

Environment



Hawai'i
a monthly newsletter

Land in Limbo

The state's purchase of thousands of acres of forest land on O'ahu from Dole was years in the making and involved a number of agencies and private parties.

With so many eyes on this transaction, what could possibly go wrong?

As it turns out, included in the purchase were some 58 acres of land to which Dole did not have clear title – acres that the state apparently already owned.

That revelation leads off a lengthy report on recent actions of the state Board of Land and Natural Resources, including the issuance of a new permit to the owners of the Kahala Hotel and Resort; the continuation of water permits on Maui, Kaua'i and Hawai'i island; as well as votes on efforts to manage human impacts on wild, protected areas.

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BOARD TALK

Routine Map Survey Reveals Dole Sold State Its Own Land

On October 25, the state Board of Land and Natural Resources unanimously approved the acquisition of 3,716 acres of native forest owned by Dole Food Company on O'ahu's North Shore for \$3.716 million and authorized public hearings to add those lands to the Pupukea-Paumalu forest reserve.

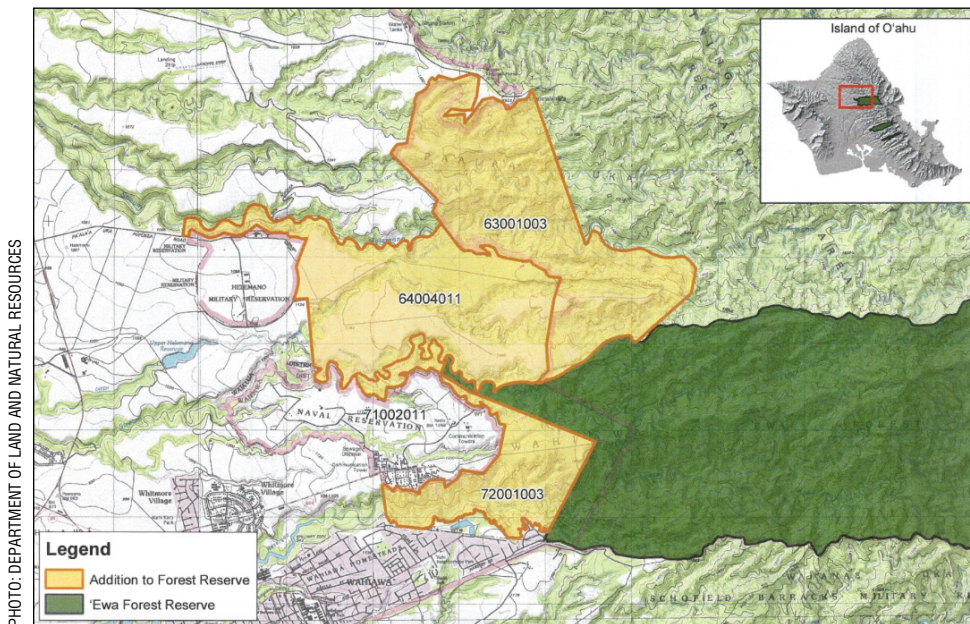
A report to the Land Board by the Department of Land and Natural Resources' Division of Forestry and Wildlife (DOFAW) noted that the acquisition, once complete, will ensure that the entire ahupua'a of Waimea is preserved. In 2006, the Office of Hawaiian Affairs purchased the lower portion of Waimea Valley to protect it from development. The DOFAW purchase would protect the summit area.

The latter acquisition received several letters of support from a range of entities, including the U.S. Fish and Wildlife Service, Malama Pupukea-Waimea, and the Pacific Islands Climate Change Cooperative.

Dole's liquidation of its agricultural lands on O'ahu over the past several years has provided the state with a huge opportunity to preserve thousands of acres for agriculture and conservation. But some of those purchases have come with a few surprises.

During DOFAW administrator David Smith's presentation to the board on the Waimea acquisition, he mentioned that there was an outstanding issue with the

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The four parcels in yellow make up the state's new Helemano Wilderness Area, purchased from Dole Food Company last year. The smallest, 71002011, was recently found to have already belonged to the state when Dole sold it.

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NEW AND NOTEWORTHY

Update I -- Kahala: In our October 2019 article, "Pohakuloa Ruling Spurs Motion for Reconsideration in Kahala Case," we reported that 1st Circuit Judge Jeffrey Crabtree was scheduled to hear arguments at the start of the month on David Kimo Frankel's motion for reconsideration in his lawsuit over a revocable permit for ceded land fronting the Kahala Hotel & Resort.

Frankel had argued that language in an August 23 Hawai'i Supreme Court decision regarding the Board of Land and Natural Resources' management of ceded, public lands within the Pohakuloa Training Area should apply to the Kahala land. "The Supreme Court's recent decision in the Pohakuloa case demonstrates that the BLNR defendants do in fact have trust duties in managing the beachfront parcel," Frankel argued.

Judge Crabtree disagreed.

In a minute order denying Frankel's motion, the judge noted that in the recent Thirty Meter Telescope case, the Hawai'i Supreme Court specifically chose not to decide whether or not public trust principles should apply to lands other than Conservation District lands.

The high court's decision regarding the Pohakuloa Training Area states that "all public natural resources are held in trust." Even so, Crabtree stated, "If this broad language was intended to change the recent and specific cautionary language in TMT, surely the Supreme Court would have said so expressly." (This item was posted October 1 in our online EH-xtra column.)

Update II -- Wells: Last month, we reported on the ongoing problem the state Commission on Water Resource Management has with well owners and diverters of surface water failing to report their monthly water use as required by law. On October 15, staff briefed the commission on outreach efforts to boost compliance with regard to ground water reporting.

The commission has so far issued two contracts for some \$423,000 to investigate non-reporting wells, remind or inform those responsible for reporting of their duties, and to show them how to use the commission's on-line reporting system. The work began in 2014 and continues today.

Wells on O'ahu (except Wai'anae) and the 'Iao aquifer system on Maui were assessed under the first contract. Work under the second began in 2017 and focused on wells on Moloka'i and the rest of Maui.

As a result of the outreach, "The number of production wells reporting statewide increased from 27 percent in 2008 to 53 percent in 2019," a commission staff report states. (Our October 2019 article had cited the figure in the newly adopted Water Resources Protection Plan, which stated that the reporting rate was only about 46 percent.) For the areas targeted under the contracts, production well reporting has increased 235 percent since 2008, the report added.

The assessment also identified about 450 new wells that are candidates for abandonment. The good news, the report states, is that those wells have not been causing any pumpage impacts. The bad news, however, is that until they are capped, they pose a contamination risk to the aquifers below.

