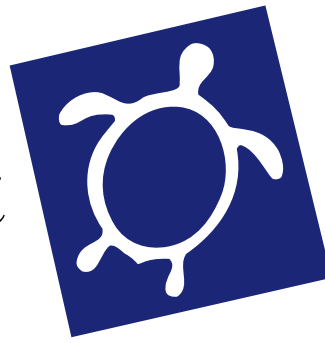


Environment



Hawai‘i

a monthly newsletter

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Justice Delayed...

When it comes to the arcana of American jurisprudence, the cases alleging Central American worker injury as a result of DBCP exposure provide a good introduction. There you will find such unusual tactics as impleadings, claims of *forum non conveniens* and even the rarely seen writ of *coram nobis*.

What you won't see is much, if any, argument on the merits of the workers' claims.

One case still being litigated in Hawai‘i courts offers residents here a front-row seat into the legal tactics that have been employed to prevent the workers from having their day in court. Whether it meets the same fate as dozens of others will depend on the outcome of the state Supreme Court hearing this month.

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Claims of Harm from DBCP Kept Alive In Lawsuit before State Supreme Court

A lawsuit filed nearly two decades ago is finally going to be heard by the Hawai‘i Supreme Court. And although the case has received little local publicity, it is part of a series of lawsuits around the country that pit Central American plantation workers against some of the giants of U.S. industry.

The plaintiffs in the Hawai‘i case are six named individuals who worked in Central American banana plantations. They are suing several Dole Food and Del Monte companies, the Pineapple Growers Association of Hawai‘i, AMVAC Chemical Corporation, Shell Oil, Dow Chemical, and Occidental Chemical, alleging that they were harmed by exposure to dibromochloropropane, or DBCP — a powerful soil fumigant developed in Hawai‘i in the 1950s to control nematodes in pineapple fields.

Manufacturers of the chemical had been aware of the harmful effects of DBCP on lab animals since at least the early 1960s. But not until 1977, after male workers at a plant in California that produced the pesticide complained that they were unable to father children, did the Occupational Safety and Health Administration begin to regulate worker exposure. The Environmental Protection Agency followed suit, banning most uses of DBCP in the continental United States in 1978 (its use was allowed to continue on Maui pineapple fields through 1984).

However, DBCP continued to be used by U.S. fruit companies on foreign banana plantations. Often, the protective clothing and gear needed to prevent skin absorption and inhalation of fumes were not provided. Also, the ways in which the pesticide was mixed and applied generally meant foreign workers had greater exposure to DBCP fumes than did workers in the United States.

But whatever the state Supreme Court

decides in this case — *Patrickson v. Dole* — it still will not address the fundamental reason for the litigation: the question of whether the defendants should be held liable for injuries the plaintiffs say they sustained as a result of the defendants' actions or products. Instead, as with so many other lawsuits brought over the use of DBCP on foreign soil, the case turns on a legal technicality: did the plaintiffs file their lawsuit before the statute of limitations barred their complaint?

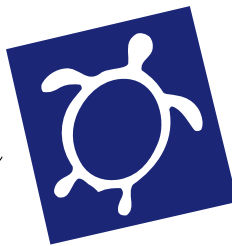
An Inconvenient Forum

Starting in 1993, tens of thousands of workers in plantations in Central America filed class-action lawsuits against the largest U.S.-based fruit growers with holdings in the region and the companies involved in the manufacture of DBCP. According to statements by three of the plaintiffs, they did not realize that their injuries were a result of DBCP exposure until after 1993, when a group of human-rights organizations began working on behalf of DBCP-affected workers in their communities. Among the defendants were Standard Fruit, owned since the 1960s by Dole Food, and Del Monte, two businesses with close ties to Hawai‘i.

Many of the DBCP cases were removed to federal court by the defendants, whose attorneys then argued that, under the legal doctrine of *forum non conveniens* (inconvenient forum), the litigation should by rights be conducted in the country where the exposure occurred. That approach only lasted so long as the foreign courts did not render significant judgments against the companies. Once large judgments began to be awarded, and the workers sought to collect, the fruit and chemical companies returned to U.S. courts.

The Hawai‘i litigation began life on Oc-

Environment



Hawai'i

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NEW AND NOTEWORTHY

Kealakehe Pilikia: The County of Hawai'i is facing mounting pressure to stop its practice of dumping treated effluent from the Kealakehe sewage treatment plant into a disposal pit near the Kona coast.

As reported in the July issue of *Environment Hawai'i*, the plant was designed and built on the promise that effluent would be reused for irrigation. However, a golf course that was supposed to receive most of the effluent was never built and, 20 years since its construction, the effluent continues to be directed to a disposal pit. In the wake of a recent federal court decision finding that injection wells from the Lahaina sewage treatment plant discharged into the ocean, requiring Maui County to obtain a Non-Point Source Discharge Elimination System (NPDES) permit, the Big Island group of the Sierra Club, Hawai'i Chapter, has given the Kealakehe plant operations close scrutiny.

One result has been a letter signed by 20 scientists urging an end to the practice of dumping the Kealakehe effluent into the disposal pit. They note that a draft report from the state Department of Health designates nearshore waters near Hohokohau (downslope from the disposal pit) as "impaired," while two nearby bathing sites (Honokohau Beach and Pinetrees-Honokohau) "had multiple violations of water quality pollutants."

"In the current system, we are both wasting a valuable water resource and threatening the local economy with its prosperous eco-tourism industry.... For all of these aforementioned reasons and more, we respectfully request that the original promise of the Kealakehe Waste Water Treatment plant for water reuse finally be realized."

Among those signing the letter were Megan Lamson; Richard H. Bennett; William Gilmartin; Ann Kobsa; William J. Walsh; Rick Warshauer; and Tracy Wiegner.

tions, a portion of which, based on total donations, will be matched by the company.

To donate, you need to have Foodland's "Maikai" shopper card. Then you need to tell the cashier at check-out you wish to make a donation to *Environment Hawai'i*. Our account number is 77036, but if you forget, you can look it up on the brochure at the register. Any amount up to \$249 per individual will be accepted through the end of the month.

Attack on the Ants: This month, the Hawai'i Ant Lab, Kaua'i Invasive Species Committee, and state Department of Agriculture are slated to launch Phase 2 of their effort to eradicate little fire ants (LFA) on Kaua'i.

For more than a decade, the ants have persisted in the heavy vegetation in and around the town of Kalihiwai, located near prime seabird habitat surrounding the Kilauea lighthouse. Introduced to Kaua'i in 1999 via infested palm trees imported from Hawai'i island, the ants have spread from a palm arboretum to adjacent properties.

Phase 1 of the eradication plan developed in 2011 by the three agencies involved the pesticide treatment of three private properties, including the arboretum, which has 183 palm trees that are more than 4.5 meters tall.

In addition to using granular bait on the ground, workers plastered trees with a putty-like gel bait developed by the ant lab.

"It works wonderfully. It sticks up into the trees. You can splatter and broadcast it throughout the vegetation," said Hawai'i Ant Lab research specialist Michelle Montgomery at the Hawai'i Conservation Conference last July.

The properties received eight treatments over 12 months.

