

Settling Down

The stakes were high when Bridge 'Aina Le'a sued the state of Hawai'i, claiming the state caused it damages in the tens of millions of dollars after the Land Use Commission returned land in the Urban District back to the Agricultural District.

That the state settled for \$1 million may not be a just outcome. It probably was prudent.

But Hawai'i has almost surely not seen the last of litigation stemming from the LUC decision in the 'Aina Le'a case. A new threat is on the horizon, this time from the new owners of the Urban land, 'Aina Le'a, Inc.

Also in this issue: Teresa Dawson reports on the ever more complex disputes over water rights in East Maui; Patricia Tummons looks at an industrial-sized photo-voltaic development proposed for a rural residential subdivision; and Pamela Frierson reviews a new work on invasive species in remote Pacific islands.

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As One Court Case over 'Aina Le'a Is Settled, Another, Larger One Looms

The state of Hawai'i has settled a lawsuit brought by Bridge 'Aina Le'a, LLC, which had claimed more than \$30 million in damages as a result of a decision by the Land Use Commission to downzone acreage the company had sought to develop.

The settlement, terms of which call for the state to pay Bridge \$1 million, all but ends a case filed six years ago in federal district court in Honolulu. In addition, Bridge has won a commitment from the state Attorney General's office that it will support a petition by the company to place the 1,893 acres of Agricultural land

that Bridge owns into the state Rural land use district, where a broader range of land uses, including residential development, is allowed. That acreage surrounds on three sides the 1,099 acres in the Urban district that the LUC had attempted, six years ago, to shift back into the Agricultural district when the conditions of Urban redistricting had not been met by the developer.

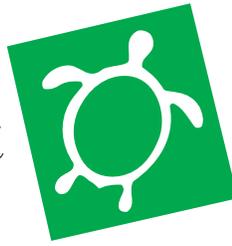
In 2012, state Circuit Judge Elizabeth Strance ruled that the reversion was improper. Following that, Bridge brought a federal lawsuit against not only the state but *to page 4*



AIMA LEA INC.

A depiction of the luxury townhouses planned for the Whale's Point development part of the Villages of 'Aina Le'a.

Environment



Hawai'i

Volume 27, No. 2

August 2016

NEW AND NOTEWORTHY

\$10M in Band-Aids: The O'ahu Metropolitan Planning Organization has proposed appropriating \$10.1 million to the state Department of Transportation (DOT) to design and construct repairs to sections of Kamehameha Highway between Kualoa and Hau'ula that are threatening to fall into the sea. The agency has decided to include the new project in the June 3 revision of its 2015-2018 Transportation Improvement Program, which must still receive final approval from its policy board but was approved last month by its community advisory council.

The DOT has recently had to make repeated emergency repairs to shore up parts of the two-lane coastal highway that crumbled onto the beach, but waves have continued to hammer the road and sections again seem on the verge of giving way.

As of May, the department had planned to conduct spot mitigation at areas along the highway in Ka'a'awa, Punalu'u, and Hau'ula, with work being completed in January 2018. But under OMPO's new proposal, the DOT will spend \$100,000



Erosion has continued to eat away at sections of Kamehameha Highway on O'ahu's northeastern coast. The two photos here were taken this summer. Left in May, right in July.

this year designing repairs to those sections, and \$10 million next year constructing them. While the design phase would be 80 percent federally funded, the state would cover half of the construction costs.

Spaceport Setback: The state Department of Business, Economic Development, and Tourism has been trying to resurrect the notion of a spaceport on the Big Island for several years now – this time for a space-launch facility at the Kona airport that would service only horizontally-launched reusable vehicles.

Last month, however, the state procurement officer denied DBEDT's request to extend the term of a no-bid contract for the required environmental studies to RS&H (Reynolds, Smith & Hills), a

company in Jacksonville, Florida.

DBEDT awarded the company the \$500,000 contract (half federal funds, half state) in 2012 to begin the technical studies to support the state's application to the Federal Aviation Administration for a spaceport license. It also is paying RS&H \$80,000 to make the application.

In June, DBEDT asked the state procurement office to approve an extension to the contract to prepare documents compliant with the National Environmental Policy Act. "Due to an oversight on the contract amendment last year, we are now requesting an amendment to the original exemption through December 31, 2016," DBEDT's Jeffrey Pang stated in the request. "We shall be more diligent in complying with this requirement prospectively."

The procurement officer was not pleased and disapproved the process as the original procurement exemption (PE) "has already expired along with the original contract with the vendor. A new PE shall be filed to cover the remaining work."

According to Pang, the decision "will slow things down. We've got to process some paperwork to initiate the work again."

One of the bumps in the road came as the Department of Transportation changed the proposed site for the launch facility, from the south end of the Kona airport to the north. This, Pang said, prompted a second review of the application by the FAA.

He's hopeful work will be completed by the end of the year.

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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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Quote of the Month

"So, basically, what you're saying ... is you're going to have close to \$300 million in costs before you can get a nickel out of the property."

— William Wynhoff
deputy attorney general
on the 'Aina Le'a development

BOOK REVIEW

The Other War in the Pacific: A Report from the Frontlines

Mark Rauzon. *Isles of Amnesia: The History, Geography, and Restoration of America's Forgotten Pacific Islands.* Honolulu: University of Hawai'i Press, 2016.

The title of this book puzzled me at first. Its subject is the effort to restore seriously disturbed ecosystems on some of the world's remotest islands. But the fact is that these farthest-flung islands of the North and Central Pacific have been far from forgotten: they have been possessed and repossessed many times over in national struggles for commercial and political power in Oceania.

Few readers are likely to be familiar with Rose Atoll, Kiritimati, Jarvis, Howland, Baker, Palmyra, Johnston, and Wake. But Mark Rauzon is referring to a different type of "amnesia": the ignorance or shortsightedness that has allowed humans to wreak havoc on island ecosystems. In Rauzon's words, "the accidental or purposeful release of animals and plants" is "unraveling the fabric of life" on islands that are arks of irreplaceable species.

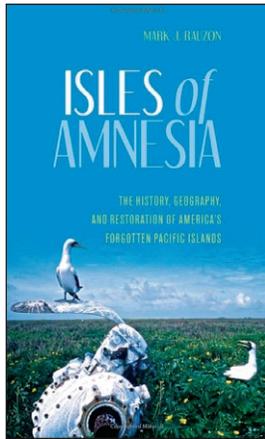
Isles of Amnesia is an intimate portrait of islands that have served as way stations for an amazing range of human use and abuse, from guano mining to feather poaching to weapons testing, and Rauzon has dug up some fascinating history. This patchwork tale of colorful characters and skullduggery is knit together by the author's in-the-trenches account of what it's like to be a conservation biologist ridding damaged islands of their most damaging invasives. (At the top of the list are rats and cats.) As Rauzon puts it, with typically wry humor, his book is "the confession of an 'island rat' using lethal force to correct ecological problems in paradise."

Rauzon, who also confesses to being a cat lover, fell into this line of work after getting a job doing rodent control soon after leaving college with a biology degree. An Alaskan boat trip and his first sighting of an albatross pointed him toward a lifelong study of Pacific seabirds and their island habitats.

Little did he know these two vectors would coalesce in a career as an "eradication expert" who has been working in the Pacific islands for the last 30 years.

