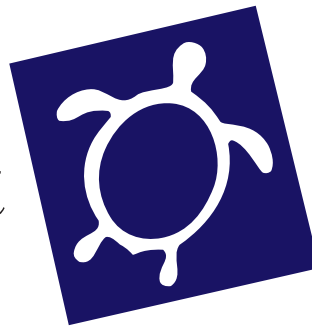


Environment



Hawai'i
a monthly newsletter

Sugar Substitutes

With the announcement of the closure of A&B's sugar plantation on Maui, the last in the state, the question arises: what is to become of the millions of gallons of water diverted each day to irrigate the crop? The proffered solution – diversified agriculture – will likely be not nearly so thirsty, freeing up a large measure of the water to return to the streams whence it comes.

Yet A&B so far has been unwilling to relinquish control over the majority of the water from East Maui streams, which it continues to divert thanks to a last-ditch effort by the Board of Land and Natural Resources to avoid the difficulties that would result from revoking A&B's permits to take the water. In our cover story, Teresa Dawson ably takes on the challenge of explaining all this.

Another case in the courts – this one directed at the several companies involved in efforts to restore a koa forest on the Hamakua Coast of the Big Island – is described in an article by Patricia Tummons.

Wrapping up the issue are highlights of recent Land Board action and a summation of the threats to oceanic whitetip sharks, recently proposed for listing under the Endangered Species Act.

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Hawaiians Seeking Stream Restoration Challenge 'Holdover Status' of Diversions

"It sounds like you got the gun in your hand . . .," Stanley Roebrig began.

"That's right!" David Frankel interjected.

"... and nobody else has bullets," Roebrig said.

"They've had the gun to the head of our clients and have been pulling [the trigger] for generations. Do you know how many generations of Hawaiians who've had to move off the land, who've had to give up kalo production, because of what those guys have done? And it's time to stop," Frankel said.

— December 11, 2015 meeting of the Board of Land and Natural Resources

Unable last December to renew revocable permits allowing Alexander & Baldwin, Inc. (A&B) and the East Maui Irrigation Co., Ltd., (EMI) to continue diverting up to 450 million gallons of water a day (mgd) from East Maui streams, across thousands of acres of state and private lands, to central Maui, the state Board of Land and Natural Resources is now relying on a notion — not described in any statute — that it can maintain the status quo by simply declaring a "holdover status."

The Native Hawaiian Legal Corporation, on behalf of a non-profit group of native Hawaiian taro growers and cultural practitioners from East Maui — Na Moku Aupuni o Ko'olau Hui — is seeking to formally put an end to that status, as well.

Had the board ignored legal precedent and approved renewal of the permits at its December 11 meeting, the action would almost certainly have been quickly overturned in court. [On December 21, more than two weeks before A&B announced it would be closing subsidiary Hawaiian Commercial & Sugar's (HC&S) operations on Maui, 1st Circuit Judge Rhonda



Kopili'ula Bridge, East Maui Irrigation system.

PHOTO: LIBRARY OF CONGRESS

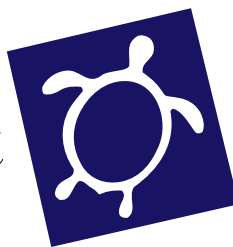
Nishimura indicated she would be invalidating the "holdover" revocable permits to A&B and EMI that the Land Board had been annually renewing since 2002, most recently in 2014. On January 8, she issued a ruling to that effect.] But faced with, among other things, contested case hearing requests from East Maui residents Healoha Carmichael, Lezley Jacintho, and Na Moku, the Land Board simply could not renew the permits again. Hawai'i Supreme Court decisions regarding the proposed solar telescope on the slopes of Haleakala and, more recently, the Thirty Meter Telescope on Mauna Kea, have affirmed that the Land Board must hold a

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February 2016



NEW AND NOTEWORTHY

Tuna Treaty Tanks: The United States has informed the other parties to the South Pacific Tuna Treaty that it will be withdrawing from the treaty, first signed in 1987. Recent discussions over terms of its renewal were fraught; last August, when an agreement was finally reached for fishing in the South Pacific for 2016, the United States had agreed to pay \$21 million to the 15 small island states whose tuna-rich waters are a major fishing ground for the 37 vessels in the U.S. purse-seine fleet. In addition, the vessel owners themselves were to make payments totaling \$68 million in four quarterly installments of \$17 million. The treaty has been the major source of U.S. foreign aid to the region.

But with depressed prices for skipjack tuna, many vessel owners in late 2015 announced they wanted to revise the price they would have to pay for a day of fishing in the member states'



PHOTO: WPFMC

Purse seine vessels have been hauling more and more bigeye tuna, which often intermingle with the targeted skipjack schools gathered around fish aggregating devices.

territorial waters. From \$9,380 per vessel day in 2015, the charge rose to \$12,600 in 2016. As a result, the United States proposed that the number of fishing days, set in August at around 5,700, be reduced to around 3,700, which translates into a \$23 million reduction in total payments under the treaty.

The Pacific Islands Forum Fisheries Agency, which administers the treaty for the South Pacific island states, rejected the proposal.

On January 17, the State Department informed the FFA that it would be withdrawing from the treaty in 12 months. (The treaty requires parties to give a year's notice of their intention to withdraw.)

In a letter sent out on Christmas Eve, Michael Tosatto, administrator of the National Marine Fisheries Service's Pacific Islands

Regional Office, informed purse seine owners that in the absence of a license from the FFA, they would not be able to fish in the treaty area beginning January 1 except within the U.S. exclusive economic zones around American Samoa and the Pacific Remote Island Areas that are not included in the PRI Marine National Monument. Also, he wrote, no fishing by U.S. purse seiners would be allowed in the area of overlap between the areas of competence of the Western and Central Pacific Fisheries Commission (WCPFC) and the Inter-American Tropical Tuna Commission, unless the purse seiner is on the IATTC registry of active vessels.

According to a report carried by Radio New Zealand, the FFA is now attempting to determine if it can sell the unused fishing days to other nations. "However," its report said, "the FFA has conveyed that it thinks it may be difficult to get all vessel days purchased at the level – over \$11,000 per day – that the U.S. fleet agreed to pay."

Nahelehele Dry Forest Symposium will be held on February 26 at the King Kamehameha's Kona Beach Hotel in Kailua-Kona, with the theme: "Dryland forest conservation — where we've been and where we are going." This year marks the 10th anniversary of the symposium, which brings together landowners, managers, researchers, and other interested parties to discuss ways to protect Hawai'i's imperiled dry forests.

Two field trips will be held in conjunction with the symposium: one on February 25 to the Ka'ōhe Restoration Area on Mauna Kea, part of Palila Critical Habitat; the other, on February 27, will be to the private Palamanui Dry Forest Preserve, dominated by lapa, alaha'e, and sandalwood. Participation is limited and on a first-come, first-served basis.