Although the ant population declined significantly, Montgomery said it's too soon to declare the ants eradicated from the slash piles and tall palm trees on the properties. She added that the area will be monitored for three more years and remnant colonies will be spot treated.

Phase 2 will involve the treatment of steep slopes and sensitive coastline habitat, she said.

The LFA is one of the least-studied ants in the world and "classic ant control methods are not very effective unless it's in a simple ecosystem in a dry climate," she said.

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give aloha

Foodland's Annual Community Matching Gifts Program

Environment Hawai'i

77036

Give Aloha: It's September, which means Foodland's "Give Aloha" program is in full swing. This allows supporters of *Environment Hawai'i* and other non-profits to make dona-

Quote of the Month

*"We're not saying, 'Walk the plank
into a pool of piranhas,' [but]
I have problem with people
just doing stuff and then saying,
It's not so bad. We did it.
Can't we just do it?"*

— **Chris Yuen,**
**Land Board member,
on Conservation District violators**

Wespac to Investigate, Discipline Itself Over Green Sea Turtle Delisting Petition

The National Oceanic and Atmospheric Administration has directed the Western Pacific Fishery Management Council (Wespac) to investigate the extent to which federal grant funds might have been misused by council staff members involved in preparing the pending petition to remove the Hawaiian green sea turtle from the federal list of endangered and threatened species.

In 2007, the Maunalua Hawaiian Civic Club introduced a proposal to delist the Hawaiian green sea turtle to the Association of Hawaiian Civic Clubs. Wespac executive director Kitty Simonds founded and is president of the Maunalua club and council staffers Charles Ka'ai and Mark Mitsuyasu also sit on the club's board of directors.

In a July 11 letter, U.S. Rep. Gregorio Sablan asked National Marine Fisheries Service assistant administrator Eileen Sobeck and National Oceanic and Atmospheric Administration chief Kathryn Sullivan for an update on NOAA's investigation into allegations that Wespac staff had prepared the petition, submitted to NMFS in February 2012 by the Association of Hawaiian Civic Clubs. Sablan represents the Northern Mariana Islands and is the ranking minority member of the House Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs.

In an August 6 letter, Sobeck responded that NOAA's Grants Management Division (GMD) had informed Wespac that the preparation of the petition by council staff "did not comply with the terms and conditions of its

Federal Assistance Award and the Council must immediately implement remedial measures." Wespac receives all of its funding in the form of government grants.

Sobeck continued that Wespac must provide details to GMD "describing by who within the Council, where, and when the petition was drafted, and the circumstances surrounding the decision to draft and edit the petition as well as provide an estimate of the costs associated with the petition. Further, the Council should impose disciplinary measures upon those Council staff members who have misused award funds. Based on the response from the Council regarding these items, NOAA will determine whether additional action is needed."



Wespac Opinion Piece Fuels Controversy Over Shark Fishing

In addition to the turtle petition, Sablan expressed his concerns about a pro-shark fishing opinion piece published in *Marianas Variety* on March 28, in which Wespac senior scientist Paul Dalzell was identified as a representative of NOAA.

At Wespac's March meeting, held in Guam and the Commonwealth of the Northern Mariana Islands, the council entertained the idea of establishing a fishery on sharks as a way to reduce depredation on the catch of fishermen in those areas. It also directed its staff to facilitate a resolution of the apparent conflict

between federal regulations that allow fishermen to catch sharks and local regulations—such as those in the CNMI, Guam and Hawai'i—that prohibit the possession of shark fins and, therefore, appear to prohibit the landing of sharks.

"[S]hark catches may contribute to optimum yield as required by the [Magnuson-Stevens Act] for federally managed fisheries. In the Marianas, most

fishery resources, including pelagic shark stocks are grossly under-utilized," Dalzell wrote.

"One of the byproducts of the [build-up] of fishery resources within the U.S. EEZ [Exclusive Economic Zone] around the archipelago is the high prevalence of shark depredation of fishermen's catches. ... Ultimately, fishing for sharks may provide some relief for small boat fishermen from the chronic depredation by sharks," he wrote.

Sablan was outraged.

"To be perfectly clear: promotion of shark fishing in this case means promotion of shark finning," he wrote Sobeck. He went on to note that one of Wespac's own scientists has stated that selling shark fins is crucial to the economic feasibility of any shark fishery.

"Encouraging the development of fisheries that would violate state laws and perpetuate the global trade in shark fins is irresponsible and undermines international shark conservation efforts," Sablan wrote, adding that worldwide shark populations are estimated to have decreased by as much as 80 percent, largely due to the demand for fins.

Sablan bemoaned what he described as Wespac's "apparent disregard for local interest, scientifically sound management decisions, and NOAA policy," and asked that NOAA clarify whether Dalzell's piece reflects NOAA policy.

In her response, Sobeck explained that the newspaper had incorrectly identified Dalzell as a NOAA employee and that his letter "clearly states that he is representing the positions of the Council."

Although she did not speak to the idea of establishing a shark fishery, she did state that shark depredation is a chronic problem in the Marianas and is a priority research area for the NMFS. She added that NOAA is also working with states and territories to better understand how their laws interact with the federal Shark Conservation Act.



Bigeye Are Overfished

It seemed inevitable and now it's finally happened: Bigeye tuna in the Western and Central Pacific are officially overfished. According to the most recent stock assessment, presented at the Western and Central Pacific Fisheries Commission's (WCPFC) Scientific Committee meeting last month in Majuro, Marshall Islands, the bigeye stock is now 16 percent of its size before fishing pressure and its spawning potential is likely



School children on Guam swarmed Wespac's March meeting with signs and testified on the value of sharks to the ecosystem.

Storm Iselle Puts to Rest Debate Over Threat Potential of Albizia

By the time it reached Hawai'i island, Hurricane Iselle was barely hanging on to its status as a hurricane, with maximum sustained winds of 74 miles per hour.

And yet it managed to turn large swaths of the rural district of Puna, on the southeastern quadrant of the island, into what appear from the air to be giant piles of kindling sticks. Those sticks are invariably trunks of albizia trees, anywhere from a foot to five feet in diameter.

For years, as the albizia grew taller, spreading their canopies over some of the most important arterial highways in the district, legislators and policy-makers seemed to regard the threat from the trees as a back-burner issue. This past legislative session, in fact, a bill that would have allotted \$5 million to remove overhanging albizia branches from roadways that were critical for emergency services got just one hearing before the House Water and Land Committee before it sank into legislative oblivion. A similar fate befell another bill that would have appropriated funds to the Civil Defense Division of the state Department of Defense allowing it to exercise its authority to remove hazardous trees and branches from private property.

No one has yet come up with a cost estimate of the damages caused by albizia trees felled by the storm. In addition to the costs that will be borne by state taxpayers, county taxpayers, and electric rate-payers, there are the untold costs of private homeowners who had to clear their own roads (hundreds of miles of roads in Puna are owned and maintained by private community associations), homeowners and renters who lost homes, furnishings, and food to damage from fallen trees, and, certainly not least, the wages and income lost when so many people could not get to their jobs for days or weeks.

In light of these losses, the proposed \$5 million for albizia control was chump change.

