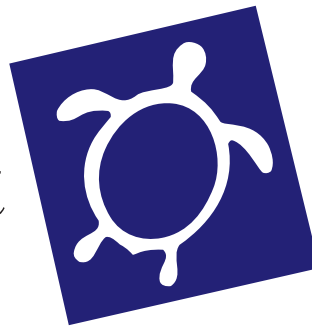


Environment



Hawai‘i

a monthly newsletter

Wasting Away On Kaua‘i

The Waimea Watershed Agreement was supposed to put an end to decades of wasted stream water on Kaua‘i, and hopefully avoid the expense and heartache surrounding lengthy contested cases or court fights. And yet, as the Water Commission recently learned, the parties to the agreement who were bound to implement required fixes have been slow to do so, and interim instream flow standards are going unmet.

As we report in our Board Talk item on East Maui stream diversions — the subject of contested case hearings and court battles for more than a decade — the Land Board has decided to no longer consider unreasonable system losses as waste so that the diversions can continue. No surprise, a lawsuit shortly followed.

Also in this issue: A trash hauler does himself no favors when pleading his case before the Land Board; a broker for foreign investors sues over a Big Island dairy lease; and ‘Aina Le‘a once again finds itself facing down creditors.

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To County Planners,
To Supreme Court*

Ditch Managers Fail to Meet Terms Of Lauded Kaua‘i Stream Agreement

In April 2017, the state Commission on Water Resource Management voted to adopt the terms of a mediated agreement intended to end the years-long conflicts over the diversion and waste of stream water via the Koke‘e and Kekaha ditch systems in West Kaua‘i. It would also help the Kaua‘i Island Utility Cooperative (KIUC) achieve its goal of developing hydropower projects there.

“Three-and-a-half years after this contemplated win-win-win resolution of the Waimea [interim instream flow standards] petition, compliance has really, sadly, fallen short,” Earthjustice attorney Isaac Moriwake said at a briefing before the Water Commission last month.

The Waimea Watershed Agreement was to have resolved a 2013 petition filed by Moriwake’s clients, Po‘ai Wai Ola/ West Kaua‘i Watershed Alliance, to

amend the interim instream flow standards (IIFS) of the Waimea River, its headwaters, and tributaries, as well as a complaint and petition they filed seeking to end the waste of diverted stream water by the state Agribusiness Development Corporation (ADC) and the Kekaha Agriculture Association (KAA), which manages the agency’s irrigation systems.

The groups alleged that water diverted by both systems was being wasted through system leaks and by being dumped into a different stream or onto the ground. In the meantime, stretches of stream bed were left dry or with inadequate flow.

Under the agreement, Koke‘e Stream was to immediately be allowed to flow past Koke‘e Ditch. The combined flows of three other streams diverted by the system were to total about 7 mgd. For

Continued in Column 2 of Page 7



PHOTO: CWRN

A stream diversion at the mauka hydropower plant along the Waimea River on Kaua‘i.

Environment

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NEW AND NOTEWORTHY

Ko'olau Loa Plan Advances: On November 19, the Zoning and Planning Committee of the Honolulu City Council voted to adopt a revised Sustainable Communities Plan for the windward Ko'olau Loa area that limits Hawai'i Reserves, Inc., which manages the land in La'ie owned by the Church of Jesus Christ of Latter-Day Saints, to building just 200 new housing units near the Brigham Young University-Hawai'i campus. HRI had at one point pushed for up to 875 units to be included in the plan.

Controversy over the housing proposal had long divided the community. The most recent amendments to the plan were proposed by Councilmember Heidi Tsuneyoshi. Prior to that, the Honolulu Planning Department proposed a plan that would have expanded the zone designated for Urban Growth just north of La'ie, in the Malaekahana area.

The bill approved by the Zoning and Planning Committee now faces a gantlet of public hearings and votes by the full coun-

cil before it becomes law. But the Defend O'ahu Coalition, which organized much of the protest against the urban expansion, was cheered by the action, posting a big "mahalo" to Tsuneyoshi and other council members on its Facebook page.

Loophole Closed: In 2017, the Hawai'i Supreme Court upheld a Circuit Court decision to invalidate aquarium collection permits issued by the state. The court found that an environmental review was required before any such permits are issued. Since then, an industry group has unsuccessfully sought approval from the Board of Land and Natural Resources of an environmental impact statement on aquarium collection permits for West Hawai'i. No EIS has been accepted for commercial aquarium collection there, or anywhere else in the state.

Even so, the industry continued to collect hundreds of thousands of aquarium specimens in the years that followed. Because they did not use the fine-meshed nets that are the industry's most common tool and are regulated by the state's aquarium collecting permits, the state Department of Land and Natural Resources argued that the collection could continue under general commercial marine licenses (CML).



PHOTO: MIKE NAKACHI/EARTHJUSTICE

Mike Nakachi feeds a Hilu (blackstripe coris), a fish steeped in Hawaiian legend and targeted by the aquarium trade for its striking appearance.

On November 27, 1st Circuit Judge Jeffrey Crabtree found that was not the case. In his order granting a motion for summary judgment brought by Willie and Ka'imi Kaupiko, Mike Nakachi, For the Fishes, and the Center for Biological Diversity, he stated that commercial aquarium fish collection under a CML is an "action" under the Hawai'i Environmental Policy Act.

"Potentially unlimited extraction of aquarium fish does not meet any of the exemption categories. ... Taking more than a half-million aquarium fish is not a minor impact, no matter how many or how few licenses are issued," he wrote.

"DLNR exercises or can exercise discretion concerning these takings. An environmental review is therefore required by law, and has not happened," he wrote.

"We are relieved that the court shut this illegal loophole so our reefs can finally rest while the agency examines the industry's harmful effects. These reefs are vital to our way of life and to the health of our entire Pae'a'ina [Hawaiian Islands]," said Ka'imi Kaupiko, a fisherman from Miloli'i, Hawai'i, in a press release.

The DLNR has stated that its Division of Aquatic Resources will not renew or issue new CMLs without a condition prohibiting the taking of marine life for aquarium fishing purposes until Chapter 343 environmental review is completed. Forty-one current commercial marine licensees report aquarium catch, the agency stated.

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Quote of the Month

*"He didn't stop at the first bin.
He came back a month later
and dropped the second bin. So
whatever reason he may have, it's
nothing to do with 'my truck broke
down.' This was planned. He had
found this lot, figured, 'The state
is not around every day, I'm going
to target this lot and I'm going to
dump anytime I want.'"*

— Russell Tsuji, DLNR Land
Division administrator

BOARD TALK

Land Board Fines Trash Hauler \$62,000 For Leaving Full Roll-Offs On State Land

Being contrite might have helped, but John Guinan, Jr., owner of The Trash Man, LLC hauling company, chose to fight.

He ended up with a fine nearly twice what he had been facing a month earlier.

