management anyway."*

**— Maka'ala Ka'aumoana, Hanalei resident**

council system with an 'aha moku council commission.

- ◆ Establish an administrative structure for the commission to oversee the council system, which shall consist of eight 'aha kiole members.

- ◆ Establish a standard eligibility criteria and selection process for each 'aha kiole member and the selection of an executive director.

- ◆ Establish goals and objectives for an 'aha moku council commission. (Files at the DLNR's Division of Aquatic Resources, include a detailed spreadsheet of draft 'aha moku systems objectives and goals from DaMate, dated August 27, 2007, two months before committee members were appointed.)

- ◆ Establish a feasible operational budget for an 'aha moku council commission to conduct meetings, cover administrative expenses, and disseminate information and advice for the creation of an 'aha moku council system.

- ◆ Submit an interim report of findings and recommendations before the 2008 legislative session, and a final report before the 2009 session.

Although a lot of this work was fleshed out in the puwala, the act requires the DLNR to provide support services to the committee "as the advisory committee deems necessary," and the Legislature appropriated \$110,000 a year to the DLNR for fiscal years 2007-2008 and 2008-2009 for administrative costs to help the committee encourage full participation in discussions on the creation of a council system.

### ***Jumping the Gun***

On October 31, 2007, Gov. Lingle announced the appointment of the eight 'aha kiole advisory committee members: Ilei Beniamina (Ni'ihau), Sharon Pomroy (Kaua'i), Charles Kapua (O'ahu), Vanda Hanakahi (Moloka'i), Winifred Basques (Lana'i), Leslie Kuloloio (Kaho'olawe), Timothy Bailey (Maui), and Hugh Lovell (Hawai'i). In 2006 and 2007, according to information provided by the Western Pacific Fishery Management Council, six of these people had received \$795 each to attend three puwala, while another had received \$545 to attend two.

On November 1, the committee held its "first official meeting" at the Pagoda Hotel in Honolulu, according to a November 1

letter to Thielen from Hanakahi, who identified herself as the committee's chair. Hanakahi informed Thielen that, at the meeting, the committee had unanimously selected DaMate as its "community coordinator."

"Their selection was approved by the more than 100 'Aha Moku representatives participating in the Ho'ohanohano I Na Kupuna Puwala 'Elima held on October 31 and November 1, 2007," Hanakahi wrote.

In a second budget proposal dated October 30, the committee proposed holding 53 ahupua'a/moku meetings on the various islands, eight mokupuni meetings, three in-person 'aha kiole committee meetings, and one puwala each year "to continue the Ho'ohanohano I Na Kupuna Puwala Series, as stated in Act 212."

Costs proposed for the puwala included air, lodging and per diem payments for 65 off-island farming (mahi'ai) and fishing (lawai'a) practitioners. The draft budget also included \$40,000 a year for a community coordinator who would travel to all islands to facilitate community meetings, generate reports, and plan and run the puwala. The community coordinator, as well as puwala facilitators (\$5,020/year) and transcribers (\$2,500/year) would all be contract employees.

When in early November the committee developed a scope of work for the community coordinator, the position's "special qualifications" once more seemed tailored to fit DaMate. In addition to good communication skills and knowledge of Hawaiian language, culture and practices, the coordi-

nator "must have been intimately involved through planning and attendance with all Puwala in the Ho'ohanohano I Na Kupuna Puwala Series, must have assisted in the drafting of Act 212, must have been active as the liaison between the Office of Hawaiian Affairs, the Department of Hawaiian Home Lands, and the Association of Hawaiian Civic Clubs, other government agencies, and the Puwala participants."

On December 28, the committee submitted its interim report to the Legislature. According to the report, the Association of Hawaiian Civic Clubs submitted to the governor a list of 21 nominees for the 'aha kiole committee on October 9, more than two weeks after DaMate informed Thielen she had been selected to be the committee's executive director.

The report also explains how, without any public notice, the committee met and voted to select DaMate as its community coordinator. The committee members happened to be attending a puwala in Honolulu the day they were officially appointed, and "at the end of the conference, they took advantage of the special circumstance of their all being together to briefly meet. During this time, they selected Vanda Hanakahi of Moloka'i as chairperson. They asked Leimana DaMate of Ka'u to assist them as community coordinator."