Next Steps

Albizia is a threat not only to the Big Island, but, as many testified to the Legislature last session, it poses a danger to residents on all islands.

Flint Hughes, an expert on albizia with the U.S. Forest Service Institute of Pacific Islands Forestry, based in Hilo, spoke with *Environment Hawai'i* about the damage wrought by albizia in Puna. "After we finish cleaning up – and that's the big task right now, getting power, water back to people – the next step will be sitting down with folks, asking how we can keep this from happening again, how can we protect neighborhoods from this tree," he said.

"It dawned on me that if all those areas that were damaged by albizia, if we had 'ohi'a around those areas, I don't think we would have seen the kind of damage that we see now."



Albizia relatively untouched by the storm encircle a field of fallen comrades.

There's a need, he said, "to pursue all the options" to control albizia — "and do so in a determined fashion."

That includes funds to remove those trees that pose immediate threats to houses and transportation, poison trees that are potential seed sources, and, given how ubiquitous albizia are, develop biocontrol measures.

The Hawai'i Invasive Species Council has awarded funds to the Forest Service to begin the search for biocontrol agents, Hughes said, but it is a long, expensive process. "A colleague mentioned that there is a pathogen, a rust, that's doing an incredible number on albizia plantations in Southeast Asia," Hughes said, "but that doesn't mean it would be a safe thing for Hawai'i."

Hughes has been involved with several communities in Puna and Hilo that have recognized albizia's danger. He and James Leary of the University of Hawai'i College of Tropical Agriculture and Human Resources devised a method of killing mature albizia trees using a few drops of Milestone herbicide and a hatchet. The cost per tree is about half a dollar's worth of chemical and around \$3 worth of labor. The treated albizia die slowly, shedding branches gradually until all that remains is a tall snag. "It just kind of crumbles in place," says Julie Tulang of the community

at or below the minimum sustainable level set by the commission.

The new data have spurred Greenpeace and other organizations to call for a year-long ban on the use of fish aggregating devices, used largely by purse seiners. The finding has also fueled the growing demand by commission member countries that the governments of Japan, South Korea, Taiwan and China provide data on the catch of their fleets.

Member nations are required by the

commission's convention to provide accurate catch data, necessary to develop accurate, reliable stock assessments. Tiga Galo of the Tokelau fisheries department reminded members of the requirement, saying "One of the obligations that all members signed up to when they joined the WCPFC was to provide full catch and effort data. ... Yet here we are 10 years down the track, and there are still four Asian (members) that are hiding behind the temporary deferment that allowed time to

amend their domestic regulations – laws that might technically prevent them from supplying this operational data."

Since 2008, the WCPFC has been trying to get its member nations to end overfishing of bigeye by placing caps on their catch and limiting the use of fish aggregating devices. The commission is scheduled to meet in Samoa in December to discuss conservation and management measures regarding the use of fish aggregating devices. —T.D.



An uprooted albizia looms over a roadway near Nanawale Estates in Puna.

of Pi'ihonua above Hilo, where some 400 albizia were "euthanized" in a matter of a few hours.

Post Iselle

Since the storm hit, many Puna residents have been talking among themselves about the albizia problem. While before Iselle, some residents voiced opposition to the idea of getting rid of the albizia "tunnels" that arched over several major roads in the district, there's no support for that view anymore.

To address the problem of landowners who allow the trees to grow unchecked on their land, one way is proposing an accelerating county tax on albizia. "Start with a two-year grace period," he suggests, "then tax low, perhaps \$10/tree/year, and double the fees every year. Chainsaws will be humming all over the island. Albizias will disappear."

Albizia were not the only trees to fall in the storm. Trunks of schefflera, ironwoods, gunpowder trees, even 'ohi'a can be seen lying along roadsides. But few would dispute that the albizia are largely to blame for the thousands of broken power lines, miles of blocked roads, and uncounted damaged buildings.

After years of inaction, some in Puna are confident the time for action is at hand. "For many like me money is a scarce resource," writes one contributor to the Punatalk forum, "and spending thousands and thousands taking down trees just isn't going to happen. It will take a combination of responsibility, community and support from the state and county to get them under control."

Or, as Hughes put it, "If this storm doesn't get us over that threshold, I don't know what will. The impact is huge and personal and large-scale in terms of financial damage. I don't see how any policy maker could ignore this any more."
— P.T.

Hawai'i Plaintiffs Await Court Action On Complaints Of Injury from DBCP

Dibromochloropropane was invented in Hawai'i, and it continued to be used on pineapple fields in the state for years after the Environmental Protection Agency banned it elsewhere in the United States.

Despite that, there seems to have been just one court case brought by Hawai'i pineapple workers alleging they were harmed by exposure to the chemical. That case was brought by Mark K. Adams and Nelson Koon Sung Ng and their spouses, Joanie Adams and Zinnia K.L. Ng. In 2007, they filed a complaint in 1st Circuit Court against several Dole companies, the Pineapple Growers Association of Hawai'i, and DBCP manufacturers, including AMVAC, Dow, Shell, and Occidental Chemical.

According to the lawsuit, Adams, who was employed by Dole as a pineapple field worker in Wahiawa, was exposed in 1974 and 1975. As a result of the exposure, he claims he suffered serious injuries, including testicular cancer. Ng worked as a pineapple harvester from 1971 to 1973 on the island of Lana'i. He, too, claims he developed testicular cancer, among other injuries, as a result of the exposure to DBCP. Both say that they discovered their injuries were related to DBCP exposure within two years of the lawsuit being filed.

In March 2008, Dole filed a motion to dismiss the case. The Hawai'i Workers Compensation Law, Dole said, barred Ng and Adams from seeking damages in court for injuries sustained during their work.

In the meantime, in light of information gained through the discovery process, the plaintiffs' attorneys filed a request with the court to amend their original complaint to include, among other things, a claim that they had experienced "non-work related" exposure to DBCP, allowing the case to go forward regardless of the legal effect of the Workers Compensation Law.

But without making a decision on the motion to amend, in August 2009, Judge Rom Trader granted Dole's motion to dismiss.

The Appellate Journey

Attorneys for the plaintiffs appealed to the ICA. In January 2010, Chief Judge Craig H. Nakamura and Associate Judges Daniel R. Foley and Katherine G. Leonard signed a three-page decision finding that the appellate court had no jurisdiction because of technical flaws in Trader's ruling. The case went back to 1st Circuit, where that July, the judge issued a revised ruling.

Again, the plaintiffs appealed. This time, the ICA took three and a half years to reach a decision in the case.

On the one hand, the judges — Presiding Judge Foley, Associate Judge Leonard and Associate Judge Lisa M. Ginoza — did not find that the lower court had improperly granted the motion to dismiss, based on the complaint as filed. However, they found that the court had "abused its discretion in denying the plaintiffs leave to amend their complaint."

"Essentially," the appellate judges found, "the Dole defendants argued ... that the proposed amendments were made in bad faith to avoid the [Worker Compensation Law] exclusivity bar ... and that granting leave to amend would further delay the action, cause prejudice, and prove futile...."

