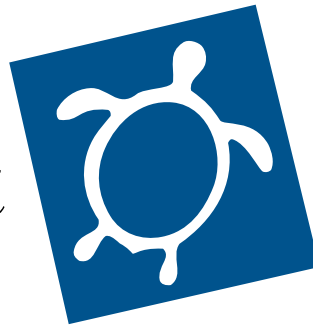


# Environment



# Hawai'i

*a monthly newsletter*

Price: \$5.00

## *Cash Crop*

Sandalwood Forest.” That’s the description of the wooded area drawn in above the ahupua’a of Hokukano in a 1901 map of Hawai’i island by territorial surveyors W.D. Alexander and W.D. Wall. It is the only sandalwood forest to be noted on the map and its unique designation suggests just how distinctive the area must have been to the surveyors.

Over the last century, cattle, logging, and depredation by rats have taken a toll, and what remains today is almost certainly a faint shadow of what used to be. Whether restoration of the land’s former glory can be achieved by a company taking down most of the remaining trees over the next year and a half, or is best done by the ranch’s former owner, who has a record of logging himself, is a question that, unfortunately, is *not* before the bankruptcy judge hearing the dispute.

The issue that he needs to decide is whether to let the logging company move forward with its reorganization plan – a plan that, inevitably, entails cashing in on an insatiable global demand for sandalwood trinkets – or to let it dissolve and have the company’s assets (primarily the land and trees) be liquidated to satisfy creditors.

## Dispute over Hokukano Sandalwood Logging Ends up Before Federal Bankruptcy Judge

Two hundred years ago, the trade in sandalwood was a tragic chapter in Hawaiian history. It devastated upland forests across the archipelago and forced native people into involuntary servitude.

In the last few months, the sandalwood trade has been rejuvenated on a large scale, in one of the last areas of the islands where old-growth trees remain in some abundance: the mauka lands of Kona, on the slopes of Mauna Loa high above Kealahou Bay.

According to the loggers, they have received orders for nearly \$15 million in sandalwood from companies in Sri Lanka, Dubai, and China. Their orders for koa from within the state pale in comparison – about \$25,000 worth, as reported in documents submitted to the U.S. Bankruptcy Court. Most of the wood to fill those orders is being taken from about 2,900 acres of what used to be Hokukano Ranch. Tom Pace, who sold the land to the loggers, is now trying to foreclose

on the property after the loggers defaulted on their mortgage in June.

Pace’s efforts to stop the logging through a foreclosure action, filed in state court July 19, are on hold for the time being. On July 21, less than two hours before a request for a temporary restraining order was scheduled to be heard in a Kona courtroom, the loggers filed for bankruptcy in Honolulu. Two days later, U.S. Bankruptcy Judge Robert J. Faris denied Pace’s motion for a restraining order preventing further logging. Although attorneys for Pace and his company, Hokukano Ranch, argued that the value of the land secured by the mortgage was diminished by the logging, attorneys for the logging company, called Jawmin, won over the court by noting that nothing in the deed that Pace gave to Jawmin prevents Jawmin from conducting any legal activity and, further, that Pace and Hokukano Ranch had no secured interest in the trees.

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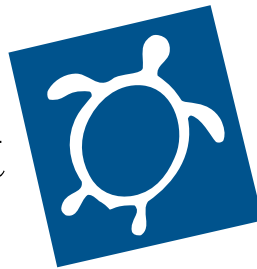


Sandalwood fruit (*Santalum paniculatum*)

PHOTO: J. B. FRIDAY

# Environment

Volume 21, No. 4



# Hawai'i

October 2010

## NEW AND NOTEWORTHY

**Valuing Trees:** How much is standing timber worth? According to the Jawmin bankruptcy filings (see the article elsewhere in this issue), the value of the trees is more than two and a half times that of the land: \$23 million versus \$9 million.

The same question arises in another bankruptcy case, this one in Oregon. The debtor, Arlie & Co., owns seven parcels totaling about 5,600 acres in East Hawai'i. Just 281 are in the state Agricultural District, where logging is a permitted activity. The remainder are in the Conservation District, where logging is rarely permitted.

Arlie has put the value of its Hawai'i holdings at \$62.7 million, although it purchased the seven parcels in 2002 for just \$2.8 million.

In late August, Arlie informed its creditors that it would be offering 30 separate properties

for sale in an effort to raise cash. Two Hawai'i properties are on the list. One, a "Hawai'i forest" said to consist of 681 acres, is valued at \$3.48 million by Arlie. The second is described as a "Hawai'i estate," 22 acres, for sale at \$1.2 million.

The larger parcel is just mauka of Akolea Road in the Kaumana area of Hilo, and is in the state Conservation District. The "estate" parcel is north of that a little ways, in Pu'ueo, and lies in the Agricultural District.



PHOTO: HAWAII COMMUNITY FOUNDATION

L-R, Jeanne Unamori-Skog, Gregory Dunn, Patricia Tummons, Selena Ching.

**Honors:** The Hawai'i Community Foundation and the W.A. Gerbode Foundation, sponsors of the annual Ho'okele Awards given to leaders of the state's non-profit sector, selected *Environment Hawai'i* editor Patricia Tummons as an award recipient this year. The award carries with it a \$10,000 stipend for personal use.

Others honored this year were Jeanne Unamori-Skog, of the Maui Economic Development Board; Gregory Dunn of the Hawai'i Nature Center; and Selena Ching of the Hawai'i Youth Symphony.

**A Rocky Reunion:** More than a year after going on strike for better meeting conditions and administrative support and more members, the state Environmental Council met last month in a spacious, fifth-floor room on Ala Moana Boulevard and with one new member, Honolulu attorney Ian Sandison.

The bad news: council vacancies remain, Big Islanders trying to participate via video that day could only make out every third word and couldn't tell people's heads from their arms, and the council's executive director, Kathy Kealoha, who is also the head of the Office of Environmental Quality Control, is on administrative leave and is basically volunteering her services.

Even so, the council resolved to at least try to continue meeting, mainly because exemption lists (lists of activities that are exempt from the state's environmental review process) submitted by state and county agencies for council approval have piled up over the past year.

At least one list, according to new council chair Mary Steiner, has been awaiting approval since 2003. With regard to the lists submitted by the state Department of Land and Natural Resources in July for the department and its divisions of Aquatic Resources, State Parks, Forestry and Wildlife, and Boating and Ocean Recreation, Steiner said that she has told the department that the council has 11 exemption lists awaiting approval and will review them in the order in which they were received (putting the DLNR's lists at the end of the queue).

The DLNR's lists have been criticized by environmental groups and others for being overly broad. Although the council would not discuss the lists until they are vetted by its exemption list committee, Cory Harden and Robert Harris of the Sierra Club both testified at the meeting against the "sweeping exemptions" that had been proposed.

(For more on this, see our August New & Noteworthy column, available at [www.environment-hawaii.org](http://www.environment-hawaii.org).)

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Hilo, Hawai'i 96720

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

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

Production: For Color Publishing

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ISSN 1050-3285

A publication of  
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### Quote of the Month

*"DW understands the importance of setting definite standards for its performance of this [affordable housing] condition."*

— Alan Okamoto,  
Attorney for DW 'Aina Le'a

## Agribusiness Subcommittee Approves Renewable Energy Project at Kekaha

When it came time to choose, the Kekaha committee of the state Agribusiness Development Corporation went with the renewable energy project that would directly benefit its Kekaha lands and farmers over the one that could have benefitted the rest of the island.

