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Bottler's Battle Goes Back to County

The recent decision of the Hawai'i Supreme Court in a case involving a bottling company's use of spring water moved the case forward — right back into the lap of the Kaua'i County agency that denied it the permits it needed in the first place. As our cover story relates, the high court's ruling reaffirms and clarifies the counties' role in ensuring that public trust resources are carefully husbanded.

Contrasted to that is the proposal of the National Marine Fisheries Service, also the subject of an article on this month's cover, that cedes its trust responsibilities over the high-value bigeye tuna fishery in Hawai'i to the very parties that exploit it.

Also in this issue, we look at access issues along the Kohala Coast; review the mounting claims against the developer of a biomass-fueled energy plant in Pepe'ekeo; and discuss recent actions of the Land Board.

IN THIS ISSUE

Hawai'i Supreme Court Decision Reaffirms Government Duty to Protect Public Trust

"We ended up on the short end of this opinion. ... Minds immeasurably superior to ours will have to do the analysis on this one, at least for now," wrote Honolulu attorney Robert Thomas in a recent post on his blog, inversecondemnation.com.

After a decade of bottling mountain spring water in Koloa, Thomas' client, Kaua'i Springs, Inc., lost its fight for the Use, Special, and Class IV Zoning permits it needs to operate.

On February 28, in a 107-page decision, the Hawai'i Supreme Court found that the Kaua'i Planning Commission had properly denied the permits in January 2007. However, the court directed the commission to clarify the findings and conclusions of its Decision and Order so they are consistent with the court's decisions regarding the protection of public trust resources.

Like its 2006 decision in *Kelly v. 1250 Oceanside Partners*, which involved marine pollution caused by excessive grading, the court's Kaua'i Springs decision reaffirms that the public trust doctrine requires state and county agencies — not just the Commission on Water Resource Management — to "take the initiative in considering, protecting, and advancing public rights in [trust resources] at every stage of the planning and decision-making process."

Furthermore, the court found, agencies must determine whether proposed water uses are reasonable and beneficial and whether alternative sources of water are available, and applicants carry the burden to prove the proposed use won't affect a protected use. (Protected uses include traditional and customary Hawaiian practices, the maintenance of waters in their natural state, and municipal drinking water, among other things.)

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Hawai'i Longliners' Bigeye Tuna Limit Jumps 80 Percent Under Proposed Rule

The Hawai'i longline fishery faces a conundrum. How can it get around a limit on its haul of bigeye tuna without appearing to violate the international treaty under which that limit was set?

The Hawai'i Longline Association, whose members represent most of the Honolulu-based longline fishing vessels, and the federal Western Pacific Fishery Management Council (Wespac) have come up with an approach that is intended to do just this. Late last year, the National Marine Fisheries Service published notice of the proposal in the *Federal Register,* seeking comments from the public before making final the change to Wespac's Pelagic Fishery Ecosystem Plan. (The comment period ended in late February. A decision on whether to accept the proposal, change it, or reject it altogether was to have been made by the end of March.)

Since 2009, the longline fleet has chafed under a quota of 3,763 metric tons a year established by the Western and Central Pacific Fisheries Commission (WCPFC). If approved, the new rule, Amendment 7 to the pelagic plan, would effectively increase the quota by nearly 80 percent, to 6,763 mt.

Congress Led the Way

In many ways, the proposal amps up a system that was put in place two and a half years ago.

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NEW AND NOTEWORTHY

Deep Percolation: Will an aquifer recharge more quickly under a forest than a grassland? The answer, according to research carried out on leeward Haleakala, is an unambiguous yes.

Researchers with the U.S. Geological Survey simulated rainfall events at two areas at Auwahi, Maui. One was a grassland. The other was inside the area where Art Medeiros and his team have been working for the last 15 years to restore the dry forest that once covered the land.

Their conclusion: "restoration with native speces at the Auwahi site has significantly altered the hydrology of the unsaturated zone to at least a 1-[meter] depth." The movement of water through the soil was much more rapid that at grassland sites. "Reforested areas appear to facilitate deep water transfer relative to grassland sites," they write. "More water may become available for [aquifer] recharge as it rapidly moves to the deep unsaturated zone below the root zone, where it becomes inaccessible to plants." Possible reasons for this include the development of pathways in the soils that are created when tree roots penetrate into the ground.

Over and above the response to rainfall, there could be other natural processes that affect the amount of water percolating into the aquifer under forests, as opposed to grassland. The interception of cloud water is one such process; a previous study, the authors write, found that up to 46 percent of precipitation in the Auwahi forest results from orographic clouds coming down the slopes of Haleakala. "Thus," they write, "it is possible that because it has more canopy surface area to intercept cloud water, the forest may receive more total precipitation than the grassland."

The results of the research were published earlier this year in the journal *Ecohydrology*: "Assessing effects of native forest restoration on soil moisture dynamics and potential aquifer recharge, Auwahi, Maui," by Kim Perkins, John Nimmo, Art Medeiros, Daphne Szutu, and Erica von Allmen.

Power Play: Start playing ball or your energy project is going nowhere. That's basically what the Land Committee of the state Agribusiness Development Corporation seemed to say recently regarding a request by the Kaua'i Island Utility Cooperative for a right-of-entry through 2016 to investigate the use of ADC land in Kekaha for an energy storage project.

The utility wants to use reservoirs to store water that, if needed, could be run through a hydroelectric plant to create energy. But, according to Land Committee member David Rietow, KIUC has refused to negotiate a power purchase agreement with the ADC's tenant group, the Kekaha Agriculture Association (KAA), on a separate energy project. The KAA has been working for years with Pacific Light & Power on a plan to generate enough renewable energy – through hydropower, biomass, etc. – to meet the tenants' needs and to sell the excess to KIUC.

PLP has a license for lands in Kekaha, but its project has stalled. KIUC representatives have said repeatedly that the utility is not interested in buying electricity from the KAA or PLP.

At its meeting last month, the Land Committee recommended that the ADC board limit the right-of-entry term to one year and direct the KAA to coordinate with KIUC on access to the area. The KAA manages the ADC's Kekaha lands.

If the KAA and KIUC manage in that time to establish a better working relationship, the right-of-entry could be extended, Rietow suggested.

Quote of the Month

"[T]he U.S. longline fleet has increased its effort despite the continued call from scientists to reduce fishing mortality."

— Amanda Nickson, Pew Charitable Trusts

Corrections: The short article on Papa'a Bay in our February issue incorrectly described a U.S. District Court decision in the case between Kaua'i County and Mandalay Properties. The court did not find that the county lost a road to the beach via adverse possession. Rather, the court found that the county failed to prove it ever owned the road, and that it lost its opportunity to claim a public access easement 20 years after a gate was erected in the 1950s.

And in our March issue's article on water, we incorrectly identified Commission on Water Resource Management staffer Lenore Ohye as Lenore Nakama (as she was once known).

We sincerely regret these errors.