At the October 23 meeting of the Board of Land and Natural Resources, the company faced a \$36,000 fine for leaving two full roll-off containers on a vacant parcel of state land in Mapunapuna, O'ahu, last winter. Guinan, through his attorney, requested a contested case hearing, arguing that he shouldn't pay any fines or state-incurred cleanup costs, and that the Department of Land and Natural Resources actually owed him money for disposing of one of the roll-off containers that sat on the lot for nine months.

He later decided not to pursue the hearing, choosing instead to plead his case at a regular Land Board meeting last month. But by then, the Department of Land and Natural Resources' Land Division administrator Russell Tsuji had a chance to rethink his recommendations.

Administrative rules would have allowed for a fine exceeding \$100,000 in this case, but Tsuji recommended a much lower amount because he thought his staff could have tried to resolve the matter much sooner than it did.

At the board meeting on November 23, however, Tsuji expressed his regret for going so easy on the company.

"I want to point out, he didn't stop at the first bin. He came back a month later and dropped the second bin. So whatever reason he may have, it's nothing to do with 'my truck broke down.' This was planned. He had found this lot, figured, 'The state is not around every day, I'm going to target this lot and I'm going to dump anytime I want,'" Tsuji said.

Given that, Land Board member

Jimmy Gomes suggested that a higher fine might be justified.

"I was trying to be reasonable," Tsuji replied. Rather than imposing the daily fines of \$500, he had recommended a \$5,000 fine, repayment of about \$3,000 in disposal costs, and payment of about \$26,000 in rent.

"After reading his testimony, I felt like I shouldn't have done it, or we shouldn't have gone that way, because he is [acting] as if he has a right to put it on our land and later saying, 'I didn't take it off because I had to get permission first.' Wait, wait.

was "leaning horrifically."

"It would have been incredibly unsafe for me to take it onto the freeway," he said. Because he said it was a DLNR job, and he knew of a lot owned by the DLNR in Mapunapuna, "I thought it was better to take it to a DLNR facility than drop it on the street," he said.

"I dumped absolutely ZERO material on that property. I set a roll-off can on that property, which was completely self-contained. ... Anything that was accumulated on that property was most certainly from the homeless or illegal dumping, which the property has a grave history of suffering from," he continued.

"Everyone's of the impression I'm some wild coyote. I just randomly, after 20 years plus in the hauling business, I just randomly decided to drop a container

for no reason on DLNR property and abandoned it. ... I've NEVER done that before.... It was 100 percent motivated by safety," he said.

He added that he later left a second container on the property, for just a day, because it was difficult to maneuver in the tight, flooded streets of Mapunapuna.

He did admit that leaving the containers on the property certainly drew others to leave their trash on the lot.

Even so, he said he left

the first container on the lot for months because he believed "we were shut down. Everyone was frozen," because of the coronavirus pandemic.

"If I had a pattern of doing this ... I can see the board throwing the book at me," he said.

(Although it was not in the Land Division's report to the board, The Trash Man does have a history of illegal dumping. He was warned in 2008 and cited in 2011 by the state Department of Health for operating an illegal solid waste transfer station in Pearl City. Inspectors found construction and demolition waste stockpiled along the edge of a stream embankment with nothing to "prevent leachate contaminants from leaching into surrounding soils and the nearby stream,"

Continued on next page



The Trash Man's two roll-off containers on a state lot in Mapunapuna, Oahu.

You put it there, first. You didn't ask permission. So, yeah, I mean, I think I would have no problem if the board was to grant a full fine or maybe 75 percent of it," Tsuji said.

Board member Kaiwi Yoon said the company's actions were pretty egregious. Gomes added that he would support a fine of at least 75 percent of what was allowed under the department's rules, "just because of the attitude ... of the person that did this."

Guinan explained that he was leaving a job — he claims it was a DLNR job; Tsuji disputes that — and heard a loud pop as he made a left turn from Sand Island onto the highway. He found pieces of his truck's leaf springs on the ground. He admitted the container was "grotesquely overweight and illegal," and

PHOTO: DLNR

the department's notice and finding of violation states.)

Gomes said that after 20 years in the hauling business, Guinan should have known the container was too heavy. "To begin with, it shouldn't be moved," Gomes told him.

"That's your opinion. You weren't there," Guinan replied. He then explained that roll-off trucks can handle loads that exceed the legal limit for state highways.

He said the container that he left on the state lot had carried excessively heavy loads for many years.

"I'll tell you what I think. I think the springs were broke already. They just broke more," because the load was so heavy, Gomes said. "If it's heavy, why deal with it?"

"So I should have left it on DLNR's property? Is that what you're saying, Jimmy? ... If the leafsprings didn't break, what motivation would I have to drop the container? To piss everybody off?" Guinan replied.

Guinan's attorney, Thomas Zizzi, interjected that he believed the DLNR did not give proper notice to Guinan regarding the violation for illegal dumping. He said that while statutes allow for posting the notice on site, which it was, it's only when the owner cannot be known or determined. In this case, Zizzi argued, the DLNR staff was eventually able to identify The Trash Man as the owner of the containers.

To this, board chair Suzanne Case asked Zizzi when Guinan placed the first container on the property.

Zizzi and Guinan both said it was in December of last year.

"Did you notify DLNR you had placed the container on the property?" Case asked.

Guinan replied that he had not.

"So you placed a container on the property and then a month later another container on the property and never notified DLNR," Case said.

While that was true, Guinan pointed out that he ceased his efforts to retrieve the first container there after Land Division's Robert Medeiros told him on February 11 not to do anything with it. By then, Medeiros explained to the board, he had begun enforcement actions after being frustrated with Guinan's slow progress in removing it.

The container was not removed and

the site cleaned by a state contractor until early August. In the meantime, the property became littered with even more garbage.

Board member Yoon noted that Guinan was trying to foist off responsibility to everyone else. That included DLNR staff and the contractor who overloaded his roll-off. "What do you think is your part in this?" Yoon asked.

Guinan admitted that he could have been more aggressive in following up with the DLNR between February and August.

In the end, after an executive session, the board voted to fine The Trash Man the maximum daily fine of \$500 a day for the period covering the time from when Guinan placed the first container on the state lot, December 17, through February 11, when Medeiros advised Guinan not to do anything further. That totaled \$28,000.

For the 117 days between February 11 and August 5, when the container was finally removed, the board applied one third of the maximum daily fine for a total of \$29,500. Case argued that during that period, The Trash Man was only partly responsible for why the container remained. Land Division staff and the COVID-19 situation were also responsible, she said.

The board also chose not to charge any back rent.

Total fines and costs amounted to \$62,536.54.

Board member Chris Yuen was the sole dissenter. "I do think this is a little bit high," he said.



Board Continues Water Permits For East Maui Stream Diversions

On November 13, the Land Board approved the continuation of revocable permits that allow Alexander & Baldwin, Inc. (A&B) and East Maui Irrigation Co., Ltd. (EMI) to continue diverting up to 45 million gallons of water a day (mgd) from four license areas in East Maui.

