

# Environment



# Hawai'i

*a monthly newsletter*

## *Power Plays In West Kaua'i*

To Waiahole, Na Wai 'Eha, and East Maui, add now Kekaha. The dispute over the use of stream water in West Kaua'i is turning out to be as complex and fraught as any of these other, more famous, water wars.

As our cover story explains, the Agribusiness Development Corporation is seeking to push the many parties to the dispute toward a resolution by the end of the year. Whether this can happen is anyone's guess — and even some ADC members seem skeptical.

Also in this issue: We report on the first few days of testimony in the contested case hearing over the Conservation District Use Permit needed for construction of the Thirty Meter Telescope on Mauna Kea; we provide an update on the latest developments in deciding if Alexander & Baldwin will continue to be allowed to use East Maui surface water to irrigate its future crops now that sugar is out of the mix; and we describe the efforts of the Board of Land and Natural Resources to deal with its new policy on contested case hearings.

## IN THIS ISSUE

**2**

*New & Noteworthy:  
GEMS, Bigeye, and a Correction*

**3**

*Slow Going in TMT Contested Case*

**5**

*Telescope Opponents Raise Issues  
Of Religion, Kingdom, and the  
Northwest Ordinance of 1787*

**8**

*Board Talk: Wind Farm,  
Water Holdovers*

**9**

*East Maui Water Case:  
Opening Briefs, Petition Denial*

## Kaua'i Utility Wins Conditional Lease For Hydroelectric Project in Kekaha

Hoping to spur a resolution of a years-long dispute over stream water in West Kaua'i, the state Agribusiness Development Corporation (ADC) approved a five-year lease to the Kaua'i Island Utility Cooperative (KIUC) for its Pu'u Opae hydropower project. The lease is subject to any conditions that may result from the dispute resolution process and must be issued no later than December 30.

The decision, made at the ADC board's November 16 meeting, brings KIUC a little closer to securing control over the land and water resources needed for its pumped storage hydropower project that utility representatives say may one day supply ten percent of the island's electricity. The lease covers the upper portion of the Koke'e Ditch, which along with the Kekaha Ditch feeds ADC's 12,500 acres of agricultural lands in Kekaha. The lease also covers four stream intakes — Waikoali, Kawaikoi, Kauaikinana, and

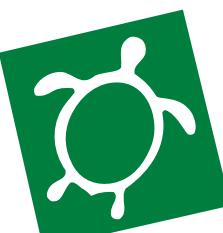
Koke'e — and the Mana reservoir and also gives the utility the option of extending the lease to 65 years.

But securing the lease by the December 30 deadline will be a tall order. The ADC and its tenant co-op, the Kekaha Agriculture Association (KAA), are in the midst of a fight over the stream water diverted by the two ditch systems. In July 2013, a community group represented by Earthjustice filed a petition and complaint with the state Commission on Water Resource Management calling for the end of water waste by the ADC and KAA, as well as amendments to the interim instream flow standards of Waimea River and its tributaries. The group argued that the ADC's Kekaha tenants required much less stream water than the former Kekaha Sugar Company and that they were simply dumping the excess rather than returning it to its streams of origin.

**continued to page 7**



Parties to the Water Commission mediation regarding water diverted by the Agribusiness Development Corporation's irrigation systems in West Kaua'i on a site visit to Kauaikinana dam, which is part of the Koke'e ditch.



# Environment Hawai'i

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## NEW AND NOTEWORTHY

**Turmoil at GEMS:** The quarterly report of the state's Green Energy Market Securitization program makes for interesting reading—laying out in grim detail the difficulties the initiative continues to have in attempting to carry out its intended goal of making renewable energy more affordable and accessible to historically underserved sectors of the market.

There was the resignation of its director, Tara Young, effective September 15. She had held the position less than a year.

There was harsh criticism from the Consumer Advocate of two of the three market initiatives GEMS proposed in this period, and the Public Utilities Commission's subsequent order suspending them.

Renew Financial, the company that was “engaged to design, implement, and operate the GEMS program,” elected not to extend its contract, and all related subcontracts were also terminated, effective September 30.

Of the \$150 million in bonds floated to finance the GEMS program, to date, approximately \$2 million has been spent on administrative and program costs (not counting fees related to the bond float). The 17 loans financed through GEMS total just \$577,947.28.

As to the “underserved” sectors that were the intended beneficiaries of this program, they continue to be underserved. Just one of the 17 loans went to a customer with a household income of between \$35,000 and \$50,000, while two went to customers with household incomes from \$50,000 to \$75,000. Fourteen of them were to customers with household incomes north of \$75,000.

Finally, in a footnote to the financial tables, the GEMS program acknowledges a major accounting blunder in its past reports. “GEMS loans were erroneously included in administrative and program costs, causing expenses to be overstated. The financials were corrected as of September 30, 2016, recording the loans as a receivable on the balance sheet (rather than an expense on the statement of revenues and expenditures).”

**Bigeye Allotment Shifts to Guam:** The Honolulu-based longline fleet burned through its international quota of 3,554 metric tons of bigeye tuna last July, but since then has continued pursuing this prized fish under a quota transfer arrangement with the Commonwealth of the Northern Mariana Islands, which allowed the longliners to take up to 1,000 metric tons of the 2,000 mt that

the National Marine Fisheries Service has determined to be the quota for each of the three U.S. territories in the Pacific.

On November 22, NMFS announced that the CNMI allocation was expected to be reached by December 1. Three days later, the agency published notice in the Federal Register that it had approved a fishing agreement between the Hawai'i Longline Association and the government of Guam, and that, “NMFS will begin attributing bigeye tuna caught by [HLA vessels] … to Guam starting on November 24.”

**Wespac Meetings on Monument Rules:** The Western Pacific Fishery Management Council is sponsoring meetings this month on regulations for fishing in the expansion area of the Papahanaumokuakea Marine National Monument. The schedule follows:

- December 6, Hilo Intermediate School Cafeteria;
- December 7, West Hawai'i Civic Center, Building C;
- December 8, Courtyard hotel near the Kahului airport;
- December 13, Chieffess Kamakalei Middle School in Lihue;
- December 15, Ala Moana Hotel, Honolulu;
- December 17, Kaunakakai Elementary School Cafeteria.

All meetings will start at 6 p.m. except for the Moloka'i meeting, which will start at 1 p.m.

**Unsung Heroes:** Patricia Tummons, editor of *Environment Hawai'i*, and Michael Lee, an environmental activist from the 'Ewa area whose efforts have been noted in these pages, were honored by Hawai'i's Thousand Friends last month as the group's Unsung Heroes of 2016. We thank them for this distinguished award.

**Correction:** In our October coverage of the state Agribusiness Development Corporation, we misspelled staffer Ken Nakamoto's name.

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### Quote of the Month

“We have waited far too long  
to hear the sounds of our streams  
alive once again in our valleys.”

— Maui Tomorrow Foundation

# Slow Going in TMT Contested Case; Hearings to Continue into New Year

The evidentiary hearing in the second contested case over the application to build the Thirty Meter Telescope on Mauna Kea began October 20 in the Willie K Crown Room of the Hilo Naniloa Hotel.

The nightclub setting for the quasi-judicial proceedings is by no means the most unusual aspect of this go-round. Twenty-three parties plus the applicant, University of Hawai'i-Hilo, have been admitted to the contested case, presided over by retired Judge Riki May Amano. Almost all the intervenors have views of the legal context framing the contested case that seem either to border on outright contempt or fully embrace it.

