

Environment



Hawai'i

a monthly newsletter

An Unsettled State

The decision of the Legislature – or rather, a handful of legislators – to second-guess settlements arrived at by state attorneys in at least two high-stakes court cases is, well, unsettling.

In the case involving the lawsuit against the Land Use Commission by Bridge 'Aina Le'a, the thinking seems to be that the state could have prevailed had it proceeded to litigate the matter.

Such hubris!

This year, as in several years since the 'Aina Le'a lawsuit was filed, the Legislature had before it a bill to bolster the LUC's enforcement powers, an action that might forestall or at least discourage similar lawsuits. None has passed.

To throw the problem back to the courts risks a court-imposed judgment that might very well eclipse, many times over, the modest settlement agreement. It won't be the legislators who voted against this who will have to pay in that event; it will be all of us.

IN THIS ISSUE

2

New & Noteworthy: Kaua'i Springs; Seawall Standstill; TMT Update

3

Hawai'i County Set To Revoke 'Aina Le'a Zoning

5

Water Security Group Chooses Projects to Fund

6

Legacy Land Conservation Program Celebrates A Decade of Protection

8

Hawaiian Electric Revives Renewable Projects on O'ahu, Hawai'i

11

Board Talk: Kekaha Kai Park, Forest Reserve Rules, & More

\$1 Million Settlement of 'Aina Le'a Case Is Rejected in Final Days of Legislature

The long-awaited settlement of a multi-million dollar lawsuit against the state Land Use Commission was signed in February. Lawyers from both the Attorney General's office and the company that, for a while, proposed to develop the Villages of 'Aina Le'a on the Kohala Coast of the Big Island had signed on to a settlement calling for the state to pay \$1 million rather than risk an uncertain and possibly very expensive outcome should the lawsuit, claiming up to \$30 million in damages and violations of due process rights, have proceeded in federal court.

The t's were crossed, the i's dotted. All that remained was for the Legislature to appropriate the sum needed to pay off the settlement.

That didn't happen.

House Bill 1022, which made appropriations for "claims against the state, its officers, or its employees," did not include any amount for settling the lawsuit brought by Bridge 'Aina Le'a, LLC, when it was drafted, since the agreement was signed only after the Legislature began.

When the bill went to the Senate Judiciary and Labor Committee on March 22,

testimony from Attorney General Douglas Chin asked that a number of additional claims be added to the bill, including the \$1 million 'Aina Le'a settlement, to be paid for out of general funds.

The lawsuit stemmed from the Land Use Commission's decision in 2011 to revert the 'Aina Le'a land, subject of a redistricting petition in the late 1980s, back to the Agricultural District, given the failure of the developer to complete 385 affordable housing units, one of the conditions of approval. By the LUC's deadline, "the only 'affordable housing' at the site was several incomplete multi-unit dwellings that did not have utilities and could not actually be used," the AG's testimony stated.

"The LUC found as a matter of fact that this work did not constitute 'substantial commencement with the affordable housing requirement. The [state] Supreme Court reversed, reasoning that \$20 million of planning and other preparation constituted 'substantial commencement.' ... Bridge's lawsuit claimed that the improper reversion was a temporary regulatory taking requiring payment of just compensation. The state

continued to page 3



Work was found to be ongoing at the 'Aina Le'a site when Hawai'i County conducted an inspection last August.

PHOTOS: HAWAII COUNTY
PLANNING DEPARTMENT

Environment

Volume 27, No. 12



Hawai'i

June 2017

NEW AND NOTEWORTHY

Kaua'i Springs Order: The Public Utilities Commission has rejected the request from a Kaua'i water bottler that it determine the bottler's source of water is exempt from requirements that apply to water utilities.

The May 22 order notes that the bottler's description of key points regarding its history and operation is at variance with the record and with statements from Grove Farm, which previously owned the Kahili Mountain Water System, source of the water, and was granted intervenor status in this case.

Generally, the PUC seems to have found Kaua'i Springs' petition confused and inconsistent. It dismissed it without prejudice, allowing the company to refile.

"Kaua'i Springs' request for a declaratory ruling ... should, at a minimum, be updated and revised to incorporate the developments described by Grove Farm," the PUC wrote. "In the event Kaua'i Springs chooses to re-file a petition for declaratory order, Kaua'i Springs

shall present a clear, undisputed, and internally consistent set of relevant facts."

(*Environment Hawai'i* has published several articles on the Kaua'i Springs case, including in June 2013, April 2014, and April 2017.)

Seawall Standstill: Last November and December, prominent Honolulu architect Robert Iopa took down most of a seawall he had built earlier in 2016 on land fronting his property in the Keaukaha neighborhood of Hilo. He had been required to do so by the state Department of Land and Natural Resources' Office of Conservation and Coastal Lands.

But the Hawai'i County Planning Department wanted to have not just the wall removed, but the area restored, to the extent possible, to its pre-existing conditions. In addition, it required Iopa to pay \$2,500 in fines for violations of the county's planning shoreline setback and special management area regulations. It set a deadline of April 7 for completion of the work.

On April 4, Iopa asked that the deadline be extended to May 22. That deadline passed without any visible change in the site.

According to Bethany Morrison, the planner overseeing Iopa's compliance with terms set by the county to satisfy the violations, Iopa and the Planning Department are still working out the restoration plan and Iopa has requested another time extension.

"He's submitted various documents, and we've granted another time extension," she said. "We're going back and forth about what should be included in the plan. ... We need additional information. We're waiting to know the scope of work."

TMT Update: As the May 30 deadline for submittal of proposed findings of fact, conclusions of law, and decision and order approached in the contested case hearing over the Conservation District permit for the Thirty Meter Telescope, the volume of filings from petitioners protesting that deadline increased.

No fewer than 12 of the parties objecting to construction of the TMT near the summit of Mauna Kea filed objections to the deadline set by hearing officer Riki May Amano. The TMT and the University of Hawai'i — the applicant in this case — filed eight objections to the petitioners' objections.

On May 23, Amano, in Minute Order 50, dispensed with them all, at times quoting the language found in some of the petitioners' filings, such as: "There has been no 'opportunity to inspect the transcripts or have any consultation on the processes of the transcripts if there should be any eras' [sic] and 'I reserved the right to make corrections as needed to the transcript and reserve time to make; those corrections to all 44 volumes and Volumes i-vii as deem.'"

Amano recited the numerous occasions, going back to October, when she had admonished the petitioners of the need to begin work on their proposed findings of fact. "If the parties are unprepared to meet the deadlines set forth, it is not because they were not warned," she wrote.

"To some extent, proffered arguments appear to be stream of consciousness comments; i.e., challenges to the exhibits 'creates the potential for a due process challenge to the outcome of the contested case.' ... 'While due process violations in this proceeding are so frequent that they have become expected, this final attack by the Hearing Officer on the ability of the Protector Interveners to participate and make their case is so blatant that a motion to recuse would be warranted, if it were not for the fact that the Hearing Officer will simply ignore such a motion.'

"All in all, movants' asserted grounds are insufficient reasons to reconsider Minute Order No. 43. The eleven motions seeking to have Minute Order No. 43 ... reconsidered ... are DENIED."