Most of that water is intended for use by Mahi Pono, which co-owns EMI with

A&B and which has plans to develop diversified agriculture on tens of thousands of acres of former sugarcane fields in Central Maui. The county Department of Water Supply also relies on a portion of that water to meet agricultural and municipal needs in Upcountry and Nahiku.

While representatives from the county and the agricultural community testified in support of the permits' renewal, the Office of Hawaiian Affairs (OHA), the Sierra Club of Hawai'i, the Haiku Community Association, Maui Tomorrow, and others opposed it.

OHA's Wayne Tanaka said that the report the Department of Land and Natural Resources' Land Division submitted to the board supporting a recommendation to approve the permits contained some "pretty fatal defects." Contrary to the department's determination that the permits were exempt from environmental review, Tanaka said that such an exemption is only allowed for actions with minimal or no significant impact. With the permits having a total diversion cap of 45 mgd, "entire streams basically could be completely diverted," he said. That would affect stream life, as well as native plants, even if the permits covered just one year of diversions, he argued.

He also suggested that without verifying what Mahi Pono's actual water needs are, the board could not meet its duty to protect the public trust. "When you do a public trust analysis, the first step [is] you need to first verify the actual demonstrated needs of the stream diverter. Then you can talk about balancing needs. You don't have this. ... You have a very generalized water claim of what Mahi Pono thinks will be used over the next several years," he said.

According to the Land Division's report, the company's estimated water demand for 2021 is only 32.3 mgd. What's more, based on EMI's last quarterly report to the board, for the period ending on September 30, 11.7 mgd, or 60 percent of the water diverted, was used for neither diversified agriculture nor municipal needs. Instead, that water fell into the company's catch-all category of "reservoir/fire protection/evaporation/dust control/hydroelectric." EMI also included system losses in that category.

Although it did not estimate the

Continued on next page

amount of system losses in that quarter, EMI admitted that it was more than the 22.7 percent rate the state Commission on Water Resource Management determined to be reasonable.

"This is primarily due to the need to continue to maintain water levels in the reservoirs largely for the County of Maui's fire suppression needs. Seepage losses from the reservoirs are thus expected and continue to occur in the unlined reservoirs just as they did during sugar cultivation. This water is not being irretrievably 'lost,' however, or 'lost' at all, since it is being returned to the underlying aquifer, which is the source for the brackish water wells that supplement the current and future irrigation needs of the Mahi Pono farm plan as well as other users in Central Maui," the company stated.

And then there are the historical/industrial uses that may or may not be allowable under the permits. EMI's report indicates these uses accounted for 1.1 mgd of the 18.9 mgd that had been diverted that quarter. There are nine different users, most of which are tenants of A&B, EMI or Mahi Pono. The uses include concrete batching, fire suppression (again), dust control (again), and water for bathrooms, animals, and pasture.

The Land Division's Ian Hirokawa told the board that it was questionable whether or not industrial use is allowed under the permits. The permits also require that all uses of water be reasonable and beneficial.

While Mahi Pono's Grant Nakama said that the companies had complied with all of the permit's conditions, A&B vice president Meredith Ching urged DLNR staff to reach out to those historic/industrial users to "see if they are indeed providing a reasonable and beneficial use ... before the decision is made to cut them off."

To address the system losses, the Land Division recommended that A&B/EMI submit a plan for proposed irrigation system upgrades no later than June 30, 2021. It also recommended that the board "amend its previous requirement prohibiting the waste of water to specifically exclude system losses and evaporation," its report states.

With regard to the historical/industrial uses, the division asked the board to require the permittees to identify the specific uses of the water and explain how they are



PHOTO: COMMISSION ON WATER RESOURCE MANAGEMENT

East Maui.

"ancillary to agricultural operations or are otherwise reasonable and beneficial."

"Given the Permittee has complied with the board's requirements to be transparent about the water use, staff recommends no adjustment to the current 45 mgd limit provided that the Permittee continue to provide timely and thorough quarterly reports," the division stated. It also recommended that if the board determined that a use of the diverted water was not reasonable and beneficial and did not comply with the permitted uses, A&B/EMI would have to cease that use within a timeframe as determined by the department.

To David Frankel, attorney for the Sierra Club of Hawai'i, the Land Division's proposed solutions were unacceptable. The group is in the midst of a lawsuit over the board's 2018 and 2019 approvals of A&B/EMI's permits. Arguments concluded earlier this year, but no ruling had been issued by press time. The case centers in large part on the fact that the board has chosen to allow the full diversion of about a dozen East Maui streams that were not part of a 2018 Water Commission decision to amend the interim instream flow standards of about two dozen other streams that serve native Hawaiian taro farmers and cultural practitioners in the area.

Frankel questioned whether the Land Board should allow A&B to drain 100 percent of the base flow of those 13 streams when most of that water is lost or wasted.

"We've provided you the data synthesized that your staff hasn't done for you that shows that most of this water is actually not used. We went through this

in the trial," he said.

He asked the Land Board not to approve the Land Division's recommendation to change the definition of waste. "It is Orwellian. It is Trumpian. If the water is not being used, it is wasted. ... What the staff is asking you today to do to is eviscerate any meaning of waste so they can lose more than 22.7 percent of the water. In fact they can lose 70 percent of the water. That is so inappropriate when streams are being drained completely dry," he said.

"There is a better way," he continued. Frankel then proposed that the board require A&B/EMI to line their reservoirs. "Take six for this year and start lining them," he suggested.

If not, "if you're going to let the water seep, pump the aquifers. ... Have them drain into the aquifer. Have a loop cycle. But to take them from East Maui streams and have it wasted is criminal," he said.

He pointed out that Caleb Rowe, counsel for Maui County, testified earlier about the improvements the county has made to its own systems to reduce water loss. "Why are we not having the applicant do the same? The county lined their reservoir. It reduced losses," he said.

Since EMI stressed in its report that the reservoirs are being filled to meet the county's fire suppression needs, Frankel encouraged the board to ask county fire department officials to identify which of EMI's 40 reservoirs are needed for firefighting. "Identify the specific ones so that it is not the excuse A&B uses to waste so much water. They do not need to have all 40 reservoirs filled, seeping

Continued on next page

into the ground, to fight fires. Ask the fire department how much water they need to fight fires,” he said.

With regard to the historic/industrial uses, Frankel said the Sierra Club testified to the board last year that East Maui stream water was being used for making concrete. “And now, a year later, your staff says, oh, it looks like they may be using this water to make concrete. HC&D’s executive testified under oath at our trial, they are using East Maui water to make concrete in direct violation of the terms of the permit. You should do something about that. Not change the terms of the permit to allow this use to occur. Get the information you need to before approving the continued use and cite them for violating the terms of the permit,” he said.