The report noted that 119 well owners or operators either did not respond to the contractor or denied its personnel access to the well or site. "We need to finalize penalty and enforcement policy/rules," it states.

Commission staff are looking to assess wells in Wai'anae and on Hawai'i island next; to seek greater compliance with chloride, water level, and temperature reporting; and to win legislative approval of two new staff positions to focus on well abandonment, the report states.

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Quote of the Month

"People can be the bane of our environment, but they can also be the salvation of a place. Increased public, positive influence is better than benign neglect."

— Sam Gon,
Land Board

City, State Planners Explore Solutions To Sea Level Rise Hazards on O'ahu

"The situation on O'ahu regarding erosion is really terrible," state Office of Conservation and Coastal Lands administrator Sam Lemmo told the City and County of Honolulu's Climate Change Commission at its meeting last month. The Wai'anae Coast is experiencing serious erosion; the North Shore has soft armoring along beachfront homes; and on the east coast, Kamehameha Highway is a giant seawall, he said.

He is convinced sea level has risen a couple inches in the last decade, but "we've not been able to measure it correctly," he said.

More than a year ago, the commission recommended that the city start factoring into its Special Management Area boundaries and planning documents the 3.2-foot and 6-foot sea level rise exposure areas (SLR-XA) identified in the state's 2017 Sea Level Rise Vulnerability and Adaptation Report (SLR report) and online viewer. The SLR-XA maps show the areas throughout the state that will likely be chronically flooded due to the combined effects of passive flooding, annual high wave flooding, and coastal erosion.

More recently, Honolulu Mayor Kirk Caldwell has sought additional advice from the commission on how to regulate shoreline areas in the face of sea level rise. At the commission's October meeting, it became clear that wouldn't be an easy task.

Kaua'i and Maui counties have already begun using the SLR-XA maps to guide planning and amend regulations, but have run into some trouble. As we reported in May, those maps proved

too crude for Kaua'i planners to feel comfortable using them for development regulations that would affect individual landowners, but good enough to inform broad policy decisions.

"The SLR-XA was sort of raw," Lemmo told the commission. Rather than investing in refining the maps, however, his office and coastal experts with the University of Hawai'i (including commission member Dr. Chip Fletcher) will be working over the next year to

other hand, is developing new erosion rate-based setback regulations similar to Kaua'i County's. The city's current regulations were last updated in 1992 and require coastal setbacks of only 40 feet.

Lemmo suggested that counties should move away from erosion-based setbacks and start looking at other hazards such as passive annual flooding. Honolulu Land Use Permits Division chief planner Katia Balassiano, however, said the city may not be able to incorporate the SLR-XA maps into its setbacks because of the lack of clarity over how to interpret them.

That being said, she recognized Caldwell's 2018 directive to use the 3.2-ft.

SLR-XA as a baseline for planning. "We are forging ahead, taking sea level rise head on," she said.

Balassiano said her department lacks funding for community outreach on proposed setback regulations and for expert help with updating the city's Special Management Area regulations and the daily review and processing of permits.

"It would be good to have a Sea Grant person [from

the University of Hawai'i]. My planners are generalists," she said.

Asked about the city's effort to assess sea level rise impacts on the elevated rail line being built, Balassiano said it's "a work in progress."

"We're in that uncomfortable situation where transit-oriented development (TOD) plans did not incorporate sea level rise when they were drafted. We are revisiting those plans, asking whether the density we envisioned would be appropriate," she said. The Downtown TOD plan, for example, was approved in August 2017, months before the SLR Report came out. "We are overlapping TOD and SLR-XA maps and seeing what we come up with," she said, add-

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Severe coastal erosion on the North Shore of O'ahu.

develop guidance on how to interpret the maps.

Lemmo suggested that they may need to address each hazard — passive flooding, erosion, and high wave flooding — separately.

Erosion may require heavy-handed mitigation, high waves may require something lighter, and for passive flooding, "maybe something in between," he said.

The team may end up creating an addendum to the SLR report, he said, adding that it will include counties to the greatest extent possible.

Even without additional guidance, Maui County has begun the process of working the SLR-XA into its shoreline setback regulations. Honolulu, on the

PHOTO: NOAA/SEA GRANT

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ing that since some of the rail stations will be within the SLR-XA, the issue of whether it will be financially feasible to move roads and utilities out of harm's way is also being discussed.

"At least the rail is elevated," state Coastal Zone Management Program planner Justine Nihipali said.

The city has secured federal funding to work with a team — that includes Lemmo's office, Fletcher, and commission chair Makena Coffman, among others — on the setback regulations update.

It is also in the midst of updating its development plan for the island's primary urban center (PUC). "We are coming to the conclusion [there will be] some areas from which we will not be able to retreat and there are other areas where we would prefer to see those legacy beaches maintained," she said.

In December 2018, the University of Hawai'i Sea Grant Program issued a white paper on sea level rise in the PUC. Using the SLR Report, the program found that 3.2 feet of sea level rise, if unmitigated, would cause "chronic flooding in 1,727 acres of land potentially impacting 1,627 buildings, displacing 4,325 residents, and flooding 24 miles of road," the white paper states.

Lemmo said that in East Coast states such as South Carolina and Massachusetts, government agencies are tackling flood threats holistically, working on strategies to address coastal inundation as well as drainage issues.

Regarding shoreline setbacks, Lemmo warned of the danger of adopting regulations that would be considered a taking of private property. The state's Department of the Attorney General has opined that the loss of property through erosion is not a taking. However, Lemmo said that is different from a government agency adopting a setback rule that would render a lot unbuildable. That's exactly what members of the South Carolina Coastal Council did decades ago to coastal landowner David Lucas, and "they lost miserably," Lemmo said. The South Carolina Supreme Court rejected Smith's takings claim, but in 1992, the U.S. Supreme Court overturned that decision.

Technically, for property owners on O'ahu's North Shore suffering from erosion, Lemmo said the state could decide to stop letting them install protective sand burritos on the beach and say, "It's not our problem. It's nature working itself out." However, he said, it could also continue to grant emergency permits to allow for some fortification. "We don't know how long we can sustain that situation," he said.

For some property owners in 'Ewa Beach, planning efforts to minimize erosion may be moot, since the U.S. military is planning to build a large seawall there. Lemmo said local government agencies often don't have much say in what the military does because of "federal supremacy." "They're not going to come to us or the county," he said.

When asked by an 'Ewa Beach resi-

dent whether such a seawall would affect adjacent properties, Lemmo replied, "Of course it would."

In her presentation to the commission on managed retreat, Nihipali said that even if low-hazard receiving areas are identified, people won't voluntarily move unless it's to somewhere better than they are. "Someone living on the coast may not want to live in a TOD [transit oriented development] infill area," she said.