Several contend that the state of Hawai'i has no authority to determine whether the telescope should be built on what they regard as sacred land. Many base this argument on the belief that the kingdom of Hawai'i is still the rightful governing authority. Some claim that over and above the summit being the dwelling place of the gods or the actual bodies of their deities, the rocks themselves are their *kupuna* (elders or ancestors) or '*ohana* (family).

An order setting forth the scope of the hearing disallowed any arguments about the legitimacy of the state government, the existence of the Hawaiian kingdom, or the state's ownership of the site proposed for the TMT. Despite this, in cross-examinations conducted to date, many opponents have persisted in raising these very issues. In addition, many have included on their proposed list of witnesses parties whose testimony concerns those issues.

Facing off against the opponents, their animistic beliefs, and their unorthodox reading of modern Hawaiian history are the University of Hawai'i-Hilo, which has oversight over the summit area, and the TMT International Organization, whose plans call for developing a cutting-edge, billion-dollar observatory. A recently incorporated non-profit group called PUEO, for Perpetuating Unique Educational Opportunities, is the only other intervenor in the proceedings that favors the telescope's construction.

The contrasting views have frequently led to exchanges between witnesses and those cross-examining them that may best be described as bizarre. At times this results from the fact that many of the telescope

opponents are representing themselves *pro se* — something they point out at every opportunity — and are learning the hearing protocol on the fly. (See the accompanying article for several verbatim examples of exchanges.)

## ***The Thirty-Minute Rule***

In general, Judge Amano has allowed the parties broad leeway to question the university's witnesses. On October 31, however, she announced that beginning with the next day's hearing she would limit cross-examination to 30 minutes for each party. The decision came after the protracted questioning of Günther Hasinger, director of the University of Hawai'i Institute for Astronomy, during the previous hearing, on October 27. One party alone — Brannon Kamahana Kealoha — questioned Hasinger for 115 minutes. Altogether, Hasinger was on the witness stand nearly 10 hours.

"I looked at everyone's direct examination and cross-examination over the last five hearing days with witnesses," Amano said in announcing her decision. "I know exactly how much time everyone took. I observed the questions and preparation. I believe that limiting the cross examinations to 30 minutes is going to help us focus and to be prepared."

She added, however, that exceptions would be made, "if there's good cause shown."

Most of the parties stated their objection to the limit, but Amano was firm, citing as her authority Hawai'i Administrative Rules Chapter 13-1-32, governing the conduct of the Department of Land and Natural Resources' contested case hearings.

Among those complaining the longest was Kealoha, who, after arriving late, proceeded to argue with Amano for 15 minutes. "My due process has been sabotaged," he stated. "When that German national" — Hasinger — "was accommodated to my tab, that's why I'm late, and then you schedule this motion. I'm shaking because, it's personal. When are you going to accommodate the *pro se*? I want to let you know that that 12-hour hearing — I have a medical condition. It's a sleep disorder.... You ultimatum me and then, since you already told me you're just going to list it and you're not going to accommodate my *pro se* stance."

Although Amano did indeed allow cross-examiners to exceed the half-hour time limit on the next hearing day and subsequent ones, on November 7, the group of opponents who challenged the TMT in the first contested-case hearing (and who are also participating in this remanded hearing) filed an interlocutory appeal with the state Supreme Court.

## ***The Interlocutory Appeal***

Amano's 30-minute rule was just one of four orders that were the subject of the appeal. The other rulings that the petitioners sought to have overturned were contained in three minute orders issued by the Board of Land and Natural Resources: No. 37 (denying the petitioners' motion to strike the original Conservation District Use Application); No. 38 (denying the petitioners' motion to disqualify the deputy attorneys general assisting in the conduct of the hearing); and No. 39 (denying several motions to disqualify the hearing officer).

Apart from the content of the appeal, it is noteworthy for at least two other reasons. It appears to be the first appeal filed under a new law, Act 48, minted this last legislative session, that provides for expedited appeals to the Hawai'i Supreme Court of grievances arising from contested case hearings "of significant statewide importance."

The Supreme Court has yet to adopt any rules to implement Act 48. Just what effect this appeal will have on the ongoing contested case is unclear, but, according to one attorney reached by *Environment Hawai'i*, unless the petitioners ask for a stay and one is granted, the appeal itself is unlikely to derail the contested case. Even if a stay is requested, said the attorney (who asked not to be identified), the high court is unlikely to grant one. The court, he continued, is generally reluctant to intervene with ongoing evidentiary proceedings, such as the TMT contested case.

Then there is the matter of the attorney representing the appellants in the Supreme Court filing: Richard Naiwicha Wurdeman. Wurdeman had represented the original petitioners in the successful appeal of the first contested case. He had also represented them at the start of proceedings in the current contested case. However, on October 10, just days before the start of the evidentiary hearings, Wurdeman informed the parties that he would no longer be able to represent them, citing scheduling conflicts. On October 17, before the scheduled start of the evidentiary portion of the contested case, Amano asked each of the petitioners affected by Wurdeman's withdrawal

whether they were ready to proceed, and all agreed that they were. Since then, KAHEA has been the sole petitioner among Wurdeman's former clients to obtain legal counsel for purposes of the contested case, retaining Yuklin Aluli and Dexter Kaiama to represent its interests. In a footnote to the Supreme Court appeal, Wurdeman states: "Unless further notices of appearance of counsel are otherwise made, counsel has been retained by the appellants solely for purposes of the instant appeal."

### **The Motions to Disqualify**

Practically since the day Amano was appointed by the Land Board to conduct the hearings, her appointment has been challenged, both as to her fitness and as to the procedures used to select her. And no sooner are the challenges dealt with than motions for reconsideration and joinders in those motions are filed. The online documents library website that records filings in the contested case ([dlnr.hawaii.gov/mk/documents-library/](http://dlnr.hawaii.gov/mk/documents-library/)) lists dozens of motions and joinders filed by one or another of the petitioners or intervenors seeking to disqualify Amano. The first was lodged by Wurdeman on April 15. When that was denied, a request for reconsideration was made on May 13.

Others filing motions for Amano's disqualification over the next several months include Dwight Vicente (joined in by the Temple of Lono) and Harry Fengerstrom (joined in by Kalikolehua Kanaele and Richard DeLeon; DeLeon has since withdrawn as a participant in the hearing).

On August 26, the Land Board issued Minute Order 17, setting forth once more its reasons for denying motions for Amano's disqualification.

But on October 10, the parties represented by Wurdeman filed yet another motion to disqualify Amano, joined in by a number of other parties. As before, the challenge was dismissed in the Land Board's Minute Order 39, filed on October 28. This is now one of the subjects of the interlocutory appeal to the Supreme Court.

The Board of Land and Natural Resources and the University of Hawai'i have both filed objections to Wurdeman's appeal.

The BLNR attorneys, led by Julie China and William Wynhoff, argue that intervention by the court at this stage would lead to "piecemeal litigation at the expense of an orderly underlying proceeding." They urged the court to dismiss the appeal and "dispose of this motion as soon as possible."

Attorneys for the university made similar arguments. "The limitations on appellate

jurisdiction are intended to avoid the inefficiencies of piecemeal litigation and the premature review of issues before the development of a complete record. Allowing this appeal to proceed would run directly afoul of these purposes," wrote attorneys Ian Sandison, Tim Lui-Kwan, and John Manaut. They also suggested that the court might consider appointment of a master to oversee the proceedings, as allowed by the statute governing contested cases.