13 Streams

Mahi Pono’s water resources director testified in the Sierra Club case that the company draws most of its water from the 12 streams in the Huelo license area, which was not part of the Water Commission’s 2018 IIFS decision. The 13th stream, Puakea, lies within the Nahiku license area, he said, and the Sierra Club has not provided evidence that EMI diverts water from it.

At the Land Board meeting, Ayrton Strauch, a hydrologist with the Water Commission’s stream protection and management branch, presented the results of his agency’s surveys of those 13 streams. In short, it found that restoration of water to the 13 streams wouldn’t improve things much.

Strauch pointed out that high amounts of fog drip contribute to East Maui’s aquifer recharge. He also noted that many of the streams — all but three — end in terminal waterfalls, which would seem to prohibit the migration upstream of indigenous stream species.

The Water Commission’s 2018 CWRM

IIFS decision, which required the partial or full restoration of a number of streams, protected 77.2 percent of habitat in East Maui identified by A&B consultant Dr. James Parham, he added.

Finally, simply adding water back into the streams the Sierra Club is concerned about may not be enough to create good habitat, he argued, since problems such as invasive plant species and parasites would also need to be addressed.

Frankel, however, argued that all 13 streams were, indeed, important. And the DLNR’s Division of Aquatic Resources (DAR) determined that a few of them — O’opuola, Naili’ilihale, Kailua, and Ho’olawa — had a high restoration priority, despite the fact that all but O’opuola end in terminal waterfalls. Maui DAR biologist Skippy Hau even found two species of native gobies in Naili’ilihale during a stream check in October.

“Although this is an evaluation of streams, the status of an estuary is directly tied to the status of the stream that feeds it. Therefore, estuary species such as aholehole (*Kuhlia xenura*), amaama (*Mugil cephalus*), moi (*Polydactylus sexfilis*), and others are also considered of great importance. To a lesser extent prawns (*Macrobrachium lar*) are considered. Although introduced, this species serves as an important food resource, consumed by many rural communities and adds to our State’s food security,” the division wrote in its testimony to the board.

“It is disillusioning to see the post hoc rationalization that Ayrton Strauch provides to argue that these 13 streams should not be restored in any way whatsoever. He argues that the Water Commission argued that 90 percent of A&B’s needs should be fulfilled. The Water Commission decision says nothing of the sort. ... He suggested terminal waterfalls are a problem for native species. They are not a problem for five native species. And in

fact some of the streams restored by the Water Commission end in terminal waterfalls. That is a red herring to talk about terminal waterfalls,” Frankel said.

Recognizing the differences of opinion between the Water Commission and DAR on the value of restoring at least some of the 13 streams, the Land Division recommended that board require A&B/EMI to cooperate with the two agencies “in studies, site inspections and other actions as necessary to address the streams in the license areas not covered by the CWRM order.”

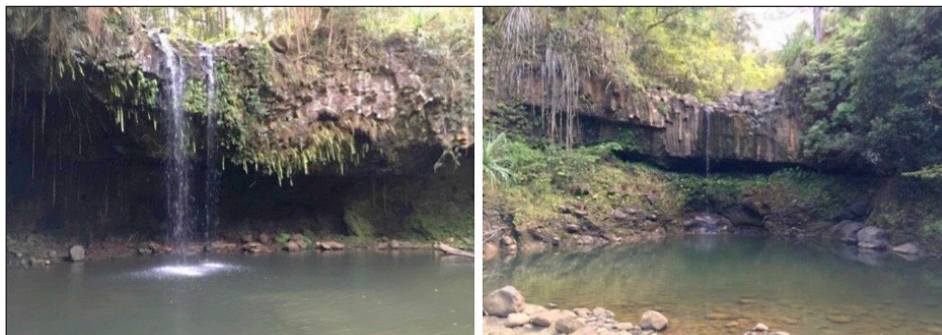
Final Words, Or Not

In his testimony in opposition to the permits, Albert Perez of Maui Tomorrow argued that A&B/EMI had access to plenty of water outside the four state permit areas. If the board decided to approve the permits, he urged it to include conditions that Mahi Pono has already agreed to for the use of water from streams in Central Maui known as Na Wai Eha. (Because Na Wai Eha has been designated as a surface water management area, allocations of water are governed via water use permit by the Water Commission. East Maui is not a designated water management area, so allocations are governed by permits and water leases or licenses issued by the Land Board.)

In a settlement agreement joined by Maui Tomorrow, Mahi Pono, Hui o Na Wai Eha, and OHA, the company agreed to limit its water usage to 2,500 gallons per acre per day for efficient diversified agricultural operations, he said. “Based on the 5,700 acres Mahi Pono said that they need to irrigate with East Maui stream water by the end of 2021, that would result in 14.3 mgd and they would be fine if they were irrigating efficiently,” he said, adding that Mahi Pono also agreed to verification of acreage planted by a licensed surveyor and to line a reservoir that had seepage losses of between 6 mgd and 8 mgd.

Lucienne de Naie, president of the Haiku Community Association, also stressed the need to line the reservoirs and expressed her concern about the DLNR’s apparent acceptance of EMI’s system losses.

To transport East Maui stream water 60 miles to seep into the aquifer in Central Maui, “I can’t agree with that. ... We want our streams to flow to recharge our



Examples of overhanging Hana volcanics forming a barrier to upstream migration.

Board from Page 6

aquifer,” she said.

She added that the advisory group the Land Board established more than a year ago to discuss East Maui water issues does not include residents of the Huelo permit area. “These folks are not represented by the county, not represented by OHA because they’re not Hawaiian. They’re just left off the table, yet you’re making decisions about streams they use every day,” she said.

Acknowledging her complaint, board member Chris Yuen, in his motion to approve the Land Division’s recommendations, added a condition to include a representative of the Huelo community in the advisory group. He also recommended that in reviewing efficiency upgrades to their irrigation system, A&B/EMI work with the fire department to determine its exact needs.

Finally, Yuen wanted to include a statement of the board: “The board intends to deal with the restoration of the non-IIFS streams and efficiency upgrades to the system no later than the time the board considers going out auction for the final lease.”

Yuen explained why he thought restoration of the 12 or 13 streams the Sierra Club wants to see restored was not necessary right now. The streams do not provide water for taro, he said, and “recreational uses are co-existing right now with diversions that have been taking place for a long time.”

With regard to the purported benefits of restoration to stream biota, Yuen cited the Water Commission’s report on the 13 streams, which concluded, “[T]he non-petition streams support limited to no recruitment or reproduction and existing diversions have minimal impact on the life history of the native aquatic biota.”

“This is not necessarily the last and final word. This is sufficient for us to go ahead with continuing to allow diversions from these streams for the coming year,” Yuen said, adding, “we’ve had a lot of discussion of system upgrades regarding seepage losses. ... To require expensive upgrades on a one-year permit is really not the way to go.”