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Up to 17 Percent of Bigeye Catch In Hawai'i is Logged to Territories

For the last three years (2011-2013), Congress authorized the Hawai'i longliners to take up to 1,000 more metric tons of tuna annually than is allowed under the quota system set up by the Western and Central Pacific Fisheries Commission.

And because of this, the National Marine Fisheries Service is able to report to the Western and Central Pacific Fisheries Commission that the total catch of bigeye under the quota assigned to U.S. longline vessels does not come close to reaching the limit.

Here's how this has played out:

Starting about a week before the National Marine Fisheries Service anticipates the WCPFC quota will be reached (usually this occurs mid-November), NMFS begins attributing to whatever territory is participating in a given year the bigeye tuna caught by those vessels that participate in a catch-allocation arrangement with the Hawai'i Longline Association. Those few vessels that don't belong to HLA can continue to fish with their bigeye tuna counted against the Hawai'i quota, but the catch of these boats does not significantly run up the tonnage.

Because of this bookkeeping maneuver, NMFS is able to say that the catches of the Hawai'i fleet are below what is allowed under the WCPFC quota. In 2011, the claimed catch was 3,565 mt, 190 mt below the quota. In 2012, the claimed catch was 3,654, or 109 mt below the quota. Amounts attributed to American Samoa in those years were 628 mt and 771 mt.

In fact, the total haul of the Hawai'i fleet during that time was 4,193 mt and 4,425 mt, respectively, amounts that exceed the quota by 11 percent in 2011 and 17 percent in 2012. (Figures are not available for 2013, when the allocation agreement was with the Commonwealth of the Northern Mariana Islands.)

Total catch of bigeye attributed to American Samoa in 2012 was 1,505 metric tons. The tonnage taken by the Hawai'i longliners that was charged to American Samoa's account represents 51 percent of that.

According to the draft environmental assessment prepared in association with the rule change that would allow this arrangement to continue, "the difference between 700 mt of bigeye tuna caught or not caught by U.S. longline vessels … is negligible (less than 1 percent) to stock status of bigeye tuna."

— P.T.

Bigeye continued from page 1

In November 2011, just as the Hawai'i fleet was about to come up against the quota, language was inserted into an appropriations bill authorizing the HLA to enter into agreements with U.S. territories in the Pacific. Such agreements allowed the fishing vessels to catch up to an additional 1,000 metric tons of bigeye, allocated now to the territory rather than charged against the Hawai'i quota. Under the WCPFC conservation measure then in place, developing island states and "participating territories" (including Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa) could take up to 2,000 mt of bigeye – or, if they were attempting to develop their fishery responsibly, an unlimited amount.

Such arrangements, says Section 113 of the 2012 appropriations act, "are to be considered integral to the domestic fisheries of the territories" – giving a nod to the WCPFC concerns – but it then goes on to state that the territories cannot impose any requirement as to where the vessels have to fish or land their catch. In other words, although the fish caught are to be attributed to a territory (American Samoa in 2011 and 2012, and CNMI in 2013), the vessels catching them don't have to go anywhere near the islands, employ island residents, or use island resources. The only condition is that the HLA pay an unspecified amount into a fund that is to support fishery development projects in the territories. The amount is to be worked out between the HLA and the territory.

The arrangement was blessed through 2013, but Congress did not reauthorize the scheme for this year. On December 30, one day before the congressional authority lapsed, NMFS published notice of the proposed Amendment 7 in the *Federal Register.*

Should the plan win NMFS's approval, it will have come over the strenuous objections of organizations that have in the past been a burr in the longliners' saddle. The Center for Biological Diversity and the Pew Charitable Trusts were able to generate thousands of comments from their members and followers in opposition to the proposal. In addition, David Henkin of the Mid-Pacific office of Earthjustice, representing the Center for Biological Diversity, and Amanda Nickson, on behalf of Pew, submitted extensive comments that argue the plan not only subverts an international treaty, but it also cannot help but further deplete bigeye stocks that urgently need to be conserved.

On the other hand, attorney Jeffrey Leppo, representing the HLA, contends that even though the measure would allow his clients to take more bigeye than allowed under the current quota, it would in fact promote conservation. This, he says, will result from having the fish be caught by Hawai'i- based boats instead of by vessels flagged to nations whose fishing vessels are not as "rigorously managed, monitored, and enforced" as those in the United States.

The Preferred Alternative

To satisfy requirements of the National Environmental Policy Act, NMFS prepared an environmental assessment that lays out various alternatives considered and describes the impacts they can be anticipated to have on the affected environment.

The preferred alternative – Alternative 4(b) in the draft EA — allows the kind of agreements sanctioned by Section 113 to continue, now under color of an amended pelagics fishery plan. The council would recommend to NMFS, and NMFS would impose, a 2,000-mt limit on each of the territories, with 1,000 of that transferable to the Hawai'i vessels. These limits would be reviewed annually by the council and adjusted, if need be, by NMFS.

"Catches by Hawai'i and territory longline fisheries, when combined with U.S. longline limit for WCPO [Western and Central Pacific Ocean] bigeye tuna (3,763 mt) would have negligible impacts on bigeye tuna stocks," the draft EA states. Even if "all of the potential 9,763 mt of bigeye tuna were caught by U.S. longline fisheries in the WCPO, projections indicate marginal impacts on WCPO bigeye tuna."

In fact, the draft EA claims that the proposed rule would improve the conservation of bigeye tuna stocks in the region "by implementing catch limits for the territories, which under WCPFC measures do not apply."

'A Fictional Regime'

However, in the view of the Center for Biological Diversity, the lapse of congressional authority creates a problem for NMFS.

"The statutory authority for U.S. Participating Territories to use, assign, allocate, and manage catch limits of highly migratory fish stocks … expired December 31, 2013," wrote Henkin in his comments on behalf of the center.

"Without Section 113," Henkin said in a phone interview, "you're looking at convention obligations," referring to the U.S. commitments to uphold the WCPFC conservation measures. Those obligations, he continued, "are pretty clear about the need to ensure that the bigeye harvest goes down, not up."

What Wespac and the HLA are doing, with NMFS' connivance, is "creating a fictional regime transferring non-existent quotas to themselves, giving themselves an open-ended license to fish. It subverts the entire international regime. There's no way you could argue that this is consistent with what the commission is trying to accomplish," he said.

"Section 113 was a get-out-of-jail-free card during the time that Congress gave it to them, covering them in the domestic legal forum. But by its terms, Congress did not give them another get-out-of-jail card."

Henkin also took issue with the notion, implicit in the proposed rule, that the U.S. territories have a separate catch limit. "I don't see that in 2013-01," he said, referring to the number of the conservation and management measure (CMM) that the commission adopted at its meeting last December. That measure specifies the quotas that all parties fishing for tunas and other migratory fish in the Western and Central Pacific are bound to observe for the next four years.

The commission has rules regarding attribution of catch, he said, which require attribution be made to the "flag state." "I kind of figure domestic fishing vessels are flying the U.S. flag," he said.