They rejected such arguments in strong language:

"At the time a complaint is filed, the parties are often uncertain about the facts and the law; and yet, prompt filing is encouraged and often required by a statute of limitations, laches, the need to preserve evidence and other such concerns. In recognition of these uncertainties, we ... allow pleadings in the alternative — even if the alternatives are mutually exclusive. As the litigation progresses, and each party learns more about its case and that of its oppo-

For Further Reading

Environment Hawai'i has reported extensively on the problems associated with albizia, including in these articles, available online at our website, www.environment-hawaii.org:

"Legislature Balks at Biosecurity Bills, But Boosts Funds for Invasive Species," June 2014;

"Behind Albizia's Beauty Lurks a Multitude of Undesirable Traits," July 2013;

"Albizia Makes Inroads in Native Forests of Puna," February 2003.

Court from page 1

tober 3, 1997, in 2nd Circuit Court (Maui). Immediately, Dole argued for removal to federal court, bringing into the litigation two companies based in Israel (Dead Sea Bromine Co. and Bromine Compounds, Limited,) that had at one point been largely owned or controlled by the government of Israel. With those companies now in the picture, Dole argued, the case involved a question of federal jurisdiction (the conduct of foreign relations). In addition, the two companies claimed immunity under a 1976 law, the Foreign Sovereign Immunities Act (FSIA).

The case came before Judge Helen Gillmor of the U.S. District Court for Honolulu. She denied the plaintiffs' request to move the case back to state court – and then she dismissed it altogether, under the *forum non conveniens* argument.

The plaintiffs appealed to the 9th U.S. Circuit Court of Appeals. Dole and other defendants in the original lawsuit appealed as well, wanting the appellate court to find in their favor on the matter of the FSIA argument and the federal jurisdiction issue.

Arguments were heard in August 2000; not until May 30, 2001, was the decision handed down. The judges overturned Gillmor's dismissal, rejecting her finding that the case should be heard in another country and the argument of the defendants that the involvement of the government of Israel required it to be heard in federal court. "[N]othing in plaintiffs' complaint turns on the validity or invalidity of any act of a foreign state," the appellate court found. "Plaintiffs seek compensation for injuries sustained from the defendants' manufacture, sale, and use of DBCP. Plaintiffs don't claim that any foreign government participated in such activities or that the defendants acted under the color of foreign law." The case was remanded to Gillmor, with instructions that she send it back to state court.

Dole and other defendants appealed to

the U.S. Supreme Court, which agreed to hear the case. Another two years passed before the high court issued its opinion, in May 2003, finding that the Dead Sea companies "were not instrumentalities of Israel under the FSIA at any time." (Dole had not appealed the 9th Circuit's rejection of its argument that federal jurisdiction was required because of the involvement of foreign relations.)

The judgment of the appeals court was thus upheld, and the decision, *Dole v. Patrickson*, has become an oft-cited precedent in many subsequent lawsuits where applicability of the FSIA was claimed.

Back in Hawai'i

Per the Supreme Court's instructions, in September 2003 the case was returned to 2nd Circuit Court (Maui), where it began life. The plaintiffs allege that Dole and the other companies being sued had conspired to

"First, they look for any kind of procedural argument to derail the case before they begin to deal with it on the merits."

— Scott Hendler

hide facts about the effects of DBCP, thus depriving the plaintiffs of "an informed free choice as to whether to expose themselves" to it; had "published and disseminated incorrect, incomplete, and misleading scientific data, literature, and test reports;" had "distorted the results of medical examinations upon persons using DBCP-containing products by falsely concealing the harm they suffered;" and had "committed fraudulent representations, omissions, and concealments" so that the plaintiffs would continue to expose themselves.

One of the many complicating aspects of the case is the fact that the plaintiffs had, in 1993, joined a class-action lawsuit known as *Delgado*. To quote from the plaintiffs' appeal brief to the ICA, "*Delgado* involved thousands of citizens of twelve foreign nations who sought damages for DBCP expo-

sure while working on farms in some 23 different countries." The case was held up from proceeding in U.S. courts while the Costa Rican courts considered whether they had jurisdiction. When that country's supreme court determined the case should not be heard in that venue, litigation began anew in the United States.

Delgado went from state court to U.S. District, to the 5th Circuit, with the defendants making the same objections regarding federal jurisdiction as they raised in *Patrickson*. When the 5th Circuit issued an order that conflicted with that of the 9th Circuit, litigation was held up pending the Supreme Court decision. Finally, in 2007, with *Delgado* back in Texas court, the case was dismissed, since by then "the only remaining identified members of the class had previously opted to pursue their claims" in *Patrickson*.

For the next couple of years, the parties

attempted to reach a settlement. Finally, in December 2006, at Dole's request, venue was transferred to 1st Circuit (Honolulu). On July 28, 2010, Judge Gary W.B. Chang found in favor of a motion for partial summary judgment filed by several of the defendants, agreeing with the defendants' new argument that the statute of limitations barred the claims.

Scott Hendler of HendlerLaw, the lead attorney for the plaintiffs, described the tactics of the defendants' attorneys in a phone interview with *Environment Hawai'i* from his office in Austin, Texas. "First, they look for any kind of procedural argument to derail the case before they begin to deal with it on the merits." There was the federal appeal, and when it did not work out, the attorneys raise the matter of the statute of limitations, he said. The clock doesn't start ticking on the statute of limitations until the injury is discovered, and, Hendler argued, case law provides for its suspension while class-action litigation is ongoing, even if that litigation is in a different jurisdiction, as it was in this case.

The plaintiffs filed a timely appeal of Judge Chang's decision, but for the next three and a half years, the case languished before the Intermediate Court of Appeals. Finally, on March 7 of this year, a three-judge panel of the ICA – Presiding Judge Daniel R. Foley and Associate Judges

nents, some allegations fall by the wayside as legally or factually unsupported. This rarely means that those allegations were brought in bad faith or that the pleading that contained them was a sham. Parties usually abandon claims because, over the passage of time and through diligent work, they have learned more about the available evidence and viable legal theories, and wish to shape their allegations to conform to these newly discovered realities. We do not call this process sham

pleading; we call it litigation."

Since the remand, there has not been any action to advance the litigation. *Environment Hawai'i* has been unable to reach any of the plaintiffs. They were represented by several different lawyers while the case was making its way through the lower court and the ICA. Elizabeth M. Dunne, the local counsel representing them most recently, according to the ICA record, is no longer practicing in Hawai'i.

— P.T.

'A Brief Description'

What follows is the synopsis of the *Patrickson* case before the Hawai'i Supreme Court prepared by Judiciary personnel:

Litigation in this case involves the Nematicide dibromochloropropane (DBCP), which Plaintiffs alleged caused damage to their reproductive systems. The instant case has lasted decades, been back and forth between state and federal courts, and is related to multiple cases on the mainland. Specifically, this case is related to *Jorge Carcamo v. Shell Oil Co.*, and *Delgado v. Shell Oil Co.*, two putative class action cases initially filed in Texas state courts in 1993, then removed to federal court and consolidated with other DBCP cases. The Plaintiffs in the instant case are the same plaintiffs in the *Carcamo* case. On July 11, 1995, the Texas district court dismissed the consolidated cases for *forum non conveniens*, ordering in a final paragraph the following:

Other motions

In addition to defendant's motion to dismiss for f.n.c., a number of other motions are pending. Because

Delgado, Jorge Carcamo, Valdez, and Isae Carcamo may be dismissed in 90 days, all pending motions in those cases not otherwise expressly addressed in this memorandum and Order are DENIED as MOOT. *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1375 (S.D.Tex. 1995).

