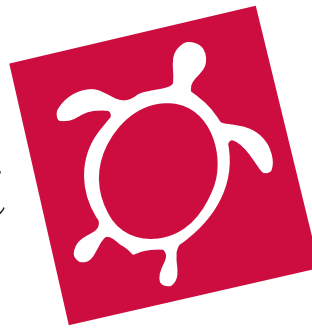


Environment



Hawai'i

a monthly newsletter

A Stealth IAL Bomb Hits Kekaha, Kaua'i

Few people appear to have known about the efforts of the Kekaha Agricultural Association to get more than 12,000 publicly owned acres designated as Important Agricultural Lands. So when the Land Use Commission met in late December to hear its petition, members were taken aback when they learned just how meager the association's outreach had been. Not even the state Department of Hawaiian Home Lands, owner of neighboring lands, had been advised of the petition.

But that wasn't their only concern. Why, exactly, had the state's Agribusiness Development Corporation turned over to KAA the task of seeking IAL designation for state land? And why had permission from the Board of Land and Natural Resources, overseer of all publicly owned land, not been sought?

Perhaps IAL designation is a good thing, as the Kekaha association argues. But the LUC's decision to defer further action on the petition until its concerns are more fully addressed can only be welcomed at this point.

LUC Members Grill Kekaha Ag Co-op Over Its Important Ag Land Petition

Can a private entity's petition to designate state lands as Important Agricultural Lands advance without the state's permission?

That question and many others arose last month, when the Land Use Commission met to consider a petition to designate 12,123 acres of land in west Kaua'i as Important Agricultural Lands (IAL). Under a 2003 executive order, the lands were encumbered to the state Agribusiness Development Corporation, an entity established by the Legislature to promote agricultural enterprises and maintain infrastructure needed for their success, including irrigation lines, reservoirs, and roads. Four years later, the ADC delegated management of irrigation and drainage infrastructure in the area to a tenants' cooperative, the Kekaha Agriculture Association (KAA).

In 2018, the ADC gave its blessing to a request from KAA to petition the LUC to designate the lands as IAL, "and to certify ADC's authorization as landowner."

Finally, on December 2, Doug Coudiga, the attorney representing KAA, filed with the LUC the formal petition requesting IAL designation.

The KAA does not own the land, prompting commissioners to ask on whose authority it filed the petition. Myra Kaichi, the ADC's executive assistant, set out the ADC's position:

"We grappled with the question of whether the ADC is the proper authority to give approval for lands set aside by the governor. ... Our position is that when lands are set aside to ADC ... they're not public lands as that term is used in Chapter 171 [Hawai'i Revised Statutes]."

Continued in Column 2 of Page 7

IN THIS ISSUE

2

New & Noteworthy:

Monument Plan, Kahala Permit

3

Wespac Advances Albatross Measure, Balks at Gear Change for False Killer Whales

5

Wespac Continues to Press Feds For Permission to Take Turtles

9

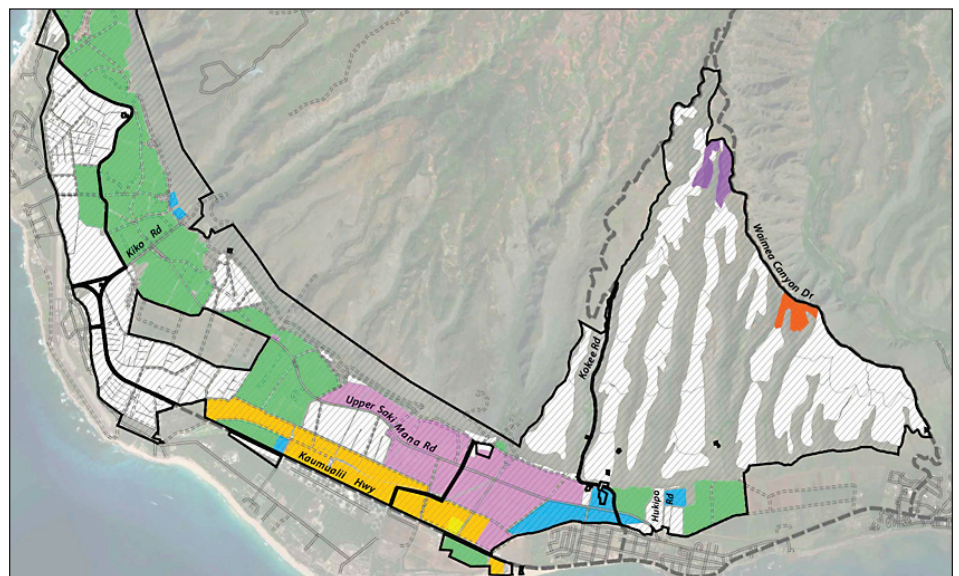
Judge to Hear Arguments on Disclosure Of Navy Fuel Spill Documents

10

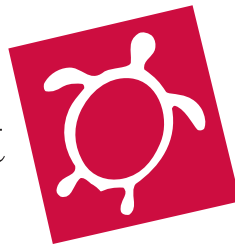
Board Talk: Lemmo Retires, KIUC Permit Renewed

12

Judge Lets Creditor Foreclose on 'Aina Le'a But Refuses to Dismiss Claim against County



Map shows IAL petition area. Green is Hartung (formerly Syngenta). Pink is Corteva (seed corn). Yellow is Kauai Shrimp. White is vacant.



NEW AND NOTEWORTHY

PRI Planning: The National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service are inviting pub-

half a million square miles in the central Pacific, includes seven islands and atolls plus 165 seamounts that NOAA describes as “hotspots of species abundance and diversity.”

NOAA-NMFS-2021-0122 in the search box, and click on the “comment” icon.

Comments need to be submitted by January 22.



PHOTO: NOAA

Farreid glass sponges are visible in the foreground of this fairly high-density sponge community found at about 7,740 feet depth.

“Many nationally and internationally threatened, endangered, and depleted species thrive at Palmyra and Kingman, including sea turtles, pearl oysters, giant clams, reef sharks, coconut crabs, fishes and dolphins,” according to NOAA. “Both Palmyra Atoll and Kingman Reef support higher levels of coral diversity (180-190 species) than any other atoll or reef island in the Central Pacific.”

Kahala Resort Permit: Last month, Honolulu resident Tyler Ralston appealed to the 1st Circuit Court to reverse a November 12 Board of Land and Natural Resources decision to approve a revocable permit to Resort Trust Hawai'i. The permit, which has been renewed or reissued for decades, allows the company to continue setting chairs and storing equipment on a piece of state land fronting the Kahala Hotel and Resort, which the company owns.

lic input as a first step toward developing a management plan for the Pacific Remote Islands Marine National Monument. The monument, which covers almost

The monument was first established by presidential proclamation in 2009 and expanded in 2014 to its current boundaries.

Ralston, who frequents the public area fronting the resort, testified to the board that he believed Resort Trust failed to comply with the terms of its previous permit. He said that the company had stored an unauthorized gazebo on the state parcel and pre-set more than the 71 chairs allowed under the permit. “I think it’s inappropriate to renew when they don’t comply with the terms,” he said.

