

# Environment



# Hawai'i

a monthly newsletter

## Turning Turtle

In their pursuit of prized swordfish, Hawai'i longline fishers have killed untold numbers of endangered and threatened sea turtles with the blessing of the National Marine Fisheries Service. A few years ago, the agency determined that with the fleet under tighter fishing restrictions, the death toll is now too low to jeopardize the turtles' ongoing survival.

But that determination has been challenged and found wanting by a three-judge panel of an appellate court, throwing into question whether the swordfish fishery can continue on with business as usual until a new biological opinion is finalized — a process that could take months.

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## With Looming Threat of Fishery Closure, Council Seeks New Ways to Save Turtles

The Hawai'i shallow-set longline fishery, which reportedly provides 50 percent of the domestic swordfish catch and generates about \$3 million in revenue, could soon close for the third time since 2004 because of its interactions with federally protected sea turtles. As of late March, the fishery had taken 31 endangered North Pacific loggerhead turtles. ("Take" under the Endangered Species Act means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.")

While the fishery's annual take limit since November 2012 has been 34 loggerhead turtles, a 2-1 decision by the 9th U.S. Circuit Court of Appeals late last December found that the biological opinion (BiOp) underpinning that limit was "arbitrary and capricious," and, therefore, violated the Endangered Species Act (ESA).

Since the National Marine Fisheries Service (NMFS), the defendant in the case, did not file a rehearing petition by March 14 — the extended deadline requested by the agency — the court issued a mandate effectuating its December judgment on March 22.

Earthjustice attorney Paul Achitoff, representing plaintiffs Turtle Island Restoration Network and Center for Biological Diversity, suggested that the ruling requires NMFS to close the shallow-set fishery in light of the high level of takes so far this year.

"I'm not really sure what they think the options are. If the court says... the biological opinion violates the ESA, I think it should be apparent [the cap is] what it used to be before they raised it unless and until they do another analysis," he said. Given that the fishery's pre-2012 BiOp cap for loggerheads was 17, "they shouldn't be fishing," he said.

Achitoff added that his clients were look-



PHOTO: NOAA

A de-hooked loggerhead sea turtle about to be released.

ing into filing for an injunction.

Contrary to Achitoff's position, NMFS Pacific Islands Regional Office administrator Michael Tosatto stated in an email that the appeals court decision did not vacate the biological opinion for loggerheads. "Instead, the decision reverses the District Court's grant of summary judgment on behalf of the agency because the administrative record did not adequately explain the discrepancy between the loggerhead's projected decline under a climate model and the agency's no jeopardy determination." He added that the March 22 Circuit Court mandate returned the case to the District Court for further proceedings and that his agency and the Department of Justice are evaluating their options with respect to those proceedings.

"The best scientific information continues to show that the North Pacific loggerhead sea turtle population is experiencing strong

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# Environment

Volume 28, No. 10



# Hawai'i

April 2018

## NEW AND NOTEWORTHY

**Kukui'o Clean-up:** Before publishing our article in March on irrigation lines, sandbags, and other beach-armoring gear along the Big Island beach at Kukui'o, we sought comment from the Kukui'o Community Association, which owns the adjoining property. None was forthcoming.

Last month we did receive this from association manager Paola Pagan, who explained her tardy reply by stating her comments had to be reviewed "by several key personnel" before being forwarded to *Environment Hawai'i*.

"Our staff visited the area and addressed the items you referenced below.

"Sandbags were in place to protect the [anchialine] ponds from the high surf conditions in December/January (sand bags have been removed as high surf conditions have subsided).

"Irrigation lines in the naupaka were old lines not being used and not connected to a water source. They were uncovered due to the high surf conditions and migrating sand (irrigation lines were removed).

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Hilo, Hawai'i 96720

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Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$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: Frances Officer

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ISSN 1050-3285

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"The only disintegrated sand bags and geotextile liner found was on the Hualalai side of the public access beach (where the Hualalai outrigger canoes are stationed). Disintegrated sand bags and liner were removed."

**Pacific Paradise Update:** For nearly two months last year – from early October to early December – the 109-ton longline fishing vessel *Pacific Paradise* foundered on the reef in shallow water just off Waikiki.

The National Marine Fisheries Service recently published a feature article on the multi-agency effort involved in the vessel's removal: "The Saga of *Pacific Paradise*," by Joseph Bennington-Castro (available at [www.fisheries.noaa.gov/feature-story/saga-pacific-paradise](http://www.fisheries.noaa.gov/feature-story/saga-pacific-paradise)). Among other things, Bennington-Castro details the efforts to ensure the safety of monk seals that were in the area while the salvage operation was continuing.

According to a spokesman for the Department of Land and Natural Resources, its Division of Aquatic Resources has surveyed the reef to determine the extent of damage to the reef and other natural resources. Any penalties associated with the grounding would have to be assessed by the Board of Land and Natural Resources, although no proposal for fines or damages has been made by DAR to date.

Bryan Ho, who represents the owner of the *Pacific Paradise*, said that the private firms involved in the effort, including Cates Marine Services, Resolve Marine, PENCO, and American Marine Group, were paid by his client, TWOL, LLC. In addition, he expects that the Coast Guard will be invoicing TWOL "for time



PHOTO: USCG

The derelict *Pacific Paradise* was towed to sea and sunk in deep water, 13 miles from the coast of O'ahu.

spent by their personnel and assets supporting/monitoring pollution response efforts."

**Vessel Permits on Hold:** The state Attorney General has advised the Department of Land and Natural Resources that a statute change is required if it wants to eventually start issuing commercial marine licenses (CML) to vessels, rather than just to individuals. Such a license would allow boat owners to avoid having to purchase individual after-the-fact CMLs for friends who may have tagged along on a fishing trip that later resulted in the sale of some of the catch. At least that was the rationale expressed by the Board of Land and Natural Resources when it voted last December to authorize the DLNR's Division of Aquatic Resources to take to public hearings rules that would have established a commercial marine vessel license. As a condition of its authorization, however, the board wanted the Department of Attorney General to first review whether or not such a license would be allowed under state law.

Members of the public who were concerned that a vessel license would undercut the state's ability to track foreign crew members of commercial longline vessels, which have come under scrutiny for possible human trafficking, had argued to the board that the current laws restrict the state to issuing CMLs to individuals. The AG's later concurrence led to the introduction this legislative session of Senate Bill 2847 and House Bill 2425, which would have amended Hawai'i Revised Statutes to include vessel as a subtype of CML. Both bills are effectively dead, however, having not been heard by the required committees in time.