As a dedicated seabird biologist, Rauzon has had to learn to shift focus from individual species to the fabric of an entire island; in his words, he had to learn to "kill with compassion for the sake of the ecosystem."

He launched his career as an eradicator in 1982 on Jarvis Island, an uninhabited



American possession that is part of the Line Island archipelago. (With the exception of America Samoa's Rose Atoll, Guam, and Kiritimati, all the islands Rauzon writes about are now part of the U.S. Pacific Remote Islands Marine National Monument.) Its 1,100 acres, which lie nearly on the equator, once supported "one of the largest [seabird] colonies in the tropical ocean."

Rauzon estimated that "the Jarvis population of about 115 cats could eat approximately twenty-five thousand birds a year and had already exterminated six species of seabirds from the island." Doing the job required a certain amount of talking himself into it: "The only real way to restore the balance of nature," he reasoned, "was to kill all the cats – if possible." To accomplish this Rauzon, along with biologist David Woodside, had to become "crepuscular," baiting live traps and stalking with flashlight and shotgun. By the end of their month on Jarvis, a few cats still eluded them.

Over the next two decades the last cats were hunted down and seabird numbers exploded, with the six species that had disappeared from the island establishing new colonies. Jarvis became once again what any bird biologist worth his salt will endure extreme heat and no shade to witness: something akin to the original vital ecosystem, in all its odorous, gloriously winged life. In Rauzon's words, "The primal nature of a full seabird colony, replete with all its species, has an old-growth feel, a ... wholeness, integrity to it."

Unfortunately, few eradication challenges are as straightforward as ridding tiny, treeless Jarvis of cats. Rats have invaded 90 percent of the world's islands, taking a huge toll on land and seabirds. Poisoning them is at this point the only effective method. Rauzon notes that "New Zealanders were pioneering aerial broadcast applications of bait (most commonly an anti-coagulant called brodifacoum)" that were "lethal at one feeding." Kiwi efforts proved that if you could afford helicopters and all else that goes with a campaign of military proportions, large temperate islands could be made safe for some of the country's rarest birds. (Aotearoa has now tackled some of its largest uninhabited islands, including Campbell, which, at 27,000 acres, is almost as large as Kaho'olawe.)

But tropical islands are a different kettle of fish: witness Palmyra Atoll, a lush, emerald-lagooned paradise with hellish conditions for rat-baiting. Rauzon, who combines a biologist's acute eye with that of an artist (his wonderful drawings and photographs illustrate *Isles of Amnesia*), contrasts the atoll's inshore beauty — "beryl green waters," "Persian rug coral reefs" — with the steamy tangles of its rat-infested interior.

Rauzon's first trip to the atoll was to assess results of an earlier attempt by pioneer federal pest controller Jim Murphy at eradicating rats through a nightmarish task of laying out 1,198 bait stations along 36 miles of transects, bushwacking through sharp screw-pines and fallen palm fronds, "while stumbling on rusty metal spikes and unexploded ordnance left over from World War II was also a possibility." The huge effort was a failure, Rauzon relates:

"Some rats nested in the tops of the palms and didn't come down to eat. ... In the pervasive wetness, bait would mold, melt, or simply disappear before rats had a bite to eat."

A decade later, a well-funded effort that included two helicopters and a work crew of 40 blanketed both ground and tree-tops. In the thick forest, a "dope on a rope" suspended from a hovering chopper dropped packets of bait directly into the palm crowns.

This time, success. Palmyra, Rauzon writes, "is now ready to be the ark of the Pacific," capable of harboring endemic birds that are elsewhere barely hanging on in their home islands.

Some of those home islands are beyond hope of restoration, at least with current methods and levels of funding and indifference from officialdom. For Rauzon,

Wake Island, Johnston Atoll and Guam are studies in hope and heartbreak. On Wake, Rauzon's team worked to rid the island of cats in the midst of a military base whose personnel responded to the effort with indifference or, as it turns out, justifiable anxiety about the rats taking over.

Had the funding been available, the rats would have been tackled at the same time. A decade later, in 2012, Rauzon was back on the island to help with "the most ambitious eradication in Department of Defense experience." This effort, the biologist claims, would be "the largest commensal (meaning among people) rodent eradication in history, and it had to succeed to prove that rat eradication in a peopled situation could be done."

Midway Atoll's Sand Island — admittedly not as large as Wake — was rid of rats in the midst of an ongoing base closure operation in 1996. But at Midway, both the U.S. Fish and Wildlife Service and U.S. Navy staff committed to the task over a period of time, whereas at Wake the rat team was given a narrow window to fly in and do

the job, with no encouragement or funds to follow up. Perhaps for those reasons, the Wake eradication failed.

As Rauzon makes clear, the damage rats do to island birds is only a part of their destructiveness. The endemic palm forests of Rapa Nui, as well as those of Hawai'i, were devastated by introduced rats and mice eating the seeds. *Isles of Amnesia* focuses on the dangers to island birds, but in fact most islands are burdened by multiple invasives — plants, insects, animals, even microbes — and removal of one pest species can cause unforeseen consequences. At Wake, the severe culling of rats meant the seedlings of invasive ironwoods flourished uneaten, and the forest is rapidly taking over seabird nesting habitat.

Island conservation under the best of conditions can seem like an advanced game of "whack-a-mole," and Rauzon's quick overview of the situations on Kiritimati and Guam suggests that under the worst it can be near-impossible. Kiritimati, home to the highly endangered bokikokiko (Christmas Island warbler) as well as feral cats and rats,

is part of a tiny island nation hampered by lack of funds and a population outstripping its meager resources.

I would have liked to see Rauzon explore more rigorously the reasons conservation is losing ground on islands such as Wake and Guam that are under the jurisdiction of a wealthy nation (the United States). In Guam's case, where military bases now occupy 29 percent of the main island and the build-up continues, efforts to restore the environment and stop the spread of invasives appear to have been woefully inadequate.

In Rauzon's too-brief snapshot of a place afflicted with the brown tree snake, one of the Pacific's worst invasives, I was left not knowing whether to hope or despair for the few endemic plants and animals that remain.

Rauzon is a terrific storyteller and he is mining a rich vein in portraying these islands, but the supremely important work he has played a part in deserves a fuller treatment.

— *Pamela Frierson*

'Aina Le'a from page 1

also the individual commissioners.

The settlement in the Bridge case came just weeks before jury selection was set to begin on August 1. On July 5, the parties notified Judge Susan Oki Mollway that mediation was successful.

The state Legislature must still approve payment, and the court noted that "such approval is not likely until, at the earliest, late May 2017." "To allow time for legislative approval, receipt by plaintiff of the settlement check, and submission of the stipulation to dismiss," the judge closed the case until September 1, 2017, when she will entertain a stipulation to dismiss.

But lest anyone think this puts paid to litigation over the issue of rights and entitlements to develop the land in South Kohala lying between the Mauna Lanii resort and Waikoloa Village, well, another lawsuit is looming on the horizon, one in which the aggrieved parties claim damages, as a result of the LUC's action, far in excess of those Bridge had attempted to recoup.

