

Green Infrastructure Hits a Red Light

The Hawai'i Green Infrastructure Authority has had an uphill climb in its efforts to launch programs that will achieve its reason for being — helping underserved populations enjoy the benefits of energy-saving technology, especially rooftop solar. The Public Utilities Commission's rebuff last month of HGIA's roll-out of its most recent proposal is just the latest signal that the agency, with its complex efforts to leverage its loan fund with investments from parties with a "tax appetite," is not just coming up against bumps in the road, it's on the wrong road.

With most of its \$150 million fund still intact, the need for tax-cut-hungry partners to be involved in HGIA's loan programs is not clear. It's past time for HGIA to give serious consideration to flying solo, in line with the consumer advocate's suggestion.



Latest Proposal to Use GEMS Fund Is Nixed by Public Utilities Commission

On November 28, the Hawai'i Green Infrastructure Authority (HGIA) proposed a new method by which GEMS funds could be distributed to residential customers.

As with several other previous proposals, the Public Utilities Commission batted it down, ordering instead an "informal conference" at an unspecified date to address concerns raised by the state consumer advocate.

What the new proposal anticipated was the issuance by third parties of loans to homeowners and the sale of those pooled consumer loans to investors in the form of "securitized consumer leases or power purchase agreements."

As explained by HGIA staff, the loans to purchase photovoltaic systems would be provided through a project sponsor — a business entity that seeks to reduce its taxes — which would then be able to offset taxes owed by the deductions allowed for invest-

ments in solar installations. The project sponsor would have been either a single business or a group of investors whose capital would cover part of the cost, with the HGIA furnishing the remainder.

According to HGIA program officer Heather Wallenstrom, "the project sponsor owns and maintains the solar equipment" and it recoups its investment through the sale of power to the homeowner by means of a power purchase agreement (PPA).

"If a project sponsor chooses to pay for the solar equipment using its cash," Wallenstrom stated in an email, then no loan from the GEMS fund is needed. "However," she continued, "if a project sponsor chooses to borrow to augment its cash equity, a loan would be requested."

The program notification describes the distinguishing features of the GEMS project sponsor loan this way: It "is different from other loan products on the market because

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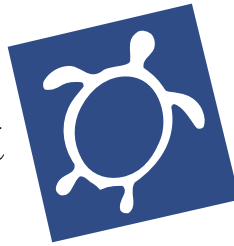
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Environment



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NEW AND NOTEWORTHY



Seawall Comes Down: The seawall in Keaukaha that was put up early last year has come down — for the most part, at least. The wall was built by Robert Iopa, an architect who owns the lot immediately mauka of the wall. The then-director of the Hawai'i County Department of Parks and Recreation, which manages the state-owned area of the wall under an executive order dating back to the 1920s, had given Iopa permission for the wall.

The state Department of Land and Natural Resources' Office of Conservation and Coastal Lands was unaware of the wall until neighbors brought the matter to its attention.

In May, Iopa agreed that he would remove it by mid-November — a deadline that was extended, with DLNR's consent, to the end of the month.

According to one neighbor, even as the new construction was being dismantled, Iopa had brought in additional fill to raise the grade of the area.

Such concerns were not addressed, however, in a letter that OCCL administrator Sam Lemmo sent to Iopa on December 16. "Based upon [a] site inspection of December 8, 2016, the OCCL has determined that the unauthorized constructed section of the seawall has been removed ... to the department's satisfaction," Lemmo wrote.

Hu Honua Goes to Court: The owners of a half-built power plant in Pepe'ekeo, Hawai'i, are suing Hawaiian Electric and NextEra in federal court, seeking more than half a billion dollars in damages. Also named as a defendant in the lawsuit is Hamakua Energy Partners, whose 60-megawatt plant near Honoka'a Hawaiian Electric is seeking to purchase.

Hu Honua, which has been working to build a biofuel-powered generating facility on the site of the former Pepe'ekeo sugar mill, north of Hilo, had an approved power purchase agreement (PPA) with Hawaiian Electric. Work fell behind schedule owing to a host of factors, including disputes with laborers and contractors, financing problems, and permitting issues.

Last January, Hawaiian Electric notified Hu Honua it was terminating the PPA because the

company had missed a milestone. Hu Honua argues in its court filing, however, that the deadline for termination following the missed milestone had passed well before the termination notice.

After failing to get the Public Utilities Commission to order Hawaiian Electric to rescind the termination, Hu Honua took its case to federal court.

The company claims HELCO, the Big Island subsidiary of Hawaiian Electric, has violated the Sherman Act by engaging in monopolistic behavior and restricting trade. It also is alleging breach of contract. No trial date has been set.

Slow Start to Water Security: Act 172 of the 2016 Legislature instructed the state Commission on Water Resource Management to establish a Water Security Advisory Group and to issue up to \$750,000 in matching-fund grants, based on the panel's recommendation for proposals aimed at increasing Hawai'i's long-term water sustainability.

The panel has yet to be established. In its report to the 2017 Legislature, the Water Commission explains the difficulties it has encountered in attempting to carry out the Legislature's wishes.

Among other things, the commission identifies issues of procurement, questions over the process for approval of recommended priority projects, potential conflicts of interest involving "committee member organizations to receive grants," certification of matching funds, the applicability of Chapter 343 (Hawai'i's environmental review law), the state's environmental documentation process, and, not least, limited staff.

"It will be challenging to implement this act given current staffing levels and other ongoing projects and commitments," the commission stated. "However, the commission will work diligently to implement this act."

Anticipated actions are to establish the Water Security Advisory Group and conduct meetings; set up a formal account to receive funds to implement the act; "coordinate with the attorney general's office, state procurement office, and state Ethics Commission to ensure compliance with applicable laws and rules;" and, finally, "initiate the process of soliciting competitive sealed proposals ... by establishing an evaluation committee and preparing a request for proposals."

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Quote of the Month

"People are so used to hearing bad news, they don't hear the good."

— Chris Yuen, Land Board

GEMS Costs of \$13 Million a Year Borne by Hawaiian Electric Ratepayers

How much does the Green Energy Market Securitization (GEMS) program cost customers of Hawaiian Electric utilities?

According to the latest figures submitted to the state Public Utilities Commission, each business day from January 1 through June 30, Hawaiian Electric will collect \$54,559.08 to pay for costs associated with the \$150 million bond float issued in late 2014 to help “underserved” electric customers enjoy the same savings as more affluent homeowners able to afford rooftop photovoltaic systems and other costly energy-saving technologies. By the end of that six-month period, the state is estimated to receive \$5,728,702.23 from the utilities.