Early registration (through February 16) is \$65 and includes lunch and parking. Student registration is \$35. After that, it is \$80 (\$50 for students). Registration is limited to 200.

To register: <http://nahelehele16.eventbrite.com>.

Environment Hawai'i

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Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$65 individual; \$100 non-profits, libraries; \$130 corporate. Send subscription inquiries, address changes, and all other correspondence to Environment Hawai'i

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

Production: For Color Publishing

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ISSN 1050-3285

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Quote of the Month

*"Approximately 200,000 to
1.3 million oceanic whitetips ...
may enter the global
fin trade each year."*

— **National Marine
Fisheries Service**

Consultant Sues Hawaiian Legacy Hardwoods Claiming Unpaid Invoices, Breach of Contract

Hawaiian Legacy Hardwoods, its principal, and a host of related businesses are being sued in federal court in Honolulu. The plaintiff, Streamline Consulting Group (SCG), alleges that the companies, all owned by or controlled by Jeffrey A. Dunster, owe around \$30,000 for work performed by SCG but, more significantly, also owe SCG in the neighborhood of \$300,000 in the wake of Hawaiian Legacy Hardwoods having obtained carbon-sequestration certification last year.

Hawaiian Legacy Hardwoods, LLC — which in 2014 changed its name to Legacy Hardwoods — is attempting to replant much of Kukaiau Ranch, on the windward slopes of Mauna Kea, with koa and other native tree species. It does this by selling investors blocks of 100 seedlings, which it then agrees to cultivate up through the point where the trees are harvested and milled. Investors get proceeds from the sale, minus costs for services provided by HLH. In recent filings with the Securities and Exchange Commission, the company puts the price of a block of seedlings at \$11,880. In addition, a nonprofit set up by Dunster, called Hawaiian Legacy Reforestation Initiative (also a defendant), plants so-called legacy trees, at \$60 each (\$20 of which is donated to a charity of the buyer's choice, \$1 donated to The Nature Conservancy of Hawai'i, and the remainder used to offset cultivation costs).

The principal of SCG is Tiffany Potter, and if that name sounds familiar, it is probably because for several years, Potter was

listed by Hawaiian Legacy Hardwoods as its “carbon and environmental assets analyst” (in a 2010 newsletter), as one of its “executive officers” (in SEC filings), and as a “senior consultant” (in a 2010 press release).

But whatever goodwill existed between Dunster and Potter in the past has almost certainly been extinguished with recent legal filings. In an affidavit filed with the court, Potter suggests that the various business entities associated with HLH operations “are all part of the same business enterprise ... under the common control of Dunster and have no independent operations.”

“To the best of my knowledge,” says Potter, who worked with Dunster for more than three years, “Dunster commingled the funds of his entities and treated them as his own.”

One of the most cutting statements Potter makes concerns Dunster's financial position. Although HLH has reported sales of blocks of trees to investors totaling more than \$4 million over the last three and a half years, Potter suggests the operation rests on a precarious footing: “Dunster's entities appeared inadequately capitalized or undercapitalized as evidenced by the fact that without receipt of a subsidy payment check from the U.S. Department of Agriculture, Natural Resources Conservation Service, they were not able to pay any of their obligations.” (According to the website of the Environmental Working Group, which tracks USDA payments, from 2010 through 2012, Hawaiian Legacy Hardwoods received \$636,731 in Conservation Reserve

Program funds.)

For their part, Dunster and the businesses that are co-defendants claim that the agreement for services, one of two agreements that Potter alleges have been breached, requires that disputes go to binding arbitration — and not be litigated in court.

They also challenge Potter's claim that all the companies she is suing are effectively Dunster's alter ego: “Other than the conclusory allegations of partial common ownership and control, Plaintiff has failed to allege any factual allegations that would plausibly suggest or support an alter-ego theory as to Hawaiian Legacy Reforestation Initiative and Legacy Holdings.” Legacy Holdings, formerly known as Hawaiian Legacy Holdings, is a limited liability corporation whose members are Dunster and his business partner, Darrell Fox.

Carbon Credits

At the heart of SCG and Potter's complaint is a seminal event in the development of HLH's business: the determination last June by The Gold Standard, a Swiss-based standard and certification organization, that HLH could sell an average of 10,000 carbon credits a year. A credit represents one metric ton of sequestered carbon dioxide or carbon-dioxide equivalent (CO₂e).

An agreement for services between SCG and Hawaiian Legacy Carbon (another defendant, whose name has since been changed to Legacy Carbon) calls for SCG to make “strategic introductions for HLC affiliates for the purposes of raising capital or selling product (e.g. carbon offsets),” among other things. It details conditions for payment of an “achievement fee” of 3.5 percent in the event that HLH or HLC receives product funding as a result of a “strategic introduction or referral” from SCG.

According to the complaint, “Streamline introduced the Dunster entities and their principals to the key personnel at the Gold Standard's Cambridge office and worked as an intermediary between the Dunster entities and the Gold Standard in order to facilitate the certification” of the carbon offset credits. By August 2014, however, “the Dunster entities, through their principals, began communicating and negotiating, orally and in writing, directly with the Gold Standard in an attempt to circumvent Streamline's involvement.” That, SCG claims, amounts to a “direct violation” of another agreement Potter signed with Hawaiian Legacy Hardwoods, the Non-Circumvention Agreement.

That agreement contains a “non-contravention” clause that prohibits HLH,



A stand of old-growth koa at Kukaiau Ranch.

Collateral for Loans: 'Office Decoration,' Lamp, 6-Year-Old Phone

Financing statements filed with the state's Bureau of Conveyances don't usually disclose the dollar amounts of loans, but they do serve as a legal notice of a claim on the property used as collateral.

One such statement filed last summer by the Hawai'i Central Federal Credit Union, in Honolulu, has a collateral list that suggests the institution has a claim on every last piece of movable goods in the Hawaiian Legacy Hardwoods office in Umikoa Village, where the company has its headquarters for field operations in Hamakua.

In addition to a list of farm equipment, leasehold improvements (including a farm nursery), software acquired in 2010 and 2011, and several vehicles — a Mini Cooper (no model year given, but acquired in 2010), a 1988 "International Stake Truck" acquired in 2012, a Pinzgauer acquired in 2012, and a

2007 Toyota Tundra — are items more likely to be found on yard-sale tables than amortization tables. To mention just a few: two five-year-old computers, unspecified "office furniture," "china acquired 10/26/12," "lamp acquired 10/26/12," and a "phone acquired 2/26/10." There's also an "office decoration" acquired five years ago, and "organization cost" and "start-up cost."