A Proposed Deal

The state was put on notice of the new claims in a letter last February from Michael Jay Green, a Honolulu attorney representing DW 'Aina Le'a Development, LLC, and Asian investors in a land trust that holds an ownership interest in some of the

Urban land.

According to Green, direct damages attributable to delays brought about by the LUC action include an increase of \$14 million in the price his clients had to pay for the Urban land; financing costs of \$27,746,664; "the carrying over of operations ... of \$8,160,392;" payments to the general contractor of \$7.2 million during the work stoppage caused by the LUC action; "interest on the land value ... in excess of \$23,701,920;" and additional legal and accounting costs in excess of \$1 million."

All that comes to \$81.81 million.

But over and above that, Green says, "the damages for 'goodwill and reputation' are very large. The damages to DW 'Aina Le'a Development, LLC, Asian marketing program is extensive. The damages for the delay in the public offering for DW 'Aina Le'a Development, LLC, subsidiary is excessive. Once documented, these damages and others which can be claimed will be in excess of \$200 million."

DW 'Aina Le'a Development (DWAL) is not the landowner. Rather, it has shares in 'Aina Le'a, Inc. (henceforth, ALI), the company that does hold title to about 1,011 acres of the Urban District land subject to the LUC action.

(The remainder of the Urban lands consists of about 27 acres, zoned commercial by Hawai'i County, that are still owned by Bridge, and 61 acres, more or less, owned

by 'Aina Le'a, LLC — a related company — and 1,139 individuals in Singapore, Malaysia, and other Asian capitals who have purchased, collectively, more than 1,700 undivided land fractions, or ULFs, giving them partial title.)

On behalf of Robert Wessels, president of 'Aina Le'a, Inc., Green has offered a deal to the state to avoid, in his words, "the turmoil of further litigation."

"Mr. Wessels initially has three proposals," Green wrote, "which will allow 'Aina Le'a, Inc., to partially compensate the DW 'Aina Le'a Development, LLC members and the Asian 'Aina Le'a Land Trust.

A \$77 Million Bond

The first proposal is to have the state "arrange the purchase of the Ziegler Securities Offered \$77 million construction development bond at a rate yielding the state 2 percent or less." It is unclear if Wessels intends the state to purchase the bond and then turn the bond proceeds over to him to fund his construction, with Wessels paying the state 2 percent or less in interest. In that event, the state would have to pay Ziegler whatever interest rate Ziegler charges — which, presumably, would be significantly greater than 2 percent.

Reference to Ziegler popped up in the quarterly report of ALI with the Securities and Exchange Commission filed last February. The company stated it had "negotiated

a \$77 million bond issuance through the investment firm Ziegler Capital Markets.” Contrary to the representation in the Green letter that the bond was to pay for construction, the quarterly filing identifies its purpose as “to pay off the ULF investors.” In addition, the bond is to close only “upon the guarantee of Certificates of Occupancy by Hawai'i County,” the SEC filing states. If funds remain after paying off the ULF investors, the quarterly report says, they will be used to finance the other developments planned for the 61-acre parcel.

The second proposal calls for the state to, “within four months and upon full approval, ... arrange the purchase of \$125 million of Community Facility District [CFD] bonds for the ‘Aina Le’a project.”

In Hawai'i, the County Council can authorize CFD bonds for specific projects; these permit the costs of infrastructure to be paid off by future landowners who are the presumed beneficiaries of the work. Ten years ago, Bridge initiated the process for obtaining CFD bonds and the County Council gave the initial approval, but that effort fizzled out. Wessels attempted to revive it three years later, but again, the process was not completed. CFD bonds are paid off through property tax assessments, collected by the county. It is unclear what role the state could have in arranging a CFD, as Wessels is proposing here.

The third proposal involves the state establishing a tax improvement district for

the South Kohala area to improve “beaches, the roadways, etc.” Allocated to this fund would be “at least one-half of the taxes paid to the state by the ‘Aina Le’a Community Development.” Since property taxes are paid to the county (not the state), and it is the county that has the authority to establish tax improvement districts, it is again not clear what mechanism is available to the state to deliver the relief Wessels is seeking.

Sources in the Attorney General’s office say that there has not been any letter sent in response to Green’s demands.

‘The Eveready Battery’

Wessels faces long odds in his efforts to move forward with the Villages of ‘Aina Le’a. In ‘Aina Le’a’s filing last month with the SEC on its operations for the year ended March 31, it reported how its own accounting firm had expressed concerns over the company’s viability and had stated that its “current liquidity position raises substantial doubt about our ability to continue as a going concern.”

The challenges ‘Aina Le’a faces are detailed in that July 14 filing.

First, there’s the financing obtained for the land purchases. Bridge paid just \$5 million for all 3,000 acres in 1998. ‘Aina Le’a, on the other hand, paid nearly that much — \$5 million — in 2009 just for the initial 61 acres, where it began to build 385 townhouses (to satisfy the affordable-housing component of the LUC redistricting conditions) and now

says it will build 48 “luxury villas” (“Whale’s Point”) and will develop 70 lots for sale to builders of single-family houses under a Planned Unit Development scheme.

Last November, ‘Aina Le’a closed on most of the remaining Urban land (1,011 acres) for \$24 million and has an option, good until November 2018, to buy the remaining 27 acres of Urban land, zoned commercial by the county, for \$22 million, bringing the land costs to at least \$51 million. (Over and above land costs, Bridge dunned ‘Aina Le’a for carrying costs also totaling several million dollars.)

Wessels has been innovative in the ways he has raised capital for the land purchases and infrastructure development. As mentioned earlier, ‘Aina Le’a sold fractional shares of the 61 acres to more than a thousand Asian investors. This “raised approximately \$44 million (before fees and commissions)” for the purchase and development of the 61 acres, the SEC was informed. The investors have been promised they will get their money back when Hawai'i County issues the first certificates of occupancy for the townhouses. To cover that payout, ‘Aina Le’a says, it has arranged the \$77 million bond from Ziegler.

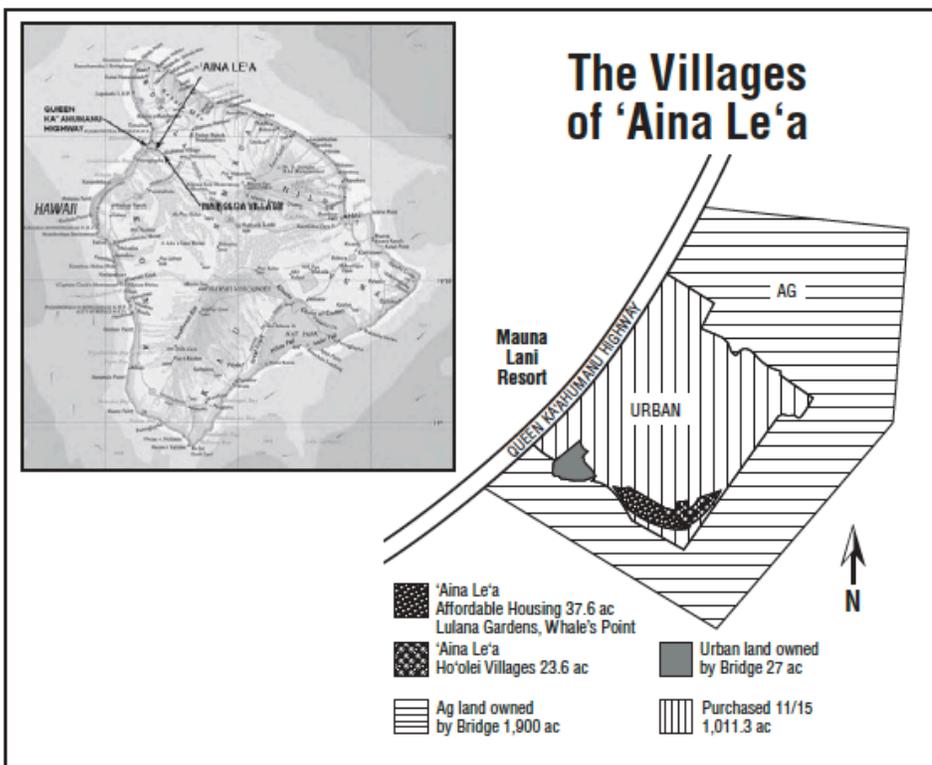
Much of the financing ‘Aina Le’a has received so far has come from China. In 2014, Shanghai Zhongyou Real Estate Group purchased \$16 million worth of shares in the company, which it says was used to finance purchase of the 1,011 acres of residential-zoned land. It also received a loan last November of \$6 million from Ms. Libo Zhang of Changchun City, secured by a mortgage on a part of the property. That loan comes due this November.