At its first publicly noticed meeting, held January 15 at the State Capitol, the committee again voted to make Hanakahi chair, and made Bailey recording secretary. The committee also held an executive session, although it is not clear from meeting notes taken by DLNR's Francis Oishi why one was held. DaMate's selection as community coordinator was apparently not discussed.

Even so, on January 9, six days before the committee's first publicly noticed meeting, Thielen sent a request to the State Procurement Office for an exemption from the public bidding process so that the DLNR could enter into a \$220,000 contract with DaMate to carry out much of the committee's work. The contract term was initially to run from November 2007 through June 30, 2009, but was amended to start on January 11, 2008.

Oishi, who is overseeing the 'aha kiole project for the DLNR, says that the total amount is not for DaMate's salary, but will cover all of the committee's expenses, including a salary for her. The draft budget submitted to the Legislature includes \$40,000 for the community coordinator position plus nearly \$2,000 for her travel expenses.

On January 28, the procurement office



sent the request back to the DLNR. Although he says he is not sure why it was returned, Oishi says that the contract issue is moot right now. As of last month, the Department of Budget and Finance had not responded to a request by Thielen in late November to release the funds for the committee's work, and Oishi says the future of the committee is "kind of academic at this point. We have no money to do it." Although he still wants to expend the appropriation through a contract, whether that can be done depends on what funds the governor will release, he says.

Hanakahi wrote Thielen in early November asking for permission to periodically have access to DLNR office space, perhaps in the Honolulu and neighbor island offices of the department's Division of Forestry and Wildlife or Division of Conservation and Resources Enforcement. It appears from documents at the DLNR that she got no reply. Although the committee doesn't have any funding, and ap-

found in files at the DLNR.

Based on his knowledge of the committee's work so far, Aila is skeptical about whether the directives of Act 212 are being met. What's more, he adds, "The law as created did not say it was the only council [that deals with native Hawaiians issues], but they are certainly posturing themselves as though they are."

#### ***A Hindrance***

In the meantime, Hanalei resident Maka'ala Ka'aumoana and others involved in community-based resource management say that the 'aha kiole legislation may be hampering efforts in some places. Ka'aumoana says people wanting to do community-based resource management on Maui had been told by the area's state representative to wait until an 'aha moku system is in place.

"The state is proceeding with place-based management anyway," Ka'aumoana said in an interview. "If you do something place-

***"It's kind of academic at this point. We have no money to do it." — Francis Oishi, Division of Aquatic Resources***

parently, no office space, it is managing to get some work done.

Efforts to reach DaMate and Hanakahi were not successful by press time. Wai'anae fisherman and Na Imi Pono member William Aila says that 'aha kiole committee member Charles Kapua has held meetings with communities in Wai'anae and the Ko'olaupoko district on O'ahu, although no notices or minutes of these meetings were

based, it's cultural. It may not be purely Hawaiian...[but] we don't need to wait until the 'aha moku system is in place." The state's newly revised Ocean Resources Management Plan, which DaMate helped create, already contains similar concepts to the 'aha moku system, Ka'aumoana pointed out. "I don't know why they had to do [an 'aha moku council system] in addition," she said.

— ***Teresa Dawson***



This is a group photo taken during Puwalu 'Ekolu (the third puwalu). Seated in the front are Sens. Clayton Hee, Russell Kokubun, and Rep. Mele Carroll.

## **Council Drags Feet On Request for Information**

Last November, in an effort to obtain hard information about the sponsorship of the puwalu by the Western Pacific Fishery Management Council, *Environment Hawai'i* submitted a formal Freedom of Information Act request to the council.

The request did not ask the council for answers to questions. Instead, it sought to obtain copies of documents that would disclose the council's relationship with parties associated with the puwalu, including Leimana DaMate, and the council's direct payouts to people attending the meetings and to the hotels and the Hawai'i Convention Center, where some of the puwalu were held.