Environment Hawai'i

190 Keawe Street, Suite 29
Hilo, Hawai'i 96720

Patricia Tummons, Editor
Teresa Dawson, Managing Editor

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

190 Keawe Street, Suite 29, Hilo, Hawai'i 96720.
Telephone: 808 934-0115. Toll-free: 877-934-0130.
E-mail: ptummons@gmail.com
Web page: <http://www.environment-hawaii.org>
Twitter: Envhawaii

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

Production: Frances Officer

Copyright © 2017 Environment Hawai'i, Inc.
ISSN 1050-3285

Officers

Patricia Tummons, President and Treasurer

Deborah Chang Teresa Dawson
Vice President Secretary

Directors

Mary Evanson Valerie Monson

Quote of the Month

*"Buying lands is one of the
most important things we can do."*

— **David Smith,**
Division of Forestry and Wildlife

Hawai'i County Lists Violations At 'Aina Le'a Site, Proposes Rezoning

Hawai'i County, once one of the biggest cheerleaders for the development known as the Villages of 'Aina Le'a, is over it.

In a nine-page letter dated May 16, county planning director Michael Yee informed attorney Alan Okamoto that in light of numerous violations of development conditions as well as a court order, he would begin the process of downzoning the project site, consisting of more than 1,000 acres lying between the Queen Ka'ahumanu Highway and Waikoloa Village in the Big Island district of South Kohala. Okamoto represents 'Aina Le'a, Inc., and 'Aina Le'a, LLC, the project developers. Lee's letter was also sent to John Baldwin, principal of Bridge 'Aina Le'a, LLC, which still holds an interest in much of the land where the development is proposed.

Yee referenced a 2013 3rd Circuit Court order that determined the county had the

authority to require a supplemental environmental impact statement for the project, which the county then required. In light of that, there was to be no further work done at the project site unless and until the environmental impact statement is accepted.

Yet, Yee wrote, a January 18, 2017 annual progress report by 'Aina Le'a, LLC and 'Aina Le'a, Inc., chairman Robert Wessels, and an August 5, 2016 site inspection by department staff confirmed that 'Aina Le'a was conducting work on the properties.

"The Planning Department requires that the applicant immediately cease all work, including but not limited to ground disturbance such as trenching and grading; grubbing and stockpiling; and construction work on the subject properties. ... Work shall be prohibited on the property until a final supplemental environmental impact statement [SEIS] has been accepted by the Department," he wrote.

In December 2015, 'Aina Le'a consultant James Leonard submitted a draft EIS preparation notice while Okamoto submitted an annual progress report (APR) to the county. "There were substantial discrepancies between the information contained in the SEIS preparation notice and APR," Yee stated, prompting the Planning Department to ask for clarification. Since then, however, "staff recently confirmed with Mr. Leonard that he is no longer preparing a supplemental EIS for the property. It has been four years since the court order was issued and a supplemental EIS for this property has not yet been initiated," Yee wrote.

Yee then went on to cite chapter and verse how 'Aina Le'a has failed to comply with a dozen of the conditions of the county's rezoning ordinance, passed in 1996.

"Based on the foregoing and pursuant to Condition AA [of the 1996 ordinance], the Director will shortly initiate rezoning of the area to its original or more appropriate designation," he wrote. "You will be notified of the date, time, and location of the Planning Commission and County Council meetings for this matter once the agendas have been finalized." — *P.T.*

'Aina Le'a from page 1

agreed to the settlement shortly before trial in federal court."

Apparently, members of the Judiciary and Labor Committee, including its chairperson, Sen. Gilbert Keith-Agaran of Maui, were not convinced that the deal was a good one for the state. The draft that emerged from Keith-Agaran's committee allotted just \$1 for the settlement. "Your committee

has concerns regarding the general fund appropriation amount of \$1,000,000 for Bridge 'Aina Le'a v. State of Hawai'i Land Use Commission ... and notes that reducing the requested amount to \$1.00 will encourage further discussion as this measure moves through the legislative process," the committee report stated.

Next stop in the legislative process was the Senate Ways and Means Committee, chaired at the time by Sen. Jill Tokuda. (In the final days of the session, Tokuda was replaced by Donovan Dela Cruz, with Keith-Agaran now vice-chair of Ways and Means as well as chair of Judiciary and Labor.)

At a meeting of the committee on April 4, Chin appealed for the restoration of the full amount to the 'Aina Le'a settlement.

"Bridge 'Aina Le'a brought this lawsuit against the Land Use Commission (LUC) and

individual commission members alleging that when the LUC changed the classification of the subject property on Hawai'i Island from urban to agriculture, it constituted a regulatory taking that required just compensation," Chin said. "Bridge 'Aina Le'a was seeking approximately \$29 million in damages. The Department [of Attorney General] believes that a settlement of \$1 million is in the best interests of the state because, if plaintiff prevailed at trial, the award would almost certainly be a much larger amount."

Tokuda's committee restored full funding to the settlement.

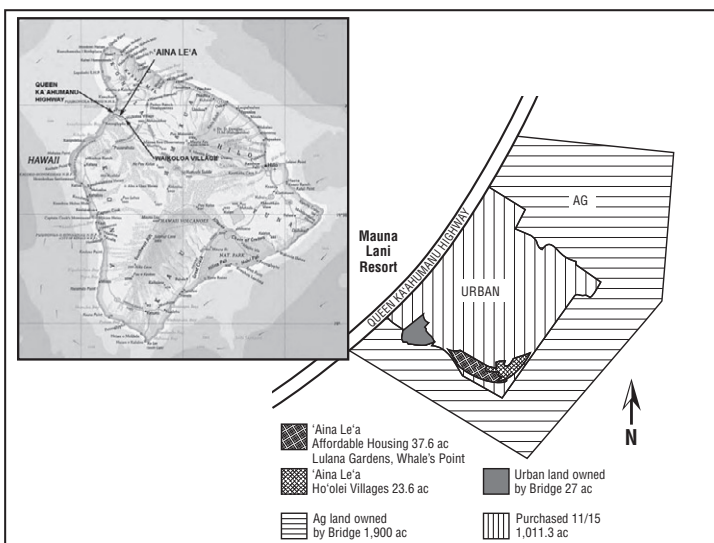
The bill then went to conference to iron out the substantial differences between House and Senate versions. Representing the lower chamber in the conference were Scott Nishimoto and Sylvia Luke, chair of the House Finance Committee. The Senate appointees were Keith-Agaran and Tokuda.

On April 26, the conferees met, releasing their version of the bill two days later. Missing from the list of approved settlements was any mention of 'Aina Le'a.

The amended bill was passed on May 2 and transmitted to the desk of Gov. David Ige, where it awaits his signature.

The state informed Susan Oki Mollway, senior judge of the U.S. District Court in

The Villages of 'Aina Le'a



Honolulu and the judge presiding over the 'Aina Le'a case, that the agreement had not been funded by the Legislature. She has set a scheduling conference for 4 p.m. on June 2, so that the trial can proceed.

In response to a query from *Environment Hawai'i*, Keith-Agaran explained his actions in this way: "I had concerns about that particular settlement when the claims bill was heard in the Judiciary and Labor Committee. Unfortunately, the deputy attorney general who appeared at the hearing could not answer some of my specific questions so to flag the issue, I included the claim but with a \$1 amount as a 'marker' or 'placeholder.'"