She said there are more questions than answers about the circumstances under which managed retreat would occur: Should we have a government mandate? What's the purpose? To remove people or protect beaches? Should infrastructure be moved to infill areas or other lands to keep communities intact?

In some cases, cities may have to simply be abandoned.

Commissioner Bettina Mehnert mentioned earlier in the meeting what everyone at a recent resiliency workshop on the East Coast was talking about. "They debated when is the time to abandon Miami. Sea level is infiltrating their water supply," she said.

While he advocated for regulators to work towards easing the cost and social disruption of sea level rise, Lemmo said he believed that the market will ultimately drive a lot of what actually happens.

"The insurance and reinsurance industries, FEMA, investors ... Miami will keep building higher until they can't do it anymore and there will be an exodus," he said.

— T.D.



Sam Lemmo of the state Office of Conservation and Coastal Lands briefs the Honolulu Climate Change Commission on efforts to address sea level rise.

Who's Who on the Fishery Council?

Last March, Gov. David Ige submitted to the National Marine Fisheries Service a list of nominees for upcoming at-large vacancies on the Western Pacific Fishery Management Council (Wespac).

"All the nominees have knowledge of or experience in the conservation and management of marine resources, commercial or recreational harvest of fishery resources, or habitat and ecosystem approaches to resource management," Ige wrote in his letter to the National Oceanic and Atmospheric Administration's assistant administrator for fisheries. He added: "My list reflects qualified women and minority candidates."

The nominees were, in order of priority: Shaelene Kamakaala; Sol Kaho'ohalahala; Matthew Ramsey; and Kawika Winter.

None was appointed.

Yet all are seemingly qualified. Under the Magnuson-Stevens Act, the federal law that established the eight regional fishery management councils – of which Wespac is one – gubernatorial nominees must be individuals who, "by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned."

Kamakaala comes from a family of subsistence fishers. In his nomination package, Ige notes that she has "lifelong recreational and subsistence fishing experience" and has also "participated in Hawai'i's commercial fishery for six years." Prior to her current position – a law clerk at the Hawai'i State Judiciary, Kamakaala was the community-based fisheries planner at the Department of Land and Natural Resources' Division of Aquatic Resources.

Kaho'ohalahala "is a lifelong traditional subsistence fisher and gatherer," Ige wrote, mentioning also his service on the Papahānaumokuākea Marine National Monument's advisory council, the Hawaiian Islands Humpback Whale National Marine Sanctuary advisory council, and as community group member of the Pacific Remote Island Marine National Monument.

Ramsey "is a lifelong recreational fisherman" who also serves as director for the Hawai'i program of Conservation International, Ige noted. "Prior to his current appointment, he served as the Hawai'i fisheries extension agent for NOAA NMFS," the governor wrote.

Winter, manager of the He'eia National Estuarine Research Reserve on O'ahu, was

identified by Ige as a subsistence fisher.

Instead, those chosen to fill the two at-large vacancies on the council were Howard Dunham of American Samoa, said by Wespac to represent commercial fishing interests, and Monique Genereux of Guam, a restaurateur. However, Dunham's financial disclosure form – available on the council's website – shows no involvement in fishing, either commercial or recreational, or in any other activity (lobbying, consulting, processing, and the like) that bears on a fishery under the council's jurisdiction. Ditto for Genereux's financial disclosure.

Sector Representation

Wespac is one of eight regional fishery management councils established under the Magnuson-Stevens Act (MSA), which provides the broad outlines of management of the nation's federal fisheries. Voting members of councils are representatives of the state officials responsible for fishery management – for Hawai'i, this is the chairperson of the Board of Land and Natural Resources or their designee – as well as the regional administrator for the National Marine Fisheries Service. In addition, in the case of Wespac, there are eight voting members who are appointed by the Secretary of Commerce.

Those appointed members are supposed to represent a "fair and balanced apportionment, on a rotating or other basis, of the active participants ... in the commercial and recreational fisheries" under the council's jurisdiction. But also, members are to include individuals "who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial and recreational harvest, of the fishery resources."

In annual reports to Congress, the National Marine Fisheries Service identifies the individual appointed members as belonging to one of three categories: commercial, recreational, or "other." That last category is a catch-all that includes people who may have scientific expertise, experience in natural resources management, or conservation interests. In the most recent (2018) such report, Wespac is shown to have three appointed members representing the commercial sector: Manuel Duenas (of Guam's fisherman's coop), Mike Goto (of the Honolulu fish auction) and Christinna Lutu-Sanchez (a longline vessel owner in American Samoa); three from the recreational sector: Ed Watamura of the Waialua

Boat Club, O'ahu, Dean Sensui, producer of the show "Let's Go Fishing," of O'ahu, and McGrew Rice, a charter-boat captain in Kona; and two "other" members: John Gourley, a consultant from the Commonwealth of the Northern Mariana Islands, and Archie Soliai, an executive with the Starkist tuna processing plant in American Samoa.

In 2019, council membership changed, with the departures of Hawai'i's Sensui and Lutu-Sanchez. Soliai was reappointed to another three-year term.

Current Members

So who is on the council now?

Here are the appointed members. Terms expire on August 10 of the year in which the appointment ends.

- Michael Duenas of Guam (2021);
- Archie Soliai of American Samoa (2022);
- John Gourley of the Commonwealth of the Northern Mariana Islands (2020);
- Ed Watamura of O'ahu (2021);
- Mike Goto of O'ahu (2020);
- McGrew Rice of Kona (2020);
- Howard Durham of American Samoa (2022);
- Monique Genereux of Guam (2022).

For at least the last two decades, there has been just one representative from a conservation group appointed to the council: Julie Leialoha, an officer of the Conservation Council for Hawai'i. Although council members may serve up to three consecutive three-year terms, Leialoha served two (2010-2016).

At-Large vs. Obligatory

The Magnuson-Stevens Act provides that Wespac is to have eight appointed members, in addition to the five ex-officio members. Of those eight, four are so-called "obligatory" appointments. The governor of each member state or territory on the council provides the secretary of Commerce with a list of nominees for these obligatory seats.

The other four appointed members are at-large members, who may be nominated by any governor of a territory or state in the region.

The number of at-large members from Hawai'i or any territory included in Wespac's jurisdiction can therefore vary. Until August 10, when new council appointments took effect, three of the four at-large members were from Hawai'i (Sensui, Goto, and McGrew Rice, a Kona charter-boat captain). Now, with the two new at-large appointments from Guam and American Samoa, Hawai'i has just two at-large members: Goto and Rice.