Finally, unable to come up with more than \$10 million of the entire \$24 million due Bridge for the sale of the property, ‘Aina Le’a gave a note to Bridge for \$14 million, at 12 percent interest. (As of mid-July, ‘Aina Le’a was in default on that loan.)

‘Aina Le’a is hoping to raise a minimum of \$17 million and perhaps as much as \$27 million through an initial public offering of up to 2 million shares. The deadline for closing that offering has been extended multiple times since it was announced last November, suggesting sales have not been robust. The most recent deadline for closing was set at July 31.

Altogether, the company reported it had liabilities totaling nearly \$63 million as of March 31, including almost \$20 million in short-term debt. This doesn’t include nearly \$40 million it owes to the ULF investors.

The fact that Wessels continues to



press forward with the projects, finding unorthodox methods of financing and ever new sources of capital, has earned him a kind of grudging admiration from Ho'olae Paoa of Bridge.

When he was being deposed by state deputy attorney general William Wynhoff last May, in anticipation of going to trial over Bridge's claims, Paoa was asked whether he thought Wessels would be able to exercise the option to purchase the 27-acre commercial property.

"We were just joking today," Paoa replied. "He's like the Eveready battery. One thing about Bob, he doesn't give up. I mean, he's been at this forever. And, you know, any other developer would have filed for bankruptcy or would have, you know, just abandoned the project. He hasn't."

Paoa suggested that the actual costs 'Aina Le'a faced in developing just the infrastructure and the golf course planned for the Urban land are far greater than what 'Aina Le'a has projected.

"You know, any other developer would have filed for bankruptcy or ... just abandoned the project."

— **Ho'olae Paoa**

In his deposition, as he was questioned about Bridge's plans for the property before it was sold to 'Aina Le'a, Paoa affirmed a statement Bridge made to the LUC in 2005 to the effect that the estimated cost of infrastructure and the golf course would come to roughly \$300 million, excluding the cost of the land itself.

The \$300 million would need to be sunk into the property before the first house could be built, Paoa said, "because you wouldn't want to have construction ongoing while you're selling homes because of the dust—you know, the problems, the accidents. You got major trucks, equipment, D9s, working the project. So, you want to have most of your infrastructure done prior to any sales of any market homes."

Wynhoff then asked Paoa: "So, basically, what you're saying ... is you're going to have close to \$300 million in costs before you can get a nickel out of the property?"

Paoa agreed.

Meanwhile, at the County

In a deposition given last March in preparation for the Bridge trial, Robert Wessels stated that work on the 'Aina Le'a site was ongoing. E.M. Rivera, the contractor, is "bringing the water in, the power. Bringing

the sewer and the sewer lines. The access road and the roadways between the — the 27 separate units, pads on which the townhouses are being built," Wessels said.

As to the status of construction, Wessels stated, "We have 16 units that we have completed a long time ago. ... We have another eight that are about 70 percent complete. And we have another — another 24 that are, the plumbing is in and things like this ..."

When asked if "vertical construction" of the planned townhouses was under way, Wessels said it wasn't and wouldn't be "until we've completed the infrastructure to the first units." This he anticipated to be done by last April. Wessels added that water service would be by means of a hook-up to the private company, Hawai'i Water Service, that serves Waikoloa Village.

Before much more can be done on site, however, 'Aina Le'a must complete the supplemental environmental impact statement, required as a result of a successful

legal challenge brought by the Mauna Lani Resort Association to the original EIS for the project published in 2010.

In his deposition, Wessels suggested that the supplemental EIS (SEIS) was just weeks away from completion, awaiting only the county's decision on whether it would "allow ['Aina Le'a] to mail it."

When asked to clarify, Wessels added: "The county has required us to do all the detail in the original, in the mailing to the public," Wessels said. "And there's been a lot of changes and delays that have been requested by the county filing."

According to Maija Jackson of the county Planning Department, she has not heard back from 'Aina Le'a's planner, James Leonard, since giving him comments months ago on a draft SEIS he had submitted to her agency.

A larger problem for 'Aina Le'a may be the failure of the developer to comply with a condition of zoning.

Condition C of the 1993 zoning ordinance (amended three years later) requires subdivision plans to be submitted and approved within five years of the zoning being approved. 'Aina Le'a was given an administrative extension several times over the course of the years since the ordinance

For Further Reading

Environment Hawai'i has published many articles over the years about the 'Aina Le'a development. Those published prior to 2014 are available for reading, free of charge, on our website, <http://www.environment-hawaii.org>. More recent articles are available free to current subscribers. Others may pay \$10 for a two-day pass to our complete online archive.

Here are several of the longer articles we've published on the subject:

- "Hawai'i Planning Director Questions Whether 'Aina Le'a Complied with Zoning Conditions," April 2016;
- "Whatever Happened to the Villages of 'Aina Le'a," January 2016;
- "Supreme Court Rejects Most Findings of Lower Court in 'Aina Le'a Appeal," January 2015;
- "'Aina Le'a Seeks Two-Year Extension of Deadline for Affordable Housing," October 2010;
- "Office of Planning: 'Aina Le'a Project Has Not Met, Cannot Meet LUC Deadlines," June 2010;
- "Under New Management, 'Aina Le'a Is Given Yet Another Chance by LUC," October 2009;
- "Two Decades and Counting: Golf 'Villages' at Puako Are Still a Work in Progress," March 2008.

was passed, but, according to Duane Kanuha, planning director, any further time extensions have to be approved by the County Council.

In the absence of the time extensions or compliance with any other condition, Kanuha is instructed to rezone the property "to its original or more appropriate designation."

Alan Okamoto, an attorney for 'Aina Le'a, has asked Kanuha to reconsider this determination. As of press time, no response had been sent.