Costs include not only interest and principal on the bonds (\$1,851,800.67 in

interest; \$4,752,932.00 in principal), but also around \$80,000 in “ongoing financing costs.” Those include “rating agency fees” (around \$50,750 a year) and “legal, consulting, and accounting fees” (about \$47,200 a year).

Not included in these figures is the approximately \$1 million a year it takes to administer the GEMS program through the Hawai'i Green Infrastructure Authority (HGIA), an agency of the Department of Business, Economic Development, and Tourism. This is paid out of the GEMS bond fund.

Add it all up, and the total annual cost of GEMS comes to just under \$13 million a year.

As of October 31, the date of HGIA's most recent quarterly report to the Public Utili-

ties Commission, the face value of the 17 loans issued through GEMS to single-family households came to \$577,947, or less than four-tenths of a percent of the \$150 million bond float.

Since that report, several additional GEMS loans have been released. In the filing made with the commission on December 16, as of early December, the total face value of 31 outstanding loans came to \$1,831,059. This included 29 loans to homeowners and two loans to owners of multi-family apartment buildings.

No breakdown of the total was available. However, it has been reported that one of the apartment building loans — to a complex in Hawai'i Kai — was in the amount of \$861,500, or 47 percent of the total loan value.

Both the apartment loans were authorized under a program notification that took effect in September, extending GEMS loan benefits to qualified large commercial operators, among others. — *P.T.*

GEMSs from page 1

it partners with conventional lenders — in this case predominantly Hawai'i-based, traditional financial institutions — to form a ‘capital stack’ that enables private lenders to stay within their required underwriting criteria. GEMS funds are used to support the loan and extend the loan term over twenty years, which provides greater flexibility for prospective project sponsors.”

The \$150 million GEMS bond fund is itself securitized, with the “security” being basically a lien against Hawaiian Electric ratepayers for the two decades following issuance of the bonds. The type of pooled consumer loans anticipated in Program Notification 10, however, is, in form, at least, more like the securitized mortgages that were pooled by large banks and sold to unwary investors in the late 1990s and early 2000s.

As to what entity would have been responsible for pooling the consumer loans into the product that eventually would be owned by the private investors, Wallenstrom replied: “The project sponsor negotiates multiple PPAs and pools them together when requesting financing.”

Wallenstrom underscored that the only secured collateral would be the PV equipment itself, not any real property on which the equipment is mounted.

Dissenting Opinion

The state Office of Consumer Advocacy

filed its objections to the latest proposal on December 9.

“Greater scrutiny should be applied to any program that proposes to lend GEMS funds to a third-party investor,” the consumer advocate stated. “This is because there are no program mechanisms in place to ensure that the benefits of GEMS financing will accrue to the consumer rather than being absorbed by the third-party.”

This proposal, the consumer advocate's filing goes on to say, “represents a significant departure from previously approved programs in which the borrowers were also the consumers of the eligible technology.”

The consumer advocate took exception to the HGIA's calculation of savings to the end consumer, which is based on a calculation of expected utility bills with and without the photovoltaic system. Instead, it stated: “a more appropriate comparison to assess the expected benefits to consumers stemming from the third-party use of GEMS program funds is ... to compare the customer's bills: 1) with PV under a GEMS financed lease/PPA, and 2) with PV under a lease/PPA backed by an alternate source of financing. ...

“As it stands, HGIA's analysis appears to assume that, but for the use of the third party, GEMS-financed securitized consumer lease/PPA product, the consumer would be unable to install a PV system or enter into another lease/PPA arrangement. It is unclear why this would necessarily be the case given that other private sector

companies appear to also offer ‘go down,’ 20-year solar lease arrangements.”

The consumer advocate recommended that the PUC look critically at this and any other proposal that would use “ratepayer-based GEMS program funds for third-party investment.”

Finally, in a footnote, the consumer advocate floated a suggestion to both the PUC and HGIA as to a possible way in which GEMS funds could be used to provide direct benefits to the parties who were the intended beneficiaries when the statute authorizing GEMS was approved by the Legislature in 2013:

“The commission should consider, at some point, requiring HGIA to conduct or provide a leased distributed generation system market analysis,” the consumer advocate stated. “Subsequently, if the estimated or measured demand for that market is significant enough, HGIA could then evaluate whether it might make sense to create a low-cost framework within which HGIA could directly lease PV systems to customers instead of HGIA making GEMS funds available to a third-party vendor(s).”

On December 16, the Public Utilities Commission issued an order suspending the effectiveness of Program Notification 10, pending an informal conference to address the consumer advocate's concerns.

Rebuttal

On the very same day the PUC issued its

Tax Exemption for \$165 Million Complex

Owners of 7000 Hawai'i Kai Drive, a new apartment complex, have recently obtained a GEMS-backed loan in the amount of \$861,500 to finance a photovoltaic system for its common areas.

The complex is owned by a subsidiary of the large Korean conglomerate Hanwha and consists of 269 two-, three-, and four-bedroom units, 54 of which (22 percent) are designated as low-income units, meaning they are intended to be affordable to families whose household income does not exceed 80 percent of the area median income for the City and County of Honolulu.

The total investment in the complex,

originally planned as luxury condos, has been pegged at \$165 million for land and buildings. The assessed valuation of the property comes to more than \$45 million — \$15 million in land value and more than \$30 million in buildings.

And the annual property taxes on the complex are just \$300 — the least possible for any privately owned lot. In 2015, before the low-income housing designation was obtained, taxes came to \$48,054.65.

The nominal tax is allowed because, under Honolulu ordinances, by having at least 20 percent of the apartments rented out at rates deemed affordable by households with

an annual income equal to 80 percent of the county's "area median income," or AMI, the complex qualifies as low-income housing, which is exempt from property tax.

The county's property tax office lists the owner as Hale Ka Lae, LLC, which was also the name of the luxury condominium complex originally proposed for the site. The state Department of Commerce and Consumer Affairs shows Hale Ka Lae as an active business organized in Hawai'i, with its sole member being Hanwha Hawai'i, LLC. Hanwha Hawai'i, in turn, while once registered to do business in Hawai'i, is no longer in good standing, with its annual filing with the DCCA more than two years overdue.

Hanwha Hawai'i is a Delaware-based LLC, with its headquarters in Chicago.

— P.T.

decision, the HGIA filed clarifications to its program notification, addressing the consumer advocate's criticisms. With respect to the criticism that GEMS "was not intended to be a vehicle for third-party lending," deputy attorney general Gregg J. Kinkley, representing HGIA, wrote that "this type of lending structure is exactly what the Hawai'i state Legislature had envisioned and authorized the authority to do" when it authorized GEMS.