While the committee members didn't discuss why they unanimously voted on September 15 to lease the ADC's mauka lands to Kaua'i's Pacific Light and Power (PLP) rather than to Delaware's Pacific West Energy, LLC (Pac West), the fact that PLP already had an agreement with the farming co-op that manages the infrastructure there clearly played a part.

Pac West has been trying since 2006 to secure more than 1,000 acres of ADC lands, as well as land from the state Department of Hawaiian Home Lands, the Department of Land and Natural Resources, and private land owners, so that it can grow feedstock for a 20 megawatt power plant at the former Kekaha sugar mill.

The company also has plans to produce biofuels and is developing a wide range of other renewable energy projects, including solar, hydro, and wind.

"The company's strategy is to create the world's first 'integrated green-energy plantation,' producing firm renewable energy from

a variety of sources for the company's own use and for sale to third parties," its website states.

Although the company had the backing of the Kaua'i Island Utility Cooperative, with which it has been negotiating a power purchase agreement for the Kekaha plant, at the time of the Kekaha committee meeting, Pac West did not have any agreements for the lands it needs.

The company had signed an agreement with KIUC in October 2009 that projected the plant would come online by April 2012.

"This project has been in the works for several years, and this agreement represents an important milestone in the process of securing more renewable energy for Kaua'i, and diversifying our energy sources away from petroleum," KIUC CFO David Bissell said in a press release on the agreement.

In contrast to Pac West's lofty plans, PLP needed only the ADC lands to make its proposal work.

The company, which is already developing a 10 megawatt solar farm on adjacent lands, focused mainly on meeting the energy needs of the Kekaha Agriculture Association (KAA), while improving some of the infrastructure there. The KAA includes all of the ADC's Kekaha lessees and has an agreement with the ADC to maintain and operate the infrastructure on those lands, including the irrigation and electrical systems.

While PLP also did not have any firm lease agreements for feedstock lands, it did have letters of support from potential lessors (KAA members) and a memorandum of understanding with the association.

PLP's proposed biogas-fired power plant would use the hundreds of thousands of gallons of pig slurry produced by the piggery located on ADC lands, 1,850 acres of the wild guinea grass growing on the ADC's mauka lands, and 1,180 acres of sweet sorghum, banagrass, and/or leucaena on fallow ADC makai lands.

The company also plans

### For Further Reading

- ◆ Kekaha Sugar's Demise Leaves West Kaua'i Water System in Limbo, February 2001;
- ◆ ADC Gets Authority Over Kekaha Ag Lands (Board Talk), August 2003;
- ◆ State's Large Ag Tenants in Kekaha Limit Opportunities for New Small Farms, July 2004.

All articles are available online at:  
[www.environment-hawaii.org](http://www.environment-hawaii.org)

to plant native species like iliahi (sandalwood) and koa on the non-arable mauka lands and to develop three hydroelectric facilities along the Koke'e and Kekaha irrigation ditches that together would produce more than 11 MW.

At the Kekaha committee meeting, Cameron Black of the Department of Business, Economic Development and Tourism's energy office said the Pac West and PLP proposals seemed viable and Kekaha committee member Bob Osgood said they both had "good attributes."

When the committee's Abe Mitsuda asked KAA representative Landis Ignacio why the association favored PLP, Ignacio noted that the piggery, which was illegal to begin with, has posed several challenges, including drainage and groundwater contamination. The association needs to relocate the facility and PLP's proposal will take full advantage of the piggery's renewable energy potential and even allow it to expand, he said.

Ignacio added that Pac West's plans to do large-scale cultivation on the mauka lands raised serious concerns about erosion.

PLP's plans are also more flexible than Pac West's and the company would solve a number of KAA's waste management and infrastructure problems, he said.

"If the seed corn industry [which occupies most of the Kekaha lands] walks away, we want the lands to be sustainable, regardless of who comes and goes," he said. "They [PLP] bring the best choice to the table. We were not really looking at what's best for the state, but for the Kekaha lands."

Mike Yamane of the KIUC, however, held a broader view.

"No disrespect to KAA, but from an energy reliability standpoint ... Pac West's proposal is important to us," he told the committee.

Despite Yamane's position, the committee went with PLP.

— T.D.



MAP: PLP

## Conservation Conference Spotlights Cultural, Natural Restoration Efforts

The 18th annual Hawai'i Conservation Conference had a broader scope this year. With the theme "Pacific Ecosystem Management & Restoration: Applying Traditional and Western Knowledge Systems," those who attended were given an opportunity to explore how native Hawaiian and Polynesian cultures relate to natural resource management, a subject that had only been touched on in previous conferences.

There were still the dozens of scientific talks by graduate students and veterans in the field, but there were also forums on the various ways traditional knowledge and practices are being used to address today's problems of invasive species control and native ecosystem restoration, among other things.

As the U.S. Forest Service's Christian Giardina said on the opening day, "We need to build partnerships with Pacific Island leaders."

Keynote speaker Aroha Te Pareake Mead of New Zealand pointed out that so many of the world's most endangered species are in the South Pacific. "This is a problem on our doorsteps," she said.

The classic idea of a conservationist is someone who is passionate, highly skilled, and singularly focused on nature rather than on people, she said. But that kind of focus is not enough, she argued, and building partnerships with a wide range of groups, especially indigenous people, is necessary.

Contrary to the "NGO perspective" that conservation will suffer if people are allowed in protected areas, Mead argued that the "nature without people" approach doesn't work and merely leads to an elitist form of knowledge. It also can't be maintained in today's difficult financial environment, she added.

"It comes down to sharing power," she said.

When asked during one forum about how integral culture is to conservation, Kawika Winter, who heads the Limahuli botanical garden on Kaua'i, said, "All these things are so integral, and a huge part is finding the best and brightest, those families that are still keeping traditions. The sad thing is, we're creating positions faster than we can fill them."

### *A Broader Vision*

From Winter's work at Limahuli to the Puanui community agriculture project in

North Kohala to the Department of Hawaiian Home Lands' plans to restore 56,000 acres of forest on the slopes of Mauna Kea, it was clear from the conference presentations that native Hawaiians and other indigenous peoples are doing much more than merely collaborating with resource managers to protect natural resources. They are taking the lead in fostering the care of marine and terrestrial areas throughout the islands, while securing the community ties necessary to ensure a healthy environment and a thriving culture.

Kekuhi Kanahale of the Edith Kanakaole Foundation explained why restoring natural resources alone is not enough. In her abstract she states, "I ola 'oe, i ola makou nei, or 'My life is dependent on yours; your life is dependent on mine,' defines the relationship among all components of a landscape, and is based on a deep respect for the sacredness of all that is animate or inanimate. ... [W]e suggest that in order to achieve successful restoration and conservation in Hawai'i, core facets of these two management paradigms [western and traditional] need to be integrated to effectively embrace the biophysical, social, cultural and spiritual."

She said that there needs to be a new vernacular that incorporates both western and traditional approaches.

"In the past, it was, 'Hawaiian science does it this way, western science does it that way,' ... It's not two worlds, it's one world," she said.

In working with management agencies and communities, Kanahale said, "We've been talking restoration with a big 'R' — social, natural, economic — and ecology with a big 'E' — of spirit, landscape, psyche, and communities within communities within communities within communities."

### *Walking the Walk*

One example of a successful holistic approach is in Waipa, Kaua'i, where Kamehameha Schools/Bishop Estate controls a 1,600-acre ahupua'a and Stacy Sproat Beck teaches children.