A few days after the meeting, the Sierra Club of Hawai'i filed an appeal of the Land Board’s decisions to renew the permits and to deny the group’s request for a contested case hearing. —*T.D.*

CWRM from Page 1

streams diverted by the Kekaha system, the IIFS was set at 2 mgd for Koaie, 8 mgd for Waimea below one of the diversions, and 25 mgd at a U.S. Geological Survey meter.

KIUC was responsible for installing and maintaining real-time monitoring systems to track flows entering and exiting the Koke'e Ditch and for modifying diversions to ensure flows were restored to the maximum extent possible and allowed for the migration of stream species. The ADC and KAA had to do much the same along the Kekaha system.

If and when KIUC completed its renewable energy project, flow standards on

A lot of progress has been made in meeting the IIFS, in increasing stream flows and ensuring that stream needs come first, he said, adding that a lot less water is being dumped onto the ground by the Koke'e system. It used to be 1 mgd; now it's a trickle, he said.

Strauch seemed frustrated, however, with the lack of progress on installing real-time monitoring gages. KIUC and KAA have blamed their failure to quickly install all necessary monitoring gages on the fact that they are tied to permitting for their ditch modifications, which is taking a very long time.

As a result, CWRM decided to go ahead and install its own monitoring



The Waimea Watershed Agreement required boards to be raised so that the streams, not the ditches, received the low flows. The KAA did not raise those boards until earlier this year due to fears the gaps below the boards would clog.

the Koke'e system would be adjusted to accommodate the project's needs.

To date, adequate flow monitoring gages have still not been installed, system adjustments to ensure that the streams receive water in low flow conditions were only completed this year, and significant system leaks have resulted in repeated failures to meet the IIFS for the Waimea River.

In his briefing to the commission on the status of the agreement, Water Commission hydrologist Ayron Strauch said there have been a number of hiccups in implementation. The death of KAA's irrigation system manager, Landis Ignacio, was one. Without him, the organization lost institutional knowledge, as well as a willingness to manage things on the ground, Strauch said.

Access, especially to the Kekaha system, was another issue, he added. In addition to road repairs, he noted that in 2018 and 2019, “there were a lot of wash-outs of road crossings that resulted in fewer site visits, intake adjustments, and operational fixes to meet agreement goals.”

system below the Waiahulu intake earlier this year, he said. “We’ve lost now three-and-a-half years of valuable data collection,” Strauch complained.

Without the stream-flow data they thought they would have by now, Water Commission staff are unable to answer whether actual flows are anything like the modeled flows that were used to establish the IIFS. They also have no idea what the total system losses are or how much water is available on the Mana plain as a result of those losses.

“Although we made great strides in basic parts of the agreement, there are a lot of holes. If this comes before the commission again, we just don’t have any data to provide for better management,” Strauch said.

He pointed out that flow measurements that commission staff took in 2017 and 2018 along the Koke'e system showed that actual flows were at times significantly different than what had been modeled.

Measurements staff took on November

Continued on next page

9 at various sites along the Kekaha Ditch show that there is significant leakage: 2.9 mgd along one section alone.

Strauch called the loss “outstanding,” given that the agricultural demand for that water is only 1.79 mgd and the flow in the Waimea River was 2.4 mgd below the IIFS.

He noted that it’s an old system that needs a lot of work, and KAA has already stockpiled the piping needed to fix some of the leaks. “There are plans to make improvements. It’s clear agriculture needs to be supported and water is valuable. In order to expand agriculture, they are going to need to be better stewards,” he said.

He said there are a large number of sections of unlined ditch and sections that have cracks. At Polihale, on the Mana plain, “there’s a nice swath of green vegetation growing along the ditch. It’s clear the ground is nice and moist there because of all the leakage,” he said.

‘Binding Law’

Moriwake reminded the commission that meeting the terms of the agreement is mandatory for KAA, ADC, and KIUC.

“This agreement is not just some handshake deal or a [memorandum of understanding]-type of agreement. ... It’s binding law,” he said.

“It took really a lot of persistence over three years to get this far. ... We can’t be sure the IIFS are being met without monitoring. We literally saw that data for the first time today. ... It’s showing compliance with one of the Waiahulu IIFS for now,” he continued.

He pointed out that in addition to failing to install adequate monitoring, KAA had 45 days to submit system modification plans, but took 16 months.

And at the lower Waimea River, he said there have been extensive violations of the IIFS.

For more than 200 days, KAA was overdrawing, on average, some 2 mgd, he said. “This has improved over time, again through persistence, but it’s ongoing,” he said, noting that the violations continued through most of September.

With regard to system losses, he said the data — not including Strauch’s November measurements — suggest to him that the Kekaha ditch flow measured after passing through a hydropower plant was around 12 mgd, but only 6 mgd was arriving at a lower spot to meet an actual

agricultural need on the Mana plain of just 1.3 mgd.

“We need gaging in the ditch system to get to verify this either way. It’s really a shame we don’t have that now,” Moriwake said. Without the gage Water Commission staff installed and the measurements it made, and a USGS gage, “we’d be totally flying blind,” he said.

He complained that compliance with the agreement has often been treated as if it was a matter of convenience rather than a legal obligation. “When push comes to shove, the IIFS takes a back seat. The burden falls on the community and staff to continually check and to hassle, rather than the diverter having to show cause,” he said.

Moriwake called for more regular updates and public reporting of the kind of data Strauch presented. “I don’t think we can be absentees, certainly not for another three-and-a-half year stretch,” he said.

KAA Responds

“There’s no way I can say we’ve hit all the timelines in the agreement, but it’s certainly not from a lack of effort,” KAA’s board president Josh Uyehara told the commission.

Since 2017, he reported, KAA has spent more than \$7 million on repairing or modifying the ditch system, installing some monitoring, and purchasing materials that will reduce system losses, among other things.

Uyehara said KAA spent \$60,000 in 2018 alone repeatedly repairing the access to the upper diversions, “most times for access to wash out before we can use it.”

He said the slow progress in getting the permits necessary for ditch modifications and gaging has been frustrating for them, as well. “There’s literally no benefit to us dragging our feet. ... If anyone knows a better way to get these things expedited, we want to hear about it,” he said.

To date, most of the improvements that have been made were supported with state funds, since the system and the lands it serves belong to the state. Some funds have come from KAA, and Uyehara said that it is looking to privately financing some of the major projects in the future, knowing that state funds may not be readily available.

“It will be tough to completely renovate the system without state assistance,” he said.

Despite falling short on meeting all of the agreement’s requirements, he said that the KAA did take immediate steps after it was signed to reduce the flows in the ditch system to meet the IIFS. It couldn’t tell if it achieved that since there were no gages, he added.

From getting funding to receiving permits, “obviously we’ve run into repeated delays,” he said.

Commissioner Neil Hannahs asked about the delays in the gaging installation and the pulling of boards in some diversions to ensure that the streams receive flows first.