"The Attorney General's office did meet with me about the claim subsequently to discuss the LUC position and the litigation, and I let the Ways and Means chair know that I was okay with the claim going forward for further consideration in conference. In conference, conferees still had concerns about settling a claim where it appears the Land Use Commission was within its authority to take some action to enforce the developers failure to meet conditions of the LUC's approval of the project."

Environment Hawai'i also sought comment from Rep. Luke. She did not respond by press time.

Another Puzzle

The 'Aina Le'a settlement was not the only one that missed the final cut in HB 1022. Last August, the state reached an agreement to settle two closely related cases — *Ah Chong et al. v. McManaman and Sheehy, et al. v. State of Hawai'i* — involving the rate at which foster parents would be paid.

Among other things, the agreement called for the state to make restitution of \$2,341,103 to foster parents who provided care between August 17, 2015, and March 5, 2017. It also required the state to pay \$1.1 million in legal fees to the firms represent-

ing the plaintiffs — fees that, according to a report by Susan Essoyan in *The Honolulu Star-Advertiser*, were heavily discounted. In addition, the settlement called for increasing future payments to foster parents as high as \$776 per month per child, resulting in total outlays of state and federal funds of \$6.9 million a year for the next two years, Essoyan reported.

On May 12, Chin and Claire Wong Black of Alston Hunt Floyd & Ing, one of several firms representing the plaintiffs, notified U.S. District Judge Leslie E. Kobayashi in a joint status report of the Legislature's failure to approve the settlement. "The case will instead proceed to trial," they wrote.

A scheduling conference has been set in that case for June 20, at 10 a.m.

A Changed Settlement Strategy

Aside from the lack of funding for these two settlements, House Bill 1022, in its final form, differs significantly not only from the bill as first drafted but also from measures in past years that paid for legal claims against the state.

In most cases, the settlements are paid with appropriations from the state's general fund, that pot of money that awaits the Legislature's instruction as to how it is to be spent — as opposed to special funds earmarked for one or another purpose or grant monies directed to specific state programs.

HB 1022 began life in this fashion as well, with all the judgments, settlements, and claims to be paid out of general funds except for those brought against the Department of Transportation. The DOT has special funds for harbors, highways, and airports; it is able to reach into those to pay three settlements totaling \$15.843 million made against it. Among the claims is one for \$10.08 million to pay subcontractors hired by DCK Pacific, the company hired

to build a cargo and maintenance hangar at Honolulu International Airport. DCK Pacific was pulled off the job after a series of problems in 2015, leaving many of its subcontractors unpaid.

In its final form, however, just \$3,843 in miscellaneous claims is to be paid out of newly appropriated general funds. Of the remaining \$17,887,484, all but \$2,045,465 is to be taken from DOT special funds.

What's left after this is just over \$2.045 million in claims against the Department of Human Services (\$1,189,348); Department of Public Safety (\$643,000); Department of Education (\$51,000); Department of Land and Natural Resources (\$93,000); and the Campaign Spending Commission (\$69,116).

In each case, the final House Bill 1022 reaches into the agencies' appropriation for the current (through June 30) fiscal year, apparently identifying unspent funds in specific accounts. For example, in the case of the Department of Education, one claim of \$30,000 is to be paid out of the DOE's account for charter schools (totaling \$76 million), while another for \$21,000 is to come from the line reflecting funds for public schools based on enrollment (with \$1.421 billion in general funds).

The entire 2016-17 budget for the state Land Use Commission comes to just under \$600,000. If the ability to pay for claims is to come from previous year budgets, the LUC is SOL.

As to the source for funding settlements, Keith-Agaran told *Environment Hawai'i* that this is something that has been discussed in the past: "I recall the Legislature suggesting back in the Cayetano administration that the departments responsible for the claim should pay the claim," he said. The use of department special funds to pay claims has been long-standing practice.

"The Legislature has rejected claims in the past," he continued. "I am also told one year the entire claims bill was rejected. All settlements are subject to legislative appropriation."

The Legislature did add \$5 million to the litigation budget of the Department of the Attorney General this year. This, Tokuda told the *Star-Advertiser*, was to send a signal that the attorney general would be better able to fight off legal challenges.

"We need to make sure that the attorney general takes very seriously those claims that come against us," she was reported to have said, "... so that people realize that if they challenge us, even those [claims] that are frivolous, that we will take that seriously."

— Patricia Tummons



Water Security Advisory Group Selects 11 Projects to Receive \$600,000 in Grants

The first — and perhaps, only — slate of projects recommended for funding by the state's nascent Water Security Advisory Group includes a range of efforts to increase freshwater sustainability, from building catchment systems to re-engineering taro irrigation canals to installing smart water meters at farms and residences.

But the fact that well more than a third of the available matching grant money provided by the 2016 Legislature may be supporting state forest or watershed restoration projects could be problematic when it comes time for the 2018 Legislature to decide whether to extend the group's life, and funding, beyond its initial two-year trial period.

The state Board of Land and Natural Resources is expected to give its final approval to the projects on June 9.

The purpose of the Water Security Advisory Group, established in 2016 by Act 172, was to foster public-private partnerships to increase water security by providing matching funds for projects that would (1) increase

groundwater recharge, (2) encourage water reuse and reduce potable water use for landscaping, and (3) improve the efficiency of potable and agricultural water use.

The Legislature appropriated \$750,000 to the Department of Land and Natural Resources (DLNR) to administer the program. Only about \$614,000 was available to grantees after overhead expenses and a five percent hold on appropriations by Gov. David Ige were deducted.

In March, as the group discussed how to achieve the act's goals, members noted that the state's various watershed partnerships would likely apply for some of the funds and could easily "suck up all that money." But state Rep. Ryan Yamane, who was instrumental in the act's passage, warned the group against using the appropriation to simply fund ongoing watershed restoration projects.

"If you use the money for existing projects for which there's funds in DLNR, watershed projects, ... just be aware, this is not going

to be extended or continued," he said. "We need to look outside the box and look at other projects."

When it came time last month to rank and vote on the grant applications that had been submitted, group member Kirk Saiki, chief engineer for the Kaua'i Department of Water Supply, said he had heartburn over the number of watershed projects that had been deemed eligible.

"We were warned ...," he said.

One proposal seeking \$70,000 for O'ahu's Wai'anae Kai forest reserve included the maintenance of a vegetative firebreak, native plant restoration, the installation of several water tanks, and community outreach and education. The project's catchment tanks would save 2,700 gallons of potable water. And by preventing fires in the reserve, the project would also prevent any fire-induced loss in recharge, which the applicant — the state's Division of Forestry and Wildlife [DOFAW] — estimated to be 102 million gallons of water per year.

Saiki expressed his concern that this was the type of project Yamane had warned against.