### Quote of the Month

*"Herding cats and herding fishermen are very similar."*

— Sean Martin,  
*Hawai'i Longline Association*

## Council Shies Away From Expansion Of Territorial Bigeye Quota Transfers

Neither the expansion of marine monuments nor the strict bigeye tuna quotas set by international fishing organizations have stopped Hawai'i's deep-set longline fleet from growing. Last year, the fishery had a record number of active vessels, 145, which together set a record number of hooks, 53 million, mostly on the high seas. But despite a favorable stock assessment last year that suggested the Western and Central Pacific stock of bigeye was neither overfished nor subject to overfishing, and despite the wishes of its executive director Kitty Simonds, the Western Pacific Fishery Management Council (Wespac) last month voted to maintain the current quota allocation regime.

Under that regime, the National Marine Fisheries Service establishes a 2,000 metric ton (mt) annual bigeye catch limit for each of the U.S. territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Of that limit, each territory may make an allocation of up to 1,000 metric tons to the Hawai'i longline fleet, which until this year had been subject to an ever shrinking quota set by the Western and Central Pacific Fisheries Commission (WCPFC).

At the WCPFC's annual meeting last December in Manila, tuna catch restrictions for longliners and purse seiners were relaxed somewhat given the rosy new stock assessment. The U.S. longline limit for 2018 was increased from 3,345 mt in 2017 to what it was in the two previous years, 3,554 mt. The commission also made it clear that the U.S. territorial quota transfers, which some argued improperly increased the U.S. quota, were acceptable to it.

Still, the 209 mt bump was cold comfort to some. Wespac and the majority of the

group that advises the U.S. delegation to the commission had both recommended that the Hawai'i longline quota be increased to 6,000 mt, which is roughly what the fishery has been landing with the additional quota from the territories. While the current regulations would continue to allow such catch levels, it's clear Simonds wanted more.

"The U.S. delegation failed to obtain the council's recommendation," she said, calling the 209 mt gain "very small." She also lamented that while the Hawai'i fleet regularly exceeds the U.S. quota, some countries aren't catching anywhere near theirs. Indonesia, which years ago was given a quota of more than 5,000 mt at the expense of the United States' quota, caught only eight tons of bigeye last year, she pointed out. "Something is wrong. ... There never really is a level playing field," she said.

While acknowledging that a 6,000 mt U.S. longline quota is "just pie in the sky," Simonds said she hoped the U.S. delegation would try again to increase it.

### *Hold On ...*

The commission does plan to revise the quotas for longliners and purse seiners at its meeting in December. By then, the Secretariat for the Pacific Community (SPC) is expected to have a revised stock assessment that incorporates information gleaned from examining a set of otoliths (ear bones) from some large, old bigeye. According to fishery biologist Keith Bigelow, that information could affect the estimated growth curve of the fish, which could then affect the overall stock assessment.

When the new assessment came out last year, a number of countries, including Japan and the United States, disagreed with the new growth model that contributed

to the findings that the stock was healthy, Bigelow told the council's Scientific and Statistical Committee last month. The new set of otoliths that are being evaluated could have "a huge influence with the stock status," he said.

"There may not be in the history of Earth a more valuable set of fish bones. They're looking to impact a \$5 billion industry," added council staffer Eric Kingma.

Results of the review are expected to be available in August.

The possibility that a new stock assessment could yield a very different result from last year's may have factored into the council's decision to maintain the status quo. When Kingma presented the SSC and the council with analyses, produced with the aid of the SPC, showing that the bigeye stock status would remain pretty much the same if NMFS allowed the territories to transfer their entire 2,000 mt quotas to the Hawai'i fleet, committee and council members from Hawai'i, American Samoa and NMFS objected to the idea.

"The stock assessment changed drastically last year. It could change again. I'm not comfortable doing anything different," said Hawai'i SSC member David Itano.

Council member Henry Sesevasara also supported the status quo, but for a different reason. He noted that American Samoa has its own longline fleet, which does catch some bigeye. "We don't want to leave our fleet without the chance to catch bigeye tuna," he said. Hawai'i's Ryan Okano also said the state supported the status quo.

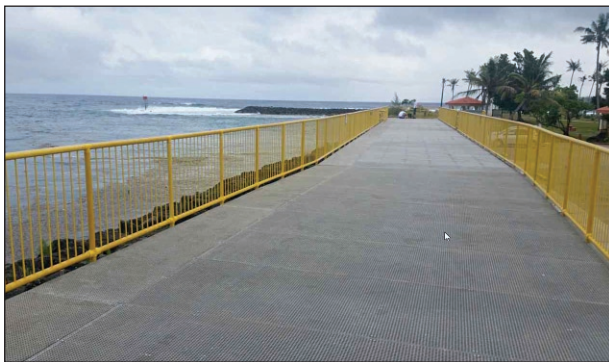
NMFS Pacific Islands Regional Office administrator Michael Tosatto added that adopting regulations that would allow an increase in territorial transfers might not go over well with other WCPFC members.

He explained that the paragraph in the current WCPFC tuna conservation measure that explicitly allows the territorial transfers to continue "was agreed to based on our argument that the U.S. would maintain the status quo. ... That was part of an overall argument to get to the 2016 level of catch." He warned that while increasing territorial quota transfers might not appear to harm the stock, "it might be diverting from the intent of the negotiations." And if the United States doesn't live up to that intent, commission members might not be open to making any more concessions, he suggested.

Finally, NOAA counsel Fred Tucher pointed out that any action that would increase the fishery's effort also raises protected species issues, which would need to be evaluated in a biological opinion (BiOp). The last BiOp for the fishery analyzed the use of about 48 million hooks a year, which is somewhat less than what the fishery currently deploys.

In the end, the council voted to maintain the practice of specifying a 2,000 mt catch limit per territory, with the condition that each may transfer up to 1,000 mt of its quota.

— T.D.



A fishing platform in Guam paid for by funds generated from bigeye tuna quota transfers to the Hawai'i longline fleet.



### *Turtles from page 1*

population growth and we are prepared to address the deficiencies identified by the majority's decision," he wrote.

### *Changing Course*

Whatever this year's loggerhead cap is ultimately determined to be, the recent high levels of take have spurred the Western Pacific Fishery Management Council, which advises NMFS, to reverse course on its recommendation last year that the caps for endangered loggerhead and leatherback sea turtles be eliminated.

Those caps, along with a suite of other management measures (i.e., employing circle hooks and mackerel-type bait), were imposed in 2004 as conditions of reopening the fishery, which had been closed after conservation groups successfully sued NMFS for failing to protect the turtles. After those measures were imposed, takes of leatherbacks and loggerheads plummeted by about 90 percent. Given that the average number of takes over the years had, for the most part, fallen short of the caps, council staffers last year began lobbying for their removal. (See our November 2017 issue for more information on this.)

Shortly after the council voted at its meeting last October in American Samoa to seek the elimination of the turtle hard caps, Achitoff threatened further litigation if the council continued on its path and if NMFS subsequently adopted implementing regulations. A couple of months later, the 9th U.S. Circuit Court of Appeals issued its ruling that found the service's 2012 determination that the fishery would not jeopardize the endangered North Pacific loggerhead turtle population was arbitrary and capricious.

