

# Environment



# Hawai'i

a monthly newsletter

## Effluenza

When it comes to making land productive, water is key. And in the area of O'ahu where the state seems to be targeting its agricultural land-banking efforts, the kind of clean water needed for irrigating edible crops is in short supply.

All that could change, however, if the Agribusiness Development Corporation is able to move forward with its big plans to help get the state Department of Health to classify effluent from the Wahiawa treatment plant as R-1 water.

It won't come cheap, but then again, neither has the land; as Teresa Dawson reports, the state has committed more than \$100 million toward improvements and the purchase of acreage in this area in hopes of turning Whitmore Village into the island's agricultural hub.



Former Galbraith Estate lands managed by the state Agribusiness Development Corporation.

## Agribusiness Corporation Eyes Effluent To Irrigate Former Galbraith Estate Lands

With its proposed Wahiawa Reclaimed Water Irrigation System, the state Agribusiness Development Corporation (ADC) may finally end the City and County of Honolulu's practice of dumping effluent from the Wahiawa Wastewater Treatment Plant (WWTP) — without a National Pollutant Discharge Elimination System permit — into Lake Wilson and Kaukonahua Stream by diverting the treated wastewater to water-deprived agricultural lands in North-Central O'ahu. If successful, not only will the project finally put to good use high-quality effluent that the city has spent nearly \$30 million in plant upgrades to achieve, it may also expand the potential uses of water from Lake Wilson and ensure that thousands of acres of land — which public agencies have committed roughly \$100 million to purchase and improve in recent years — have a secure, ample, and unrestricted water source.

"Our whole mission on this is to take R-1 water out of Lake Wilson so we can use it for ag and the lake will become usable water," said ADC director James Nakatani at a June meeting of the agency's board of directors.

R-1 is a classification of wastewater that has undergone oxidation, filtration, and disinfection. It is considered the highest quality wastewater and, under the state

Department of Health's (DOH) guidelines for reuse, it can be sprayed on all manner of food crops and even be used as drinking water for livestock (except dairy animals) and poultry.

Although the Wahiawa WWTP currently has the ability to produce R-1 quality water, the DOH has found that the facility does not yet meet the standards for an R-1 facility. "[I]nspections indicate some deficiencies. The one-year certification is acceptable for an R-2 facility," according to April Mido Matsumura of the DOH's wastewater branch.

Agricultural use of R-2 water is severely limited. It may only be applied via subsurface drip irrigation to above-ground crops, such as fruit trees, "where the edible portion has minimal contact with the water," the DOH guidelines state. Because the Wahiawa WWTP's effluent is still considered R-2 water, water from Lake Wilson, which receives effluent from the facility, is also considered R-2 water.

As *Environment Hawai'i* reported in its July 2015 edition, state Sen. Donovan Dela Cruz's vision to make the Whitmore area O'ahu's agricultural hub is quickly solidifying, at least when it comes to acquiring land.

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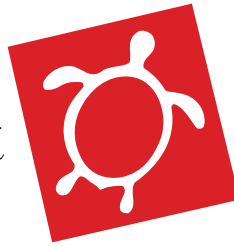
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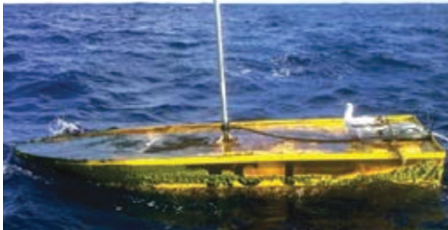
# Hawai'i

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## NEW AND NOTEWORTHY

PHOTO: ERIC KINGMA, WESPAC



A Wespac "community FAD"

**Wespac's Missing FAD:** When the Western Pacific Fishery Management Council met in Guam last June, there was a lively discussion about the dearth of fish-aggregating devices (FADs) in waters around the island. The Guam Department of Agriculture and Wildlife said it was doing all it could to deploy new FADs, but the expense of getting them into the water – about \$20,000 per FAD – was a high hurdle.

Just one vendor was competent to deploy the buoys, Jamie Bass, in charge of the department's FAD program, told outraged council members.

"Those are outrageous prices," said McGrew Rice, a council member from Hawai'i. "Seems like the vendor has you guys bent over."

As it happens, two years ago, the council itself reimbursed the Guam Fishermen's Cooperative Association \$24,500 for a barge, trailer, tow gear, and other materials to be used to deploy FADs. At the same time, it paid the co-op \$19,500 for a buoy, rope, chain, metal fittings, and navigation supplies needed to outfit a FAD.

The permit for the FAD, required by the U.S. Army Corps of Engineers, was issued to Mrs. Rose B. Simonds (better known as Kitty, executive director of Wespac) in May of 2014.

Three months later, on August 25, 2014, invoices for the barge and FAD gear, totaling \$44,000, were submitted by Manuel P. "Manny" Duenas II, president of the co-op – and also at the time a member of the council. Wespac's check covering those invoices was signed just four days later, on August 29.

That FAD has never been deployed nor has the barge to deploy it been used.

*Environment Hawai'i* questioned Simonds about the FAD.

She responded: "[T]he project has been delayed due to the health of Manny Duenas, president of the Guam Fishermen's Cooperative Association. Mr. Duenas is still recovering from a life-threatening, debilitating health condition that required him to be hospitalized off-island for over a year.

"Mr. Duenas' health is improving, and we are hopeful for a full recovery. We anticipate the deployment of the Guam Community FAD within the next 12 months. The barge will be

used to deploy future Community FADs and FADs deployed by the Guam Department of Agriculture, as appropriate."

**Leithead-Todd Case Remanded:** The Intermediate Court of Appeals has remanded to the 3rd Circuit Court a case challenging the qualifications of the director of the Hawai'i County Department of Environmental Management (DEM).

Bobby Jean Leithead-Todd – whose resume includes stints at various times as County Council member, staff attorney with the county's Corporation Counsel, county legislative auditor, and director of the Planning Department – was appointed to head the DEM in July 2013. She had held the same position in the administration of former Mayor Harry Kim, starting in 2007, but in 2010 the county charter was amended to require persons holding the DEM directorship have "a minimum of five years administrative experience in a related field and an engineering degree or a degree in a related field." Leithead-Todd has a degree in English and a law degree.

Then-Council member Brenda Ford, who had voted against confirming Leithead-Todd, challenged her appointment in a *quo warranto* action in 3rd Circuit Court.

In May 2015, the lower court determined that the burden of proving that Leithead-Todd was not qualified fell on Ford, who had not met that burden.

Ford appealed. On September 8, the appellate court vacated the lower court ruling: "It is not Ford's burden ... to prove that Leithead-Todd is not qualified for the office she holds. ... Instead, it is Leithead-Todd's burden to prove that she is qualified for the office she holds."

Leithead-Todd told *Environment Hawai'i* that she was pleased with the ICA decision. "It's consistent with the basic premise that we took when we were appointed," she said. The ICA remanded the issue to the lower court, she continued, to determine whether her law degree and associated experience counts as a "related field," in the language of the charter – related, that is, to the duties of the department director rather than related to engineering.

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### Quote of the Month

*"The more veg and fruit crop farmers we can get for ADC land, the easier my life will be. ... Especially on Kaua'i."*

— **Scott Enright, state Department of Agriculture director**

## Stage Is Set for Contested Case 2.0 For TMT Conservation District Permit

The contested case hearing over the Thirty Meter Telescope is gearing up. It is set to begin in Hilo on October 11.