In the 1980s, KSBE planned to develop houses on the land, but families from the area, many of whom were Kamehameha Schools alumni, offered an alternative proposal: lease the land to a community group for the development of an ahupua'a learning center. KSBE bought the idea and the land has been leased to the Waipa Foundation, which Sproat directs, since the mid-1980s.

"Things worked out well. We didn't have to go to war," Sproat said at a forum on creating conservation and cultural alliances.

The foundation conducts programs where children tend lo'i and an organic garden, plant koa trees to enhance the watershed that feeds their lo'i, and clear the stream.

"We do all we can do in all ecosystems," she said.

The children also make poi in a garage, enough to feed 150 local families for half the cost of supermarket poi, Sproat said, and they draw 400 to 600 people to their Tuesday farmer's market. They're also working on getting a community kitchen up and running.

Although their work benefits the area's natural resources, that effort is culturally driven.

"I don't consider myself a conservationist ... We do restoration. To live our culture, we need land and places and 'aina to do that," she said.

She added, "Where our hope lies is in the kids. We're fortunate enough to work with most Hawaiian and other families in the community. One of the main things is teaching them that 'aina is that which feeds us ... whether it's making laulau ... making parfais with banana and poha or growing our food to sell at farmers market. I see us changing the future social landscape of our community."



## Fishing May Have Impacted NWHI Monk Seal Population

Retired National Marine Fisheries Science researcher George Antonelis thinks commercial fishing in the Northwestern Hawaiian Islands might be behind the current inability of juvenile monk seals to compete with other top predators for food.

Monk seals, of which roughly 1,100 are left in the wild, are critically endangered and the species' survival depends greatly on the survival of juvenile seals to adulthood. While they appear to be succeeding in the Main Hawaiian Islands, where there may be less competition from apex predators for food, NWHI youngsters are starving to death.

In his conference presentation, Antonelis suggested that a fishery that had targeted species that compete with monk seals for food may have allowed the monk seal population to grow at one time. He noted that up until about the mid-1980s, there was an active fishery at French Frigate Shoals, which targeted some of the area's top predators: ulua, omilu, papio, and kahala. Coin-

cidentally, the monk seal population spiked during that time.

When concerns arose over possible ciguatera poisoning from these fish species in the mid-1980's, that fishery "dropped like a hot rock" and was replaced by a bottomfish fishery "that took off," Antonelis said. And with the emergence of the bottomfish fishery, which targeted species that monk seals eat (kale kale, 'opakapaka, 'ehu, onaga, and gindai), the seal population in the NWHI plummeted, he noted.

The population didn't immediately decline after the bottomfish fishery began because, Antonelis said, monk seals probably shifted their focus to other prey species, and to avoid competition with ulua, the seals began foraging in deeper waters.

Today, even though bottomfishing ceased several months ago, "the top predator system is not working for monk seals," Antonelis said. NMFS researcher Frank Parrish is looking at the current monk seal carrying capacity of French Frigate Shoals, Antonelis said, adding that he believes it is unlikely to improve without some kind of aggressive management.

"Fishery managers unknowingly conducted a 'fish-down' experiment at FFS," he said. Unfortunately, no stock assessment at FFS was done when commercial fishing was occurring and he can only look at catch and effort statistics to determine how fishing was affecting the competitor and prey stocks, which is key, he said.

In his initial analysis, "we only went on the assumption that resources are dwindling," he said.

### Monk Seal Movement

Whether it's good or bad news is not yet clear, but sub-populations of monk seals in the Main Hawaiian Islands and the Northwestern Hawaiian Islands, which were thought to be isolated, actually move between regions.

New research by Thea Johanos shows that monk seals don't often travel far from home, but some travel quite far, with the major movements being between the Necker/Nihoa area, French Frigate Shoals, and the Main Hawaiian Islands.

Johanos noted in her presentation that a seal born on Midway pupped at South Point on the Big Island and pupped five times on O'ahu. Another, born on Laysan, traveled to Kaua'i.

Regular movements between the MHI and the NWHI have profound management implications, she said, since they increase the threat of disease transmission, but also might allow for greater resiliency.



## Miconia Infestation Threatens O'ahu

People ask, 'Why not do fiddlewood? Why do miconia when we don't see it?' People don't understand how much work it takes to *not* see miconia," says Rachel Neville, operations manager for the O'ahu Invasive Species Committee (OISC).

When people think of a miconia infestation in Hawai'i, they think of the Big Island or Maui, even though miconia has been on O'ahu since the 1960s. It's rarely seen on O'ahu in part because businesses and property owners agreed more quickly than the Big Island with requests from the state Department of Agriculture to stop selling and growing miconia. Another reason is that the OISC, which works to control about a dozen invasive species, from fountain grass to coqui, spends half of its time just on miconia.

Backcountry miconia control on O'ahu began in the mid-1990s with volunteers and the state Department of Land and Natural Resources. In 2001, OISC took the lead, and as of July 1, has surveyed a total of 21,370 acres by ground and 15,853 acres by air, and removed 17,887 immature plants and 75 mature trees.

The effort appears to have suppressed miconia's spread, as only four mature trees were found in 2009 and the island has no monotypic stands.

But because miconia produces seeds that can lay dormant in soil for up to 16 years, constant vigilance is necessary. In a poster at the conference, Neville and OISC GIS expert Jean Fujikawa showed the results of a recent model Fujikawa developed that provides a conservative, yet shocking, estimate of how far and fast miconia could spread if OISC had stopped its efforts in 2007.

Between 2007 and 2009, OISC removed 5,538 immature plants and 10 mature trees. Using that as a rough baseline, Fujikawa ran the model with a beginning scenario of 10 seed-bearing trees and 380 immature plants. Under the model, the immature plants began seed production at four years old, a mere 18 seeds were dispersed randomly within 400 meters, and two seeds were randomly dispersed within 1,600 meters, which mirrors data collected by OISC on seedling dispersal ranges. Considering that a mature miconia plant can produce several million seeds a year, a dispersal of 18 seeds is conservative, to say the least.

Neville explained that the reason why the seed dispersal numbers used in the model were so low is because they lacked the computing power to do more.

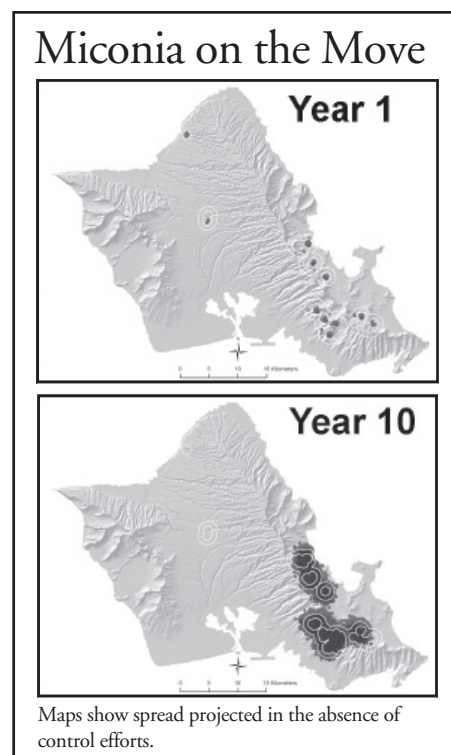
Despite the conservative approach, the model showed that O'ahu could see large monotypic stands of miconia within a decade if left uncontrolled.