Kinkley also disputed the consumer advocate's suggestion that GEMS loans should be more attractive than those offered by commercial vendors. This was challenging for two reasons, he wrote. First, the HGIA "would need to constantly research difficult-to-obtain proprietary financing terms and conditions of other lease/PPAs being offered." Second, he wrote, "existing program requirements already make the GEMS financing option less attractive to solar installers when compared to other lenders," he wrote, seeming to acknowledge the programs constraints that have made it so far unable to meet expectations. "If the authority were required to continually change its criteria to be 'better than market,' ... it would be extremely difficult to attract borrowers and solar installers."

A Limited Pool

Even if the Program Notification is eventually approved, the class of potential beneficiaries of the new type of securitized consumer loan may be relatively small. Under the current circumstances regarding PV connectivity, the only customers likely to apply for this type of GEMS loan would have been those Hawaiian Electric customers who applied for net-energy metering rates

before last October, when the PUC halted new applications to the NEM program, but who have yet to install the PV systems on their homes.

Wallenstrom says that at the end of November, "the number of homeowners remaining in some stage of the NEM review or approval process was 7,576."

"The amount of time these homeowners have to execute the NEM agreements depends on where they are in the process and whether an extension [of time] has or will be granted," she continued. Hawaiian Electric was planning to send out notices last month to homeowners still in the NEM queue who were on the utilities' most saturated circuits, she noted.

"HECO [Hawaiian Electric] anticipates that solutions will be available in September of 2017 and May of 2018 for customers in areas where more complex upgrades are necessary, so some customers will be installing PV systems with NEM approval through 2018 at least," she stated.

A Confounding Order

But whether those several thousand NEM-approved customers continue to maintain that status over the 12 to 18 months would seem to be an open question, given a recent Public Utilities Commission decision.

On December 9, the PUC ordered Hawaiian Electric to "transfer grid capacity from the NEM program queue" to open up additional capacity for grid-supply customers, referring to the limited option opened up after new NEM applications closed last year. Under the grid-supply option, customers with PV arrays export power to the grid in the same way as NEM customers, but instead of receiving retail

credit for each kilowatt hour of power exported, they would be compensated at a discounted rate.

On its website, Hawaiian Electric provides a time extension request form for NEM-approved customers awaiting financing or other issues to be resolved. The form states that such customers will be allowed no more than "a one-time, 180-day extension to finalize [their] Net Energy Metering project."

In addition, the form requires customers to acknowledge that any failure "to finalize and submit post-installation documentation within the extension period may result in the cancellation of my NEM application and forfeiture of my place in the queue."

In effect, Hawaiian Electric has been given a green light by the PUC to shift capacity from the NEM queue to the more lucrative (for the company) grid-supply queue.

Hawaiian Electric spokesman Peter Rosegg was asked what the company's policy was on retaining customers in the NEM queue for protracted periods.

"If a customer is in the approved NEM queue, they have either 12 months (residential) or 18 months (commercial) to complete a project," he stated in an email to *Environment Hawai'i*. "We allow for a six-month extension if justifiable. Some 5,000 customers are in the NEM queue approved to install who have not yet interconnected."

Rosegg added: "We are cooperating with the solar industry to implement the directions from the PUC. We will work with customers to complete their projects if they choose, making sure all customers are treated fairly and provided with safe, reliable electric service." — Patricia Tummons

Proposed Budget for Whitmore Ag Hub Shifts Away From Land Acquisition

For the past few years, the state Legislature has sunk tens of millions of dollars into state Sen. Donovan Dela Cruz's and the state Agribusiness Development Corporation's vision of turning the Whitmore area in North-Central O'ahu into a thriving agricultural center. Thousands of acres of land have been or are slated to be acquired from the former Galbraith Estate, Castle & Cooke, and the Dole Food Company. Plans are underway to develop a much-needed irrigation system, to secure water sources adequate to serve the lands purchased, and to create a 'food hub' complete with cafes, workforce housing, processing and packaging facilities, and — per Dela Cruz's wishes — a pedestrian bridge that connects the area to Wahiawa town.

Jeff Melrose, a Hilo-based planner who in 2015 oversaw the preparation of the Statewide Agricultural Baseline Project, suggested at a recent talk sponsored by the University of Hawai'i's Department of Urban and Regional Planning and the American Planning Association that state ownership is one way to increase the likelihood that farming will, indeed, occur on agricultural lands and not be turned into fake farms or upzoned for urban development. However, he added, "There's a limit to how much the public should spend." He said he didn't think the state should buy up all of the thousands of acres Dole has up for sale, but the Whitmore area — one of a number of agricultural "hotspots" throughout the state — is "the right place to invest in at this point in time."

Indeed, the biennium budget Gov. David Ige released last month doesn't allocate any money for the purchase of agricultural land. It does, however, call for \$4 million in general obligation bonds to be used in fiscal

year 2018 for a "state packing and processing facility," which may include the food hub planned for more than 200 acres of former Dole lands in the Whitmore area.

The budget also anticipates that the Department of Agriculture's loan program, which has a ceiling of \$5 million, will likely see an increase in demand "as the Galbraith lands are made available to farmers." It also seeks a legislative allocation of \$5 million to that program.

Currently, limited water resources restrict farming to fewer than half of the 1,200 acres of former Galbraith lands managed by the ADC. Melrose noted that stringent food safety regulations may also hamper full utilization of the lands.

"Getting to scale is a big deal. A lot of little farmers are going to lose because of food safety regulations. They've gotta have domestic water," he said, adding that a larger farmer may be able to help achieve that.



Arkansas, Hawai'i Experts Draft Plan for Food Hub

When the state Agribusiness Development Corporation spent several million dollars a few years ago buying 280 acres in the Whitmore area from the Dole Food Company, it knew that the land had potential to become a diversified ag-industrial complex, but it didn't really have any notion of how to make it happen, given that nothing like it exists in the state.

While the ADC had an idea that it wanted public-private partnerships to drive the development, when it came time to is-

sue a request for proposals and a request for qualifications to get facilities built, "that's where we got stalled," ADC executive director James Nakatani told the agency's board of directors in November. "You need to know what you want," he continued, and the ADC didn't know what it wanted. In fact, Nakatani said it's still working out what kinds of processing facilities it wants to include.

Enter the University of Arkansas and the University of Hawai'i, which the ADC hired last year to craft a "food hub" master plan.

"We got approval for \$400,000 ... to find someone with experience," Nakatani told the agency's board of directors in May. The planners at the University of Arkansas, in particular, are "more versed in small communities in ag. We don't have that much experience master planning for an ag community," he said.

At the board's November meeting, Nakatani added, "This will not only benefit Hawai'i. It could be a national model ... for rural areas in agriculture." Representatives from the University of Arkansas Office of Sustainability and Community Design Center and the University of Hawai'i's School of Architecture then briefed the board on what they envisioned the development of the property to be.