— **Patricia Tummons**



Coming PUC Decision Could Make Ka'u Solar Projects Uneconomical

An outdated and overpriced tariff scheme. An entrepreneur who exploited loopholes in a law intended to benefit small farms. And a residential community that is seething over the prospect of more than two dozen photovoltaic arrays, intended to generate more than six megawatts, scattered across a rugged landscape that ranges from near desert conditions to dense 'ohi'a forest.

These are just a few of the elements that have combined to create a controversy over a renewable energy project in the remote subdivision of Hawaiian Ocean View Ranchos (HOVR) in the Ka'u district of the Big Island.

The solar projects were approved years ago as part of the so-called Feed-in Tariff (FIT) program. The intention was to give owners of small, "shovel-ready" renewable energy projects, including those on certain agricultural lands, a way to sell power to Hawaiian Electric utilities without having to engage in lengthy negotiations over terms of a power purchase agreement.

Beset by a host of problems, the FIT program has stalled out, for the most part. As of last year, just over 20 megawatts of FIT renewable energy had been installed, out of the 80 MW allowed statewide. No new FIT applications have been filed in years.

In the Ranchos subdivision, though, the problems associated with FIT projects proposed by one company are reaching a climax.

Although the projects were approved with effectively no opportunity for the public to weigh in on the matter, there's one last hurdle that needs to be overcome before the solar panels — 30,000 of them, more or less — can go up. The PUC must approve the request of the Big Island utility, Hawaiian Electric Light Co. (HELCO), to install an overhead 69 kV transmission line to carry the electricity they generate to a new substation in HOVR. The utility formally made the request last August in PUC Docket 2015-0229. A decision is pending.

If the commission decides that an overhead line should not be built, HELCO would then be left with no choice but to put it underground — at a cost that could, residents are hoping, be a deal-killer for the whole project.

'Inconsistent with the Public Interest'

The idea of building multiple small-scale solar arrays on state-designated agricultural lands, all qualifying for the special treatment afforded to FIT projects, may not have originated with Patrick Shudak, but he certainly ran with it. He bought or leased dozens of properties on O'ahu, Maui, and Hawai'i island, and proceeded to obtain building permits (as required by the FIT program) allowing his companies — Solar Hub and a number of subsidiaries — to erect the solar arrays.

Nowhere were the sites more concentrated than in the Ranchos subdivision. There, Solar Hub subsidiary Ohana Solar went on a buying spree, putting 20 three-acre lots in escrow and then placing them in the active FIT queue for mid-size projects. (Only 19 lots were eventually purchased, 18 in Ranchos and one in a nearby subdivision, Kula Kai. One owner apparently grew weary of waiting for Shudak to close and sold the land to another party.) Immediately to the east of the Ranchos subdivision, Solar Hub placed eight larger parcels of 21 acres each in the FIT queue.

FIT Tier 2 projects — the kind that Shudak proposed — were intended to be small-scale, with a capacity no greater than 250 kilowatts. To encourage participation in the program, developers on Hawai'i island were assured a payment of 23.8 cents per kilowatt hour, far above any negotiated rate for large-scale power purchase agreements. (Current PPAs call for around 14 cents per kWh.)

Shudak obtained loans for his purchases from SPI Solar, a subsidiary of SPI Energy. That parent company is based in Shanghai but last year moved its corporate headquarters to the Cayman Islands. In 2012, SPI acquired all of Shudak's projects and it is now working with HELCO to develop the required substation and power lines they require.

HELCO has claimed that the substation "will serve the entire Ocean View community," resulting in "better reliability and power quality." However, the anticipated load far exceeds the needs of the local area. According to HELCO, the projects will produce more than 700 percent of Ocean View's demand.

In addition, as many of the Ranchos residents have noted in their comments on

the PUC docket, they have not experienced any problem with HELCO's service at current levels — no flickers, outages, or other issues with reliability or quality.

In its statement of position (SOP) filed with the PUC, the Division of Consumer Advocacy raised many of the same points. "The FIT process was deemed necessary at the time to encourage renewable energy project development, but the need for FIT projects, at compensation rates that are no longer reasonable, may not be consistent with the public interest at this time," it stated in its filing of June 29.

The projects and associated infrastructure, the SOP continued, "could adversely affect the existing and future residents who live and/or will live next to or near the proposed FIT projects and associated infrastructure." Also, with 26 of the 27 projects "owned or controlled by the same entity/entities, these projects may have been an attempt to circumvent the competitive bidding process since the combined capacity of the 26 FIT projects in question exceeds the competitive bidding threshold for the island of Hawai'i." (For projects over 5 megawatts capacity, the utilities are supposed to engage in a process of competitive bidding to keep power costs low.)

The SOP went on to comment on certain irregularities associated with the overall process of approving FIT projects, echoing concerns raised by a number of Ranchos residents, 600 of whom signed a petition opposing the projects in their neighborhood. "At the time when FIT projects were being reviewed for possible approval, the Consumer Advocate placed significant reliance upon the established FIT process, which included the retention of an independent observer (IO) to help protect the public interest," the SOP stated. "At this time, however, the Consumer Advocate is concerned that the IO failed to properly address relevant issues ... [I]n reviewing the proposed Ocean View extension, the commission should take note of these issues related to the FIT projects and take the appropriate actions to protect the public interest."

Community Involvement

In an effort to allay possible PUC concerns over perceived indifference to the community's wishes, attorneys for SPI-affiliated companies filed with the commission a table showing the companies' efforts to address them.

Company representatives met with the community in June and July 2015, the attorneys note. Another meeting was scheduled

for September, but “a severe storm causing perilous road conditions prevented project representatives from being able to attend,” they state

In response to concerns that construction of the arrays would destroy stands of ‘ohi‘a trees on some of the lots, they wrote, “the 26 Solar Project Owners are working with the Hawaiian Agricultural Resource Center (HARC) in an effort to fund research to cure the deadly disease that is impacting ‘ohi‘a trees in the area” — an

A Failed Fix

State Rep. Richard Creagan, whose district includes the Ranchos subdivision, introduced in the 2016 regular session of the Legislature a bill that was designed to prevent the development of large-scale solar energy production in residential subdivisions on land in the state Agricultural District.

House Bill 2636 would have amended Chapter 205 of Hawai'i Revised Statutes to require a special permit be issued by Hawai'i County for solar projects on Ag

View situation.” “The district of Puna, near Hilo, has many huge non-conforming subdivisions, such as Hawaiian Acres, Eden Roc, Fern Forest, Hawaiian Paradise Park, Hawai'i Beaches Estates, Aina Loa Estates, Orchid Land Estates, Leilani Estates, Nanawale Estates, Vacation Lands, Kalapana Black Sands, Kalapana Gardens, and Kalapana Sea View Estates. Any one of these could fall victim to being industrialized,” they wrote.

The bill made it through to the waning days of the Legislature, but then failed to move out of conference.

Land Control

To qualify for a place on the FIT queue, developers had to secure control of the land where their project would be sited for at least 20 years, either through a lease or outright ownership.

In most cases, SPI subsidiaries own the land outright. However, eight of the projects have been proposed for large, 20-plus-acre lots in a paper subdivision called Kona South Estates, immediately to the west of Ranchos. The subdivision has no built roads and no legal access to any of the stub-outs of roads from the Ranchos subdivision.