On October 3, 1997, the Plaintiffs filed a putative DBCP class action in Hawai'i. Defendant Dow Chemical Corporation filed a motion for partial summary judgment on statute of limitations grounds, which the circuit court granted. The Plaintiffs appealed, arguing that the pendency of class action certification motions in the Texas cases "cross-jurisdictionally tolled" the two-year Hawai'i statute of limitations under Hawai'i Revised Statutes section 657-7.

The ICA affirmed the circuit court's judgment. The ICA did not reach the cross-jurisdictional tolling issue, holding that, in any event, the Texas district

court's July 11, 1995 order denying all pending motions as moot included the class certification motion pending in the *Carcamo* action. The ICA held that any tolling of Hawai'i's two-year statute of limitations thus ended on July 11, 1995. Therefore, the Plaintiffs' class action complaint, which was filed approximately two years and three months after the July 11, 1995 order, was time-barred.

On certiorari, the Plaintiffs present the following questions:

A. Whether an order entered on July 11, 1995 – purportedly dismissing the prior class action – that explicitly did not take effect until October 11, 1995, operates to bar Petitioners' October 3, 1997 lawsuit on limitations grounds.

B. Whether an administrative "housekeeping" order included in a *forum non conveniens* order denying "all pending motions" as "moot" – without specifying those pending motions – put putative class members on notice that class action tolling had ended.

Katherine Leonard and Lisa Ginoza – upheld the lower court judgment. They agreed with the defendants that although the statute of limitations was tolled (suspended) while similar litigation in other courts was pending, by any reasonable standard, the two-year statute of limitations applying to most of the plaintiffs' claims had expired before they filed their lawsuit in Hawai'i. The claim of a breach of implied warranty, for which a four-year statute of limitations applies, was also rejected. "[E]ven though a four-year statute of limitations applies to the breach of implied warranty claim," the judges wrote, "that claim was not timely asserted because it accrued in the mid-1980s."

A Grant of Cert

The plaintiffs appealed the ICA decision to the Hawai'i Supreme Court. The original lawsuit, they pointed out, was filed on October 3, 1997, which was within the two-year statute of limitations set by the October 11, 1995, date on which a Texas judge's ruling in a related case took effect.

The defendants, led by attorneys for The

Dow Chemical Company, argued vigorously against the plaintiffs' application for a writ of certiorari from the high court. There was "no grave error of law" on the part of the ICA, wrote Honolulu attorney Calvin E. Young and Texas attorney Michael L. Brem, assisting in Dow's defense. The time within which the plaintiffs' could bring a class action ceased within two years of the Texas judge's denial of their motion for class certification on July 11, 1995, they wrote, and as a result, "petitioners' claims are hopelessly time-barred."

For the plaintiffs, however, Sean Lyons (also of Texas, but admitted to the Hawai'i Bar in 2011) argued that the ICA opinion "creates a trap for putative class members by interpreting an ambiguous housekeeping order" – the Texas judge's action – "as terminating class action tolling."

When the Hawai'i Supreme Court finally does hear arguments on the case, scheduled for September 18, the limited question before it will be whether the lawsuit can proceed. If the court finds in the plaintiffs' favor, that will clear the way for the lower court finally to weigh the merits

of the case – more than three decades after the plaintiffs' DBCP exposure occurred.

The defendants "are scared of the merits because their misconduct is so egregious," says Hendler. "They'll be exposed to significant punitive damages, since their conduct is so unconscionable. They're spending many millions of dollars more to prevent these cases from reaching the merits than they would probably have to pay in a settlement because they're afraid of the evidence."

Susanna Bohme, author of the forthcoming *Toxic Injustice* and a lecturer at Harvard University, notes that many of the DBCP cases have been settled, while *Patrickson* continues. "It has survived a huge challenge, to the credit of the attorneys," she told *Environment Hawai'i*.

"What's sad about these cases, what's really angering, is that the corporations know that if they can delay, the threat of suits will diminish over time. Delay is frustrating in and of itself, but it becomes tragic when you realize all these workers will die and, since so many of them are childless, there will be few family members to continue legal action." — *Patricia Tummons*

In 30 Years of Litigation, Only Once Has a Jury Heard Case on the Merits

On her web page, attorney Andrea E. Neuman boasts of her knock-out court victories in several prominent lawsuits brought against her corporate clients, including Dole Food.

Neuman, a partner with the white-shoe New York law firm of Gibson, Dunn & Crutcher, discusses at some length her involvement with DBCP litigation. She notes that she “successfully defeated all pending DBCP claims against Dole in Hawai'i in *Adams v. Dole* and *Patrickson v. Dole*...”

Actually, it is a bit early to carve notches in her belt for those cases. *Patrickson* will be argued before the state Supreme Court on September 18. And *Adams* — “the only DBCP claims to have ever been made by U.S. agricultural workers,” in Neuman’s words — still clings to life. In January, the Intermediate Court of Appeals remanded that case back to the 1st Circuit Court for further proceedings.

Still, Neuman and several other high-profile attorneys have pulled out all stops to prevail, not only in courts of law, but in the court of public opinion as well, in many of the other cases brought on behalf of foreign agricultural workers who claim injury as a result of DBCP exposure.

Background

Although exposure for most of the Central American workers occurred in the 1970s and early 1980s, not until the late 1980s did most workers find out that DBCP could be associated with some of the problems they were experiencing, including low sperm counts or even complete sterility.

One of the earliest lawsuits, *Domingo Castro-Alfaro*, was brought against Dow and Shell in a Texas court in 1984. After an appeal to the Texas Supreme Court upheld the plaintiffs’ right to bring the case in 1990, a settlement was reached in 1992, with the more than 80 plaintiffs receiving from \$1,000 to \$10,000 each. Similar cases brought in Florida and California around the same time were dismissed on the ground of *forum non conveniens*. In some instances, foreign courts heard the lawsuits, but many times awards were capped at such low levels that attorneys had little incentive to pursue them.

In 2001, the Nicaraguan government enacted Special Law 364, which allowed for generous awards for plaintiffs claiming harm from DBCP exposure, with the result that banana workers there received a number of

favorable judgments.

“In contrast to their earlier assertions that cases should be tried in plaintiffs’ home countries,” write Vicent Boix and Susanna Bohme in a commentary published in 2012 in the *International Journal of Occupational and Environmental Health*, “the fruit and chemical companies argued that these cases were invalid. According to *The New York Times*, Dole, Dow, and Shell hired people who had been prominent in the Reagan and Clinton administrations to obtain the collaboration of the Bush administration in repealing Law 364,” the law that facilitated the DBCP trials.

The Nicaraguan Supreme Court upheld the law, however, and Nicaraguan plaintiffs sought to enforce judgments in courts not only in the United States, but in other jurisdictions as well, where the corporations had a presence.