Group chair Jeff Pearson, who is also the director of the state Commission on Water Resource Management, agreed that

Projects (in order of rank)	Applicant	Grant Request	Total Cost
Follow the Drop: Storm Water Curriculum, Mobile Application & Rain Garden	Kupu	\$61,952.00	\$128,452.00
Restoration of the Hakioawa Watershed for Kaho'olawe Ground Water Recharge	Kaho'olawe Island Restoration Council	\$100,000.00	\$239,029.00
Increasing Efficacy in Water Usage and Recharge at Ala Mahamoe, O'ahu, through Native Plant Plant Restoration and the Establishment of a Hawaiian Cultural Garden	Ko'olau Mountain Watershed Partnership	\$19,470.00	\$44,789.00
Engaging Community to Restore Wetland Kalo and Study Water Recharge	Ka'ala Farm, Inc.	\$74,293.00	\$148,585.00
Lo'i Kalo as Retention Basins: A New Approach to Designing Constructed Wetlands in Hawai'i	The Nature Conservancy of Hawai'i	\$68,006.00	\$136,012.00
Increasing Water Use Efficiency & Conservation by Upgrading Agricultural Water Meters to Advanced Metering Analytics Monitoring System for Moloka'a Irrigation Cooperative	Moloka'a Irrigation Cooperative	\$26,936.00	\$54,652.00
Water Security for Agriculture – Capturing and Utilizing On-Farm Surface Water	Center for Tomorrow's Leaders	\$100,000.00	\$310,225.00
Wai for Hawai'i	DOFAW	\$7,500.00	\$15,000.00
Wai'anae Kai Forest Reserve Protection and Restoration Project	Hōku Nui Maui, LLC	\$70,000.00	\$140,000.00
Lana'i Water Efficiency Improvement Project: Smart meters for homeowners to monitor use and detect leaks	Lana'i Water Efficiency Improvement Project	\$30,750.00	\$60,750.00
Kipahulu Forest Reserve Restoration Project	DOFAW	\$73,535.00	\$147,070.00

Legacy Land Conservation Program Celebrates A Decade of Protection

This is one of the really cool things the state does. We come away from this every year feeling we did something, we really did something,” said outgoing Legacy Land Conservation Commission member John Sinton at the group’s meeting last month.

Every year for the past decade, the commission has been making recommendations to the state Board of Land and Natural Resources on how to allocate millions of dollars in Land Conservation Funds for the purchase of easements and/or land to protect valuable natural areas from development.

Under the Legacy Lands Act, signed by Gov. Linda Lingle in 2005 and amended a few years ago, ten percent of the state’s conveyance taxes or \$6.8 million, whichever is less, is deposited into the Department of Land and Natural Resources’ Land Conservation Fund. The Legislature has traditionally set the program’s spending ceiling at \$5.1 million. About \$4.5 million

goes towards grants, while the rest pays for overhead costs.

The funds are intended to be used to help acquire land for watershed and habitat protection, or for the preservation of coastal areas, ocean access, cultural and historic sites, recreational and public hunting areas, parks, natural areas, agricultural production, and open spaces or scenic resources.

The very first round of projects to be approved for funding included the purchase of 11 acres by MA’O Farms in West O’ahu and Hawai’i County’s acquisition of more than 500 acres of coastal lands at Kawa. Since then, the Land Board has approved about four dozen projects in total. More recently, the program has supported the widely publicized purchase of 181 acres along O’ahu’s Ka Iwi coast and a conservation easement over hundreds of acres at Turtle Bay.

Had all approved acquisitions and easements over the past decade been completed,

the project “didn’t really follow the intent” of the program, but went on to say that the funding was “much-needed.”

The group had a similar discussion when considering a proposal by DOFAW seeking \$73,535 for forest restoration at Kipahulu on Maui. The project was the last-ranked project to receive a grant recommendation and the group did not have enough to fund it fully. DOFAW’s proposed actions were typical: ungulate removal, fencing, out-planting of native species, weed management, bio-control. The agency estimated that the work would save about 40 million gallons of water a year in groundwater recharge.

The group agreed to allow Pearson to negotiate with DOFAW on a revised scope and funding amount.

Group member Barry Usagawa of the Honolulu Board of Water Supply recommended that in revisiting the scope of the project, DOFAW emphasize what was different about it. Otherwise, “this is one that’s just another fence.”

In response to Saiki’s recurring concern that providing grants to typical watershed projects would endanger the future of the water security program and/or its funding, member John Richards pointed out that the act did not preclude it.

“We are in full compliance with the law,” he said. “If [legislators] want to put

‘no watershed’ [in the law], they can. That’s easy.”

Representatives from DOFAW added that the Kipahulu project was unique in a number of ways. Managers would be testing a new method of reforestation, as well as using new techniques to spread strawberry guava biocontrol agents, among other things. They noted that the fencing work has already been completed.

The group ultimately decided to recommend that the Land Board provide about \$56,000 to the project, which was all that was left of the total funds available. (Two other watershed projects were also recommended funding: the Kaho’olawe Island Restoration Council’s restoration of Hakioawa. The project would receive the maximum funding allowable for an individual project — \$100,000 — and included the planting of 10,000 plants and herbicide treatment of non-native plants. Estimated amount of water to be saved: 67,885,000 gallons. The group recommended granting the Ko’olau Mountain Watershed Partnership’s request for nearly \$20,000 for native plant restoration and the establishment of a cultural garden, as well.)

Act 172 is set to be repealed on June 30 of next year. Whether the Water Security Advisory Group continues beyond that time will be decided next year. The idea for the



The non-profit Maika’i Kamakani ‘O Kohala used Legacy Lands funds to purchase 27.5 acres at Kauhola Point in North Kohala that contain important natural and cultural resources.

they would have protected some 30,000 acres at a cost of about \$35 million. But not all projects that receive Land Board approval are completed in a timely manner, or at all.

According to a map prepared recently by Legacy Land Conservation Commission chair Theresa Cabrera Menard, who is also a GIS specialist for The Nature Conservancy of Hawai’i, only two dozen or so purchases had actually been completed as of press time, while another 17 were pending completion. (According to program specialist David Penn, some of those numbers may change soon as some of the pending projects reach completion.)

group came directly from recommendations made in 2015 by the Hawai’i Community Foundation’s Fresh Water Council in its “Blueprint for Hawai’i’s Water Future.” The blueprint seeks to provide an additional 100 million gallons a day of freshwater by 2030 through increased efficiency, increased recharge, and increasing the use of treated wastewater.

While the blueprint called for an initial \$5 million in state funding for the program, the 2016 Legislature provided a mere fraction of that, and according to Yamane, “we’re just fortunate we got this amount.”

— *Teresa Dawson*

For Further Reading

- “NEW & NOTEWORTHY: Iopa Seawall, Hu Honua, Water Security,” January 2017;
- “Legislature Sets Up New Panels To Advise on Water, Game, USTs,” September 2016;
- “Hawai’i Community Foundation’s Council Unveils Blueprint for Freshwater Security,” October 2015.

All articles are available at environment-hawaii.org.



The County of Kaua'i used Legacy Land funds to purchase 0.74 acre on Hanalei Bay that are now part of Black Pot Beach Park, one of the most heavily used parks on the island.

The DLNR's Division of Forestry and Wildlife has received approval for the most Legacy Conservation projects. It's received some \$3.2 million for pending and completed projects totaling more than 8,000 acres.

"This is a great program. We've bought so many lands," DOFAW administrator David Smith told the commission last month. "Buying lands is one of the most important things we can do."