The lots are owned by the Doolittle Trust, which purchased them in April 2013. Neither the Hawai'i County Department of Finance nor the state Bureau of Conveyance has any record on file of an encumbrance on the Doolittle lots in favor of SPI or its subsidiary South Point FIT, LLC. The deed conveying ownership mentions no qualifications or encumbrances other than the standard ones regarding mineral rights and Native Hawaiian rights.

Enrollment in the FIT program did not require outright ownership, but it did require, in the absence of ownership, a letter of intent from the owner committing to a lease of 20 years, the expected lifetime of the solar array.

Ann Bosted notes that this letter “has to be renewed every three months.... HELCO claims these letters exist,” although it has not disclosed them to Bosted. If the developer were to have complied with those terms, there should be four years' worth of such letters in HELCO files — for each of the eight lots — from the two owners of record of the properties since 2012.

Environment Hawai'i asked one of the attorneys representing the SPI companies to explain the nature of control that its clients have over the Doolittle lots. No reply had come by press time.

— *Patricia Tummons*



Work has begun on the first FIT installation in Hawaiian Ocean View Ranchos — the only site not controlled by Solar Hub.

apparent reference to rapid ‘ohi‘a death (ROD) caused by the fungus *Ceratocystis fimbriata*.

HARC has not been a major player in the full-on effort to investigate ROD, but has been following the work of scientists and researchers on the Big Island who are heavily involved.

Blake Vance, assistant director of HARC, told *Environment Hawai'i* that although it had been working with SPI on the construction of two photovoltaic assemblies on HARC property on O‘ahu, it had not done anything with SPI in relation to rapid ‘ohi‘a death and had received no funds from the company for that purpose.

Scientists on the Big Island who are heading up research into ROD told *Environment Hawai'i* that they had never heard of the company or its Ka‘u projects, much less had they received any support from SPI.

lands whenever the total capacity exceeded 25 kilowatts.

The Department of Agriculture opposed it, stating that the only benefit would be to “non-conforming residential uses” on Ag land. The Office of Planning opposed it as well, favoring instead “a more comprehensive land use reform.”

Ann and Peter Bosted, Ranchos residents who have been among the leaders of the opposition to the SPI projects, testified that the 2011 law allowing solar projects on less productive ag lands — the same law that paved the way for Shudak’s buying spree — had been aimed at “bona fide agricultural land owners and lessors, not a huge international corporation buying three-acre housing lots that happen to be zoned ‘agriculture’ and installing 27 three-acre solar installations among homes.”

Contrary to critics of the bill who objected to its narrow focus, the Bosteds noted that it was not only about the “Ocean

Recent Court Rulings May Complicate State's Ability to Grant A&B a Holdover

House Bill 2501 invites litigation.” That succinct reply was all Native Hawaiian Legal Corporation (NHLC) attorney David Kimo Frankel provided *Environment Hawai'i* when asked back in May whether a holdover of water rights granted in accordance with the bill could be challenged, given the requirement that it must comply with the public trust doctrine.

Determining whether or not a water diversion is in accordance with the public trust doctrine is something that can take more than a decade to ultimately resolve, as Frankel's client, Na Moku Apuni o Ko'olau Hui, is well aware. In 2001, Na Moku and the non-profit Maui Tomorrow requested a contested case hearing over Alexander & Baldwin's request for a lease to continue its century-long diversion of dozens of East Maui streams. The groups argued, among other things, that the diversion violated the public trust doctrine. The case is still ongoing.

A lawsuit over the state Board of Land and Natural Resources' December 2014 renewal of holdover permits to allow A&B's diversions to continue pending a final decision on the company's lease application resulted in a 1st Circuit Court ruling in January that those permits were invalid. The court later granted an injunction to the Maui Department of Water Supply to ensure that the county's portion of diverted water — around eight million gallons a day — continues to flow. However, A&B did not receive, nor did it ask for, such relief.

Despite the injunction, the state Legislature worried that the county's water supply was still in danger. To keep the water flowing to the tens of thousands of residents in Upcountry and Nahiku, as well as to A&B's agricultural fields in Central Maui, the Legislature passed HB 2501, which gives the Land Board the ability to authorize annual holdovers of water rights for up to three years pending the resolution of a lease application for that same water.

“[N]ot continuing [A&B's permits] could result in people being left with no drinking water, farmers being left with no water for their fields, and schools and hospitals being forced to shut down,” the Legislature's conference committee stated in its report on the final version of the bill.

The committee also noted that A&B's

planned transition from sugarcane to diversified agriculture could be jeopardized without affordable, sufficient water. “Embracing this transition is in line with the state's constitutional duty to conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. Currently, there are 27,000 acres of Important Agricultural Lands (IAL) whose status may be threatened if water rights were terminated,” the report stated, noting that the IAL law states that if water is insufficient to allow for profitable farming, a landowner may seek to remove the IAL designation.

Many of the bill's critics have suggested that it all but guarantees that A&B and its subsidiary, East Maui Irrigation Co., Ltd. (EMI) will be allowed to continue the diversions at least until its water lease application is resolved.

But now that the bill has become law (Act 126), will A&B and EMI actually be granted such a holdover while the state Commission on Water Resource Management inches toward a decision on flow standards for those streams and while the companies work toward completing a long-overdue environmental impact statement for the proposed lease? Will they even need one?

Shifting the Burden

Even though 1st Circuit Judge Rhonda Nishimura declared their permits invalid, A&B and EMI have continued to divert water from East Maui and neither the Department of Land and Natural Resources (DLNR) nor the Land Board has moved to stop them. The DLNR has continued to receive payment for the water, according to department staff. What's more, statements by Land Board members during oral arguments on June 24 in the contested case regarding A&B's lease application suggest that the board will likely allow the diversions to continue unless ordered by the court to do otherwise.

During those arguments, which centered largely around a request Na Moku made in April that the board halt the diversion of water for commercial uses, Land Board member Chris Yuen asked NHLC counsel Summer Sylva why her clients had not asked the court to issue such an order. Sylva stated that was an option, but because A&B hadn't

yet completed an environmental assessment (EA) or impact statement (EIS) for its lease application, the burden of supplying an evaluation of the diversions' harm to her clients “is shifted improperly, we believe, to us, to Na Moku, when that burden should properly sit with the diverter.”

Yuen seemed uncomfortable ordering the return of water to streams that are part of a related contested case hearing before the Commission on Water Resource Management on amendments to the interim instream flow standards (IIFS) of 27 streams that Na Moku says it relies on for traditional and customary Hawaiian practices.

“I'm a person that likes to do things in an orderly way. And it seems to me the orderly way of dealing with this is to wait for the IIFS to come out, and then we know what is the minimum [amount of water] that could possibly be awarded under a lease after that. And then we take up the question of the lease application,” Yuen said. “In the meantime, they're [A&B] working on whatever elements of the EA or EIS that can be done without knowing the maximum amount of water that could possibly be taken out under a lease.”

When asked by Sylva what he thought the basis was for A&B and EMI's continued use of its diversions, Yuen replied, “I believe that it's the RP [revocable permit].”

“But they have been invalidated,” Sylva said.

“But there has been no injunction,” Yuen replied. “I'm correctly stating the state's position, right? That there has not been an injunction issued, and that the state disagrees with the invalidation of the RPs and it's on appeal. Am I ...”