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For more information on the monument, visit: <https://www.fisheries.noaa.gov/pacific-islands/habitat-conservation/pacific-remote-islands-marine-national-monument>. To submit online comments, go to: <https://www.regulations.gov>, enter

Quote of the Month

“It feels like you’re at the championship game but those who have most at stake are left in the locker room and are not part of the game.”

— **Hawai'i Longline Association director Eric Kingma on the Western and Central Pacific Fisheries Commission**

He also complained that the landscaping on the state parcel made one area look like it was part of hotel property, when it should be open to the public.

“It’s very exclusionary ... the way it’s laid out,” he said.

Ralston requested a contested case hearing on the proposed permit, but was denied after the board held an executive session. Ralston’s appeal also asks the court to reverse that decision.

Ralston is being represented in the case by David Kimo Frankel, who had similarly fought the company’s previous permit renewals to no avail. Ralston and Frankel argue that the Land Board’s decision violated its public trust duties, as well as the state Coastal Zone Management Act.

No hearings have yet been scheduled.

Wespac Advances Albatross Measure, Balks at Gear Change for False Killer Whales

The 189th meeting of the Western Pacific Fishery Management Council convened last month, amid a spate of unfavorable publicity, much of which dealt with the council's lack of transparency.

On the day before the full council meeting, the council's Executive and Budget Committee had a publicly noticed meeting, held virtually. But, as if to thumb their collective noses at the critics, committee members' exchanges were muted during the quarter of an hour that the public was able to tune in. Instead, the public was treated to a pantomime of sorts. Kitty Simonds, the council's executive director, could be seen speaking on her cell phone or texting from her place at the head of the conference table in the council headquarters in Honolulu. John Gourley, council member checking in from the Commonwealth of the Northern Mariana Islands, could also be seen on his phone. On occasion, Simonds, phone in hand, got up from the conference table and walked out of view, leaving two or three council staff still seated at the table. A few times, the video for Gourley and Simonds was turned off.

Around 3:10, a square popped up indicating that someone from American Samoa had logged into the meeting. For a few minutes, video of the council office in Honolulu came on and went off again, as did that for CNMI.

Finally, at 3:15, members of the public were excluded from the WebEx link altogether, having never heard so much as a peep from council staff or any council member.

It was not the first time the public was kicked out of this committee's meeting. It was, however, the first time that not a single word was uttered while the public was still able to listen.

Nor was it the case that nothing was discussed. Much later in the full meeting, shortly before adjourning on the third day, the council voted to endorse the financial and administrative reports that the Budget and Executive Standing Committee had apparently considered. Simonds stated in advance of the vote that council members had had more than a week to look at the reports, then asked if anyone had questions about them. No

one did – or at least no one raised any at that time.

The records provided to the public by means of links to council agenda items did not include any financial or administrative report. In this way, it was entirely in keeping with past council meetings, where financial information is never disclosed publicly.

On the council's website, the agenda for the standing committee meeting included, as item 8, the opportunity for "public comment."

During the course of the regular meeting, the full council approved a long-anticipated recommendation that the National Marine Fisheries Service revise its rule intended to deter seabirds – particularly black-footed albatrosses – from attempting to take bait from hooks as they are deployed by longline vessels fishing for bigeye tuna.

The existing rule requires bait to be dyed blue (making it less visible to birds), which can be messy and expensive, and also that crew discard offal from fish already caught while lines are being set. The council approved a recommendation that NMFS instead require the use of a tori line – a rope suspended from a pole at the vessel's stern that extends above water three times the vessel's length, and from which are hung short streamers. During a three-year trial period where selected fishing trips deployed the tori pole, albatross were found to be four times less likely to make contact with baited hooks than when blue-dyed bait and strategic offal discharge were used and were 14 times less likely to actually be hooked.

In a news release from the council praising this action, Simonds was quoted as saying, "This action is an example representing the council's long history of proactive and adaptive conservation measures to address fishery impacts to protected species."

False Killer Whales

One of those protected species is the false killer whale. As with all marine mammals, it enjoys protection under the federal Marine Mammal Protection Act. But the small population of false killer whales that sticks close to the Main Hawaiian Islands

has been listed as endangered and is protected also under the Endangered Species Act by a no-longline-fishing zone around the Main Hawaiian Islands. Another population, the pelagic stock, whose range lies further offshore, is protected under a Take Reduction Plan established under the MMPA.

Under that plan, the deep-set longline fleet is to be excluded from a large swath of water south of the Main Hawaiian Islands – the so-called Southern Exclusion Zone, which covers about 17 percent of all available fishing grounds for longliners within the U.S. Economic Exclusion Zone – if the fleet is found to have killed or seriously injured four false killer whales between the closed zone and the EEZ.

In 2021, the number of interactions between the deep-set longline fleet and false killer whales approached a record high, with most of the interactions occurring outside the EEZ. On November 19, however, at 3:14 in the morning, an observer aboard a deep-set longliner fishing just inside the EEZ almost due west of Honolulu recorded the hooking of a false killer whale. The animal had been hooked in the mouth. According to the observer's record, "the crew stopped the vessel and pulled the whale alongside the vessel. At the observer's encouragement, the crew got the captain. The captain directed that the branchline be secured to a floatline and tied off to the vessel. He then used the vessel to apply tension to the line. The line broke at the swivel before the hook straightened. The interaction lasted 15 minutes."

The Protected Species Division of NMFS' Pacific Islands Regional Office immediately began a fast-track review of the incident, since, if determined to have resulted in a mortality or serious injury (M/SI), it would be the fourth for the year and trigger closure of the Southern Exclusion Zone. Expedited reviews are to take no more than 25 days. By press time, no determination had been made public.

The captain in this case seems to have followed the protocol advised by the False Killer Whale Take Reduction Team (TRT) – pull the line tight and hope the hook straightens as the animal struggles to free itself.

The hook in this case had a wire diameter of 4.5 mm. Many members

Continued on next page

of the TRT have pushed for years to require the use of weaker hooks, which would straighten with less pull. The idea is that, if the hook is the weakest part of the gear, large bycaught species could free themselves by straining against the line and unbending the hook.

More than a decade ago, a study undertaken by a researcher at NMFS' Pacific Islands Fisheries Science Center looked at the catches of vessels outfitted with both 4.5 mm hooks and 4.0 mm hooks. No significant catch differences for bigeye tuna were observed. However, since the fishing trips that were part of the study were not made at a time of year when the largest bigeye tuna are typically caught, the results were regarded skeptically by the longline fishing community. Today the standard hook size remains 4.5 mm.

Last year, another study was conducted to determine catch differences between sets using the 4.5 mm hook and those using a smaller one, with a diameter of 4.2 mm. Overall, bigeye tuna caught with the strong hooks were heavier by almost 7 pounds than those caught on weak hooks. And a heavier fish usually also means a more valuable one.