Uyehara first noted that KAA has installed some gages. Others that require modifications to the diversion, however, have been hung up in permitting, he said.

“We’re relying on USGS for long-term gaging upstream of our diversion points,” he said.

With regard to the boards, which were not pulled until earlier this year, he explained that, basically, the KAA was too worried that the space beneath the board would clog with debris, resulting in no flows into the stream until the water levels topped the height of the board. So it held off.

But this year, he said, KAA had regular access to the sites, so it decided to finally raise the boards and, so far, the passages have not plugged.

While discussion during the briefing focused mainly on the Kekaha ditch, Dawn Huff, representing KIUC, reported that its stream gage installation on the Koke’e system and streams is also tied into ditch modifications and obtaining all the permits for those. It is currently awaiting approvals from the state Office of Conservation and Coastal Lands, the Historic Preservation Division, and the Department of Health.

Ways Forward

“How hard is it to put gaging in your own ditch? You can’t tell me you need permitting to do that,” Moriwake asked after Uyehara’s presentation. If KAA can’t handle installing gages in its own ditch system, Moriwake suggested that perhaps Strauch should take care of it and KAA fund it.

Strauch said it was possible for the commission staff to install gages. “It’s not

Continued on next page

CWRM from Page 8

easy to get to. That's an understatement. It would take a lot of effort. Travel is difficult. Day trips are fine. It would take a lot of day trips," made more difficult by the pandemic, he said.

"If it's all tied to their construction permits, then it's going to be a while. I take my direction from the commission," he said.

A number of the commissioners stressed how much they want the agreement to succeed, to show that people can work together and resolve their differences and not need to go through years-long contested case hearings or court battles.

"We've got to have more regular updates and we've got to see action before we find ourselves in situations we don't need to be in," Commissioner Kamana Beamer said.

—**Teresa Dawson**

For Further Reading

Environment Hawai'i has given extensive coverage to the controversy over diversion of stream water in West Kaua'i. The following are all available at www.environment-hawaii.org:

- "Kaua'i Pumped Storage Project Wins Preliminary Approval of Land Lease," December 2014;
- "Mediation Over West Kaua'i Stream Diversions May Hinge on Response to Information Request," July 2015;
- "Water Commission Gives Parties One Month to Mediate West Kaua'i Waste Complaint," "Agricultural Tenants in Kekaha Object to Basic Questions About Water Use," September 2015;
- "Kaua'i Utility Wins Conditional Lease For Hydroelectric Project in Kekaha," December 2016;
- "Kaua'i Utility, Agriculture Groups Commit To Restoring, Monitoring Diverted Streams," May 2017; and
- "Alterations to Kekaha Ditch Diversions Hinge on ADC's \$3.5M Funding Ask," March 2018.

Big Plans for Foreign Investment In Dairy Operations Run Aground

It has been more than a year since the Big Island Dairy in O'okala, along the Hamakua Coast of the Big Island, shut down. The closure followed a series of disastrous spills of manure into streams that outraged residents and prompted investigations – and fines – from the state Department of Health. Given environmental considerations, it seems unlikely a dairy will ever be sited there again.

Yet in the eyes of the California Energy Investment Center, LLC (CEIC), the O'okala dairy is one of several targets for acquisition by foreign investors hoping to acquire permanent residency in the United States through the EB-5 visa program. That program allows wealthy foreigners to jump to the head of the line in the award of so-called green cards if they invest significant resources into qualified projects in the United States.

Then there's the Cloverleaf Dairy near Hawi, on state-owned land near the northern tip of the Big Island. In June, the state Board of Agriculture approved the sale of the dairy by its longtime owner, Ed Boteilho and Boteilho Hawai'i Enterprises, Inc., to Dutch-Hawaiian Dairy Farms.

That dairy, too, is among the enterprises that the CEIC says it is planning to purchase.

Finally, consider the Honoka'a Land Company, LLC. That affiliate of CEIC was authorized by the Legislature in 2017 to float up to \$50 million in special purpose revenue bonds. The purpose: to develop a facility to manufacture soil amendments and compost animal waste at the old Hamakua Sugar mill site in Haina, near Honoka'a.

GGR Real Estate Holdings, LLC, yet another affiliated entity, did purchase the site in 2014, but lost it in a foreclosure action that became final earlier this year.

All three of these ventures were to be undertaken as part of what, under the rules of the EB-5 visa program, is called a New Commercial Enterprise, or NCE. In this case, the enterprise pulled together by CEIC and placed under the corporate umbrella of Hawai'i Agriculture, Energy and Earth Products, LLC, was intended to attract 50 foreign investors with a total investment of \$25 million.

It now appears uncertain that CEIC will be able to move forward with any of these ventures, much less all three, but that has not stopped it from moving forward

with litigation in hopes of salvaging the project.

'Contiguity' Challenge

The system that has been set up to implement the EB-5 visa program involves a network of what are called regional centers. As the term suggests, each regional center operates within a given geographic area, subject to approval of the DHS's Citizenship and Immigration Services (USCIS). Thirteen such regional centers have been approved to undertake investment projects in Hawai'i, according to a DHS website. CEIC is not among them.

On August 31, 2016, CEIC applied for permission to expand its geographical jurisdiction to include Hawai'i. That same month, HAEF Products, LP, was registered in Hawai'i with the state Department of Commerce and Consumer Affairs. Another entity closely tied to CEIC changed its name from Haina Mill Holdings, LLC (established July 14, 2012) to HAEF Holdings, LLC. A month later, HAEF GP, LLC, was registered with the state.

In July of this year, the USCIS informed CEIC that it was denying the request to include Hawai'i in the region where CEIC could operate.

On October 22, CEIC and HAEF sued Chad Wolf, the acting secretary of the Department of Homeland Security, Kenneth Cuccinelli, acting director of USCIS, Sarah Kendall, chief of the Immigrant Investor Program Office, and the USCIS itself. The lawsuit is in the form of a complaint for a writ of mandamus, asking the court to order the DHS to overturn its denial of the application for expanded regional authority. It also seeks to recover attorney fees and costs.

According to the complaint, CEIC "provided sufficient evidence" to DHS "documenting that Hawai'i is in the same economic region as plaintiff's already approved geographical region within the state of California."

The complaint acknowledges that a regional center "cannot sponsor a project in an area outside of its territory until USCIS approves an amendment to that territory." Nonetheless, CEIC established HAEF, which was intended to "raise up to \$25 million from 50 foreign investors through the EB-5 program, and loan that money to the developer of the project, which includes:

Continued on next page

the acquisition, construction, and operation of the two remaining dairies located in O'okala, Hawai'i, and Hawi, Hawai'i; construction of solar barns and energy and water recovery facilities; extraction and processing of the highly enriched soil from the Haina Mill site (soil amendments which reduce water consumption in agricultural production and greatly enhance crop yields thus further reducing energy consumption); and developing root and feedstocks and using animal wastes."