The approach hasn’t succeeded, however. In one of the more prominent cases involving a Law 364 judgment, the Nicaraguan workers filed a lawsuit in Miami (*Osorio v. Dole*), seeking to enforce an award of \$97 million against Dole and other companies. In 2009, the judge threw out the lawsuit, holding that certain provisions of the law were inconsistent with international standards of justice.

California Court

In another case — notorious or celebrated, depending on one’s viewpoint — 12 Nicaraguan workers filed suit in California state court against Dole and other DBCP producers or users. The case, known as *Tellez v. Dole*, was the first — and, so far, only — in the United States in which a jury heard the merits of the worker claims argued.

In 2007, the jury awarded six of them a total of \$3.2 million in compensatory damages. Five of those six were awarded additionally punitive damages in the total amount of \$2.5 million, with the jury determining that Dole had concealed DBCP’s danger from the workers. Dole protested the verdict, and the trial judge, Victoria Chaney, dismissed the punitive damages altogether and reduced compensatory damages to just \$1.58 million to be distributed among just four of the original 12 plaintiffs.

Following the *Tellez* verdict, attorneys representing the plaintiffs filed two more lawsuits involving similar claims — *Mejia v. Dole* and *Rivera v. Dole*. This time, Dole challenged the employment histories of the

plaintiffs, alleging that the plaintiffs never worked for Dole, had been coached on their testimony by their attorneys, and were perpetrating a fraud on the court. They rounded up witnesses in Nicaragua who supported the claim of fraud, although Dole asked that their identities not be disclosed to the plaintiffs on the ground that the witnesses feared for their safety.

Boix, of the Polytechnic University of Valencia, and Bohme, a lecturer at Harvard University, discuss these cases at length in their commentary, “Secrecy and justice in the ongoing saga of DBCP litigation.”

“Chaney seemed to accept the story offered by Dole’s witnesses, despite the fact that, in contravention of usual practice, no meaningful cross-examination of their story was allowed,” they write. Chaney then dismissed both the *Mejia* and *Rivera* lawsuits with a finding that a fraud had been committed on the court by the plaintiffs’ law firms, their doctors and laboratories, and Nicaraguan judges.

Dole’s attorneys asked Chaney to vacate the *Tellez* verdict as well, which they claimed was built on the same kind of fraud. She obliged by overturning that in July 2009.

Since then, write Boix and Bohme, “evidence countering the version given by the secret witnesses in California emerged,” including allegations that Dole investigators had paid some of the secret witnesses to provide scripted testimony.

The *Tellez* case has been exceptionally nasty, with charges and counter-charges of unethical behavior being leveled against attorneys from both sides. In February 2011, the California State Bar dismissed the plaintiffs’ complaint against three Dole counsel. Also, the defendants’ complaint to the bar over the conduct of Juan Dominguez, a flamboyant attorney representing the Nicaraguan workers, was dismissed, with the bar finding “this matter does not warrant further action.”

Tellez was appealed to the Court of Appeals in California (under the title *Laguna v. Dole*). In March of this year, the appellate court affirmed Judge Chaney’s ruling.

Health Effects

On its website page titled “DBCP Facts,” Dole states, “there is no credible scientific evidence that Dole’s use of DBCP on banana farms caused any of the injuries claimed in any of the DBCP lawsuits, including sterility.”

Some researchers have even cast doubt on the claim that DBCP exposure results in long-term sterility or other reproductive problems. In a study published last year in *The Open Urology and Nephrology Journal*, the four au-

BOARD TALK

Former North Shore Convalescent Home May Soon Shelter Sex Trafficking Victims

It was a difficult choice: Provide a home for a few dozen underage sex trafficking victims or a campus for a new intermediate school for as many as 200 North Shore kids.

In the end, it came down to which organization seemed better prepared.

On July 25, the state Board of Land and Natural Resources unanimously supported a recommendation from the Department of Land and Natural Resources' Land Division to approve, in concept, a 30-year lease to the non-profit Ho'ola Na Pua, which provides housing and therapy to young people who have escaped the sex trade. The lease would be

for nearly 13 acres of agriculturally zoned land in Waiale'e on O'ahu's North Shore, the site of the 100-year-old, burned-out ruins of the Boys Industrial School and the Crawford convalescent home. The board also approved a right-of-entry to allow the organization to conduct due diligence work.

If and when the Land Board approves the lease, Ho'ola Na Pua will need to conduct an environmental assessment.

North Shore Middle School, which had filed a competing application to use the property, requested a contested case hearing on the matter. The school group and its supporters

have complained that North Shore students must attend either Kahuku Intermediate and High School or Waialua Intermediate and High School. Both schools are as much as an hour's drive away for some students and force kids as young as 12 to attend school with those much older, they told the board. Although the state Board of Education has not yet approved the groups' second application to establish a charter school, students from the area and their parents testified in favor of its request for the land.

The Land Division noted in a report to the Land Board that the property had been vandalized since its last tenant left last year and needs much repair.

Representatives from the North Shore Middle School estimated it would cost only \$80,000 to turn the former convalescent home into a school and said that the community, which includes expert fundraisers, supported their cause.

thors—Kathleen Hwang, Michael Eisenberg, Rustin Walters, and Larry Lipshultz—argue that while sperm counts in lab rats clearly decline after DBCP exposure, similar effects are not seen in humans, since rats “produce more damaging DBCP metabolites than humans and are less able to detoxify these resulting products.” In other words, they argue, rats are more sensitive to DBCP than humans.*

They go on to pooh-pooh the various legal actions taken by foreign workers. “Despite the lack of substantive scientific data indicating a causal relationship between testis failure and the agricultural application of DBCP, extensive litigation continued and extends even to the present day. Driven by suspect putative data, international political ambitions, and potentially large settlements, the legal journey reads like a Hollywood movie.”

The Environmental Protection Agency has no qualms about linking DBCP to reduced sperm counts in workers who have experienced chronic exposure. “Chronic exposure to DBCP causes male reproductive effects,” the EPA states on its fact sheet for the chemical. “Decreased sperm counts have been observed in men occupationally exposed to DBCP.”

Bohme also takes exception to the arguments of Lipshultz and his co-authors that would minimize the impact of DBCP on male reproductive health. “Claims that there is no evidence of reproductive harm in farmworkers are so contrary to the clinical evidence of DBCP damage that they seem geared toward mounting a scientific defense in the courtroom in case the defendants’ procedural gambits fail to protect them from a trial,” she said in an email to *Environment Hawai'i*.

As to the “legal journey that reads like a Hollywood movie,” the defendants have played up this interpretation. But Bohme, whose book, *Toxic Injustice*, will be published in December by the University of California Press, has a different spin.

The defendants “have successfully avoided trials in these cases from 1983 until 2007,” she said in a phone interview. The first jury trial of the claims, she added, “resulted in a very measured jury verdict in favor of the Nicaraguan workers, but the defendants used no-holds-barred, unethical tactics to overturn the verdict.”

Now, she said, “they’re very focused on avoiding jury trials or any trial on the merits.”