Having a layout similar to that of a school campus, replete with tree-lined walkways and a common lawn/athletic field, the parcel would also include a technology plaza, shops, eateries, facilities for processing and packaging food, housing, and even terraces of taro patches.

"The campus model is one that gets stronger over time," said Ken McCown, head of the University of Arkansas's Landscape Architecture Department.

Possible tenants could include a local poi processor and a coffee roaster that could sell value-added products, McCown said. He and his students also envision about 30 housing units, each about 400 to 500 square feet, for farm workers or people who might be visiting and working in the "ag tech hub."

In addition, McCown said, "Senator Dela Cruz was adamant about having a bridge that connects Whitmore Village to Wahiawa."

Nakatani said he thought that much of the development could be achieved through private-public partnerships, but suggested that the packing plant might need to be publicly funded since "there's no real money in that."

A final master plan was expected to be completed soon. — T. D.



The state Agribusiness Development Corporation has contracted with the University of Arkansas and the University of Hawaii to develop a food hub master plan for former Dole Food Company lands in the Whitmore area (picture here).

BOARD TALK

Land Board Grants One-Year Holdover Allowing A&B to Divert East Maui Streams

I think it's important to keep in mind it's been 'just one more year' for 30 years," Office of Hawaiian Affairs public policy advocate Wayne Tanaka told the Board of Land and Natural Resources last month, noting that kupuna seeking stream restoration in East Maui have died waiting for it to happen.

Indeed, the contested case initiated by the late Beatrice Kekahuna—one of the original group of native Hawaiian taro farmers who in 2001 challenged Alexander & Baldwin's (A&B) efforts to continue diverting streams upon which they relied—has dragged on so long that it is now in the hands of a younger generation that includes Kekahuna's son Sanford and Lurlyn Scott, daughter of another original petitioner, Marjorie Walleit.

At the Land Board's December meeting, Native Hawaiian Legal Corporation (NHLC) attorneys representing Kekahuna, Scott, Healoha Carmichael, Lezley Jacintho, and the community group Na Moku Aupuni O Ko'olau Hui, argued against a proposal by the Department of Land and Natural Resources' Land Division to grant A&B and its subsidiary, East Maui Irrigation Co., Ltd. (EMI), a one-year holdover of four revocable permits held—or once held, some say—by the companies.

But after hearing several hours of impassioned public testimony, mainly in opposition, the Land Board voted four to two to grant the holdovers in order to allow A&B to better transition its 35,000 acres in Central Maui from sugarcane to diversified agriculture.

In making his motion to approve the holdovers, Land Board member Chris Yuen responded to the arguments Tanaka, the NHLC and others made by highlighting the fact that in a separate but related contested case hearing before the Commission on Water Resource Management, the commission in July ordered that all streams identified by the petitioners as important to taro growing to be fully restored. Yuen incorporated that order into his motion and, to better ensure that the needs of organisms in "high-priority" streams are met, required the companies to fully restore another East Maui stream, Honomanu. Yuen also ordered the removal or repair of those portions of EMI's irrigation system that either continue the diversion of streams that are supposed to be fully restored or prevent those streams from achieving mauka to makai connectivity.

The holdovers, granted under Act 126 of the 2016 legislative session, allow A&B and EMI to divert up to 80 million gallons of water a day (mgd), and perhaps even more, from East Maui streams in the state license areas of Nahiku, Huelo, Honomanu, and Ke'anae. The holdover also allows EMI to maintain control over access to the 33,000 acres included in those license areas.

The companies, some have argued, had been diverting the water without any legal authority since a January 2016 circuit court ruling invalidated their permits to do so. Although A&B has taken the position that it doesn't really need the permits, the company sought the holdovers just in case the

state Intermediate Court of Appeals decides A&B is wrong.

Contested Case Denial

Before the Land Board even began discussing the holdover item, NHLC attorney Camille Kalama submitted a written request for a contested case hearing on behalf of her clients.

First, she wrote in her supporting testimony to the board, "as of today, A&B no longer needs the

water from East Maui. A&B simply has no need for any of that water today, tomorrow, or next month." She pointed out that A&B subsidiary Hawaiian Commercial & Sugar, which closed its sugarcane operations last month, hadn't needed any water for its last crop for months. Given its vastly reduced water demand, she stated, A&B can and should be relying on its own ample supply of well water, even though pumping costs are something it would rather not pay. She also pointed out that the Hawai'i Supreme Court has ruled that a water applicant's proposed use "must be denied if the applicant does not show that there is no practicable alternative water source."

Kalama also jumped on the Land Board's complete reversal of recent positions taken in other legal proceedings in which her clients have sought to restrict, if not end outright, A&B's diversions.

In January 2016, 1st Circuit Judge Rhonda Nishimura ruled that four revocable permits to A&B and EMI that the Land Board renewed at its December 2014 meeting were invalid because state law never intended temporary permits to be continuously renewed for more than a decade, which is exactly what the board had been doing. An appeal followed and is still ongoing. In December 2015, aware of Nishimura's inclinations, the board continued the companies' diversions by voting to simply reaffirm a holdover it had granted years ago as part of the contested case hearing initiated by Kekahuna, Walleit and others.

Kalama noted that the Land Board has consistently taken the position in the appeal of Nishimura's decision and the Land Board's 2015 decision that its votes in 2014 and 2015 "were of no legal significance."

"You have argued that you gave A&B authority to use this land and water in 2001 and 2002 and that no other legal authority is necessary. Are you willing to repudiate that position?" she asked.

She also took issue with the Land Division's characterization in its report to the board that Nishimura's ruling had been stayed pending the outcome of the appeal by A&B, the Land Board, and Maui County.

"It is well-settled law that the mere filing of an appeal from an order or judgment, in the absence of a stay of proceedings, will not disturb the operative effect or validity of such an order during the pendency of the appeal. Thus, the DLNR staff submittal statement that, 'Although the permits were invalidated by the Circuit Court, the ruling was stayed pending the appeal' is patently false [with regard to the Land Board, the



Taro patches on the Ke'anae peninsula in East Maui.

DLNR and A&B]. Likewise, the DLNR staff's contention that '[t]he Department considers the revocable permits to be in continued holdover status, until the resolution of the pending contested case before the board on the water license' is a misguided misbelief that invites the DLNR and this Board to be held in civil contempt for their plain-as-day failure to take all reasonable steps within their power to comply with the court's January 2016 order," she wrote.

She argued that granting the holdovers requested by A&B/EMI would violate the public trust doctrine, Hawai'i's environmental review law, obligations to protect native Hawaiian traditional and customary practices, due process rights, and even Act 126, which the Legislature crafted last year specifically to allow for the continuation of water diversions while the processes associated with the issuance of a long-term lease — including legal challenges and the completion of environmental review documents — run their course.