In year one of the model, miconia were found only in small clusters in east and south O'ahu and two isolated sites in north and central O'ahu. By year 5, the clusters in east and south O'ahu grew so large that they overlapped. By year 10, the entire windward side of the Ko'olau range from Kane'ohe to Waikane was infested, as well as an even larger swath covering of the hills above Honolulu, including Tantalus, Manoa, and Nu'uuanu, and spilling windward toward Waimanalo and Maunawili.

Should such an infestation occur, it could put nearshore waters at risk from runoff and endanger the island's water supply, the poster states.

To keep that from happening, OISC workers, which are supported by public and private funds, need to continue their work, hiking into remote and sometimes dangerous mountain areas and removing each miconia plant they find. Over the years, OISC staff has dipped to as few as three people and now currently stands at five, Neville said.

"Staff size varies depending on our funding support, but the important thing is that we receive steady funding. What the model shows is that one mature tree could set us back years. We have to make sure we are always surveying," she said. — **Teresa Dawson**





## BOARD TALK

## Board Adds Kulani Forest To Pu'u Maka'ala Reserve

Adding some 6,000 acres of pristine native forest to the state's Pu'u Maka'ala Natural Area Reserve was a no-brainer. Transferring about 600 acres that were part of the former Kulani prison site to the state Department of Defense to be used as a Youth ChalleNGe Academy (YCA) proved to be anything but.

The difficulty arose, in part, because the DOD surprised the state Board of Land and Natural Resources with a proposal to allow the Hawai'i Army National Guard to conduct several military operations on the Kulani lands, in addition to establishing a YCA there.

At the board's September 9 meeting, the DOD's Neal Mitsuyoshi proposed that the guard, as well as the FBI and SWAT (special weapons and tactics) teams could use the former boy's school located at a site miles from the former prison to practice breaching rooms. The long, dirt road connecting the former prison to the school could be used to help the guard identify roadside bombs. An abandoned pasture could serve as a helipad for air operations and the quarry could be used as a shooting range for the guard and law enforcement officers.

Mitsuyoshi told *Environment Hawai'i* that aside from the shooting range, none of the proposed activities would have included live fire.

In her testimony before the Land Board, community activist Kat Brady supported the NARS expansion, but opposed the DOD transfer, especially the plans for military training.

"Hawai'i is already one of the most militarized places on the planet. ... You can't really slide this thing through on your way out the door," she said, referring to the fact that the current administration had only about 90 days left.

State Sen. Russell Kokubun, a former Land Board member, asked the board to defer both the NARS expansion and the DOD transfer.

"There needs to be a grander vision for this piece of land," he said, adding that there had not been enough disclosure on the proposed uses other than the NARS addition. (During an earlier hearing before the Land Board on the proposed DOD transfer, the YCA — a military-style rehabilitation program for troubled youth — was the only

proposed use. Military training was not mentioned, except by members of the public who suspected it was part of the DOD's plans.)

Kokubun continued that he did not support Gov. Linda Lingle's decision to close the Kulani prison and pointed out that, should the Land Board chose to transfer the site to the DOD, the state Legislature has the power to disapprove that transfer.

"I have no problem with Youth ChalleNGe, but I do not think it's appropriate for this place [or] the National Guard, as well," he said. He also argued that some of the 600 acres proposed for transfer could be restored and that the prison should be reopened.

Marjorie Ziegler, executive director of the Conservation Council for Hawai'i, urged the Land Board to at least approve the NARS expansion.

"You're not going to see a more compelling proposal for expansion" than the Kulani lands, she said.

In the end, because so many members of the public, and the Land Board itself, felt that military training was not appropriate at Kulani, the board decided to restrict the use of the DOD lands to the YCA only. Because they were not integral to the YCA, the road and the boy's home were included in the NARS expansion (which the board unanimously approved), rather than the DOD transfer.

Rob Pacheco, the Land Board member representing the Big Island, voted against the DOD transfer, and Brady, Kyle Kajihiro of the American Friends Service Committee, and Hawaiian activist Michael Lee requested a contested case hearing.

Before the board's vote Pacheco said, "To dispense with those public facilities in that way requires more public input." Instead of transferring the lands from the Department of Public Safety to the DOD — which is necessary because the executive order to the DPS requires the land to be used as a prison — Pacheco argued that the land should return to the DLNR, where it could then be leased out to an appropriate entity.

The YCA is expected to start classes at Kulani in January, and according to Mitsuyoshi, has one year of funding in hand.

## Board Extends Ranch Lease, Adds, Protects Palila Habitat

At the same meeting, the Land Board permanently removed 2,177 acres of land at Pu'u Mali from K.K. Ranch's pasture lease on the slopes of Mauna Kea.

Since 2002, that area had been managed by the U.S. Department of Transportation under a 10-year easement intended to provide habitat for the endangered palila (*Loxioides bailleui*), which had lost thousands of acres of critical habitat in the department's realignment of Saddle Road.

With that easement expiring in 2012, the lessee seeking an extension, and palila numbers tanking, the DLNR's Land Division proposed removing the area from the K.K. Ranch lease. The division also recommended that the Land Board approve in concept setting aside the area to the department's Division of Forestry and Wildlife for inclusion in the Mauna Kea Forest Reserve and issuing DOFAW an immediate right of entry. Finally, the division recommended extending the K.K. Ranch lease on the remaining 5,105 acres another 20 years, until February 2031.

In an August 25 letter to the Land Division regarding the easement area, U.S. Fish and Wildlife Service field supervisor Loyal Merhoff wrote, "Should this parcel revert to cattle grazing, we would need to reanalyze the effects of the action from the 1998 Biological Opinion and take into consideration the loss of these mitigation lands for palila. The resumption of grazing on these lands would reverse any mamane-naio forest regeneration that has occurred during the last 10 years and undo our forward momentum for habitat restoration on Mauna Kea. According to [DOFAW] biologists, the state has spent approximately half a million dollars restoring mamane habitat in Pu'u Mali in order to help sustain the second population of palila."

At the board's meeting, the DOT's Dave Gideon made it clear that his agency would not participate in palila protection past 2012.

"Palila recovery is not the responsibility of the Saddle Road mitigation," he said.

K.K. Ranch owner Jason Moniz also didn't seem interested in protecting palila, complaining to the board about a lease term that requires him to maintain portions of fence that border the forest reserve. The fence, built with DOT funds, was constructed to keep cattle, goats, and sheep out

PHOTO: DAVID LEONARD/DOFAW



The Palila, shown here on a mamane tree, has a heavy finch-like bill for breaking open seeds, and a striking yellow head and breast. It is one of 17 surviving members of the Hawaiian honeycreeper family, a diverse group of birds that evolved from a single ancestral species.

and is more elaborate and, therefore, more expensive, than what he would have built to control his cattle.

"The fence is overbuilt for my needs. It's not fair to me. I don't want to be stuck with the maintenance of a fence that is more than I need," he said. One of the terms of the lease requires keeping fences in good repair.

At-large board member David Goode argued for some kind of compromise. Because Moniz actively works the land, Goode said, "He's going to be the most cost-effective fence repairer." To Moniz, he said, "Why

would be responsible for fixing it.

Moniz responded, "I don't know how you're going to determine that. We've already been accused of being in the mitigation area."

Despite Moniz's complaints, board chair Laura Thielen reminded him that the board does not have the power to amend the lease terms (other than its duration). The board then unanimously approved the Land Division's recommendations.