The final report on this study was issued in late November, just days before the Wespac meeting. Looking at the value of all fish collected and sold at the Honolulu fish auction, the mean difference between strong and weak hooks in sales price-per-pound was just 1.18 percent, with fish caught with the weak hooks being greater in overall value. For bigeye tuna, fish caught with weak hooks brought 1 percent less per pound than those caught with strong hooks, with the difference in overall sale price between bigeyes caught with weak versus strong hooks just over 9 percent in favor of the strong-hooked fish. "The total ex-vessel gross revenue for all species sold at auction that were caught on strong hooks was only \$604.15 greater than the total gross revenue for all species sold at auction that were caught on weak hooks," the study noted. These differences, the study concluded, "were within TRT's threshold of revenue loss" of a less than 10 percent reduction.

Ryan Steen, an attorney for the Hawai'i Longline Association and also a member of the False Killer Whale Take Reduction Team, disputed the suggestion that anything less than a 10 percent reduction

in revenue loss was acceptable to his clients. "The suggestion that the TRT had agreed upon a 10 percent threshold ... is not exactly correct. There was never any agreement on what threshold of impact is acceptable. The only thing that was discussed at the TRT meeting is the number of sets performed and the statistical power available to detect a change. Based on the number of sets conducted, it was only possible to detect a statistically significant difference of 10 percent. We had hoped for 5 percent, but this was only what the study was capable of. There's no acceptable percentage change for switching to a weaker hook. ... From a fisheries perspective, the switch to weak hook is not the way to go. We will be advocating for the TRT to take a different direction."

The council then approved a motion to direct its staff "to develop the council position on the implications of the hook study," with input from a special Working Group set up by the council's Scientific and Statistical Committee.

Bigeye Quotas

For years, the Hawai'i-based longliners have chafed at the bigeye tuna quotas imposed on them by the Western and Central Pacific Fishery Commission (WCPFC), the international organization that, by treaty, regulates fishing throughout most of the Pacific Ocean.

That quota has been stuck at around 3,500 tons for years. To get around it, the Hawai'i Longline Association has been allowed by the federal government to purchase a portion of the bigeye catch allocated to the three U.S.-flagged Pacific territories – Guam, Commonwealth of the Northern Mariana Islands, and American Samoa. That has resulted in the longline fleet being able to continue fishing through the end of each calendar year and has added around 2,000 more tons of bigeye to be landed in Honolulu annually than otherwise would have occurred.

The U.S. delegation to WCPFC has presented information at the organization's meetings year after year that it says shows the bigeye stocks in the fishing grounds usually plied by the Hawaii longliners are healthier than in other regions of the Pacific. A higher percentage of longline trips are monitored by observers than in the fleets of other countries. In

the words of Kitty Simonds, the Hawai'i longline fishery "is the gold standard of the commission."

Despite it all, at the WCPFC meeting that concluded last month, the commission rejected the U.S. plea to increase the U.S. longline quota for bigeye.

Simonds did not hold back in her disparagement of the WCPFC:

"We support the world," she said. "We have a hard time supporting our little, manini requests. We need a new U.S. strategy in the WCPFC. 2021 was to be the year of the Hawai'i longliner, but it ended up another victory lap for Japan."

All this, she continued, "signals the need for a new high-level strategy in the Pacific – a completely new strategy for the U.S. government to tie into our geopolitical interests in the Pacific. A high-level campaign, with much more engagement with [the Departments of] State and Commerce."

Before the 2021 meeting, she said, Wespac staff helped the U.S. delegation craft a proposal to increase the U.S. quota, "based on scientific evidence that the U.S. industry could increase catch without risking" the health of bigeye stocks. Despite that, the WCPFC members "insisted on the status quo."

The commission, she said, "is rooted in hypocrisy and inconsistency. ... It's all about politics."

Eric Kingma, executive director of the Hawai'i Longline Association, expressed his group's frustrations with the WCPFC. "We have been aggrieved, injured by the WCPFC. We have a quota that has never matched fleet capacity or local demand," he said.

The U.S. government needs its commissioners to be more involved in the negotiations, he said, adding, "It feels like you're at the championship game but those who have most at stake are left in the locker room and are not part of the game."

Signing Off

The meeting ended, hours behind schedule, just as it had begun: with a prayer delivered by chair Archie Soliai, thanking his heavenly father for "your greatest gift, Jesus Christ."

With that, he announced he was opening a new bottle of scotch.

Continued bottom story of next page

Wespac Continues to Press Feds For Permission to Take Turtles

For years, the Western Pacific Fishery Management Council has sought to obtain permission from the federal government to authorize the killing of green sea turtles (honu, in Hawaiian) for cultural purposes. The turtles around the Hawaiian archipelago are classified as a Distinct Population Segment (DPS) under the Endangered Species Act, and their status is threatened.

The fact that the turtle is listed as a DPS with its status as threatened sets it apart from other green sea turtle populations in the Pacific and elsewhere. And that fact is itself a result of a petition to delist it that was directed a decade ago by council executive director Kitty Simonds in her capacity as head of the Maunaloa Hawaiian Civic Club.

At the council's December meeting, the push to kill green turtles in the name of preserving Hawaiian culture was on full display once again.

Late on the third day of the meeting, council staffer Josh DeMello gave a synopsis of what was described as a cultural take feasibility study, prepared by Wespac staff. DeMello stated that the study had been provided to council members, but it was not available to the public.

In several power-point slides that gave a synopsis of the study, DeMello stated that the study's purpose was to analyze "the regulatory and policy pathways that could afford a cultural take of green sea turtles in order to determine the council's options for potential green turtle management."

The United States, DeMello said, was party to the Interamerican Convention for the Protection and Conservation of Sea Turtles (IAC), a treaty that is intended to prevent the capture and trade of sea turtles. "Under this convention,"

he continued, "there's a way for each party to allow an exception for satisfying the economic subsistence needs of traditional communities." To be granted such an exception, the governing body would have to establish a management plan, including take limits, that was consistent with the convention as a whole. "Those are the international actions we're looking at now," he said.

Simonds then took the floor. The staff sent the feasibility study to the National Oceanic and Atmospheric Administration's headquarters and also to Michael Tosatto, head of the National Marine Service's Pacific Islands Regional Office, for their review and comment, she said.

Then, she said, "we learned that Dave Hogan was available to speak to the council about the IAC and answer some of the questions."

Hogan, with the State Department's Office of Marine Conservation, proceeded to explain why such an exception was not possible for the kind of cultural take proposed by the council.

The sea turtle convention, he said, "is designed specifically to conserve and protect sea turtles. ... The negotiating dynamic at the time was specific to coastal communities in Latin and Central America who directly harvested turtles primarily during nesting, taking turtles and eggs."

The development of the procedure to allow take for subsistence reasons "was specific to economic subsistence for food and nutrition for coastal communities," he said. "The consideration of the federal government at that time was that the agreement would rely on and link with U.S. domestic regulations and laws regarding sea turtles at that time. ... Generally, if take is prohibited



PHOTO: NOAA FISHERIES/MARYLOU STAMMAN

Green sea turtles at French Frigate Shoals.

by the Endangered Species Act, it would not be possible for the United States as a matter of policy to advance a request for an exception."