With regard to the latter, Kalama wrote, "By its plain terms, Act 126 applies only to lease applications concerning 'a previously authorized disposition of water rights.' The first circuit court has already ruled that the BLNR's prior disposition was unauthorized. Therefore, Act 126 is inapplicable to A&B for their permits." What's more, Act 126 requires the holdovers to be consistent with the public trust doctrine. And as she had already argued, "granting holdover status is inconsistent with the public trust doctrine."

Anticipating that the board might reject her arguments and approve the holdovers, Kalama asked that it condition them on the following:

- Explicitly bar A&B from obstructing native Hawaiian access to gather, hike, and "malama the 'aina and kahawai" in the license areas;
- Require A&B to give Na Moku the keys or combinations to locks on any and all gates that may impede access;
- Require A&B to clean up debris, including metal and PVC pipes, concrete waste and equipment in the license areas;
- Require A&B to eliminate alien plant species growing within 50 feet of diverted streams; and
- Require A&B to provide basic information on water amounts diverted daily from the license areas and to install meters at each diversion point.

In discussing the NHLC's contested case hearing request with attorney David Schulmeister, who represents A&B, Land Board chair Suzanne Case asked his opinion on



East Maui Irrigation supply aqueduct going into tunnel, in vicinity of Na'ili'ihiha'ele Bridge - Hana Belt Road, Between Haiku and Kaipahulu.

PHOTO: LIBRARY OF CONGRESS

what effect Act 126 might have on whether the hearing should be granted. In recent decisions regarding telescope development on Haleakala on Maui and Mauna Kea on Hawai'i island, the Hawai'i Supreme Court has ruled that the Land Board must address contested case hearing requests before making a decision on the matter being contested.

After Schulmeister replied that Act 126 does not directly address that issue, the board decided to go into executive session with its deputy attorney general. When it reconvened, Yuen made a motion, which the board agreed with, to deny the NHLC's request, stating that a contested case hearing was "not available as a matter of law." He also noted that since the holdovers were only for a year, granting a contested case on them (that could conceivably last even longer than that) "would frustrate the legislative intent of Act 126."

Disputed Claims

HC&S manager Rick Volner, Jr., told the Land Board that it is currently diverting between 15 mgd and 20 mgd — down from a historical average of about 160 mgd — from East Maui and that the seven taro lo'i-serving streams that it promised last year to permanently restore have been nearly or fully restored. Biofuel crop trials and cattle grazing are already occurring on some of the former sugarcane lands, and there are plans to develop an agricultural park for small farmers, he said. Key to a successful transition to diversified agriculture, especially for

the 27,000 acres of its former sugar plantation that have been classified as Important Agricultural Lands, is a secure source of water, he said. State Department of Agriculture director Scott Enright, corporation counsel for Maui County, and representatives from the island's and state's farming and ranching organizations also argued for the continued diversion of water by A&B.

Albert Perez, executive director of the Maui Tomorrow Foundation, however, argued that A&B should not be able to divert an unlimited amount of water while it figures out what it's going to do with it. Citing a letter from the group's attorney, he said that court rulings require a higher level of scrutiny to be applied to private, commercial uses, and that A&B show its actual water needs, not its forecasted needs.

"Basically, you can sum it up by saying, 'show me the farming.' If they just get a blank check, they have no incentive to really do agriculture," he said.

In trying to pin down the actual water uses and needs of A&B and its subsidiaries, Land Board members Sam Gon and Keone Downing first asked Volner where all of the water that used to be diverted is going.

"East Maui," Volner replied. "It stays in the watershed, in the streams."

Regarding an argument by A&B that it needs to continue diverting stream water, in part, to keep its ditch system operational, Gon then asked how much water that would require.

Volner said that was hard to pinpoint.

EMI president Garrett Hew noted that

while his company is not currently diverting any streams in the Nahiku and Ke'anae license areas, it is maintaining the ditch system there in case "any adventures require more water."

To Downing, Hew had just admitted that the ditch doesn't really need to stay wet to, as Volner explained later, clear debris and remain operational.

"The diversions" — in Ke'anae and Nahiku — "have gone dry?" Downing asked Hew.

"For the most part, yes," Hew replied.

"So the diversions don't really need water," Downing said.

Maui Tomorrow Foundation board member Lucienne de Naie also took issue with A&B's claims that it needs East Maui water from state land. In addition to its well water, she noted that the company's ditch system takes water from 51 stream intakes located on its own property.

NHLC attorney David Frankel pressed the issue further.

"Why would you let A&B divert water from East Maui before they take 83 mgd [from its well] first? Additional water comes from A&B's own land. If they say they're using 20 mgd and they have access to 112, why let them take it from the public?" he asked.

Both de Naie and Frankel also addressed Volner's statement that the water HC&S no longer needs is being kept in the East Maui watershed. "It's being returned to the watershed. The question is how," she said, arguing that the company was, as Kalama had testified, shifting water from one stream to another, rather than keeping streams undiverted.

"When you've been told the taro streams have been dealt with, it's not true," she said. She added that she has video showing Hanehoi Stream is still being diverted, despite claims that it's been restored. Another tester showed video that Pi'ina'au, another stream that was supposedly restored, is still being diverted due to a hole in the ditch.

"Don't assume everything is peaches and cream just because you saw a paper from CWRM," said Frankel, who also pointed out that the Water Commission did not impose in its order any deadlines on A&B's restoration of streams.

While de Naie conceded that obtaining all of the government approvals required for full restoration may take some time, she asked the board, "Do you think three to four years is too long to wait? That's the question."

Frankel accused A&B of dragging its feet in the permitting process, as well as in

its efforts to complete the environmental impact statement the Land Board had ordered it to begin.

Deliberation

As the Land Board came closer to making a decision on the holdovers, Frankel reminded the board of the fact that Judge Nishimura's ruling had not prompted the board or DLNR to stop A&B from continuing to divert East Maui streams. That being the case, "Why would you consider the [holdover] proposal? They're doing it now. Why do anything?" he asked. (He and Kalama added, however, that they believed that because the Land Board and A&B had not received a stay of Nishimura's ruling, the diversions — except for those serving the Maui Department of Water Supply — were illegal.)

Board member Stanley Roehrig suggested that perhaps the board had changed its mind, or even made a mistake, regarding the legality of diverting water without the permits.

"I'm not in favor of illegal. Under what lawful authority are they [A&B and EMI] going to do it if we don't do something?" he asked. "The Legislature gave blood on this bill [House Bill 2501, which became Act 126] ... After her ruling, the ledge passed Act 126. We cannot ignore that and pretend only Judge Nishimura made her ruling," he said.