The council turned the information request over to the National Marine Fisheries Service's Pacific Islands Regional Office. Once there, it landed on the desk of the staff member assigned to handle FOIA requests, Steve Thumm. NMFS, however, did not have any information responsive to our request, so Thumm had to ask the council for the information.

What Thumm received, and which has been forwarded to us, has been of little help so far. More than 300 of the 319 pages provided to date consist of copies of information contained in binders given to people attending four of the five puwalu, including where to eat in Waikiki, a floor plan of the Hawai'i Convention Center, and many lined blank pages headed "Notes."

In addition, there are council-created spreadsheets purporting to show the council's expenses associated with the puwalu. One set of spreadsheets shows how much was paid to people attending three of the puwalu. (According to the council, 90 people received payments ranging from \$250 to \$795. There is no way to confirm this without examining receipts or other payment records, which is what we requested. According to at least one person who attended more than one puwalu, the council information does not match what she received.) Total payouts to individuals came to \$44,135, per the council information.

A second spreadsheet purports to summarize the council's contributions to five separate puwalu. That spreadsheet indicates that the council spent \$340,847, far eclipsing the next-largest puwalu underwriter, the Office of Hawaiian Affairs (\$60,000). Again, without being able to verify the claims through examination of receipts, contracts, invoices, and other records, there is no way to confirm the council's claimed expenses.

*Environment Hawai'i* asked for records relating to any contract between Leimana DaMate and the council. So far, none has been provided.

— ***Patricia Tummons***

## 2 Decades and Counting: Golf 'Villages' At Puako Are Still a Work in Progress

In the two decades since development was first proposed for some 3,000 acres inland of Puako Bay on the western Kohala coast of the Big Island, plans have changed frequently – and radically.

Initial plans, put forward in the late 1980s by then-owner Signal Puako (held by the Signal Oil Company), called for development of the “Puako Residential Golf Community – six “villages” with a total of 2,658 housing units (both large-lot single family dwellings and apartments), built around as many as six 18-hole golf courses. An environmental assessment prepared for the project described it as a “complete support community that would provide housing at affordable prices for employees of the various resorts that are being proposed on the Kona coast.”

Hardly was the ink dry on the Land Use Commission approval of the plan, in 1989, when Signal Puako sold a 90 percent interest in the land to a Japanese company, Nansay Hawai'i in May 1990. Within a year, Nansay was back before the LUC, seeking an amendment to the LUC decision, which had redistricted a core area of 1,060 acres into the Urban district from the Agriculture district. Nansay sought to revise “the proposed project from a support community with onsite affordable housing to an upscale residential community providing affordable housing offsite.”

The LUC obliged, but still required Nansay to provide at least 1,000 housing units (off-site or on) that met the definition of “affordable” to families earning up to 140 percent of the county's median wage.

By the mid-1990s, the real-estate bubble that had dramatically inflated land values in Hawai'i was collapsing. Nansay Hawai'i,

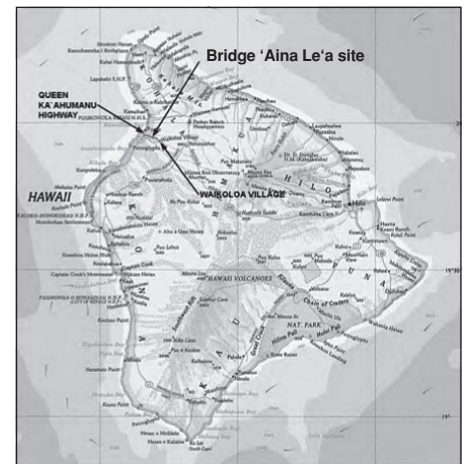
which had purchased the land for \$42 million, was having difficulty paying its creditors. In August 1996, the Hawai'i County Real Property Tax Office announced it would foreclose on the Puako property to recover taxes owed. Nansay was also falling behind in payments to its chief mortgage holder, Mitsui Bank of Japan.