— *Patricia Tummons*

Board from page 1

state's purchase last year of 2,881 acres of Dole land at Helemano. He described a boundary dispute, with discussion among the involved parties going "back and forth," but board members did not question him about it.

According to his written report to the board, a 58.54-acre parcel that was part of the \$15,163,800 million purchase wasn't Dole's to sell. It actually already belonged to the state.

A warranty deed for the sale of the four parcels included in the deal was recorded in the Bureau of Conveyances in October 2018. After a public hearing a couple of months later, the Land Board voted in May to add the Helemano lands to the 'Ewa forest reserve.

In preparing maps for the executive order designating the lands as a forest reserve, the state surveyor discovered a discrepancy in the ownership of the 58.54-acre parcel, Smith's report stated. "The parcel is not a lot of record, but rather a remainder parcel created from the boundaries of surrounding parcels. It was discovered that the parcel was never actually conveyed by the state and had remained under government ownership. The Department, along with the Attorney General, is currently working with Dole to resolve this matter," it continued.

It's unclear how the title discrepancy was only discovered after the sale. A September 2018 DOFAW report to the Land Board on the acquisition of the Helemano lands states that the division obtained title reports for the parcels "for the state's review and approval."

"A preliminary boundary review was conducted prior to the purchase indicating that Dole owned all four parcels of land and the boundaries of the land were accurately represented in the purchase documents. However, an irregularity was discovered after the purchase," is the only explanation DLNR staff offered in an email to *Environment Hawai'i*.

Most of the money for the purchase of what DOFAW calls the Helemano Wilderness Area came from federal sources, but \$2.75 million came from the Kawaihoa wind farm as mitigation for take of endangered bats and a little more than \$1.5 million came from the state's Land Conservation Fund.

The parcels included lands in both the Conservation and Agricultural land use districts. Conservation lands are generally appraised at a lower value than agricultural lands, but according to property tax records, the 58.54-acre parcel had an assessed value of only \$100 since at least 2001. However,

in the 2017 appraisal for the purchase of all four parcels, the two parcels with the potential for agricultural use and speculative investment — the 58.54-acre parcel and a 1,247.7-acre parcel — were assigned a combined fair market value of \$14,890,000, which works out to \$11,399 per acre.

The actual purchase price was more than a million dollars lower than the appraised price. And according to DLNR staff, "Because the purchase was a 'bulk' sale of all four parcels at once, the valuation was spread evenly over each acre." Given that, the state paid about \$308,000 for the 58.54-acre parcel.

"Given the significant public interest in acquiring the Waimea Native Forest, the Board is requested to approve the current acquisition despite the outstanding issue regarding the Helemano Wilderness Area parcel. Completing the present acquisition will not serve to waive any rights or avenues to relief that the State may have in the Helemano matter. Furthermore, the Department and the Attorney General will continue to seek resolution on that matter independently, including pursuing alternatives for relief as appropriate," the report stated.

In light of the problem with the Helemano purchase, DOFAW recommended that the Land Board require Dole to convey the Waimea lands to the state via a warranty deed.

Daniel Nellis, Dole Food Company's general manager, testified that his company had been working with the state for several years on the Waimea transaction. "I hope it goes through," he said.

In its email to *Environment Hawai'i*, the DLNR's only comment on whether Dole agreed with the state's ownership assessment of the 58-acre parcel was, "We are in discussions with Dole regarding this issue." It added that the issues with the parcel do not in any way threaten the Helemano purchase and have not complicated negotiations regarding the Waimea lands. Staff only brought the issue to the board's attention in the interest of transparency, the agency stated.

Lead Remediation

In September 2018, when the Land Board approved the purchase of the Helemano lands, a heated discussion ensued over who was going to take care of contamination that had been discovered on one of the larger parcels.

The contamination was the result of a former Dole tenant allowing about an acre

to be used as a firing range. Soil testing revealed significant lead contamination and elevated antimony levels.

"Dole was unwilling to remediate the site prior to closing the acquisition, so TPL" — the Trust for Public Land, which brokered the purchase — "assumed responsibility for remediating the site post-closing and obtaining a determination of No Further Action from the Hawai'i Department of Health," Smith's report stated, adding that the DOH provided a No Further Action determination on August 2.



Board Tacks 'Penalty' Onto Kahala Hotel Rent

On January 7, 2019, David Kimo Frankel emailed deputy attorney general William Wynhoff about activities on the state parcel in front of the Kahala Hotel and Resort rented by Resort Trust Hawai'i (RTH), the hotel's owner:

"After removing a lot of its commercial things off of the state parcel by November 1, some time in mid-December, the hotel re-installed the rental clamshell lounge chairs — with ads for drinks. Waiters and waitresses provide drinks throughout the area — as they had been doing."

RTH's permit only allowed for commercial uses on the property if the City and County of Honolulu permitted them first. RTH had never even asked for permission.

In testimony to the Land Board on October 25, Frankel, who had sued in 1st Circuit Court to void the permit, stated that the hotel later admitted that "from January 1, 2019 through January 9, 2019, as part of the busy holiday season and in response to customer requests and complaints, RTH made on a temporary basis 'clamshell' lounge chairs available to rent on the State Parcel for those staying at the Hotel. Limited food and drink service was provided to those using the 'clamshell' lounge chairs during that time period."

At the board's October 25 meeting, the DLNR's Land Division asked the board to renew RTH's permit, with some amendments. The new permit would allow for a smaller range of uses in a smaller area. Representatives of the hotel testified that it was no longer using cabanas and clamshell loungers, and wasn't storing as much equipment on the parcel.

Despite the apparent permit violations

Continued on next page

in January, as well as other instances of possible violations documented by Frankel and Tyler Ralston — and even DLNR staff — the division did not recommend penalizing RTH.

"There were a few instances," Land Division administrator Russell Tsuji told the board. The clearest example of commercial activity was a vendor — the Hans Hedemann Surf School — seen using the state parcel for stand-up paddle instruction. "We understand that's since been corrected," Tsuji said.

RTH's attorney, Jennifer Lim, assured the board that the hotel had advised the surf school on where it is supposed to operate and that hotel staff had been informed that there should be no food or drink service on the state parcel. "That has been stopped entirely ... and we continue to strive to do better and better all the time," she said.

Frankel lamented the Land Division's decision not to recover money that had been generated improperly or punish RTH. He also opposed the idea of allowing the hotel to preset 70 lounges on the prime areas of the parcel and asked for a contested case hearing.

As it did with Frankel's request last year, the board voted to deny him a contested case hearing.

Board member Chris Yuen, however, did seem to think RTH should be penalized for the activities that occurred in January.

"By serving customers on the clamshells in the RP, they exceeded the permitted scope of the RP. Shouldn't there be some penalty for that?" Yuen asked Tsuji.