In any event, any action under the IAC would have no effect on the status of turtles under the Endangered Species Act, he said.

In their initial questioning of Hogan, council members seemed not to understand what he was saying. McGrew Rice suggested that the Big Island fishing community of Miloli'i, whose population is almost entirely Native Hawaiian, could include turtle takes in the community based fishery management plan.

David Sakoda, sitting in for Suzanne Case as the council representative for the state of Hawai'i, noted that the plan did not include any take of turtles.

Guam council member Monique Amani said she was "super-interested in this. I like the direction it's going for sure. The [Guam] Department of Agriculture is working on enforcement. This is definitely feasible."

Chesla Muña-Brecht, the designated official for the Guam government, asked Hogan if the IAC would move forward with considering an exception "if they're presented with a substantive request to consider an exception from

Continued on next page

Wespac from Page 4

Simonds saw him and raised the pot: "We're celebrating with bluefin tuna sashimi from the industry," she said.

But neither Simonds, at the council office, nor Soliai, in his government office in American Samoa, outdid the send-off the previous week for Kurt Schaefer, a

member of the council's Scientific and Statistical Committee whose term on the committee was at an end.

Following an elaborate power-point presentation by staff, complete with inside jokes and many references to margaritas, a grinning Schaefer was shown seated at a kapa-covered table in council

offices, behind a line-up of a dozen bottles of hard liquor and wine.

"Notice all the bottles at the front," Simonds instructed the group, drawing special attention to the labels on two bottles of wine, featuring "women practically naked on old cars."

— *Patricia Tummons*

Turtles from Page 5

the Endangered Species Act for Hawai'i and/or Guam?"

Hogan repeated that the only exceptions are for economic subsistence – “to eat. There’s no exception available for cultural take. So there’s a distinction there. Also, there is no way that the IAC can affect an ESA listing. They are two separate legal regimes. The ESA status existed at the time we negotiated the IAC. The prohibition of direct take of turtles under the ESA is the primary domestic legal barrier to taking turtles in Hawai'i. We could not proceed with any action of the IAC if green turtle takes are prohibited under the Endangered Species Act.”

Finally, he added, “Even as a hypothetical situation, if there was an action under the ESA to allow for green sea turtle take, that does not automatically mean that the federal government would put forward a request under the IAC – primarily because we could only proceed [at the IAC] because of economic subsistence, and not cultural take.”

Simonds then asked, “If our honu was removed from the threatened list, then where would we be in terms of IAC and management of turtles?”

“If there was a change under the ESA,” Hogan replied, “the IAC would still remain as it is right now with regard to the international obligation of the United States to prohibit the direct take of sea turtles.”

Any petition from Hawai'i stakeholders to seek an exception would need to show that it was for purposes of economic subsistence, but even then, Hogan said, the federal government “might not move the petition forward because there might be little chance of success ... since it would contradict the position we took in negotiations and what we told the Senate.”

Simonds persisted. “If it was taken off the threatened list ... the United States could take it on if it wanted to. Because we have our own population. The honu is a distinct population segment. They don't go anywhere else. They stay here. You've answered my question, but it's not what I wanted to hear,” she said.

But, Simonds said, at the time the treaty was subject to ratification, “the U.S. could have actually gone in and maybe did some exceptions, right? They

could have actually not agreed to the whole thing, or what? What would've helped us – or nothing – when the Senate ratified the convention?”

“When the Senate provides advice and consent,” Hogan replied, “the agreement is limited at that moment. It would be very rare that the United States would decline to ratify an agreement and go back and reopen things. In this case, we were the initiators of the convention. We pressed very hard to negotiate it. The outcome was one that satisfied our political and international relations at the time, which exported our bycatch reduction policies, particularly for bycatch trawling.”

Tosatto, the regional NMFS administrator, weighed in. “The status of the honu in Hawai'i, being threatened, is different from the status in Guam and the CNMI. No options are there even to pursue a take under section 4D.” (Section 4D of the Endangered Species Act allows some take of threatened species so long as it does not interfere with its survival and recovery. While green sea turtles are listed as threatened in Hawai'i, they are listed as endangered in Guam and the Mariana Islands.)

Under the IAC, exceptions are granted when necessary for economic subsistence, and, Tosatto added, “this is a very high bar, because they have not been consumed for a number of years.” Communities in Hawai'i are looking “for a more cultural use that's not one of economic subsistence.”

Sakoda noted that there seems to be “growing recognition of indigenous rights at the international level. Is there a process to renegotiate the terms of the IAC to include cultural take?”

“Anything is possible,” Hogan replied, but this would require renegotiating the treaty, “and that would also allow other parties to introduce provisions that we may not like. ... We would also have to have ratification by all of the existing parties. So it's not necessarily something we could undertake easily or lightly, even if there was an interest in doing so.”

In any case, he added, “that would be proscribed so long as there is the Endangered Species Act prohibition on direct take.”

Despite the discouraging message from Hogan, the council approved a motion directing its staff to “send a letter

requesting the Biden administration pursue an avenue to recognize indigenous cultural harvest of Hawai'i green turtles within the IAC.”

Meanwhile, at French Frigate Shoals

The beaches of the Northwestern Hawaiian Islands – primarily those at the French Frigate Shoals – are critical nesting grounds for the Hawaiian green sea turtle. Most years, the National Marine Fisheries Service's Pacific Islands Fisheries Science Center conducts surveys at FFS to see how the turtles and monk seals are doing.

The report that PIFSC prepared for the December council meeting indicated that the turtle count in 2021 exceeded censuses in recent years. “The Lalo [French Frigate Shoals] turtle team identified more than 1,000 individual turtles on Tern Island, including 679 females. The average number of females on Tern Island was only 254 over the past three seasons,” the report noted.

Mike Seki, head of PIFSC, noted during the meeting of the council's Scientific and Statistical Committee that the increases “are not as robust as what we've seen in the past.”

The PIFSC report mentioned challenges to turtle recovery at Tern Island. “Across the atoll, East Island still recovers after being washed away by Hurricane Walaka in 2018,” it stated. In addition, “aging infrastructure from World War II often poses entrapment threats to wildlife.” In 2021, the PIFSC team “documented 344 turtles, 2 [monk] seals, and 10 seabirds that were entrapped or otherwise unable to get back to the ocean, and released 329 turtles, 1 seal, and all 10 seabirds (11 turtles and 1 seal got out on their own and 4 turtles died).”

Seki also mentioned marine debris, which can entangle wildlife. “We just had a marine debris team up there,” he said. “The amount of debris – it's a real eye-opener.”

A Chemical Threat

Were the threat from potential cultural takes, loss of habitat, entrapment, and marine debris not enough for the sea turtles, last year scientists revealed yet another post-industrial challenge: PFASs, or perfluorinated alkyl sub-

Continued on next page

Turtles from Page 6

stances. (The study, “Sea turtles across the North Pacific are exposed to per-fluoroalkyl substances,” was published last year in the journal *Environmental Pollution*. The research was led by the lab of Jennifer M. Lynch of Hawai'i Pacific University's Center for Marine Debris Research.)