As *Environment Hawai'i* went to press, the Supreme Court had yet to address Wurdeman's appeal.

### **The Temple of Lono**

The list of motions to disqualify Amano mentioned in the Supreme Court appeal does not include the "Quo warranto demand of jurisdiction" submitted by Brannon Kealoha on July 18 or 25 — both dates provided on his signature line — and resubmitted in expanded form on August 8 as "MOTION invoking Quo Warranto, respectfully, a demand of jurisdiction; declaratory judgment on a constitutional issue/violation." This was rejected in Minute Order No. 30 of October 10.

Nor does it include a challenge raised by the Temple of Lono on September 17, which claimed that Amano had not allowed it to respond to "a sweeping ad hominem attack" made on it by the attorneys for the university. "There was no opportunity for the Temple to bring the full implications of the attack to the attention of the hearing officer by means of a motion because the deadline for filing pre-hearing motions had passed," Sinkin wrote. Amano did not allow Sinkin to make an untimely filing in rebuttal, and this, Sinkin argued, was "a clear abuse of discretion."

On November 14, Sinkin appealed to the Supreme Court, claiming that the Temple of Lono's due process rights had been systematically violated by the BLNR and the hearing officer's refusal "to permit the Temple to raise the question: Has the applicant demonstrated a hostility toward the Traditional Hawaiian Faith that disqualifies the Applicant from receiving the permit requested" and by "refusing, without explanation, to take up numerous motions filed by the Temple."

Of the 400-plus documents—motions, requests, joinders, rebuttals, minute orders, and other papers that defy easy categorization — that have been submitted to or by the hearing officer in the contested case, 45 were filed by Sinkin, who makes frequent requests of Amano for orders addressing his numerous filings. — **Patricia Tummons**

## **The TMT Permit Application in 200 Words**

The original Conservation District Use Application for the construction of the Thirty Meter Telescope (TMT) was submitted to the Board of Land and Natural Resources in 2010. The Land Board awarded the permit, but at the same time ordered that a contested-case hearing be held before construction could begin.

The hearing was held in 2011 and in 2012 the hearing officer made his recommendation to the Land Board that the permit be granted. In 2013, the Land Board agreed and the permit was issued.

The six parties to the contested case challenged the permit in court and late last year, the state Supreme Court found that the Land Board had erred when it voted to approve the permit before conducting the contested case. The matter was remanded to the Land Board.

In February, the board appointed retired Judge Riki May Amano to conduct the hearings. In addition to the six original petitioners — Mauna Kea Anaaina Hou, Clarence Ching; the Flores-Case 'Ohana, Deborah Ward, Paul Neves, and KAHEA: the Hawaiian Environmental Alliance — 17 parties have been admitted to the proceeding as intervenors.

The first evidentiary hearing was held October 20. The hearing is scheduled to continue well into the new year.

## **For Further Reading**

*Environment Hawai'i* reported extensively on the previous contested case over the TMT application for a Conservation District Use Permit. All are available at <http://www.environment-hawaii.org>:

- "Native Hawaiian Beliefs, Practices Are Argued in TMT Contested Case," January 2012;
- "Claims of TMT Foes are Denied," January 2013;
- "BLNR Gives Final Approval to Permit to Thirty Meter Telescope," May 2013;
- "Land Board Approval Before Contested Case Is Issue in Appeals of Two Telescope Permits," January 2014;
- "Groups Appeal Ruling on Thirty Meter Telescope," July 2014.

# Telescope Opponents Raise Issues of Religion, Kingdom, and the Northwest Ordinance of 1787

For more than a decade, beginning in 1992, Riki May Amano served as a judge in Hawai'i's 3rd Judicial Circuit, which, like all judicial circuits in the state, is bound by strict rules of evidence and procedure that, generally speaking, give a certain decorum to court proceedings.

In quasi-judicial contested case proceedings, however, the leeway afforded to participants is somewhat more lax, which can result in exchanges between witnesses and their cross-examiners that are, safe to say, unlike anything Amano ever saw in her courtroom.

Consider the cross-examination of the university's very first witness, Perry White, with the firm of Planning Solutions, which prepared the Conservation District Use Application for the Thirty-Meter Telescope.

Not long after White took the stand on October 20, Pua Case, on behalf of the Flores-Case 'Ohana, asked him, "Do you believe Mauna Kea is sacred?"

Ian Sandison, representing the University of Hawai'i, objected, noting that the question went well beyond the scope of White's direct testimony.

Amano sustained the objection, but then Brannon Kealoha objected: "How come he" — pointing to Sandison — "can object and I can't? I'm objecting to the objection."

As White was cross-examined by Harry Fergerstrom, Fergerstrom stated that the rocks that would be excavated during construction of the TMT are his *kupuna*: "Not only are you going to excavate my *kupuna*, you're going to spread them around and build on my *kupuna*."

Fergerstrom then apologized for his disorganized line of questioning: "I apologize for having to use the bathroom but I lost my entire train of thought... I had a really great train of thought going but I lost it when I had to go to the bathroom."

What follow are excerpts from the evidentiary hearings in October and November.



## 'Consent of the Gods'

On November 2, Dexter Kaiama, attorney representing KaHEA, cross-

examined master navigator Chad Kalepa Babayan, a witness for the University of Hawai'i.

**Dexter Kaiama:** Do you know if anyone associated with the building or the construction of the telescopes on Mauna Kea has asked for and received the full consent of the gods of Mauna Kea? Do you know?

**Chad Babayan:** Me personally? My knowledge and perspective? I do not recognize the deities of my ancestors because in 1819, under the wisdom of our then great leaders principally Liholiho Kamehameha the second, his mother, Keopualani, the regent Ka'ahumanu, the ranking ali'i Kalanimoku, and the high priest Hewahewa, abolished the religion. So I would need clarification on gods. Are you talking about gods pre-1819 or — because I don't recognize, and I do this in full recognition that other people do continue to recognize the religious order but I personally do not recognize the religious order because I wish to follow the great wisdom of our chiefs. So I am not sure how to answer this question.



## TMT and Standing Rock

Clarence M. Kaho'okahi Kanuha, a leader of the TMT protests in 2015, queried master navigator Chad Kalepa Babayan on his view of those protests, among other things.

**Kaho'okahi Kanuha:** Are you aware of the arrests that took place on Mauna Kea between March and December of 2015?

**Chad Babayan:** Yes, I am.

**Kanuha:** And are you aware that these arrests occurred due to the fact that TMT and its affiliates were attempting to build on Mauna Kea?

**Babayan:** Yeah, I believe it's a process of civil disobedience.

**Kanuha:** Do you believe that the building of the TMT on Mauna Kea is worth — and I won't throw a number there because again that calls for speculation, I guess — so do you believe that the building of the TMT is worth many Hawaiians and non-Hawaiians alike getting arrested to protect their sacred mauna?

**Babayan:** I believe that people have to stand up for what they believe in. So I believe that if they are arrested, it's part of the process.