The credit union financing statement lists Hawaiian Legacy Hardwoods, LLC, as the debtor, although by the time the statement was recorded, the company's name had changed to HLH LLC. Earlier in 2015, First Hawaiian Bank filed a financing statement listing HLH LLC as debtor, with collateral identical to a statement the bank first filed in 2013. The bank appears to lay claim to many of the same items attached by the HCFCU statement. The bank financing statement

attaches, for example, "all inventory, equipment, accounts ... money, other rights to payment and performance, and general intangibles...; all timber to be cut; all attachments, accessions, accessories, fittings, increases, tools, parts, repairs, supplies and commingled goods," among other things.

FHB's claim on timber also seems to be duplicated in another financing statement, this one filed by landowner Kukaiau Ranch in 2012. According to that document, the debtor — i.e., Hawaiian Legacy Hardwoods, LLC — "shall not assign, harvest or sell any trees held by it as lessee as part of lessee's planted share until the end of the lease term, except pursuant to the terms and conditions set forth in the lease." The lease is not on file with the state Bureau of Conveyances, making it impossible to know what conditions would allow timber harvests.

for a period of ten years, from negotiating directly with a party to whom it has been introduced by Potter without Potter's prior consent. In the event of a violation, then the agreement calls for Potter to receive a fee equal to 20 percent of the total value of the benefit HLH receives.

"Based upon the Gold Standard's certification" of 10,000 tons of sequestered carbon-dioxide per year, the complaint states, "Streamline is entitled to 20,000 tons, calculated as 20 percent of 10 years of the product." At the estimated market value of \$15 per carbon credit, the complaint says, Streamline is owed \$300,000. (As of mid-January, the going price for a carbon credit on the world market was around \$13 per metric ton.)

In 2012, when *Environment Hawai'i* first reported on HLH, Richard Lindberg, who has worked for the company practically since its inception, said that the company made no money on its legacy trees and little on the investment trees. The real profit center, he told *Environment Hawai'i*, would come from the sale of credits for carbon sequestration.

But by the next year, things had apparently changed. In an email to Potter on October 30, 2013, Dunster downplayed the role of carbon-credit sales. Legacy Carbon (LC), he wrote "is only one component of a much larger program. As great as all of this is, LC won't generate anywhere near enough income to cover the cost of planting a tree. That cost is covered by HLH through the Legacy Tree and sustainable harvest models."

"I think," he continued, "the LC component should be viewed as a very good source of residual income (just like Legacy Tours) that will be shared with the land owner as part of an income stream that would justify the land owner taking their lands out of production and not doing cattle, tobacco, or whatever else they might do to earn a living."

A 'Corporate Veil'

Dunster's attorneys argue that SCG has lumped all the Dunster-affiliated companies into the lawsuit without providing any reason for doing so. SCG "not only sued the counterparties to the two contracts and their principal, but also indiscriminately named as defendants various affiliates and/or related companies which entities had no involvement whatsoever in the alleged claims," they state in their motion to dismiss. SCG, they claim, "alleges no factual basis for piercing the corporate veil."

Furthermore, claims against Dunster himself must fail, they argue, since Dunster is not alleged to have signed either agreement on his own behalf, but rather on behalf of the LLCs. Thus, they go on to say, "In addition to there being no factual allegations to support the claims against Dunster, such claims fail as a matter of law. ... That is, Hawai'i limited liability company law provides that members are not liable for the debts, obligations, and liabilities of an LLC (except under certain circumstances not alleged in the complaint)."

Dunster's attorneys also objected strenu-

ously to the contents of Potter's declaration and moved the court to have it ruled as inadmissible.

Judge Susan Oki Mollway heard arguments January 20 on Dunster's motion to dismiss and said she planned to issue a ruling by the end of January or shortly thereafter. While Potter's attorney, John Winnicki, supported Mollway's initial inclination to have all matters raised in the case decided in arbitration, Dunster's attorney, Christopher Muzzi, argued that Mollway should at least decide which of the defendants must participate in that arbitration.

Mollway had stated the day before the hearing that she was inclined to deny the motion to dismiss and stay the case pending the outcome of arbitration. After hearing oral arguments, she did not immediately indicate whether she would convene an evidentiary hearing to determine which parties would be required to participate in arbitration.

Both Potter and Dunster were asked for comments. Neither responded by press time.

—Patricia Tummons

For Further Reading

Environment Hawai'i reported extensively on Hawaiian Legacy Hardwoods and related issues in our March 2012 edition, available on our website at <http://www.environment-hawaii.org>.

The Hawaiian Legacy Companies

The “corporate veil” mentioned in the motion to dismiss filed by Jeffrey Dunster’s attorneys shrouds a host of companies in addition to those named in the lawsuit:

- The board of the nonprofit Hawaiian Legacy Reforestation Initiative includes Dunster as its president and three employees of Dunster-related companies as directors. In a filing with the state Attorney General’s charity registration division, the organization acknowledges it has a relationship with another Dunster-related company, Ecotech Nursery Systems, LLC. The same document identifies Dunster as the owner of Ecotech, which is a vendor to the nonprofit.

- Ecotech Nursery Systems, LLC, provides all the seedlings planted on the 1,000-plus acres of Kukaiau Ranch land, whether by the nonprofit, visitors on tours organized by Hawaiian Legacy Tours, or as part of the HLH sales of koa plantings to investors. According to the state Department of Commerce and Consumer Affairs (DCCA), Ecotech has just one member:

Legacy Hardwoods, Inc.

- Legacy Hardwoods, Inc. was first registered with the DCCA in 2008 as Hawaiian Legacy Hardwoods, with its corporate purpose given as “forestry consulting.” The name change was filed in 2014. The sole officer on record is Dunster, who is listed as its president and director in the company’s most recent filing.

- Legacy Carbon, LLC, was registered with the state in 2011 with three managers: Dunster, Darrell Fox, and Lew Rothstein. Its purpose was given as “carbon credit production/sales.” Last November, Dunster, signing as the president of Legacy Hardwoods, informed the DCCA that Legacy Carbon’s new manager was Legacy Hardwoods, Inc., and Synergistic Connections, Inc.

- Synergistic Connections, Inc. is a Delaware corporation, which registered as a foreign corporation with the state DCCA in 1995. Its stated purpose is “electronic publishing and any other lawful activity. The registrant was Darrell Fox.

- Legacy Holdings, LLC, was registered in 2008 as Hawaiian Legacy Holdings, LLC. Members are Dunster and Fox. Its name was changed in 2014.

- Legacy Tours, LLC, was registered in 2012. It also registered the trade name Hawaiian Legacy Tours. It conducts tours of the koa plantation, with the online advertised rate for an adult “grand tour” of three and a half hours being \$180. (The fee also includes a “Legacy” seedling to plant.) Last November, Dunster changed the manager from himself to Legacy Hardwoods, Inc.

