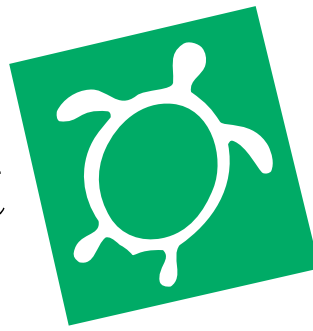


Environment



Hawai'i

a monthly newsletter

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Fields of Dreams

What's not to like about a plan to bring back koa forests to the denuded slopes of Mauna Kea?

To be sure, Hawaiian Legacy Hardwoods offers an attractive package, appealing to everyone from ritzy hotel managers at the Four Seasons Hualalai and Halekulani to the Boy Scouts and Kidney Foundation, from hard-core environmentalists to hard-nosed investors.

As we report in our cover story, however, the plan is based on koa growth rates hitherto unseen by acknowledged experts in the field. It assumes no ceiling in the market for koa and no limit to what consumers of this high-value hardwood will be willing to pay in the future.

The issue wraps up with our usual thorough coverage of recent actions by the Board of Land and Natural Resources.

Koa Plantation Company Has Big Plans To Restore Grazed, Logged Ranch Land

It sounds almost too good to be true. A private company, Hawaiian Legacy Hardwoods, LLC, has plans to restore native koa forests to thousands of acres of Big Island land, grazed and logged to a nub over the last century and a half. To achieve this it has devised a business plan that claims to benefit not only investors and the environment, but dozens of Hawai'i non-profit organizations—everything from the Boy Scouts to the Kidney Foundation to The Nature Conservancy of Hawai'i.

True or not, the operation is moving forward with plantings of hundreds of thousands of koa seedlings on the vast grassy plains of Kuka'iau Ranch, on the northern slope of Mauna Kea near Pa'auilo town. The plantings, which so far occupy about 400 acres, are on lands leased by Hawaiian Legacy Hardwoods (HLH) from ranch owner David S. DeLuz Sr. In the tiny village of Umikoa, nestled in the middle of the ranch, HLH has

erected three greenhouses. Here, HLH workers take seeds harvested from what sales manager Richard D. Lindberg says are the hardiest, straightest koa remaining on the ranch and bury them in soil cylinders the size of espresso cups. When ready to be planted, in four to five weeks, each seedling goes into the ground accompanied by a computer chip embedded in a tongue-depressor-like plastic stick. Coded into it is the origin of the seed and its purchaser, who, the company says, will be able to track remotely the tree's progress over the years.

One cannot help but be impressed by the sight of a hundred thousand bright green seedlings, each an inch or two high, each ready to be enlisted in the fight to bring back the forest.

"Reasonable Expectations"

That's not the only, or even the most, impres-
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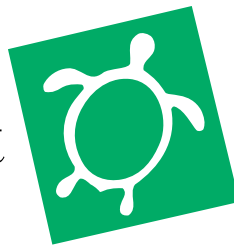
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Fields ready to be planted in koa.

Environment Hawai'i



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NEW AND NOTEWORTHY

Off With Their Heads! The owner of the catamaran *Queen's Treasure* is not giving up plying the waters off Ka'anapali without a fight.

On Valentine's Day, two weeks after a federal judge denied its motion for a temporary injunction preventing the state Department of Land and Natural Resources (DLNR) from interfering with vessel operations, Ka'anapali Tours, LLC (KTL) filed a motion for reconsideration.

Last September, the DLNR barred KTL from adding *Queen's Treasure* to its commercial use permit, claiming it allowed for monohull vessels only. (For more on this, read last month's cover story and our EH-xtra item, both available at www.environment-hawaii.org.)

In its motion for reconsideration, KTL's attorneys argue that the company has the right to operate any vessel from its inventory — either monohull or multihull — and that its current and previous permits anticipated the use of multiple vessels and the substitution of vessels. They point out that even owners with catamaran-only per-

mits have a shuttle vessel registered with their catamarans.

The state failed to prove it erroneously renewed KTL's permit and the court can't assume, based on "unsubstantiated allegations," that an error was made, they wrote. They suggested the court find that KTL has established a likelihood of success on its due process claim against the state.

KTL's current owners believed the permit was valid when they bought it in 2009, the motion states. "They paid extra money [\$200,000+] ... because of the fact that it was a multihull/monohull permit. ... Instead of attempting to take advantage of any improprieties, they sought the advice of government officials responsible and received assurances that their intended use of the permit was valid," they wrote.

If the DLNR, which is responsible for ensuring compliance, failed to do so, "they created and caused the irregularities they currently complain of," they wrote.

They added that regardless of whether the permit was erroneously issued or contains erroneous conditions, KTL should be given a catamaran permit.

They point out that only nine of the 10 Ka'anapali catamaran permits are active and KTL is the only company on the waiting list that has turned in the required catamaran registration. The 10th catamaran permit has been available since 2009 and should have been offered to the first person on the list, but no catamaran owner had paid the fee to be placed on the catamaran list until KTL did so in July 2011, they wrote, adding, "[KTL] ... should be first on any catamaran wait list."

A competitor of KTL prompted the DLNR investigation that led to its decision to block

Queen's Treasure from operating. And in its motion for reconsideration, KTL attacks its competitors right back. KTL points out that catamaran owner and operator Peter Wood, second on DOBOR's list, is barred by DLNR rules from having more than one permit. KTL also argues that Ka'anapali Kai Charters, Inc., which already holds two permits, should have one of them revoked.

"Clearly, the DLNR is not doing its due diligence in maintaining the wait list and is thereby harming people who have applied for Ka'anapali Permits and paid the fees," they wrote.

Thrice Denied: Parties opposed to the state Department of Land and Natural Resources' comprehensive management plan for Mauna Kea, prepared by a University of Hawai'i consultant and approved in April 2009, were dealt a setback on January 25. That day, the Intermediate Court of Appeals affirmed a February 2010 3rd Circuit Court dismissal of their appeal of the Land Board's decision to deny their contested case hearing requests.

The petitioners — which include KAHEA: the Hawaiian-Environmental Alliance, Mauna Kea Anaina Hou, Clarence Ching, the Royal Order of Kamehameha I, and the Sierra Club, Hawai'i Chapter -- argued that the Land Board had violated statutory and constitutional due process rights when it denied their petitions in August 2009. The 3rd Circuit Court found that because the plaintiffs had failed to show that a contested case hearing was required, the court lacked the jurisdiction to review the Land Board's approval of the CMP or its denial of the petitioners' contested case hearing requests.

In its decision, the ICA stated it had found no statute or rule requiring a hearing on a comprehensive management plan submitted for approval separately from a permit application. Therefore, it reasoned, a contested case hearing was not required by law.

Constitutional due process also failed to apply in this case, the ICA found, because the petitioners did not demonstrate how the CMP restricted public access or interfered with their cultural practices.

References in the plan to the University of Hawai'i's management of access, parking, visitor traffic, off-road vehicle use, hiking, etc., are "nothing more than considerations for the future," the ICA stated.

Environment Hawai'i

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Quote of the Month

"We will actually be the first certified licensed tropical hardwood carbon credit on U.S. soil in the world."

— Jeffrey Dunster,
Hawaiian Legacy Hardwoods

EDITORIAL

Critical Review Should Have a Place in Reforestation Plans

On its face, the plan to reforest more than 7,000 acres of Kuka'iau Ranch is remarkable. Using a combination of government grants, private philanthropy, and market drivers, a substantial chunk of the northern slope of Mauna Kea would be restored to something approaching its pre-human state. Palila would flit about in mamane trees at the upper elevations. The songs of 'iwi and apapane would fill the koa and 'ohi'a forest below.