**Kanuha:** Are you aware of the situation taking place in Standing Rock, North Dakota, at this time?

**Pete Manaut,** attorney for UH: Objection. Irrelevant, your honor.

**Judge Amano:** I'm going to overrule. Go ahead.

**Kanuha:** Are you aware of the situation

**Amano:** But I'm going to ask you to kind of —

**Kanuha:** Slow down.

**Amano:** Slow down, yes —

**Kanuha:** Kala mai.

**Amano:** But wind up. Slow down and wind up your questioning.

**Kanuha:** Are you aware of the events and the situation taking place as we speak at Standing Rock, North Dakota?

**Babayan:** Yes, I am aware of the protests

**Kanuha:** Taking place there.

**Babayan:** — against building the pipeline on private land because it's going to affect adjacent Indian lands and their waters.

**Kanuha:** Mahalo. Do you believe the building of the TMT is worth bringing a Standing Rock-like situation here to Hawai'i?

**Babayan:** Are you asking me to compare Standing Rock to TMT?

**Kanuha:** I'm just asking if building the TMT is worth bringing a situation like what's taking place at Standing Rock to Hawai'i?

**Babayan:** I don't know how to compare. Standing Rock is a separate issue.

**Kanuha:** Whatever you know of that's taking place at Standing Rock at this point in time, is the building of TMT in Hawai'i worth bringing whatever knowledge it is that you have of that place and that situation here to Hawai'i?

**Babayan:** Yes, I think it is.



## The Northwest Ordinance of 1787

Dwight Vicente embraces the view that a law passed by the Congress of the Confederation of the United States in 1785 and amended in 1787 means no states have been admitted to the union since that time. Here are selections from his cross-examination of Perry White:

**Dwight Vicente:** Do you have training to be a principal planner?

**Perry White:** Yes.

**Vicente:** And where is the training? Is it a college degree and in what country?

**White:** I obtained a master's degree in regional planning from the University of Pennsylvania, which is in the United States.

**Vicente:** One of the 13 states, right? Perpetual states. How do their planning be transferred to this kingdom, or applied to this kingdom, I should say?

**Ian Sandison:** Objection, relevance.

**Judge Amano:** [to Vicente] Why does it matter in this case?

**Vicente:** It does, because we're dealing with two different countries, that a treaty was continued through Article 4 Section 3 Clause 1 in 1898 by the U.S. Congress to continue the Reciprocity Treaty of 1875 amended in 1887.

...

**Vicente:** You stated in your testimony that Mauna Kea is in different subzones.

**White:** I said that there are different sub-zones to the Conservation District. I said that the portion that was the subject of the application was in the resource subzone of the Conservation District. I said that there are other subzones on Mauna Kea.

**Vicente:** When you said resource, did you mean money-making?

**White:** That's not how resource is defined in the Conservation District regulations.

**Vicente:** Does it have to draw in revenue?

**Sandison:** Objection. Argumentative.

**Amano:** I didn't understand the question. Does it have to draw in revenue to be considered a resource?

**Vicente:** Yes.

**Amano:** I'm going to overrule the objection.

**White:** No.

**Vicente:** Is it based on gold and silver?

**White:** I don't understand the question.

**Vicente:** How are they expected to pay for it, in gold and silver?

**Sandison:** Objection. Vague and ambiguous.

**Amano:** This witness, how would he know that?

**Vicente:** That's what I'm getting to.

**Amano:** You have to establish that he would have it in his knowledge to answer the question.

**Vicente:** Today everybody is using federal reserve notes, credit cards, and cyber money and all that. It's not authorized by either the kingdom's constitution nor the U.S. Constitution. So we're playing with Monopoly money, make believe, but the

end product, the land, are real. The documents are fraud.

**Amano:** I'm going to have to sustain the objection as to that particular question, and ask you to move on to the next question, please.

Vicente followed much the same line of questioning in his cross-examination of James Hayes, the planner who oversaw preparation of the environmental impact statement for the TMT.

**Vicente:** Where were you born anyway?

**James Hayes:** California.

**Vicente:** Are you a U.S. citizen?

**Hayes:** Yes.

**Vicente:** Have you been naturalized to one of the 13 states?

**Sandison:** Objection.

**Amano:** May I ask where you are going with this line of questioning, please.

**Vicente:** The conservation use is based on Indian land. We don't have Indian lands here. If you read Rice versus Cayetano, it says Native Hawaiians are not Indians. And so with the case Patrick Kawaiolaa versus I forgot the name. We don't have Indian lands here, so to apply Indian law on crown and government lands here is questionable. Conservation use designation is over Indian lands only.

**Amano:** So, why does his citizenship have anything to do with that line of questioning, for one thing, and, number two, I think we already said we weren't going there as a matter of what's relevant to this contested case hearing.

**Vicente:** Yeah, but you see the problem is there's a big gap in the history. 1776 and then you go to 1959. We're lost in space right there. And without fillin' that historical gap we'll be lost.

**Amano:** And how is this witness going to fill that gap?

**Vicente:** Well, he's part of the gap, too. He says he was born in California. That's a gap, too.

**Amano:** Okay, so —

**Vicente:** The United States got only 13 states and the five equal-footin' states under the Northwest Ordinance. And California is not one of them.



### ‘Did Poli‘ahu ... Ever Give Permission for the TMT?’

**O**n November 16, E. Kalani Flores, one of the original petitioners and

an instructor of Hawaiian studies at the Hawai'i Community College — Palamanui campus in Kona, cross-examined Wallace Ishibashi, Jr., a cultural consultant who works with the Office of Mauna Kea Management and claims lineage from Poli‘ahu, the legendary goddess of Mauna Kea.

**Kalani Flores:** In your written direct testimony, page one, you make reference to being born and raised in Keaukaha, is that correct?

**Wallace Ishibashi, Jr.:** Keaukaha, yes.

**Flores:** And you make reference to family roots to Waipio Valley in Hamakua and Miloli‘i in South Kona, is that correct?

**Ishibashi:** Yes.

**Flores:** And you make reference to family connections to Pu‘u Poli‘ahu, is that correct?

**Ishibashi:** Yes.

Flores: When you say Poli‘ahu is in your genealogy, are you referring to an individual or are you referring to the deity or goddess Poli‘ahu?

**Ishibashi:** Probably both.

**Flores:** So have you consulted with the goddess Poli‘ahu regarding this TMT project?

**Ishibashi:** Yes, I have — not Poli‘ahu, but to my ‘aumakua, yes.

**Flores:** That was not the question. Did you ever consult with Poli‘ahu, the known —

**Ishibashi:** No.

**Flores:** So Poli‘ahu, the goddess and deity of Mauna Kea, do you know if she ever gave permission for the TMT projects?

**Ishibashi:** Excuse me?

**Flores:** So the goddess and deity Poli‘ahu, on Mauna Kea, to your knowledge, did she ever give permission for the TMT project?

**Tim Lui-Kwan** [attorney for the University of Hawai‘i]: Objection. Assumes a fact not in evidence here, that Poli‘ahu does give consent to anything.

**Amano:** I'm going to overrule. Please answer.

**Ishibashi:** No.

Additional verbatim excerpts from the TMT contested case hearing are posted in the EH-Xtra section of our website: <http://www.environment-hawaii.org>. Videos of all hearings are available from the Na Leo TV website: <http://naleo.tv/vod>. — **P.T.**

### Koke'e from page 1

Parties to the case, including petitioner Poai Wai Ola: the West Kaua'i Watershed Alliance, the ADC, the KAA, KIUC, and the Department of Hawaiian Home Lands (DHHL) have been in mediation for more than a year, hoping to avoid a long, drawn-out, and expensive contested case hearing. In the meantime, the petition has suspended KIUC's plans for the Pu'u Opae project, which proponents say will not only bring the state closer to its goal of generating 100 percent of its electricity with renewable sources by 2045, but will also improve and maintain valuable irrigation infrastructure at no cost to the state and bring much-needed water to land the DHHL wants to see cultivated and developed.