- HLH, LLC, registered in November 2008 as Hawaiian Legacy Hardwoods, originally had several individuals listed as members, including Dunster, Darrell Fox, and Richard Lindberg. Last November, Dunster informed the DCCA that the new managers were Legacy Hardwoods and Synergistic Connections. The company’s purpose is listed as “forestry and forest products.” This is the entity that holds the land lease with Kukaiau Ranch. — *P.T.*

EMI from page 1

contested case hearing (if one is requested) before it issues a permit.

Loath to disrupt the diversions which feed HC&S’s 30,000 acres of cane fields in central Maui and provide roughly 8.5 mgd to the county Department of Water Supply for Upcountry Maui’s agricultural and domestic water needs, the Land Board approved a motion by member Chris Yuen to affirm a holdover status ordered years ago as part of a contested case hearing, and to “maintain the status quo pending the issuance of the interim instream flow standards (IIFS).” IIFS, which are the minimum flows that must be left in streams for public trust purposes, are set by the state Commission on Water Resource Management, which is expected to amend the IIFS for 27 of the more than 100 diverted East Maui streams some time this year.

Yuen stated that the affirmation of the holdover “does not constitute a long-term decision on the issuance of water.”

In her ruling last month, however, Judge Nishimura frowned on the Land Board’s authorization of A&B/EMI’s use of state lands and waters “on a holdover basis,” specifically because it has gone on for so long. The contested case from which the

initial holdover order grew began in 2001, when A&B sought to move from month-to-month revocable permits to a 30-year lease for the right to divert East Maui water. As the contested case dragged on, bouncing to Circuit Court, then back to the Land Board, two more holdovers were ordered, with the last one in 2007.

“A&B’s continuous uninterrupted use of these public lands on a holdover basis for the last 13 years is not the ‘temporary’ use that HRS Chapter 171 [the state’s public land use law] envisions. Otherwise, holdover tenants could arguably be allowed to occupy public lands almost in perpetuity for continuous, multiple one-year periods. Such a prospect is inconsistent with the public interest and legislative intent,” she wrote.

A&B attorney David Schulmeister has argued that although holdovers extending beyond one year are not authorized by statute, the Hawai’i constitution, which tasks the Land Board with protecting public trust resources, implicitly gives the board the authority to grant holdovers.

“If it is true that the board has an obligation to protect the public trust, ... if they have the duty to protect the public interest, then they have to have the power to do it,” Schulmeister told the Land Board

at its December 11 meeting.

Should his argument ultimately fail, the seemingly endless status quo of the diversions — in which commercial uses have taken precedence over the needs of those with constitutionally protected rights — may finally be turned on its head.

The Appeal

On January 8, mere hours after Judge Nishimura had declared the 2014 permit renewal invalid, NHLC attorneys David Kimo Frankel, Summer Sylva, and Camille Kalama filed an appeal on behalf of Na Moku attacking the holdover status the Land Board affirmed on December 11.

The attorneys point out that the Land Board did not provide any notice in its agenda that it would consider re-affirming the holdover status. Also, they told the court, the board had failed to notify their clients who are part of the original 2001 contested case hearing that the board on that day would be considering or accepting testimony on the re-affirmation.

What’s more, they wrote, the Land Board doesn’t even know how many streams A&B and EMI divert, how many diversions exist, or how much water is diverted in the area covered by the four revocable permits.

"BLNR has never issued an order requiring A&B and EMI to provide data regarding how much water is diverted daily from each of the diverted streams within the area covered by revocable permits 7263, 7264, 7265, and 7266," they wrote.

"According to A&B, approximately one third of the water flowing through the EMI ditch system does not originate from state land," they wrote, adding that if all diversions of streams on lands covered by the revocable permits were stopped, "the EMI ditch system would still transport, on

A Rebuttal

Schulmeister, who has represented A&B on this issue since 2001, has argued at length in the 2014 permit case and to the Land Board at its December 11 meeting that the holdover is, indeed, still valid.

When A&B asked the Land Board in 2001 to consider granting it a 30-year lease or license and to renew its permits in the meantime, the NHLC requested a contested case hearing on the matter on behalf of East Maui taro farmers who required more stream flow to maintain their lo'i. At

"If they have the duty to protect the public interest, then they have to have the power to do it."

— David Schulmeister, attorney for A&B

average according to A&B, at least 30 million gallons of diverted East Maui surface water each day."

Contrary to Schulmeister's argument that the holdover status remains valid, NHLC argues that the Land Board's holdover authorizations granted in 2001, 2002, and 2007 expired long ago.

"A&B and EMI currently lack any legal authority to use the 33,000 acres of state land covered by [the four permits] or to divert water from any of the streams flowing across those lands," the appeal states, adding that the Land Board's December 11 decision to re-affirm the holdover status prejudiced Na Moku's substantive and procedural rights under the state's laws governing contested case hearings.

Furthermore, the NHLC argues, the board's affirmation violates state laws governing the use of public lands; conduct of public meetings; environmental reviews; and coastal zone management. In addition, the attorneys allege the board breached its duties to protect the public trust and traditional and customary practices.

The NHLC asks the court to reverse the Land Board's reaffirmation of the holdover status, declare that A&B/EMI have no legal authority to use the land and divert the water from streams covered by the four revocable permits, and to stop the companies from taking any more water from streams within the permit areas until they receive the authority to do so in compliance with the state's environmental review (Chapter 343), public land use (Chapter 171), and coastal zone management laws (Chapter 205A).

They made these same arguments in a January 11 proposed amended complaint in the case over the 2014 permits.

the same time, the NHLC petitioned the Commission on Water Resource Management to amend the interim instream flow standards of 27 of the streams diverted by EMI.

Rather than launching an investigation of its own to determine how much water should be returned to streams to meet public trust needs, including those of the taro farmers, the Land Board chose to piggyback on whatever the Water Commission decided. However, given that it would likely be years before the commission amended the IIFS for all the streams involved, the Land Board held a contested case hearing in 2005 on how much water should immediately be returned to streams to meet taro needs, pending the Water Commission's decisions.

Schulmeister told the Land Board in December that in the contested case hearing on the interim release of water, the NHLC

statement is completed.

"So what do we do? We shut down the county of Maui? Shut down the plantation?" he asked the board. "There's a lot of what I'd call ... reflexive propaganda. 'The plantation is dewatering the streams,' and on and on. I understand that for some people their mission in life is to make that argument [but] it's the facts and evidence that should be considered," he said, noting that over the years EMI had on its own and under the direction of the Land Board and Water Commission released a lot of water back into some of the same streams the taro farmers draw from.

"Between 2007 and today, the facts on East Maui have changed. Now, all of the streams where taro is growing, the low flows are allowed to pass," he said.

He stressed repeatedly that the NHLC never appealed the Land Board's decision in 2007 to hold over the four permits until the original contested case concluded and appoint a monitor to ensure adequate water was released from the diversions to East Maui taro farmers in the meantime. (The Water Commission addressed the IIFS in 2008 and 2010, but, following an appeal from the NHLC on the IIFS amendments in 2010, a contested case hearing was held for all 27 streams. Recommendations from the hearing officer, Lawrence Miike, are expected early this year.)