But...

Why should it cost so very much — \$6 million or more — just to lock up the land, with at least that much more needed over the next decades to build fences and plant trees? To acquire a conservation easement over the lower portion will take \$2 million in federal dollars, through the Forest Service's Forest Legacy program, plus \$600,000 in state funds through the Legacy Land conservation fund. For the upper portion, the appraised value for the fee interest is \$3 million. For that, The Nature Conservancy of Hawai'i is seeking funds from a number of different federal, state, and private sources, that will allow it to take title.

The price tag, we are told, reflects no more than the going rate for land these days, with an appraisal done to federal standards to back it up. One can't argue with that, we're told.

Think again. The market value is based on the highest and best use of the land, and in the case of Kuka'iau Ranch, that is said to be ranching. But in Hawai'i, ranching is profitable only because government programs make it so. If ranchers had to stand or fall on the basis of a free market in beef, without taxpayer subsidies, there would probably be a whole lot fewer ranchers, and the appraised value of ranch land might not be so high. Taxpayers would then be able to buy a whole lot more conservation with increasingly limited public funds.

At Kuka'iau Ranch in particular, government payments have been especially generous. Members of the DeLuz family, which owns the ranch, have received hundreds of thousands of dollars in subsidies from federal agricultural programs over the years, and the state virtually bought them a slaughterhouse to process their beef. And through all that time, they have been pulling old-

growth koa off the land as though it was going out of style.

Proponents of the acquisition raise the threat of subdivision. To date, sales of the 40-acre ranchettes carved out on the lower portion of Kuka'iau Ranch have been sluggish, to be kind. In any case, at least one couple who bought land from the ranch has been working with the state to obtain grants to help reforest their property, logged to a nub by former owners. In the upper area, the threat of subdivision is even less serious when you consider that it's miles from nowhere and takes hours over a rutted jeep road to get there — not likely to be the sort of area likely to appeal to the folks that make up the high-end market for country retreats.

Good projects should be able to withstand scrutiny. In government, as in forests, sunshine is a tonic.

There is, of course, the real threat that if the ranch cannot pay off its creditors, banks may end up laying claim to the land, which would tie any restoration plans in knots for years to come. So, argue proponents, now, when there is a willing seller, when funds are lined up from private parties as well as state and federal agencies, why not close the deal?

The Easement

What, exactly, would the public be assured of receiving, should the deal go through?

In the lower area, the state would get a perpetual conservation easement that would run with the land. The upper area would be acquired in fee and managed by The Nature Conservancy of Hawai'i, which has indicated it would want eventually to turn the area over to the public, as state forest or even part of the national forest system.

TNCH has a good track record of managing the lands it acquires, but the easement over the lower portion of the property is more problematic. According to Sheri Mann, who is the staff person in charge of the state's Forest Stewardship Advisory Committee, not even committee members can be privy to terms of the easement until after the deal closes. In the case of a Forest Legacy easement that the state acquired from Kealakekua Ranch, and for which the federal government paid \$4 million, terms

of the easement are, some might say, remarkably lax. The ranch owner, Tom Pace, can log up to a quarter of a million board feet of lumber from live trees before he has to notify the state, and there's no limit on the quantity of dead or dying snags he can salvage. He can continue to graze cattle. He can have hunters up on his land, even as part of commercial hunts, giving him little motivation to eliminate pigs and sheep — anathema to any plan of forest restoration.

The proponents of the Kuka'iau Ranch plan might note at this point that grazing is not part of the long-term management plan. And while logging is, they will say, it's going to be done in a sustainable manner. To bolster their argument, they point to hundreds of acres already planted in koa seedlings.

A more sober assessment might consider other facts. The company that is doing the planting, Hawaiian Legacy Hardwoods,

does not have long-term tenure over the land. Even with the best intentions and methods, it may not be able to renew its lease, much less acquire title to the property. If it is thrown off the land, it is unclear what will happen to the trees owned by investors and the legacy trees that are intended never to be logged. HLH claims to have agreements that protect the investor trees, but those are not public and, without knowing what terms will be included in the easement the state acquires, no one can be assured that the legacy trees will be left standing in future logging operations. Nor should one overlook the fact that the success of HLH depends in large part on its ability to continue to sell blocks of koa seedlings as investments. If that market fails or falters, it is unclear whether HLH will be able to weather the resulting storm.

To be sure, reforesting slopes that have been cleared by logging and grazing is one of the most essential projects that the state should be undertaking. But it is in the interests of everyone that this be done prudently and rigorously, assuring taxpayers that their money is being spent wisely. Good projects should be able to withstand scrutiny.

In government, as in forests, sunshine is a tonic. By opening up the processes behind these decisions to more public review, we can be better stewards not only of the land, but of public funds as well.

Kuka'iau Ranch Owner Poised to Get \$2.6 Million for Koa Reforestation Project

In the years since he purchased Kuka'iau Ranch, owner David S. DeLuz Sr. has received hundreds of thousands of dollars in federal funds to support his cattle operation. According to the Environmental Working Group, which tracks subsidies made by the U.S. Department of Agriculture to farms and ranches, DeLuz received between 1995 and 2009 \$585,470 in conservation and disaster subsidies. According to the USDA response to a request for information from *Environment Hawai'i*, in 2010 and 2011, he was paid an additional \$78,634, bringing the total to \$664,104.

Throughout that time, the ranch has supported logging operations that continue to this day. Although the company logging Kuka'iau Ranch land claims it is taking only dead or wind-felled trees, on a recent day, its mill at the ranch was in full operation processing what appeared to be recently cut logs.

Now, after paying hefty subsidies to underwrite DeLuz's cattle operation, the USDA, through its Forest Service, is proposing to pay him another \$2 million for a conservation easement over 3,688 acres of his 10,000-acre ranch, including lands that are now being leased to and planted in koa by Hawaiian Legacy Hardwoods. In September 2010, the state's Forest Stewardship Advisory Committee voted to accept the ranch's proposal to be nominated by the state to the national Forest Legacy priority list. The Forest Service's Forest Legacy program is intended to protect from development or degradation lands that are considered "working forests" – "those that protect water quality, provide habitat, forest products, opportunities for recreation, and other public benefits."

The Forest Service ranks the nominations that come in from the states. Last year, the Kuka'iau Koa Forest was slotted in as No. 13 on the Forest Service's national priority list for 2012.

In addition to the \$2 million that the federal government will pay DeLuz for the easement, The Nature Conservancy of Hawai'i is asking the state's Legacy Lands program to pay DeLuz an additional \$600,000, which will be part of the non-federal match for the Forest Legacy easement. (The Forest Service requires a match of one dollar for every two dollars in Forest Legacy funds.) The total cost of the ease-

ment is pegged at \$3 million: \$2 million from the federal government, \$600,000 from the state, and \$400,000 as a "donation" from the ranch owner.

(The cost of the easement is based on an appraisal of nearby property that looks at the value of the land without the easement and compares it to the likely value with the easement. According to documents filed with the state, the market value of the three parcels making up the 3,688 acres of Kuka'iau Ranch land that would be subject to the easement was \$11 million in 2010.

The terms of the easement are yet to be spelled out. ...the easement language could not be made public until after the deal was consummated.

With the easement, the value would be \$3 million.)

The terms of the easement are yet to be spelled out. Sheri Mann, who manages the Forest Stewardship Program for the state Department of Land and Natural Resources' Division of Forestry and Wildlife, told the Forest Stewardship Advisory Committee (FSAC) that the easement language could not be made public until after the deal was consummated.