KIUC says it will need 11 million gallons of water a day from the Koke'e Ditch for its project. With the petition and complaint still unresolved more than three years after being filed, "we had to pull the trigger to force the parties to really come together," said deputy attorney general Myra Kaichi at the ADC's board meeting last month. "If [the petition] goes into contested case, we'll be in it for 20 more years. We can't afford that. Everyone has to come to an agreement. Everybody has to give up a little."

Earthjustice attorney David Henkin questioned the utility's claimed need of such a large amount of water (especially for a project that simply shuffles water back and forth between two reservoirs), but told *Environment Hawai'i* that he would welcome a 21st century hydropower project that has a minimal impact on the environment.

"We think there's enough water for justified offstream use, but don't want wasteful technology to generate power and not food," he said.

He added that while he and his client would like to resolve the water dispute sooner than later, they're not going to allow an artificial deadline to force an agreement.

"Whatever moves forward has to address the needs of the river and the needs of the local community," he said.

### Contingencies

Once it completes its repairs to the irrigation infrastructure and builds powerhouses at the Pu'u Opae and Mana reservoirs, KIUC plans to use solar power to pump water from the Mana reservoir on ADC lands to the DHHL's high-elevation Pu'u Opae reservoir during the day. During

peak demand hours at night, it would then release the pumped water downhill through the powerhouse to generate electricity. In addition, KIUC has committed to delivering irrigation water to the ADC's tenants, the DHHL, and taro farmers fed by one of the smaller ditches.

"The actual amount to be delivered will be subject to the water needs of DHHL tenants, above, once DHHL issues leases to ... beneficiaries. More than sufficient water for the ADC Mana plain tenants will be stored in the Mana reservoir for irrigation purposes at all times. A separate irrigation pumping station will be installed that will allow the ADC and the [KAA] to control irrigation releases independent of the project operations and based on irrigation needs," states an ADC staff report to the board.

Before any of that can happen, several obstacles — in addition to the mediation resolution — must be cleared first. Foremost among them is the fact that the KAA, which has managed all of the ADC's infrastructure in the area for nearly a decade, has 11 years remaining on its license to operate and maintain the Koke'e Ditch and Mana reservoir. Before the lease to KIUC can be issued, the ADC must renegotiate its memorandum of agreement with the KAA that spells out the terms under which the co-op maintains and operates the irrigation infrastructure. Because the Mana reservoir sits on lands currently included in Syngenta's license, the ADC must also work with the company to remove the reservoir and some surrounding lands from its license.

In renegotiating the agreement with the KAA, Kaichi said, "that again is also a delicate balance. We have to make sure KAA tenants ... have benefits and use of that project and the KIUC project can still function." She hinted that should KIUC earn a profit from the pumped storage project, royalties could be directed to the KAA to fund infrastructure improvements on those parts of the ditch system it still controls or be used to purchase electricity from KIUC. In addition, she said, the KAA is already negotiating a new power purchase agreement with KIUC for the two hydroelectric plants on the Kekaha Ditch to ensure that it can afford to run all of the pumps that keep the Mana plain — which is also home to the Pacific Missile Range Facility — from flooding.

The right to divert water from the streams feeding the Koke'e Ditch must also be transferred from the ADC to KIUC. To achieve that, the utility must obtain a water

lease from the state Board of Land and Natural Resources. Although Kaichi said that the Department of Land and Natural Resources seems to support the idea, it's not guaranteed that KIUC would succeed in securing a water lease, since such leases are generally awarded via a public auction. And in the case of East Maui, the lease applicant has been tasked with conducting a full environmental impact statement.

The ADC board ultimately approved the issuance of a lease and related easements — no later than December 30 — subject to the outcome of the mediation over water, as well as a renegotiated agreement with the KAA, among other things. (It appears that some water may continue to be dumped, as one of the conditions of the lease is that the KIUC must obtain a discharge permit for water that is not used by ADC tenants.)

Although the ADC determined that no environmental assessment or impact statement was required before the land lease could be issued, since the lease will merely continue existing diversions, KIUC must conduct an environmental review of the electric generation facilities it plans to add to the system. Should the utility fail to complete that process, the ADC may cancel the lease.

### Reservations

Before voting on the matter, ADC board member and Kaua'i resident Sandi Kato Klutke stressed that the renewable energy portion of the project should be secondary to the agriculture irrigation part.

"The land out there is specifically for agriculture. It is not for a power plant. Unless you are going to give our ag people a benefit ... I think we need to look at it a little closer," she said.

KIUC president David Bissell assured her that his organization's management of some of the irrigation infrastructure will benefit the farmers.

"The utility will be there, arguably, forever, taking care of the ditch so there's more capacity ... It's long-term agriculture security of Kaua'i," he said.

Board member Margarita Hopkins expressed her concern that once KIUC takes over control of the water in the Koke'e Ditch, it might one day charge the Kekaha farmers a lot of money to deliver it.

"I know it is very, very hard to farm with no water or not affordable water. Is there any chance as time goes by the rate of the water is going to go up to the point where it's not going to be affordable for farmers to farm?" she asked.

## BOARD TALK

# Opponents Block Efforts to Allow Wind Farm to Harm Rare Animals

**O**n November 10, multiple requests for a contested case hearing forced the state Board of Land and Natural Resources to defer taking action on a request by the Department of Land and Natural Resources' Division of Forestry and Wildlife to approve an incidental take license and a habitat conservation plan for Na Pua Makani wind farm on O'ahu's North Shore.

(In its ruling late last year on the Conservation District Use Permit for the Thirty Meter Telescope on Mauna Kea, the Hawai'i Supreme Court made it clear that the Land Board may not issue a final decision on a matter when a contested case hearing has been requested before the vote. As a result, the Land Board has recently started explaining at the start of and throughout its regular meetings the public's rights to and procedures regarding contested case hearings.)

The incidental take license would have

allowed the farm to incidentally injure or kill limited amounts of eight species federally listed as threatened or endangered: the Newell's shearwater and the Hawaiian black-necked stilt, coot, moorhen, duck, goose, short-eared owl, and hoary bat. Mitigation measures for the waterbirds called for installing fences, predator traps and monitoring supplies, and/or educational signs to reduce fatalities of the birds at managed wetlands in Kailua and Kahuku. Mitigation for takes of shearwaters or owls involved funding related research or management measures. As for the bats, which are the animals most likely to be taken and which had the highest allowable take levels under the proposed license, Na Pua Makani Power Partners would be required to conduct habitat restoration and monitoring at Poamoho Ridge, in addition to funding bat research.

The facility, which received a lease from the Land Board in October, will consist of

Bissell replied that that will depend on the final cost of the project, but preliminary modeling of costs shows that "it looks like it's going to be good," he said.

Syngenta station manager Josh Uyehara, representing the KAA, offered his tentative support of the project.

"We have water, we have land, we have willing partners. It would be a shame if we can't come to agreement on a project like this," he said. However, he seemed concerned about how water allocations will be dealt with given that a number of parties have "overlapping claims to water."

With the Water Commission poised to amend interim instream flow standards so that some of the diverted water is returned to streams, Uyehara said, "We won't know what water will be available to parts of the system," adding that the amount flowing through two hydroelectric plants on the Kekaha ditch that the KAA controls will likely be reduced.