Later, when board member Stanley Roehrig asked Schulmeister why the NHLC didn't appeal the 2007 decision, Schulmeister speculated, "I think they agreed it's nonsense to think the board doesn't have the power to protect the public interest until this is resolved."

If the 2007 holdover was meant to last until the contested case hearing was

"Eighty percent of the water that serves the Upcountry community comes from these streams."

— Caleb Rowe, Maui County

argued against the holdover the board had issued in 2002.

"The argument was, 'Look, there is no statute that allows the permits to go beyond the one year if we haven't gone to auction.' We had this unique situation where we were trying to go to auction but it was tied up in this contested case hearing, so it was put in this holdover status," Schulmeister said.

In his view, it would be disastrous to find there is no legal basis to continue the diversions until interim instream flow standards are amended and an environmental impact

resolved, has the Land Board's annual renewal of the revocable permits been an implicit termination of the holdover status? Schulmeister asked.

"We don't know. I'm not sure the board knows," he said, answering his own question.

"What you don't want to do is launch ourselves into a situation Mr. Frankel is trying to project, where suddenly the county and the board are madly trying to get water to 35,000 people in Upcountry Maui," he said.

Caleb Rowe, corporation counsel for Maui County, testified that the EMI diversion provides the vast majority of the water needed for Upcountry Maui, part of the Department of Water Supply's second-largest water service area on the island, which includes a hospital, several schools, and 450 acres of farmland.

"We need A&B to have a legal right to have this water for us to take that water from them. Eighty percent of the water that serves the Upcountry community comes from these streams. Twenty percent is from wells pretty much at capacity, largely over concerns over legacy pesticides," Rowe said.

Should the diversion stop, there would be a health crisis, Rowe argued. "People wouldn't be able to clean themselves, [there would be] issues of fire prevention, food shortages, with the Kula ag park not being able to grow food," he said.

Maui Land Board member and Ulupalakua Ranch operations manager Jimmy Gomes interjected, "We wouldn't have water for all our cattle. All the ranchers, if you look at the Kula area, we're totally dependent on it." (Because of his and his company's reliance on the diversions, Gomes later recused himself from discussing or voting on the matter.)

Shifting the Paradigm

Despite Schulmeister's and Rowe's testimony, the NHLHC's Frankel and Kalama gave several reasons why the Land Board could not renew the permits, many of which were included in their January 8 and 11 filings in 1st Circuit Court: 1) the board failed to investigate and protect native Hawaiian practices; 2) granting the permits would violate the public trust doctrine; 3) an environmental impact statement needs

of water from the ditch," Frankel said.

Board member Roehrig asked how the county would get the water if not through EMI.

Frankel replied that the Land Board has a 1938 agreement that gives it the right and ability to use EMI's ditch to transport water.

"HC&S is gonna bag sooner or later. You know they're not gonna stay. What you gonna do with all the water they're using for sugar?"

**— Marjorie Ziegler,
Conservation Council for Hawai'i**

"Four-hundred-fifty mgd is the [ditch's] capacity. Maui takes 8 mgd. That's a fraction. A tiny, tiny fraction of water. Do you think our clients want to jeopardize ... public health and safety? That's ridiculous."

In any case, he continued, given the Hawai'i Supreme Court's December 2 decision in the Thirty-Meter Telescope case and its earlier decision in the case involving construction of the Daniel K. Inouye Solar Telescope on Haleakala, the board could not make a decision that day.

"You have to hold a contested case hearing," he said, arguing that the due process of his clients, not A&B's or EMI's, are affected.

"Their RP [revocable permit] expires on December 31," he said.

Land Board chair and Department of Land and Natural Resources director Suzanne Case was clearly uncomfortable with the board's hand being forced in light of the potential consequences.

"[Y]ou are saying that because you've

permits expire on December 31, EMI will not have legal authority to take water for their commercial ag operations. However, there's a very easy process you guys can go through to allow the county to continue to take water."

He added that EMI has private land from which they divert water. Although he

did not concede that this was being done legally or properly, he told the board, "If you guys do not extend the permits, there's nothing stopping EMI from diverting water, a good quantity of water, through the EMI system." And logistically, he continued, it will take time to turn these diversions off even if the permits were allowed to expire on December 31. The claim that come January 1, the ditch will run dry, "that's not reality," he said.

He suggested that the Land Board could exercise its easement over the ditch system to authorize the delivery of water to the county for domestic purposes.

"Once you make a decision like we are asking for, it gives us the ability to actually sit down and properly negotiate with A&B," he said, which is when board member Roehrig told him he sounded like he had a gun in his hand and was the only one with any bullets.

Despite Frankel's assurances that the Land Board had the authority to allow the county to receive water through EMI's system, member Chris Yuen asked him, "Wouldn't your argument about Chapter 343 apply to the County of Maui's access to domestic water from this license area as well?"

Frankel said that it probably would, but that allowing the county to divert without an EIS versus A&B/EMI diverting was the lesser of two evils and he was not going to sue to stop Maui County from providing domestic water.

When that seemed to give Yuen little comfort, Frankel said it would be very easy for the Land Board to provide the county with water through the diversion system via an executive order.

"Could someone sue you over it? Could be, but their case would be significantly weaker than ours," Frankel said.

"We made it very clear to the county, we're not seeking to stop the county's use of water from the ditch."

— David Kimo Frankel, NHLHC

to be done first; and 4) granting the permits before conducting a contested case hearing would "violate due process as well as other constitutional obligations."

"EMI is a private, commercial user. Their priority is the lowest," Frankel told the board, adding that the county could still receive water from the ditch should the Land Board choose not to renew the permits.

"We made it very clear to the county, we're not seeking to stop the county's use

requested a contested case hearing, then automatically there can be no decision ... on these revocable permits. So therefore, the water runs dry on January 1. You are saying that," she told Frankel.

"No," Frankel replied.

Case: "Yes."

Frankel: "No."

Case: "You're saying that."

"No, I'm not!" Frankel said finally. "People are making leaps which are inaccurate and unfair. If the revocable

When Yuen said he didn't see the difference, legally speaking, between water going to HC&S or to Maui County, Frankel replied that one takes around 450 mgd, while the other only 8 mgd.

Still, Yuen said, "I don't even know how you get 8 mgd [to the county], I mean, mechanically."

When it came time for the public to testify, the board heard from a number of people opposed to the permit renewal, including East Maui residents and members of the Sierra Club. Marjorie Ziegler, executive director of the Conservation Council for Hawai'i, pointed out that the maintenance of the status quo for so long has allowed A&B and EMI to control the permit areas for "a mere \$5-10 an acre per year. I find those numbers just staggering."

ing those wrongs now because weaning some of the current users off the diverted water and finding alternative sources will take time.