But the sparring has already begun, and if the number of documents filed with the Department of Land and Natural Resources and the number of potential witnesses to be called are any measure of the discord to come, hearing officer Riki May Amano, a retired judge, will have her hands full keeping order in this forum.

The Thirty Meter Telescope (TMT) is proposed to be built near the summit of Mauna Kea, but before construction can start, it needs to have a Conservation District Use Permit granted by the state Board of Land and Natural Resources. In 2010, the University of Hawai'i-Hilo applied for the CDUP. The BLNR voted to approve the permit, but at the same time ordered a contested case hearing be held.

That first hearing was conducted in 2011. In early 2013, the Land Board approved the hearing officer's findings of fact, voting in effect to ratify the earlier decision it had made. Opponents challenged the procedure in court, arguing that by holding the contested case after the board had already voted to approve the permit for the telescope, their rights to due process had been violated.

Late last year, the state Supreme Court agreed with the protesters, ordering the Land Board to begin the contested case process anew and refrain from voting on the permit until after the hearing had run its course.

On the eve of the second contested case hearing, here is how things stood.

### *The Hearing Officer*

On March 31, Land Board chair Suzanne Case announced the appointment of Amano as hearing officer — a decision that was challenged by the six parties who petitioned for the contested case hearing the first time around: Mauna Kea Anaina Hou and Kealoha Pisciotto; Clarence Kukukahi Ching; the Flores-Case Ohana; Deborah Ward; Paul K. Neves; and KaHEA: The Hawaiian-Environmental Alliance. (For convenience, these will be known as the original petitioners.)

These petitioners, represented by attorney Richard Naiwieha Wurdeman, claimed that Case lacked the authority to make the

appointment and that Amano's conduct would be prejudiced by her membership in the 'Imiloa Astronomy Centre at the \$85-a-year "family" level. (Wurdeman noted that the TMT was itself a member of 'Imiloa, at the corporate level.) This affiliation, he argued, was sufficient to disqualify her.

The Land Board disagreed. In Minute Order 4, issued May 6, it explained its reasons for not dismissing Amano.

First, the board noted, "a 'family membership' does not confer any right to participate in 'Imiloa's governance or decision-making, in contrast to organizations where members may vote for a board of directors or other officers. A 'family membership' in 'Imiloa means only that the member has prepaid the admission for two people and five children and receives some discounts at the restaurant and gift shop."

The board also considered whether in an "exercise of discretion," it should replace Amano "even though no legal grounds exist for disqualification. The board declines to do so."

That same day, Wurdeman repeated his clients' objections to the way in which Amano was selected, by a committee that included BLNR member Chris Yuen. He argued that Yuen should have been disqualified on the basis of statements made in a 1998 interview he gave to *Environment Hawai'i*, in which, Wurdeman said, Yuen appeared to be prejudiced in favor of telescope development.

(Wurdeman and his clients also protested the DLNR's posting of documents related to the contested case on a website devoted to the topic: <http://dlnr.hawaii.gov/faqs/mauna-kea-faq/>. "How did this web page come about and why a Mauna Kea specific web page? Was it discussed and approved in a hearing of any kind? Who authorized it? Who rendered the opinions and through what process? ....")

A week later, Wurdeman filed a formal motion for a reconsideration of the board's decision to stick by its selection of Amano as hearing officer.

In early June, the board denied the motion. Among other things, the minute order announcing the denial addressed the claim that Yuen was prejudiced against the petitioners as a result of statements made in 1998. "In his written response to petitioners' objections," the minute order

states, "Member Yuen considers whether he should recuse himself despite the lack of legal grounds to do so and states: 'I think that the policy for board members is similar to that for judges: there is a duty to serve when you are not legally disqualified, just as there is a duty to disqualify yourself when good cause exists. ... To disqualify one's self because a party to a contested case thinks that comments the member has expressed in some point in the past imply a predisposition on a particular application means that individuals who, for example, have expressed strong opinions on the need to preserve coastal open space should not vote on a CDUA for a house on the shoreline if the applicant objects. Board members should not be selected for the absence of opinions: they have to know how to review facts and decide particular cases on their merits given the legal criteria.'"

The minute order offered further discussion on the petitioners' argument (joined by both the University of Hawai'i and TMT) that the selection of Amano might not survive review in any legal appeal of a future board decision: "The board is concerned that taken to its logical extreme ensuring a contested case process that subjectively 'appears to be fair' to every possible person who takes an interest in the TMT project would likely necessitate not only the disqualification of Judge Amano but of every potential hearing officer who otherwise possessed the acumen to hear this case. No qualified hearing officer candidate is likely to satisfy all spectators and remove all fears of reversal. The board will not go down this rabbit hole."

### *The Parties*

Generally, Amano took a liberal approach to allowing interested parties to intervene, approving more than two dozen individuals, associations, or institutions to participate in the contested case proceedings.

Among the parties admitted is the TMT International Observatory, LLC, the organization that is seeking to build the telescope and to which the University of Hawai'i, in 2014, issued the sublease of land where the TMT is to be built. In the first contested case hearing, the TMT organization — which at that time was calling itself the TMT Observatory Corporation — did not participate, although it did have counsel that observed the proceedings closely. The original petitioners have objected to the TMT's participation.

Eleven individuals who had submitted a timely application to intervene in the contested case were not granted standing.



In Minute Order 13, issued July 21, Amano dismissed their applications, citing the fact that they were not physically present at a June 17 pre-hearing conference nor had they appealed their dismissal within the time allowed for appeals.

Almost all the parties seeking admission to the contested case, including those dismissed, indicated their opposition to construction of the TMT.

Apart from the TMT itself, the only intervenor that has taken a stance in favor of the TMT's construction is a group calling itself PUEO, short for Perpetuating Unique Educational Opportunities, Inc. As described in its petition for standing, PUEO's purposes "include furthering 'educational opportunities for the children of Hawai'i in the fields of science, technology, engineering, and mathematics.' Its board members and beneficiaries include native Hawaiians that reside in the Keaukaha-Pana'ewa Hawaiian Homesteads located in Hilo, Hawai'i. PUEO's board members include native Hawaiians who seek knowledge and understanding and exercise customary and traditional native Hawaiian rights on Mauna Kea."

The original petitioners have objected strenuously to PUEO's admission as an intervenor. In a memorandum opposing Amano's decision to admit PUEO, the original petitioners' attorney, Wurdeman, claims that PUEO was formed for the sole purpose of intervening in the case.

"[G]iven the timing of its formation, the P.U.E.O., Inc., was obviously formed solely to try and participate in the contested case hearing and the Petitioners submit that such an attempt is clearly improper," Wurdeman wrote. He went on to recite the chronology of the group's origin:

"On March 31, 2016, the BLNR appointed ... Amano ... as the hearing officer in the instant proceeding. According to the Articles of Incorporation of P.U.E.O., Inc., ... Richard Ha, Jr., incorporator, signed the Articles of Incorporation on the very same day. ... According to the state Department of Commerce and Consumer Affairs (DCCA) records, P.U.E.O. was registered with the DCCA on April 12, 2016."