An Imperfect Process

Discussion at the commission's meeting last month revealed the many reasons why an approved land acquisition or conservation easement can take years to complete or may fail altogether: a lawsuit, appraisal disputes, title issues, a funding lapse, even confusion over who pays due diligence costs. (Normally, the landowner must provide proof of ownership as well as a survey of the property to be conveyed. If a project receives Land Board approval, the Land Division will order an appraisal. For former agricultural lands, it may also require a Phase 1 or Phase 2 environmental survey be done at the state's expense.)

Sometimes delays are caused by a combination of things, as in the case of DOFAW's planned purchase of 800 acres within the Pua'ahala watershed on Moloka'i, which was approved by the Land Board in 2015.

Malama Minn, a project development specialist with the DLNR's Land Division

who helps shepherd projects to completion once they receive Land Board approval, told the commission that the Pua'ahala lands are made up of ten separate residential-, agricultural-, and preservation-zoned properties.

"It being on Moloka'i, as well, is a unique challenge for our appraiser," she said. What's more, she added that her division is missing some of the necessary surveys and title reports.

When it comes to the quality of title the division wants for any lands the department is purchasing, "we prefer warranty deeds, [but] getting warranty deeds is challenging," she said. "We're looking at what is the best possible title we can get."

"The complexity of the acquisition, we knew it was going to take some time," she said, adding that the DLNR was also being very conscientious about maintaining public access.

"When you talk about fencing and the hunting community, it can be very contentious. We're trying to get the population to support this acquisition," she said.

In other cases, it's not clear at all who owns the land.

For one of the earliest projects to receive approval — the DLNR Division of State Parks' acquisition of seven acres around the Kukuipahu heiau in North Kohala — Hawai'i County's property website shows that the state already owns the land and the DLNR has been unable to find a point of contact for the actual owner, Minn said.

"Some landowners know they don't have clear title [to the land] and they want to get rid of it. We think we're getting a good deal, doing it for conservation reasons ... We find out they don't have clear title and they owe taxes on it," she said.

Sometimes, Minn suspects, the landowners aren't really interested in selling their property for conservation purposes. Rather, they just offer their land for sale under the Legacy Land program because they want a free appraisal from the state or help determining title, she suggested.

"Landowners looking to sell a property for a long time, ... sometimes they're looking at 'What is my property worth? Maybe I can get the state to appraise it and shop it around.' ... That's why we have projects sitting on the books for years and years and years," she told the commission.



Legacy Land Legislation

Every year, the legislature wants to attack **E**this program," and spend the money that goes into the Land Conservation Fund on other things, DOFAW administrator David Smith said. This past session, while legislators largely left the program alone, they did pass House Bill 839, which calls for an audit of expenditures from the fund — at least those between July 2015 and the end of this month — to determine whether they "were in compliance with laws and in accordance with the terms of the contracts, grants, and memoranda of understanding and whether contractors and awardees were adequately screened and qualified."

The time period to be audited coincides with a "funding debacle," as program specialist David Penn called it, that occurred at the end of fiscal year 2016. The Legacy Land program's previous administrator left in late 2015. The department's failure to fill her position in a timely manner resulted in contracts for three non-state projects that had been approved in 2015 (except for the Ka Iwi coast lands) not being completed in time to encumber more than \$2.2 million. Funds came or will come from subsequent appropriations. As a result, only \$800,000 was available for projects this year.

Gov. David Ige had not signed the bill as of press time.

In his proposed budget, House Bill 100, Ige requested that the Legacy Lands program be reimbursed the \$2.2 million that had lapsed, and be granted \$1.7 million in additional funds. The legislature "did not concur" in its final version of the bill.

The Legislature did, however, appropriate \$1 million to DOFAW — which didn't ask for it — for the acquisition of potential 'elepaio habitat at Paiko Ridge that has been targeted for development. It also appropriated nearly \$24 million in capital improvement project funds for agricultural land acquisitions in North-Central O'ahu by the state Agribusiness Development Corporation.

Bills that would have increased the amount of money going into the Legacy Conservation Fund — HB 69, 221, and 1570 — all passed first reading, but ultimately failed. — **T.D.**



The most expensive project to be funded, in part, by the Legacy Lands program: the protection of coastal lands at Turtle Bay, O'ahu.

Hawaiian Electric Revives Renewable Projects It Cancelled While NextEra Deal Was Pending

Nearly a year after NextEra's proposed takeover of Hawaiian Electric was voted down by the Public Utilities Commission, four of the renewable energy projects that were axed by Hawaiian Electric — at the behest of NextEra, some claim — have seen new life breathed into them.

Three are utility-scale solar farms on O'ahu. The fourth is the power plant on the Hamakua Coast of the Big Island that is designed to burn biofuel — mainly eucalyptus logs grown on former sugar plantation land stretching from Ka'u to Hamakua.

Whether these projects move forward is now up to the PUC, which has indicated it intends to move quickly. And time is of the essence if the projects are to be eligible to take advantage of tax credits by the end of next year, when the window of eligibility begins to close, ultimately shutting altogether at the end of 2021.

Meanwhile, the PUC shot down Hawaiian Electric's proposed \$86 million purchase of a 60-megawatt naphtha-fueled power plant near Honoka'a, on the Hamakua Coast of the Big Island. Hawaiian Electric has indicated it intends to challenge that decision.



The Solar Farms

The three O'ahu projects were originally proposed by subsidiaries of First Wind Solar Portfolio, LLC, a Boston company. The largest was a 49 megawatt solar farm to be built at Kawaihoa, next to the wind farm that First Wind had already built there. A second project was for a 45.9 MW facility at Waiawa. The smallest of the three was a 14.7 MW facility, Lanikuhana, to be built near Mililani.

In January 2015, SunEdison, a company based in St. Louis, purchased First Wind. By December, however, it was experiencing serious financial problems and identified an investor, D.E. Shaw Renewable Investments, Inc., that was both willing and able to take over the three O'ahu projects, all of which had been given the green light by the PUC in late July of that year.

Initially, HECO indicated it was willing to work with SunEdison and Shaw, offering in January 2016 conditions to resolve missed milestones in the power purchase agreements (PPAs). Yet after SunEdison and

Shaw accepted those conditions, HECO reneged on them in February and the agreements were terminated. A report prepared by PUC staff found that by that time, the developers had paid \$31.4 million to HECO to cover its costs of linking the projects with the utility grid and had spent more than \$42 million on other costs, including land purchases and leases, design, and the construction.

In April, SunEdison did file for bankruptcy. In October, in a sale approved by the bankruptcy court, NRG Renew, LLC, a subsidiary of NRG Energy, Inc., purchased all three of the O'ahu projects for \$2 million.

The following month, NRG and HECO began negotiating new power purchase agreements. By the end of January, terms had been worked out for the Lanikuhana and Waiawa facilities, and HECO was formally seeking PUC approval for these amended PPAs. Not until April was the third and final amended PPA, for Kawaihoa, completed. It was submitted to the PUC on April 21.

On May 10, the PUC ordered the new PPAs be consolidated into one new docket in an effort "to promote administrative efficiency."

All the projects had originally been approved under a waiver from the requirement that independent power producers engage in competitive bidding before being awarded with a power purchase agreement with the utility. In submitting the revised PPAs, HECO indicated it was assuming that the earlier waivers could be transferred from the previous developer to NRG. If that would not be allowed, HECO asked that the PUC grant an "alternative waiver request."