Rather than focus on past legal arguments, Yuen offered a motion to approve the holdovers, despite the fact that he had wanted the board to refrain from making any serious decisions on the use of East Maui stream water until the Water Commission concluded its contested case hearing on amendments to the interim instream flow standards of about two dozen streams.

"But here we are," he said.

He started by asking that several documents filed in the Water Commission's contested case hearing be incorporated into his motion. Those documents, which called for the full restoration of all 14 taro streams, among other things, went a long way toward meeting Act 126's requirement that holdovers meet the public trust doctrine, he seemed to suggest.

The commission's order to restore those streams was significant, he argued. "People are so used to hearing bad news they don't hear the good," he said.

With regard to protecting stream life and biota, Yuen pointed to a Division of Aquatic Resources study that had identified eight priority streams, six of which are covered by the July 2016 Water Commission order.

The two others are diverted high up by the Maui Department of Water Supply. Even so, he ordered the restoration of one of those streams, Honomanu, which had once been identified by DAR as a priority stream but was removed from the list because there were doubts that losing reaches might prevent it from connecting to the sea.

He added conditions that there be no waste or non-beneficial use of diverted water, that a hole in the Pi'ina'au diversion be closed, and that A&B remove sections of the ditch system that erode and cause portions of the streams to be restored to go dry, thus allowing for full connectivity.

Yuen had recommended capping diversions at 80 mgd, but upon a recommendation from Case, revised the condition so that the matter is merely brought back to the board for review if and when diversions come close to 80 mgd.

The 80 mgd amount didn't appear to be based on any actual need stated by A&B, but Yuen argued that allocating water for potential uses was reasonable. (A&B's protected agricultural uses, not including ditch system losses, total about 89 mgd.) He said that A&B's well, according to the Water Commission's hearings officer, cannot serve even half of company's lands and requires electricity to pump, whereas water from the ditch system does not. Also, he said, it's not practical for the company to have water only for a certain set of uses and be required to return to the Land Board whenever it has need for more.

"That's a chicken and egg thing and we'll end up with neither the chicken nor the egg without a practical allocation [of water]," he said, adding that the motion he had crafted took care of many of the interests of those seeking stream restoration.

Addressing arguments that commercial agriculture is not protected by the public trust doctrine, Yuen said that contrary determination was made before the state passed its laws requiring the designation and protection of Important Agricultural Lands (IAL). IAL are of constitutional importance, and therefore the water needed to make those lands productive should have constitutional protection, he said.

Board member Gon, however, said he was troubled by the lack of information regarding A&B's request and that if the board were to deny the holdovers, it would not affect the company.

"I have a feeling I need to vote against this until enough information is available to support the public trust ... and justify it if someone came up to me," he said. Board member Downing agreed.

Downing asked company representatives why the board was being forced to take a stand on something “you knew you had an abundance of? ... There’s no data from you folks. How much are you gonna use? What for?”

Roehrig warned the companies that “next time around, I’m going to vote no. ... Take that to headquarters.”

With an amendment (recommended by Roehrig) to the motion that representatives from the opposing sides of the issue trade phone numbers so they can perhaps informally work out certain issues among themselves, the board approved the hold-overs. Gon and Downing opposed the motion. Yuen, Roehrig, Case, and Kaua’i board member Tommy Oi voted in favor. Maui Land Board member Jimmy Gomes had recused himself from the matter.



Na Pua Makani wind farm rendering.

concern about the potential harm to the endangered Hawaiian hoary bat, which is the species most often taken by wind farms in the islands.

With regard to Na Pua Makani’s HCP proposals to fund research or control ungulate damage in the forest as mitigation for bat deaths above a certain number, Riviere called the plan fatally flawed and encouraged the board to send it back to the Endangered Species Recovery Committee, which is made up largely of scientists from various government agencies. The committee must approve all HCPs before they come to the Land Board.

Mike Cutbirth, manager of Na Pua Makani Power Partners, argued that the HCP was, in fact, scientifically sound and that Keep the North Shore Country was merely seeking to delay the project. The state has



PHOTO: CORINNA PINZARI

Endangered Hawaiian hoary bat.

contested case hearing and determine that it had standing. While his motion passed, it was far from unanimous.

Member Sam Gon, chief scientist for The Nature Conservancy of Hawai’i and a recent former member of the Endangered Species Recovery Committee who was involved in lengthy discussions regarding wind farm interactions with bats, agreed with Cutbirth that Riviere’s group had had ample opportunity to engage in the public process. Gon added that when a habitat conservation plan is developed, it has to pass muster with the state Division of Forestry and Wildlife and the U.S. Fish and Wildlife Service. “The suggestion that the HCP is ‘fatally flawed’ ... is problematic in my mind,” he said.

When it came time to vote, Maui member Jimmy Gomes and board chair Suzanne Case joined Gon in his opposition to the motion.



Wind Farm Opponent Secures A Contested Case Hearing

At its December meeting, the state Board of Land and Natural Resources granted a contested case hearing to the community group Keep the North Shore Country, which opposes the approval of a Habitat Conservation Plan (HCP) and incidental take license (ITL) for Na Pua Makani wind farm on O’ahu’s north shore.

Group president Gil Riviere, who is also the state senator for the area, pointed out to the Land Board that Keep the North Shore Country’s purpose is environmental protection in the region and it has received funds from Turtle Bay Resort to enhance protection of the endangered Hawaiian goose, or nene. Nene are one of several threatened or endangered species that are expected to be harmed or killed by the wind farm’s nine turbines. Riviere also expressed

very high standards when it comes to HCPs, he said, adding that the species covered by the plan and license will be “better off with the project than without” and that the mitigation requirements for his project are higher than those for the five other wind farms throughout the state.

He pointed out that Keep the North Shore Country had ample opportunity — seven public meetings — to comment on the plan and license, but it chose not to.

In October, the Land Board approved a lease for the project and took up the matter of the HCP and ITL at its November meeting. At that meeting, Riviere, on behalf of Keep the North Shore Country, and Kahuku resident Kent Fonoimoana, on behalf of the Kahuku Community Association and another group, requested a contested case hearing. At the Land Board’s December meeting, the board entertained only Riviere’s request.

After the board discussed legal issues in executive session, board member Chris Yuen made a motion to grant Riviere’s group a



Board Transfers 600 Acres To Department of Agriculture

More than a decade after the state Legislature passed a law directing the Department of Land and Natural Resources to transfer some of its agricultural lands to the Department of Agriculture, the mission is still not complete. But at the Land Board’s meetings in November and December, it approved the transfer of more than 600 acres on O’ahu, most of which are under leases or permits to about two dozen farmers and ranchers. Nearly 169 acres are unencumbered.