"HC&S is gonna bag sooner or later. You know they're not gonna stay. What you gonna do with all the water they're using for sugar? They're gonna hang onto it as long as they can just like they did in Waiahole [on O'ahu]. It's time folks, we gotta start planning," she said.

Coda

In the end, the Land Board tried to maintain the status quo without actually taking an action that would be subject to environmental reviews or violate anyone's due process rights. The board, with Gomes recused, decided to simply "affirm the holdover



An unlined open-ditch section between Kolea and Punalu'u Streams.



An old wood flume and a replacement stainless steel flume near Pe'ahi Reservoir.



Eby Flume at Manawaiiaio Stream.



Shirota Flume at Kuiaha Gulch.

PHOTOS: U.S. GEOLOGICAL SURVEY

And not only do the diversions "come on the backs of native Hawaiian people who need that water for other purposes ... they come at the expense of the native stream fauna," she said.

Despite concerns over the possible impact that ending the permits would have on Upcountry Maui, Ziegler pointed out, "Who was worried about the Hawaiians when this water was taken? ... There was no consideration for these people who depended on this water a long time ago."

"Are we trying to right the wrongs of the past using the Water Code and Chapter 343 and contested case hearings? You bet. Because what else are we supposed to use?" she asked.

She urged the Land Board to start right-

status of the revocable permits."

"The desire is to maintain the status quo pending the issuance of the interim instream flow standard," Yuen said.

Following Judge Nishimura's ruling that those permits are invalid, it's unclear what the current legal status is of the ongoing diversions. Maui County has asked Nishimura to stay enforcement of her ruling pending an interlocutory appeal, A&B/EMI and the Land Board have asked for a re-hearing, and NHLC's clients have asked to amend their original complaint and to transfer the case to the newly established environmental court. A hearing on all of these motions had been scheduled for February 1.

— Teresa Dawson



For Further Reading

Environment Hawai'i has given extensive coverage to East Maui water issues over the years. For more background, see the following:

- "Hawaiian Farmers, Cultural Practitioners Demand Environmental Review for East Maui Water Diversion," May 2015;

- "Appeals Court Orders Contested Case in East Maui Water Dispute," EH-XTRA, November 30, 2012;

- "Water Commission Denies Hearing on Flow Decisions for East Maui," November 2010;

- "Water Commission Amends Flows for Six of 19 East Maui Streams," July 2010;

- "Water Commission Defers Vote on East Maui Stream Restoration," March 2010;

- "Water Commission Amends Standards for Six Diverted East Maui Streams," and "Land Board Resumes Discussion of Diversion of East Maui Water," November 2008;

- "Land Board Orders EMI to Release Water to Meet Needs of East Maui Taro Farmers," May 2007;

- "Commission Gains Funds, New Tools to Pin Down Water Use, Stream Needs," September 2006;

- "Ex-Judge Says East Maui Farmers Don't Need More Water for Taro," August 2006;

- "East Maui Taro Farmers May Receive Interim Relief From Water Diversion," December 2005

- "Water Commission is Urged to Look at Lessons from Mono Lake Dispute," August 2005;

- "Board Talk: Land Board Favors EMI Water Diversion," March 2003;

- "Board Talk: East Maui Water Dispute Heats Up with Hearing Officer's Recommendation," January 2003;

- "Board Talk: Contested Case on Renewal of EMI Water Permits," July 2001;

- "Battle Looms Over Waters Diverted from East Maui Streams" and "Complex Legal Issues Surround A&B's Taking of East Maui Water," August 1997.

Impending HC&S Closure Raises Questions About Future of East, West Maui Diversions

With Hawaiian Commercial & Sugar's announcement that it will be harvesting its last crop of sugarcane this year, the question looms large: What's going to happen to the hundreds of millions of gallons of stream water diverted daily from East and West Maui to feed the thirsty crop?

If what happened in the Waiahole Ditch case on O'ahu after the closure of Amfac's sugar plantation in mid-1990s provides any clue, it's more than likely that much of the water will be returned to the streams of origin. Exactly how much and when remains to be seen.

East Maui

In East Maui, it's not at all clear just how much water is being taken from more than 100 streams diverted by the century-old irrigation system operated by Alexander & Baldwin, Inc., subsidiary East Maui Irrigation Co., Ltd. The system's capacity is estimated at 450 million gallons a day (mgd), but there are currently no stream or diversion gages that could give an accurate picture of how much water is in the streams and how much is diverted.

"EMI represents they release all flows on low-flow days," Native Hawaiian Legal Corporation attorney Camille Kalama told the state Board of Land and Natural Resources in December. Even so, monitoring data collected by the state Commission on Water Resource Management for a handful of the streams show that the interim instream flow standards set several years ago often go unmet. (Those standards are the subject of an ongoing contested case hearing.)

"We're not able to determine whether it's from low flows or diversions upstream," Kalama said, referring to the deficiency. In any case, she said her clients, who grow taro and gather fauna from the stream, have complained repeatedly that water restored in 2007 under a Land Board order is insufficient.

She noted that real-time stream gages installed by the U.S. Geological Survey have been discontinued. As a result, "if there is an IIFS set and it's not met, our clients don't find out until two or three years later," she lamented.

Land Board chair Suzanne Case agreed with Kalama on the importance of having adequate data on how much water is flowing above and below the diversions,

"It's an expense, but I think we can collectively agree, the more data we have, the better our ability to manage the system will be," Case said.

Because East Maui is not a water management area, which means that the Water Commission does not allocate water to users via Water Use Permits, the IIFS will go a long way toward determining what's left in streams. When or whether the Land Board issues a lease, license, or permit allowing for diversions of stream water from East Maui will also affect the amount left in streams. The current diversion by A&B and EMI is under heated dispute (see this month's cover story).

Attorneys for NHLHC did not respond by press time to questions about how the closure of HC&S will affect their clients' attempts to restore stream flows in East Maui.

Na Wai 'Eha

HC&S once diverted some 50 mgd via a ditch system that draws water from four West Maui streams known collectively as Na Wai 'Eha, but under a 2014 settlement agreement, about half of that is being left in the streams. Because this system, unlike that of East Maui, falls within a water management area, the Water Commission governs who gets to use water from the streams and how much.

In 2009, the Water Commission received more than 100 water use permit applications from existing users. HC&S submitted two applications to meet the water needs of its sugarcane fields: 36.29 mgd for its Waihe'e-Hopoi fields, and 10.59 mgd for its 'Iao-Waikapu fields, for a total of nearly 47 mgd.

Similar to what's occurring in East Maui, taro farmers and other holders of appurtenant rights in the area of Na Wai 'Eha have objected to the diversion of most of the stream water for sugarcane.

"The upshot is we are heading to a contested case in the WUPA [water use permit application] proceeding," says Earthjustice attorney Isaac Moriwake, who represents the non-profit Maui Tomorrow, as well as Hui o Na Wai 'Eha, which includes many area residents seeking stream restoration.