"We didn't bring it up. We don't have evidence of it," Tsuji replied.

Yuen pointed out that RTH had basically admitted that it did do things it wasn't allowed to under the permit.

Tsuji said he sympathized with the hotel having to deal with demanding guests. "It's not an excuse. It's your guys' prerogative how much you want to charge for a penalty," he said.

The board ultimately chose to fine RTH \$702 for using 13 clamshell loungers without first obtaining the city's permission. However, because the board's agenda did not include an item regarding alleged violations by RTH, and the company did not want to admit to a violation that wasn't fully supported by facts, the board characterized the fine as additional rent for the first month. After the first month, the monthly rent would revert to \$1,320.50.

'Public Beach' Dispute

Before the board voted on the permit,

Frankel and Land Board chair Suzanne Case debated whether or not the parcel could be used for anything other than a public beach.

The new permit states that the public would have rights of access and use of 97 percent of the parcel, with the other 3 percent being occupied by the hotel's lounges, hammocks, a shower, a towel caddy, and a portion of a cabana hale.

The reduced footprint of the hotel's activities did not go unappreciated. Frankel testified that there was no question that the use of the parcel was significantly better than it had been. There is no more restaurant seating, weddings are no longer held there, and the rentable cabanas and clamshell loungers are gone.

Even so, Frankel and Ralston, another vocal critic of the hotel, disputed the way the Land Division had calculated the area occupied by the permitted uses. When set up and spread out, they argued, the space the lounges occupy is much more than the sum of the square footage of each lounge. What's more, those lounges are placed in the areas that members of the public would want to use, they said.

In recounting the history of the parcel, the Land Division report states, "As part of the development [of the hotel], the state, the Kahala Hilton Hotel Company, Inc., and [Kamehameha Schools] agreed that the hotel would create a new piece of fast land by filling submerged land makai of existing land. The new land would continue to be owned by the state and would be used by both the Hotel and the public."

The report leaves out language in that 1963 agreement stating that the land "shall be used as a public beach." Frankel criticized the omission.

"Please, do not think the beach was created out of the goodness of the hotel's heart. It was created in order to obtain zoning for the hotel. And please, keep in mind that [the parcel] has been dedicated in a Land Court document, to be used as a public beach," he stated in written testimony.

"There was a quid pro quo. ... You should know this context so you know you don't owe them anything for this beach," Frankel said.

Earlier in the meeting, the Land Division's Tsuji had characterized the parcel as reclaimed lands, the kind which the state has issued easements for and even sold in the past. And today, with the hotel's preset beach chairs and tables with "Reserved" signs on them, the parcel looks more like the hotel's lawn than a public beach.



A photo taken on September 19, 2019 of the state parcel fronting the Kahala Hotel and Resort.

Frankel pointed out that the area that has been grassed in over the years was sandy when he was a child. "That's how this land should be used," he argued.

Land Board chair Case recalled that Frankel had made the same arguments when the permit renewal came up last year and that the Land Division had determined the public beach area to be seaward of the high wash of the waves, not the makai boundary of the hotel's land.

Frankel again cited the 1963 agreement, and argued that Case's frame of reference was inaccurate.

"We have a difference of opinion," Case said.

To which, Frankel insisted, "It's *unquestioned*. There's a Land Court document saying this shall be used as a public beach. ... Don't shake your head at it."

The Land Division's report to the board conceded that the filled land was originally sandy, and acknowledged that there was language in the 1963 agreement about the intended use of the parcel. However, it also noted that the mauka portion has been grassed for decades.

"Staff disagrees that the board has a duty — trust or otherwise — to ensure in perpetuity that the land remain untouched and wholly open to the public. And staff also points out that the public has unfettered access to 94 percent — now to be 98 percent — of the premises. Also the alleged 'dedication' to public beach use arises out of the same 1963 agreement by which the developer made the filled land. The state agreed to the hotel's use as part of the agreement. Nothing in the 1963 agreement prohibits issuance of the RP. Staff does not agree that it is a breach of the public trust to allow RTH to use a small portion of the premises for presetting, especially when the public interest is so well served by the money and services that the State receives in return," it stated.

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RTH's attorneys have also pointed out in correspondence with the DLNR that in the 1963 agreement, Kamehameha Schools [formerly Bishop Estate] reserved its right of access to the beach and improvements, "subject to all applicable laws, regulations, etc."



Water Permits For A&B, KIUC, and Others

On June 18, the Intermediate Court of Appeals vacated a Circuit Court decision invalidating revocable permits that the Land Board had granted to Alexander & Baldwin and its subsidiary, East Maui Irrigation Co. Ltd. The year-to-year permits allowed for the continued diversion of stream water from East Maui to Central and Upcountry Maui.

The Native Hawaiian Legal Corporation (NHLC), which represents the plaintiffs in the case, has asked the state Supreme Court to review the ICA's decision. In the meantime, the holdover water use permits issued by the Land Board under Act 126 of the 2016 Legislature to A&B, EMI, and others diverting water from state land are set to expire at the end of the year.

Although the Legislature did not extend Act 126's sunset date beyond 2019, the ICA decision allowed the Land Board to continue the water permits to those who are still in the process of obtaining a long-term water lease.

On October 11, the DLNR's Land Division recommended that the Land Board continue A&B/EMI's permits, so long as their diversions were capped at a monthly average of 35 million gallons a day. The division arrived at that number by averaging their highest monthly diversions from January 2017 to April 2019, and rounding up.

A representative of Mahi Pono, which co-owns EMI and seeks to expand farming

on the agricultural lands in Central Maui it bought from A&B, told the board that 35 mgd would not be nearly enough for the coming year.

Mahi Pono operations manager Grant Nakama said the company plans to plant more than 4,000 acres of food crops next year and maintain 12,000 acres of pasture. To meet its needs, as well as those of the Maui Department of Water Supply, it would need an annual average of 45 mgd, he said.

The company plans to invest \$20 million into more efficient irrigation and \$60 million to ramp up farming operations, he said.

"We'll enter the year already using 34 mgd," he said.

Upcountry Maui resident Andy Ho testified in support of the permits, especially in light of the recent wildfires on the island. "We need some kind of agriculture in the central plain. It's too much acres in a big dustbowl," he said.

Huelo resident and Sierra Club member Lucienne De Naie, however, questioned Mahi Pono's claimed water needs, which she called "very slippery-slidey." Reserving 5 mgd for the county's needs, 40 mgd would be left for Mahi Pono. "It's like 10,000 gallons per acre [per day]," she said. She noted that none of the crops proposed in the recently released draft environmental impact statement for A&B's long-term lease would require that much water, and that it was unclear how much well water would be used.