PFASs make up a family of chemicals that have been, since the 1950s, in widespread use in a number of consumer products and industrial processes. They are “nearly non-biodegradable,” the authors write, being formed by strong chains of fluorinated carbons. This bond “is incredibly stable, which gives PFASs extreme persistence and both hydrophobic and lipophobic properties” – that is, they are not soluble in either water or oil. One widely used application for PFASs is in foams used to fight fires at military bases and airports.

PFASs are known to have toxic effects in wildlife and humans, and starting in 2001, manufacturers in the United States began phasing out their production. Effects on reptiles are not known.

Reviewing concentrations of PFASs in eggs and turtle plasma from samples obtained in Hawai'i, Commonwealth of the Northern Mariana Islands, and Palmyra Atoll, the authors determined that offloading of PFASs from female materials to eggs is strongest in the first clutch of the season and that “egg concentrations were highest in nests laid nearest international airports.”

They hypothesize also that the higher concentrations found in hawksbill turtles are a result of their feeding higher in the food chain than green turtles. In addition, two contaminants of the particular PFASs chemicals – PFUnA and PFTriA – “were related to reduced emergence success of hatchlings.” These levels in hawksbill eggs “are concerning near concentrations causing developmental toxicity in birds.”

The study considered also whether concentrations of PFASs might be connected to fibropapilloma disease among green turtles. However, they concluded, “[p]revalence and severity of FP did not relate to PFAS concentrations, so the search continues for environmental stressors that may contribute to this viral disease.”

— *Patricia Tummons*

Kekaha from Page 1

And the management and control is transferred. . . . ADC happens to still keep the [Department of Land and Natural Resources] informed of everything we're doing, particularly when it's something that's perpetual.”

But does the set-aside convey title?

Commissioner Dawn Chang pressed on this point, asking Kaichi: “You indicated that the ADC has management control of these lands through the executive order. But in that order, is there a reverter clause? If the land is no longer used for the purpose [set forth in the executive order], it would revert back to the Board of Land and Natural Resources?”

“Yes,” Kaichi replied.

Chang then turned to Codiga. LUC rules require petitions to be filed with the permission of the landowner, she noted, with the landowner being defined as one who holds the fee-simple interest. “Given the reverter clause, and given the

position the DLNR would take.”

In any case, Kaichi said, the fee interest “is not held by the DLNR. It's held by the state of Hawai'i.”

Referring back to Kaichi's statement that the DLNR is kept informed of “everything we're doing,” LUC chair Jonathan Scheuer noted that when the ADC approved the filing of the petition back in January 2018, it also requested “that the Land Board also approve the KAA action.”

More specifically, the staff report to the ADC for that board action states, “Although the ADC manages these lands, the fee simple interest in and to the lands remain [sic] with the state of Hawai'i, through its Board of Land and Natural Resources. Therefore, simultaneous with this request, the ADC has requested that the Land Board also approve the KAA's proposed action.”

Minutes of that meeting indicate that in arguing for the IAL petition, Kaichi herself stated at the time, “the ADC has

“The ADC didn't secure approval from the BLNR. . . . We didn't intend to go to the BLNR to secure approval.”
— *Myra Kaichi, ADC*

ADC only has management authority . . . what is your opinion as to whether this requires the BLNR to provide authorization – or is it just the ADC through its board action?”

Codiga replied that the petition is based on the authority granted to the ADC through the executive order.

“You would agree with the reverter clause, that the BLNR is still the owner?” Chang asked.

Codiga: “It is appropriate to defer to the ADC as to how it recognizes its authority.”

Chang turned back to Kaichi, asking if she believed the ADC had a fee-simple interest in the land.

“Such an interesting question,” Kaichi replied. “You have raised the crux. Any time the issue of ownership, fee-simple interest – every time we encountered this, the answer depended on the situation. I can appreciate your likening the reverter interest to a lease, where at the end of the lease all entitlements revert to the fee owner. I never actually got a consistent position from the DLNR . . . and don't know in this particular situation what

requested that the Land Board also approve the KAA's proposed action.”

Commissioner Gary Okuda asked if there were any evidence in the record showing that the Land Board ever approved the IAL petition of KAA.

Kaichi acknowledged there was none. “The ADC didn't secure approval from the BLNR,” she stated. She added that in her recollection of the ADC meeting of January 2018, “the ADC was not taking on the responsibility of getting approval of DLNR. We were suggesting they would get approvals. We did send a letter to [BLNR Chair Suzanne] Case. I don't think it was responded to. We didn't intend to go to the BLNR to secure approval.”

Nor, it seems, did ADC or KAA reach out to anyone else. At the very start of the meeting, William Aila, director of the state Department of Hawaiian Home Lands – which holds substantial acreage adjoining the petition area – asked the LUC to defer any action on the petition or, failing that, to grant DHHL a contested case hearing on the petition.

Continued on next page

Aila was following up on a request that he initially made in an email to the LUC at 12:10 a.m., just hours before the start of the LUC hearing. In that email, Aila stated that he had learned of the petition and the LUC hearing on it “a few hours ago.” He had no position on the petition itself, he said, but “we just need more time to understand how the IAL petition” could impact plans to develop DHHL property.

Beth Tokioka, communications manager for the Kaua'i Island Utility Cooperative (KIUC), also asked the commission for deferral. “We have concerns about the petition. Unfortunately, we only learned about the petition yesterday.”

Commissioner Gary Okuda asked how KIUC found out.

“Someone alerted someone on our senior staff that this was on the agenda. We are concerned about it as it relates to the West Kaua'i Energy Project. The LUC has not been recently on our radar screen. ... We'll start monitoring your agendas more in the future.”

Commissioner Lee Ohigashi asked if KIUC had any kind of interest adjoining the project area or in the area proposed for IAL designation.

“Yes,” Tokioka responded. “Very briefly, the West Kaua'i Energy Project is a renewable project we're developing, a pumped storage hydro project. It includes state lands, including ADC lands, the Mana reservoir. It requires us to construct facilities at the reservoir, rehabilitate the reservoir.”

KAA as Farmer

LUC rules limit the right of persons to file an IAL petition to either the landowner or the “farmer,” with permission of the landowner.

So, Chang asked Codiga, is KAA filing as a farmer?

A farmer, Codiga replied. “We acknowledge the terms ‘landowner’ and ‘farmer’ may be subject to interpretation. If the commission chose to exercise its discretion and concluded it was appropriate to interpret ‘landowner’ to encompass KAA, we would not object. ... However, we think the clear interpretation is that this is a farmer petition. KAA is a farmer.”

KAA does not farm anything, as Kaua'i commissioner Dan Giovanni pointed out. “In my reading of your peti-

tion, KAA is responsible for management of infrastructure and is not necessarily a farmer. I'm confused,” he said.