Given the various challenges the KAA is expected to face with the amended IIFS and the Pu'u Opae project, Uyehara said the KAA is exploring what kind of assistance it can get to meet those challenges.

"There's no way we can settle those is-

nine wind turbines capable of producing up to 25 megawatts of electricity. Mike Curbirth, manager of Na Pua Makani Power Partners, told the Land Board that the project will generate electricity at about half the cost of burning oil.

"This is the lowest cost wind energy project in the history of Hawai'i," he said, adding that it will contribute \$2 million to a community benefit fund over the life of the project.

Despite its potential benefits, a number of area residents remained skeptical. Sean Quinlan, newly elected state representative from the area, testified that in all of his canvassing of his district, he met no one who supported the project. He also said he found the proposed mitigation measures inadequate.

"I'm not sure we should continue to invest huge sums of money to build centralized distribution models," he said, noting that residential solar photovoltaic systems have benefitted homeowners the most.

State Sen. Gil Riviere also testified in opposition and went so far as to request a contested case hearing on behalf of himself and the community group Keep the North Shore Country.

sues right now but we don't want to hold up the process. We're operating on the basis of trust with the state and various stakeholders," he said.

He assured the board that despite the recent loss or downsizing of seed companies in the area, the current tenant mix at Kekaha supplied enough funds to maintain the agricultural infrastructure under the KAA's control.

"I don't see in the near future that situation would change," he said. Still, he added, "We are taking another look at our structure as an organization, looking at the longer term picture of how do you make partnerships more sustainable to withstand ups and downs."

"We know the amount of water that could be diverted will be reduced as a part of the [IIFS] process. There's nothing we can do about that," he said. "We no longer will have so much leeway that we could guarantee [adequate water] without thinking about it. ... Now we have to be a little more careful [and] can't take for granted that there will always be water for every part of the land," he said.

— *Teresa Dawson*

### *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>.

- "Water Commission Gives Parties One Month To Mediate West Kaua'i Waste Complaint," and "Agricultural Tenants in Kekaha Object to Basic Questions About Water Use," September 2015;
- "Mediation Over West Kaua'i Stream Diversions May Hinge on Response to Information Request," July 2015;
- "Early Findings on Claims of Kaua'i Water Waste," March 2015;
- "Kaua'i Pumped Storage Project Wins Preliminary Approval of Land Lease," December 2014;
- "KIUC Advisor Outlines Potential Impacts of Pumped Storage Projects in West Kaua'i," October 2014.

Kent Fonoimoana, president of the Kahuku Community Association, also requested a contested case hearing on behalf of himself, the association, and a group called Makani o Kahuku. "You are charged with the protection of our environment," he told the board. "Solar is far better in not killing critters."

(Earlier in the meeting, the Land Board denied a request for a contested case hearing he had made in October regarding the state lease for the project. Upon the advice of its deputy attorney general, the board found that Fonoimoana had no standing or property interest to warrant granting him a hearing.)

A representative of Tetra Tech, which prepared the habitat conservation plan for the project, admitted that there is a lot of uncertainty in anticipated take levels, "but we use the best science available ... to come up with the plan. We also use really conservative estimates of developing the take estimates."



## Board Grants Holdovers To Nine Water Permittees

In January, 1st Circuit Judge Rhonda Nishimura issued a ruling in a Maui water case that caused panic among those who had been diverting water from state lands under revocable permits. Nishimura found that state law never intended revocable permits held by Alexander & Baldwin and its subsidiary, the East Maui Irrigation Co., Ltd., to be endlessly renewed, thereby closing off any opportunity for others to gain access to that water or to evaluate the environmental impacts of the diversions. She therefore ruled that the four permits those two companies held — which had been regularly renewed by the Land Board for more than a decade — were invalid.

Although Nishimura's ruling spoke specifically to A&B's and EMI's permits, many throughout the state, including the state itself, were convinced that it meant that all of the state's revocable permits for water were in danger. To ensure that those permittees continued to receive water pending Land Board approval of their applications for a long-term lease, the Legislature passed and the governor signed Act 126. This measure provides for the annual approval of a holdover of water permits for up to three consecutive years, provided that they are consistent with the public trust doctrine.

On November 10, the Land Board finally took advantage of the act and approved

## Na Pua Makani Proposed Incidental Takes

Common Name	Scientific Name	Tier	Requested Authorization 21-Year Limit
	'Ope'ape'a (Hawaiian hoary bat)	Tier 1	34 bats
		Tier 2	51 bats
	'a'o (Newell's Shearwater)	Puffinus newelli	Length of Permit
	Nene (Hawaiian goose)	Branta sandvicensis	Length of Permit
	koloa maoli (Hawaiian duck)	Anas wyvilliana	Length of Permit
	ae'o (Hawaiian stilt)	Himantopus mexicanus knudseni	Length of Permit
	'alae ke'oke'o (Hawaiian coot)	Fulica alai	Length of Permit
	'alae 'ula (Hawaiian Moorhen)	Gallinula chloropus sandvicensis	Length of Permit
	Pueo (Hawaiian short-eared owl)	Asio flammeus sandwichensis	Length of Permit 4 adults/fledged young and 4 chicks/eggs

Tier 1 and Tier 2 refer to specific mitigation measures to be implemented whenever the take limits are met.

holdovers to nine permittees on Kaua'i and Hawai'i. Three of them provide domestic water, which is a public trust use, according to Kevin Moore of the DLNR's Land Division. All of the others, except for two that provide water for hydropower plants, use their water for agriculture. In making its determination that the uses comply with the public trust doctrine, Land Division staff wrote in its report to the board that "making irrigation water available to farmers and ranchers promotes agricultural use of public land and water. It also allows for the local production of food, supporting the goal of food sustainability and food security for Hawai'i. It may also translate into lower prices for consumers when produce does not have to be shipped to Hawai'i from outside of the state. Any tension between identified public trust uses of water and the constitutional mandates above will be resolved in the process of issuing water leases, because section 171-58, HRS [Hawai'i Revised Statutes], requires the joint development of a water reservation to support current and future [Department of Hawaiian Home Lands] homestead needs.

"The hydroelectric use of water allows utility companies to provide clean energy to domestic and commercial users. This

method of energy production also supports Hawaii's Clean Energy Initiative, which sets goals for the state to achieve 100 percent clean energy by 2045 coming from locally generated renewable sources. Further, those hydroelectric projects that return water to the same stream or other body of water from which it was drawn are considered non-consumptive. Although hydroelectric projects are not an identified public trust use of state waters, the public trust concerns will be addressed in the processing of the water lease applications under Section 171-58, HRS."

The Land Division recommended that rent during the holdover remain the same, except for those permittees not paying at least \$480 a year. With regard to future rent calculations, the division's report noted that it has met with the Department of Hawaiian Home Lands, Office of Hawaiian Affairs and the Office of Environmental Quality Control to devise a method of "charging for the use of water in a way that will help to sustain the resource. On September 15, 2016, the agencies met with three economics professors from the University of Hawai'i to discuss possible methodologies for valuing the water and assessing charges for its use."

— T.D.

# HC&S Claims Diversified Ag Needs Will Exceed 100 Million Gallons a Day

On January 9, the contested case hearing on Na Moku Aupuni o Ko'olau Hui's 2001 petition to amend the interim instream flow standards (IIFS) of 27 East Maui streams resumes. The group, which includes native Hawaiian taro farmers and cultural practitioners from the area, has long sought restoration of streams that have been diverted for roughly a century by Alexander & Baldwin, Inc. (A&B) through its subsidiary the East Maui Irrigation Company (EMI).