In its May 10 order, the commission declared that "HECO's presumption" of a still-valid waiver for the three projects "is incorrect." Thus, it will be considering the alternative waiver request.

The PUC then went on to identify the "two issues that will govern this consolidated proceeding." First, has HECO "met its burden of proof in support of its request to waive NRG Renew LLC's ... projects from the commission's competitive bidding requirements." And second, "whether HECO has met its burden of proof in support of its request for the commission to approve" the PPAs for the three projects.

HECO and the consumer advocate — the only other party to this proceeding — were instructed to work out a procedural order, including a schedule, by May 31.

The revised PPAs call for HECO paying less for energy than what was specified in the original agreements. In the case of the Kawaihoa project, the contract price is 12.37 cents per kilowatt hour, representing a 5.5 percent reduction from the original PPA. For Lanikuhana, the price is 13.5 cents per kWh, a 3.9 percent decrease from the original agreement. And for energy produced by the Waiawa plant, HECO will pay 12.81 cents per kWh, a reduction of 9.6 percent from the price in the original PPA.



Hu Honua

It didn't take a bankruptcy for Hu Honua to force Hawaiian Electric back to the bargaining table, but a federal lawsuit that the company brought against Hawaiian Electric Industries, its Big Island subsidiary Hawaiian Electric Light Company (HELCO), NextEra, and Hamakua Energy Partners, which owns a naphtha-fueled power plant near Honoka'a, probably had a role in nudging the electric utility in the direction of renewed negotiations.

Hu Honua Bioenergy, LLC, had been rehabilitating a plantation-era power plant near Pepe'ekeo, north of Hilo, intending for it to generate 28 megawatts of electricity by burning biofuel grown on former plantation lands in Hamakua and Ka'u. In 2012, it executed a power purchase agreement with Hawaiian Electric, which the PUC approved in December 2013. The base rate for power was set at this time at 21.5 cents per kilowatt hour.

In 2014 and 2015, Hu Honua faced a number of challenges. These included labor disputes, unpaid contractors, and liens and foreclosure actions from numerous creditors and suppliers. The company fell behind on its construction schedule and missed several milestones in its agreement with Hawaiian Electric.

On March 1, 2016, HELCO cancelled the power purchase agreement with Hu Honua. By then, Hu Honua had sunk \$120 million into rebuilding the plant, which was 50 percent complete, it said, adding that it had identified \$125 million in financing to finish the work within another 14 to 16 months.

Hu Honua appealed to the PUC to overturn Hawaiian Electric's decision, but, as Hu Honua was not a party to the original

docket, the PUC demurred in an order issued last September.

At that point, Hu Honua undertook to restart negotiations with Hawaiian Electric. Yet the fall talks did not bear fruit and, in December, Hu Honua sought redress in federal court. It asked for recovery of the \$120 million already invested in the plant, plus \$435 million in lost profits, for a total of \$555 million in actual damages. Hu Honua also claimed it was owed treble this amount since the conduct of HELCO and the other defendants violated federal antitrust laws and state laws against unfair methods of competition.

Hawaiian Electric responded to the lawsuit with a request that the court force Hu Honua into arbitration. A hearing on that motion was set for May 18. In advance of that deadline, Hu Honua and Hawaiian Electric appear to have worked frantically to iron out a deal.

By May 5, they had generally agreed to the power purchase agreement submitted on May 9 to the PUC. Among the other terms included in that agreement was the condition that the PUC would need to approve it no later than July 3, a date that, in a filing with the court, Hu Honua attorney Barry W. Lee stated was “critically important as Hu Honua must begin to ramp-up construction of its facility in July so that construction can be completed and the plant operational no later than December 2018.”

Judge Seabright then agreed to Hawaiian Electric’s request to postpone the hearing on Hawaiian Electric’s motion to dismiss until August 7. At that time, Seabright is to hear NextEra’s motion to dismiss. If Hawaiian Electric and Hu Honua have a final deal by then, Hawaiian Electric and HELCO will be removed as defendants, but NextEra and Hamakua Energy Partners will remain in the litigation.

A New Rate Structure

When the PUC approved the power purchase agreement between HELCO and Hu Honua back in 2013, the agreed upon price that HELCO would pay over the 20-year term of the contract was 25.3 cents per kWh, which, adjusted for inflation, would be 28.6 cents today. This represents the levelized cost of electricity, which is basically the total cost of building and operating the plant over the life of the contract (including return on investment) divided by total energy output. In the more recent PPA, the levelized cost is said to be 22.1 cents per kWh, which reflects, in part, the longer term over which the construction costs may be amortized.



PHOTO: HU HONUA BIOENERGY

Work has begun anew at the Hu Honua biofuel plant near Pepe'ekeo, Hawai'i.

The cost to the consumer would be about 7 percent higher, or around 23.6 cents per kWh. (These figures come from a May 5 letter to HELCO from Hu Honua that is included in the revised power purchase agreement.)

In other power purchase agreements approved recently by the PUC, including those for the O'ahu solar farms, rates have been far lower. As Life of the Land's Henry Curtis has pointed out in his Ililani Media blog, “Kaua'i Island Utility Cooperative (KIUC) agreed to pay Tesla 13.9 cents per kilowatt hour for its fully dispatchable solar+storage project, which went online earlier this year. The system will allow solar energy to be delivered in the evening and at night.”

Hu Honua rejects the comparison with the KIUC agreement, stating that the “battery+solar” projects “do not provide the same level of firm dispatchability as Hu Honua and are not capable of replacing fossil fuel baseload generation.”

“For example,” Hu Honua goes on to say, “for the [Kaua'i AES plant] ... with pricing at 11 cents/kwh, the 20 MW of storage capacity reportedly would only be dispatchable for a five-hour duration, whereas Hu Honua is capable of being dispatched 24/7.”

Hu Honua acknowledges that when its plant is included in HELCO's rate base, the result “will likely be higher than the estimated ‘open market’ cost of a ... long-term resource portfolio that does not include Hu Honua.” That is a result of the company seeking “preferential rates” for its energy — that is, rates over and above what would be established through open competition.

What the PUC is now going to have to

decide is whether Hu Honua will receive these preferential rates.

In 2009, a new state law allowed for preferential rates — rates, that is, that are higher than those obtainable on the open market — to be charged for electricity generated in connection with agricultural activities. “It is the policy of the state to promote the long-term viability of agriculture by establishing mechanisms that provide for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities,” according to the new law, codified as Section 269-27.3 of Hawai'i Revised Statutes. “The public utilities commission shall have the authority to establish preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities.”

Because of that clause, giving the PUC the authority to establish the preferential rates, HELCO was unable to arrive at anything more than a proposed pricing framework. As noted in the May 5 letter of Hu Honua, “With respect to the [power purchase agreement], except for the price reduction amendments set forth in section 5.1 therein, Hu Honua and the [Hawaiian Electric] companies have agreed to all of its provisions....”

While it's true that the proposed price schedule yields a per-kWh cost less than that of the first power purchase agreement, a table that is included in that May 5 letter suggests that many of the factors that were folded into the cost have greatly increased from that first PPA.