Nansay sought to attract investors by amending certain conditions of the county's rezoning ordinance. The County Council cooperated, but in the end, Nansay lost the property. Mitsui sold the non-performing mortgage to a company called Kennedy-Wilson, which took ownership through foreclosure. In 1999, the land was sold to the current owner, Bridge Capital, and companies closely affiliated with it. At the time of the sale, Bridge was based in the U.S. Virgin Islands. It has since relocated to Saipan, in the Commonwealth of the Northern Mariana Islands.

### *Under New Management*

Once more, it was back to the drawing board. By late 1999, Bridge Puako was proposing several significant changes to the approvals granted by the county and Land Use Commission. In the face of community opposition, it withdrew its requests to the county for a reduced buffer requirement, reductions in the land to be dedicated for school use, and elimination of the provision for public play on the golf courses.

But Bridge Puako did not give up on the request to have time-share units included in the development. While it initially sought the required County Council resolution allowing time-shares with no cap on the number, it eventually informed the county it would



limit the number of time-shares to 750. In May 2000, the council adopted the resolution. Over the next few years, Bridge Puako (now known as Bridge 'Aina Le'a) sought to attract investors to participate in developing the property. In 2005, at the time that Bridge was asking the LUC for relief from some of the affordable housing requirements, it disclosed that Cole Capital/Westwood Development Group was its “development partner.” The agreement with Westwood, said Westwood president Michael Bowen, was contingent on the LUC lowering the 60 percent affordable housing requirement to “coincide with the 20 percent County of Hawai'i standard.”

“If this condition is amended, Westwood is prepared to begin development of this project immediately in conjunction with Petitioners,” Bowen told the LUC.

The LUC went along with the proposal, agreeing to reduce the affordable housing component to 20 percent (385 units) within the development itself and requiring certificates of occupancy for those dwellings to be obtained by November 17, 2010.

In addition, the LUC ordered Bridge 'Aina Le'a to submit a signed joint venture agreement and mass grading contract by November 17, 2006. It denied Bridge 'Aina Le'a's request to amend a community benefit package that was part of the original approval, and it emphasized that if any time-share units were to be included in the project, specific LUC approval would be required.

In December 2006, Bridge 'Aina Le'a broke ground—ceremonially, at least—on the project. Bowen, the Westwood executive, said agreements were in place to move forward. He was reported as having told *West Hawai'i Today* that construction equipment had been mobilized, but that engineering studies would take up to a year to complete.

### *Yet Another Plan*

By July 2007, Cole Capital/Westwood was



Typical terrain on the land proposed for development by Bridge 'Aina Le'a.

PHOTO: COUNTY OF HAWAII



## Endangered Red 'Ilima at Puako Vanishes in the Course of a Decade

The land proposed for development as the Villages of 'Aina Le'a is covered for the most part with scrub. When botanist Evangeline Funk surveyed the area in 1991, she found fountain and buffel grass, mesquite trees, and koa haole—vegetation typical of the alien-dominated savannah common in West Hawai'i.

Yet in one of the gulches crossing the property, Funk made a surprising discovery: 38 individuals of the endangered ko'oloa'ula, commonly known as red 'ilima (*Abutilon menziesii*), concentrated in an area half the size of a standard parking stall.

Although note was taken of the presence of the endangered species in the 1991 Land Use Commission findings of fact, conclusions of law, and decision and order, no special protections for the plants were written into the conditions of approval. When the Hawai'i County Council passed the rezoning ordinance for the project in 1993, however, it required a "botanical preservation and mitigation plan" for the red 'ilima and a native fern,

*Ophioglossum concinnum*, that was at the time a candidate for the federal endangered species list. (The fern is no longer regarded as endemic to Hawai'i and no preservation plan is needed for it.)

In 2000, Funk was approached by Bridge 'Aina Le'a with a request that she develop the requisite preservation plan. When Funk revisited the area, she found no red 'ilima, leading her to the opinion that the plant "appears to have succumbed to the severe drought and wind conditions."

"Without the presence of the plant it is difficult to recommend a location as an appropriate habitat for a preservation site," she wrote in a letter to a Bridge representative.