The department underscored the need to aggressively protect palila habitat a few

don't you maintain the fence and [have the DLNR] adjust your rent accordingly [when rent is re-opened]?"

But an exchange between DOFAW administrator Paul Conry and Moniz suggested that collaboration will be a challenge.

Erosion and runoff have compromised the fence in the past, but Conry informed Moniz that if his cattle were to damage the fence, he

days later in a September 14 joint press release with the FWS and the American Bird Conservancy (ABC).

They announced that a recent survey by the U.S. Geological Survey indicates that the palila population has decreased by nearly 75 percent over the last seven years from about 4,400 birds in the core area in 2003 to about 1,200 birds at present.

"We know what needs to be done to protect this species, and every day that goes by without those actions being implemented brings it one step closer to extinction," George Wallace, ABC vice president for oceans and islands, said in the release. DOFAW, with FWS support, has begun to fence the majority of palila critical habitat and has committed to eradicating ungulates once the fence is complete. The FWS gave \$900,000 to DOFAW in 2009 for fence construction, and recently committed to providing an additional \$1.447 million in 2010, the release states.

"The mamane-naio forest is also threatened by persistent drought conditions and the ensuing threat of wildfires, such as the one that burned 1,387 acres of Palila Critical Habitat on the southern slope of Mauna Kea during late August and early September of this year. DOFAW, FWS, the U.S. Army's Pohakuloa Training Area, and other stakeholders are working on a comprehensive fire management plan for this area," the press release states. — **Teresa Dawson**

### *Hokukano (continued from page 1)*

And so the logging continues. Documents submitted by Jawmin in the bankruptcy filing indicate that the actual removal of timber from the property is expected to last from 18 months to two years.

### *Paces*

The Pace family owns Hokukano Ranch and Kealakekua Ranch, two adjoining properties that have been subject to logging and cattle grazing for much of the last 200 years. Since the Paces took over ownership — Hokukano was acquired 23 years ago, and Kealakekua six — they have made much of their commitment to conserving the land. A planned subdivision and golf course in the lower part of Hokukano Ranch was dubbed "Hokukano Preserve," while some 9,000 acres of Kealakekua Ranch were proposed by the state Department of Land and Natural Resources for inclusion in the federal Forest Legacy Program, with Congress appropriating \$4 million for acquisition of a permanent easement on the lands.

Both the Hokukano subdivision and the Kealakekua Ranch conservation easement appear to be on hold for the moment. The Hawai'i County Planning Department has twice extended the deadline for submittal of a final plat map for Hokukano Preserve subdivision. Though originally due August 25, 2009, Pace now has until August 25, 2011, to deliver it. Records supplied by the U.S. Forest Service suggest that the Kealakekua conservation easement is held up by encumbrances on the land. Tom Pace, ranch manager, wrote in an email to *Environment Hawai'i* that he anticipates "completing the easement once all state requirements have been fulfilled. We hope this occurs shortly."

The Pace family fortune was made by John H. Pace Jr., who developed Pace Island, a gated community near Jacksonville, Florida, and founded Cardinal Investment Company. His son Tom, a 1972 St. Louis High graduate, has been active in Hawai'i since the 1980s in real estate and logging. In 1988, a year after acquiring Hokukano Ranch, Tom Pace came under fire for logging up to 1,700 logs of sandalwood from the mauka areas, shipping

as much as 300 tons of the wood to China — the sale of which, Pace later claimed, netted him just \$40,000.

For the last few years, John Pace and his wife, Gussie, made their home in South Kona. When the state announced approval of the Kealakekua conservation easement, the elder Paces were featured prominently in the press release of the Department of Land and Natural Resources, which portrayed them as avid conservationists. John Pace, age 91, died in July, making official Tom's de facto role as sole manager of the family's interests in Kona.

### *Jawmin*

Jawmin was registered as a limited liability company with the state last October. Principals are Wade Lee, his brother Arthur J. "Jeff" Lee, Matthew Charbonneau, and Allen J. Gourley. (The name derives from the first-name initials of the parties, with an "in" suffix for ease in pronunciation, according to Wade Lee.) Three have backgrounds in logging and timber going back several years. Jeff Lee is a Kona businessman and owner of The Club, a fitness center in Kailua-Kona, among other

things. In a resume filed with the bankruptcy court, he lists interests in “highland game/habitat management” and hunting, and he claims “affiliations” with several Big Island ranches, including Hokukano and Kealakekua. Wade Lee has a history of involvement with several logging operations on the Big Island. He and Charbonneau are principals of Hamakua Framing and Structure, which, under an agreement with Jawmin, is carrying out the logging and warehousing activities associated with the Hokukano Ranch operation. Gourley, whose principal address is in Pennsylvania, has logging interests in Hawai'i and elsewhere. His company Ohana Sanctuary owns 3,137 acres of Conservation District land north of Hilo that at one time Kyle Dong proposed to log as part of Dong's Hawai'i Forest Preservation operation. (Gourley's land was withdrawn before Dong's application came before the Board of Land and Natural Resources – where it ultimately failed to win approval.)

At the start of 2009, Wade Lee says, the Jawmin principals saw an article in *West Hawai'i Today* that Tom Pace was wanting to sell off the lands in Hokukano and Kealakekua that remained in his ownership. By fall, they had narrowed down their interest to some 2,800 acres in three separate but contiguous parcels at the top of Hokukano Ranch, nearly eight miles above the Hawai'i Belt Road. Eventually, they agreed on terms of a sale. Jawmin would pay \$9 million for the property, with Pace accepting a purchase money mortgage, \$1 million down, and a promissory note for \$8 million. Terms of the note called for payment of no interest, but \$3.5 million would be due by June 13 and the remainder by August 12.

On February 18, the North Hawai'i Community Federal Credit Union, which appears to have been the source of the down payment, filed a financing statement with the state Bureau of Conveyances, claiming as security “all timber, timber byproducts, and proceeds from the sale of timber” taken from the land Jawmin intended to purchase. After documents convey-

ing the property were signed later that month and finally filed with the bureau on March 15, the credit union's so-called UCC (Uniform Commercial Code) secured claim on the timber expired. Hokukano Ranch could have – and, in hindsight, probably should have – filed a similar claim to the timber, but it did not do so. Instead, concurrent with the filing of the deed transfer and mortgage, it assigned the mortgage over to two other parties – Pacific Rim Bank and Entrust Hawai'i, Inc. – as security for other debts the ranch had incurred in recent years.

### *The Logging*

No sooner did Jawmin take title to the Hokukano land than it began to log the property. Or, rather, employees of Hamakua Framing and Structure began clearing what Wade Lee has described as “dead, dying, and diseased trees.” On the internet, another company, Keala Ke Aloha (owned by Wade Lee) began advertising 15 million board feet of Hawaiian hardwoods for sale and “100 tons of Hawaiian sandalwood,” including logs, heartwood, root balls and chips, at prices ranging from \$4,000 to \$35,000 a metric ton (minimum order: 10 metric tons).

From March to June, Jawmin carried out its logging operations, apparently without protest from Pace – although Pace did say in a deposition he did not know of Jawmin's plans to log; instead, he said the principals indicated they were going to conduct hunts there and restore the forest through large-scale replantings.

Orders for millions of dollars worth of

sandalwood came in almost immediately, from three processors: in Dubai, Sri Lanka, and China.