Parties to the case are expected to start filing motions this month and continue through April, with the hearing commencing in June, he said. Former Water Commissioner and state Department of

Health director Lawrence Miike will be the hearing officer.

When asked how the impending closure of HC&S will affect the WUPA proceedings, Moriwake says, "We need to figure that out, particularly before we dive too deeply into the permit applications. ... HC&S was using 85 percent of the water."

"This is the Waiahole Ditch case all over again," he said.

If A&B does, indeed, fulfill its diversified agriculture plans, Moriwake says that will still open the door for large volumes of water to be returned to streams. He noted that in the Waiahole case, the Hawai'i Supreme Court compared the water needs of sugar and diversified ag, finding that sugar needed 7,500-10,000 gallons per acre per day, while diversified crops required only 2,500 gallons per acre per day.

— T.D.



For Further Reading

Environment Hawai'i has published many articles, all available at environment-hawaii.org, that will provide additional background to the dispute over West Maui surface water. The following is an abbreviated list:

- "Commission Struggles with Conflicting Claims Surrounding West Maui Stream Diversions," February 2006;
- "Hearings Begin in Contested Case over Diversion of West Maui Streams," "USGS Seeks Temporary Releases For Study of Instream Values," and "Wailuku Water Co. Sells Ditch Water Without Consent of Utilities Commission," December 2007;
- "Commission Tightens Grip on Waters of Central Maui," May 2008;
- "Commission's Order on Na Wai 'Eha Baffles Its Most Experienced Member," "The Water Commission: An Idea Whose Time Has Passed (Editorial)," "Maui Agency Is Sued Over Plan to Have A&B Put Stream Water in Municipal System," "*Environment Hawai'i* Questions Miike On Dissent in Na Wai 'Eha Decision," July 2010;
- "Supreme Court Weighs Jurisdiction In Appeal of Decision on Maui Water," and "Supreme Court Dissects Arguments In Appeal of Maui Stream Standards," July 2012;
- "Supreme Court Orders Water Commission to Revisit Decision on West Maui Streams," September 2012

BOARD TALK

Lack of Detail in Permit Renewal List Draws Fire from Public, Board Members

For years, every December, the Department of Land and Natural Resources' Land Division has submitted a list of hundreds of revocable permits (RPs) to the Board of Land and Natural Resources for renewal, for everything from a 40-square-foot empty lot the division wants an adjacent landowner to maintain, to, as our cover story notes, the use of 33,000 acres of state land to divert hundreds of millions of gallons of water a day from East Maui.

This year, members of the public and the Land Board took the division to task for not providing even basic information about each of the permits to be renewed. The list it provided contained the name of

anyone on the renewals.

"If Land Management walked across the hall to DAR [the Division of Aquatic Resources], they might have seen the 2009 study on the significant impact of stream diversions. ... To claim that the diversions are not having a significant impact is belied by the sister division of DLNR's own study," he said.

With regard to the list of permits as a whole, Marti Townsend, director of the Sierra Club, Hawai'i Chapter, testified that the board needs much more information than what it was given to decide whether or not to renew.

"You need to know the exact location, the current conditions ... This kind of

"With regard to the list of permits as a whole ... the board needs much more information than what it was given to decide whether or not to renew. You need to know the exact location, the current conditions ...

This kind of cursory review is not okay."

**— Marti Townsend, director
Sierra Club, Hawai'i Chapter**

each permittee, the tax map key number for the property, the date the permit was first issued, the character of use (i.e., parking, church, recreational, agriculture), the land area, and the annual rent.

Native Hawaiian Legal Corporation attorney David Kimo Frankel, who testified only on the four permits to Alexander & Baldwin and East Maui Irrigation Company, ridiculed the Land Division's "Exemption Notification" that the annual permit renewal was exempt from environmental review because there were no changes in use.

"What is really profoundly disturbing is the one-page exemption determination that your staff provided to you," he told the Land Board. "This is really an embarrassment. We're talking about the diversion of hundreds of streams and the conclusion that it doesn't have a significant impact ..."

He added that contrary to what's required by the department's administrative rules, the division had not consulted with

cursory review is not okay," she told the Land Board at its December 11 meeting.

She added that the board needed to assess the permits' impact on traditional and customary practices, evaluate any changes to the property and surrounding uses, and determine whether others may want to use the property.

Conservation Council for Hawai'i director Marjorie Ziegler took a particular interest in how the rents were being calculated. She noted that in the case of the four to A&B and EMI, the recommended rent amounted to between \$5 and \$9 per acre per year. Other permits for smaller areas had really high rent, she said.

"It would be nice if you and the public could get a little more information on how the rents are determined. Aren't you worried someone is going to sue you that their rent is higher? ... Also, the department needs the money," she said.

She urged the Land Division to look more closely at each permit and ask itself whether it was proper to remain a revo-

cable permit.

"It's just like a bad habit. You keep approving these lists of permits without any deliberation here," she said.

A number of the Land Board members agreed that the Land Division (and the Division of State Parks, which had submitted a similar list earlier in the meeting) needed to provide more information to the board.

"I think the general gist of this is we want ... more transparency in what's going on with this piece of land or this permit," board chair Suzanne Case told the Land Division's Kevin Moore.

The Land Board ultimately approved the list as submitted (except for the four permits to A&B and EMI), but directed the division to include in next year's submission an explanation of why each permit area is not being put out for lease and of the basis for the rent amount if it is not set at market rates.

The board also asked that the division bring the renewal requests to the board in four separate meetings next time, one for each island group, and to return to the board in June with an update on three of the permits.

Board member Chris Yuen wanted to revisit the permit for the Country Club condo on Hilo's Banyan Drive to make sure the board wasn't giving the tenant too much of a rent break. He also wanted to evaluate whether McCandless Ranch should continue to use a parcel known as the Waiea tract on Hawai'i island.

"It is an environmentally sensitive area ... with the 'alala (endangered Hawaiian crow) and other issues. I'd like to see a concurrence by DOFAW [the DLNR's Division of Forestry and Wildlife] on the continuation and the use of this as an RP. When I was on the board 20 years ago, I said this should be limited to access rather than pasture," he said.

Board member Stanley Roehrig also wanted the division to report back on a permit to Kukio Resorts for 2,500 acres of pasture land for \$216 a year.

"That's a gated community and they lock the gate unless you're a landowner or a vendor," he said, adding, "These are the guys with the jets at the airports. ... The Land Board's not supposed to take care of the really rich guys at the expense of the poor guys."

With the changes asked for to next year's round of permit renewals, Yuen said he expected the board to have "a little bit of a better sense we're doing the right thing."

— T.D.

NMFS Seeks Comments on Protecting Oceanic Whitetip Sharks Under ESA

The National Marine Fisheries Service is seeking public comment on a petition from Defenders of Wildlife that seeks to protect oceanic whitetip sharks (*Carcharhinus longimanus*) under the federal Endangered Species Act.