This past January, hearing officer Lawrence Miike finalized his recommendations on how much water should be returned to streams, how much should go to Maui Department of Water Supply customers in the upcountry area, and how much could be reasonably diverted for A&B subsidiary Hawaiian Commercial & Sugar's sugarcane plantation, which spans tens of thousands of acres in central Maui. He determined that 140.19 million gallons a day (mgd) for sugarcane, 7.1 mgd for the Maui DWS's Kamole Water Treatment Plant and Kula Ag Park, 6.66 mgd for HC&S industrial uses, and 34.95 mgd in irrigation system losses due to seepage or evaporation were reasonable, beneficial offstreams uses. Those uses totaled 188.9 mgd. However, Miike noted that if HC&S used 83.32 mgd from its brackish water well, it would only need 105.58 mgd of diverted water.

Shortly before Miike released his recommendations, A&B dropped a bombshell: it planned to close plantation operations at the end of the year and seek to use the lands for diversified agriculture. To recalculate reasonable, beneficial offstream water uses in light of this dramatic change, the state Commission on Water Resource Management, which will ultimately decide how to amend the IIFS, decided earlier to reopen the hearing.

In October, parties to the case submitted their opening briefs. Response briefs are expected to be filed this month. In those opening briefs, HC&S unveiled its detailed vision for its former sugarcane lands, Maui County asked for more water to address current and future needs, and the Maui Tomorrow Foundation urged the Water Commission to refrain from giving HC&S's hypothetical future water uses much, if any, weight when determining the IIFS.

No opening brief from Na Moku was

filed, according to an attorney with the Native Hawaiian Legal Corporation, which is representing the group.

## *Hawaiian Commercial & Sugar*

According to HC&S's opening brief, EMI has restored much of the water it once diverted back into East Maui streams and no water at all is being diverted from the Nahuku or Ke'anae water license areas. (A&B and EMI divert water from four license areas controlled by the state: Nahiku, Ke'anae, Huelo, and Honomanu.) Although EMI's ditch system has the capacity to divert hundreds of millions of gallons a day, HC&S states that it is now taking only 20 to 25 mgd from East Maui to meet the Maui DWS's needs as well as its own requirements for industrial uses, firefighting, dust control, diversified agricultural test crops, and erosion-controlling cover crops. While this amount is a fraction of what's been historically diverted, the company anticipates that its future water needs may again exceed 100 mgd.

HC&S argued that the state Water Code requires the Water Commission to consider not only current non-instream uses, but potential uses of water that benefit the public. The company pointed out that of its 31,000 acres of sugarcane fields, 22,254 of those acres have been designated by the state Land Use Commission as Important Agricultural Lands.

Included in HC&S's exhibits is a map, dated March 2016, depicting the company's vision for its Central Maui lands once sugar operations end. According to the map, the company foresees the bulk of the lands will be used to support livestock (including dairy operations) and biofuel or bioenergy crops. Large areas are also earmarked for diversified farm leases, agricultural parks, and beverage crops such as coffee or cacao.

HC&S explained that the plan is not fixed or guaranteed. "[I]t is extremely challenging to immediately identify an economically viable plan to maintain the majority of the HC&S lands in an alternative agricultural use. This plan will evolve over time," it stated.

Most of the area, 26,600 acres, will need to be irrigated and HC&S has calculated the foreseeable water needs for each crop or use. To meet all of those needs and to account for reasonable irrigation system losses, HC&S

claimed it would need 116 mgd.

Some of the planned uses—i.e., pasture, dairy, orchard, pongamia (a biofuel crop), and bioenergy crops—may be met with groundwater from its brackish well, which has historically provided HC&S with about 70 mgd, the brief stated. However, the company warned, the cessation of sugarcane production may decrease the amount of water that percolates into the aquifer below, thereby reducing the well's capacity. It also noted that some of the planned crops may not tolerate brackish water and that well water is more expensive than surface water.

"The assurance of the availability of an economically feasible source of water is necessary to justify such major investments by A&B and others who will be farming on HC&S land. Additional operating costs, such as the cost to pump groundwater, could cause the return on these investments to be less attractive and difficult to justify," the brief stated.

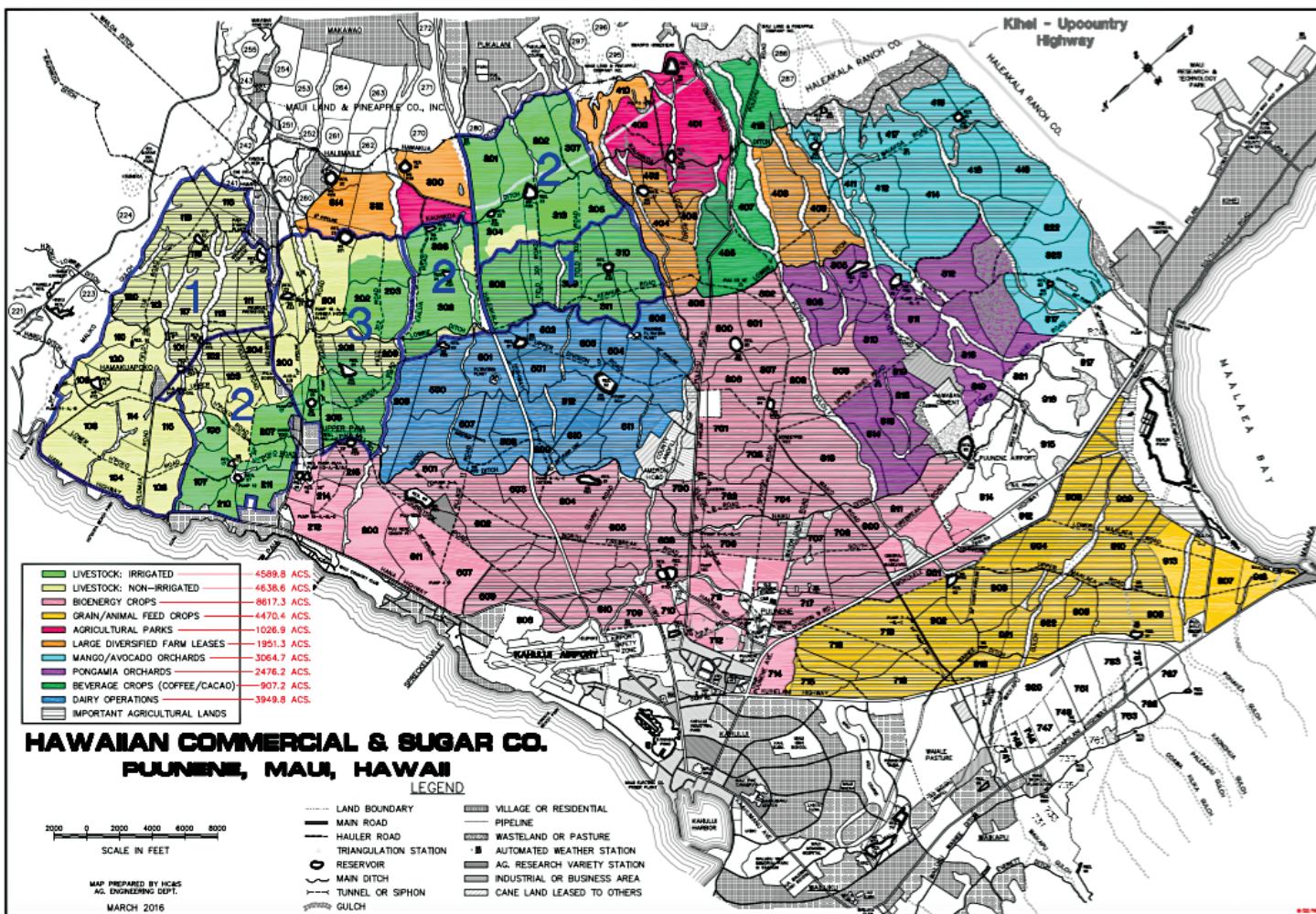
## *Maui Department of Water Supply*

During prior contested case hearings on the IIFS of East Maui streams, the Department of Water Supply refrained from seeking more water because, given HC&S's needs at the time and the instream uses pursued by Na Moku and the Maui Tomorrow Foundation, "there quite simply would not be enough water to meet those demands," the department stated in its opening brief. Currently, the county requires around 8.4 mgd of diverted water.