Still, the committee is tasked with advising the state on the management plans submitted by Forest Legacy applicants. As Mann told the committee, "we need your approval to meet the Forest Legacy application needs. We're not holding it to a high level of forest stewardship, but it needs to be a plan we stand behind and feel is worthy."

No one from either Kuka'iau Ranch or Hawaiian Legacy Hardwoods was present to explain the plan or answer questions. John Henshaw, director of land protection for The Nature Conservancy of Hawai'i and FSAC chair, championed it in his comments, noting that "TNC is supporting the plan." (TNCH receives \$1 for every Legacy Tree planted by Hawaiian Legacy Hardwoods, and HLH has also promised TNCH \$50,000 a year in addition.)

J.B. Friday, a forester with the University of Hawai'i's extension service, criticized the proposal for its lack of specifics. "There's no economic analysis in the plan," he said. "Yet it's claiming to be a commercial plan." Referring to published projections on the HLH website, Friday observed that HLH

will be getting \$32,000 an acre for planting investor trees, and \$22,500 an acre for the legacy trees. "We're all familiar with establishment costs," he said. "Boutique re-establishment costs \$5,000 an acre. They're getting \$32,000 an acre."

Henshaw again defended the project: "This is enormous in terms of its cost," adding that the economics of HLH "is interesting, since it's all prepaid. You've got great economics" – prompting committee member Rich von Welsheim to remark: "What you're doing is defrauding the public."

Once more Henshaw rose to HLH's defense: "The investor is told these are estimates, and only qualified investors can invest – someone who's very wealthy already. The third thing is, I'm not altogether sure they can't do this."

Following a robust discussion, the committee decided to not accept the plan until it had been substantially revised.

Legacy Lands

The state Legacy Land Conservation Commission (LLCC) must approve the application for the \$600,000 portion of the non-federal funds match for the Kuka'iau Ranch easement. The Land Conservation Fund receives 10 percent of the conveyance taxes paid to the state annually, and with this, the LLCC issues grants to state agencies, counties, and non-profit organizations to assist them in acquiring properties with resource value. Counties and non-profits must provide matching funds equal to at least 25 percent of project costs.

Last year, the LLCC received a request for funds for the project that listed both TNCH and the state of Hawai'i's Division of Forestry and Wildlife as applicants. Since TNCH is not going to be holding the easement (DOFAW will, if the Forest Legacy purchase is completed), it is not clear why TNCH would be on the application. When asked, the TNCH's Henshaw said his organization "is a supporter of Forest Legacy conservation easements in Hawai'i.... We are doing what we call a government assist as the state of Hawai'i will hold" the conservation easement.

In December, the LLCC met to rank the various applications made for the coming year's appropriations. Commissioners heard a report from three of their members – Dale Bonar, LLCC chairman, Rob Shallenberger,



PHOTO: J.B. FRIDAY

Forked plantation koa may be the result of psyllid damage.

Psyllid May Be Cause of Forks Seen in Plantation Koa Stands

When it comes to the prospects of growing high-value koa in plantations, Hawaiian Legacy Hardwoods CEO Jeffrey Dunster and University of Hawai'i forester J.B. Friday do not see eye to eye.

They disagree over the yields of marketable koa that can be expected from a given area, with Dunster predicting productivity rates more than twice those reported by Friday.

They also disagree over the quality of the wood, especially when it comes to the production of the tall, straight trees highly valued in hardwood markets.

In the journal *Small-scale Forestry*, Friday, Travis Idol (also with the University of Hawai'i), Paul Scowcroft and Janis Haraguchi (both with the U.S. Forest Service in Hilo), and Nicklos Dudley (with the Hawai'i Agriculture Research Station) published a paper called "Poor Stem Form as a

Potential Limitation to Private Investment in Koa Plantation Forestry in Hawai'i." As the title suggests, they found that "most existing plantation koa trees fork so close to the ground that they will produce little to no merchantable wood."

"The product in forestry ventures is often sawtimber, which requires trees with straight, single-stemmed, defect-free trunks," the authors write. Often, plantations of high-value hardwood trees "tend to produce low-value, short butt logs and bolts due to crooked stems, low fork heights and delayed shedding of lower branches."

The plantation koa studied by the authors follows that pattern: "few plantations contain large proportions of well-formed trees that might one day yield sawlogs. Instead, plantation trees generally appear to have multiple trunks originating within 3 m

[meters] of ground level, a growth form unlikely to yield much merchantable wood."

Dunster argues that his company has the benefit of knowing the source of its seeds and that, by tracking seedling growth from one year to the next, his workers can figure out which seed sources are most successful and eliminate the less successful ones from their future plantings.

Of the first 20,000 seedlings planted, Dunster said, "none of them forked. We did notice differences in growth, though, and we monitored that over the next year. We started to notice trends – certain trees were really vigorous, strong, and straight. . . . In year two, we selected trees for planting and refined our mix. Year two trees are faster [growing], more vigorous. . . ."

Friday is not so sure that the HLH trees will escape the same fate as other plantation koa, however. While superior genetics helps, he told *Environment Hawai'i*, there's also the koa psyllid *Psylla uncatoides*, to deal with.

"Koa wants to be a big tree," Friday said. "It's in its architecture. But if bugs come in and kill the terminal leaders, they branch out. At Umikoa [a neighboring ranch where koa has been planted], every single tree is forked."

"What I guess happened is, all the plantations were hit by psyllids. They take off in summer and nail the terminal leaders. . . . At Umikoa, all the trees forked at six feet. If it was three feet, you'd suspect cows were responsible. But at six feet, it'd have to be a pretty tall cow. I suspect they got hit by psyllids."

"To get a straight tree," he continued, "everything has to be right – good genetics, good environment. But if you kill the top, you'll get branching." — **P.T.**

and Carl Berg – of the site visit they made to the HLH site in September. According to draft minutes of the meeting, "Chair Bonar explained that they [HLH] will be planting legacy trees (there forever) and then other trees, thirty, fifty, a hundred years down the line, they can be harvested."

In response to a question about management of the area, Henshaw replied, "Right now it is with the DeLuz family. Once it [the Forest Legacy easement] goes through, then the plan is to have Hawai'i Legacy Hardwoods (HLH) buy the restricted fee from the DeLuzes so it would be managed as a forest under HLH."

What if the company fails? asked another commissioner. "Mr. Henshaw said the rights and the property will always be transferred as a whole," the meeting minutes state. Another

question concerned HLH's tenure on the land. Henshaw assured commissioners that HLH would have a 60-year lease.

In the final ranking of projects, the Kuka'iau Ranch easement came in tied for third with the proposed expansion of Ka'ena Point Natural Area Reserve on O'ahu (estimated to cost \$86,450). The commission staff estimates that the grants totaling at least \$3.7 million can be distributed this year, making it likely that the \$600,000 match for the Forest Legacy easement will be available.

Subsidies Continue

In an interview with *Environment Hawai'i*, Jeffrey Dunster, the CEO of HLH, said he and his partner, COO Darrell Fox, "are just trying to find a way to put the forest back, without

government handouts and philanthropy."

But the "handouts" continue. Over and above payments made to DeLuz, USDA and state programs have underwritten HLH operations with one-time payments of \$57,920 (\$36,500 from the USDA for enrollment in its Conservation Reserve Enhancement Program, \$19,790 from the state as a one-time payment for its cost-share of CREP monies covering 84 acres of plantings) and ongoing, annual payments of at least \$92,722. When asked to verify the figure, Dunster said he didn't know exactly – "and even if I did know, I don't know if I should share it."