Codiga acknowledged that KAA is “an independent legal entity, a cooperative ... comprised of farmers.” Five of its members are engaged in farming activities, he added.

“So why isn't it ADC that represents the farmers more directly, as opposed to the infrastructure entity?” Giovanni asked.

Codiga replied that KAA and ADC “concluded that the co-op is a better fit. ... It was decided that if you look at who are the farmers, you're looking at members of the co-op.”

Are there farmers on the proposed IAL area who are not members of KAA? Giovanni asked.

“I believe there are other agricultural farmers, if you will, or agriculturalists, who are doing activities on the land who are not members,” Codiga answered.

Kaichi attempted to clarify. “The members of KAA are the bigger tenants,” she said. “Of all the licensed lands, they represent the largest share, but not 100 percent of all Kekaha lands. KAA is comprised of these large members who also service, provide services, infrastructure improvements, infrastructure repairs, for all farmers, large and small. The question for the ADC is, is this in the best interests of the lands and tenants. In my mind, there's no question of how this could not be in their best interests.”

Lee Ohigashi, the commissioner from Maui, wanted to know what notice was given to these smaller farmers about the plan to designate their lands as IAL. “It seems that these tenant farmers ... have an interest in the property and therefore, as a matter of due process, I'm just wondering what notices were given before filing this petition,” he said.

Codiga said he was not aware of any formal notice.

Big Island commissioner Nancy Cabral followed up with questioning of Josh Uyehara, president of the KAA board. Had other farmers on this land been notified “in an official manner that the land they're leasing is being swept up in this petition?”

Uyehara said KAA had put together a short informational document on the benefits of IAL designation, particularly the tax credit incentive. “No certified

letter, nothing like that. But we did have process over a number of years.”

Documents submitted by KAA in support of the petition state that just three tenants account for the majority of active agricultural operations in the proposed IAL area. Hartung Brothers, Inc. (formerly Syngenta) occupies 2,314 acres; Corteva Agriscience 767 acres; and Kauai Shrimp 415 acres. Wines of Kauai, in the mauka lands of the tract, occupies 127 acres, while Koke'e Farms occupies 62. Smaller tenants hold licenses for about 167 acres, according to the petition. Of the more than 12,000 acres proposed for designation, nearly 4,000 are “fallow but available for license to new farmers.” The rest of the proposed IAL area – consisting of about 4,377 acres – “are designated for continuity for maintaining critical land mass important to agricultural operation.”

Deferral

The commissioners agreed that given the outstanding issues of ownership and the evident lack of notice to tenants, further deliberation on the IAL petition should be deferred.

Scheuer summarized the concerns. “I want either an additional briefing on the specific issue of whether or not BLNR authorization is required ... or verification that the BLNR has approved it, before it comes before us. ... And then, moving on to more of a suggestion, when you have notable agencies and neighbors showing up at a hearing and saying, hey, we never heard about this, it makes everybody's job a heck of a lot easier for more outreach before moving forward. It would behoove the applicant to do outreach to any and all affected parties, including their own tenants.”

Chang also wanted the parties to address the matter of who is the appropriate applicant, KAA or ADC.

LUC executive officer Dan Orodener explained that given the commission's hearing schedule, it would be months before the matter could be taken up again, and in no way could it do so earlier than April.

“I assume that's adequate time” for the parties to prepare their briefs, Scheuer said.

The motion for deferral was unanimously approved.

— *Patricia Tummons*

Judge Will Hear Arguments on Whether Fuel Spill Documents Should be Disclosed

On January 11, 1st Circuit Judge Jeffrey Crabtree will hold a hearing on the Sierra Club of Hawai'i's motion for summary judgment regarding a complaint it filed last October against the state Department of Health.

The group seeks to force the department to produce records it holds regarding a fuel spill — or spills — last year at Hotel Pier in Pearl Harbor that appear to be related to the U.S. Navy's Red Hill bulk fuel storage facility.

In September, the group requested records — test reports, correspondence, etc. — held by various divisions within the department to determine whether and how the Hotel Pier spill was related to the Red Hill facility. The Sierra Club, as well as the Honolulu Board of Water Supply, initiated a contested case hearing over the Navy's application for an operating permit for the facility.

That hearing concluded months ago, but the DOH's own Environmental Health Administration filed a motion in early November to reopen the case after a Navy official revealed that the military withheld crucial information regarding the system's design and corrosion history.

The massive contamination in late November of the Navy's water system with fuel has superseded the controversy over the Red Hill operating permit, especially since the DOH issued an emergency order December 6 calling for operations to cease, the tanks with fuel in them to be drained, and for design and operational flaws to be identified and fixed.

Late last month, hearing officer and state deputy attorney general David Day issued his recommendation that the Navy be required to comply with the DOH's order. Shortly thereafter, the Navy filed its objections to Day's proposed findings of fact, conclusions of law, and decision and order in the contested case over the DOH's emergency order.

DOH deputy director Marian Tsuji is expected to make a decision on that case this month.

In the meantime, the Sierra Club and the Health Department are scheduled to argue before Judge Crabtree the extent to which the group is entitled to receive

information regarding the Hotel Pier fuel spills.

In the Sierra Club's motion, the group's attorney, David Kimo Frankel, cited federal laws regarding removal and remedial action at federal facilities, 42 USC § 9620(a)(4), as well as the operation of underground storage tanks, 42 U.S.C. § 6991f(a). Both laws require federal agencies to comply with state law.

"The federal government has waived sovereign immunity and subjected itself to state regulation," Frankel wrote. He added that state laws require facility operators to report releases of hazardous substances and that information on those releases be made available to the public.

"It is difficult to fathom how the disclosure of a fuel spill violates any federal law or imperils national security. We live in a democratic society; not a totalitarian one," he wrote.

If the court finds that some of the documents the Sierra Club seeks should not be disclosed, Frankel continued, "it should not allow the Department of Health to unilaterally withhold them." Instead, he argued, the court should either order documents to be produced for review by a judge or it should produce a Vaughn index, describing the documents being withheld from review and providing the reason for withholding them.

In response to the Sierra Club's motion, attorneys for the Health Department agreed that it is required to provide access to government records, but argued that the state Sunshine Law provides exceptions to protect certain kinds of information from disclosure. "[P]rotecting those types of documents also arguably serves the public interest," they wrote.

They noted that the department presented to the Navy records responsive to the Sierra Club's request, "redactions were made, and the redacted copies of those documents delivered to the Sierra Club."

They also state that 10 U.S.C. § 130e, "Treatment under Freedom of Information Act of certain critical infrastructure security information," allows the Secretary of Defense to exempt such information from disclosure if it makes a written determination that the information is

"critical infrastructure security information" and that public interest in disclosing the information does not outweigh reasons for withholding it.

"Federal law simply could not be more explicit about the degree to which critical infrastructure security information is to be protected," the DOH attorneys wrote. They added that the code also states that any state law that authorizes disclosure of critical infrastructure security information does not apply when the Secretary of Defense has made a written determination to withhold it.