"Twenty-nine percent of their [A&B's] water used to come from the wells. ... Where are all these numbers heading? No one wants to stop agriculture, but we see the same stories come up year after year. ... During the last four years, there's not been enough water in the summer months [in the streams] even without giving any to DWS," she said.

Marti Townsend, executive director of the Sierra Club of Hawai'i, said she appreciated that the Land Division tried to establish a cap on the diversions, but thought even 35 mgd was too much. "This is not an opportunity to, slow by slow, ratchet up without doing any environmental review," she said.

She added that Mahi Pono should be limited to about 26 mgd and grow whatever it can with that amount of water. "They should not be allowed to use this water for flushing toilets, making concrete. One mgd goes toward industrial uses," she said of Mahi Pono's past uses for the water.

NHLC attorney Alan Murakami was also alarmed by Mahi Pono's claimed water need of 54 mgd at the end of its next growing cycle. He said a typical truck crop requires only 2,500 gallons per acre per day. More details on what the water will be used for seemed like a minimal thing to ask of a private, commercial operator, he argued.

The Hawai'i Supreme Court decision in the *Ka Pa'akai* case, which sets forth how agencies must assess and mitigate potential impacts of their actions on traditional and customary Hawaiian practices, requires the Land Board to get more precise information on Mahi Pono's water use, he argued. While the board still had two more months to get that information before the current permit expired, he said he wasn't sure whether that was enough time.

Seeking the restoration of streams in East Maui, the NHLC's clients initiated a contested case hearing on A&B's proposed long-term lease in 2001, as well as the more recent challenge to the Land Board's annual renewal of revocable permits for the company's water diversions. "When the RP lasts longer than the leases that it's replaced, there's something wrong with that," he lamented.

"I've had two clients pass on [during the course of this process]. I might sound a little strident saying these permits should not be granted [but] it has to be done right and not justified with some kind of post hoc rationalization that these laws can be ignored," he said.

"We've been before you 18 years already asking for the same thing. Exactly the same thing. I'm just asking that you do the right thing," he said.

As it did last year, the Sierra Club asked for a contested case hearing on the permits' impacts on its members, and after an executive session, the Land Board voted to deny it.

Townsend and De Naie have repeatedly pointed out that the board has failed to determine whether enough water will remain in the dozen or so diverted streams that have not had their interim instream flow standards amended recently by the Commission on Water Resource Management. (Having been rejected last year, the Sierra Club sued in 1st Circuit Court to overturn the permits approved in 2018. A trial has been scheduled for next May.)

Under the terms of Mahi Pono's purchase of A&B's lands in Central Maui, if Mahi Pono is unable to secure enough water to fulfill its

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Alexander & Baldwin vice president Meredith Ching (left) and Mahi Pono operations manager Grant Nakama (right).

plans, A&B must reimburse the company some of what it had paid for the land.

Yuen increased the cap from a monthly average of 36 mgd to an annual average of 45 mgd. He noted that the interim instream flow standards of 27 of the streams diverted by the EMI system left 93 mgd available for offstream use.

"The Land Board can decide to allow the taking of only half of what's available. ... I'd like to see them expand," he said. He added another condition to his motion: that Mahi Pono inform lessees that their access to water is based on a permit that expires in a year. For orchards, in particular, he said, there is no guarantee of water in the long term.

With additional amendments recommended by board member Stanley Roehrig to require Mahi Pono to clean trash or other remnants of sugar plantation use of the stream areas, the board approved the permit. Maui board member Jimmy Gomes recused from voting.

KIUC

In addition to the permits to A&B and EMI, the Land Division recommended the continuation of permits held by the Kaua'i Island Utility Cooperative and the Hawai'i Electric Light Co. for hydroelectric power generation purposes, a permit to Kaua'i resident Jeffrey Linder, and four permits to farmers and ranchers in the Ka'u district of Hawai'i island. The board approved all of the permits, as well as a new permit to Ka'u Mahi, LLC, which provides water to farmers in Ka'u.

The KIUC permit garnered some criticism from Earthjustice attorney Leina'ala Ley. KIUC president David Bissell had testified that the utility has been providing at least the minimum amount of water in the streams as required by the Land Board last year. Even then, he noted, there are times when about 100 feet of Wai'ale'ale Stream is dry.

He added that in the past year, there was a leak in a concrete flume feeding KIUC's upper hydropower plant, a large albizia tree fell on an irrigation ditch and broke a metal pipe siphon, and a large landslide made things difficult to repair. "It's kind of an indication of how much work goes into keeping these systems in use," he said.

Ley argued that the amount of water KIUC was releasing into the streams was less than what is needed for mauka to makai flows. She added that KIUC admits to losing 2.6 mgd in system losses. "They brought up again today there were larger breaks. Some clients took pictures of water

pouring out of the system," she said before recommending that the board set some kind of standards for best practices.

She asked that the board require that KIUC provide a report on what's been done to mitigate system losses, install gauges on the smaller diverted streams, and complete an investigation by a certain deadline as to how to reconfigure the diversions to take high flows rather than low flows.

She also asked for an emergency plan to shut the diversions down in a disaster so that water isn't wasted.

"I think there's a lot of room for the board to set the bar higher," she said. The board did not adopt any of her recommendations.

To Ley's assertion that KIUC was not releasing enough water to establish continuous flow throughout Wai'ale'ale Stream, board member Chris Yuen noted that it's a gaining stream. "If there's no water in it [even with KIUC's releases], it's because there's not going to be any water in it," he said.

East Kaua'i

The East Kaua'i Water Users' Cooperative asked that its permit not be continued because it can't afford to maintain the old sugar plantation irrigation system it draws water from, nor can it afford some of the costs associated with securing a long-term water lease.

"Hopefully, another entity can assume management of the system," land agent Ian Hirokawa told the board. Otherwise, the Land Division will shut it down, he said. According to his division's report to the board, that would include the removal of the Wailua and Upper Kapahi reservoirs.

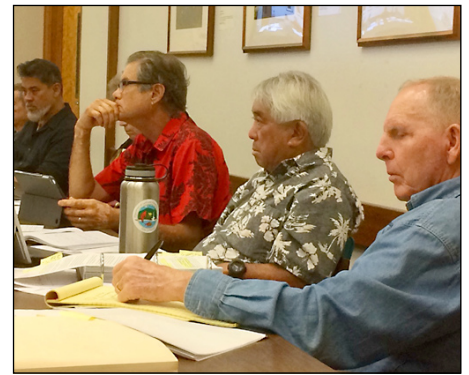
The report explains that the co-op had supported a bill in the last legislative session that would have given the state Department of Agriculture authority over the irrigation system, as well as staff and funding to manage it. When the bill failed, the co-op decided to bow out.