Bottom Line

As the years pass, the likelihood of a verdict favorable to any of the Central American workers grows dim. This fact is reflected in the public filings with the Securities and Exchange Commission by several of the defendant companies that are publicly traded. (Dole dropped out of this category two years ago.)

The Dow Chemical Company, for example, writes in its annual filing with the SEC, “Numerous lawsuits have been brought against the Company and other chemical companies, both inside and outside of the United States, alleging that the manufacture, distribution or use of pesticides containing dibromochloropropane (DBCP) has caused personal injury and property damage, including contamination of groundwater. It is the opinion of the Company’s management that the possibility is remote that the resolution of such lawsuits will have a material impact on the Company’s consolidated financial statements.”

The American Vanguard Corporation, whose subsidiary AMVAC produced DBCP, is similarly sanguine about its prospects in various pending DBCP lawsuits. “At present, there are approximately 100 lawsuits, foreign and domestic, filed by former banana workers in which AMVAC has been named as a party,” the company states in its 10-K filing dated December 31, 2013. “Fifteen of these suits have been filed in the United States (with prayers for unspecified damages) and the remainder have been filed in Nicaragua.”

American Vanguard discusses several of the lawsuits at length, including the two Hawai'i cases. Regarding both *Patrickson*, where the plaintiffs are Central American banana workers, and *Adams*, the case involving Hawai'i pineapple workers, the company says it “does not believe that a loss is either probable or reasonably estimable and, accordingly, has not set up a loss contingency for this matter.” —P.T.

*In an oddly worded disclaimer, the authors of the article state at the conclusion that “this article content has no conflicts of interest.” One of the authors, Lipshultz, a professor of urology at Baylor College of Medicine, testified for defendants in a Florida case brought by Latin American plantation workers, *Osorio v. Dole*. He told the court he was billing defendants “my usual hourly rate of \$850.00 per hour.”



The former Crawford's convalescent home on O'ahu's North Shore.

Ho'ola Na Pua's developer, on the other hand, told the Land Board that it would cost \$2 million to restore the property to meet its needs and that the organization already has financial commitments and foundations lined up to fund the project. She added that Honolulu City Council member Ernie Martin, state legislators and family court judges supported the non-profit.

Jessica Williams, president and founder of Ho'ola Na Pua, told the board that sex trafficking is growing problem for the state, with victims as young as 11 or 12 years old being raped, beaten and forced into a life of abuse.

The state Department of Human Services, the Department of Health, the Department of Education, and family court judges are all struggling with the problem of child trafficking, she said.

"We have no residential facility that will meet their needs. Currently these girls are being locked up in detention facilities or put in foster homes or sent to the mainland. This site allows us to meet a statewide need," she said.

Hawai'i island Land Board member Stanley Roehrig asked whether Ho'ola Na Pua and the intermediate school could co-exist on the same piece of land.

Williams said that the state Department of Health would allow only one organization to be on site.

Maui Land Board member Jimmy Gomes moved to approve the Land Division's recommendation to go with Ho'ola Na Pua, which would allow the group to seek more public input on its project.

"It's not an easy thing for me. Hearing the testimonies from both sides, I'm totally torn," he said. "This is the only way I think I can see more clarity."

Board members Roehrig and Chris Yuen were also torn, but supported Gomes' motion.

"For me, I'm choosing between the des-

perate and the really desperate," Roehrig said.

"We only have one facility," Yuen added. "Had this been brought to the board with either one of them, we would have had a short, easy meeting." But in the end, he said he thought Ho'ola Na Pua had a more realistic idea of the funding needs.

"It's very much a concern to me," he said.

The board unanimously approved the motion, adding that the decision would be stayed pending the outcome of the contested case hearing process.



Land Board Rejects TMT Contested Cases

The Land Board has unanimously denied all of the recent contested case hearing requests regarding the University of Hawai'i's sublease for the Thirty Meter Telescope on Mauna Kea.

The board conditionally approved the sublease on June 27, pending the outcome of the contested case hearing requests from various parties, including Dan Purcell, the Flores-Case 'Ohana, Mauna Kea Anaina Hou, Paul K. Neves, Clarence Ching, Kealoha Pisciotto, and Harry Fergerstrom.

The Department of the Attorney General advised the Land Board that no due process rights, or statutes or rules required it to grant a contested case to any of them.

At the board's July 25 meeting, E. Kalani Flores argued that the decision to grant the sublease was "null and void" because former member Rob Pacheco had participated in the vote. Flores argued that Pacheco, who owns the tour company Hawai'i Forest and Trail and has a permit to conduct tours on Mauna Kea, should have recused himself.

"Mr. Pacheco failed to disclose that as owner for Hawai'i Forest and Trail he has an interest and association with UH," Flores said.

"He has an extraordinary relationship with the applicant."

Flores asked that the Land Board defer deciding on his contested case request until the Department of the Attorney General and the Ethics Commission rendered an opinion on the Pacheco matter.

He also noted that the Hawai'i Supreme Court's decision in the Kilakila 'O Haleakala case regarding telescope development on Maui requires the Land Board to deal with contested case hearing requests before taking action on an item.

After an executive session, Hawai'i island member Stanley Roehrig moved to accept the DLNR's recommendation to deny the contested case hearing requests.

"It's not for me and my children, but the human race," Roehrig said.

The board unanimously approved the motion.



Another Mokuleia Landowner Installed an Illegal Revetment

On July 25, the DLNR's Office of Conservation and Coastal Lands brought yet another enforcement case to the Land Board regarding illegal shoreline hardening during the severe storm swells that devastated North Shore properties in January.

The landowner this time was Sutton family partners, whose properties abut Grand View Apt., Inc.. In April, the OCCL recommended fining Grand View \$31,000 for illegal shoreline construction, but the matter was deferred. Grand View's properties abut a parcel owned by Kathryn and Morris Mitsunaga, whom the board fined \$10,500



Sutton property during storm swell in January.

for illegal shoreline hardening. (See our June 2014 "Board Talk" for more on these cases.)

"This is one in a series of problems we're experiencing in this area. We picked up this case out visiting others," OCCL administrator Sam Lemmo told the Land Board of the Sutton case.

Lemmo said the shoreline structures along these properties were heavily damaged by last winter's storm swells. Like the Mitsunagas and Grand View, "they came in and unilaterally made the decision to armor the area ... by adding additional structures, mostly large boulders in this case," he said.

The DLNR coastal lands program's job is to protect and preserve the state's beaches and the Land Board has adopted a "no tolerance" policy regarding illegal shoreline structures, Lemmo said.

He recommended fining the Sutton Family Partners \$15,000 for illegal construction in the Conservation District and \$1,000 in administrative costs, and ordering the removal of the unauthorized materials within 120 days of the Land Board's decision.

Sutton consultant Laurie Clegg, however, argued to keep the boulders in place and noted that the state Legislature had passed a resolution directing the DLNR to grant an easement to several North Shore landowners whose shoreline structures sit on what is now considered to be state land. What's more, Clegg asked that the Land Board amend its map for the proposed easement to include what's there now.

Lemmo, however, pointed out that the Legislature approved only a portion of the Suttons' seawall and a small rock pile that existed prior to the illegal rock dump last winter.