In addition, the attorneys cited part of a state Office of Information Practices opinion (Letter No. 07-05) regarding the disclosure of information that would frustrate a government function.

The opinion states, "To the extent that public disclosure of information about the physical security of critical energy infrastructure would compromise the security of that infrastructure and expose it to hazards such as vandalism, copper or equipment theft, or other criminal activity, [a state agency] may withhold the information under the UIPA's [Uniform Information Practices Act] exception for information whose disclosure would frustrate a legitimate government function."

Given the federal restrictions and the UIPA exception, the DOH can't provide the requested records "without appropriate review and redaction by the Navy," the state attorneys concluded.

Last May, the Navy Facilities Engineering Command, Hawai'i issued new instructions regarding its operational security program. Among the items listed in the Critical Information List is the Red Hill facility, water sources and infrastructure, and utility pipelines.

According to Frankel, the DOH has provided the Sierra Club with some information.

"We got a bunch of documents — downloaded from some DOD website. ... And we did not get other documents. It looks like the leak lasted (I'm not clear that it is over yet) longer than we were led to believe. Supposedly, we are going to get some more documents. But the Sierra Club has acknowledged that DOH had its hands full with the fuel release (which took place after we filed our motion for summary judgment regarding the documents)," he stated in an email.

— *Teresa Dawson*

BOARD TALK

'Pioneer' OCCL Director Retires

At the Land Board's December 10 meeting, Department of Land and Natural Resources' Office of Conservation and Coastal Lands administrator Sam Lemmo announced that he would be retiring at the end of the month after 30 years with the DLNR.

In reminiscing about some of the more memorable cases he brought to the Land Board, Lemmo recalled an issue reported at length by *Environment Hawai'i* editor Patricia Tummons in 1994.

"One of the reasons I sort of turned out the way I did ... was ironically something that happened to me in the early '90s," he said. He described how, as a young planner with the department, he had been pressured by a Land Board member to accept an application by a wealthy homeowner in Makena, Maui to expand her landscaping onto state land that was in the Protective subzone of the Conservation District.

"I recommended denial. They were not happy with me," Lemmo said, adding that some board members had berated him for the position he had taken.

The board approved the Conservation District Use Permit anyway — despite past violations by the applicant and concerns expressed by the county Department of Water Supply, other divisions within the DLNR, and members of the public — but the permit was later forfeited and revoked after Tummons' May 1994 cover article on the whole affair.

"At the end of the day, I had done the right thing," he said, adding that the case shaped his approach to work at the department: "Try to do the right thing. Try to be consistent. Try to be fair and reasonable."

He recalled how his office led the state's violation case against companies owned by James Pflueger after excessive bulldozing on their property caused a massive landslide in November 2001 that smothered the reef at Pila'a Bay in North Kaua'i. While the money took a decade to collect, the state won \$8 million in its lawsuit over coral damages.

"Luckily [Facebook founder Mark] Zuckerberg purchased the property and they paid us promptly," he said.

More recently, the OCCL recommended approval of the controversial Conservation District Use Permit for the Thirty Meter Telescope on Mauna Kea. While he declined to delve into that case because "there are probably too many sensitive issues," he said he believed his office "came out with our best shot. It was fair and reasonable. At the end of the day, who knows what's going to happen."

Lemmo is perhaps most widely known for his work on beach protection and climate change issues.

With the creation of the OCCL, which grew out of the DLNR's Land Division,



OCCL Administrator Sam Lemmo.

"we sort of developed a beach conservation program for the state," he said.

When he, former DLNR director and current state Supreme Court justice Michael Wilson, and the University of Hawai'i's School of Ocean and Earth Science and Technology associate dean Chip Fletcher wrote the state's coastal erosion management plan in the 1990s, "we didn't know at the time that sea level rise would be such a major problem for us." Since then, cases regarding unauthorized shoreline hardening have come to the Land Board with increasing frequency and have resulted in thousands of dollars in fines.

Board member Chris Yuen said he believed that Lemmo was leaving the OCCL in good hands, having instilled values and good practices in his staff. "You recognized to do your job, you have to have the guts to say, 'no,'" Yuen said.

Board chair and DLNR director Suzanne Case noted that the OCCL did not exist until Lemmo helped create it. In addition to overseeing activities on mauka Conservation District lands and along the states shorelines, the OCCL has fostered and shaped the state's climate change mitigation and adaptation efforts.

Together with consultant Tetra Tech, Inc., the OCCL wrote the Hawai'i Sea Level Rise Vulnerability and Adaptation Report in 2017, which identified the areas around the state that will be exposed to the effects of rising seas. That report has served as the basis for recent legislation and state and county policies affecting real estate transactions, community planning, development, and more.

"You were a pioneer," Case told Lemmo, adding that he was going to be a very tough act to follow. "Your ability to carry us into this new world is foundational."



Board Renews KIUC Permit

On December 10, despite two requests for a contested case hearing, the Land Board approved the continuation of the Kaua'i Island Utility Cooperative's revocable permit to divert water from Wai'ale'ale and Waikoko streams into its Waiahi hydroelectric plant.

The utility has been working for years toward securing a long-term lease for the water and has been relying on the annual renewal of its month-to-month permit.

In recent years, community groups have objected to the diversions, arguing that they left portions of the streams dry and impeded the exercise of constitutionally protected traditional and customary native Hawaiian practices.

In 2018, to address those concerns, the Land Board included permit conditions establishing minimum stream flows — 4 million gallons a day in the north fork of Wailua River (Wai'ale'ale Stream is the west branch of the north fork) and 800,000 gallons a day in Waikoko Stream. Those amounts were based on recommendations made that same year by staff with the state Commission on Water Resource Management for proposed interim instream flow standards (IIFS) for the two streams.

Continued on next page

A commission decision on the IIFS has been held up in a contested case hearing. In the meantime, storm damage to the water diversion system has resulted in KIUC diverting no water from the two streams for two and a half years.

At the Land Board's December meeting, Earthjustice attorney Leina'ala Ley, representing Hui Ho'opulapula Na Wai o Puna, testified in opposition to the permit renewal. She, and others, pointed out that KIUC obviously did not need the water, since it hasn't diverted any for the last two years because of a damaged siphon. And even if KIUC were able to resume its diversion, she argued that the water should be left in its streams of origin, rather than be diverted to another stream.

Ley pointed out that when running at full capacity, the Waiahi hydropower plant provides less than 1 percent of the electricity KIUC generates. And the electricity gained from the two streams is even less than that.

"We have a whole host of instream uses affected by these diversions. Of all the streams used by the Waiahi hydros, these two are the only on public lands. ... KIUC has asserted electrical needs that don't seem to be there," she said.

Board member Chris Yuen questioned Ley about why Earthjustice had chosen to oppose the diversion of water for renewable energy production.

"Earthjustice is a firm that takes on what it believes are environmental cases in the public interest. Earthjustice has evaluated the environmental effects and decided in its view the negative effects of removing water from streams outweighs positive effects?" he asked.