"We do not know with certainty if there are viable seeds of the *Abutilon* in the seed bank which could produce new plants under more normal weather conditions. With this in mind, we are recommending that an area be set aside for the time being and another botanical survey be done when more normal weather conditions prevail... For now, our



Flower of the red 'ilima, or ko'oloa'ula (*Abutilon menziesii*)

PHOTO: FOREST AND KIM STARR

recommended preservation and mitigation plan is for you to not disturb the land within 500 feet of the location where the *Abutilon menziesii* Seem had been previously found."

The U.S. Fish and Wildlife Service concurred, according to a letter to Bridge representatives in October 2000. Dan Palawski, writing on behalf of the service, urged the company to avoid disturbance within 500 feet of the location where the plants were found, at least until another survey could be undertaken. "Meanwhile, we encourage any interest you have in incorporating red 'ilima and other unique endemic dry forest plant species into your project either as artificially established wild populations or as horticultural use plants." —P.T.

out of the picture, and a new company, DW 'Aina Le'a, announced it had entered into a joint venture with Bridge 'Aina Le'a. In a press release, John Baldwin, CEO of Bridge 'Aina Le'a, described DW 'Aina Le'a's principals, Steve Dunnington and Robert Wessels, as having "resort and construction experience [and] industry contacts." The press release went on to state that the Villages of 'Aina Le'a would have a "shopping center, affordable homes, shared-ownership resort condominiums, a hotel, a luxury lodge, townhouses, single-family homes and estate homes, all with ocean views and surrounding a golf course."

Several of the amenities listed in the press release would require petitioning the LUC for additional amendments to conditions of the redistricting approval. Also, county approval would be required if the project were to include a hotel and, possibly, a luxury lodge.

In the fall of 2007, Sidney Fuke, a planning consultant for Bridge 'Aina Le'a, submitted to the county Planning Department a project district application for the company's land at Puako. Under county law, owners of more than 50 acres can apply for a project district, which allows greater flexibility in developing larger properties. Within project districts a wide range of uses may be allowed, including

hotels and commercial areas. The Hawai'i County Code requires preparation either of a county environmental report or, if circumstances require, compliance with the state's environmental disclosure law, Chapter 343.

County Planning Director Chris Yuen returned the application to Fuke, along with the \$5,000 check covering the required application fee. Because of two recent events, Yuen wrote in the accompanying letter, "we have re-evaluated our practice in reviewing applications to see whether the proposed project(s) would require compliance with Chapter 343, Hawai'i Revised Statutes, particularly when a land use application for private development will require improvements within the state or county road right-of-way. For your information, one of the events was a recent memo from the state Department of Transportation which stated that they would not process applications from a private landowner for improvements within the state right-of-way unless the landowner could show that there had been compliance with Chapter 343 when the permits for the land use were granted. The other event was the state Supreme Court's recent opinion on the Superferry case." (In that decision, the court found that use of state facilities by the private Superferry required compliance

with Chapter 343.) Yuen also pointed out that, should Bridge 'Aina Le'a's plans call for construction of a wastewater facility on site, that, too, would require preparation of an environmental assessment or EIS.

On December 8, 2007, the state *Environmental Notice* announced the availability of an EIS preparation notice for the Villages of 'Aina Le'a. According to that document, improvements would include infrastructure, give golf courses and a golf academy, a 40-unit lodge, up to 2,406 housing units in a mix of multi-family and single-family dwellings, 863 rural-agricultural lots, and commercial uses." The master plan would address all 3,000 acres of the Bridge 'Aina Le'a land at Puako, the document stated, although the Project District would only cover the 1,060 acres included in the Urban district. "The balance of the property, or 1,940 acres, would be developed in accordance with its existing ... zoning," according to the EIS preparation notice.

The notice was prepared by Constance Kiriu of Makani Resources. Deadline for comment was January 7, 2008. According to Kiriu, additional studies are being done in preparation for the draft EIS. She said it probably would not be published until May, at the earliest. —Patricia Tummons

## Bridge's Tactics in Lawsuit to Force An EIS Characterized as a SLAPP

late last year, Bridge 'Aina Le'a announced it would be preparing an environmental impact statement for a development planned for some 3,000 acres of land at Puako, on the western side of the island of Hawai'i. Yet for two years, the company strenuously fought in court efforts by a group of citizens to get it to do just that.