As HLH clears and plants more acreage, the size of the subsidies will increase, since the USDA programs, on which the state payments are based, are a function of acreage in production. — **P.T.**

Big Plans from page 1

sive part about HLH's operations. The company's projections of growth rates and yields of marketable koa from investors' trees are far greater than anything that foresters from the University of Hawai'i and the U.S. Forest Service have recorded. In mature stands of planted koa, just a few miles from Kuka'iau Ranch, the trees' basal area—the actual square footage occupied by trees, and a proxy for tree productivity—has been measured by foresters as somewhere between 60 and 175 square feet per acre. HLH claims that for its koa, "250 square feet per acre seems a reasonable expectation." In a booklet distributed to potential investors, HLH states that their estimates of growth are arrived at "using the growth rates typical of other plantation grown tropical hardwoods," such as *Acacia mangium*, which has been described by some promoters as "an investor's miracle tree" in terms of fast growth.

(In a telephone interview last month, HLH chief executive officer Jeff Dunster backed away from the 250-square-foot claim. Last year, he said, "we actually modified all of our yields to 175," reflecting the upper limit in the range set by university and Forest Service experts. Despite the lower number, he said, projections for investor profits did not diminish. "Because the price of koa has gone up so drastically," Dunster said, lowering the basal area estimates "didn't change the profits." The reduction was made, Dunster continued, "not because we agree with the number—we still think it's woefully low. But it doesn't matter, since the price has gone up.")

Basal area projections are not the only area of disagreement between the experts and HLH. Estimates of the volume of lumber taken from HLH stands at the end of the 25-year investment cycle were "an order of magnitude more than what we observe on a neighboring ranch," said J.B. Friday, a University of Hawai'i extension service forester and one of the authors of several studies on koa growth trends. HLH projects that more than 77,000 board feet per acre will be taken over a 25-year rotation, Friday noted at a January meeting of the state Forest Stewardship Advisory Committee where HLH's plan was discussed. When Friday prepared a paper on koa plantings on former ranch land, he continued, "we used a figure of 9,500 board feet per acre, and still Peter Simmons [a Big Island forester] thought we were way over. The most recent figure I published was 7,000 board feet per acre... And they [HLH] project 77,900 board feet per acre."

Lindberg, who was a mortgage broker in Honolulu before becoming sales director for HLH, explained the discrepancy by noting

that HLH was using seed from trees specially selected for their vitality and likelihood of producing "investment-grade" wood. Seed sources for the plots Friday and his colleagues had examined were unknown, he said.

That's not quite right, Friday said. At the best of the three koa plantation sites (all within a few miles of the HLH plantings) studied by him and colleagues Paul Scowcroft, Janis Haraguchi, Travis Idol, and Nicklos Dudley, the planted trees were from seeds taken under "superior parent trees." Those trees, planted at an area called Keanakolu, did have "much better form" than trees at the two other sites, but yields were still nowhere near those anticipated by HLH.

Whatever the yields, HLH tells investors to expect no return until the eighth year following planting of their blocks. In a prospectus-like booklet given to investors, HLH says that it assigns "no value to the trees that are culled or thinned in years 1-7."

"We do however value the wood derived from the year 8 thinning harvest," it continues. At year 8, of the 100 seedlings planted, between 37 and 43 will be harvested, each with 35 board feet of "marketable wood." Later harvests will be made at years 13, 17, and 21, with the final harvest—of between 9 and 11 trees—at year 25. By that time, each tree is anticipated to have around 540 board feet of marketable wood. With a projected value ranging from \$30.43 to \$47.47 per board foot, each tree would then be worth more than \$16,000, and possibly as much as \$26,000. Between 43 percent and 64 percent of the investor's total projected profits would come from this last harvest.

From the initial \$7,807 block of trees, then, investors can expect to see net returns (after HLH takes out costs for milling, harvesting, processing, and maintenance) of between \$282,946 and \$316,485, the booklet states. Averaged over the 25-year investment period, that comes to an annual return on investment of between 14 and 16 percent.

The high risks associated with the investments are disclosed only in the order form that potential purchasers of 100-tree blocks must complete. There, HLH states that it will replace any tree "that is not growing as anticipated or of good form" only within the first year of planting. Also, buyers must "acknowledge that HLH does not guarantee the growth of your trees, the value of your trees, the yield of your trees or the value or saleability of the logs/lumber that may be harvesting [sic] from your trees."

Accredited Investors

HLH also includes in the order form a clause normally found only in sales of high-risk stocks, requiring purchasers to attest that they are "accredited investors," as defined by the Securities and Exchange Commission. Accredited investors are generally institutions (pension funds and the like) and wealthy individuals.

According to Dunster, the restriction was included just to make sure that investors knew what they were getting into. "It was a personal decision on my part," he told *Environment Hawai'i*. "We want to deal with people who have the ability to hire their own analysts. We want to make sure we're not dealing with situations where, even with good intentions, someone buys an investment that's not right for them."

When questioned as to whether investor funds were segregated from the company's general revenues, Dunster said that they were—in a trust controlled by the company. "It's our way of making sure we only draw down funds to fulfill our obligations to the tree owners," he said. "The largest expense, when someone buys a block, occurs in the first year. But we keep a reserve. Over the next three and a half years, after the trees are planted, they need to be fertilized."

Dunster knows a thing or two about risk, having once held a registration with the National Association of Securities Dealers, or



Workers planting koa seedlings at Kuka'iau Ranch.

Nature Conservancy Plans to Purchase, Restore Mauka Acreage of Kuka'iau Ranch

Immediately above the land that Hawaiian Legacy Hardwoods is proposing for its koa plantation, just across rutted Mana Road, lies a 4,469-acre tract. At its lower elevations (starting at 5,200 feet), the landscape bears the scars inflicted by more than a century of grazing. The once-forested pasture has a few koa snags, wider than tall. A cabin and kitchen house for cowboys, an FM tower and repeater station, and three cellular towers are sprinkled among the water catchments, troughs, and other ranching relics.

At its upper end, close to 8,400 feet above sea level, about 2,000 acres are within designated critical habitat for the palila (*Loxiodes bailleui*), one of the most endangered native Hawaiian birds. The mamane forests essential to the palila's survival have been badly hit by grazing and browsing animals, but, under a plan proposed by The Nature Conservancy of Hawai'i, the potential palila habitat will be fenced, feral animals removed, and trees planted.

TNCH acquired a conservation easement over the property in 2009. The same year, it had an appraisal done, which placed the market value of the land at \$3 million, and, according to TNCH, ranch owner David S. DeLuz and his family agreed to sell the property at that price.

Now TNCH is asking the state to pay, through its Legacy Land program, \$1 million

toward the purchase. In addition, TNCH has applied for a grant of \$1 million through the Fish and Wildlife Service's Recovery Lands Acquisition program.

It has received \$500,000 from the WalMart Acres for America program, says John Henshaw, TNCH director of land protection. That grant passed through two intermediaries: the National Fish and Wildlife Foundation received the WalMart funds before passing them on to the Hawai'i Islands Land Trust, or HILT, which was the nominal grant recipient. Dale Bonar, executive director of HILT (and also chairman of the Legacy Land Conservation Commission) told *Environment Hawai'i* that HILT transferred the entire award to TNCH, "since we did not wish to hold fee or easement interest on the property, nor any management responsibilities."