Wurdeman disparaged the claimed interests of the PUEO's leaders in protecting traditional practices on Mauna Kea. "As for the assertions made by the four individuals, who apparently are directors of the newly formed P.U.E.O., Inc., Richard Ha, Jr., doesn't even claim to be a cultural practitioner. ... As for the other three individuals, they seem to assert improved access to the Mauna as a result of telescope

development, in general, for any of their asserted cultural practices related to the Mauna. The comparisons they make are essentially pre-development of the summit road access versus access post-development of the summit road. This has nothing to do with the proposed addition of another telescope on the Mauna and thus, even their individual claims are irrelevant to the instant case. .... The assertions and implications in their declarations that telescope development on the Mauna is somehow a recognized cultural and traditional practice firmly rooted in custom and tradition ... is completely nonsensical, unfounded, and absurd."

The effort to discredit PUEO did not stop there. In its list of witnesses to be called, the original petitioners included Stanley Roehrig, who would be asked to testify about "conflict of interest and voting on issues with P.U.E.O., Inc., representatives."

Wurdeman and other parties to the case have pointed out a close relationship between PUEO's president, Shadd Keahi Warfield, and board member Roehrig. Roehrig was instrumental in establishing another non-profit, Keaukaha One Youth Development Corporation, which Warfield now leads as its president. That group uses as its base of operation a home in Keaukaha owned by Roehrig. Wurdeman claimed that the group rents the house from Roehrig, but Warfield says the group pays no rent.

In a pre-conference hearing in late August, Amano rejected — for now — the state's efforts to have Amano issue a protective order that would keep Roehrig, Land Board chair Case, and Gov. David Ige from being called as witnesses by the petitioners. Amano noted that the usual way of handling challenges to witnesses in cases such as this is to hear them later in the proceedings. "I'm aware the Supreme Court [remanded the permit] because of failure to follow the process," Amano was reported by the *Hawai'i Tribune-Herald* as saying. "For that reason, I'm reluctant to support anything out of process. It's just not worth it."

Dwight J. Vicente, one of the parties admitted to the contested case, voiced his support for Wurdeman's efforts to have Ige testify. In an August 11 filing wherein he indicated his opposition to the state's request for the protective order, Vicente recited his reasons for claiming that the state of Hawai'i does not exist. On this basis, he argued that Ige, Case, and Roehrig enjoy no special treatment: "David Y. Ige

is a Japanese national, which gives him no rights in this Kingdom and its affairs. He has no, immunity, Quo Warranto, who made him governor? The office he claims, is a fraud. Suzanne Case and Stanley Roehrig, are also, not nationals of this Kingdom, which also gives them no rights in this Kingdom and its affairs (including their claim to immunity)."

### *Kingdoms Come*

Vicente's claims are by no means unusual among the TMT opponents.

Kalikolehua Kanaele, in petitioning for admission as an intervenor, stated: "I as a Native Hawaiian (where Native Hawaiian is used it also means Kanaka Maoli, Hawaiian Subject, and National of the Kingdom of Hawai'i) ... participate here in pursuit of Justice and also under duress as I ... do not recognize the jurisdiction of the United States of American or it alleges occupation or lording over Hawai'i or over our Kingdom."

Perhaps the most extreme example is that of the purported Kingdom of Hawai'i. On June 22, Lanny Sinkin filed on its behalf a "notice of absence of necessary and indispensable parties" with the DLNR.

Sinkin says that his pleading "is a limited appearance solely to provide notice to the hearing officer of the missing necessary and indispensable parties and provide the hearing officer with sufficient evidence to conclude that, given the absence of these parties, the hearing officer lacks jurisdiction and must sua sponte dismiss the case." Attached to Sinkin's pleading is a declaration from the king, Ali'i Nui Mo'i Edmund Keli'i Silva, Jr.

Among other things, Silva claims that, "at the request of an elder descended from the last House of Nobles of the Kingdom of Hawai'i, I agreed to assume the position of Ali'i Nui Mo'i (High Chief/King) within a restored Hawaiian Kingdom Government twelve years ago." One of his first acts, he goes on to say, "was to affirm the Kingdom's independence from the United States."

The lands of the restored kingdom include the lands where the TMT is proposed to be built, he says, making his participation in the hearing necessary. (Neither Silva nor the Kingdom of Hawai'i applied to be an intervenor in the case.)

In reply, J. Douglas Ing, one of the attorneys for the TMT, writes, "The purported Kingdom of Hawai'i and its claimed king (collectively, "the Kingdom") is not a necessary and indispensable party to this contested case because it does not exist." (Ing also takes a swipe at Sinkin, noting in

a footnote that “neither the Kingdom nor Mr. Sinkin provide any evidence that Mr. Sinkin is properly representing the Kingdom under [Hawai'i Administrative Rule] § 13-1-10(a),” which states that a person can appear on their own behalf, a partner can represent a partnership, an officer or director of a corporation can represent the corporation, or an officer or employee of an agency can represent the agency in any proceeding before the Land Board or its hearing officer. Otherwise, representation is limited to licensed Hawai'i lawyers. “Mr. Sinkin is not a licensed Hawai'i lawyer and therefore cannot represent the Kingdom ... Mr. Sinkin's appearance before this Hearings Officer on purported behalf of the Kingdom is therefore in violation of HAR § 13-1-10. Mr. Sinkin's cavalier attitude towards the applicable administrative rules should not be tolerated by this Hearings Officer and the Notice should be dismissed on this basis alone.”)

Ing cites a federal case brought by David Keanu Sai on behalf of a different Kingdom of Hawai'i against then-Secretary of State Hillary Clinton, in which the Circuit Court of the District of Columbia opined that, it has “long [been] recognized that the determination of sovereignty over a territory is fundamentally a political question beyond the jurisdiction of the courts.” (In another footnote, Ing points out that “the Kingdom that filed the Notice is different than the Kingdom of Hawai'i that Mr. Sai claimed to be the regent of. ... Indeed, a quick Google search reveals at least four different websites claiming to be the Kingdom of Hawai'i.”)

Sai himself appears on the list of witnesses submitted by Chase Michael Kaho'okahi Kanuha. According to a website Sai maintains, [hawaiiankingdom.org](http://hawaiiankingdom.org), he is the acting minister of interior and chairman of the council of regency for the Hawaiian kingdom. Sai may be best known for his involvement in a company called Perfect Title, which sold fraudulent deeds to hundreds of Hawaiian homeowners facing foreclosure. Sai and Perfect Title claimed that since the overthrow of the Hawaiian monarchy, all land transfers were invalid if they were subject to pre-existing claims. Sai was sentenced to five years' probation in 1999 after a jury in state Circuit Court found him guilty of attempted theft for his part in the scheme.

### **Religious Claims**

In addition to presenting claims on behalf of the Kingdom of Hawai'i (one of them, in any case), Sinkin also is representing the Temple of Lono and its leader,

Tahuna Frank Kamehameha Tamealoha Anuumealani Nobriga.

On June 20, Sinkin filed a motion for partial summary judgment, asking the hearing officer to acknowledge “that the peak of Mauna Kea (Mauna a Wakea) is especially sacred to the traditional Hawaiian faith and that the traditional Hawaiian faith still exists.”

“Mr. Nobriga is a kahuna and a teacher of the ancient faith,” Sinkin continued. “He is recognized as such by such luminaries as Judge Samuel King who wrote: ‘Frank Nobriga is an active force behind the Temple of Lono movement which began in 1971. Their purpose is to maintain a spiritual land bank, with five temples throughout the islands. ... The Temple of Lono is rediscovering the elements of ancient Hawaiian religion, including a four-god concept.’”