The fishery then proceeded to come dangerously close to hitting the annual loggerhead cap of 34 takes (a number that may now be invalid), belying the council's October finding that historical interaction rates suggested the fishery was unlikely to ever hit its caps for the two species. Between 2005 and 2017, the average number of annual observed interactions with loggerheads was 10.8, according to council staff.

In the first month of this year alone, however, the fishery had interacted with 27 loggerheads. By early March, that number had grown to 31. And this came after a year in which the fishery interacted with more loggerheads — 21 — than it had since the caps were established in 2004.

The reason for the spike is still being studied, although local fisheries scientists have noted that it seems to coincide with

an increase in nesting sites in Japan. "The turtles we interacted with [are part of] the 2008-2014 cohort, which is the offspring from high nesting years," the Pacific Island Fisheries Science Center's (PIFSC) T. Todd Jones told the council.

"We don't know the cause of the spike. If it is a spike in the population, it won't be a one-time event," added PIFSC director Mike Seki.

Given all that, the council recommended at its meeting last month that a new management framework for the fishery be added to its Pelagic Fisheries Ecosystem Plan. And rather than proposing to eliminate the turtle hard caps, the council suggested the framework could include them, as well as temporary, in-season closures if and when the fishery reaches a certain proportion of the loggerhead or leatherback limits. (The shallow-set fishery season runs from October through spring or early summer, according to council staff.) The framework might also include measures to monitor takes in real time, manage "interaction hotspots," and establish a fleet communication program to facilitate real-time management.

NMFS posts the fishery's interactions with turtles as they happen on its website, but fishers would have to check it regularly to determine how close they were to hitting the cap.

"With this spike, we saw these numbers rise quickly. ... The numbers are not being updated in a real-time basis. It really took phone calls letting the shallow setters know the numbers are this high," council staffer Asuka Ishizaki said, adding that some vessels then decided to return to port to prevent the cap from being reached. "They responded quickly and as a result of that the fishery is still open in March today," she said.

"One of the things the recent interactions highlighted was the lack of information feedback to the fleet. ... Not all of the vessels talk to each other in the fishery. The challenge right now, we can inform the people we know and they can inform the people they know," she continued.

Council member Mike Goto, who manages Honolulu fish auction operator United Fishing Agency, said the establishment of a network within the shallow-set fishery, through which vessels might report where they are in real time and if they're encountering turtles, "is in flux due to these are independent operators. Things like fishing grounds are still proprietary in their minds."

At last month's meeting of the council's Scientific and Statistical Committee, which is to advise the council, Russell Ito, a fishery biologist with PIFSC responsible for

analyzing the fleet's logbooks, warned that improving real-time communication among the fleet may actually backfire and lead to a "tragedy of the commons."

"You better be careful for what you ask," he said, suggesting that the behavior that led to the spike in turtle takes might have become more widespread if vessels flocked to where the interactions occurred believing they could catch more fish there.

### *'Herding Fishermen'*

Before the full council meeting, the SSC recommended that the industry be allowed to develop its own ways of avoiding the hard caps on turtle interactions. Committee members noted that in a number of fisheries on the mainland, fishers who are subject to quotas for bycatch (although not for catch of endangered species) have been policing themselves.

So in addition to recommending the development of a real-time, spatial management framework for the shallow-set fishery, the council also directed its staff to work with the industry to prepare recommendations on a cooperative program that would give the industry the discretion to "manage fleet-wide sea turtle interactions based on hard caps identified by the council and NMFS and may include industry-implemented transferable interaction quotas or other innovative and efficient methods (e.g., risk pools)."

A risk pool is a group of fishers in a given fishery who have pooled their individual quotas for a bycatch species in need of conservation. In the California Groundfish Collective, for example, pooling quotas allows fishers to continue fishing even if they exceed their individual allocations, "so long as they operated in accordance with the agreed upon terms of the risk pool. California Groundfish Collective members collect and share information about where, when and what type of fish are caught using an application called eCatch, an electronic logbook and online mapping system developed by the [Nature] Conservancy to meet the need for real-time data collection," according to a website for The Nature Conservancy, which supports the collective's work.

With regard to the hard caps, Ishizaki said perhaps they could be applied in a way that targets "anomalous vessels" that are causing a spike in takes without penalizing the whole fleet, which currently consists of 18 longline vessels. If a single vessel interacts with four or five turtles in a single trip, "that's when a management measure kicks in for that vessel, which could be told to sit out for the year," she suggested.

Hawai'i Longline Association representa-

# Court Finds Federal Agencies Violated Law In Granting Permit, Setting Loggerhead Cap

In January 2012, the National Marine Fisheries Service (NMFS) issued a biological opinion (BiOp), which found that the Hawai'i shallow-set longline fishery would not jeopardize the continued existence of loggerhead or leatherback turtles if it operated under a leatherback interaction cap of 26 and a loggerhead cap of 34. Both species of sea turtle are listed as endangered.

Several months later, the U.S. Fish and Wildlife Service (FWS) granted NMFS a three-year special use permit allowing the fishery to incidentally kill birds protected under the Migratory Bird Treaty Act (MBTA). The permit allowed for the killing of up to 191 black-footed albatross, 430 Laysan albatross, 30 northern fulmars, 30 sooty shearwaters, and one short-tailed albatross, which is also an endangered species.

The Turtle Island Restoration Network and the Center for Biological Diversity subsequently sued NMFS and the FWS, arguing that the actions of the two federal agencies violated the National Environmental Policy Act, the Endangered Species Act, and the MBTA. Last December, two of the three 9th U.S. Circuit Court of Appeals judges reviewing the case found in the groups' favor, at least with regard to the loggerhead caps and the MBTA permit.

They found that the FWS's regulatory framework restricts the agency to granting special use permits only for activities that relate to migratory birds and for which there is a compelling justification. Commercial longline fishing, they found, does not "relate to" migratory birds.

"The FWS ... maintains that longline fishing is 'related to migratory birds' because it incidentally interacts with them. Although

nothing in the regulation requires that the permitted activity directly concern migratory birds, it nevertheless strains reason to say that every activity that risks killing migratory birds 'relate[s] to' those birds," they wrote, adding that the agency's legal interpretation "does not conform to either the MBTA's conservation intent or the plain language of the regulation."

With regard to the loggerhead cap, they pointed out that the BiOp's climate-based model "predicted a decline in loggerhead populations to a level that 'represents a heightened risk of extinction,' but still upheld a finding of 'no jeopardy' on the grounds that there was 'little to no difference in the extinction risk when the annual removal of one adult female loggerhead resulting from the proposed action is considered in the model.'"

They noted that in 2008, the court ruled in *National Wildlife Federation (NWF) v. National Marine Fisheries Service* that when baseline conditions already jeopardize a species, an agency cannot take actions that deepen that jeopardy. In this case, NMFS "reached an arbitrary conclusion by only comparing the prospective harm to the loggerheads that is attributable to the proposed action—the death of a single adult, female loggerhead per year—to the much greater harm resulting from factors beyond the fishery," they wrote.