Ley said that her firm does have a clean energy policy in which matters of equity are considered. Given that the plant provides less than 1 percent of the island's electricity, "in this instance, the balance of competing uses is in favor of keeping water in the stream," she said.

Yuen reminded Ley that the board had tried to address instream uses three years ago by setting minimum flows. With 4 mgd in the north fork of Wailua stream "it has little pools and rapids," he pointed out.

"On the other hand, as far as the environmental benefits of renewable energy, I've been involved in environmental issues for 50 years. ... The need to get off of fossil fuels and transition to renewable

energy is by far the most important issue on the planet. And you keep saying this is only 1 percent of Kaua'i's energy generation. To get off of fossil fuels is going to take a millions of small actions, from people weather-proofing their houses to putting solar panels on their roofs to giant solar farms and wind farms and who knows what else. What is lost specifically that justifies not putting the production of clean, renewable energy as the priority?" he said.

Ley replied that the flows the board is requiring be left in the streams is only 30 percent of their median flow, "which is pretty low."

"For some of our clients, Wai'ale'ale in particular, these are considered sacred waters and different from other streams. ... These waters have cultural value in and of themselves. I hear what you're saying on balancing the energy production needs, but KIUC has been operating without these for two and a half years," she said.

Yuen said he was concerned about Ley's statement that for some of her clients, the water is sacred. "That to me is a religious statement. As a member of a public body, I don't see how I can prioritize someone's religious belief that the water should stay in the stream over a use that's very important to the general public: the generation of electricity through renewable energy. Are your clients saying it's absolutely wrong to divert water from this stream for any purpose?" he asked.

"Yes, some," she replied, adding that others whose practices depend on flowing water also object.

Kaua'i resident Debbie Lee-Jackson testified that she came from a family of healers. "To speak to what Mr. Yuen said, our traditional and customary rights do include how we feel spiritually about the water. Restricting the flow of water in the Wai'ale'ale Stream negatively affects my ability to engage in spiritual practices. ... Please don't continue to violate our traditional and constitutional rights," she said.

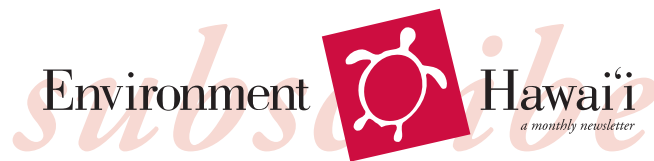
Yuen made a motion to approve the permit, which was seconded by member Doreen Canto. Ley then asked for a contested case hearing. Bridget Hammerquist of the group Kia'i o Wai'ale'ale had also requested one earlier in the meeting.

After meeting in executive session, the board voted unanimously to deny their requests.

Before the board's vote on the permit itself, Yuen encouraged KIUC to improve its management of the diversion system to eliminate some of the community opposition.

Although the Waiahi plant was a relatively small part of KIUC's portfolio, Yuen noted that it is able to prevent 6,900 tons of carbon dioxide a year from being released into the atmosphere.

The board ultimately voted to approve the permit, although member Kaiwi Yoon abstained. — T.D.



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Judge Lets Creditor Foreclose on 'Aina Le'a But Refuses to Dismiss Claim against County

'Aina Le'a, Inc., owner of more than 1,000 acres of land near the Big Island town of Waikoloa, has effectively lost a foreclosure lawsuit that was brought against it by the creditor whose loan allowed the company to climb out of bankruptcy two and a half years ago. A minute order issued by 3rd Circuit Judge Wendy DeWeese on November 23 granted the motion for summary judgment and foreclosure decree sought by Iron Horse Credit, LLC.

The company has been struggling for more than a decade to develop the property, which was first placed in the state Urban land use district more than 30 years ago. A decade ago, it began to build townhouses on the most mauka (upland) portion of the property, but, for a number of reasons, including a dispute over requirements of the state's environmental disclosure law and financing issues, work on the property has stalled.

Following a court hearing in November, DeWeese issued her order, stating that the court "finds it is undisputed that borrower 'Aina Le'a, Inc., and its related entities ... have failed to make the agreed monthly payments under [Iron Horse's] note and mortgage, that such failure constitutes an 'Event of Default' under the loan agreement, and that the loan agreement gives Iron Horse Credit, LLC, the right to accelerate the note and take possession of the project." Iron Horse attorneys were instructed to draft the order, which was filed with the court on December 10.

The draft order authorizes a foreclosure auction of Iron Horse's interests in

the secured property. The sale is to be subject to confirmation by the court and shall be "free and clear of any and all claims ... except for the interests of" three other 'Aina Le'a creditors: Libo Zhang, a Chinese national; Romspen Investment Corporation, of Canada; and Bridge 'Aina Le'a, LLC, of the Commonwealth of the Northern Mariana Islands. Bridge 'Aina Le'a was the owner of the land prior to its sale to the corporate predecessor of 'Aina Le'a.

DeWeese's minute order dealt not only with Iron Horse's claim against 'Aina Le'a, but it also addressed 'Aina Le'a's third-party claim against the County of Hawai'i, in which 'Aina Le'a blames the county for its inability to perform on the Iron Horse loan. County attorneys had argued for dismissal of the complaint. Among other things, they noted that much the same claim was being litigated in a different lawsuit that 'Aina Le'a made against the county in 2020. Litigation in that case was put on hold shortly after the administration of Mayor Mitch Roth was installed in the hope that the county and 'Aina Le'a could work out a way to move its development forward that would satisfy the interests of both parties.

During the November hearing, comments from the judge suggested she was sympathetic to 'Aina Le'a's claim that the county bore at least some responsibility for the difficulties it had experienced.

'Aina Le'a has argued, DeWeese said, "that the county somehow wrongfully refused to move forward with the environmental impact statement, or what

have you, and that that then interfered with 'Aina Le'a's ability to carry out its land use action plan, which then led to default."

"If that is indeed the case," she continued, "then ... why is the third-party complaint under those facts not correct procedurally?"

Ryan Thomas, the deputy corporation counsel arguing for the county, replied that the "land use action plan" — a unilateral plan presented to the creditors during bankruptcy as providing a pathway to move forward with development plans — "was all on 'Aina Le'a."

The following week, when DeWeese issued her minute order, she indicated that she was not convinced by the county's arguments. She rejected the county's motion to dismiss, noting that the third-party complaint "includes claims for breach of covenant of good faith, interference with business advantage, [and] negligence," in addition to the claims made in the 2020 complaint.

The court, she wrote, "cannot find that the claims in the third-party complaint are independent of those" in the original complaint (that is, they differed from those alleged in the 2020 lawsuit), nor could the court determine that they are the same. In light of that, DeWeese rejected the county's motion to dismiss.

Among the many twists in the long 'Aina Le'a saga is this: the county corporation counsel, Elizabeth Strance, who now represents the county as it is being sued by 'Aina Le'a, was the 3rd Circuit judge who, back in 2012, sided with 'Aina Le'a when it challenged the state Land Use Commission's action to revert the property from the Urban district to the state Agricultural district.

— *Patricia Tummons*