As to the claim in the draft EA that the new rule will improve conservation of bigeye by actually setting a limit on territorial catches, Henkin noted that while earlier CMMs contained a "clear allocation of 2,000 mt quotas to the territories, that's not how 2013-01 deals with anyone flying a U.S. flag. It gets attributed to the United States unless the tuna have been caught under a charter arrangement." The arrangements between the HLA and the territories do not meet the WCPFC's definition of a charter, nor has the United States reported the catch taken under the territorial agreements to the commission in the way that charter catches are to be reported to the commission.

The proposed rule "doesn't advance the conservation goals of the convention or its conservation measures," Henkin said, "and that's the framework under which NMFS measures need to be evaluated…. With the expiration of 113, there's no fig leaf left."

'A Net Increase'

In her comments on behalf of the Pew Charitable Trusts, Amanda Nickson wrote that while the trusts support NMFS' "providing assistance to U.S. Pacific island territories, we strongly oppose the allocation of portions of the territories' catch to the Hawai'i-based longline fleet."

The proposed rule "ignores scientific advice and threatens the future of the fishery by allowing the … Hawai'i-based longline fleet to catch up to an additional 3,000 metric tons of bigeye tuna," she wrote.

Nickson noted how the negotiating

The Western and Central Pacific Fisheries Commission convention area.

stance of the United States at the most recent meeting of the WCPFC "ran counter to the latest scientific advice… [T]he proposal presented by the U.S. to WCPFC 10 simply called for an extension of the closure period for purse seine vessels fishing on [fish aggregating devices] – a measure already proven to be ineffective at lowering the catch of bigeye – and proposed only a ten percent reduction in longline catches."

Further, "the U.S. longline fleet has increased its effort despite the continued call from scientists to reduce fishing mortality," Nickson wrote.

"In 2005, the U.S. Hawai'i-based deep-set longline fishery set 31,913,246 hooks in the Pacific Ocean. By 2012 the effort had increased to 43,965,781 hooks, while overfishing of bigeye tuna has continued." Projections in the draft EA suggest that if the proposal is approved, "hooks in the water would increase to approximately 46,117,532 per year, representing an increase in fishing effort of almost 44 percent within a decade despite the repeated call for catch reductions," she noted.

Not only is the proposed rule inconsistent with international conservation measures, it also runs counter to the federal Magnuson Stevens Act, Nickson said. "National Standard 1 [in the MSA] requires that management measures prevent overfishing, and the proposed rule would increase catch of a species already subject to overfishing."

Beyond Bigeye

Both Nickson and Henkin point out that if the rule is adopted as proposed, catches of other species, in addition to bigeye tuna, will also increase.

There would inevitably be additional catches of yellowfin and northern albacore tunas, Nickson observes. WCPFC's conservation measure 2013-01 calls on fishing nations not to increase their longliners' take of yellowfin, while another conservation measure, 2005-03, prohibits an increase in effort for northern Pacific albacore over and above levels reached in 2004. "Adopting the proposed rule would not only allow for continued overfishing of bigeye tuna," Nickson writes, "but would allow the U.S. longline fleet to disregard other WCPFC conservation objectives, specifically in regard to northern albacore and yellowfin tuna."

Billfish and both silky and oceanic whitetip sharks, all experiencing overfishing, would also likely be caught in increased numbers should the proposal be approved, Nickson added.

In his comments, Henkin refers not only to the tunas and sharks, but also several listed endangered species that would be at greater risk, including leatherback and loggerhead sea turtles, sperm whales, Main Hawaiian Islands insular false killer whales, and short-tailed albatross.

What's more, Henkin notes that the increased fishing effort under the proposed rule would require a finding of negligible impact before it could be authorized under the Marine Mammal Protection Act, which has not occurred. To obtain this finding, he writes, fishery monitoring is required "at levels to produce statistically reliable estimates of marine mammal serious injury and mortality," which would entail increasing observer coverage of the longline fleet to 100 percent (it is now roughly 20 percent). "This level of monitoring has already been recommended in the Fish and Wildlife Service's 2012 biological opinion for Hawai'i-based pelagic longline fisheries, shallow-set and deep-set." Without MMPA authorization, he warns, the increased fishing effort allowed under the proposed rule "could lead to illegal incidental take" of protected species.

'Leading by Example'

Not surprisingly, comments from Leppo on behalf of the HLA praise the proposed rule as "faithful to, and indeed notably more stringent than, international requirements applicable to other participating countries." Because of this, he goes on to say, it "meets and exceeds applicable standards" under the WCPFC, the Magnuson Stevens Act, and (the now-expired) Section 113. Also, he says, "it bears particular emphasis that Amendment 7 … is based upon the best available science … and because, within the limits of an international fisheries issue, the United States is upholding its end of the bargain and, indeed, leading by example, to end [bigeye tuna] overfishing" in the Western and Central Pacific Ocean.

However, Leppo adds "two cautionary notes."

First, he states, "The procedures proposed … are cumbersome, difficult to understand, and fraught with the risk of litigation (and attendant delays and costs)." "It is not the case that more requirements, process and limits are always better," he writes. "Imposition of an ever increasing suite of complicated substantive and procedural requirements and limits on the Hawai'i-based commercial longline fisheries renders it more complex, costly, and risky to engage in these fisheries, eroding their competitive advantage over far less responsible and less regulated foreign fisheries."

For Further Reading

Environment Hawai'i has covered the subject of bigeye tuna allocations extensively in past issues. Here are some of the recent articles that shed light on issues discussed in this article:

Section 113:
"Federal Law Gives Hawai'i Longliners Free Rein to Ignore International Quota," January 2012;

WCPFC bigeye conservation measures:
"Pacific Tuna Commission Cannot Agree on Meaningful Steps to Protect Bigeye," May 2012; and

"For Another Year, Pacific Bigeye Tuna Go Without Strong International Protection," January 2014.

Second, the proposed transferable limit of 1,000 mt is "substantially more stringent than the conservation measures adopted by the WCPFC and the mandate of Congress in Section 113," he writes. If this limit were lowered or "otherwise procedurally" limited, "the result would both violate applicable law and do more harm than good for U.S. commercial fisheries, BET [bigeye tuna] … and species conservation."

Leppo recommends that if the territorial transferable limits are to be reviewed annually, there be a "default" in the event of any hangups – and that would be "continuation of the previously existing annual limit." "It is entirely punitive to the fisheries and … counterproductive to conservation to presumptively foreclose any transfer of BET catch by territories if, for whatever reason, the complicated annual review process proposed in the regulations is delayed or fails." Also, rather than have annual reviews, he suggests a "multi-year limit," which "would add important predictability."

Indeed, the HLA challenges NMFS' right even to propose such limits. "[R]espectfully, we disagree that NMFS has authority to adopt regulations that limit the transfer authority of a territory," he writes, arguing that this exceeds the agency's authority under Section 113.

(Leppo states that his comments are submitted on behalf of HLA, "a non-profit industry association," and Quota Management Inc., which he identifies as a "wholly owned subsidiary of HLA and the contract-

Hawai'i County Council Finally Accepts Easement Along North Kohala Coast

I don't trust the Planning Department – even now" said Hawai'i County Councilmember Margaret Wille.