In its application for the Legacy Land grant, TNCH said it expects to receive yet another \$1 million grant from the U.S. Army's Army Compatible Use Buffer (ACUB) program. (Although the ranch land does not adjoin any Army land, Alvin Char, who runs the ACUB program in Hawai'i, explained that sometimes, to relieve pressure on areas where Army activities have an impact on endangered species – such as at Pohakuloa Training Area – "we work with someone to increase the population off-post, to relieve

the pressure on the Army to conserve on-post." In mid-February, Char said the Army was still in discussions with TNCH over the ACUB grant.)

Henshaw explained to the Legacy Land Conservation Commission (LLCC) in December that the Recovery Land Acquisition funds were not a sure bet. "What happened at the last minute," he said, "was, the federal government had to chop the budget a little bit, so they lost that funding." Still, according to meeting minutes, he expressed hope that RLA funds would come through this year. "It's the number one project for the state," he said. Furthermore, over and above the \$1 million that ACUB was being asked to contribute toward the land's purchase, TNCH was seeking \$800,000 for management, "primarily fencing and outplanting of native species in the upper area."

In its application to the LLCC for funds, TNCH also spells out a role for Hawaiian Legacy Hardwoods. "For the lower portion of the property," it states, "efforts are underway to partner with Hawaiian Legacy Hardwoods to reforest approximately 2,500 acres in koa and other native forest species. Funding for this portion of the project will come from HLH 'Legacy Tree' sales." Once title to the property is in hand, the application states, the conservancy, "HLH, and the state and federal government will partner to manage the property."

At the end of the LLCC's two-day meeting, commissioners ranked the applications before them to come up with a priority list for funding. The TNCH proposal was ranked No. 6 of eight. — P.T.

NASD, now known as FINRA, for the Financial Industry Regulatory Authority. According to FINRA's online "brokercheck" records, Dunster was expelled from NASD in 1990 for non-payment of a fine imposed on him as a minority stakeholder in a brokerage firm, Pan Oceanic Investments, that the NASD had sanctioned for several unethical trading practices. When asked about this, Dunster provided the decision of the NASD Board on an appeal of the original sanctions against him and Pan Oceanic. In that decision, the NASD Board severed him from the fines against Pan Oceanic and instead imposed on him a 10-day suspension and a \$75,000 fine intended to "effectively deprive him of the \$58,778, or 25 percent of the excessive mark-ups ... plus assess an additional \$16,222 as a deterrent against future misconduct." After Dunster did not pay the fine, the NASD expelled him.

Dunster also provided a copy of a letter dated May 10, 1994, from the New York law



A few of the thousands of koa seedlings in the greenhouses of Hawaiian Legacy Hardwoods.

firm that represented him before the NASD Board. Referring to the NASD Board's decision in the appeal, written February 28, 1990, the letter states, "The net effect of the decision for any and all purposes is that you are not now suspended and have never been expelled 'from membership in ... an association regis-

tered as a national securities association" with the SEC. However, as far as NASD/FINRA is concerned, Dunster was well and truly expelled from its ranks as of July 17, 1990. In an interview last month, Dunster disparaged NASD: "It's an organization that makes its living going in and imposing fines. It's just simply a game... It's all about collecting fees, and I wasn't going to pay it [the fine]."

In the 1990s and well into the last decade, Dunster and his partner, Darrell Fox, worked closely with a number of penny-stock companies, advising them on mergers, drumming up publicity for their activities, and consulting on raising capital. Now, Dunster says he is interested in more than making money. "Why are we doing this?" he said in the interview. "I've seen what money does to people – it makes you a target. I want to put my money now in a place where I can feel I've done something with it. Securities is basically betting on horse races. I want to do some-

thing with a tangible impact. Putting up a forest is for us the ultimate statement.”

Second-Growth Koa

One of the most significant variables in the company's projections is the market price of koa. The three possible scenarios set forth in the HLH booklet for investors calculate different rates of increase in market prices for koa: 6 percent a year, 7 percent, and 9 percent. These rates are conservative, HLH says, given that “the rate of increase in tropical hardwood prices since records started being kept in 1972 has averaged 13 percent per year.”

“For koa, demand and limited supply has resulted in a price increase of more than 1000 percent in just the last 10 years,” it goes on to say.

Friday points out a flaw in the projections, however. Today, he said, “everybody's harvesting old-growth stuff. It's beautiful wood.” But whether young, so-called “second generation” koa can demand the same high prices is an open question, he said.

In 2009, Friday was part of a demonstration project at Kuka'iau Ranch that looked at a one-acre stand of koa planted in 1976 by the Forest Service – a stand, by the way, that Lindberg and others with HLH now cite as an example of the high productivity that can be expected from their plantings.

The object of the project was to examine the quality of plantation koa. “We took down one large, ‘crop’ tree and four smaller ‘cull’ trees, milled them up and scaled them,” Friday said. “We looked at the lumber, said here's what you can get out of a 32-year old tree. The loggers said that if I had a pallet of this wood, I couldn't sell it in today's market. I could mix in a few boards of it with a lot of better wood, but this stuff isn't marketable in today's market.”

The crop tree, with a 20-inch diameter at breast height (dbh), yielded 200 board feet of lumber, while the two cull trees that were milled (12 inches dbh and 15.5 inches dbh) yielded 42 board feet each. Of the approximately 1,000 trees planted in the one-acre stand, there were just 12 potential crop trees.

Nothing would please Friday more than to see a market develop in second-growth koa, “but in my view, it's not there today.”

“What we got isn't the same stuff as you get from a huge tree in a pasture that falls down. Slice it off, get a beautiful rind of wood. But that's not sustainable – you're just hunting wild meat.” (Photos of the August 17, 2009 demonstration are available online at: <http://www.ctahr.hawaii.edu/forestry/Workshops/kukaiau17Aug09.html>.)

Dunster was asked how confident he was that the second-growth wood produced by

HLH trees will be as marketable as old-growth koa and fetch prices just as high. Very confident, he replied. As the supply of old-growth koa diminishes, people will have bidding wars over what remains, he said. “It's a supply-demand thing,” he said. “I do know there are folks that can make use of 25-year koa.”

If the wood from young trees isn't attractive enough for veneer, sales director Lindberg said, it can be used to make the plywood substrate. That, he said, would allow vendors to advertise products as “solid koa.”

Legacy Trees

The investor trees are not the whole story of HLH's operations, however. The company had no representative at the January meeting of the Forest Stewardship Advisory Committee, but in a recent tour of the operation, Lindberg said that HLH is planting as many legacy trees as it is investor trees. The business plan called for having legacy trees represent up to 20 percent of plantings, he said, but as it turns out, they are around 50 percent.

So what is a legacy tree?

According to one of the company's websites, www.legacytrees.org, these are trees that are not intended to be harvested, but which will, instead, be a part of a long-term reforestation plan. Individuals wishing to plant a legacy tree – in memory, perhaps, of a loved one, or as penance for extravagant carbon consumption, or to participate in a reforestation effort – pay HLH \$60 to plant a tree. Of that, \$20 goes to a charity of the buyer's choice, \$1 goes to The Nature Conservancy of Hawai'i (which also receives \$50,000 a year from HLH), and the remaining \$39 goes to the company.

To date, all the legacy trees have been koa, but, says Lindberg, that won't always be the case. Mamane, 'ohi'a, or other native species “appropriate for the area” could also be planted as legacy trees, he said. Dunster told *Environment Hawai'i* that HLH has contracted with nurseries to furnish iliahi (sandalwood), mamane, naio, 'ohi'a, and even some understory plants such as akala and ko'oko'olau.

The proposal submitted to the Forest Stewardship Advisory Committee states that such trees “will stand as a permanent memorial on the land. They will be planted in fenced units along ridges, gulches, and hollows that are not otherwise suitable for commercial plantings.”