"Because the NMFS has not articulated a rational connection between the best available science and its conclusion that the loggerhead sea turtles would not be affected by the increased fishing efforts, the agency's determination that the loggerhead 'population will remain large enough to retain the potential for recovery' is arbitrary and capri-

cious," they concluded.

Between 2012 and 2016, the fishery caught an average of 78 birds a year, the vast majority of them albatrosses, according to data collected by federal observers. And between 2012 and this year (so far), the fishery interacted with an annual average of 15 loggerhead turtles. If only the last five years are taken into account, that average jumps to 19.

## Dissent

Judge Consuelo Callahan, the dissenter, argued that NMFS and the FWS should have been granted deference. The court should be at its most deferential "when reviewing scientific judgments and technical analyses within the agency's expertise. ... Yet instead of anchoring its analysis in well-established principles of agency deference, the majority sets sail on a voyage of discovery, leaving in its wake our precedent," she wrote.

With regard to the bird permit, she argued that it actually does promote bird conservation. She pointed out that NMFS regulates the shallow-set fishery "under a program that is expressly geared at reducing seabird bycatch. Indeed, since the program took effect in 2004, incidental take of seabirds by the fishery has plunged nearly 90 percent. Thus, whatever CBD [Center for Biological Diversity] means by activities that 'promote migratory bird conservation,' FWS's issuance of the permit is consistent with the agency's historical practice of tying incidental take permits to conservation measures."

Callahan also found that NMFS did consider the fishery's incremental impact along with degraded baseline conditions, as required by the NWF decision.

"To 'deepen the jeopardy' of a species is to 'reduce appreciably' a species' chance at continued survival and recovery. It cannot—as CBD and the majority suggest—simply mean exacerbating a species' already 'imperiled' existence, no matter how de minimis the impact. An 'endangered species' like the loggerhead is, by definition, a 'species which is in danger of extinction...' If the ESA prohibited any action that worsened—no matter how marginally—a species' current plight, then it is difficult to conceive of an action that *could* survive § 7 consultation [under the ESA]," she concluded.

While NOAA counsel Kirsten Johns told the Western Pacific Fishery Management Council last month that her agency was "happy with the dissenting judge's very thorough analysis," the Department of Justice ultimately chose not to green-light a petition for a rehearing before a larger panel of circuit judges.

tive and former council chair Sean Martin testified in support of that idea, or something similar. He did, however, caution against relying on industry participants to work together to police themselves, as would be the case in a risk pool. "Herding cats and herding fishermen are very similar," he said, adding that the SSC's recommendation that the industry take the reins on minimizing turtle takes would be difficult to implement.

Council executive director Kitty Simonds, however, seemed to think the fishery permittees could be forced to cooperate.

"They'd have to be part of the program or

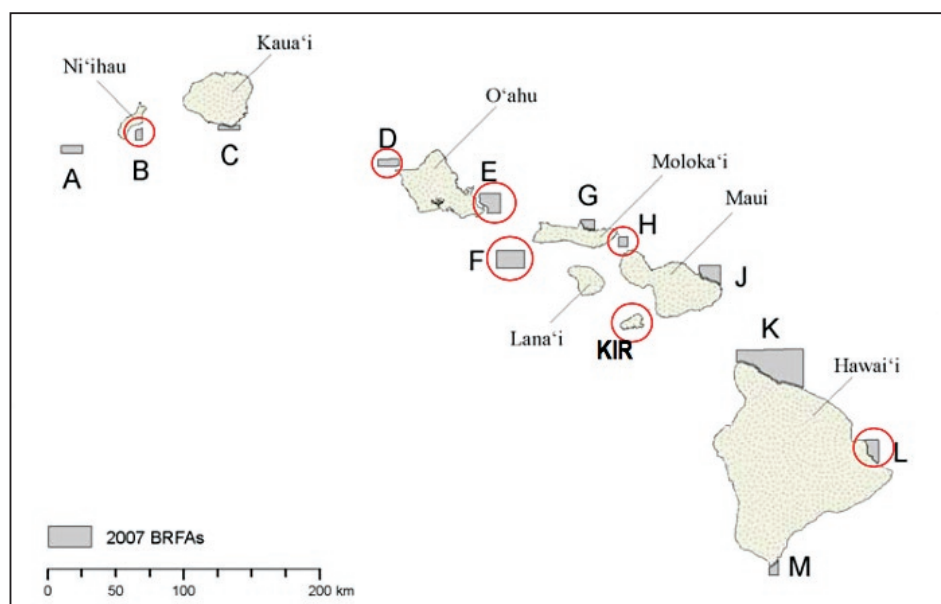
[we] take away their permits," she said.

Achitoff withheld comment on the council's proposals to manage turtle bycatch, but reiterated his concerns about the fishery in an email. The U.S. Circuit Court decision required NMFS to immediately reinstate consultation on the fishery's impacts, "which in turn requires the fishery to shut down until consultation is complete, particularly since the fishery has already hooked many more loggerheads in 2018 (31) than it would have been allowed to hook under the previous Biological Opinion (17)," he wrote.

—Teresa Dawson

—T.D.

## New Assessment of Bottomfish Stock May Lead State to Open Fishing Areas



A new stock assessment by the Pacific Islands Fisheries Science Center (PIFSC) suggests that the Main Hawaiian Islands bottomfish restricted fishing areas (BRFAs) established two decades ago, when stocks were thought to be in deep peril, could be downsized — or perhaps even eliminated, which is something the Western Pacific Fishery Management Council has advocated for years.

While it remains to be seen whether the state Department of Land and Natural Resources will completely abandon its BRFAs, the bottomfish stock, managed jointly by the state and federal government, appears to be so healthy that the council is likely to recommend that future annual catch limits be set about 50-60 percent higher than they've been in recent years.

The National Marine Fisheries Service has traditionally approved of the council's approach of setting bottomfish catch limits that pose about a 40 percent risk of overfishing. Based on the new assessment, a catch of about 490,000 pounds would pose such a risk. That's about 184,000 pounds more than the 2017-2018 catch limit.

As recently as 2014, the center produced a much more pessimistic stock assessment update that suggested the commercial bottomfish fishery needed to reduce its annual catch by about 80,000 pounds to avoid overfishing. An independent review panel, however, found several faults with that assessment, which the center tried to

remedy in the full "benchmark" assessment released earlier this year. Among other things, the center readdressed prior assumptions, included fishery-independent data, improved data filtering and standardization techniques, and incorporated fishing data from a broader time range. As a result of these changes, the center determined that there are several million more pounds of bottomfish available in the Main Hawaiian Islands than had been estimated in the 2014 update assessment.