The cost of the fuel has dropped — from a high of around 24 cents in 2015 to just 8 cents today. But the “variable O&M [operations

and maintenance] component” more than tripled, going from three-tenths of a cent per kWh in 2012 to 99/100ths of a cent. The fixed operations and maintenance component went from \$7,727.27 a month for each megawatt of energy produced to \$25,000. And the “capacity charge rate,” which is a fixed amount the utility is charged for each megawatt of power generated over a month, went from \$4,364 in 2012 to \$54,000.

At the time of the filing, HELCO had not done an analysis of the impact of the PPA on customers’ bills. This was to have been submitted by May 24.

The commissioners’ initial response to the revised agreement with Hu Honua throws cold water on some of the assumptions that HELCO was hoping it would agree to.

As with the revised PPAs for the O’ahu solar farms, Hawaiian Electric was hoping that it could again have the Hu Honua agreement qualify as a waiver project. But the presumption that this applies to the new PPA, the PUC stated in an order issued May 17, “ignores the conditions placed upon the waiver” that was first granted in 2008. Under that waiver, HELCO was required to file “a fully executed term sheet within four months of the date” the waiver was granted (November 14, 2008) and to demonstrate that the price paid by HELCO to Hu Honua “was fair and in the best interest of the ratepayer.”

“Because the timing and pricing structure of the new PPA makes compliance with these conditions impossible, the commission concludes that HELCO’s presumption is incorrect,” the order stated.

With respect to the “preferential rates” relating to energy produced as a result of agricultural activities, the commission made it clear that it was not inclined to rush a decision on this: “A request for such preferential rates filed pursuant to HRS §269-27.3 has never been granted by the commission, and merits a thorough review.”

The order set out at some length the problems that the PUC has had with HELCO in getting the utility to submit an approved long-term power supply improvement plan. The most recent version, filed last December, “does not reference Hu Honua’s proposed biomass fuel within the 2020 period,” the order stated, even though the “commercial operation date deadline of Hu Honua’s facility is completion by 2020.”

All told, the commissioners wrote, there is a “critical need for sufficient, up-to-date resource planning on HELCO’s part.”

In opening a new docket for the Hu

Honua agreement, the commissioners identified three issues to be determined: whether HELCO had met its burden of proof in support of its waiver request; whether it could justify its request for approval of the new PPA; and whether Hu Honua had met its burden of proof in support of its request for preferential rates. “The three issues set forth ... do not constitute an exhaustive list of the issues to govern this proceeding,” they went on to say.



Hamakua Energy Partners

One of the defendants in the Hu Honua lawsuit is Hamakua Energy Partners (HEP), which owns a naphtha-fueled power plant in Honoka’a. When the Hu Honua power purchase agreement was filed with the Public Utilities Commission back in 2012, HEP sought status as an intervenor, arguing that the commission needed to consider what Hu Honua’s approval would mean for HEP, especially if power production at HEP were curtailed as a result of Hu Honua’s operation.

Then in December 2015, HELCO announced that it had reached an agreement with the owners of HEP, ArcLight Capital Partners, LLC, calling for HELCO to purchase the 60 MW plant for around \$86 million. In a press release, the utility said that by purchasing the Honoka’a plant, HELCO customers “will save from the elimination of payments to HEP under the current contract for making energy available 24 hours a day,” among other things.

HELCO asked the PUC for formal permission to purchase the plant in February 2016. The utility said the company had given it right of first refusal to buy the facility in the event HEP wanted to sell, as it now did. The Division of Consumer Advocacy weighed in, saying that the purchase should be approved, but the price should be no more than \$60 million.

On May 5, the commission issued its order disapproving of the purchase. The PUC determined that HELCO had not demonstrated any ratepayer benefit, that its assumption that the plant, built in the late 1990s, would remain useful through 2040 was “speculative,” and that the purchase price had not been shown to be reasonable.

Twelve days after the commission issued its order, HELCO asked that it be allowed to ask for an enlargement of time in which to request a reconsideration – to May 31.

“There are changed circumstances with respect to the purchase price,” HELCO

stated. In mid-April, “Hamakua Energy Partners ... and Hamakua Land Partnership, LLP [owner of the underlying land] ... approached the companies [HELCO and its parent, Hawaiian Electric Industries] to explore ways to accelerate a favorable decision regarding the proposed HEP sale transaction. These discussions resulted in a materially lower purchase price that allows for full depreciation of the companies’ investment in HEP by 2030 and provides significant savings to customers. The [PUC order] was filed on May 5, 2017, before any new purchase price as finalized. On May 17, 2017, the seller and the companies agreed on a price of \$■ million.”

Although the original purchase price was stated in previous HELCO filings and press releases, this time, the price was blacked out. In a footnote, HELCO states, “Public disclosure of the proposed price would adversely affect seller’s negotiations with other potential buyers and cause substantial competitive harm to seller should the amendment to the purchase agreement not be approved. Public disclosure of the confidential information could also harm the companies’ relationship with existing and potential vendors, place the companies at a competitive disadvantage in current and future negotiations, and may discourage vendors from doing business with the companies and making confidential disclosures to the companies in the future.”

The new price, HELCO argued, “increases and solidifies the significant benefits to consumers over the remaining term of the HEP [power purchase agreement] through 2030, which essentially allays the vast majority of concerns with the transaction raised by the commission, the Division of Consumer Advocacy, ... and participating parties.”

— *Patricia Tummons*

For Further Reading

- “PUC Staff Excoriates Hawaiian Electric over Cancellation of 3 O’ahu Solar Farms,” June 2016;
- “Creditor Owed \$30 Million Presses Forward with Foreclosure Action Against Hu Honua,” December 2014;
- “PUC Puts the Brakes on PV Project in Ka’u, Biofuel Plant in Pepe’okeo,” October 2016.

BOARD TALK

Kekaha Kai State Park Gets Permit For Upgrades Over Surfer's Objection

No surfer likes it when one of their favorite breaks is crowded. That includes Hawai'i island resident Janice Palma-Glennie, who sits on the executive committee of the Surfrider Foundation's Kona Kai Ea chapter.

At the April 13 meeting of the Board of Land and Natural Resources, attorney David Frankel testified on behalf of Palma-Glennie and urged the board not to include road paving among the activities to be included in a Conservation District Use Permit for improvements to Kekaha Kai State Park, on the Kona Coast north of the Keahole airport.

"Kekaha Kai State Park has an annual visitation of 235,700, with 73,400 visiting the Mahai'ula Section and 162,300 visiting Manini'owali. It is estimated that 57 percent of these park visitors are from out-of-state and the other 43 percent are Hawai'i residents. There is a need for additional improvements at Kekaha Kai State Park to safely, equitably and efficiently accommodate the existing level of use at these parks, in keeping with the low-key character of the park," states a report to the Land Board by the Department of Land and Natural Resources' Office of Conservation and Coastal Lands.

Improvements proposed by the DLNR's Division of State Parks include additional showers and picnic tables, restroom upgrades, and walkway and road repairs at the Manini'owali section. At the Mahai'ula section, where Palma-Glennie surfs regularly, the division plans to repave and repair the access road, make way for more parking, and add new picnic tables and barbecue pits, among other things.

According to Frankel, Palma-Glennie worries that the road improvements at Mahai'ula will make it too easy for people to crowd the section of the park where she frequently surfs.