Lindberg was asked how the plantings can be deemed permanent while HLH has less than 30 years left on its lease with Kuka'iau Ranch. He pointed out that the company's website never claims that the plantings will be perpetual and that, in any event, HLH is in negotiations with DeLuz to exercise its option to purchase the land. According to records at

the state Bureau of Conveyances, in 2010, HLH was granted an option to extend the lease by 32 years (for a total of 60 years from its commencement, in 2009), but there is no recorded mention of an option to purchase.

Dunster acknowledged that there was no assurance the company would be able to purchase the land from Kuka'iau Ranch. “What I can tell you is, we have documents signed by them stating that that was their intention, and I think they're changing their minds. If we can work a deal with them, we absolutely want to purchase all of this.” Dunster made clear he was referring to all 3,688 acres that are included in the restoration proposal HLH submitted to the Forest Stewardship Advisory Committee, not simply the 1,000 acres the company leases.

At the end of the third year of the 28-year lease term, would Dunster continue to sell blocks of trees with an expected 25-year life?

Dunster responded by explaining that the 28-year clock only began ticking when a given field within the lease area is planted. “In the lease, it states, ‘The term of the lease shall vary as to individual Planted Areas.’ In other words, the 28 year lease begins as we take on each new parcel of land for that year's planting. In essence we end up with many little leases with staggered expiration dates,” he wrote in an email to *Environment Hawai'i*. (The lease itself was not recorded at the state Bureau of Conveyances, but rather only a memorandum of lease, taking notice of its existence.)

Dunster added that the lease also requires HLH to hold back a percentage of each year's planted trees (1/6th) as a reserve asset to protect DeLuz and tree owners if HLH defaults on its obligations to its investors.

Should HLH lose the land, what will happen to the investor trees and legacy trees? Dunster was asked. “When we set it up,” he said, “we designed it so that if something happened to HLH, the obligations we've committed to will be honored by the landowner. We built it right into the lease – that the landowner agrees they'll honor all our obligations.”

Carbon Credits

Lindberg said the company makes no money on its legacy trees and not much on its investment trees, either. The real profit center, he said is in selling credits for carbon sequestration. (Since there is no requirement for greenhouse gas emitters in the U.S. to offset their emissions, at the moment there is no strong U.S. market for credits.)

“We have had an analysis done for carbon” by Kent & Associates, Dunster said. “We haven't published it, haven't released it, but... they agree with our old numbers” (the 250-plus square feet per acre basal area of koa, not

BOARD TALK

Malaekahana Park Managers Stay While DLNR Seeks a New Lessee

The Friends of Malaekahana (FOM), which has managed the 36-acre Kahuku section of the Malaekahana State Recreation Area for nearly 20 years, on O'ahu's north shore, has dodged eviction, but its future there is still far from secure.

At the meeting of the Board of Land and Natural Resources in late January, the Division of State Parks recommended ousting FOM, restarting its search for a long-term lessee, and issuing a revocable permit to a new entity to run the park until a lessee is selected. It also recommended authorizing the Land Board chair to collect money from FOM for one of the park's cabins that burned a few years ago.

But after hearing heartfelt testimony from several supporters and members of FOM and a lengthy explanation by FOM director Ipolani Tano of its fractured, and in the Friends' eyes, hamstrung efforts to manage the park, the Land Board voted to issue a revocable permit to FOM allowing it to stay on for the next several months.

In the meantime, FOM must work with State Parks to address wastewater and cesspool violations identified by the federal Environmental Protection Agency and the state Department of Health in 2009. If the Department of Land and Natural Resources does not shut down its large capacity cesspools (LCC) by next month, the DOH could fine it \$25,000 per violation per day.

Despite the threat of fines, as well as a number of other outstanding management concerns, Big Island Land Board member Robert Pacheco said, "I do have a problem with throwing the baby out with the bathwater." He added that he doubted State

Parks could care for the park any better. "I don't see it," he said.

A Long Time Coming

As both oral and written testimony showed, FOM supporters couldn't understand why the DLNR would want to close the park — "a gem to our community," according to one young woman — and evict the Friends. Some of them speculated it was for economic or political reasons.

They were wrong.

In addition to the potential fines by the EPA/DOH, State Parks administrator Dan Quinn told the Land Board that FOM had conducted unauthorized grading, construction, and landscaping; owed the division thousands of dollars in overdue water bills; allowed people to live in the cabins; allowed a historic cabin to burn without having fire insurance; and, without a permit or a lease for the past six years, had no legal right to be there.

"Management at Malaekahana is a mess. We should have gotten to it earlier. ... It languished and now it needs to be addressed," he said.

In 2004, FOM was the sole bidder in response to the division's request for qualifications/request for proposals (RFQ/RFP) to find a long-term lessee. Although State Parks tried as late as 2007 to issue FOM a lease, disputes over requirements, including an appraisal, an environmental impact statement, and a development agreement, killed the deal. Because the FOM fell behind on its water bill in the meantime, the division could not renew FOM's permit before it expired at the end of 2006.

Even so, FOM continued to manage and improve the property, grading cabin sites and installing yurts, despite letters from State Parks to cease and desist.

Then in April 2009, the DOH and the EPA notified State Parks that Malaekahana contained ten unpermitted wastewater systems and five active LCCs, which were banned by the EPA in 2005. (Quinn told the board that FOM had since added a sixth LCC.) The parties later agreed on an action plan, which called for the closure of the illegal facilities next month.

A Bad Marriage

To O'ahu Land Board member John Morgan, State Parks may have expected too much from its manager.

In response to Morgan's question about why there weren't more bidders in 2004, Quinn noted that the improvements his division included in the RFP would have cost \$4 million, in addition to the cost of doing an environmental impact statement.

Morgan suggested that the division had proposed a business model that made little sense.

"Nobody else, maybe with a sharper pencil, threw their hats in. Maybe it was an unreasonable goal," Morgan said.

In her rebuttal to Quinn's statements, Tano agreed with Morgan, stating that the request for proposals was "poorly conceived." She also painted a picture of FOM as an organization committed to caring for Malaekahana, but thwarted by bureaucrats.

She said FOM had removed 32 abandoned vehicles and 50 tons of trash from the park, invested \$2 million in its water system and \$250,000 in yurts, and hosted more than 35,000 visitors a year. FOM employs nine permanent and eight casual workers, she said, noting that the casual workers are homeless people who help care for the park in exchange for use of its facilities and/or a place to stay.

In total, she said, FOM had spent \$4 million on improving the park. She added

the 175-square-foot number in the company's current projections). Kent & Associates "did their own studies," Dunster continued. "They came up on their own with the same numbers that we had, within one or two percent. It was rewarding and vindicating."

Kent & Associates "certify carbon, which is all about growth rates," he said. "We're in the final stages... We will actually be the first certified licensed tropical hardwood carbon credit on U.S. soil in the world."

According to Kent & Associates' website, it "performs carbon project eligibility and

feasibility assessments. If a carbon project makes sense, we will help the client prepare a project and list the carbon credits with an appropriate registry."

Investors are told that the carbon-credit value of the trees they own is theirs to sell. "If you plant 100 koa trees," HLH claims, "the anticipated yield over their 25-year growth and harvest cycle is in excess of 17,000 board feet. Koa weighs approximately 3.15 pounds per board foot. That makes the yield about 53,550 pounds. If half of this is carbon, you have trapped about 26,775 pounds of carbon.