The assessment also found that the period between 1981 and 1990 was the only the time there was a greater than 50 percent chance that overfishing was occurring and that for the past several decades, there was never more than a 29 percent chance the Deep 7 bottomfish stock was overfished. (The Deep 7 bottomfish species are opakapaka, onaga, ehū, gindai, lehu, hapuupuu, and kalekale.)

Given the new assessment, Bruce Anderson, administrator for the Department of Land and Natural Resources' Division of Aquatic Resources, announced at the council's March meeting that his department planned to explore the possibility of opening half of the 12 BRFAs. "We're seriously

considering pushing that forward," he said, adding, "the non-commercial catch is still a big question mark." Under the assessment, the non-commercial catch was estimated to be about equal to the commercial catch.

Council chair Ed Ebisui, a bottomfish fisher himself, practically beamed over the new report. "It really seems like we're beginning to really drill down and dial it in. We ... owe a debt of gratitude to the science center and the fishermen who participated in the fishery-independent research. ... We always felt the fishery was healthy. Now the science seems to be catching up," he said.

The council ultimately voted to send a letter to the state urging it to open all of the BRFAs and offering its support in developing a data collection plan if and when that happens.



## Team to Discuss Protection Of False Killer Whales

From April 10-13, a federal take reduction team (TRT) will meet in Waikiki to discuss ways to prevent the Hawai'i tuna longline fleet from harming the Main Hawaiian Islands population of false killer whales, which has been determined to be endangered. Data suggest that the current suite of measures in place to minimize the fleet's impact on the whales needs refining.

For one thing, the required employment of weak fishing hooks has failed to keep hooked whales from breaking lines and swimming away with trailing gear that could threaten their survival. As recently as February, a false killer whale hooked in the mouth inside the exclusive economic zone around Hawai'i broke the line as the crew attempted to keep it taut and straighten the hook. The whale escaped with a wire leader and about 12 meters of fishing line attached to it, according to a description of the incident.



Hawaiian insular false killer whales.

PHOTO: COURTESY OF ROBIN BAIRD



"We still don't have a silver bullet solution to reduce the number of interactions. So how do we let the animal go without gear?" asked council protected species coordinator Asuka Ishizaki at the council's Scientific and Statistical Committee last month. She reported that of the 35 false killer whale interactions observed since 2013, the whales straightened the hooks in only four cases. This despite the Hawai'i Longline Association's creation of an instructional video on how to best handle a whale hooking. In 10 of the cases, the lines broke; in 11 cases, the lines were cut, she said.

She said members of the industry are working on ways to cut the wire leaders that are attached to the lines and release the hooks. If successful, the practice could also benefit incidentally caught sharks and endangered leatherback sea turtles she said.

Another whale protection measure that Ishizaki suggested the TRT revisit is the southern exclusion zone (SEZ), which is a swath of ocean south of the island chain that would close to the longline fleet if it seriously injured or killed two false killer whales within the EEZ in a calendar year.

To date, the SEZ has never had to be closed. But Ishizaki said that even if the fishery's whale takes triggered a SEZ closure, it "wouldn't do much to prevent interactions," since only three have been seen to occur in that area since the zone was established.

She noted that the fleet's increasing use of the high seas could become more of a focus of the TRT, since so few of the whale interactions since 2013 have occurred within the exclusive economic zone around Hawai'i, which extends out to 200 nautical miles. Between 2013 and 2015, the fleet was estimated to have killed or seriously injured an average of about 21 false killer whales a year on the high seas and only four in the EEZ, she said, adding that a brewing question among TRT members is whether the fishery is spending more of its time on the high seas to avoid triggering a SEZ closure.

Of the eight false killer whales the fishery interacted with last year, only two were within the EEZ, said Kevin Brindock of the National Marine Fisheries Service's protected species division.

As of last month, the fleet had interacted with two false killer whales this year, one within the EEZ (mentioned earlier) and one on the high seas. As of press time, the National Marine Fisheries Service had not yet determined whether the whale caught

inside the EEZ was considered to be seriously injured



## Two Retirements From Council Office



Paul Dalzell

Charles Ka'ai'ai

PHOTOS: WESPAC

Paul Dalzell, former senior scientist with the Western Pacific Fishery Management Council, could always be relied upon for a colorful quote. And at last month's council meeting, where he and fellow retiree Charles Ka'ai'ai were honored for their years of service, Dalzell did not disappoint.

In recounting the events that punctuated his council career, he noted that he and executive director Kitty Simonds had "midwived" the Western and Central Pacific Fisheries Commission, the international fishery management organization that now sets tuna quotas for the region. For the past several years, Simonds has made no secret of her belief that the commission has given Hawai'i longliners short shrift. "Kitty wishes she'd strangled it with its own umbilical cord," Dalzell said.

Dalzell leaves the council staff after 21 years.

Ka'ai'ai, the council's former indigenous program coordinator, spent 17 years with the agency and a fair amount of that time overseeing the incorporation of the traditional native Hawaiian aha moku/aha kiole system into the state's natural resource management scheme.

Simonds pointed out that Ka'ai'ai was a successful litigant in some significant lawsuits over native Hawaiian rights, including a decades-old case that resulted in a \$600 million settlement award to the Department of Hawaiian Home Lands.

While he said he'll miss the adventure of being sent to foreign lands with little more than a laptop, "what I'll miss least is the pace, the intensity. ... It's tough to work for the council. ... If you can't [keep up], you get winnowed out real fast," Ka'ai'ai said.

— T.D.

## For Further Reading

### BOTTOMFISH:

"Bottomfish Catch Limit Drops," EH-xtra, June 2015;

"NMFS, Wespac Butt Heads Over MHI Bottomfish Stock Assessment," December 2014;

"Council Maintains Bottomfish Catch Limit, Despite Evidence It May Be Too High," August 2014;

"Council Once More Increases Quotas for Bottomfish in Main Hawaiian Islands," September 2009;

"Bottomfish Restrictions May Do Little for Stocks in Main Hawaiian Islands," August 2007;

"Council Plan for Bottomfish Takes Little Heed of State Efforts," April 2007;

"New Rules for Bottomfish: Are They Too Little, Too Late?" June 1998;

"State Wrestles with New Rules as Bottomfish Decline Continues," October 1996;

"DLNR Does Nothing to Protect Islands' Stocks of Prized Bottomfish," March 1994.

### FALSE KILLER WHALES:

"Plan to Protect Rare False Killer Whales Is Scrutinized After Serious Injuries Spike," April 2015;

"Lawsuits Yield Settlements to Boost Protection for False Killer Whales," January 2013;

"New & Noteworthy: Protection for False Killer Whales; A Cancelled Meeting," November 2012;

"Meanwhile, Wespac, Longliners Assail Report on False Killer Whales," EH-xtra, May 21, 2012;

"Island False Killer Whale Population Is Found to Be at High Risk of Extinction," November 2010.