The lawsuit was filed in July 2000 by a group of nearby residents and landowners calling themselves Protect Puako. Their complaint alleged that the owner, Bridge Puako (later renamed Bridge 'Aina Le'a) had failed to comply with the state's environmental disclosure laws. Named as defendants were both the landowner and the county of Hawai'i, which had, according to the lawsuit, been remiss in failing to require an environmental assessment or environmental impact statement.

Ultimately, the challenge was deemed untimely: the deadline for contesting the county's failure in this regard had passed in the early 1990s, when county approvals for rezoning involving infrastructure improvements over public lands were granted. But before the litigation ran its course, Bridge 'Aina Le'a had filed a counterclaim against Protect Puako, intimating that the group was in essence a front for the Puako Community Association, which in the early 1990s had reached an agreement with the previous owner of the land, Nansay Hawai'i, to drop challenges to the proposed development in return for assurances that environmental monitoring would take place and that golf courses on the property would adopt management practices that restricted pesticide use and otherwise limited environmental harm.

A review of the record of the litigation in Third Circuit Court in Hilo gives an indication of just how nasty things became. One of Bridge's representatives, real-estate broker Eugene McCain, sent letters to members of the Puako Community Association threatening to sue them if Protect Puako did not back off. Attorneys for the landowner later admitted McCain's actions may have been overzealous, yet their own questions posed to people thought to be involved with Protect Puako were characterized by the Protect Puako attorney as intimidating and intended to chill free speech. In January 2001, Bridge 'Aina Le'a filed a counterclaim against Protect Puako and a third-party complaint against the Puako Community Association as well.

At one point, the attorney for Protect Puako, Steven Strauss, asked the court for a protective order, "declaring that Protect Puako need not further respond to the document production requests of Bridge Puako" – as Bridge 'Aina Le'a was then known – and "staying all discovery in this case."

"Bridge Puako now seeks written depositions of everyone it believes is supportive of Protect Puako and ask[s] them questions about their finances and contacts. . . . None of this desired information has anything to do with whether state environmental review is required in this case or whether injunctive relief is proper, the only relief sought in Protect Puako's complaint," Strauss wrote in a brief filed with the court.

Strauss argued to the judge, Riki May Amano, that the counterclaim amounted to a SLAPP suit. SLAPP stands for strategic lawsuit against public participation, and it is a term that has come into use to describe efforts of corporations to use the court system as a means of intimidating people who, through their involvement in governmental processes, seek to thwart or alter a corporation's plans. A local representative of the national SLAPP Resource Center, based in Colorado, agreed, and in July 2001 filed an *amicus curiae* brief with the court, setting forth the many ways in which the Bridge 'Aina Le'a counterclaim met the definition of SLAPP.

Judge Amano appointed Hilo attorney Valta Cook to act as a "discovery master" and arbitrate the dispute, but Cook's determination was not accepted by Strauss, who sought relief, in the form of a writ of mandamus, from the Supreme Court. Filing a brief on behalf of Protect Puako were the national SLAPP Resource Center and Earthjustice, on behalf of Hawai'i's Thousand Friends.

Long story short: the Supreme Court turned down Strauss on December 5, 2001. A month later, Strauss had withdrawn as Protect Puako's attorney and Jim Paul, of Honolulu, took over the case. In June, Bridge 'Aina Le'a dropped its third-party complaint against the Puako Community Association and counterclaim against Protect Puako. With that, the court entered judgment against Protect Puako on all remaining claims.

### *Meanwhile, in Guam*

Several of the parties involved in the Puako development have brought lawsuits alleging defamation and other damages against people

in Guam. The lawsuits stem from efforts by a company owned primarily by John Baldwin, Guam Greyhound, Inc., to win voter approval on a referendum to allow slot machines at Guam's dog-racing track. According to materials provided to the Land Use Commission, Baldwin is co-owner, with Shawn Scott, of Bridge Capital, which in turn owns Bridge 'Aina Le'a.