“The [DLNR] has been working with the Department of Agriculture (DOA) in order to expedite additional transfers, in keeping with the Governor’s initiative for the development of sustainable local agricultural production. The set aside of the properties to DOA will allow the properties to be managed more consistently with that initiative,” a staff report states. — T.D.

Tempers Flare as TMT Contested Case Closes Out Third Month of Hearings

The contested case hearing on a Conservation District Use Application for the Thirty-Meter Telescope continued its slow pace last month, with 11 days of hearings.

On December 13, the University of Hawai'i, which is the applicant for the Conservation District Use Permit (CDUP), concluded its case in chief following the testimony of hydrologist Tom Nance. Nance was the last of a dozen witnesses the university had called since the evidentiary portion of the contested case began on October 20. Next up was the TMT International Observatory, the nonprofit corporation that is proposing to build the controversial telescope near the summit of Mauna Kea.

Despite efforts of retired Judge Riki May Amano, the hearing officer, to set clear boundaries as to what subjects could be raised during the process, many of the TMT opponents continued to attempt to argue the existence of the kingdom of Hawai'i in their cross-examinations of university and TMT witnesses.

In addition, much of the focus of opponents in their questions to witnesses presented so far has had to do with their knowledge of Hawaiian religion and practices that may be associated with it. Many of them argue that the mountain is sacred and any disturbance to the summit area is tantamount to desecration. Some have claimed that the very stones are their ancestors, while others argue that the pu'u (cinder cones) and other natural features of the landscape represent the bodily forms of their gods and goddesses.

There were two other recent developments that have a bearing on the question of whether the TMT will be built in Hawai'i.

First, the state Supreme Court turned down an interlocutory appeal of six petitioners in the contested case who challenged Amano's decision to impose a 30-minute time limit on each petitioner's cross-examination. Although Amano said at the time that the limit could be exceeded for good cause — and it has often been — the TMT opponents asked the court to reverse her decision. On December 2, the high court dismissed the appeal, stating it lacked jurisdiction.

Then, on December 15, 3rd Circuit Judge Greg K. Nakamura issued an oral ruling that would seem to remand to the Board of Land and Natural Resources its decision

to consent to the University of Hawai'i's sublease to TMT of land where the telescope is proposed to be built. (The written order had not been released by press time.) One of the petitioners in the TMT case, Eric Kalani Flores, had brought the lawsuit against the BLNR after it did not grant him a contested case over the consent to sublease.



Hearing-Room Drama, I: 'A Zombie Proceeding'

On December 19, Ed Stone, executive director of the TMT International Organization (TIO), testified. During cross examination by Lanny Sinkin, representing the Temple of Lono, Stone was asked about the plan to finance decommissioning of the telescope, which Stone had referenced in his testimony but which had not been included in the exhibits offered as part of TIO's case.

Sinkin asked if Stone had the plan with him.

Stone replied that he did not.

"Do you know if your counsel has a copy here today?" Sinkin asked.

Stone answered that he did not know.

"I'm wondering if I could ask counsel if he has a copy of this DFP," Sinkin then said, referring to the Decommissioning Funding Plan.

"I have a copy," replied Douglas Ing, one of the attorneys for the TIO.

"Would you care to share it with the rest of us?" Sinkin asked.

"No," Ing replied, without elaboration.

Sinkin addressed Amano, complaining that parties to the case "don't get discovery. They [TIO] get to testify about a document they won't share with anybody, and we're just supposed to say thank you very much. There's something wrong with the process."

Ing noted that Stone's testimony had been on file since early October. "In the months that have transpired, no one has made a request," he stated. "I didn't know they wanted to make a request. There are dozens of documents that have been referred to — even more than dozens, but I don't know which documents they're interested in asking questions about."

Sinkin responded by making an oral

motion, asking Amano to force production of the plan.

Amano characterized Sinkin's request as "rather untimely," noting that intervenors had been on notice since the previous week that Stone would be testifying. "Even then," she said, "had there been a request, I could have done something about it."

The following morning, the last day of hearings before the holiday break, one after another petitioner lined up to express concerns about their inability to compel production of documents — not just the decommissioning plan of TIO, but any and all other documents that might be referenced in testimony.

Deborah Ward led them off. "I believe there has been some confusion with regard to the way we conduct our hearing," she said. "It's come to my attention that maybe somewhere in the middle of this proceeding the rules have changed and it appears from what happened yesterday with Mr. Sinkin that we could have asked various witnesses for documents that they did not present in their exhibit list or we could have asked the university for those documents but because of the rule on discovery we were under impression that was not possible. Now we find out we actually should have asked for documents that we thought were missing or we wanted to ask questions about."

Amano attempted to explain her description of Sinkin's request for the decommissioning plan as untimely. "My thinking was, if you knew this was going to be coming up, you would have gone to the exhibit list to look for that exhibit," she said. "So that's when you should've found out there was no such exhibit. Had the request been made last week — yesterday morning, even — we would have had time to do something about that. But this was late in the day. And that's my basis for thinking that it was untimely."

Sinkin was next up, informing Amano that the Temple of Lono considered the matter "far more seriously and in a broader context than was raised by Ms. Ward."

"As far as the temple is concerned," he said, "the refusal of the hearing officer to direct TIO's counsel to produce the document during cross examination by the temple is simply one more decision demonstrating the extraordinary lengths the hearing officer will go to in protecting the applicant and the telescope project. When the hearing officer refused to allow the temple to file a motion to ..."

Amano appeared dismayed and interrupted Sinkin.

"Just a minute."

"Yes, ma'am," Sinkin responded.

“Do you really mean what you say?
“This is the way I feel,” Sinkin said.

Amano: “So you think that I’ve gone to great lengths to protect the telescope and the telescope project?”

Sinkin: “Absolutely. That’s why I’ve filed two motions to recuse, which have never been addressed. I’ll just make my statement for the record, your honor. I’m not here to obviously argue with you. And I’m sorry — I hope you don’t take this personally.” At that, Sinkin smiled.

A very unsmiling Amano responded: “I do.”

Sinkin continued: “Okay. Well, I can’t help that. When the hearing officer refused to allow the temple to file a motion seeking to dismiss the permit application based on the bigoted and libelous attack on the temple by the university . . . the temple understood that this would not be a fair and impartial proceeding. The temple now has thirteen or fourteen motions pending that the hearing officer either never took up or never ruled upon, so the temple came to understand that the temple has second-class status as an intervenor in this proceeding.

“Now, on a simple matter of having TIO produce a document about which their witness testified in his direct testimony, the hearing officer has chosen again to be the protector of the permit application. Two of the motions filed by the temple and not addressed are motions requesting this hearing officer to recuse herself based on demonstrated hostility toward the Temple of Lono and bias in favor of the applicant and telescope.