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— T.D.

## Bill for Ko'olau Loa Plan Awaits Hearing on Proposed Amendments

February came and went without a vote, despite an express wish in November by Honolulu City Council member Ikaika Anderson that one would be taken. March passed, too, and Anderson's Bill 1, to approve the Ko'olau Loa Sustainable Communities Plan, never made the agenda.

It's been more than five years since the City and County of Honolulu's Department of Planning and Permitting released its proposed update of the plan—a document that under ordinance is supposed to be updated every five but hasn't been since 1999.

The DPP's draft had built upon recommendations generated through two years of Public Advisory Committee meetings and, in a controversial move, incorporated proposed residential and commercial development plans for agricultural lands in Malaekahana and La'ie managed by Hawai'i Reserves, Inc. (HRI), the land management arm of the Mormon church. Those plans included some 875 new homes, a significant portion of which were slated for people who already lived and worked in the area.

In 2015, a bill to approve a version of the plan that had deleted all references to development at Malaekahana died, in part,

because the council was unsure how much growth in the area was being allowed for in the pending revision of the O'ahu General Plan. The DPP had not yet issued a proposed revision to the more comprehensive plan, which, among other things, would have outlined where population growth on the island should be directed.

The department finally released a draft of the general plan last December. Similar to the existing plan, it recommends that growth be directed so that only one percent of the island's population will live in the Ko'olau Loa region by 2040. That percentage was rounded down from the current plan's recommendation of 1.4 percent.

Just how many people that adds up to remains to be seen. In 2013, the DPP determined that the Ko'olau Loa population totaled 16,732 people, but expected that number to shrink to 16,172 by 2035. The proposed general plan revision, which received Planning Commission approval last month, seems to envision an even greater contraction. The plan assumes that population will grow in accordance with the most recent projections developed by the state Department of Business, Economic Development, and Tourism. In 2012, which appears to be the last time it projected population growth, DBEDT estimated that in 2040, 1,086,700 people would reside on O'ahu. Given that, the general plan seems to suggest that just under 11,000 people should live in Ko'olau Loa.

Whether or not the proposed general plan's population distribution recommendations influence the city council's decisions on the amount of development it will allow for in the Ko'olau Loa region also remains to be seen.

Anderson's Bill 1 would have kept the community growth boundary in La'ie where it is, leaving the vast majority of the agricultural lands slated by HRI for development untouched. Many community members testified at a November committee meeting that it should approve the bill unamended. But some committee members were swayed (or distracted) by a downsized housing plan unveiled by HRI at the meeting. The plan included about 90 new affordable homes in La'ie town, many of them on the Brigham Young University's La'ie campus, and 250 new market-rate homes on agricultural lands across from the Malaekahana State Recreation Area, but



The fact that an eroding coastal highway is the only route through Ko'olau Loa is often raised by those who oppose further urbanization of the region.

situated in the ahupua'a of La'ie.

To accommodate HRI's request, Anderson introduced on February 14 amendments to Bill 1 that would expand La'ie's current growth boundary to include some 50 acres within "northern La'ie," located adjacent to a sliver of undeveloped land he had previously proposed to designate for industrial use. He also proposed to amend the text of the plan to state that enrollment at BYU-Hawai'i should not exceed 3,200 students over the lifetime of the 2018 plan (the DPP's version envisioned 5,000 students, per representations made by university representatives at the time).

Also on February 14, council chair Ernie Martin introduced an amendment to Bill 1 that would specify that the Malaekahana lands located adjacent to La'ie should "remain undeveloped and preserved as open space, whether by a conservation easement, reclassification as preservation lands, or otherwise." Martin had proposed similar, more vague language in an amendment offered just prior to the November committee meeting, which was another reason council members chose to defer voting on Bill 1. Martin and Anderson said they wanted time to discuss with HRI the possibility of establishing a conservation easement over the Malaekahana lands.

Neither of the current proposed amendments seeks to revise the population projections for the region. Even under Bill 1, the proposed plan still states that the region's population is expected to grow from 14,500 in 2000 to 15,500 in 2035, despite DPP offering revised figures years ago and despite the population distribution recommendations in the proposed general plan revision.

— T.D.

### *For Further Reading*

"Panel Defers Ko'olau Loa Plan Vote To Discuss Easements for Malaekahana," January 2018;

"Committee Tables Malaekahana Development, City Council Chair Awaits a New General Plan," April 2015;

"New & Noteworthy: Malaekahana development, 'Aina Le'a, and Charles Barker," March 2015;

"Debate Over La'ie Expansion Continues As Community Plan Nears Council Vote," November 2013;

"Commission Approves Ko'olau Loa Plan Despite Questions Over Housing Figures," May 2013;

"New & Noteworthy: QLT Appeals; Green v. Blue on O'ahu's North Shore," January 2011.

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# Homeowners' Association Is Sued By Ka'u Developer with Big Plans

A half-century-old plan to build a lavish resort in Ka'u is at the heart of litigation that's been brought by the current owner of the land where two high-rise hotel towers were once proposed to be built, along with restaurants, bars, offices, condominiums, and other visitor lodgings.

The land in question consists of two parcels — one just over 11 acres, the other about 18 acres — separated by a roadway in the Discovery Harbour subdivision, near the community of Waiohinu.

The owner is South Point Investment Group, LLC (SPIG), which in 2009 purchased the two parcels as well as the golf course that lies at the center of Discovery Harbour.

Perhaps surprisingly, the litigation pits the landowner not against Hawai'i County or another governmental entity whose zoning or land use regulations might pose a bar to development. Rather, the defendant is the Discovery Harbour Community Association (DHCA). Its claim that the 29 acres that SPIG wants to develop are subject to association regulations — and have been since the early 1970s — is a central factor in not one but two lawsuits brought by SPIG in 3rd Circuit Court.

The first complaint, filed in May 2016, is well along the path to trial. The community

association has filed a counter-claim against SPIG in that case. The dispute revolves around the association's claim that its covenants, conditions, and restrictions apply to SPIG-owned lots.

The second complaint was filed on February 28 of this year, alleging that the claims of the association had damaged SPIG as the county was developing the Ka'u Community Development Plan. While some Discovery Harbour residents had supported the new plans of SPIG to build a restaurant, "hotel lodge," "hotel villas," a retail center, timeshare units, and condominiums, among other things, on the two large lots, the association spoke against the plan. The committee advising the county on the CDP then fashioned its recommendations to accord with the limitations that the association said applied to the area. When the plan was adopted in October by the Hawai'i County Council, the planning map identified the SPIG commercial lots as suitable for "low density urban" zoning. (The second lawsuit had not been served on the DHCA by press time.)

## *A Divided Community*

Discovery Harbour began life in the 1960s as the second phase of several proposed by a California developer, with the phases to

be developed in increments of "from 300 to 500 acres" each.