Wille, whose district includes a seven-lot gated subdivision known as Kohala Kai along the coast north of Kawaihae harbor, made the comments March 7, as the council was poised to approve a shoreline path along the subdivision that had been accepted last spring by former county Planning Director B.J. Leithead-Todd.

Following a council committee meeting in February, Wille had been working with representatives of the landowner to come up with language that was intended to establish a setback from and prevent further development near an alignment over which the old Hawaiian coastal trail, known as the Ala Loa, had passed. The easement proposed for acceptance by the council generally runs makai of the Ala Loa alignment.

Kohala coastline

Earlier in the week, she said, she had received an email from the developer's attorney, Steve Lim, proposing language that was to be included in the grant of easement that called for any construction, landscaping, or other improvements to be set back at least 10 feet from the mauka limit of the trail alignment.

But the draft easement before the council when it met on March 7 was unchanged from what was before the council in February. The only amendment, the public and council members were told, came in the attached map that located the easement across the subdivision. Although it was practically illegible, the new map was said to show the easement as being 20 feet wide, instead of the 10-foot easement shown in attachments to earlier drafts of the easement.

"There are two issues," Wille told her fellow council members. "One is the status of the Ala Loa. Two is the grant of easement. At the last meeting we dealt only with the grant of easement. I asked that the developer put something in the subdivision CCRs [covenants, conditions, and restrictions] that the Ala Loa would not be blocked.... Two days ago, we had language that I felt was solid."

The day before the meeting, however, Wille said she learned of negotiations between Aric Arakaki, with the National Park Service's Ala Kahakai National Historic Trail program, and the developers' representatives. "I got calls at 10:30 at night about what's going on here. Now it's all mixed up," Wille said.

Wille was not the only one whom the talks caught by surprise. Members of the public testifying in Kohala, Kona, Waimea, and Hilo also told council members that they knew little of the recent developments.

Toni Withington, who has long been active in efforts to protect and promote coastal access in North Kohala, told the council that "all the agreements were made behind the scenes." People wanting to testify on the agenda item "are talking about something we don't know anything about. Send this back to the Planning Department... Give us more time. It doesn't have to be passed today."

Other testifiers also asked for deferral. Some requested as well that the process used by Leithead-Todd in accepting the proposed easement – one described by testifiers as unsafe for children and the elderly – be reviewed. Not one of those testifying urged the council to approve the easement as presented.

Two Separate Issues

"It's complicated," said Lim, the developer's attorney. "We do have an access plan, [identified in] the grant of easement." At its previous discussion on the easement, he said, the council vote "recognized the grant of easement was separate from the Ala Loa. The GOE relates to the subdivision and SMA [special management area] requirements." In relation to the Ala Loa, he went on to say, "we are voluntarily working with the National Park Service," but approval of the easement "is needed to move forward with marketing" of the subdivided lots.

Karen Eoff, representing the council district that includes most of North Kona, said that while she agreed that these could be seen as two separate issues, "at this time they're joined.... Negotiating an agreement is helpful, and exactly what we need to do. But this affects the grant of easement and changes the public access plan."

"I'm hesitant," she said, "since I haven't seen the plan. I don't know if it's a big deal to hold it off for one more meeting. It causes the public angst, and us, too."

Bill Brilhante, the deputy corporation counsel attorney advising the Planning Department, said he had only that morning received a copy of the "good faith agreement," as it is being called, between the developer and the National Park Service. But the only issue before the council on this day, he said, was "whether condition 14 of

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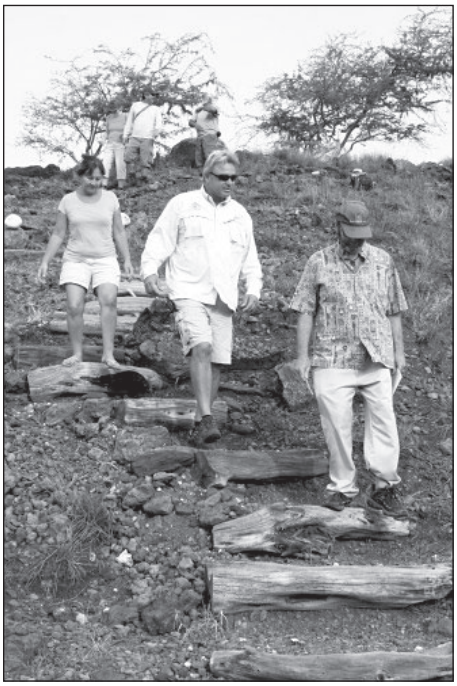
ing entity for the only agreement with a U.S. Pacific territory that would meet the requirements of, and be subject to, the pending proposals." While records kept by the state Department of Commerce and Consumer Affairs confirm that HLA is a nonprofit, QMI is not shown to be a subsidiary, nor is it a non-profit. Rather, the DCCA shows it is a domestic profit corporation, registered with the state last September. Incorporators were James Cook of Pacific Ocean Producers, Michael Goto, of the United Fishing Agency, and Khang Dang, of Dang Fishery, Inc., which owns several longline vessels.) ***— Patricia Tummons***



PHOTOS: DEPARTMENT OF HAWAIIAN HOME LANDS

Maka'ala Kaneali'i (left foreground) is joined by Rick Gmirkin (center), an archaeologist with the Ala Kahakai National Historic Trail program and David Hirt, an aide to Hawai'i County Councilmember Margaret Wille, in a hike along the coastal access trail fronting the Kohala Kai subdivision.

the 2006 SMA permit has been satisfied. The 2006 issue of public access was specific to parking and accesses. There was nothing in it with respect to the Ala Loa. I am sympathetic, desirous of recognition of the Ala Loa. It has tremendous historic value. But that's not what we're here to discuss. We can't make the good faith agreement part of the Grant of Easement."

Councilmember Brenda Ford said she was also concerned about safety and the lack of more parking. "The three-car parking lot is disturbing," she said. What's more, she said, the lot "is 300 feet from the traihead," along a major highway.

"Good grief! Does the council have the right to change this? I'm not happy with this," she added. "It's unsafe."

Brilhante advised that any language that would change the agreement along those lines "would be a substantial change" and "would have to go back to the Planning Department."

Ford then commended Wille for her efforts to tighten up the language in the easement. "I'm distressed that the language you worked out disappeared… The public is not privy to the negotiations regarding the trail that we're not allowed to talk about.... You could call me very wary – when something is being negotiated and is not in front of us. Very wary."

If the lots were sold immediately, without the protections for the Ala Loa, "that could be disastrous for the trail," she said.

'A Good Segue'

Referring to the draft language that Wille had received from Lim, Eoff asked why that could not be included in the grant of easement. "It's very good," she said. "Why not incorporate that into the grant of easement?" Although Lim had said the language would be put into the CCRs, "the county has no jurisdiction" over agreements between sellers and buyers, she noted.