The university objected. In responding to Sinkin's motion, UHH attorney Ian Sandison stated that any acknowledgement by the hearing officer that the mountain is a sacred site “would violate the establishment clause of both the U.S. and Hawai'i Constitutions. It would require the hearing officer to recognize a religious servitude over that small land area of Mauna Kea proposed for the TMT project.”

“It is irrelevant to this proceeding,” Sandison argued, “whether ‘the traditional Hawaiian faith is still practiced,’ unless ‘the traditional Hawaiian faith’ also was actually ‘practiced’ on the Mauna Kea summit or within the TMT site. ... [T]he Temple has not even shown that it held or conducted any religious ceremonies within the summit's astronomy precincts. Therefore, there can be no burden on the religious ceremonies, and, in turn, no viable claim under the free exercise [of religion] clause.”

Sandison laid out the university's strategy in dealing with any effort by TMT opponents to use religious exercise claims as a means of halting telescope construction: “The Temple will try to use this proceeding to galvanize a religious movement. Indeed, the Temple states that religion will be an essential part of this proceeding: ‘[I]ssues related to Traditional Hawaiian Faith are going to be an essential part of the contested case...’ The hearing officer should not allow such diversions from the stated criteria to obtain a permit. ... The hearing officer should not allow this proceeding to become a platform for the Temple to advance its religious agenda.”

### **Setting Limits**

In July, PUEO filed a motion to delineate

the issues that it argued should properly be before the hearing officer in making her recommendation to the Land Board as to whether or not it should grant the Conservation District permit allowing the telescope to be built. The TMT and UHH joined in support of the motion, while the original petitioners, the Temple of Lono, and intervenor Harry Fergerson filed motions in opposition, with intervenor Mehana Kihoi joining the original petitioners' opposition.

At a prehearing conference on August 29, Amano asked PUEO to draft a minute order granting its motion.

In its proposed minute order, PUEO offered five topics that would be fair game for arguing in the contested case:

- First, whether the proposed use complies with the eight criteria for Conservation District use set out in the DLNR's rules;
- Second, whether it is consistent with Article XII, Section 7 of the state Constitution, which affords protection for traditional and customary practices of Native Hawaiians, “subject to the right of the state to regulate such rights”;
- Third, is the proposed use consistent with the state Supreme Court decision in *Ka Pa'akai o Ka 'Aina*, which sets out a three-part analytical framework that state agencies must use when deciding issues that could have an impact on Native Hawaiian traditional and customary practices;
- Fourth, is the use consistent with Chapter 183 of Hawai'i Revised Statutes, which relates to Conservation District uses;
- Finally, “does the public trust doctrine apply to the proposed land use and, if it does, is the proposed land use consistent” with it?

In addition, PUEO set forth three issues that would not be allowed to be raised in the contested case hearing:

- “1. The sovereignty of the Kingdom of Hawai'i or any other issues relating to the purported existence of the Kingdom of Hawai'i.
- “2. Challenges to the legal status of the state of Hawai'i.
- “3. Challenges to the state's ownership of and title to the lands comprising the summit area of Mauna Kea.”

Such issues, PUEO stated, “present non-justiciable political questions that are outside the subject matter jurisdiction of this hearing officer and are therefore not issues for this contested case hearing.”

No decision on PUEO's proposed minute order had been issued by press time.



## TMT Sublease Remanded To BLNR

One of the arguments put forward by the TMT International Observatory in support of its participation in the contested case over the Conservation District Use Permit for the telescope it proposes to build is the fact that, as holder of a sublease of land on Mauna Kea, it has a property interest in the outcome.

The sublease was approved by the Land Board in June 2014, over the objections of Kalani Flores, one of the original petitioners. At the meeting in which the sublease was granted, Flores requested a contested case hearing. In keeping with the board's past practice, which has held that land dispositions are generally not subject to contested case hearings, the board denied the request.

Flores appealed to 3rd Circuit Court. Judge Greg K. Nakamura issued his ruling in the case last April. He did not vacate the Land Board's award of the sublease, but did order a remand, in light of the Supreme Court's decision last December.

Flores, Nakamura wrote, "asked that this court take judicial notice of the opinion in Mauna Kea Anaina Hou and vacate the board's action in consenting to the sublease. This is not appropriate, because it requires consideration of an adjudicative fact, the vacating of the TMT CDUP, which the board has not addressed."

He went on to note that Flores' request "is the functional equivalent of a request that the fact that the TMT CDUP has been vacated be presented to the board. This fact is material because the sublease and consent are premised upon the existence of the TMT CDUP."

Nakamura ordered a remand for the purpose of presenting the Mauna Kea Anaina Hou opinion to the board "for appropriate action."

"When reviewing the new evidence," he continued, "the board may consider the following questions:

"a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?

"b) If the board takes the position that the consent to the sublease should remain in place because of the assumption that the board will grant the TMT CDUP in the future, would this not run afoul of the 'cart before the horse' due process concern established in the Mauna Kea Anaina Hou opinion?

"c) Since the existence of the TMT CDUP is such an integral part of the board's consent to the sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to sublease application process?"

"d) In Mauna Kea Anaina Hou, Justices Pollack, Wilson, and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the state's constitutional obligations. How is the board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the state fulfill its constitutional obligations?"

On June 28, BLNR chair Suzanne Case ordered Flores and the attorneys for the University of Hawai'i-Hilo to submit briefs on the remand order by July 29. "The briefs may discuss any substantive or procedural issue relating to the board's consent" to the sublease.

The DLNR's public information office was asked when the remand might be scheduled for the Land Board's reconsideration. No response had come by press time.



## Human Remains Placed On TMT Access Road

The entire Mauna Kea summit and the proposed site for the TMT have been thoroughly surveyed for possible human burials, which, if found, can bring any ongoing construction work to a standstill until a means of addressing the burials is determined by the burial council established for the island where the work is being done.

Archaeological surveys done for the TMT's environmental impact statement indicate that the site selected for the telescope, some 800 feet below the summit in an area called the northwestern plateau, is more than a mile away from the closest possible burial.

Still, in recent weeks, opponents of the telescope have claimed that Hawaiian burials are present close to the TMT site.

On August 17, Harry Fergerstrom stated in comments on a proposed site visit, "I am able to speak of the sacredness of the northwestern plateau and it's [sic] light connection that spans the island chain. I can speak of several burials at the site as well as speak on water caves (s)."

A couple of weeks later, on September 2, Fergerstrom elaborated on the claim, stating: "This is a notice of Family Burial Claim under the proposed TMT site. This information was sent to me (9-2-2016) by my cousin Michael Lee. This brings into this case [Hawai'i Revised Statutes] 6E, State Historic Preservation/Burial Counsel [sic] protocols. ... As you are familiar, family burials are a sensitive issue and certain amount of discretionary information about exact location must be followed according to protocols established by State Historic Preservation/Hawai'i Island Burial Counsel." A "Burial Registration Form" accompanying Fergerstrom's statement indicated that the burial site was "on the access road to the TMT."

Meanwhile, Hawaiian activist Palikapu Dedman told the *Hawai'i Tribune-Herald* that he had placed bones of an ancestor on an ahu, or stone shrine, on the TMT access road. The ahu was erected during the summer-long TMT protests last year. Dedman reportedly said that he first placed bones there in September 2015. After finding that they were no longer at the site, he placed additional bones there again last month, he was quoted as saying.