In 1969, the developer sought approval from the Hawai'i County Planning Commission of a special permit for what it described as a \$40 million project on the two parcels. A special permit was required since the land was in the state Agricultural District. (It still is.)

A sales brochure submitted to the county at that time identified the first phase as the Mark Twain Estates, a 700-lot subdivision on 370 acres. Discovery Harbour would be built just west and south of the first phase. It was to consist of 540 acres divided into about 800 house lots, 200 acres set aside for a "championship" golf course, and 18 acres for a "Mark Twain Hotel."

"Many tour experts predict that the 'Mark Twain Hotel' will be among the most popular in the islands due to its wonderful climate, its excellent recreational facilities and geographic location — half way between Kona and Hilo," the sales brochure states. Eventually a "dude ranch" would be built: "There are many miles of excellent riding trails for the horse enthusiasts," the publicity states. Also, "Located approximately 3 miles from the bottom portion of Mark Twain Estates is the Ka'alu'alu Bay small boat harbor. In recent years this harbor has been little used. However, the developers have been informed that the harbor will be rehabilitated if there is sufficient demand for its use." (Ka'alu'alu Bay was identified in 1992 as a "refuge harbor" by the Army Corps of Engineers. It was in use at the turn of the 20th century but has not undergone any improvements to speak of since then.)

The application itself sought village-commercial use "to permit the construction of a small hotel-motel type operation with a restaurant, bar, and office space." "There are only a limited number of hotel rooms in the District of Ka'u," the application stated. "Yet the drive from Hilo to Kona or vice-versa is long and arduous. A stopover at the subject property would be welcome. Further, the golf course will encourage people to stay overnight."

Yet when the Planning Commission heard from the developer at its May meeting that year, the architect for the project, Shigenori Iyama, described much more ambitious plans.

The first phase of development, he said, would involve construction of a golf course clubhouse, a restaurant, two seven-story buildings with 200 hotel units, plus restaurants, stores, and shops. A second phase of commercial development would include



The current landowners' plan for the area includes hotels, time share units, condos, and other visitor amenities on 29 acres.

more hotel units and 60 condominium units, all with underground parking. All totaled, there would be 950 hotel rooms, with most of them in two 20-story “twin towers.”

Architectural drawings of what the area would look like once it was all built out show multiple high-rise, mid-rise, and low-rise buildings and even a helipad.

Commissioners expressed concerns over the adequacy of water supplies and also over “incremental development.”

The application came at a time when the Planning Department was said to be on a “crash program” to include Ka‘u in the county’s General Plan. For that reason, the department asked the commission to defer action on the application. Separately, a Planning Department analysis of the application concluded there was “no basis for this amt commercial this time.” It is not clear that this was ever transmitted to the Planning Commission.



The development proposed for Discovery Harbour in the 1960s included retail and office space, as well as two high-rise hotel towers.

### **Permit or No?**

Work on the golf course was completed in the early 1970s, but the two lots where the developer had wanted to build hotels and other amenities remain vacant to this day. And that’s not all that’s vacant. Of the more than 800 house lots that were established in the Discovery Harbour subdivision, only about 25 percent have houses built on them.

The golf course fell into disuse in the 1990s. In 2009, however, Gary McMickle, an investor from the Fort Worth area, and several others formed the South Point Investment Group and purchased it as well as the two large lots where the hotels had once been proposed. (Separately, McMickle has purchased several hundred acres south of the subdivision.)

In 2012, SPIG argued before the Hawai‘i County Board of Appeals that the permit sought back in 1969 was valid, despite the planning director’s determination that it was never approved. The county’s “failure to act on the application means that it should be deemed approved,” wrote SPIG attorney Randy Vitousek in his petition to the board. “Alternatively, appellants submit that hotel and commercial uses have in fact been approved by the county and that these should be considered pre-existing and non-conforming uses on the subject parcels.”

The appeal was rejected. The BOA determined that the planning director lacked the authority to make any such determination regarding a special permit. (Under the county charter, special permits

are to be approved by the Planning Commission.)

In a letter to the planning director on Valentine’s day of 2014, Vitousek notified the county that SPIG “currently plans to file a complaint in the Circuit Court of the Third Circuit asserting due process violations and inverse condemnation.”

“It is SPIG’s position,” he continued, “that since 1961 both the state and county have been aware of and involved in the plans to develop a commercial district on the subject parcels. Based on this history, SPIG has invested substantial resources in acquiring the parcels, making development plans, and seeking approvals for such plans.”

The threatened lawsuit did not materialize — against the county and state, at least. Instead, as the Planning Department began to work on its community development plan for Ka‘u, a new spanner was thrown into SPIG’s plans when the community association leadership argued to the group advising the Planning Department that the lots in question were subject to its CCRs.

“In 2015, ... the DHCA began to aggressively oppose SPIG’s development in Ka‘u CDP meetings,” SPIG claims in a brief to the court filed in association with the first lawsuit it filed against the homeowners’ association, in 2016. “As a result, while the Ka‘u CDP steering committee was prepared to propose designating the commercial lots for use as a Retreat Resort area, it abruptly shifted gears. Between October 2015 and December 2015, it changed its recommendation to Low Density Urban.

... The DHCA’s interference in the Ka‘u CDP process has delayed development of the commercial lots and repair of the golf course lots, has cost SPIG a favorable land use designation, and has caused it to incur significant other monetary damages.”

As finally adopted, the land use policy map for SPIG’s parcels designates the lots as “low density urban,” which allows only single-family residential, multiple-family residential, or residential-commercial mixed use development.

A scheduling hearing is to be held on June 29 by the judge hearing the first lawsuit. If the landowner prevails, then it will still need to obtain changes in the state land use district classification and zoning.

Prevailing in that first lawsuit would also clear the way for the second one, seeking damages from the homeowners’ association for its statements during the preparation of the Ka‘u CDP. Vitousek denied that this amounted to a SLAPP action (a strategic lawsuit against public participation).

“No, I don’t think it’s a SLAPP. You’re not privileged to make false testimony,” he said. The litigation is “essentially dealing with the fact that some of the members of the homeowners’ association made representations to the regional plan steering committee as to whether the SPIG properties were subject to the CCRs. It had an impact on the property.”

If, on the other hand, the homeowners’ association prevails in the earlier litigation, then the second lawsuit is pretty well mooted. — P.T.



## Court Mulls Whether Contested Case Should Be Granted for TMT Sublease

How, if at all, should last year's contested case proceeding and resulting Conservation District Use Permit (CDUP) for the proposed Thirty Meter Telescope (TMT) influence the lawsuit over the denial of a contested case over the sublease for the facility?