In 2006, Guam Greyhound launched the first of two efforts to win voter approval of expanded gambling opportunities. Opposed to the referendum was a group calling itself Lina'La Sin Casino (Chamorro for Life Without Casinos), headed by Jacqueline Marati.

Marati and Lina'La Sin Casino distributed a press release describing, among other things, the efforts of Scott to win voter approval for slot-machine gambling in Washington, D.C., in 2004. Under Scott's plan, his company would keep 75 percent of the revenue, with the remainder going to the district. In 2004, the political action committee that Scott helped finance was fined \$622,880 for violations of election laws. Marati and Lina'La Sin Casino erroneously stated that the fine was against Scott.

Within days, Scott's attorney, Deborah Dietsch-Perez of the Dallas law firm of Lackey Hershman put out a statement to the Guam press, disputing many of the claims made by Marati about Scott, Baldwin, and another party closely involved with Bridge Capital and its subsidiaries, Hoolae Paoa. In August, Dietsch-Perez filed lawsuits against Marati and Lina'La Sin Casino on behalf of Baldwin and Guam Greyhound, in Guam Superior Court, and on behalf of Paoa, in the First Circuit Court of Hawai'i.

Guam Greyhound and Baldwin also sued Dorothy Brizill, a leader of DCWatch, a group opposed to the Washington, D.C. gambling initiatives. Brizill had made statements on a Guam radio program in August 2006 that, Baldwin's attorneys alleged, repeated the same defamatory statements made by Lina'La Sin Casino.

In 1998, the Guam Legislature passed the Citizens Participation in Government Act, which follows closely language in a model anti-SLAPP statute. Brizill, represented by the ACLU in Washington, D.C., argued that the Guam law made her immune from defamation claims.

In ruling on the case last July, Judge Elizabeth Barrett-Anderson of the Superior Court of Guam agreed with Brizill and granted a motion to dismiss the case. "The Court agrees with the Supreme Court of West Virginia in *Webb v. Fury*, . . . in its statement concerning a SLAPP lawsuit, 'we shudder to think of the chill . . . were we to

## Affordable Houses Divided: Settlement Allocates Credit for Units Nansay Built

A dispute over how to allocate affordable housing credits accumulated by Nansay when it owned the Puako was settled only last year after years of litigation involving Nansay, Bridge 'Aina Le'a, and the County of Hawai'i.

In the early 1990s, Nansay Hawai'i received county zoning approvals for devel-

allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation.'...

Baldwin's attorneys have appealed to the Guam Supreme Court, arguing that the Guam anti-SLAPP law is unconstitutional. Baldwin's and Guam Greyhound's suit against Marati and her organization is pending, delayed, according to her attorney Anita Arriola, by charges of a conflict of interest on the part of the judge assigned the case. A hearing could well await the Guam Supreme Court's decision in the Brizill case, she told *Environment Hawai'i* in a telephone interview.

Arriola is also defending Marati in the case brought by Paoa. Although initially filed in state court in Honolulu, Arriola successfully argued for its removal to U.S. District Court in Honolulu, and, in December 2007, won an order for its removal to federal court in Guam. No hearing date has been set. — **P.T.**

opments not only at Puako, but also an area along the Kona coast just south of Keahole, called Kohanaiki. Conditions of both rezonings were that Nansay would build housing that would be affordable to people earning some percentage of the median income of Hawai'i County, as determined by the county's Office of Housing and Community Development. Separately, the Land Use Commission imposed another condition on Nansay in relation to the Puako development, calling for 60 percent of the housing units built there to be "affordable."

Over the next few years, Nansay built 147 units, most of them low-income rental apartments in Waikoloa Village. By 1998, Nansay was in default to its primary Japanese lender, Mitsui, and its projects at both Puako and Kohanaiki were moribund. Mitsui sold the note to Kennedy-Wilson International. Later that year, Kennedy Wilson foreclosed on the mortgage, acquiring both the Kohanaiki and Puako parcels. In 1999, it sold the Puako land to Bridge Capital but retained ownership of Kohanaiki.