The online news site *Civil Beat* shed more light on the subject. According to an article it first published on September 16, in July, the DLNR received a request for information on any enforcement action it may have undertaken in regards to the disinterment of human remains from a site not on Mauna Kea and the reinterment of those remains on the proposed site for construction of the TMT. "My understanding," the unidentified requester wrote, "is that this attempt was stopped, some individuals who were not suspects were questioned, and that no charges have been filed against any single person."

The DLNR denied the request in its entirety, citing the exemption provided in the state's Uniform Information Practices Act for information that would frustrate a government function.

— Patricia Tummons



## WHITMORE PROJECT AREA

Projects / Lands	Year	Size (acres)	Cost
Galbraith lands	2012	1700	\$25,000,000.00
7-1-02-09 (from Castle & Cooke)	2013	24.092	\$3,300,000.00
7-4-12-16 (Tamura warehouse)	2013	1.572	\$4,490,000.00
7-1-02-04, 7-1-02-23 (from Dole)	2015	257	\$5,600,000.00
Galbraith reservoirs	2016		\$5,000,000.00
<b>Subtotal</b>			<b>\$43,190,000.00</b>
<b>Legislative Allocations</b>			
Dole lands purchase	2016		\$31,500,000.00
Whitmore master plan, improvements	2016		\$1,350,000.00
Galbraith Irrigation Project	2016		\$13,000,000.00
Dole/Castle & Cooke lands purchase	2015		\$10,000,000.00
Planning, design reclaimed wastewater irrigation system	2014		\$2,500,000.00
Planning for Galbraith irrigation	2012		\$750,000.00
<b>Subtotal</b>			<b>\$59,100,000.00</b>
<b>GRAND TOTAL</b>			<b>\$102,290,000.00</b>

### *Agribusiness from page 1*

Nearly \$40 million has already been spent (mostly by the state) acquiring about 2,000 acres there from Dole, Castle & Cooke, and the former Galbraith Estate. In the past two sessions together, the Legislature authorized the issuance of \$41.5 million in general obligation bonds to purchase about a thousand more acres owned by Castle & Cooke and Dole.

While some of the lands the state is eyeing have water wells or access to Dole's irrigation ditch, as of now, the only water source to the fields the state has bought is a single well that can produce at most 2 million gallons of water a day. Nakatani said it isn't enough to provide water to all of the ADC's farming tenants all of the time. At most, if crops are rotated and some fields left fallow, the well can serve about 600 acres.

Last year, Kennedy/Jencks Consultants evaluated irrigation scenarios for the area that included various combinations of Lake Wilson water, Wahiawa WWTP effluent, and/or water from Dole's Wahiawa Irrigation System, which also includes effluent from the wastewater plant. The consultants estimated that bringing an adequate supply of water to the Whitmore lands could cost as much as \$11 million, in addition to the

\$5 million the ADC has already committed to spending on the construction of two reservoirs capable of holding up to 13 million gallons of water.

This past session, the Legislature approved \$13 million in general obligation bonds to design and build an irrigation system for the 1,200 acres of former Galbraith lands controlled by the ADC. Picking up where Kennedy/Jencks left off, consultant

**“Hopefully, we can get a straight answer from DOH ...”**  
**— Darin Izon, Brown and Caldwell**

Brown and Caldwell has been tasked by the ADC to plan, design and build a pipeline to carry reclaimed water from the Wahiawa WWTP to the former Galbraith lands.

As of late August, five potential routes had been mapped out. Some of them passed through Lake Wilson and former Galbraith lands owned by the Office of Hawaiian Affairs. Another, the least desirable option, ran through Wahiawa town, cut across Kauko-nahua Stream, and ended up at one of the reservoirs to be built by the ADC.

“From start to finish, the process will take a couple of years,” said Brown and Caldwell's Darin Izon.

### *‘A Straight Answer’*

The beauty of the project is that once discharges from the WWTP into Lake Wilson stop, “any water taken from the lake is usable,” said Brown and Caldwell's Dean Nakano. So in addition to the 1.6-2.5 million gallons of water a day from the WWTP, the ADC may one day have access to many millions more from the lake, which holds more than 9,000 acre feet.

Before any of that can happen, however, the DOH needs to classify the plant's effluent as R-1 water. In its inspection of the plant last year, the DOH noted that the effluent consistently failed to meet turbidity standards and the plant's ultraviolet disinfection of the effluent sometimes fell short of R-1 standards. Although the city has improved its disinfection since then and argues that better testing will reveal that the effluent does, indeed, meet R-1 turbidity standards, the issue of storage and backup systems continues to be a major hurdle for the city.

Under Hawai'i Administrative Rules,

recycled water systems must have an adequate storage or a backup disposal system to prevent overflows or discharges “when the irrigation system is not in operation or when recycled water quantities exceed the irrigation requirements.”

The Wahiawa WWTP was upgraded to include a storage tank, but that has apparently been insufficient to meet the DOH’s requirements.

In an email to *Environment Hawai'i*, the DOH’s Matsumura stated, “The county is aware that in order to be considered an R-1 plant, ... a back-up disposal system is required. ... The county does plan to con-

**“My thing is, you never turn away what the Legislature gives you.”**

**— James Nakatani, ADC**

struct an irrigation system to resolve this.”

What that system will ultimately look like is unclear.

“Hopefully, we can get a straight answer from the DOH on the needed storage requirements to get to R-1,” Izon said.

The DOH’s storage requirement is a very difficult thing to meet to get R-1 certification, Nakano added. In addition to a storage system, the agency also requires an emergency backup system to hold water that has not been fully treated. In the past year or so, power outages have forced the city to occasionally discharge untreated or partially treated effluent into Lake Wilson. Under the DOH’s reuse guidelines, the emergency backup storage system must be able to hold at least one average day’s worth of flow, or the average daily design flow of an approved alternate reuse area, whichever is less.

If the DOH’s storage and backup system criteria can be met, it’s likely the DOH will consider this R-1 water, Nakano said.

Jack Pobuk of the city’s Department of Environmental Services would not go into detail about its efforts to meet R-1 requirements, but said the project is under active discussion. It will be at least a year before his agency seeks formal permission from the DOH to use its Wahiawa WWTP effluent for irrigation, given that the ADC must first complete its plans, he said.

As far as efforts to find the best route for the irrigation system, Nakatani said his agency is looking to get an easement across the 500 acres of former Galbraith lands owned by the Office of Hawaiian Affairs, which also need water. He added that while it might be cheaper today to simply drill wells, the reclaimed water system is a better use of resources in the long run.

Board member Lloyd Haraguchi asked Nakatani whether ADC’s farming tenants would have enough water without the project.

No, Nakatani replied.

Right now, the ADC’s dozen or so farming tenants on the former Galbraith lands occupy some 300 of the agency’s 1,200 acres in the area. License areas range from about six acres to more than 80. At least one small farmer unable to shoulder the rent has recently asked for and received permission to scale back his license area from 20 to ten acres. Although board member Yukio Kitagawa lamented the fact that those

ten forfeited acres are now vacant, fellow member Letitia Uyehara commended the farmer’s honesty.

“It remains to be seen how many of these [farmers] can actually ramp up. ... Other guys are asking for the moon, 100 acres, and they’re probably going to do 10,” she said.

While some tenants have said they want to expand their areas and there are other applicants for the lands, unless the water issue is dealt with, Nakatani seems hesitant to expand.