Duane Kanuha, who replaced Leithead-Todd as planning director last June, referred to paragraph 4 of the easement, which states that the county's acceptance of the easement "is without prejudice to any existing rights to ownership or use of the historical Ala Loa alignment within the property."–

This, he said, "provides a good segue to the good faith agreement."

Eoff was still concerned. "I can't see where the county has any fallback if this isn't in the grant of easement," she said. "The county needs something. The Ala Loa isn't even on the map attached to the grant of easement."

Wille also was wanting more. "The easement agreement with the feds – we're not part of it. We need something now."

Lim was firm that the grant of easement would not be changed at this point. "New language in the grant of easement is directly counter to my client's legal interest," he said. "We won't agree to that. It's ironic that the good-faith effort with the National Park Service is now biting us in the butt."

Although she could not get the language she wanted inserted into the grant of easement, Wille did extract a commitment from Lim that the same exact terms he had outlined in his email to her earlier in the week would be included in deed restrictions. To be perfectly clear, Wille read them out once more and elicited oral promises from both Lim and Kanuha that the Ala Loa would be given these same protections.

"On behalf of Kohala Kai," Lim agreed, "I'm authorized to record a deed restriction recognizing the Ala Loa that is included in the good faith agreement."

With that, the council voted seven-to-one to accept the easement. The lone holdout was Ford.

The Good Faith Agreement

The good faith agreement between Kohala Kai and the National Park Service is not so much a final determination of protections to be given to the Ala Loa so much as it is a declaration of the parties' intent to move forward in establishing a conservation easement over the trail in favor of the NPS.

"In order to preserve the Ala Loa Trail alignment and provide protective buffers … all structures, landscaping elements, fences and/or rock walls, constructed within any lot within the property, shall be set back a minimum of 10 feet from the east/mauka edge" of the trail, the agreement states.

On the day of the council meeting, Brilhante and Lim represented to council members that the agreement did not involve the county at all. However, a draft of the agreement bearing the same date as the council meeting contained one paragraph that certainly would affect the county, were it to remain in the final agreement.

Paragraph 6 of the Good Faith Agreement calls for the rescission of a memorandum of understanding that was worked out and signed in 2010 by Hawai'i County, the Hawai'i Department of Land and Natural Resources, and the National Park Service. The MOU outlines a cooperative approach among all agencies involved in attempts to establish continuous access along the coast from Upolu Point at the northern end of the Big Island all the way to the eastern boundary of Hawai'i Volcanoes National Park, a distance of some 175 miles.

According to the NPS's Arakaki, "the provision calling for the cancellation of the MOU will be deleted from the agreement." In an email to *Environment Hawai'i,* Arakaki went on to say that the developer intended to cancel the MOU only as it applied to the Kohala Kai property. "Even this was not acceptable," Arakaki said, "since we would still need to work with the county on the management of the access easement."

A meeting to get input from community members was held in mid-March. By press time, the final agreement was still being worked out. ***— Patricia Tummons***

For Further Reading

"Coastal Access for Public an Issue in North Kohala Luxury Subdivision," *Environment Hawai`i,* February 2014.

This article is available online through the archives section of our website, http://www.environment-hawaii.org. Access is free to current subscribers. Others are asked to pay a $10 fee for a two-day pass.

Kaua'i Springs from page 1

How does the ruling affect future decisions by government agencies that deal, even in small, tangential ways, with water?

For now, Thomas is mum on the subject, and with regard to how it affects his client, he also has little to say.

"In cases that aren't finally resolved, I try not to say too much. If the court resolved it, I might have more to say," he says. "Obviously, we're disappointed. ... It was not to be."

Whether or not he agrees with the decision, it's the law now, he says.

Throughout the appeals process, Kaua'i Springs has continued to bottle water under an injunction against the county ordered by 5th Circuit Judge Kathleen Watanabe.

> *"To the Kaua'i Planning Commission's great credit, they didn't just try to sweep this under the rug."* ***— Isaac Moriwake, Earthjustice***

How the Supreme Court's decision affects the operation is unclear.

"We'll have to figure that out with the Planning Commission," Thomas says. "This has gone on so long now ... a lot of people who were on the county side may not be there."

In an email, Kaua'i County public information officer Beth Tokioka states that the Kaua'i Planning Department is still reviewing how the decision affects the continued operation of Kaua'i Springs.

She adds, however, that the Supreme Court's decision "makes it clear that all state and county agencies that make decisions that affect water and its uses must proceed through a public trust analysis so as to ensure that such uses protect the public trust resource and are reasonable and beneficial. ...

"As outlined in the [decision], the county took its public trust duties very seriously in this case as it does in all cases. The county is highly aware of its public trust duties and obligations under the law and ... remains committed to ensure that any decision it makes regarding water and its uses complies with its obligations under the public trust."

Water Commission director William Tam predicts that the Supreme Court's decision may lead to some "difficult procedural issues."

With counties now apparently having to analyze things like alternative sources of water and determining what reasonable and beneficial uses are when reviewing things like zoning permits, counties may start asking the Water Commission for advice, he says.

"It will heighten the water-land relationship," he says.

The Water Commission was scheduled to discuss the Kaua'i Springs case at its March 21 meeting.

Background

In 2003, Kaua'i Springs obtained building and zoning permits from the county for a 1,600-square-foot "watershed." A year later, the state Department of Health granted it a permit to bottle water. *The Garden Island* newspaper shortly thereafter ran a feature story on Kaua'i Springs, a new entry in the local water bottling market that until then had been dominated by O'ahu-based water bottlers.

Under a licensing agreement with the EAK Knudsen Trust, Kaua'i Springs takes water from a spring in Kahili mountain that has been diverted miles away to a tank owned by Grove Farm Company. The trust owns the land surrounding the spring as well as the transmission system that delivers the water. Grove Farm operates the system, and its water tank serves Kaua'i Springs as well as dozens of residences.

Water that is not used overflows the tank into Waihohonu Stream.

Spurred by a complaint, allegedly from an employee of an O'ahu water bottler, the Kaua'i Planning Department in 2006 issued a cease and desist letter to Kaua'i Springs' landlord, Makana Properties, charging that industrial processing and packaging were occurring on the property, which lies in the state Agricultural District, without the necessary permits.

After some initial resistance, Kaua'i Springs applied to the county for a Use permit, a Special permit, and a Class IV zoning permit.

During the commission's hearings on the permits, Kaua'i Springs owner Jim Satterfield testified that he planned to increase production from 2,500 gallons a week to 35,000 gallons a week. He went on to say that there was no limit on how much water he could extract.

The Planning Commission asked the state Water Commission and the Public Utilities Commission whether either of those agencies would require Kaua'i Springs to apply for permits for its operation. The Water Commission said it might require permits under certain circumstances, such as if the source of the water had been modified (as it apparently had been). The PUC said Grove Farm might be required to obtain authorization to sell water as a public utility, but Kaua'i Springs would probably not.