"This is a fantastic park. ... It's just glorious," Frankel said. "One of the visions was Mahai'ula was going to be wilderness area, low-impact, less crazy, less urbanized. The road into Mahai'ula is awful and that's great. ... It impedes access, which is great. You don't want it to be overcrowded."

He admitted that the division did need to fill in some of the worst potholes, but stressed that Palma-Glennie and others who use the

park did not want the road paved.

Land Board member Chris Yuen, a Hawai'i island resident and a surfer, did not share her concern.

"I don't see any objection the surf community would have to these approvals. ... All we're approving is some small facilities to be changed ... that is going improve the parking for surfers at Mahai'ula," he said, noting that at a county meeting and hearing in Kona on the overall project, no one expressed any opposition.

"I don't think there's any reason to hold up approving this Conservation District Use Permit," he said.

Board member Stanley Roehrig (also from the island and a surfer) said he would support the permit only if State Parks got together with Frankel and the surfing community to get their input.

"It is a cherry area for surfing. If we don't address it now, we're not going to see it again," Roehrig said.

"In this day and age, the balance is very difficult because of the amount of tourists we have and the amount of surfers we have now. We have more surfers than we had in the '60s," added Kaua'i Land Board member Tommy Oi, who said he supported the division's plan.

The Land Board ultimately approved the permit, but with a number of conditions: that State Parks (1) monitor the shower

areas to ensure soapy water is not entering the ocean and that sand is kept on beach as much as possible; (2) discuss the access issues with the surfing community as requested by Roehrig; (3) report back to the Land Board on the results of its monitoring and community discussions; and (4) refrain from using barbed wire in any fencing, unless necessary for security reasons.



New Airport Inspection Facility

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service is privatizing the construction and maintenance of its new plant inspection facility at the Honolulu International Airport as a way to cut costs, according to Ross Smith of the state Department of Transportation's (DOT) Airports Division.

On April 13, Smith sought and received approval from the state Board of Land and Natural Resources to issue a direct 20-year lease to an unnamed third party to develop, construct, and manage the USDA Honolulu Plant Inspection Station.

He explained that because of funding cutbacks, the USDA had originally asked the DOT to construct the building, which the federal agency would then lease.

"It became clear we're not in the business of being able to maintain lab facilities ... at the level they need to" be maintained, Smith told the Land Board. Instead, it was decided that the DOT would issue lease to a third party to build and maintain the facility.

"It's a little bit convoluted," he said.



Sign me up for a ☐ new ☐ renewal subscription at the
☐ individual (\$65) ☐ non-profits, libraries (\$100)
☐ corporations (\$130) ☐ economic downturn (\$40)

To charge by phone, call toll free: 1-877-934-0130

For credit card payments:



Account No.: _____ Exp. Date: _____

Phone No.: _____

Signature of account holder: _____

name _____

address _____

city, state, zip code _____

email address _____

Mail form to:

Environment Hawai'i

190 Keawe Street

Suite 29

Hilo, HI 96720

We are a 501(c)(3) organization. All donations are tax-deductible to the extent allowed by law.

Land Board member Chris Yuen praised the fact that an improved, larger facility was going to be built, but was largely taken aback by the fact that APHIS was passing off such a significant task to a contractor.

"It's just amazing to me that the federal government is not going to maintain its own building. Like ... I don't get it. This is a tremendously important function," he said.

"People talk about biosecurity and invasive species. This is the front line, having a facility like this. I mean a lot of APHIS protects the mainland against us rather than the other way around, but it's, you know, still important for the country to have facilities like this. The idea that they could be so starved of money that they have to do some strange workaround ... just boggles my mind as far as the priorities of the country," he said.



Cultural Practitioners Pan Changes in Forest Rules

An effort in April by the DLNR's Division of Forestry and Wildlife to update its administrative rules for activities in forest reserves was met with considerable backlash from native Hawaiian cultural practitioners who worried that the proposed amendments would inhibit their ability to exercise their constitutionally protected rights to gather and conduct ceremonies there.

Upon the advice of the Department of the Attorney General, DOFAW proposed amending its rules to incorporate the fees and other charges it had been assessing with regard to forest reserve activities. Since the division's forest reserve rules had not been comprehensively updated in more than two decades, it decided to also include changes that address current problems. For example, DOFAW proposed adding a new section establishing a process to deal with abandoned property, such as vehicles, waste,

or dumped bulky items.

At the Land Board's April 13 meeting, a handful of native Hawaiians, as well as one non-Hawaiian cultural practitioner, testified in opposition to DOFAW's request to take its proposed rule amendments out to public hearings. Three of the testifiers requested a contested case hearing.

One of them, Halona Fukutomi, expressed his concern that the rules would restrict access and negatively impact his ability and that of other cultural practitioners to conduct cultural practices, such as picking ti leaf for attire or collecting rocks.

"Are you aware that, currently, collecting requires a special use permit in the forest reserves?" Land Board member Sam Gon asked.

"I'm not aware of that," he said.

A subsequent testifier, Healani Sonoda Pale of Ka Lahui Political Action Committee, argued that native Hawaiians don't actually need a permit to gather from forest reserves, as their rights to do so have been preserved "since the Mahele and the Kuleana Act of 1850."

"The amendments are definitely targeted against kanaka maoli, specifically our *kia'i Mauna Kea*," she said, adding, "We don't need a permit to access. It's in our laws."

The proposed fees and charges, in particular, posed undue hardship and stress to people who are already socio-economically challenged, she said.

As Mauna Kea is our most sacred mountain, these rules target Mauna Kea protectors, she said.

With regard to DOFAW's proposed rules regarding the disposition of abandoned and unattended property, she said that kanaka maoli — including herself and her family — often have temporary shelters in the mountains and at the ocean that they use while practicing their culture. "This infringes on our rights to access," she said.

And as for DOFAW's proposed language to allow for the closure of certain areas to the public, she asked, "What if you do it on a

night that is the night of the akua and we need to access the forest during that night? That is going against our religious practices."

After an executive session to discuss the matter of the contested case hearing requests, board member Chris Yuen, who is also an attorney, made a motion to deny them.

"A contested case is when a board applies existing laws," he said. "Making rules is not a subject of a contested case."

After the board approved his motion, Yuen made another motion to approve DOFAW's request to take the rules out to public hearings, with one amendment regarding area closures. Yuen said he wanted the rules to allow the Land Board chair to independently close an area for up to 90 days in emergency cases.

"There may be a situation where the chair must do something immediately," he said, offering as examples a case of a plant disease outbreak that needs to be contained and people need to stay out of the area to prevent its spread, or when a geological condition emits poisonous fumes out of the ground.

His proposed amendment would allow the chair to take immediate action and then bring a recommendation to the full Land Board for an extension beyond 90 days if necessary.

Before the final vote, Yuen tried to reassure those who had raised concerns that the proposed rules would infringe on their cultural access rights.

"We're thinking of closing [forest reserve areas] for lava hazards, plant disease, and the like. On the question of native Hawaiian rights, we are bound and we do respect and obey those," he said. However, he added, the state constitution allows traditional and customary practices to be subject to reasonable regulations, such as bag limits and fishing gear restrictions.

"All these are in the realm of reasonable regulation," he said.

The Land Board unanimously approved his motion.

— T.D.