Last September, after a months-long contested case hearing in Hilo, the majority of the state Board of Land and Natural Resources voted to approve a Conservation District Use Permit for the TMT. Telescope opponents argued, among other things, that its construction would interfere with their right to engage in traditional and customary native Hawaiian practices. Despite the witness testimony and evidence they provided, the board (except for members Keone Downing and Stanley Roehrig) found that the TMT site and "its vicinity were not used for traditional and customary native Hawaiian practices conducted elsewhere on Mauna Kea, such as depositing piko, quarrying rock for adzes, pilgrimages, collecting water from Lake Waiau, or burials. ... Some groups perform ceremonies near the summit. The evidence shows that these ceremonies began after the summit access road and first telescopes were built, but, in any case, the TMT will not interfere with them." Even so, the board included a number of conditions in the CDUP aimed at protecting native Hawaiian rights (including access rights) and the mountain's cultural resources.

But did that process and those permit conditions (which are under appeal) absolve the Land Board of any responsibility to grant E. Kalani Flores, a native Hawaiian party to the CDUP contested case, a contested case on the sublease, as well?

In arguments last month before the Hawai'i Supreme Court, attorneys representing the state and the University of Hawai'i argued that case law has determined that native Hawaiian rights to access lands for traditional and customary purposes endure no matter who owns it, and that being the case, none of Flores' private, protected interests were being affected by the sublease or in danger of being subject to "erroneous deprivation."

Chief Justice Mark Recktenwald asked the state's attorney Clyde Wadsworth whether that would still be the case if the sublease in some way affected Flores' ability to access the area. "We don't know what TIO's

position is going to be. They may be more restrictive. They may say, 'Well, you know, instead of certain days a week, you can only come on once a month,'" Recktenwald said. (TIO stands for the Thirty-Meter-Telescope International Observatory, the legal entity proposing the telescope.)

Wadsworth argued that wasn't the case with this sublease, which explicitly states that it is subject to the rights of native Hawaiians. He added that the university and TIO had established measures to avoid impacts on cultural practices. Those measures, outlined in the CDUP decision and order, include implementing a cultural and natural resource training program for employees, hiring a cultural resource specialist, and preparing an archaeological mitigation plan, among other things.

"But that's all in the other case," Recktenwald said.

"Your honors, if they so choose, since that's a public record, they could take judicial notice" of that case," Wadsworth replied.

If the sublease, for some reason, stated that the lessee had the right to exclude anyone from the subleased area, Flores' contested case hearing request would

have to be evaluated in light of whether that provision affected his rights and whether there could possibly be the erroneous deprivation of those rights, he added.

In his rebuttal, Native Hawaiian Legal Corporation attorney David Kaiula Kopper argued that the state could not fulfill its obligations to protect native Hawaiian rights if it refused to be informed *before* it acts. The Land Board had denied Flores' petition without holding a hearing and without making any findings, Kopper noted, suggesting that his client had been denied due process.

"We actually have no findings as to what extent the CDUP ... actually addresses the native Hawaiian rights and practices in the area of the sublease," he said.

"If you were granted a contested case hearing, what would it look like? What would your clients be asserting as the interest that was adversely affected?" asked justice Richard Pollack.

Kopper cited Flores' access rights, as well as "his interest in the disposition of ceded lands." He also suggested that despite



An artist's rendering of the proposed Thirty Meter Telescope on Mauna Kea.



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the arguments that case law prohibits the infringement of native Hawaiian cultural access rights, the state in this case seemed to be improperly passing off its responsibility to protect native Hawaiian rights to a third party, the sublessee. It is the state's job to balance the interest of the TMT International Observatory with the rights of native Hawaiians, he said.

Aside from Flores' concerns about the disposition of ceded lands, Recktenwald asked Kopper what specific effects would result from the sublease approval.

"The appellants are arguing he's no worse off or no better off now than he was when it was the University of Hawai'i. ... How do you respond to their arguments that, in essence, TIO stepped into the shoes of UH and his interests have not been affected one way or the other?" Recktenwald asked.

Kopper said it again came down to access, adding that the state needed to hold a contested case because of the risk of erroneous deprivation of Flores' rights. What's more, Kopper pointed out that the Land Board appeared to violate its own rules regarding when it can deny a contested case request without holding a hearing.

"[The rule] sets forth the two, and only two, instances. ... The first is when it is clear as a matter of law the request concerns a subject that is not under the adjudicatory jurisdiction of the board. We know that's not true because the board has jurisdiction over sublease approvals. The second is when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case. And that is not true. Based on the board's allegations, he does have rights to a contested case under Article 12, Section 7, and Article 12, Section 4 [parts of the state constitution regarding Hawaiian affairs], when it comes to the disposition of ceded lands," Kopper said.

He added that another reason the CDUP contested case cannot have satisfied Flores' due process rights is because that case did not conclude until three years after the Land Board approved the sublease.

To this, Pollack expressed his concern with the arguments by both sides that the court look to the CDUP hearing to see what Flores argued. "For our decision to pivot on what arguments were made in that hearing or whether Mr. Flores participated or not, it seems to me we should be looking at what was the process that was provided. If that process provides the due process to make sure that there's no adverse effect on native Hawaiian rights, that's what we look at. We don't look at what individuals participated or what arguments were made in the hearing," he said.

Kopper countered that the court also needed to know what rights were addressed "and we don't. The state wants to just assume

all of his practices were addressed."

Toward the end of the hearing, the state's Wadsworth was asked whose burden it was to show that the sublease did not affect any of Flores' interests or erroneously deprive him of his rights.

Wadsworth suggested it was Flores' burden. "But even if the court were to decide that was the burden of the state ... he can't show as a matter of law that his private right would be affected by the sublease or that there would be erroneous deprivation," he said.

It's unknown when the court will issue a ruling in this case, or how long the appeal of the CDUP will take. The latter case was still in the opening briefs stage at press time.

— T.D.

## *Aloha, dear readers.*

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This represents the first uptick in rates since July of 2010, when the cost of a basic individual subscription rose from \$50 to \$65. We've held to that number, even though the cost of living has risen considerably, along with costs involved in our production, and even as the services we provide to our readers have grown dramatically with the addition of our expanded internet presence.

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I realize that for some of you, the increase will be difficult to accept. Keep in mind, please, that neither Teresa Dawson nor I have received any increase in our pay over this same time (and, in fact, my own pay has diminished substantially). Think of the increase in individual rates as less than, say, a glass of wine with your restaurant dinner, or the cost of a frozen pizza. We hope that you can forgo that one glass of wine, or that one frozen pizza, in order to continue your subscription. Believe me when I say that in the long run, you may not miss the wine or the pizza, but we will absolutely miss you!

Both Teresa and I work hard to bring you investigative reports on issues that, for the most part, are unreported or under-reported in the daily media here in Hawai'i. Over the years, thanks to your support, we've been able to make a positive difference in the way many things are handled in this state as well as the broader news coverage given them. I hope we are able to continue to do so for many years to come.

And for this to happen, we need the support of each and every one of you. If you would like to discuss this with me, please give me a call at (808) 934-0115. Thanks for your understanding.

— Patricia Tummons, editor