“We want to make sure there’s adequate water to farm. The worst thing you could do is put them on the land and there is not adequate water,” Nakatani said.

**“Every single booth has kale and okra. I don’t eat kale and don’t eat okra.”**

**— Sandi Kato-Klutke**



### Land Purchases

While the ADC and the City and County of Honolulu are toiling away at bringing reclaimed water to the former Galbraith lands, efforts to expand the state’s agricultural holdings in the surrounding areas continue. This past session, the Legislature allocated \$31.5 million for the purchase of several parcels owned by Dole, which has put 18,000 acres in North-Central O’ahu up for sale. In April, the ADC board authorized Nakatani to negotiate and purchase two of those parcels, which staffer Ken Nakamura suggested might be good for an orchard or a Christmas tree farm. Only 134 acres in the two parcels are usable; 52

acres are in a gulch.

At the same April meeting, the board gave Nakatani permission to negotiate and purchase about 217 acres owned by Castle & Cooke that are across the street from one of the ADC’s proposed reservoirs. The company is asking \$5.35 million. That parcel includes 72 acres of unusable gulch and a 12-acre road easement to the Navy, meaning just over 61 percent of the land can be put to productive use.

In June, the board authorized Nakatani to negotiate the purchase of the fee simple interest in a 91-acre, tree-covered property in Mililani owned by Castle & Cooke.

In 2015, the Legislature appropriated \$10 million to the ADC to acquire a handful of properties owned by Castle & Cooke and Dole, including the Mililani parcel. The asking price for that piece is \$2.3 million.

Located above Kipapa Gulch, the land could be used to grow pineapple again or an orchard, Nakamura told the board. Although a road leads to the property, it is legally land-locked and the ADC would need to acquire access, he said, adding that while there is access to a nearby water well, there is no electricity.

Still, he said, “we want to preserve the land. It’s one of the most critical components of boosting the economic viability of Hawai’i agricultural industry.”

“Of all the inventory that Castle & Cooke has, why this piece?” asked state Department of Agriculture director Scott Enright.

“One, it’s on the market. My thing is,

you never turn away what the Legislature gives you,” Nakatani replied. Also, he said, the parcel has potential.

At the ADC’s subsequent meeting in August, the board authorized Nakatani to negotiate the purchase of 895 acres of former pineapple and sugar land in the Whitmore area owned by Dole. Only 761 of the 895 acres are farmable. All of the lands have access to a well and/or Dole’s Wahiawa Irrigation System.

Some of the fields are already being cultivated and require minimal to no preparation, a staff report states. What’s more, the irrigation infrastructure already on the lands could be integrated with the future Galbraith Irrigation System, “thus, increasing the capacity of the entire system which will correlate to increased produc-





tion on the [former Galbraith lands],” it states.

Dole is asking for \$25.7 million for the parcel. Dole’s per-acre asking prices have gone up since the state first started expressing interest in its properties, according to Nakatani.



## ‘Import Replacement’

The bill for acquiring land to turn the Whitmore area into a thriving agricultural center is quickly approaching \$100 million. And in the past session alone, the Legislature approved tens of millions of dollars more for various irrigation infrastructure and ag technology projects across the state. The target driving much of this largesse is increased food sustainability, which Gov. David Ige underscored with his commitment last month to double local food production by 2030.

The agency tasked in large part with spearheading efforts to turn the state’s agricultural investments into thousands of acres of locally grown and consumed food, however, is actually rather skeptical of the idea.

In discussing the crops being grown by its tenants on former Galbraith Estate lands, ADC board member Letitia Uyehara expressed concern that the bulk of them seemed to be planting the same thing — Japanese cucumbers, bananas, tomatoes, okra, asparagus, bitter melon — and wondered about the local market’s ability to absorb all of these crops.

State Department of Agriculture director Scott Enright asked whether the ADC should actively encourage import crop replacement by stipulating in future leases or licenses that the agency is looking for import replacement crops, “so we don’t have Thai basil shipped off to Chicago.”

To say the idea wasn’t well received by the ADC is an understatement. “I see Jimmy twitching,” Enright said, referring to ADC executive director and former DOA director James Nakatani. Still, Enright impressed on the board that legislators and the governor — “people in the square building” — seem to be leaning toward import crop replacement.

As things stand, the ADC’s largest tenants grow crops, seed crops in particular, for export.

“Sixty-six percent of everything we grow in the state is exported,” Enright said. “We’ve always been an exporter, but there is a movement in state government

to utilize more land resources for food sustainability.”

Although he said he agreed with the basic idea, ADC board member (and also a former DOA director) Yukio Kitagawa said, “I think we should have individuals who would like to export [and] encourage those that want to grow basil and pineapples ...”

Board member Jeff Pearson, director of the state Commission on Water Resource Management, asked Enright whether those government officials seeking greater food sustainability could state a percentage of crops they want kept in the state. “It would take the pressure off us,” he said.

“I wouldn’t be surprised to see that,” Enright replied.

Whatever goals government officials set, some ADC board members stressed the need to let the marketplace determine where crops go.

“Farmers are in it to make money,” said Uyehara, marketing director for Armstrong Produce, Ltd. She pointed out that on Hawai’i island, there are thousand of acres of lychee. “They need to export it. They make more money on it. Just sort of let the marketplace dictate what happens. ... The state cannot consume everything that is grown. The market is going to fall out and they’ll lose the crop,” she said.

Board member Sandra Kato-Klutke related a similar story about a sheep ranch on Kaua’i that exports its lambs. When she asked them what it would take to keep the lambs on the island, “they say, ‘Sandi, if you can find me someone who will pay what I get from the mainland, I’d be glad to. I need to make money.’”

She also lamented the narrow range of crops at local farmers’ markets. “Kale and okra. Every single booth has kale and okra. I don’t eat kale and don’t eat okra,” she said. To better educate growers about the local market’s needs, she said she planned to have them meet with local chefs who can tell the farmers what they’re looking to buy.

Board member Douglas Schenk noted that often times a grower will lose money on one crop, but on a small part of their product mix, “if they can export, it will carry the whole show.”

“That’s why I was concerned looking at all of these [Galbraith crops], the same-ness,” Uyehara said.

Enright wasn’t surprised by the sentiments and said he agreed with what had been said.

“It’s sound logic that doesn’t always prevail,” he said.

## For Further Reading

*Environment Hawai’i* has published many articles over the years providing additional background on the subject. All are available on our website, <http://www.environment-hawaii.org>.

Earlier ones may be read free of charge; to read more recent articles, you must be a subscriber or must purchase a two-day archive pass for \$10.

- “Bringing Water to Land ADC Acquired Near Whitmore Could Top \$11 Million,” July 2015;
- “Water May Be Limiting Factor On Former Galbraith Ag Lands,” December 2013;
- “ADC: Tobacco License, Galbraith’s 1st Lessee, and More,” June 2013;
- “ADC Supports Intent to Buy Whitmore Village Lands,” February 2013;
- “ADC Gives Ho’opili Farmers First Shot at Large Chunk of Former Galbraith Land,” January 2013;
- “Senator Accuses Agribusiness Board of Doing Nothing to Fulfill its Mission,” August 2012;
- “Dam Safety Trumps Effluent Concerns at Central O’ahu’s Wahiawa Reservoir,” August 2009.

“We need to strategize how we utilize these lands so we satisfy their desires as well as the business people growing it,” member Denise Albano said.

The key to any such strategy, Kitagawa suggested, is having willing and able farmers.