In January, Miike concluded that restoring a mere 18 mgd would meet instream uses, while HC&S announced plans that suggested it may need a lot less water. Given that, "it now appears there is sufficient water to accommodate MDWS future needs," the county stated.

For Upcountry, meeting the needs of the 1,852 applicants on the department's water meter priority list as well as 8,000 or so future area residents would require an additional 9.15 mgd, it stated. Although the county has wells there that can provide up to 3.4 mgd, surface water is cheaper, it added.

The agency, citing several county planning documents, argued in support of A&B's plans to keep Central Maui in agriculture, as well as EMI's continued operation of the East Maui Irrigation system. If EMI should for some reason stop maintaining and operating the system, the county said, it would be concerned that it might not be able to continue supplying water to its 35,000 customers in Upcountry. The county lacks the capacity and expertise to take over the



system, and coming up with alternatives to East Maui surface water would take time, it stated.

#### Maui Tomorrow Foundation

In its opening brief, MTF disputed HC&S's claims that EMI has modified its ditch system to restore vast amounts of water to East Maui streams.

In the midst of this past legislative session, as controversy raged over bills aimed at giving water permittees (principally A&B) the ability to obtain a three-year holdover while the state Board of Land and Natural Resources decided on their applications for long-term water leases, the company announced that it would be permanently restoring water to eight priority streams that provide water to taro farmers and residents in East Maui. In its opening brief, MTF argued that A&B and its subsidiaries have not fulfilled that promise. Streams in the Hanehoi watershed — where residents rely on stream water for domestic uses — have not been fully restored, and EMI is either wasting water or not restoring unused water to streams targeted for restoration, the organization stated. Instead, EMI has been releasing into a single stream — Ho-

nopou — water that is no longer needed for HC&S's sugarcane, contrary to a request by Miike that this excess water be released into "those of the 27 streams that the Hearings Officer recommended to have increased flows," MTF stated.

Regarding any proposed amendments

to the IIFS, MTF argued that the cessation of HC&S's sugar plantation is such a massive change "that a wholesale re-opening is required of any state granted rights to these East Maui waters, the manner in which they are to be transmitted, where they are to be transmitted, as well as who may qualify to



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use these waters. These issues cannot be decided in this proceeding alone and wider notice of the opportunity to qualify for these waters is required.”

Because East Maui is not a designated water management area where water use permits are issued by the Water Commission, the Land Board will ultimately decide whether or not A&B and/or its subsidiaries will continue to have rights to East Maui water. A&B is working toward completing an environmental impact statement for its proposed long-term water lease for the four license areas, and the Land Board is expected to eventually hold a public auction for that. The amount to be diverted under the lease will be limited largely by the Water Commission’s determination of how much water should remain in streams and how much can be diverted for offstream uses.

In MTF’s view, allocating or reserving any water for HC&S’s fields during the IIFS process would constitute a “clear, reversible error,” and any discussion of the company’s proposed future uses should be subject to a full evidentiary hearing.

“It cannot be automatically assumed that A&B and HC&S have any rights to reserve these waters for themselves or their surrogates to be used on lands that formerly constituted the HC&S sugarcane plantation. . . . Just because the diversions were constructed to direct East Maui’s water to the HC&S plantation does not automatically mean that the HC&S plantation owners possess any rights to maintain control over that water once the plantation no longer operates and the fields are not used at all or are not used for sugarcane. . . .

“The CWRM cannot allocate water to a closed plantation with unused fields,” MTF stated, adding that while the commission has some authority to provide for future uses, HC&S’s alleged future uses “cannot be hypothetical and speculative, such as possible cattle ranching and possible biofuel

production. At some point when these future uses ‘ripen’ some allocation may, at that time, be made.”

With regard to the DWS’s request that it be allowed more water from the diversions, MTF stated that it wants East Maui streams to be fully and permanently restored before any more water is awarded to the county.

“[I]t could not be plainer that long-ignored and unsatisfied legitimate ‘present’ riparian, appurtenant and instream needs must have priority over speculative, now non-existent ‘potential’ future offstream uses.

“We have waited far too long to hear the sounds of our streams alive once again in our valleys,” it stated.



### Land Board Rejects Request To Halt A&B Stream Diversions

**N**a Moku and other East Maui residents represented by the Native Hawaiian Legal Corporation have been fighting on a number of fronts A&B’s ability to continue diverting streams while the Land Board decides on its application for a long-term lease. In December 2015, after 1st Circuit Judge Rhonda Nishimura indicated she would be invalidating holdover revocable permits (as she did in her decision issued last January 8), the Land Board stopped short of reissuing such permits to A&B and instead it simply reaffirmed a decade-old decision to continue the diversions on a holdover basis.

The state Intermediate Court of Appeals is slated to decide on an appeal of the 1st Circuit Court’s decision. Meanwhile, Na Moku is fighting the Land Board’s 2015 decision in the state’s new Environmental Court, which is scheduled to hear oral argu-

ments in the case on December 22.

Na Moku has also appealed to the Land Board itself, which has an open contested case hearing on A&B’s 2001 application for a 30-year water lease. Earlier this year, the group submitted a petition to the board asking it to reject A&B’s lease application, halt of all of the company’s current diversions from East Maui (except those needed to meet DWS needs), and require the company to provide more information on its water demand and meter all streams with diversions. On August 26, the Land Board denied the petition.

With regard to Na Moku’s request that all of A&B’s diversions cease, the board stuck to its position that its 2007 contested case hearing order for an interim release of a few million gallons of water to several East Maui streams, while continuing the diversions on a holdover basis, remained in effect.

“No party appealed this order. The board, in the context of this contested case, cannot summarily reverse its 2007 order without procedural and evidentiary safeguards when the decision depends on facts disputed by the parties, such as the current needs for water and the effect of diversions on stream life. Unquestionably, the end of sugar cultivation will affect the allocation between instream and offsite uses when this is considered again by the board, but rather than commence its own evidentiary hearings on this subject, the board prefers to wait for the current CWRM proceedings,” the board stated in its most recent order.

It went on to say that it was unaware of any evidence that the diversions, if continued for a few months to allow for the Water Commission’s review, would permanently harm ecosystems or contribute to the extinction of any species. “Petitioners have also not shown that the public interest otherwise requires that diversions cease during this interim period before the CWRM review is completed,” it stated.

— T.D.