"For more than 15 months from the submission of the application, the plaintiff heard nothing on the application until Defendants issued a request for evidence on December 15, 2017," the complaint states. The sole issue raised with respect to the expansion of the regional center's territory, it says, was that "the proposed geographical region is not 'contiguous.'"

In its response, filed on March 9, 2018, CEIC argued "that because California is the closest state to Hawai'i and shares economic ties with Hawai'i, the regional center should be allowed to expand its territory to include Hawai'i."

When the denial finally came last July, it "was based solely on a finding that the geographical area of the regional center should not be extended to cover the project in Hawai'i," the CEIC says in its court filing.

The law establishing regional centers "makes no specific reference to a requirement that a regional center be limited to a geographic or economic region," the complaint notes. Further, USCIS policy at the time the application to expand CEIC's region was filed "reiterates the regulatory requirement of promoting economic growth in the proposed geographic area of the regional center. There is no mention of a contiguity requirement."

CEIC goes on to say that the USCIS has approved regional center sponsorship "of many projects in geographical areas not contiguous to the regional center's previously approved geographical boundaries, including applications" from CEIC itself.

"One reason given for the denial of the ... application is that the regional center requested that its geographic area include the Pacific Ocean, which is not part of the 'United States' as defined in the Immigration and Nationality Act," the complaint states. However, "[i]t is not correct that the regional center proposal sought to include the Pacific Ocean as part of the geographic region of the regional center."

In arguing its case, CEIC's attorneys Terri Fujioka-Lilly and Jason Braswell, of Kailua-Kona, point out that the USCIS

"has approved many regional centers that include bodies of land separated by bodies of water," including regional centers covering all of the Hawaiian islands, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

In 2019, they note, USCIS regulations changed to require "contiguous census tracts" in determining so-called "targeted employment areas" that qualify for EB-5 investment. Contiguity can include census tracts separated by a "waterway," the complaint says.

If CEIC "cannot add Hawai'i to its territory, the only way it could sponsor the project is if it were to apply for the designation of a brand new regional center ... , together with a filing fee of \$17,795, and waiting for many years for defendants to act on that application," the complaint says.

Even if contiguity is a requirement for the geographical area of a regional center, the complaint concludes, "under the facts of this case, Hawai'i and California should be considered to meet any contiguity standards."

A Broken Contract?

Meanwhile, in Hawai'i's 3rd Circuit Court, the Honoka'a Land Company is suing Boteilho and Dutch-Hawaiian Dairy Farms, alleging that Boteilho breached a contract to sell the dairy to HLC and that Dutch-Hawaiian Dairy Farms' principals engaged in tortious interference to block that sale.

Back in 2017, the land under the Boteilho dairy was still part of the state Department of Land and Natural Resources' portfolio. On December 8 of that year, the DLNR's Land Division brought to the Board of Land and Natural Resources a recommendation that it consent to the assignment of the Boteilho dairy's lease to HFD Farms I, LLC, an entity that – according to a company "organizational breakdown" provided by HFD Farms – had as its sole member HFD Partners, LLC, which in turn had as its sole member Hawai'i Agriculture, Energy, and Earth Products, LLC, which, in turn, had as its sole member Gemco Green Resources, Inc. (That last entity is not registered in Hawai'i, although GGR Real Estate Holdings, LLC, is; its sole member is Hawai'i Agriculture, Energy, and Earth Products Holdings, LLC.)

The Land Division's report took note of the fact that in August 2016, the board had consented to Boteilho's request to assign the lease to Mauna Kea Moo, LLC, which is another company owned by the Kea family (the same who own the Dutch-Hawaiian Dairy). But the sale of the lease

fell through, the report says, "as a result of prolonged negotiations and the inability of Mauna Kea Moo, LLC, to secure the necessary funding." Boteilho and Kees Kea formally signed an agreement cancelling the proposed sale on November 7, 2016.

Less than a year later, Boteilho informed the Land Division he wished to assign the lease to HFD Farms I, LLC, an entity that, the Land Division report states, "was formed specifically for the purpose of purchasing the assets of the lessee."

Attached to the Land Division's report was a letter from Scott Enright, chairperson of the state Board of Agriculture, to Josh Gottlieb, CEO of HAAE, supporting the lease assignment. "HAAE's acquisition of the Cloverleaf Dairy, one of two remaining dairies in Hawai'i and its conversion to Certified Organic will present the first and only Certified Organic dairy in Hawai'i," Enright wrote.

Enright also mentioned HAAE's association with the EB-5 program, writing that this connection "initiates an exposure to foreign investment not able to be secured through the state of Hawai'i directly."

The Land Board approved the transfer of the lease to the HAAE subsidiary. At the same time, it reaffirmed its prior approval of a set-aside of the leased land to the state Department of Agriculture. That set-aside was finally accomplished on April 12, 2018.

The sale to HFD Farms I or any other HAAE subsidiary did not go through. Instead, in 2019, Boteilho agreed to sell once more to Dutch-Hawaiian Dairy Farms.

On June 30, Brian Kau, administrator of the Department of Agriculture's Agricultural Resource Management Division, forwarded to the Board of Agriculture the staff recommendation that the board approve the sale of the lease and cattle for the purchase price of \$700,000.

Of that amount, \$411,000 was to be used by Boteilho to pay off indebtedness he had incurred to Paul Pozzi, dba Poz Trading, of Petaluma, California. Boteilho had taken out a loan from Pozzi in late 2017. But, Kau's report states, "in 2019, severe drought conditions caused a significant increase in [the dairy's] feed costs, which put them in poor financial condition." Since then, he continued, the dairy "has not recovered from their losses and their financial condition remains poor and they are at risk of shutting down operations."

At the BOA meeting, Gottlieb, CEO of HAAE, objected to the transfer, claiming that his company had an existing agreement to purchase the dairy.

Continued on next page

Boteilho told the board, however, that his contract with Gottlieb back when the Land Board approved the transfer in 2017 called for a signing bonus of \$100,000, of which he had received \$50,000. According to the BOA minutes of the June 23 meeting, Boteilho said that the performance timelines in the agreement had all passed, and while he had been trying to repay the \$50,000, Gottlieb "had not been cooperative."

Boteilho's attorney, Alan Okamoto, said that Gottlieb had been notified in 2019 that there was possible environmental contamination on the property and that an environmental study had been done. "With the passage of time, the value of the dairy decreased, and the offer was made to reduce the price if Mr. Gottlieb wished to proceed," Okamoto told the board. No response was received, Okamoto said. "Mr. Boteilho is still prepared to return the money but he needs the proceeds from the sale to Mr. Kea to do so."

On a vote of 7-1, the board approved the transfer.