As the Planning Commission continued to seek more information from Kaua'i Springs, the deadlines to decide on the Use permit and the Class IV Zoning permit passed. The commission planned to decide on all three permits by the Special permit's approval deadline, January 31, 2007.

Given the PUC's and Water Commission's advice, and the limited information provided by Kaua'i Springs, the Planning Commission denied the permits on January 23 of that year.

In its Decision and Order, the commission wrote that the land use permit process should "insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits. The applicant ... should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency."

The Planning Commission found that Kaua'i Springs failed to provide any substantive evidence that it had the authority to extract and sell the water.

Satterfield appealed to the 5th Circuit Court, which on April 30, 2007, found in his favor and granted him a preliminary injunction against the county. Circuit Judge Watanabe ordered the Planning Commission to issue the permits.

A year ago, the Intermediate Court of Appeals vacated Watanabe's decision, but still found that the Planning Commission's decision was "arbitrary and capricious." The ICA remanded the case with instructions on how to better review the permits in light of the Planning Commission's duty to protect public trust resources.

"[T]he Planning Commission's public trust duty under [the state Constitution], coupled with the state's power to create and delegate duties to the counties, establishes that the Planning Commission had a duty to conserve and protect water resources in considering whether to issue the special permit to Kaua'i Springs," the ICA found.

Despite standards set forth in the Kaua'i General Plan, zoning ordinances and the state's land use law requiring the protection of water, however, the Planning Commission failed to apply them, the ICA found. The Planning Commission merely focused on whether Kaua'i Springs' water use was "legal and met all potentially applicable regulatory requirements," it stated in its decision.

Automatic Approvals

Last November, the Supreme Court heard

oral arguments in the case. In its final decision, the majority of the Supreme Court supported some of the ICA's findings and disagreed with others.

The court's decision first addressed whether the Use and Class IV Zoning permits had been automatically approved when the Planning Commission failed to decide on them in time. Kaua'i Springs argued that they had been approved. The ICA and the Supreme Court, however, found that Kaua'i Springs had, by its actions and behavior, assented to a time extension.

The ICA had focused on the fact that the company and its representatives had continued to negotiate on permit terms, and that Kaua'i Springs had even amended its permit application, then retracted the amendment, after approval deadlines had passed. The Supreme Court, however, found that the ICA erred when it used Kaua'i Springs' post-deadline behavior as evidence of assent.

Assent must occur *before* an automatic approval deadline, and in this case, Kaua'i Springs had assented to an extension before the deadlines for the Use and Class IV Zoning permits, the high court found.

"[B]oth Kaua'i Springs and the Planning Commission treated the application for the three permits as comprising a consolidated application request [and] agreed, as repeatedly evidenced by their conduct, that the Planning Commission would be required to render a decision on the consolidated application by January 31, 2007, which was the latest deadline possible for the Special Permit," wrote Justice Richard Pollack in the majority decision.

Kaua'i Springs had similarly argued that the public trust doctrine doesn't empower agencies to deny applications based on a simple lack of information that is "within its [the agency's] power to obtain, thus shifting the burden to the applicant."

However, the Supreme Court found, "a lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource." And in this case, it stated, Kaua'i Springs failed to prove it had the legal authority to put to commercial use a public trust water resource.

"There is also no indication in the record of the substance of any water purchase agreement, nor of the water supplier's right to make the public trust resource commercially available," the decision states.

The Planning Commission had identified specific permits or authorizations Kaua'i Springs might need from the Water Commission and the PUC, the decision continues.

"The Planning Commission correctly imposed on Kaua'i Springs the burden to demonstrate the propriety of its proposed use of the public trust resource, which, under the circumstances of this case, required Kaua'i Springs to demonstrate that any necessary permits and applicable regulations from the Water Commission and PUC were complied with," the decision states.

Thus, the court concluded, the Planning Commission's decision was neither arbitrary nor capricious.

Those seeking a commercial use of water use can't simply say a use is grandfathered or get some sort of perfunctory response from agencies and that's the end of it, says Earthjustice attorney Isaac Moriwake. Arguments Moriwake raised in an amicus brief in the case, filed on behalf of Hawai'i's Thousand Friends and Malama Kaua'i, closely track those made by the Hawai'i Supreme Court.

> *"Obviously, we're disappointed. ... It was not to be."* ***— Robert Thomas, attorney***

Kaua'i Springs needed both the Special permit and the Use permit to operate in the Agricultural District. Thus, "[f]rom the Planning Commission's position, it would have been illogical and impractical to decide separately upon the Use Permit and Special Permit, given the similarity of the permits' requirements," he wrote.

Arbitrary and Capricious

The Supreme Court majority also disagreed with the ICA's conclusion that the Planning Commission's decision was arbitrary and capricious. In the ICA's view, the Planning Commission's requirement that Kaua'i Springs prove that its proposed use complies with all applicable laws administered by the Water Commission, the PUC, or other applicable regulatory agencies created "an obscure and indefinite burden of proof."

"In so many cases in land development, despite questions, [agencies] just punt, issue a permit subject to conditions that never get enforced and are practically meaningless," he says.

In the Kaua'i Springs case, the responses the PUC and Water Commission gave to the Planning Commission were inconclusive, Moriwake says.

"At that point do they sweep it under the rug and keep it hanging? ... To the Kaua`i Planning Commission's great credit, they didn't just try to sweep this under the rug."

In backing the Planning Commission's denial of Kaua'i Springs' permits, the Supreme Court's opinion clarifies that under a trust fiduciary duty, that kind of business as usual is unacceptable, he says.

Dissent and a Rebuttal

The Supreme Court's decision was not unanimous. Chief Justice Mark Recktenwald issued a 13-page dissent in the case.

"This case requires us to address how [the public trust doctrine] should be applied by governmental entities other than the Commission on Water Resource Management, in light of our decision in *Kelly*," Recktenwald wrote.

He pointed out that the ICA had considered the role of the Kaua'i Planning Commission first, then assessed additional duties imposed by the public trust doctrine.

The ICA decision directed the Planning Commission to simply make "appropriate assessments and require reasonable measures to protect water resources."

"In contrast," Recktenwald wrote, "the majority's approach requires that the applicant prove that all potentially applicable regulatory requirements, including those applicable to third parties not under the applicant's control, have been satisfied."

The majority's decision would require Grove Farm "to seek a declaration from the PUC on its status as a utility," he continued. "It is unclear ... how that additional regulatory review will further the purposes of the public trust doctrine. And, if Grove Farm decides not to pursue it, Kaua'i Springs' application will be at an end."

Recktenwald also pointed out that the Planning Commission did not seek a decision supporting its denial of the permits. Rather, the commission had agreed with the ICA's decision to remand the matter, and with the court's directions on how to evaluate the permits.

"[T]he majority is crafting an outcome that neither party sought," he wrote.

To Recktenwald, the majority's decision went too far.