“The question I ask myself is, who’s going to grow it? All these here” — referring to the list of new lessees for the Galbraith lands — “is not local guys. [Many are Laotian] ... It’s a real issue. Nobody wants to admit that it’s not only talking, you gotta do it.”

— *Teresa Dawson*

## ADC Delays Syngenta's Withdrawal Pending Briefing on Future Plans

Last year, two of the state's anchor tenants Lin Kekaha, Kaua'i — seed companies Dupont Pioneer and Syngenta — together withdrew more than 1,500 acres from their licenses with the Agribusiness Development Corporation (ADC). In August, Syngenta sought to abandon about 850 of its remaining 2,037 acres, but concerns about how the continued exodus would affect the management paradigm there led the ADC to defer the matter until Syngenta representatives could brief the board on the company's future plans for the area.

Maintenance of the expansive irrigation system that feeds the ADC's lands in Kekaha, the roads, and other infrastructure is carried out by the Kekaha Agriculture Association (KAA), a co-op composed of all of the ADC's tenants in the area. The fees those tenants pay to the KAA support maintenance activities, so with fewer tenants, or with tenants occupying less land, the maintenance costs each tenant will have to shoulder increases.

"Whatever they [the seed companies] do reduces the amount of money KAA gets to maintain the property. ... So, the small farmer comes in and wants to do ten acres, what is KAA going to be charging?" asked board member Sandi Kato-Klutke, who lives on Kaua'i.

"The maintenance costs are going to rise. That's a given," ADC executive director James Nakatani replied.

In the past, the ADC has agreed without contest to requests by the seed companies to release hundreds of acres of land. But at the ADC's August meeting, board member Jeff Pearson asked whether Syngenta's 20-year license included a penalty for early termination.

"We could just say no" to the withdrawal request, he suggested.

ADC staff said that all of its Kekaha licenses are the same and none of them include language regarding penalties for early termination. Even if they did, Nakatani said, the lands are subject to licenses, not leases that are recorded in the Bureau of Conveyances, suggesting that the ADC may not have as much leverage to enforce terms.

Still, the idea of penalties for early termination also occurred to Department of Agriculture director Scott Enright, since the withdrawal of so much land at once puts ADC in a quandary over how to keep the entire area viable. Until Syngenta can brief the board on its plans for Kaua'i, Enright said

he thought the matter should be deferred.

Syngenta, which is about to be purchased by the China National Chemical Corporation (ChemChina), recently announced that it is looking to sell its Kaua'i and O'ahu operations. Enright noted also that Dow and Dupont are going to merge and seed company tenant BASF is also closing its Kekaha operations.

"The whole industry is in play. It would be timely to have a discussion with Syngenta," he said.

Board member Denise Albano asked whether the lands to be returned to the ADC are farmable and whether there are farmers willing to take them on.

"On Kaua'i?" Nakatani asked.

Enright said that given the public testimony a couple of years ago on the county's Bill 2491, which proposed additional regulation of pesticides and farmers growing genetically engineered crops, "as soon as Syngenta leaves, there's going to be a horde of organic farmers. ... I'm very anxious to catch up with the horde."

"We won't have a long line of organic farmers waiting for 846 acres," Kato-Klutke said.

Without soil remediation, it's unlikely organic farmers would want to jump on the property. For produce to be considered and labeled organic, land used to produce it must not have had "prohibited substances" — e.g., pesticides — applied to it in the past three years.

ADC staff said farmers have expressed interest in the vacant lands at Kekaha, but exact numbers were not available by press time. The agency planned to revisit Syngenta's request on September 28 and consider the assignment of two of BASF's licenses to seed company Beck's Superior Hybrid Corporation, as well as the issuance of a license to Umi's Farm, a produce farm.

"We're losing our anchor tenants in Kekaha. ... Getting [rents] from big tenants is much easier than getting it from small tenants," Enright said. Even so, he stressed, "The more veg and fruit crop farmers we can get for ADC land, the easier my life will be."

"Especially on Kaua'i," added ADC staffer Ivan Kawamoto.

"Especially on Kaua'i," Enright said.



**Native Hawaiians File Complaint Opposing Pesticide Use in Kekaha**

On September 14, Earthjustice filed a complaint on behalf of The Moms On a Mission (MOM) Hui and Po'ai Wai Ola/ West Kaua'i Watershed Alliance calling on the U.S. Environmental Protection Agency and U.S. Department of Agriculture to investigate potential violations by the state DOA and ADC of native Hawaiian civil rights.

A press release on the letter claims that the ADC "facilitates the constant drift of pesticides and pesticide-laden dust into Native Hawaiian communities by leasing thousands of acres near them to heavy pesticide users, primarily genetically engineered seed companies, that spray tens of thousands of pounds of toxic pesticides each year."

The statement also highlights the ongoing controversy over the ADC's lack of a National Pollutant Discharge Elimination System Permit that would require it to "monitor, restrict, and report contaminants in its vast West Kaua'i drainage canal system that weaves through the fields and empties millions of gallons of untreated waters into the ocean bordering Waimea and Kekaha." (Earthjustice, representing Surfrider Foundation, is suing the ADC over this issue, as well.)

The ADC's and DOA's failure to restrict the community's exposure to pesticides sprayed by their tenants "disproportionately harm Native Hawaiians in West Kaua'i and on Moloka'i, where large populations of Native Hawaiians live very close to large-scale spraying operations," the press release states.

"I live in a community that is home to the largest population of pure blooded Native Hawaiian, native speakers in Hawai'i, what many would consider an endangered race and a wealth of cultural knowledge. We also happen to be a community that is inundated daily by exposure to industrial use pesticides. When you consider the danger of frequent, long-term exposure to industrial pesticides, some may consider this to be a form of genocide," said Malia Chun, member of The MOM Hui and Kekaha resident.

"Although EPA regulations require recipients of federal funding to have a program to ensure their actions do not have discriminatory effects, neither ADC nor HDOA has one," the release states.

Earthjustice attorney Paul Achitoff argued that concerns of native Hawaiians living on Moloka'i or Kaua'i's west side are being dismissed because they lack political clout. If someone were spraying the toxic chemicals that were drifting into homes and schools in affluent neighborhoods, however, someone would shut it down, Achitoff said. — *T.D.*

BOARD TALK

# Board Bemoans Tepid Response To Auction of Big Island Ag Lands

It's deep dirt. It gets loads of rain ...” Board of Land and Natural Resources member Chis Yuen said of the seemingly perfect 6.7-acre lot in Hakalau.

“And if you live on the Big Island, you dream of dirt,” land agent Gordon Heit added.

But at the public auction held by the state Department of Land and Natural Resources on August 23, there was only a single bidder, Yun Yan Huang. Huang won a 30-year lease for the land at the upset rent of \$1,700 a year.

The result of that auction, at which two other parcels were leased out at the upset price, worried Land Board members and led them to conclude that 1) the state's paradigm for leasing agricultural lands needs to be changed; and 2) there just aren't enough willing, able, and business savvy farmers out there.

This past summer, the DLNR's Land Division put leases for four parcels up for auction. A total of seven people applied. For three of the parcels, the division determined there was only one qualified applicant. No one bid on the fourth parcel, a 7.8-acre lot in Waiakea designated for intensive agricultural use.

The weak response to the auction wasn't for a lack of trying, Heit told the Land Board at its September 9 meeting. In addition to advertising the auction in three daily newspapers, Heit said, his office mailed 250 letters to potential lessees.