On January 12, NMFS announced in the *Federal Register* that it had concluded its initial 90-day review of the petition, finding that the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted for the species worldwide.” At the same time, the agency opened up a 60-day comment period, soliciting information on the status of the shark from both the commercial and scientific sectors.

The shark is found in waters of the open ocean throughout the world, including those fished by the Hawai'i longline fleet. Its fins are highly valued, NMFS notes, commanding market prices of between \$45 and \$85 per kilogram. “In fact, demand from the international fin market is considered to be the primary force driving retention of bycatch of this species, as the meat is considered to be of low commercial value,” NMFS goes on to say. With the oceanic whitetip shark accounting for roughly 3 percent of all shark fins auctioned in Hong Kong, one of the world's largest fin-trading centers, NMFS says, this means that “approximately 200,000 to 1.3 million oceanic whitetips ... may enter the global fin trade each year.”

Even when they are not retained on board after being hooked, Defenders of Wildlife said in its petition, many oceanic whitetips will die. NMFS' own research, however, determined that these sharks “do have relatively high survivorship in comparison to other shark species when caught on longline gear.” Still, NMFS adds, “we do agree with the petition that ... although oceanic whitetips have higher survivorship than some other pelagic shark species, these sources of mortality must also be taken into consideration.”

Since 2011, the catch of oceanic whitetips has been banned by the International Commission for the Conservation of Atlantic Tunas (ICCAT), resulting in a substantial reduction – from 1.1 metric ton caught in 2011 to 0.03 mt in 2013.

But the declining catch is not necessarily a positive sign. As measured by a standard

fishing metric, catch per unit effort (CPUE), the oceanic whitetip shark has gone from being the second-most abundant shark in the ICCAT region, as recently as 1997, to low CPUEs in recent years. “Though these data do not indicate whether a decline in the oceanic whitetip population occurred, they clearly show that this species is currently not abundant in this area.” What's more, a high percentage of the oceanic whitetip sharks caught are juveniles, “which, in combination with significantly low catches and low patchy abundance in areas where the species was formerly abundant, may be indicative of significant fishing pressure leading to population declines.”

In the Pacific Ocean, the situation is no better. A stock assessment conducted in the region under the jurisdiction of the Western and Central Pacific Fisheries Commission (WCPFC) determined that “fishing mortality on oceanic whitetip sharks ... has increased to levels 6.5 times what is sustainable.”

Hawai'i's Role

As recently as 2013, oceanic whitetips accounted for 3 percent of the sharks caught by the Hawai'i longline fleet. But the CPUE of the species has decreased dramatically over a 15-year period: from 0.428 sharks caught

per 1,000 hooks in 1995 to less than a tenth of that in 2010: 0.036/1,000 hooks. In addition, the number of longline sets that saw no oceanic whitetips on the lines increased in the same period: from 74.7 percent in 1995 to 95.3 percent in 2010.

When all other factors – sea surface temperature, areas fished, et cetera — are considered, “whitetip CPUE declined by more than 90 percent in the Hawai'i-based longline fishery since 1995,” NMFS has determined.

According to reports compiled by NMFS' Pacific Islands Fisheries Science Center, in 2014, Hawai'i longline vessels caught 701 oceanic whitetip sharks, with a CPUE of 0.01 per 1,000 hooks.

Up until 2000, when the state of Hawai'i prohibited finning and required shark fins to be landed with their corresponding carcasses, Hawai'i was the source for a large part of the fins exported to Hong Kong. After that, NMFS says, “shark fin imports from the United States into Hong Kong declined significantly (54 percent decrease, from 374 to 171 tonnes) as Hawai'i could no longer be used as a fin trading center for the international fisheries operating and finning in the Central Pacific... However, in other parts of the species' range, the inadequacy of existing fishing bans may be contributing to further declines in the species by allowing the wasteful practice of shark finning at sea to continue.”

Michael Tosatto, administrator of NMFS' Pacific Islands Regional Office, based in Honolulu, was asked how the ban



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on shark-finning was enforced. NMFS' Office of Law Enforcement (OLE) "monitors some but not all of the offloads and responds to any reports to enforce our fins-attached rules," he replied. The Honolulu fish auction "knows that they need fins attached, so they don't accept anything else," he went on to say. "They will only dress (remove) fins when they must and as a practice will secure the offal/trash until it is picked up for disposal."

As for the practice of transshipping fins at sea — transferring them from one boat to another, so as to avoid landing fins where they are banned — Tosatto stated: "Transshipping fins off ahead of landing would be risky, since you'd need a lot of fins to make it worth someone's time to pick them up. There is always a chance someone is trying to cheat, but I think I would put [the fins-attached rule] at a low threat of violation."

"That said, the international rule for 5 percent by weight is problematic and remains a high threat. When foreign

boats offload in U.S. ports, OLE is alert for this."

The rule Tosatto is referring to here is one adopted by WCPFC in 2010 that says the weight of any detached fins on board a regulated vessel has to be no more than 5 percent of the weight of corresponding shark carcasses.

"Fishing mortality on oceanic whitetip sharks ... has increased to levels 6.5 times what is sustainable."

— WCPFC Stock Assessment

Other Factors

Aside from the market in shark fins, other factors make oceanic whitetip sharks susceptible to extinction, NMFS notes. Defenders of Wildlife pointed out that the shark's low reproductive rate (5-6 sharks per litter, with one litter produced every two years), and its relatively long time to mature (four to seven years) make it espe-

cially vulnerable to overfishing and impede its ability to recover rapidly.

On this point, NMFS notes that a 2012 assessment of Atlantic sharks ranked oceanic whitetips sixth out of 20 pelagic shark species in terms of its susceptibility to longline gear.

In summarizing its analysis of the suit-

ability of Endangered Species Act protection for the species, NMFS concludes that the petition and other information in NMFS' own files "do present substantial scientific or commercial information indicating that ... 'overutilization for commercial, recreational, scientific, or educational purposes' as well as 'inadequacy of existing regulatory mechanisms' and 'other manmade or natural factors' may be causing or contributing to an increased risk of extinction for the species."

NMFS has opened a 60-day comment period on the petition through March 14. More information is available on the NMFS PIRO website: <http://www.fpir.noaa.gov/>.

— P.T.



Oceanic Whitetip Shark (*Carcharhinus longimanus*) and *Naucrates ductor*. Oceanic whitetip shark with a small school of pilot fish.

PHOTO: WIKIPEDIA.ORG

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For Further Reading

The January 2016 issue of *Environment Hawai'i* reports on shark-finning in the WCPFC:

- "Loopholes in Measures to Protect Sharks, Limit Transshipments Withstand Protests;"
- "Greenpeace Busts Taiwanese Shark Finning Operation."