To do this, your trees removed 49.1 tons of carbon dioxide from the atmosphere." Even after the trees are felled, investors need not worry about the carbon once more becoming a greenhouse gas: "When the wood grown is precious tropical hardwoods, the lumber and products made from this wood will be around for generations. It will be a very long time indeed before that carbon finds its way back into the atmosphere." The carbon-credit value of legacy trees and of any other non-investor trees planted by HLH belongs to the company. — *Patricia Tummons*

that \$500,000 in grant funds for further improvements had to be returned because FOM lacked tenancy, a situation that led to the cabins becoming dilapidated.

"We were told we're not authorized to fix them. We're embarrassed by the cabins," she said.

The FOM had tried since the mid-1990s to get the state to allow it to restore the Kawanakoa cabin that eventually burned because of faulty wiring, she continued. In 2008, the FOM sent the DLNR four emails over eight months regarding its tenancy, with no response, she said.

"[Former DLNR director] Laura Thielen only responded after the cabin burned down, blaming us and saying that we owe \$6,000 for the water bill," Tano said. "I take extreme offense to those statements."

The FOM just wants to be treated fairly, Tano said, pointing out that State Parks has issued long-term leases to other non-profits to manage its facilities and not required them to pay for an appraisal or conduct an EIS.

Zane Bouvette, who provided FOM with the yurts, claimed that State Parks staff has a "vendetta" against park manager Craig Chapman.

"We were stonewalled and screwed every step of the way," Bouvette said.

To Kahana resident Jim Anthony, FOM was entitled to a long-term lease. "They're not perfect. They've made some mistakes, [but] done essentially good work. Community support, money ... those things don't often come together in one package," he said.

Working it Out

"Much has been said. ... Regardless, we have no permit in place right now. We need to have a decision," Quinn told the board after the public testimony ended.

He said his division intends to keep the park open and undeveloped, however, it would like to make some improvements.

"We want to make sure they're done legally. We don't want to be surprised," he said, referring to FOM's past actions. "Construction of eco-cabins is not treading lightly." He added that because federal funds were used to purchase the park, it needs to stay as an outdoor recreational area. Homeless housing and social services are not a part of that, he said.

Still, the board members believed FOM had made a good case and thanked everyone for their uncommonly respectful, informative testimony.

"There are obviously issues of compliance. Accompanying all that is this bad relationship. I would like to see both parties adopt a win-win solution ... rather than a 'burn the

bridges right now' kind of approach," Morgan said.

That being said, Morgan thought the park needed improving and supported State Parks' recommendation to reissue an RFQ/RFP for a new park manager.

Board member Pacheco didn't seem to think all the blame for the park's problems should be laid at FOM's feet.

"Any relationship that's not working, both sides are bringing something to it. ... You can't put the cesspool stuff on them when they don't have a legal agreement [to fix things]," he told Quinn. "They've never had a functional lease to put in millions in capital improvements."

In the end, with the understanding that all of the LCCs would shut down as scheduled and that the FOM would work with the department on resolving all compliance issues, the Land Board unanimously approved a six-month revocable permit for FOM. The board also authorized its chair, William Aila, to issue a RFQ/RFP for a long-term park manager, appoint an evaluation committee, evaluate proposals, and select the best offerer.



Standoff Over Seawall Nears Resolution

One can never be too careful when buying beachfront property in Hawai'i. California resident Tom McConnell is finding that out the hard way.

In 2002, McConnell's company, TLM Partners, Ltd., bought an old 1930s-era house along Niu beach in East Honolulu, knowing that the attached lanai encroached on state land. He told the Land Board in January that he did not realize that the fast land and 6-foot high seawall makai of his lanai were also encroachments. He learned that only after he began the process of rebuilding the old house.

A shoreline certification, often required for work in coastal areas, revealed that the wall and some of the land behind it sat beyond his property line, which is only a few feet from his house. Believing he needed an easement to keep the wall, which was built pre-1950 and fronts several properties, McConnell sought and received one from the Land Board in 2008. Before seeing the easement document, McConnell paid the DLNR the cost of the easement: \$135,135.

But after reading the final document, which required him to post

signs on the wall announcing it was public property and obtain permits to maintain or repair the wall, he wanted out. And he wanted his money back.

"[D]ue to personal reasons, including health issues and the fact they no longer had the ability to travel to Hawai'i to reside at the property, the McConnells decided not to proceed with rebuilding," wrote McConnell's attorney Gregory Kugle in a January 26 letter to the Land Board.

In previous correspondence with the DLNR, Kugle had further argued that the land behind the wall was not fill, but accreted land, and, therefore belonged to McConnell. The wall, Kugle claimed, belonged to the state. The DLNR disagreed and was not willing to let McConnell walk away with his money.

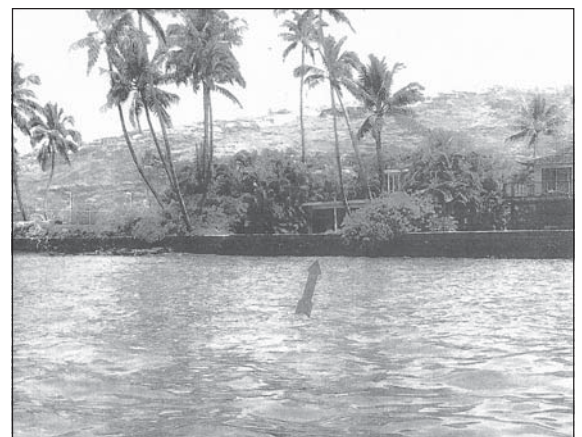
The Land Board first heard McConnell's case on June 9, 2011. Some board members were sympathetic to his plight and were uncomfortable keeping money for an easement that was never executed. The board voted 3-2 to return the money, but because a minimum of four votes is needed to pass a motion, the matter was deferred.

After McConnell and the Land Division failed to settle the matter, the issue returned to the Land Board on January 27. Staff recommended that the Land Board either deny McConnell's request or return the money and authorize its chair to execute an easement document and a real property lien, for \$135,080, that runs with the land.

McConnell said he could not support a lien because it would interfere with refinancing. "The bank would require it to be satisfied," he said.

But to Big Island board member Robert Pacheco, the board simply could not ignore the encroachment.

"For me, the cat's kind of out of the bag. ... You're going to have to deal with this ease-



The DLNR wants an easement for the portion of the seawall that fronts Tom and Linda McConnell's residence, indicated by the arrow.

ment one way or another," he told McConnell.

"You're going to have a problem getting rid of a property with an encroachment," Maui board member Jerry Edlao added.

Without an easement in place, the DLNR would have no choice but to pursue a violation case, Land Division administrator Russell Tsuji said. To which Kugle responded, "Should the state choose to do enforcement, you would have to prove who built that wall, that it was not a state or territory project."

After an executive session, Kaua'i Land Board member Ron Agor suggested imposing a first mortgage instead of a lien, which McConnell seemed to support.

"That sounds more attractive than a straight lien," McConnell said.

Deputy attorney general William Wynhoff, however, recommended deferring the matter because he needed to ensure that it was legal to award an easement that won't be paid for until the property is sold.

Kugle said he had "a large problem with kicking this can down the road." And in the end, the Land Board voted to return McConnell's money, but directed the DLNR to work with him to perfect a lien/first mortgage and an easement. Should they fail, the department was directed to initiate an enforcement action within 30 days of the board's decision.

Pacheco alone opposed the motion.



Board Approves Hearings On Caps for Aquarium Fish

David Goode, the sole dissenter, just wasn't comfortable endorsing rules proposed for aquarium fish collection that had been largely, if not solely, drafted by collectors.