“That's correct,” interjected deputy attorney general Linda Chow, who is representing the Land Board in its appeal of the 1st Circuit Court's ruling.

“That's where we part,” NHLC attorney Alan Murakami said. Without a stay of the court's ruling, there is no legal authority for the diversions, he argued. “I find it somewhat disingenuous to then throw the burden on us to say, well, you didn't get an injunction [and] troubling that the lack of an injunction should preclude you from doing the right thing,” he said.

By mid-July, neither A&B nor EMI had requested a holdover under Act 126, according to a review of permit files at the DLNR's Land Division. Neither company had sought an injunction or stay to forestall enforcement of the 1st Circuit Court's ruling, either.

East Maui Irrigation Co. Returns Some Water to East Maui Streams

Hawaiian Commercial & Sugar Co. representatives have said it will be depriving its final sugarcane crop of water during the latter half of this year. So what's happening to all of the tens of millions of gallons of water normally diverted by East Maui Irrigation Co. (EMI) to feed HC&S's fields? Is it being wasted?

While that is difficult to know without actual measurements, a chart provided to the Commission on Water Resource Management on June 15 by attorney David Schulmeister suggests that for more than a dozen of the streams that feed the EMI system, the company has fully opened or removed sluice gates along some of the ditches and in some cases also closed stream intake gates.

Dozens of streams feed into EMI's ditch system and the Water Commission is in the midst of a contested case hearing to determine the interim instream flow standards of about two dozen of them. Alexander &

Baldwin, EMI's and HC&S's parent company, has committed to permanently restoring several of those that are most important to East Maui residents for agricultural,

domestic, and cultural uses.

The non-profit group Maui Tomorrow, which is a party to the contested case, has suggested that merely opening a sluice gate may be insufficient when the gate is too narrow to allow peak stream flows to pass through, and EMI does plan to further modify a number of its diversions once it receives all necessary regulatory approvals.

— T.D.

Stream	Status as of mid-June, according to Alexander & Baldwin
Honopou	Sluice gate fully opened on Wailoa & Lowrie ditches. Stream intake gate closed on Lowrie ditch. Projects to modify diversions on the New Hanakua and Haiku ditches pending regulatory approvals.
Puolua	Sluice gate fully opened on Haiku ditch. Projects to modify stream diversions on Lowrie and New Hamakua ditches pending regulatory approvals.
Hanehoi	Sluice gate fully opened on Haiku ditch. Projects to modify stream diversions on Lowrie, New Hamakua, and Wailoa ditches pending regulatory approvals.
Pi'ina'au	Project to seal intake pending regulatory approvals.
Paluahulu	Sluice gate fully opened on Koolau ditch.
Waiokamilo	All Waiokamilo diversions closed and sealed in 2007 (6/7/2007 to 6/14/2007) per Land Board order.
Kualani	N/A
Wailuanui (East and West)	Both East and West Wailuanui sluice gates removed on Koolau ditch. Stream intake gates closed.
Makapipi	Sluice gate fully opened on Koolau ditch.
Hanawi	Sluice gate fully opened on Koolau ditch.
Waiohue	Sluice gate removed on Koolau ditch. Stream intake gate closed.
East Wailuaiki	Sluice gate fully opened on Koolau ditch. Stream intake gate closed.
West Wailuaiki	Sluice gate fully opened on Koolau ditch. Stream intake gate closed.
Walkamoi	Sluice gate fully opened on Center ditch.
Kopiliula	Sluice gate fully opened on Koolau ditch. Ditch control gate closed on Koolau ditch.
Puakaa	Sluice gate removed on Koolau ditch.

One-Two Punch

Given the divide between the Land Board's and the NHLC's positions on what the board is legally required to do, Frankel sent a letter on June 27 to board chair Suzanne Case, state Attorney General Douglas Chin, and Chow informing them of Na Moku's intent to sue the board, the DLNR, Case, and Chow in 60 days for "egregious breaches of their trust duties." The letter, also addressed to A&B attorney David Schulmeister, stated that the NHLC intended to sue the company within 45 days for failing to obtain government approvals required under state laws regarding the use of public land.

A&B and EMI have been diverting water from East Maui streams without any authority or any need and causing damage to public trust resources, Frankel wrote. (The NHLC has argued that the companies don't really need the stream water because, first, HC&S's sugarcane currently needs no water, and second, the company has an adequate supply of well water.)

State agencies and officials "appear to be completely unaware of their affirmative duties," he continued, citing the state constitution as well as a litany of court decisions, including the Hawai'i Supreme Court's decision voiding the Conservation

District Use Permit granted by the Land Board for the construction of the Thirty Meter Telescope on the slopes of Mauna Kea, a place considered sacred by many Hawaiians.

Na Moku plans to seek declaratory and injunctive relief, as well as damages and attorneys' fees, unless the state takes steps "consistent with that of a prudent landlord and trustee," Frankel stated.

In a follow-up letter to Case on June 30, Frankel requested on behalf of his clients a contested case hearing on any efforts to grant A&B a holdover pursuant to Act 126. He argued that it would be "nothing short of outright lawlessness and defiance of the Hawai'i Supreme Court" if the board granted a holdover without the requested hearing. "Simply stated, sequence matters," he wrote.

In addition, Na Moku and East Maui residents Sanford Kekahuna, Lurlyn Scott, Healoha Carmichael, and Lezley Jacintho are asking that the Land Board give NHLC at least five days' notice before it considers granting a holdover to A&B and EMI, require an EIS, and comply with its duties pursuant to the public trust doctrine.

A holdover would prolong the harms to native Hawaiians who use the streams for

growing taro, gathering, and recreation, Frankel wrote. "In addition, gates and locks used by A&B and EMI improperly obstruct Native Hawaiians' access to gather, hike, even malama the 'aina and kahawai located on these 33,000 acres. ...

"Approval at this time would violate due process, HRS Chapter 343 [Hawai'i's environmental review law], Article XII section 7 of the Hawai'i State Constitution [which protects traditional and customary rights], and the public trust doctrine," Frankel wrote, referencing specifically the Hawai'i Supreme Court's decisions overturning Conservation District Use Permits issued by the Land Board for telescopes on Haleakala on Maui and Mauna Kea on Hawai'i island. The court made clear in both cases that the board must hold a contested case hearing before making a decision on something that harms native Hawaiians' ability to exercise rights protected by Article XII, section 7, he stated.

Frankel further cited recent statements made by Environmental Court judge Jeannette Castagnetti, who is presiding over Na Moku's appeal of a Land Board decision in December 2015 that reaffirmed the holdover status of A&B's and EMI's

permits. The Land Board granted A&B and EMI holdovers for years, but the NHLC has contended that they have long since expired.

While Castagnetti has not yet ruled on the merits of the board's decision to reaffirm the holdover, she stated during a June 9 hearing that by its action, the board effectively approved the prior holdover decisions, which authorized A&B and EMI to continue using state land and diverting stream water. Had the board not affirmed or reaffirmed the holdover status, the permits would have expired on December 31, 2015, and A&B/EMI arguably would not have been authorized to use the land and divert the water, she continued.

"The court concludes that a hearing was required by law," she said.