"In our judgment, they created a much larger rock apron than was contemplated under the easement approved by the board, the Legislature, and approved by the governor," Lemmo said.

Clegg told the Land Board that nobody could have anticipated last winter's storm and that what the Suttons did was an emergency action. The waves had caused sinkholes to form behind the seawall, which was starting to lean toward the ocean, she said.

She added that when the Suttons placed the rocks on the beach, they did it to match the footing of the property to the west, creating a more uniform shoreline.

"It wasn't just an isolated problem. There needs to be a solution ... for the whole coastline. ... Otherwise, we're just patching and patching," she said.

Christopher Moreland, Sutton's tenant on the property and the one who supervised the construction, described how bad the sink

holes and flooding were during the January storm.

To Moreland's decision to "play cowboy," Hawai'i island Land Board member Stanley Roehrig said, "If we don't punish you, the next guy is gonna do the same thing."

Roehrig also wanted to ensure that the problem isn't exacerbated by any order to remove rocks.

Moreland said that if the Suttons were forced to remove what it had installed, the seawall approved by the Land Board and Legislature would fall.

Clegg added that the Suttons do not deny that the work was unauthorized. "We want to know what to do with it," she said.

At-large member Chris Yuen said he thought the Land Board would have to impose a fine for the construction.

"We're not saying walk the plank into a pool of piranhas, [but] I have problem with people just doing stuff and then saying it's not so bad, we did it, can't we just do it," he said. "I don't want it to be much easier than to go dump a bunch a rocks."

Kaua'i Land Board member Tommy Oi suggested that the area owners work together on a solution.

"Right now, it's every man is for himself. This isn't the wild west," he said.

"I seen homes go into the ocean on Kaua'i. They couldn't do anything because they couldn't harden the shorelines like you guys," he said.

Roehrig seemed to think the state might be responsible for damages if it required the Suttons to remove the encroachment. The board discussed the matter in executive session.

During public testimony, Dan Purcell reminded the Land Board of the public's loss

in these cases.

"I would say in front of these properties there was nice sandy beach. The public had a nice sandy beach," he said. "As waters started to rise ... the public began losing property. [Government agencies] didn't say, cut your wall back, move your house back. ... We've lost tangible property. ... Now we've got a bunch of boulders there. Now the public has been completely cut off."

"I continue to make the case that Hawaiians cannot walk on water," he said, adding that he foresaw the need for another legislative fix.

Maui Land Board member Jimmy Gomes moved to accept the OCCL's recommendations. Oi seconded the motion and Yuen reiterated the need to get a permit before undertaking such construction.

Roehrig, however, said, "I have strong reservations about telling somebody to take the rocks out unless you can get a Superman to put them back if the waves come." He suggested that since the state has the responsibility for everything below the shoreline, it could face some liability for damages.

Still, he voted with the rest of the board, hoping it would foster an opportunity for area landowners to work with the OCCL to resolve the issue.

"There is a possibility you could mediate a dispute," he said, but added, "if you keep singing the same song – 'emergency, emergency' – these guys in the state have heard it a million times," he said.

"If there's gonna be a beef, they get free lawyers. Nobody quits. They stay there forever," he said, referring to the state's attorneys.

The deputy attorney general advising the Land Board noted that in light of a contested



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Old Pacts With Waikiki Hotels Confound Enforcement of Ban on Beach Occupancy

For more than a year, Douglas Meller has been complaining to the state Department of Land and Natural Resources about the dozens — and sometimes hundreds — of unoccupied beach chairs he regularly sees on the beaches fronting Fort DeRussy, the Royal Hawaiian Hotel, the Outrigger Hotel, and the Moana Surfrider Hotel during his frequent morning walks.

In all of his emails to the DLNR, Meller asks the department to issue citations to these “scofflaws” who he claims are illegally storing commercial equipment on public beaches.

The department is working on the issue of unauthorized storage of equipment on Waikiki beach, but clarifying the department’s jurisdiction over some portions of Waikiki beach has taken some time, DLNR staff have said. While the state normally owns all land seaward of the high wash of the waves, the question of who owns the part of Waikiki beach fronting the hotels owned by Kyo-ya Hotels and Resorts — including the Royal Hawaiian and the Moana Surfrider — has become complicated by agreements made decades ago.

Under a 1928 Waikiki Beach Reclamation Agreement, the Territory of Hawai’i committed to widening Waikiki beach. In exchange for being allowed to undertake the project, the territory agreed to grant the title to that land to the abutting landowner, according to a 2013 OCCL report on the most recent Royal Hawaiian beach nourishment project.

“Land was granted with the understanding that the landowner would refrain from building new structures on the beach and allow 75 ft. of public beach access measured from the mean high water mark of the newly replenished beach,” the report stated.

Decades later, when the U.S. Army Corps of Engineers proposed another beach widening project, the state of Hawai’i entered into an agreement with the owners of the Moana Surfrider and Royal Hawaiian that superseded the 1928 agreement.

In an email to *Environment Hawai’i*, Meller says that the state “was able to convince some but not all Waikiki coastal property owners to amend the 1928 agreement to relinquish their movable coastal property rights. (The Corps did not want to widen the beach if the wider



Chairs and umbrellas crowd the beach fronting the Royal Hawaiian, Outrigger, and Moana Surfrider hotels.

beach ended up becoming de facto private property.)”

Under the Surfrider-Royal Hawaiian Sector Beach Agreement, signed in May 1965, except for a narrow strip fronting their properties, the owners would give the state their respective estate, right, title and interest in and to the Surfrider-Royal Hawaiian sector of Waikiki Beach. The agreement further stated that the narrow strip, even though private, would be subject to the same public easement terms included in the 1928 agreement until a beach at least 75 feet wide is created seaward of the strip. And so long as the easement was in place, the agreement prohibited the state and the owners from conducting any commercial activity in the strip.

In February, Meller stated, Sam Lemmo, head of the DLNR’s Office of Conservation and Coastal Lands, confirmed that the DLNR has jurisdiction over the area being used to store commercial equipment. But not only has Lemmo not issued any citations to the hotels, “he has not even issued citations for commercial recreational equipment stored on the public beach in front of Fort DeRussy,” Meller wrote. “None of the public beach in front of Fort DeRussy is encumbered under some kind of confused/confusing agreement between abutting private property owners and the Territory of Hawai’i.” — **T.D.**

case request by the Suttons, the vote would be suspended pending a decision on that request.

Ordinance Hazards Keep ‘Ahihi-Kina‘u NAR Closed

The ‘Ahihi-Kina‘u Natural Area Reserve on Maui will remain closed at least until July 2016. On July 25, the Land Board approved a recommendation from the DLNR’s Division of Forestry and Wildlife (DOFAW)

to extend the closure, in effect since 2008, because the U.S. Army Corps of Engineers has concluded that the unexploded ordnance (UXO) throughout the reserve poses a serious public safety hazard. The Natural Area Reserves System Commission and the ‘Ahihi-Kina‘u advisory group both support the decision.

The reserve was formerly part of the Kanahena bombing range and was used by the U.S. military for target practice during World War II, a DOFAW report states.

— **Teresa Dawson**