"There are a large and diverse array of agencies that might issue permits or approvals that could in some way affect a water resource. Would the Kaua'i building division, in considering a request by Kaua'i Springs for a permit to expand its facility, be obligated to consider Kaua'i Springs' use of the water that would be processed in the expanded facility? What if Kaua'i Springs sought to add a second floor to its processing facility, and wanted to install an elevator to access it – would the Boiler and Elevator Inspection Branch of the Department of Occupational Safety and Health be required to consider the impact of granting an elevator installation

permit on water use issues? The answers presumably would depend on the extent to which those agencies had a regulatory interest in water use. Thus, starting the analysis with an examination of the agency's regulatory mandate, as suggested by the ICA, makes sense," he wrote.

The seemingly extreme examples Recktenwald posed don't seem to concern Moriwake.

"That's the job of dissents. ... You throw out the parade of horribles [to try to illustrate that] this rule, left to its ultimate conclusion, is going to result in disaster," he says.

But the majority opinion simply clarifies what the public trust requires of private companies that wish to use public resources for profit, he argues.

The Supreme Court concluded that the standards laid out by the ICA incorrectly inverted the public trust doctrine by mandating the evaluation of "appropriate assessments" and "reasonable measures" *before* the propriety of the proposed use has been assessed.

"[T]he ICA's proposed test is deficient because it does not provide the degree of protection of the public trust required by the law that our prior holdings recognize," the majority decision states.

Moriwake notes that the standard to make "appropriate assessments" and impose "reasonable measures" — terms drawn from the *Kelly* case — comes into play late in the planning process. Had the Supreme Court agreed with the ICA, it would have set a "diluted and superficial standard," he says.

WMA Designation

Designating all of Hawai'i as a water management area (WMA), which is what was originally proposed when the state Water Code was created, would give the Water Commission more authority over water issues statewide. Designation might "make it clear that there's a primary agency where the buck stops," Moriwake suggests. Currently, only Moloka'i, most of O'ahu, and a small part of Maui have been designated.

But in the absence of statewide designation, "we're not going to say it's a water free for all. The state has a trust duty," he adds.

While designation might help centralize decision making with regard to water, it comes with its own problems, according to the Water Commission's Tam. Once an area is designated, the work required to simply process water use permits is enormous, he says.

He also warned against letting isolated conflicts drive designation.

"In areas not under stress, you don't need to permit everything right now because of a conflict. There's always the danger of the tail wagging the dog, of using a water conflict to get the zoning," he says.

"We've got a lot on our plate," he says, referring to three contested case hearings on Maui, management of Central O'ahu water use, a petition to designate an aquifer in Kona, and stream issues on Kaua'i.

(For more background on this case, see the story published in our June 2013 edition, "Kaua'i Water Bottler's Permit is Vacated by Appellate Court.") ***—Teresa Dawson***

BOARD TALK

DLNR Rule Amendments Expand Protection Of Live Rock and Coral

The state Board of Land and Natural Resources has amended its rules protecting coral and live rock to improve the board's ability to prosecute violations and impose penalties for damages.

The Department of Land and Natural Resources's Division of Aquatic Resources has been working on the rule amendments for the last five years to address problems it's had in the past "with proof and causation," DLNR water deputy William Tam told the Land Board on March 14.

Under the new rules, the definition of damage has been broadened. Instead of including only actions that cause "extensive injury," "irreparable harm," or death to coral or live rock, under the new rules, the living portions of coral or rock are considered damaged if an action causes *any* physical or physiological harm.

Prohibited activities are also broadened. It used to be that taking or damaging stony coal or live rock by using some kind of implement – i.e., a chisel or hammer – was the only prohibited activity. Now, except as otherwise provided by law, any take or damage to coral or live rock, or the intentional or negligent introduction of "sediment, biological contaminants, or pollution into state waters" is prohibited. However, if someone inadvertently damages less than half a square meter of coral by legally dropping an anchor not more than once a year, "[n]o liability shall be imposed," the rules state. The same applies to inadvertent damages caused by someone stepping on coral.

The rules also specify how the Land Board might proceed in violation cases. Violators may be subject to criminal or civil administrative penalties, or both, and those penalties may be cumulative "to each other and to the remedies or penalties available under all other laws of this state," the rules state.

When assessing administrative fines, the rules now specify that the Land Board may base the amount on the number of specimens of live rock, fish, invertebrates, or solitary or stony corals damaged. Where damage to coral colonies is less than one square meter, fines may be based on the number of heads or colonies damaged. In areas larger than one square meter, the board may base its fines on the number of square meters of damaged coral or live rock, the rules state.

During public hearings on the amendments, DAR received little to no opposition, according to that division's report to the board.

In addition to solving problems that the agency has had in the past regarding prosecution, Tam said another important reason to amend the rules is to preempt potentially burdensome federal regulation. The federal government is proposing to list three species of corals in Hawai'i as endangered, including one that is relatively common here, he told the board.

"If it's listed, we are going to have a lot of our biologist's time writing to NOAA [National Oceanic and Atmospheric Administration] for Section 7 consultation," he said, referring to the process under the Endangered Species Act that requires assessment of the impacts federal actions, or federally funded or permitted actions, have on threatened or endangered species.

"We get federal funds for everything now," Tam said of DAR.

With stronger rules, the DLNR can argue that it doesn't need federal help protecting endangered corals and that the state of Hawai'i has its own capacity to do it, he said.

The Office of Hawaiian Affairs and a few law students with the University of Hawai'i submitted testimony supporting the rule amendments, although one student suggested that the definition of pollution could be improved to include such things as heat and molasses.

During discussion by the Land Board, at-large member David Goode asked Tam how the rule amendments apply to activities that have received government permits, such as a pollution discharge permit from the state Department of Health.

Tam said the DLNR's rules are independent of the Clean Water Act.

"This is about a natural resource damage issue," he said. "It is simply saying, if you damage coral, because the state owns it, because it's part of submerged lands, you may be liable."

Currently, the department sometimes charges for removing a boat stuck on the reef, but not for damages the boat caused to state lands, he continued.

"This is a rule by which we say if you damage it, you violate our rule, Clean Water Act aside," he said. "Remember, the Clean Water Act is aimed at pollutants in water. … it doesn't give you a pass to go damage coral."

If someone has a permit to discharge sediment into the ocean, and that discharge damages state submerged lands, "then we have a claim separately," Tam said.

Goode expressed his concern that in cases where damage is caused by an action that had received government permits, those government agencies could be included in any legal action.

"Depending on the amount of coral [damaged], the types of coral involved, it's big money. … I also know the tendency is if there is a big event and they want to go after somebody, they look for deep pockets. It could be the county, it could be the state," Goode said.

"The government is not liable for someone who exceeds their authority," Tam replied.

He added that, unlike the Clean Water Act, the DLNR's rules allow the Land Board to direct what happens with fines. Under the Clean Water Act, fines go into the U.S. treasury and not to the Environmental Protection Agency, he said.

"Financially, Clean Water Act fines have the whammy of taking money out of the state," he said.