"The Land Division doesn't have the expertise to be a water provider [and] there's no way the system can operate without a subsidy," Hirokawa told the board.

Kaua'i board member Tommy Oi, however, argued that the division shouldn't even be thinking about closing the system down if the state wants to pursue agriculture in the future.

Board member Chris Yuen agreed. "If we were to close the system, that would be tragic," he said.

Hirokawa said that hopefully, during the



Land Board members listen to testimony on revocable permits for water use.

next legislative session, the Department of Agriculture will get the resources it needs to take the system over. "No one wants to shut it down [but] I don't see how DLNR can substitute as an operator," he said.

To this, Yuen asked what's the worst that would happen if the division just let the water run through the system.

Board chair Suzanne Case explained that just letting the water be diverted with no end users could be considered waste.

"We all share the concern about not letting this investment deteriorate. We had that problem in Hamakua [on Hawai'i island]. It's a big problem. There's no urgency of use and so that's the challenge," she said.

In the case of East Kaua'i, it's a big system that's expensive to operate and not much is being farmed, she said.

Watershed Management Plans

Under state law, water lease holders must complete a watershed management plan, which can be an expensive undertaking. To ease the burden on some of the smaller water users seeking a lease, the Land Board earlier this year asked the Land Division to set minimum standards for the plans and to investigate to what extent existing plans might suffice.

"There are many existing mauka watershed plans, including those implemented by the State's Division of Forestry and Wildlife (DOFAW) and groups like the Watershed Partnerships. Some water lease applicants also have their own watershed management plans. Unfortunately, existing watershed plans are not always directly correlated to the water lease area and some plans are old and outdated. In certain places, new threats to watershed health (e.g. Rapid 'Ohi'a Death) are not addressed in existing watershed plans. Furthermore, estimated budgets may not reflect the current cost of management if the plan is over five years

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old," a division report states.

Even so, it concluded that a 2012 Ka'u Forest Reserve Management Plan prepared by DOFAW meets the minimum content requirements. "Therefore, that plan will be utilized to the greatest extent possible, and the department will work with the Ka'u lessees to determine how to implement on an equitable basis," the report states.

Yuen asked DOFAW planner Katie Ersback whether KIUC's environmental assessment for its proposed lease or A&B's draft EIS would suffice as watershed management plans. She said her division had not yet reviewed them.



Climbing Damage Prompts Partial Closure of Maui Reserve

The state's Natural Area Reserves System includes some of the most pristine and biologically and geologically unique places. Extractive or potentially destructive uses either require a permit or are prohibited altogether.

In the Lihau section of the West Maui Natural Area Reserve, rock climbers have reportedly defaced rock cliffs by drilling footholds and installing rebar supports. And according to a DOFAW report, these activities have affected threatened and endangered plants, such as *Achyranthes splendens* ('Ewa hinahina, also called the Maui chaff flower) and *Schiedea menziesii* (Hawaiian bonamia or Hawai'i lady's nightcap).

"Some individuals of these species are actually growing under the metal holds and steps pounded into dry cliff walls of concern. The only known *Hibiscus brackenridgei* (Ma'o hau hele or Aloalo) West Maui population is in danger of trampling or breakage during the hike to the vertical walls for climbing," it states.

The division asked the Land Board on October 11 to close the cliff areas for up to two years to prevent further harm to the plants.

DOFAW's Emma Yuen told the board that up until recently, the plants had been pretty well defended by the steep cliffs. Now that a rock climbing community is starting to go up there, the endangered plants are getting trampled, she said.

"It's not illegal to climb. ... It is illegal to drill holes," she added.

Board member Sam Gon, a scientist who helped survey the NAR in the 1980s, said the cliffs are riddled with caves that contain

cultural sites that could also be threatened if the climbing is unchecked.

Wai Yi Ng, vice president of the local rock-climbing non-profit The Arch Project Hawai'i, testified against the proposed closure and suggested that a special use permit be granted instead to allow climbers to assist DOFAW in taking an inventory of the rare plants, relocating the climbing trail around them, and controlling invasive species.

"The climbing community is very interested in this," she said before asking for a contested case hearing. The board denied her request, but expressed a willingness to work with the climbers on a plan.

Arch co-founder Nate Lim explained that the organization focused on safety and conservation. "I wanted to make sure it's well known that climbers are equally if not more passionate about the environment than they are about climbing. ... None of us is wanting to do something that is illegal," he said.

Gon replied that he wasn't saying people shouldn't be climbing in the reserve, but pointed out that DOFAW's proposal was based on the observed damage that's occurred.

The board then unanimously approved the closure for up to two years.



Board Expands Options For Kawainui Marsh Plan

At the Land Board's October 25 meeting, a representative of the Lani-Kailua Outdoor Circle pleaded with the board to minimize any improvements within the 986-acre Kawainui Marsh-Hamakua master plan project area. To appease concerns expressed by that group and others about over-development, the Division of Forestry and Wildlife (DOFAW) had already scaled back some of the trails and structures that had been proposed in a draft environmental impact statement for the plan.

Those components, however, were aimed at expanding educational opportunities and Hawaiian cultural practices, and were, in fact, favored by many of the wetland's longstanding stewards.

"People are afraid we're going to turn cultural practice [areas] into a commercial use area," DOFAW administrator Dave Smith told the board. The changes proposed—new trails around the marsh perimeter and gathering spaces—were not expected to dramatically change the character of the marsh, he

said, adding, "We would like to increase the ability to bring students down there."

Smith requested only that the board accept the final environmental impact statement for now. DOFAW will bring the master plan's components to the board for approval as more details become available, he said.

Board member Chris Yuen said he understood the reasons for dialing down some of the projects that had been originally proposed. "I get it. Kailua has been inundated with tourists," he said. However, he added, "I just don't think this is a tourist generator."

Yuen floated the possibility of restoring some of the projects that were in the draft EIS. He asked Smith why the size of a proposed cultural center along Kapa'a quarry road was reduced from 9,600 square feet to 7,200. "If people get funding for 9,600 square feet, why would that be bad?" he asked.

"I don't think it would be," Smith replied.

Mapuana DeSilva, kumu of Halau Mohala 'Ilima and president of the Kailua Hawaiian Civic Club, helped draft a plan for the marsh decades ago to establish a place for Hawaiian cultural practices. The plan was never approved by the state, she said. "And ten planning documents later, we are still waiting to do more than piecemeal work, to do than a little bit here and a little bit there, to do more than beg for scraps at what was once our table," she told the board.