Sixteen days later, Honoka'a Land Company sued Boteilho, Boteilho Hawai'i Enterprises, Dutch-Hawaiian Dairy Farms, Mauna Kea Moo, Kees Kea, Cornel Kea, and Malena Kea. The complaint states that on numerous occasions, the contract between Boteilho and HLC was amended "to accommodate difficulties that arose in BHE's ability – or perhaps, in hindsight, willingness – to close the contemplated transaction, such as environmental issues related to underground storage tanks on the properties to be transferred."

"Undeterred, HLC patiently waited for BHE to fulfill its obligations and close the transaction. **HLC remains ready, willing, and able to fulfill its obligations under the contract and close the transaction,**" the complaint says (emphasis in the original).

In response, Francis Jung, attorney for Dutch-Hawaiian Dairy and related parties, argued that the complaint should be thrown out if, for no other reason, it fails to name the Department of Agriculture as a necessary party. He noted that from January 2017 to June 2020, "the plaintiff never sought the consent of the DOA to the assignment of the lease. ... Consequently, there was never an enforceable or legally valid or enforceable contract for the defendants to breach."

In October, Judge Robert D.S. Kim denied the defendants' motion for summary judgment; a hearing on their motion for partial summary judgment is to be heard December 20. —*Patricia Tummons*

'Aina Le'a Update: From State Court, To County Planners, to Supreme Court

For years, the various owners of land in South Kohala where the 'Aina Le'a development is proposed have struggled to move forward with their plans. The problems they have faced related to permitting and entitlements, but also to finances.

The current owners of the 1,100 acres in the state Urban land use district that are at the heart of the development are all subsidiaries of 'Aina Le'a, Inc. That company, headed up by Robert Wessels, has gone through several metamorphoses since Wessels first came onto the scene more than 10 years ago.

In August 2019, 'Aina Le'a emerged from bankruptcy, thanks largely to a loan from Iron Horse Credit, secured by the property. But since June, Iron Horse alleges in a 3rd Circuit complaint filed October 13, 'Aina Le'a has been in default. "As of October 1, 2020," the complaint says, 'Aina Le'a "owed plaintiff the sum of \$5,429,772.97," with additional amounts "continuing to accrue." The loan agreement states that interest has been prepaid, but 'Aina Le'a will still pay 8 percent annual interest on the principal balance of the loan. If the loan goes into default, the interest rate jumps to 18 percent.

The complaint also names as defendants three parties known to hold superior mortgages: Romspen Investment Corp., Bridge 'Aina Le'a, LLC, and Libo Zhang,

a Chinese national.

On November 29, 'Aina Le'a filed its response. Among other things, argued its attorney, Mike Matsukawa, "the circuit court may lack subject matter jurisdiction" because the federal bankruptcy court retained jurisdiction "over certain subjects and issues that pertain to or are related to the bankruptcy plan" referred to in the Iron Horse complaint.

In the main, the defense comes down to blaming the county. "The Defendants' inability to fully perform their obligations for the loan and the defaults that the Plaintiff has asserted ... are the result of and caused by the County of Hawai'i and the Planning Director, Department of Planning for the County of Hawai'i's failure and refusal to perform the obligations on their part to be performed under the bankruptcy plan, which performance conditions the Defendants' obligations to the Plaintiff. ...," the brief states.

As *Environment Hawai'i* reported in 2019, when 'Aina Le'a was emerging from bankruptcy, the company claimed that it possessed all necessary permits to move forward with construction of 385 units of affordable housing and other projects it had dangled before investors.

Yet even then, the county Planning Department put the company on notice that it was still required to prepare an

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environmental impact statement, as the county had earlier determined that one prepared more than a decade ago was inadequate. That determination followed a legal challenge to the EIS brought by the Mauna Lani Resort Association, which owns property that lies between 'Aina Le'a's property and the ocean.

But earlier this year, Lulana Gardens, LLC, one of the companies 'Aina Le'a established to develop the affordable housing project, filed a complaint against the county and Michael Yee, its planning director, asking the court to find that that earlier EIS is sufficient, notwithstanding the county's determination.

Third Circuit Judge Robert Kim heard arguments in July on Lulana Gardens' motion for partial summary judgment, and ruled against it on August 24.

Since that ruling, there have been no additional documents filed in that litigation.

Perhaps recognizing that they would need to prepare a new EIS after all, last month, representatives of 'Aina Le'a met with Planning Department staff to discuss what was needed to get the department to accept an EIS preparation notice for the development. Once the EISPN is accepted by the county, the county can then forward it to the state Office of Environ-

mental Quality Control for publication in its bi-monthly Environmental Notice.

In the normal course of events, the EISPN triggers a range of comments from the public and interested agencies, which comments are then used in developing a draft EIS. The draft EIS is once more considered by county planners before being forwarded for publication in the OEQC's Environmental Notice. Following a comment period, a final EIS is prepared and published. If no legal challenge is brought, the way is cleared for the county to issue the necessary permits.

From the time an EISPN is published to final, unchallenged acceptance of an EIS can take a year or more.

Bridge 'Aina Le'a Seeks Cert

In July, Bridge 'Aina Le'a, which once owned the 'Aina Le'a project site and which still owns about 2,000 Agricultural acres wrapping around the Urban land on three sides, appealed a 9th Circuit Court decision to the U.S. Supreme Court. That appellate court ruling earlier this year had the effect of denying Bridge compensation that it says was owed to it by the state when the Land Use Commission reverted the Urban land – now owned by 'Aina Le'a – to the state Agricultural District. The reversion was effected in

2011 following Bridge's failure to complete construction of at least 16 affordable housing units by March 31, 2010 – the deadline set by the LUC following years of delay in fulfilling conditions set in the redistricting order.

That reversion was overturned in state court but Bridge has claimed that it nonetheless is owed compensation for the period of time in

which the reversion was in effect.

Bridge filed its petition for a writ of certiorari on July 17. Since then, a host of organizations and individuals have filed amici curiae briefs in support of Bridge, including the Pacific Legal Foundation (joined by the Cato Institute and New England Legal Foundation), University of Hawai'i law professor David Callies with three other "takings" scholars, the National Association of Home Builders, the Owners' Council of America, the National Association of Reversionary Property Owners, and Reason Foundation.

No one has stepped forward as an amicus of the state.

On September 30, however, the outside legal counsel retained by the state filed his request to extend the deadline for the state's response. It was filed on November 25.

"The extension is warranted because the undersigned counsel ... was recently retained as counsel of record and must familiarize himself with the issues and record," he wrote in the request, which was granted by the court.

That undersigned counsel? None other than Neal Katyal, the former acting solicitor general of the United States, but perhaps better known for his frequent appearances on MSNBC, where he is the resident legal analyst. —P.T.

For Further Reading

Over the years, *Environment Hawai'i* has written numerous articles on the ups and downs of this proposed development. All articles may be viewed free of charge on our website, www.environment-hawaii.org. For a full list, readers may wish to use the search engine in the upper right corner of the home page.



Architect rendering of proposed Lulana Gardens.