When Bridge began moving forward with its plans to develop the Puako land, it sought to have the affordable housing units built by Nansay credited against its obligations under the county rezoning ordinance. Kennedy-

Wilson, on the other hand, claimed that it had not transferred those credits to Bridge when it conveyed title to the Puako land. Therefore, it argued, all the affordable housing credits accumulated by Nansay should be available to KW, to count against its obligations on the Kohanaiki land.

So, in 2005, Bridge sued KW and Nansay, now known as NHICORAM, seeking rights to claim all 147 affordable housing units.

In 2007, the litigation was settled, with a non-financial agreement (public) and a financial agreement (sealed). According to the public agreement, Nansay agrees to assign the housing credits it earned during the 1990s to Kennedy-Wilson. In turn, Kennedy-Wilson agrees to use those credits to satisfy the requirement that it build 100 affordable units for 500 planned market units at Kohanaiki.

Kennedy-Wilson assigns the balance of 47 units to Bridge, with the county agreeing that those units may be used against the county-imposed affordable housing requirement at Puako. According to the settlement, Bridge can apply those credits "towards satisfying future affordable housing requirements for the development of Puako ... but not towards satisfying Bridge's existing affordable housing obligation at Puako to construct 385 affordable housing" units pursuant to the LUC decision of 2005.

The state LUC affordable-housing requirement was lowered to 20 percent in 2005. Bridge 'Aina Le'a has said it will satisfy that through onsite construction of 385 units meeting the affordable criteria. — **P.T.**

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## LETTER

# Critics Take Cheap Shots At State Water Commission

To the Editor:

I was disappointed in your analysis in the February 2008 edition of *Environment Hawai'i* ("Reversals at Supreme Court Raise Question: Is Water Commission on the Right Track?"), about how the commission "doesn't get it." I expect more truth, honesty, and balance from *Environment Hawai'i* and this example was very discouraging.

I have plenty of reason to complain about what gets done at the commission, being long dedicated to the proposition of being more pro-active and transparent. But I'm also first in line to defend the forward-looking attitude of the people on our staff, the constant-upgrade mentality, the attention to detail, the professionalism, and the smart way with limited resources.

I wish I could be as complimentary to our good friends in the environmental community, who are always searching for a sound-bullet. There are some great things they're doing, but intelligent reflection on decision-making isn't one of them. I think they're using you to drum up funding for the next project. How else to explain some irresponsible comments?

Let me first point out that the Supreme Court's *Waiahole* opinion was a breath of fresh air for our staff, reinforcing many things we believed and advocated. I should not have to tell you that the law in this state is political, and we are not only bound by the law but by some

of its politics. Thankfully, interpretations are now going our way. We are now able to change much of our procedures and to use the court's interpretations to advance them.

I also should not have to point out to you (this is basic homework) that the *Waiahole* opinion was issued *after* the commission issued its Decision and Order in both the *Waiola* and the *Kukui* cases, and therefore what we "didn't get" is just any timely word about the Court's views on water resource management. What you evidently didn't "get" was that most of the opinion recognized sound principles and decisions by the commission, with just a handful of points that needed to be revisited, for technical legal reasons. Some of these same issues have been revisited upon us in both *Waiola* and *Kukui* cases—big surprise! What our detractors don't "get" is that the commission is not given

to taking extreme legalistic positions on technicalities and blowing them into whole catastrophes. That's their job, and they're fairly good at it—certainly took your paper for a ride.

It was disappointing to see their immature gloating over small points, when their own performance is less than spectacular. When it comes to delivering required information for the commission's consideration, where are they then?

We are very, very grateful for a court that treats important public subjects in a sound, public-interest interpretation, even when it turns out they don't understand the science or the practicalities of some things; that's our job, and we're better for their contributions. It's a far cry from the irresponsible flight from fundamental law taken by their counterparts at the federal level. We invite our adversaries, who are also our friends, to step up above cheap sound-bite thrills they've expressed recently. We have some important business to do together, and undermining their credibility isn't helping.

Charley Ice  
Honolulu



Waiahole Stream

PHOTO © ANNE KAPULANI LANDGRAF. USED WITH PERMISSION.