"Although the FEIS does not give us everything we've lobbied for, it gives us enough. Our worst fear for Kawainui [is that] 38 years from now, our 80 year old daughters will be asking for the same things," she said.

Pauline MacNeil of the Lani-Kailua Outdoor Circle, on the other hand, opposed the approval of the EIS, stating that DOFAW's modifications do not address her concerns about modern, permanent structures around the marsh.

"The growing public use that would occur over time, 100 years, would diminish rather than improve water quality," she said.

Chuck "Doc" Burrows said he believed common ground between those with opposing views could still be found and he chairs a group — Hui Kawainui Kailua Ka Wai Ola — focused on achieving that. Burrows has for years led native forest restoration efforts around the marsh, as well as educational and Hawaiian cultural programs.

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PHOTO: DAN DENNISON



Kawainui Marsh

He testified in support of the EIS, with some reservations. "All these years, we've been sort of working on the sidelines ... in restoration and conducting environmental and cultural educational programs," he said. He lamented the removal of what he saw as central components of the plan. For example, an environmental educational center was replaced with a pavilion and restroom. "Fine. We can work with that," he said.

Still, he said he appreciated Yuen's interest in putting back things that had been taken out of the plan, especially some of the trails and overlooks. "We take our volunteers as close to the marsh and in the marsh. ... If the Kawainui education center comes into being, this will be the only area where the public can come to. We then could provide guided tours to schools and groups and visitors from abroad," he said.

Members of 'Ahahui Malama i Ka Lokahi, which has a state permit to restore wetland habitat at the base of Na Pohaku o Hauwahine, and at the base of Ulupo Heiau, which overlooks the marsh, also supported putting some of the removed components back.

Group president C. Lehuakona Isaacs said that the trails connect people to the environment and allow them to get out of their cars. They also provide access to areas in dire need of invasive species control. "I think a lot of people do not realize the

extent of the work that exists right now at Kawainui," he said.

Isaacs asked for the reinstatement of trails and a hale wa'a (canoe house), among other things. "Our vision is we would have a place for research, a place to hold presentations from people around the world who are prominent in cultural or ecological practices. This is not a big thing for tourists to visit. This is for our community," he said.

Biologist Steve Montgomery, the group's

treasurer, described how rewarding it's been to be able to volunteer with groups restoring the marsh. It was "one of the most satisfying things" when 'alae 'ula, the Hawaiian moorhen, started showing up and nesting in areas where ponds were opened, he said. And as a longtime member of the National Wildlife Federation, whose motto is "no child shall be left indoors," he said he was disappointed that DOFAW would leave out

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some of the trails and reduce the size of the proposed cultural center.

After an executive session, Yuen made a motion to restore a number of things that were removed from the draft EIS, including trail segments, building areas and the number of proposed educational and cultural structures, two observation decks and interpretive pavillions and to remove a sentence about the marsh's Mokulana peninsula being used only for DOFAW management activities.

"It's always better to include more in the discussion on the potential impacts than to

try to put something in afterwards," board member Sam Gon said of Yuen's proposal. "This allows for a broader range of discussions and broader set of potentials. It does not guarantee they'll be met," he said.

Yuen said he believed people should be encouraged to enjoy nature and that he wanted the Hawaiian community to have the cultural sites they asked for.

Gon added, "People can be the bane of our environment, but they can also be the salvation of a place. Increased public, positive influence is better than benign neglect. The disconnection of the public from their places is a big problem."

The board unanimously approved Yuen's motion to approve the EIS with amendments.

DOFAW's planner, Ron Sato of HHF Planners, said the changes to the EIS would take a few weeks to make.



Haleakala Bridle Trail Open to Guided Hikes

Ever since the Land Board terminated an agreement in July 2017 with Haleakala Ranch Company to allow guided hikes on the state's historic Haleakala Trail that bisects the ranch, the Division of Forestry and Wildlife (DOFAW) has been working with community hiking groups and the ranch on terms of a new access agreement.

The original agreement allowed only two guided hikes a year. It was signed in 2012, when the ranch maintained that it owned the trail.

On October 11, over the objections of David Brown, executive director of Public Access Trails Hawai'i (PATH), DOFAW sought and received Land Board approval of a new memorandum of agreement with PATH, the ranch, the Sierra Club's Maui group, and the Department of Land and Natural Resources.

Under the agreement, public use of the trail is limited to scheduled, guided hikes of no more than 20 people. The Sierra Club Maui group would maintain an online reservation system and would schedule a hike once each quarter and on additional days upon request.

In a February 10 letter to the Land Board, Brown objected to the MOA. "The real purpose of the memorandum is to close down Haleakala Trail and not to open it to its owners, the public. Four trips a year of three hours each is 12 hours use a year. This is 0.14 percent of a year. The public owners of Haleakala Trail deserve the full 100 percent use," he wrote.

It wasn't until 2014 that the 2nd Circuit Court ruled that the state owned the trail. PATH was the original plaintiff in that case and Brown noted that there is already a court-approved survey of the trail, "and much historic rock work is on it."

Even so, DOFAW Maui branch manager Scott Fretz told the board at its October meeting that that the trail is "impossible to follow. People are getting on, wander off on ranch property and are essentially trespassing and creating issues for the ranch."

"The trail is not closed. It's never been closed. We're not asking you to close the trail in this submittal. It's just that you can't see the trail on the ground," he added.

DOFAW's report to the board states that the division doesn't plan to improve, construct, and maintain the trail anytime soon. "[I]t is our recommendation that the trail remain as an unencumbered inventory trail. ... If, at any time in the future, the division recommends use of the trail that involves improvements, construction, and maintenance, we will reevaluate the disposition with consideration to set aside as a [Na Ala Hele] program trail," it states.

DOFAW has also stated that the lack of parking at both ends of the trail is another reason why it does not encourage unguided public use.

— Teresa Dawson

For Further Reading

Several of the articles in this Board Talk column have a long history. For more background, see the abbreviated list below.

Helemano Wilderness Area:

- "BLNR Moves to Buy Dole Land at Helemano, 'Warts and All,'" October 2018.

Kahala Permit:

- "Land Board Grants New Permit for Hotel's Use of Kahala Parcel," December 2018.

Water Permits:

- "Board Talk: Water Permits, Detector Dogs," January 2019 and "Land Board Delays Action on Plan to Move Forward with Water Permits," May 2019.

Kawainui Marsh Plan:

- "As City, State Deadlock on Marsh Transfer, Kawai Nui Restoration Groups Forge Ahead," January 2007.

Haleakala Bridle Trail:

- "Land Board Shuns Ranch's Offer to Privatize Haleakala Bridle Trail," February 2014.