While getting orders was easy, getting financing was not. Wade Lee told *Environment Hawai'i* that Jawmin had intended to obtain refinancing of the loan before the first payment came due. However, he said, because of changes in the financial regulatory picture, it became difficult to get a loan for raw land. As a result, Jawmin was not able to make the first mortgage payment of \$3.5 million when it came due.

After the deadline passed, the ranch presented Jawmin with a forbearance agreement, which would have: set a new schedule for payment (delaying final payment until November); called for an additional one-time payment of \$300,000; provided for a \$10,000-a-day penalty if deadlines were missed; and allowed Hokukano Ranch to record a security interest “in and to all timber and timber byproducts located on or from the property, together with a security interest in the proceeds from the disposition of such collateral.” No ban on logging was proposed.

Jawmin rejected the agreement and continued to log.

On July 14, Duane R. Miyashiro, attorney for the ranch, sent a demand letter for immediate payment of the total loan amount, as provided for in the promissory note.

Jawmin did not reply.

Five days later, the two Lee brothers and Charbonneau went to Hokukano Ranch headquarters for what they thought would

be a discussion of a re-scheduled payment plan with Pace. Pace was not there, but Gregory Hendrickson, one of the attorneys for the ranch, was – and he promptly served them with the foreclosure complaint and the motion for the temporary restraining order.

Two days later, and less than two hours before a hearing on a temporary restraining order to stop the logging, Jawmin trumped the state court by filing its Chapter 11 petition in federal bankruptcy court.

The logging continues.



Sandalwood (*Santalum paniculatum*)



## Debt Catches Up with Hokukano Ranch

The Ranch needed the purchase price to pay its other creditors.”

That quote, taken from a footnote to Jawmin's statement opposing Hokukano Ranch's motion asking the bankruptcy court to stop Jawmin's logging operations, sheds some light on possible motives for Hokukano Ranch's efforts to sell off not just the three parcels at the top of the ranch but much of the rest of the ranch's mauka acreage. According to the legal memorandum, Tom Pace acknowledged as much in a deposition taken July 20.

A review of records at the state Bureau of Conveyances bears out the view that Hokukano Ranch has serious cash flow problems. At the moment, it faces two lawsuits seeking foreclosure on properties purchased by the ranch – one, a lot in the stalled-out Hokuli'a subdivision, another, the house where John and Gussie Pace lived near Keauhou Bay.

The Hokuli'a lot was purchased by the ranch in 2004 for \$850,000 (the seller was the Pace-owned Cardinal Investment Co.); in 2007, the ranch pulled a building permit for

a new dwelling estimated to cost \$1.5 million, and then took out a construction loan of \$3 million from La Jolla Federal Savings Bank (now One West Bank). In July 2009, the bank sued the ranch, seeking to foreclose on the Hokuli'a property. The balance owed on the Hokukano loan, the bank claimed at the time, was \$3,663,570, with interest accruing daily.

Also in 2007, the ranch purchased the house in Keauhou for \$9.75 million, giving the seller, Margaret Joye of Australia, a promissory note for \$6 million at 6 percent interest (that's \$30,000 a month), with the principal amount due on or before August 2 of this year. Judging from other transactions recorded the same date as the Joye deed was transferred, the down payment appears to have come from a \$3.3 million loan and a line of credit of up to \$750,000 from Pacific Rim Bank. To secure the loans, the bank took a mortgage on three Hokukano Ranch lots, including one of the lots later sold to Jawmin.

A week after the note came due, Joye sued for foreclosure.

The Joye and One West loans together come to nearly \$10 million.

In addition to those loans and the mortgage for the Joye down payment held by Pacific Rim Bank, Hokukano Ranch lands are burdened by additional encumbrances.

Other lenders whose loans have ranged from the low six digits to more than seven, and which are secured by claims on ranch property, include Entrust Hawai'i (a private investment company for people wanting to “self-direct” their own IRA accounts) and, at times, Island Land Co., a real estate brokerage owned by Ed Rapoza. (As of last month, Rapoza included several of the mauka Hokukano lots among his listings: a 979-acre parcel was for sale at \$3.2 million, \$3.58 million was the asking price of a 481-acre lot; and the price of a 400-acre lot was pegged at \$2.98 million.)

Tom Pace told *Environment Hawai'i* that “economic conditions in general and the aging (and recent death) of members of the senior Pace generation have prompted the sale of ranch parcels. The foreclosure actions off the ranch have had little bearing on the sale of ranch parcels (the Joye foreclosure was filed just last month [August] and we are seeking to achieve a modification of the mortgage on the property at Hokuli'a.” — **P.T.**

### Trading Accusations

Tom Pace has stated that Jawmin violated an oral agreement that it would not log the land. In a deposition taken the morning of the scheduled (but forestalled) TRO hearing, Pace was asked whether Gourley had indicated any interest in the timber. “Our discussions were futuristic, for his family's trust in the future,” Pace said. “[T]hey were going to reforest, and his children's children would be able to harvest timber from the reforestation efforts.”

Wade Lee, Pace said, had told him that “the area, land they were working on in Hilo, they had already lost two bulldozers in, that the cost of restoration of conservation land over there was six to seven thousand or something in that range per acre to cut the waiawi that was taking over.” (According to Lee, this is a reference to the efforts he undertook to restore 13 acres of Conservation District land that had been illegally logged by Kyle Dong. The money available for the project — \$22,000, Lee says — ran out after just seven acres had been restored.)

Pace said in his deposition that he was under the impression that Jawmin wanted the land for long-term forest restoration and that “they needed the top cabin area

because they were starting immediately with reforestation efforts and setting up a nursery and staff to manage the nursery.” Pace told *Environment Hawai'i* that he had been informed “that the area was going to be used as a mitigation bank and we understood that a pre-existing restriction would make the property ineligible.” In other words, Pace went on to explain, if the seller places a restriction on the property, such as a ban on logging, “then the new owner will not have the ability to negotiate the conservation or preservation status or tax deductions, as then the new owner is not giving up anything towards conservation” that has not already been given away.

Jawmin's principals describe an altogether different scenario. In the same deposition of Pace, they note in a filing with the bankruptcy court, Pace acknowledged that although in other sales of Hokukano Ranch parcels he had included “preservation clauses,” no such clause existed in the sales agreement with Jawmin because the ranch “needed the purchase price to pay its other creditors.” Pace told *Environment Hawai'i*, however, that “we have had great success selling land to conservation-minded people...and have not restricted the land

we sold to them.”

Furthermore, in a declaration filed with the bankruptcy court, Wade Lee depicted a forest that had been badly managed for years: “At the time that Jawmin took possession... many of the Debtor's [i.e., Jawmin's] sandalwood trees had already been weakened by fire, fires which either injured the sandalwood trees directly, or indirectly, because sandalwood trees being a parasitic species, require healthy host trees. The property in the spring of 2010 had an extremely high fire fuel load. Many decades of tree cutting and leaving the slash and scrap wood in the forest, accentuated by the dry kikuyu grass, had left the entire South Kona slopes of Mauna Loa vulnerable to fire. Hokukano Ranch in 2010 has lost over 2,000 acres to fire and the forest and trees that were present there a year ago have all but disappeared.”

Tom Pace said in an email, “We have removed dead trees from the fire area on the ranch. We have also continued our practice of removing downed trees elsewhere on the ranch.”

Wade Lee described the logging done by the ranch when it was owned by the Greenwell family: There were “huge harvests. The canopy that once existed is gone.