Goode said he was still worried about the implications of the rule amendments. Because corals are subject to a variety of stressors, including sea-level rise and warming ocean temperatures, "someone could say [the] DLNR should be going after folks who are contributing to these other stressors," he said. "I can see … we'd all be dragged into it."

With the new rule amendments, "the blanket got really big," he said.

"You still have to prove cause," Tam replied, adding that the rule amendments were necessary because it had become too difficult for the state to prove "what is an implement or not."

Despite his concerns, in the end, Goode voted with the rest of the board to approve the rule amendments.

Biofuel Company Absence Leads to Deferral

No representatives from Hilo-based Hoku Kai Biofuels, LLC, showed up at the Land Board's March 14 meeting to answer questions the board had about the complex biofuels project the company is proposing. As a result, the Land Board deferred acting on Hoku Kai's request for a right-of-entry permit to conduct an environmental assessment, sample soils, and inspect and clean a 10-inch-wide underground pipeline on state land near the Hilo harbor.

The DLNR's Land Division had requested approval-in-concept of a 65-year non-exclusive easement that the company needs to transfer biofuel — namely palm oil – from ships at the port to the former Shell Oil asphalt plant, now owned by Hoku Kai. The division also recommended that the Land Board approve a right-of-entry permit.

The pipeline is 1,635 feet long, but only a portion of that is controlled by the DLNR. Hoku Kai must also negotiate agreements to use parts of the pipeline under the jurisdiction of the state Department of Transportation's Harbors Division and the County of Hawai'i.

According to a Land Division report to the Land Board, between 400 and 700 gallons of heating oil spilled from the pipe in 2008, while the DOT was removing about 300 feet of corroding pipeline.

"Based on available information, the pipelines, including the heating oil lines, have not been cleaned and may still contain both asphalt and heating oil," the report states.

A Phase 1 environmental site assessment recommended several actions for both the asphalt plant as well as the properties surrounding the pipeline, including soil sampling, contaminated soil removal, and pipe removal or repair.

Before it can obtain an easement from the DLNR, the company must perform all of the recommendations in the site assessment, complete an environmental assessment, and obtain a finding of no significant impact (FONSI), the report states.

Given the past industrial uses, at-large Land Board member Sam Gon said he had a hard time believing Hoku Kai would be able to get a FONSI.

The Land Division's Kevin Moore agreed and said the company will likely have to conduct a full environmental impact statement.

Land Board member David Goode noted that palm oil "has a lot of potential negatives on a worldwide basis."

"Biofuels can be great or very harmful," said Life of the Land's executive director Henry Curtis. He suggested that before the Land Board allows the pipe to be used, it should know what kinds of biofuels Hoku Kai is planning to transfer.

"The fact they're not at this meeting is not a good sign. I ask you defer until they show up," he said.

"I went back and forth on this one. I am disappointed no one is here," said Hawai'i island Land Board member Rob Pacheco, adding that he had no objection to deferring the matter.

"I concur, considering it's a fairly complex [project]. We have a partial pipeline; it has some history and will need some environmental attention," Gon said.

The board unanimously voted for a deferral. ***— T.D.***

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Hu Honua Bioenergy Now Facing Creditor Claims That Top $50 Million

The financial troubles seem to keep growing for Hu Honua Bioenergy, LLC, the company that is building a 21-megawatt biomass-fueled power plant on the coast of the Big Island, about six miles north of Hilo.

As of press time, the company was facing lien claims that exceed $50 million from nine companies that had either provided supplies to contractors or subcontractors, had done work on the plant, or had otherwise been engaged by Hu Honua in connection with the facility, being built at the site of the former Pepe'ekeo Sugar mill.

In our March issue, we listed six of the creditors that had filed applications in 3rd Circuit Court for mechanic's liens against Hu Honua. By far the largest single lien is being sought by Hu Honua's general contractor, Hawaiian Dredging Construction Inc. Lawyers for Hawaiian Dredging stated in court last month that its claim, originally pegged at $35 million and change, now is around $40 million, when carrying charges and attorney's fees are included.

The second-largest claim has now been filed by ESI, Inc. of Tennessee, which says Hu Honua owes it $11 million for work on the design of the plant.

Other recent liens have been filed by Smith-Koch, Inc., and Unitek Insulation, LLC. Smith-Koch, a Pennsylvania corporation, says it is owed $49,522, plus interest, costs, and attorney fees for having provided Hu Honua with a "remote fill station," pump and control panel. Unitek, based in Honolulu, is seeking a lien in the amount $104,709 plus interest, costs, attorney fees, and incidental expenses associated with work it performed to remove lead-based paint from the site.

Further hearings on the liens are scheduled for late July.

Corporate Spying

But Hu Honua's troubles do not end with the liens. On February 27, Hawaiian Dredging filed a complaint in 3rd Circuit Court alleging that Hu Honua and its construction consulting company, Paragon Construction Consulting, Inc., stole "confidential and proprietary trade secret information and attorney-client communications and attorney work product materials" from computers that were left at the construction site when Hawaiian Dredging was locked out on February 7, eight days after filing the lien.

> *Hu Honua 'surreptitiously accessed and copied the files of such hard drives and computers' belonging to Hawaiian Dredging.*
>
> ***— Complaint filed in 3rd Circuit Court***

The defendants, the lawsuit claims, "surreptitiously accessed and copied the files of such hard drives and computers" belonging to Hawaiian Dredging.

On February 19, the lawsuit alleges, Hawaiian Dredging personnel were allowed to retrieve certain items left behind, and at that point, they "discovered that certain computers and electronic files … were missing from Hawaiian Dredging's offices." A week later, it goes on to say, Hu Honua's legal counsel "conceded that HHB downloaded Hawaiian Dredging's electronic files 'to a hard drive.'"

The company is seeking unspecified damages, an order to Hu Honua to return all of Hawaiian Dredging's property, and a permanent injunction prohibiting Hu Honua "from accessing, using, possessing, or otherwise interfering with Hawaiian Dredging's rights in and to Hawaiian Dredging's property."

On a separate matter, 3rd Circuit Judge Greg K. Nakamura issued a final judgment in the lawsuit that nearby property owners had brought against the Hawai'i County Planning Commission, which had issued a Special Management Area permit for the plant. The judgment affirms his ruling in January that upheld the permit, which was augmented by a hearing last fall that reported on an archaeological inventory of the site.

Public Comment on Revised Permit

Under a settlement order filed in federal court, the state Department of Health has drafted a revision to the permit to operate that it gave to Hu Honua three years ago.

"The state had to revise certain items," said Clean Air Branch engineer Darin Lum in a phone interview. "The revisions clarify some of the emission limits that were already in the permit, but needed further clarification. It's not anything more, just further clarification as far as our methodology" in determining emissions.

The proposed permit is still a minor emissions permit, he added. "We kept it underneath the emission limit caps" that would have required issuance of a major prevention of significant deterioration (PSD) permit, he said.

The draft permit is posted on the department's website: http://health.hawaii.gov/cab/files/2014/03/072401permitamendment.DRAFT.pdf

The public comment period will close on April 14. ***— P.T.***