Board member Yuen, a farmer and resident of Hawai'i island, expressed his surprise that the Hakalau parcel attracted just four applicants, only one of which was deemed qualified. He said the property was similar to what he farms.

While he said he understood that sweet potato or ginger farmers might not be interested in such a long lease term, “for there to be only one serious person who's actually in the business, this raises the question whether we or Department of Ag should have first-time farmer leases.”

Indeed, Heit explained that the DLNR's qualification requirements are geared more toward experienced farmers, not first-time farmers.

“Most of these guys are immigrants and aren't really business-plan savvy, the ones

getting their fingernails dirty,” Yuen said.

He also echoed a widely held sentiment that there simply aren't enough farmers out there. “For all the talk about ag ... and farming, the actual number of people who are like seriously ready to bust their ass is not that much,” he said. “There's loads of ag land, private as well as state, that is asking somebody to farm it. In some cases, water is an issue.”

Yuen suggested that if the state could make the lease application process easier, more people might bid.

More than a decade ago, the Legislature passed what became Act 90, which directs the DLNR to transfer certain agricultural lands in its inventory to the DOA. That transfer has never fully been completed, although the DOA has taken on some parcels.

“It was my understanding the DOA would be the agency to get the new farmers on the land. The DLNR is looking for the second tier of farmers, those who already know the process,” Heit said.

Land Board chair Suzanne Case reported that she and DOA director Scott Enright have been discussing transferring more DLNR ag land to the DOA in the near future.

“It's really them who are more suited to work with these folks,” she said.



## Legacy Land Funding Shifts In Kuka'iau Ranch Acquisition

At its September 9 meeting, the Land Board approved a request by the DLNR's Division of Forestry and Wildlife to redirect \$600,000 approved in 2012 for the acquisition of a conservation easement over 3,688 acres on the lower end of Kuka'iau Ranch on Hawai'i island to the fee purchase of 4,469 acres above it.

In short, plans to acquire the conservation easement “fell through,” said DOFAW administrator Dave Smith. “The landowner backed out on that.” However, the owner is willing to sell the upper piece.

Although there is already a conservation easement over the mauka lands, buying them would allow the division to erect a fence line around a portion of Mauna Kea, where the state is court-mandated to eliminate ungulates in palilia habitat, Smith said.

He urged the Land Board to approve the funding shift, in part, because if the money goes back into the Legacy Land Conservation fund, it could get raided by the Legislature next session.

Questions over whether the easement and fee would merge once the state took ownership and whether the value of the land includes the easement are yet to be worked out, but the board ultimately voted to approve the funds transfer.

“There's some technical issues associated with the purchase. None are deal-killers. Overall, it's a really good piece of property, if we can restore koa forest,” Smith said. — T.D.



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## PUC Puts the Brakes on PV Project In Ka'u, Biofuel Plant in Pepe'ekeo

The state Public Utilities Commission (PUC) has issued orders that resolve – at least for now – two of the longest-festering matters before it.

The first of these involves a series of Feed-In Tariff (FIT) projects, totaling more than 6 megawatts, proposed for the rural Hawaiian Ocean View Ranchos subdivision in the Big Island district of Ka'u. The Big Island utility, HELCO, needed PUC approval before it could build the substation and overhead lines required to add the new output to its circuits.

The second involves the stalled-out Hu Honua power plant being built on the same site as the old Pepe'ekeo sugar mill on the Hamakua coast, a few miles north of Hilo. Faced with repeated delays and missed milestones, HELCO informed the plant's owners that it was canceling the power-purchase agreement calling for Hu Honua to produce around 21 megawatts of electricity to be added to the island's grid.

### *The FIT Projects*

For several years now, residents of the remote Hawaiian Ocean View Ranchos (HOVR) community have chafed at the behavior of an entrepreneur, Pat Shudak, who sought to exploit the FIT rules by buying up practically every available lot offered for sale in the subdivision. Tier 1 of the FIT program was intended to benefit small generators by allowing them to sell energy at premium rates to Hawaiian Electric utilities across the state, with a capacity limit of 250 kilowatts per installation. Shudak bought more than two dozen lots in HOVR and an adjoining unimproved subdivision, consisting of forested 'a'a lava. He received approvals for FIT photovoltaic installations with a total capacity of 6.5 megawatts. (One additional 250 kilowatt project had already received approval to enter the FIT queue, making for a total of 6.75 MW of total added capacity.)

In August 2015, HELCO applied to the PUC for approval to build a 69 kV overhead transmission line through the community to serve the FIT projects and a new substation.

Growing community dissatisfaction with the developer resulted in hundreds of public-comment letters being sent to the PUC. This culminated in the submittal, on August 29, of a 72-page-long formal complaint by residents Ann and Peter Bosted, which has been logged in as PUC docket 2016-0224.

On September 9, the PUC suspended further action on the HELCO request for approval of the overhead line required to serve the FIT projects, pending resolution of the Bosteds' complaint.

"The commission observes that the proposed Ocean View substation and related line extension ... would not be necessary but for the underlying FIT projects," it wrote in its order. "The Consumer Advocate has raised numerous concerns related to the underlying FIT projects, including that the projects were shepherded through the FIT process in a manner that may have circumvented the Competitive Bidding Framework. Furthermore, the Bosteds have filed the complaint, which pertains to the underlying FIT projects, raising many of the same issues that were identified by the Consumer Advocate. If the commission were to grant the relief sought in the complaint, namely that the commission issue an order removing the FIT projects from the FIT's active queue, it could materially affect the commission's evaluation of the instant proceeding."

### *Hu Honua*

In February, HELCO informed the PUC that it would be terminating its power-purchase agreement for the Pepe'ekeo Hu Honua plant on March 1, owing to Hu Honua's failure to meet several significant construction milestones.

On February 23, Hu Honua informed the commission that "the only current barrier to completion of the project was HELCO's unwillingness to negotiate milestone extension dates."

After the notice of termination, on May 19, Hu Honua appealed to the commission, asking it to investigate HELCO's "attempts to terminate the PPA," "issue information requests as a part of that investigation," and "clarify what actions and/or decisions the commission" intends to make.

The commission followed up with information requests to both Hu Honua and HELCO. On September 8, it issued its order in the matter, finding that "a dispute between Hu Honua and HELCO clearly exists." However, the power-purchase agreement itself "sets forth a process for resolving disputes ... including provisions for mediation and arbitration."

Hu Honua had also asked the commission "to review whether it is in the ratepayer's interest for HELCO to execute a price reduction and milestone amendment to Hu Honua's commission-approved PPA." However, the PUC order continued, "Hu Honua is not a party to this docket. No party to this docket has proposed an amendment to the PPA, and the commission action that Hu Honua requests would contravene the express terms set forth in the PPA." For that reason, "it is not appropriate for the commission to intercede in this matter. Hu Honua's request is, therefore, dismissed with prejudice."

That does not mean that the Hu Honua plant will not be completed and eventually made a part of the HELCO grid. "HELCO has stated that it is 'agreeable to continuing to work with Hu Honua' to see if HELCO and Hu Honua 'can mutually agree upon a proposal that will enable the [project] to move forward for commission review and approval. If HELCO and Hu Honua come to an agreement regarding proposed amendments to the PPA or any alternate proposal, the commission expects that HELCO will promptly submit any proposed amendment or proposal to the commission for review." — *P.T.*