## Bank Financing Hokukano Deals Has Ties to Conservative Group

Pacific Rim Bank, which holds several mortgages secured by Hokukano Ranch land, is one of the newest lending institutions in Honolulu, having been founded in 2006. Its young age is not the only thing setting it apart from more established banks. Four members of PRB's board of directors (out of a total of seven) have close ties to the Hawai'i Family Forum, a group that has been active in advancing conservative social causes at the state Capitol:

- ◆ Austin Imamura, chairman and CEO of the bank, is vice president, treasurer, and a director of Hawai'i Family Forum, according to records at the state Department of Commerce and Consumer Affairs;

- ◆ Francis Oda, bank director and ex-

ecutive with Group 70 International, is chairman of Hawai'i Family Forum and was one of its founders;

- ◆ Kelly Rosati, another bank director, was executive director of HFF for 10 years before moving into the national spotlight, as a vice president of Focus on the Family, the group founded by James Dobson;

- ◆ Ernest Lum, a bank director and president of Ernest K.F. Lum Construction, Inc., is an HFF director as well.

When the bank opened, it announced that it would give 10 percent of its profits to nonprofit organizations. *Environment Hawai'i* asked Melvin Tanaka, a bank vice president, what criteria the bank used in deciding on which organizations would receive donations. Tanaka responded that

The slash pile of koa has gotta be a half mile long. Five saws were set up at one time on rail tracks, for the big koa logs. After that, all the trees were cut down, cut up in chunks and burned. They planted kikuyu grass. Up till the time that we bought it, the land was used for pasture. There are still several cattle up there," which Lee is trying to get out.

In addition, he said, Hokukano Ranch has done nothing to control the rats that eat sandalwood seeds. When Jawmin took possession of the property, it "was inundated with rodents and the seed bank for sandalwood was nonexistent," he said in the bankruptcy court declaration, adding that grazing livestock belonging to the ranch and feral sheep "have been consuming all of the native juvenile trees and seedlings on the property."

What sandalwood trees remained, he continued, "were infected with fungus, which destroys the sandalwood tree, by rotting the tree from the inside out. Many of Jawmin's trees face a serious fungus issue, more than 60 percent of all adult trees show signs of fungus, causing severe rot in the pith and heartwood."

"Jawmin has concluded that over time, healthy sandalwood trees will be more valuable than the current inventory of dead and diseased sandalwood trees," Lee went on to say in the declaration. The company's "forest management plan" calls for removal of the diseased or weakened trees first, leaving the healthy, more valuable trees for "future

Timber Stand Improvement decisions."

To that end, Jawmin has brought in as a consultant Randy Senock. From 1999 to 2004, Senock was an assistant professor in the College of Agriculture, Forestry and Natural Resource Management at the University of Hawai'i-Hilo. Senock is now an associate professor of environmental science at California State University-Chico. He is working for Jawmin in his capacity as owner of a private consulting firm, On Solid Ground. As of early September, Jawmin had paid him \$11,000 of a \$24,000 contract for his work. The bankruptcy court has approved payment of the full amount.

According to "Preliminary Check Cruise Resource Inventory Results," dated September 6, Senock wrote that his mean estimate of the "total property sandalwood" [sic] weight came to 3,579 metric tons (7.9 million pounds), though it could be as high as 4,437 metric tons or as low as 2,720 mt. Based on that, the estimated value of the timber was put at \$23 million.

Wade Lee told *Environment Hawai'i* that eventually, Jawmin hopes to obtain certification through the Forest Stewardship Council – but that this depends on whether it is even possible at this point to restore the forest. He anticipates having a forest management plan developed later this month.

### Bankruptcy

When Jawmin filed for bankruptcy, it did

the bank was profitable only in its second year and that it gave some money to charities then – "not churches," he said, but charities. He did not provide further details.

Tanaka said there were no links between the Family Forum and the bank. Rather, he said, the bank's directors were all respected businessmen and community leaders.

The bank holds the Jawmin note to Hokukano Ranch as security for other credit it has extended to the ranch. Tanaka was asked why the bank has not been represented in the bankruptcy proceedings. He indicated the bank was aware of Jawmin's bankruptcy petition and was confident the bank's interests would be protected by Hokukano Ranch attorneys.

(The Hawai'i Family Forum was in the news last month, when its annual filing with the Internal Revenue Service disclosed that it had to pay the IRS a penalty of \$20,741 for 'excessive lobbying' conducted in 2009.)

— P.T.

so seeking protection from creditors under Chapter 11, which allows for reorganization instead of dissolution. Basically, Jawmin claims that whatever short-term credit problems it may have can be resolved if it is allowed to continue logging, fulfill the orders for sandalwood it has already received, and thus have millions of dollars in accounts receivable that it can use to pay off Hokukano Ranch.

Hokukano Ranch, however, wants to have the bankruptcy judge appoint a disinterested trustee to oversee Jawmin's operations, arguing that this is the only way in which the ranch's interests can be protected.

On September 13, a hearing was held on the bankruptcy petition before Judge Faris. Court minutes state that the judge was "not ready to appoint a trustee nor dismiss the case" – remedies sought by Hokukano Ranch. "Instead, there are concerns regarding heavy insider involvement [and] the need for updated reports." The next hearing is set for October 18.

— Patricia Tummons

**Editor's Note:** Selected records from the bankruptcy court are available in the EH-Xtra column on our website: [www.environment-hawaii.org](http://www.environment-hawaii.org).

For more background on Kealakekua and Hokukano ranches, see the October and November 2007 editions of *Environment Hawai'i*. These are available online in the Archives section of our website.

## 'Aina Le'a Seeks Two-Year Extension Of Deadline for Affordable Housing

The November 17 deadline for completion of 385 units of affordable housing at the Villages of 'Aina Le'a is fast approaching. And, to judge from all appearances, there is no possible way it can be met.

In late August, the developer, DW 'Aina Le'a, LLC, filed with the Land Use Commission a request for a time extension. Attorneys for the landowner, Bridge Capital, filed a supporting document that all but threatened the LUC with legal action should it vote to revert the 1,060-acre project site, near Puako, Hawai'i, to the state Agricultural land use district.

At the same time, DWAL launched a public-relations campaign, issuing in mid-September a press release stating that a research firm it had hired determined that "Hawai'i Island residents strongly support" the development, with 68 percent of residents indicating they support it. The press release stated also that beginning September 13, 'Aina Le'a would open reservation requests from local Realtors and that the units would be "introduced for sale" this month.

In other developments:

◆ The company building the affordable houses, TrueStyle Pacific Builders, has been sued by Pacific Source, a Seattle company, for \$102,152.89 owing on deliveries of hardware to the 'Aina Le'a site. According to court records, 'Aina Le'a purchased the items in quantities sufficient to outfit 32 of the units. Pacific Source is also seeking a lien on the property.

◆ Another lawsuit against TrueStyle has been brought by Honsador Lumber for failure to pay invoices amounting to more than \$400,000.