"I've never seen the department wholesale take proposed rules by a commercial entity. Usually our department has done some analysis," he said before the final vote.

On January 13, the rest of the Land Board approved a recommendation by the DLNR's Division of Aquatic Resources (DAR) to hold public hearings on the proposed rules, which establish gear restrictions and daily take limits for O'ahu collectors. Last year, a group of collectors created the rule package after the state Legislature failed to impose a statewide ban.

O'ahu Land Board member John Morgan applauded the move to establish rules for the industry, but asked DAR's Alton Miyasaka whether the current level of aquarium fish collecting on O'ahu was sustainable.

"Good question," Miyasaka said. Having reviewed catch data for the past 30 or so years, Miyasaka said, he believed it was.

"The way they fish ... they only catch what they need," he said, adding that the traditional measure of whether a fishery is sustainable — catch per unit effort (CPUE) — doesn't apply to aquarium fishing. The wide range of species targeted by collectors also makes it difficult for DAR to assess fishing impacts, he said.

"We cannot do a species by species assessment. That would take \$50 million," he said.

Under the proposed rules, a collector could not exceed the following daily limits:

- 100 yellow tang (with no more than six less than 1.5 inches or more than 5 inches in length);
- 75 kole (with no more than six over five inches in length);
- 50 Potter's angel;
- 50 naso tang;
- 25 Moorish idol;
- 10 Achilles tang;
- 2 bandit angelfish more than 5.5 inches in length;
- 6 cleaner wrasse.

A fishing vessel would be allowed to hold no more than three daily bag limits, regardless of how many collectors are on board. Collecting ornate, oval, or reticulated butterflyfish would be prohibited.

Jerry Isham, who helped draft the rules, assured the board that his fellow collectors did not create "B-S limits."

"This package is an awesome package," he said. Although collecting has allowed him to

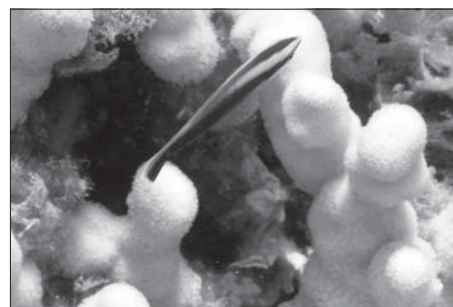


PHOTO: PAULO MAURIN

Hawaiian cleaner wrasse

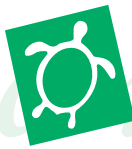
pay for his child's tuition to Kamehameha Schools, "not one fisherman in this room is getting rich off this trade," he said. "Right now, there is no resource issue. [It's] just fishermen taking a step in the right direction."

For Chaminade University environmental studies professor Gail Grabowski, it was a resource issue. In her written testimony opposing the rules, she stated that her surveys of commonly collected species at 25 sites around O'ahu suggest that those species are rare everywhere except Hanauma Bay, where collection is prohibited.

Inga Gibson of the Humane Society of the United States pointed out a flaw in the proposal: without limiting the number of fish collectors, daily take limits are meaningless.

Gibson also argued that the proposed limits are too high and often exceed the current catch levels. For example, the average number of kole caught between 2007 to 2009, when divided among the 40 or so active collectors on O'ahu, was less than one per day, she said.

Land Board chair William Aila, a former collector himself, acknowledged that the



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DLNR may need to establish a limited entry program at some point.

Aila was not so sympathetic to testimony from dive master and activist Rene Umberger. When Umberger cited a study that found that aquarium fish collectors overfished reefs in west O'ahu after storms in the 1990s, Aila countered that the absence of fish was due solely to the fact that the storms destroyed all of the finger coral.

"The fish simply weren't there to harvest," he said. "I'm saying hurricanes caused yellow tang collection to shift from O'ahu to Kona."

"That's not what the study says," Umberger replied.

Aila later challenged, "If your concern is the reef health, why have you not expressed concern over consumptive users who take the very same species?"

To this, Umberger said, "I don't think these animals should be used as ornaments."

Divers, fishers, and environmentalists from Maui, Kaua'i, and Hawai'i island who worried about the precedent the rule package would have on the rest of the state asked the board not to send it out for public hearings. Maui County has already banned selling aquarium fish, and Kaua'i and Hawai'i counties support a statewide ban.

Willie Kopiko of the Hawai'i fishing village of Mo'ili'ili expressed his frustration with aquarium collectors on his island, claiming they have depleted fish stocks he relied on for food.

"Now I gotta go South Point fo' get tings fo' eat," he said. He added that he has reported to the DLNR collectors fishing in no-take zones, to no avail.

Aila said that everyone agrees that the DLNR needs to improve its enforcement and Isham supported Kopiko's proposal for a no-tolerance policy for violators.

But Aila's wife, Melva, expressed her disdain for those from the outer islands giving advice on the management of O'ahu resources.

The board ultimately chose not to add any

language to the rule package that would cap the number of collectors on O'ahu, but Kaua'i member Ron Agor did try to address concerns that DAR had presented little to no scientific information supporting the various proposed caps. (The staff report to board was a mere three paragraphs long.)

If and when the rules return to the Land Board for final approval, Agor said before the final vote, he wants DAR to present data supporting the claims of fish collectors that the caps are sustainable. He added he would also consider limiting the number of fish collecting licenses and closing certain areas.

If, after holding public hearings, the Land Board or DAR decide to significantly change the rules, they must go out for more public hearings.

"If it means writing the rules again ... then do so. We need to vet this properly," Agor said.

This year, the Legislature has before it again several bills that would limit or ban aquarium fish collecting and sales. If any become law, action by the Land Board to adopt rules could be moot.



DOBOR to Share Data For NOAA Fishing Surveys

The National Oceanic and Atmospheric Administration will be better able to target its recreational fishing surveys now that the Land Board has decided to allow the DLNR's Division of Boating and Ocean Recreation to share some of the information it collects on vessel owners.

Quantifying recreational catch is crucial to fisheries management and NOAA has been seeking the state's help for years, but until now the state had withheld that information, citing privacy reasons.

"There was a question whether we could disclose that information," DOBOR administrator Ed Underwood told the board.

But under an agreement approved by the Land Board on February 10, DOBOR may now supply NOAA with information on which of its non-commercial boaters fish recreationally. In return, NOAA is providing \$100,000 to upgrade DOBOR's online vessel registration system.

"In order for us to get the money, we have to disclose. It's going to be a win-win for both sides," Underwood said. Without DOBOR's information, NOAA has to collect recreational fishing data the hard way.

"We literally go through the phone book. The first question we ask is, 'Do you fish?' We reach two percent of the population. It's very inefficient," said Michael Tosatto, administrator for NOAA's Pacific Islands Regional Office.

With DOBOR's help, NOAA can now target boaters who checked a box on their vessel registration form noting that they fish recreationally.

"Our survey becomes vastly more efficient," Tosatto said.

Underwood added that the information would only be used for survey purposes and would not be distributed.

Now that NOAA has access to the state's information, Hawai'i fishers may be exempt from registering with the National Saltwater Angler Registry, Tosatto said. (Fishers in states, such as Hawai'i, without a licensing program are required to register if they use federal waters.) What's more, the exemption saves Hawai'i fishers from having to pay the program's \$15 registration fee, a DOBOR report states.

Supporting the agreement was Kitty Simonds, executive director for the Western Pacific Fishery Management Council, which advises NOAA.

"We are a regional council. Everything should be done regionally and locally. ... The state should be collecting this information so our fishermen shouldn't be reporting to the national government," she said.

— *Teresa Dawson*