The Public Trust

In addition to Frankel's arguments about contested case hearings, he also cites several passages in a 2014 state Supreme Court decision in a case regarding a Kaua'i bottler's diversion of water. The court recognized four public trust purposes: maintenance of waters in their natural state, domestic water use, the exercise of native Hawaiian and traditional and customary rights, and the reservation of water "enumerated by the state Water Code." The court specifically noted that private commercial use is not protected by the public trust and that "a higher level of scrutiny is therefore employed when considering proposals for private commercial use."

"The applicant is obligated to demonstrate affirmatively that the proposed use will not affect a protected use," the court stated, adding that the applicant's proposed use must be denied if the applicant fails to prove that it has no practicable alternative water source.

Frankel argued that there is no evidence that the holdover would not harm public trust purposes and also no evidence that A&B lacks alternative water sources. "In fact, A&B has its own, private groundwater sources from which it pumps regularly to fill its needs," he wrote.

"Without further factual findings, the holdover violates the constitution and cannot be authorized," he stated.

In contrast, the state claims in filings with the Intermediate Court of Appeals that the Land Board did all the analysis required under Act 126 nearly a decade before the law was passed. The new law sets requirements for the Land Board to authorize a holdover, wrote deputy attorney general Chow in a filing last month: 1) that an application

be made for a lease; 2) the application is to continue a previously authorized disposition of water rights; and 3) the holdover is consistent with the public trust doctrine. With regard to the first two requirements, Chow notes that A&B is seeking a lease to continue its diversions. With regard to the third requirement, Chow states that in 2007, the Land Board "affirmed that the holdover of the revocable permits was based on the public trust and recognized in particular the need to protect domestic water uses by Maui County."

"Other reasons cited by the board include the impact it would have on Maui Land and Pineapple's [MLP] economic viability, the continued economic viability of HC&S and EMI and the resulting loss of over 800 jobs on Maui, and the reduction in Maui Electric Company's ability to provide electricity service to its customers based on the electricity by HC&S's operations," she wrote. Today, some of those "other reasons" no longer apply, since MLP closed in 2009, HC&S will close its operations at the end of the year, and the power purchase agreement between HC&S and Maui Electric was terminated in January.

Chow noted that the Land Board in 2007 recognized the water needs of native Hawaiian taro farmers in Wailuanui valley and ordered that more water be restored to Waiokamilo stream.

"The fact that the holdover decision was made in 2001 and affirmed in 2007 does not affect the applicability of Act 126. The board has fulfilled all of the requirements of Act 126. When the board's decision to put

the revocable permits into holdover status is reviewed by this court, it must be reviewed under the lens of the current law. The current law allows for the action that was taken by the board in putting the permits into holdover status," she wrote.

Chow failed to note, however, that Act 126 requires that holdovers be approved annually and that they not exceed three years in total. The holdover permits that had been invalidated by the 1st Circuit Court had been renewed annually for more than a decade.

Even so, A&B's Schulmeister and co-counsel Elijah Yip made similar claims in a filing with the appellate court. "The Legislature recently validated the legal basis by which the BLNR maintained the status quo pending resolution of the Water License [contested case hearing]," they wrote. In any case, they present arguments suggesting that Act 126 is superfluous.

"If a state agency is to carry out public trust duties, it must have the powers of a trustee. Legislative enactments do not limit the exercise of public trust powers," they wrote. They, too, make reference to the Hawai'i Supreme Court's decision in the TMT case, which referenced the Kaua'i Springs case: "As the public trust arises out of a constitutional mandate, the duty and **authority** of the state and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the Legislature. [Emphasis is added]"

— *Teresa Dawson*



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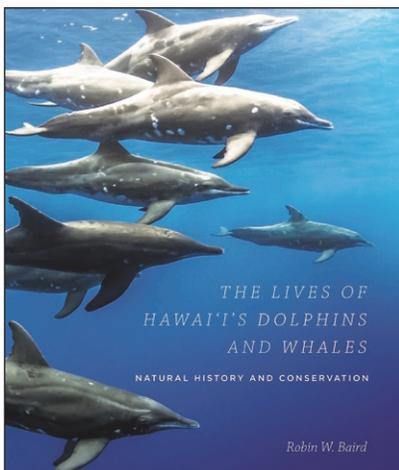
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For Further Reading

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

- "Land Board Set to Hear Arguments In Dispute Over A&B's Water Lease," June 2016;
- "Water Commission Chair Reopens Case On Interim Stream Flows in East Maui," April 2016;
- "Recommendation of Hearing Officer Favors Restoration of East Maui Streams," and "Despite Invalid Permits, Lack of Stay A&B's East Maui Diversions Continue," March 2016;
- "Hawaiians Seeking Stream Restoration Challenge 'Holdover Status' of Diversion," and "Impending HC&S Closure Raises Questions About Future of East, West Maui Diversions," February 2016;
- "Judge Stays Ruling to Invalidate Permits for Maui Stream Diversion," EH-XTRA, February 2, 2016;
- "Hawaiian Farmers, Cultural Practitioners Demand Environmental Review for East Maui Water Diversion," May 2015;
- "Appeals Court Orders Contested Case in East Maui Water Dispute," EH-XTRA, November 30, 2012;
- "Water Commission Inaction Frustrates Legal Appeal of East Maui Stream Decision," November 2011;
- "Water Commission Denies Hearing on Flow Decisions for East Maui," November 2010;
- "Water Commission Amends Flows for Six of 19 East Maui Streams," July 2010;
- "Water Commission Defers Vote on East Maui Stream Restoration," March 2010;
- "Water Commission Amends Standards for Six Diverted East Maui Streams," and "Land Board Resumes Discussion of Diversion of East Maui Water," November 2008;
- "Land Board Orders EMI to Release Water to Meet Needs of East Maui Taro Farmers," May 2007;
- "Commission Gains Funds, New Tools to Pin Down Water Use, Stream Needs," September 2006;
- "Ex-Judge Says East Maui Farmers Don't Need More Water for Taro," August 2006;
- "East Maui Taro Farmers May Receive Interim Relief From Water Diversion," December 2005;
- "Water Commission is Urged to Look at Lessons from Mono Lake Dispute," August 2005;
- "While Commission Ponders Stream Policies, Communities Make Headway With Petitions," February 2005;
- "Board Talk: Land Board Favors EMI Water Diversion," March 2003;
- "Board Talk: East Maui Water Dispute Heats Up with Hearing Officer's Recommendation," January 2003;
- "Board Talk: Contested Case on Renewal of EMI Water Permits," July 2001;
- "Battle Looms Over Waters Diverted from East Maui Streams" and "Complex Legal Issues Surround A&B's Taking of East Maui Water," August 1997.

Book now to join our annual celebration!



Robin Baird, perhaps the world's foremost expert on false killer whales and other whale and dolphin species around the Hawaiian islands, will be the featured speaker at Environment Hawai'i's annual dinner.

Baird, who has studied these cryptic animals for the last 17 years, will be speaking on the topic, "Conservation and Management of Hawai'i's Whales and Dolphins." His book, *The Lives of Hawai'i's Dolphins and Whales*, will be published later this year by the University of Hawai'i Press.

Much more information about Baird's work may be found in the Cascadia Research Collective's website, www.cascadiaresearch.org.

Date: August 21, 2016 (Sunday)

Time: 6-8:30 p.m.

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