◆ Both major contractors on the project, TrueStyle and Goodfellow Bros., have advanced money to 'Aina Le'a: Goodfellow, to the tune of \$1.64 million in infrastructure costs; TrueStyle, in the amount of \$7.84 million, according to DWAL's attorney;

◆ On August 18, Robert Wessels, a principal of DWAL, was in Malaysia to meet with Capital Asia investors, each of whom has put up at least \$96,000 toward purchase of land and construction of the affordable units. According to one of the participants, Wessels "shared that he has a new exit strategy for this investment." "Initially I was informed that I need 30 months to realize my returns of 30 percent on the project," wrote Jonathan Quek Chin Wei, who describes himself as "Asia's Youngest Wealth Coach." "Looking at the

progress of the partners in Big Island, I now need less than 30 months to make money from this Land Development Project." In a filing with the LUC, the developer's attorney stated that Capital Asia is bringing in \$1.5 million a month, and that "the volume of investment will increase when investors begin to receive back their returns." According to Hawai'i County property tax records, the individual investors in Singapore and Malaysia holding an undivided interest in the 62-acre affordable housing lot now number more than 400.

◆ DW 'Aina Le'a took out a full-page ad in Big Island papers last month, announcing it had partnered with Hawai'i First Federal Credit Union in establishing a program to give qualified buyers of the affordable units a match of \$4 to every \$1 saved toward a down payment, "up to a set amount." In August, DWAL told the Land Use Commission that one of the major obstacles it was facing in selling units was the difficulty that potential buyers were facing with down payments, and "FHA regulations do not allow DW to make direct subsidies of down payments. DW has been working with Hawai'i Home Ownership and with Bank of America on a program to subsidize down payments..."

### The Motion

On August 30, Alan Okamoto, the Hilo attorney representing DWAL, filed a motion with the Land Use Commission to amend three conditions in the LUC's order placing the land in the Urban District: Condition 1,

requiring the 385 units to be completed by November 17; Condition 5, requiring the sewage treatment plant be built inside the project boundary; and Condition 7, requiring the developer to provide 16 acres of land within the project area to the state Department of Education.

Regarding Condition 1, DWAL is asking the LUC to give it until December 31, 2011, to complete 190 affordable units and to December 31, 2012, to finish the remaining 195. This "slightly extended period of time," writes Okamoto, is needed so that DWAL can "confirm eligibility of prospective buyers ... and assist them in obtaining financing." And, with no apparent irony intended, he adds: "DW understands the importance of setting definite standards for its performance of this condition..."

On the matter of the location of the wastewater plant, Okamoto writes, "there are engineering and aesthetic benefits" to providing the plant to treat waste from the entire project (more than 2,000 houses) on land in the adjoining Agricultural District.

As to the school site, Okamoto writes, "When DW purchased the project, it appeared that the Department of Education wished to acquire a much larger area," and one alternative was a site in the adjoining Agricultural land "where the site would have good access to utilities and roadways."

In a supporting statement, Wessels describes some of the difficulties DWAL has had getting financing for the project. It approached Bank of Hawai'i and First Hawaiian Bank, "four major banks on the mainland," and "equity and hedge funds." None, he says, was interested in providing loans for the project. DWAL then "proceeded with its available funds, funds from the Capital Asia investor



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program, and the cooperation of its contractors ... and its material supplier to carry a portion of construction costs until the construction loan is funded. To date, DW, its investors and its contractors have invested over \$20 million” on the affordable housing site, he says. (However, if each of the 400-plus investors in Capital Asia put in the minimum required amount of \$96,000, DWAL would have raised more than \$38 million from that source alone.)

Wessels refers to a pending loan from “Exim Corp.” that would “cover the construction costs for the balance of Phase I and payment toward the purchase price for the remainder of the residential, the golf course, and village commercial elements of the project.” On July 1, when asked about his company’s plan to purchase the remainder of the project area (another 1,000 acres besides the 62 for Phase I), Wessels told the LUC that the Exim Bank would come through with a loan of \$98 million by mid-August, which would include \$12 million still owed on the Phase I land. In his more recent statement, dated August 27, he says that loan package “is expected by October 2010.”

A hearing on the motion to amend the conditions is scheduled for November 4 in the LUC conference room in Honolulu.

### **The Threats**

A week after DWAL filed its motion, Bridge ‘Aina Le’a, LLC, the subsidiary of Bridge Capital that still owns nearly all the Urban area of the project and which remains one of the petitioners in the matter pending before the Land Use Commission, filed a position statement on DWAL’s motion. Basically, while Bridge supports the amendments proposed by DWAL, its attorney, Bruce Voss, argues that the motion does not do nearly enough to remedy the past injuries that the

LUC has inflicted on the project.

Thus, the LUC should eliminate deadlines altogether, Voss argues.

In addition, the ‘Aina Le’a project has been subject to more stringent conditions than the LUC has imposed on other projects, Voss argues, claiming “the commission has deliberately discriminated against” it. What’s more, he writes, the commission has violated due process by not giving proper notice of its “action” proposed in the July 1 meeting, by having the motion July 1 be “vague and ambiguous,” by failing to define what it meant when it talked about “completed” houses, and by establishing an arbitrary and capricious deadline for completion of the 385 affordable units, among other things.

Voss even seems to suggest at one point that 107 apartments built by a previous landowner, Nansay, to satisfy various affordable housing requirements for its projects at Puako and Kohanaiki should be credited against the obligations of DWAL. Litigation over how those units – low-income housing in Waikoloa – should be credited resulted in a settlement in which none of the units could be used “towards satisfying Bridge’s existing affordable housing obligation at Puako.”

The commission’s finding on July 1 that the requirement to complete 16 units of affordable housing by March 31 was not met was “illegal,” Voss says, in that it “completely failed to comply with the contested case requirements of Chapter 91 of Hawai’i Revised Statutes.” Despite that, he says, the action “cast a dark cloud over the project and crippled DW’s effort to conclude financing to continue the affordable housing construction.”

### **The Rebuttal**

Voss is especially unhappy with the actions of Abbey Seth Mayer, the director of the Office of Planning. Mayer’s comment to the LUC on the progress ‘Aina Le’a was making in May was unsolicited, Voss argues, and unprecedented, since he did not submit any similar comments on the progress of any of the other Big Island developments.

Undaunted, Mayer has responded with the Office of Planning’s memo opposing the motion to amend the three conditions. The memo notes that the 2010 affordable housing deadline was itself two years beyond what Bridge ‘Aina Le’a indicated would be needed – that in 2005, Bridge itself had proposed that it be given only until 2008 to complete 385 units.

One of the points Mayer has raised over the last two years that the integrity of the commission is compromised if it does not enforce the conditions it attaches to land reclassification. The decision made in 2005, setting the 2010 deadline for affordable housing, “should stand for something, and should not be revisited,” the memo states. “The petitioner should not be rewarded for failing to meet those representations and conditions. In order to preserve the integrity of LUC decisions and the LUC decision-making process, the petitioner’s request” should be denied, Mayer writes.

If DWAL is going to argue that reversion would be an economic hardship, “OP notes that DW’s remedy is not to ask the LUC to forsake the integrity of the land use process but rather to pursue Bridge ‘Aina Le’a.... DW cannot rely upon the LUC to avoid its economic losses and should resolve its monetary concerns over the transaction with Bridge ‘Aina Le’a.”

As far as the request to amend the conditions concerning the location of the sewage treatment plant and the school site, Mayer notes that if the LUC votes to revert the land, “any amendment of conditions 5 and 7 will be moot.” What’s more, as concerns DWAL’s claim that the Department of Education will accept 32 acres of land in the Agricultural District, Mayer attaches to his memo an email from a DOE planner, stating that the agreement worked out with the developer called for DWAL to “secure a boundary amendment” for the parcel before the DOE would accept it. So far, “Petitioner has not filed a new petition to reclassify” those 32 acres, Mayer says. —**Patricia Tummons**