“The temple renews those motions and adds the refusal to order the production of the decommissioning plan as further evidence in support of those motions.

“As far as the temple is concerned, this proceeding is a zombie proceeding. There are so many serious and fundamental errors in the conduct of this proceeding that the permit is already dead.”

Other intervenors queued up to express their overall unhappiness with the proceedings. Kealoha Pisciotta, on behalf of her group Mauna Kea Anaina Hou, joined in the complaints of Sinkin and others and also objected to a perceived slight made the previous day against the Hawaiian kingdom.

“[E]veryone here in Hawai’i, who’s especially born here, is, would be a citizen of the Hawaiian kingdom. I know that the Hawaiian kingdom has been objected to repeatedly here, but I do want to say that as far as treaties go, treaties according to the United States constitution are the highest law of the land. The Hawaiian kingdom in America



The ahu in the middle of the roadway to the TMT site erected by protesters in 2015.

had treaties, [that] are part of American law and American Constitution, as well. And that’s not opinion, that’s recorded by the Congress repeatedly in the apology bill, in, for example, the native Hawaiian health care improvement act —”

Amano interrupted to ask what point Pisciotta was attempting to make.

“My point is that I think the treaties were objected to and, you know, I don’t think the treaties should be objected to. Because —”

Amano: “The treaties were not objected to.”

“Well, that’s what I heard,” Pisciotta replied. “So, if I’m wrong, that’s fine. That’s fine. But I just wanted to make the record that the treaties between the United States and the Hawaiian kingdom are a matter of public record.”

After everyone had a chance to weigh in on the matter, Amano instructed any motions relating to the production of documents to be filed by December 29, with responses due January 3. They are to be taken up at the start of the hearing on January 5.



Hearing-Room Drama, II: The Sublease

On December 16, the morning following Judge Nakamura’s oral ruling appearing to order a contested case hearing on the Land Board’s consent to the sublease between the university and TMT, TMT opponents queued up to ask Amano to stay the contested case over the CDUP. They also argued that the ruling deprived the TMT of any property interest in the proposed construction site, and that, for this reason, the TMT no longer had any justification for participation in the proceeding.

Amano insisted that she could make no decision, one way or another, in the absence of a written order.

Still, the opponents pressed their point. On behalf of the Temple of Lono, Sinkin had already filed a formal motion asking Amano either to dismiss the TMT from the proceedings or to stay the proceedings. Sinkin argued that Nakamura’s order had effectively voided the sublease and, he went on, since the sublease was the basis for TIO’s participation in the contested case, it should be expelled from the proceedings.

Amano reminded Sinkin that in her order admitting parties to the contested case, she



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had allowed the TIO to participate not on the basis of any property interest, but rather because of the information they could add in helping her come to a recommendation.

Dexter Kaiama, representing KAHEA, also pressed Amano to stay the proceedings, arguing that it would be a waste of time to allow TMT to present its case, calling witnesses that would require the opponents to prepare questions and cross-examine them, if it turned out that the TMT had no valid sublease.

"We don't even have a written order," Amano said.

Kaiama went on to challenge the independence of Amano herself, suggesting that she did not write the minute order admitting parties to the contested case on her own.

Amano, who has been slow to anger throughout the contested case, immediately set Kaiama straight on that. "Let me cure you of that curiosity. I put the minute order together, and it reflects the oral order I made," she said.

Kaiama wasn't finished, arguing that because the deputy attorney general representing the DLNR before Nakamura was also providing "counsel and advice" to Amano, she "needs to reassess that question which arises about the appearance of independence."

Clarence Ching seconded Kaiama's remarks.

"The CDUA application is a separate process from the sublease permit application," Amano said. "I do not intend to stay this proceeding. I don't even have a written order!"



Water Resources

Tom Nance, a hydrologist, was presented by the university on December 13 to discuss what impacts the TMT might have on water sources – a concern that many of the telescope opponents have raised.

As proposed, the telescope facility would transport all wastewater generated on site and truck it down the mountain for treatment at a wastewater facility.

As to any runoff from the hardened surfaces around the telescope structure, Nance said it would flow to the north, away from Lake Waiau. Nor would any runoff from the construction staging area known as the batch plant, much closer to the lake, enter the lake's watershed, Nance stated under questioning from TMT attorney Douglas Ing.

"So is it physically possible for runoff from either the ... TMT observatory site or the batch plant to reach Lake Waiau?" Ing asked.

"It is not physically possible," Nance replied.

Under cross-examination by the petitioners, Nance was repeatedly questioned about his knowledge not only of underground aquifers, but also about the views held by petitioners on Hawaiian religion, mythology, and sovereignty.

Several challenged Nance about his claim that no runoff would ever make its way to Lake Waiau.

"You wouldn't really know exactly where the cracks and crevasses and aqueducts and things are under the ground, would you?" petitioner William Freitas said in his turn at cross-examination of Nance.

"That's correct," Nance said, "but the realities are that if you're going to suggest that something spilled at the TMT site could get into Lake Waiau – Lake Waiau is a perched groundwater source. So let's just take your example. Let's say something spilled and started migrating wherever, it still can't get into Lake Waiau. Because Lake Waiau, the bottom is sealed off by an impermeable layer."

Freitas remained skeptical, going on to suggest that heavy rains, snow melting, earthquakes or other disaster could lead to just such an outcome.

Although the operation of the TMT will not involve the use of mercury at all, the prospect of a mercury spill is a point that has been frequently raised by the opponents.

Freitas questioned Nance on this point, asking if he had ever tested to see if mercury percolated through cinders or solid rock. (Nance answered no.)

While Nance acknowledged that the exact hydrology of Mauna Kea had not been studied extensively, the structure of Hawai'i's volcanoes had been characterized well enough to give him confidence that the presence of telescopes in the summit area would have no impact on any underground water sources.

Petitioner Pisciotta questioned Nance extensively on this. "In your written direct [testimony], you actually discuss that any discharge at the summit of – I suppose, anything hazardous or contaminant – will be filtered through a thousand feet of porous lava. Is that correct?" she asked.

"Probably multiple thousand of feet," Nance replied.

"So I'd like to ask you, if you understand that – and you may not – but do you understand that waters are considered sacred to native Hawaiian practitioners?" she asked.

"I'm not qualified to answer that," Nance said.

"Are you aware that native Hawaiian practitioners consider those waters sacred because they're associated with different gods and goddesses?" she asked.

"I'm not aware of that," Nance replied.

She then asked Nance if he'd tested around the observatories for the presence of mercury, jet fuel, washing chemicals, hydraulic fuels, or any release of hazardous materials or sewage. Nance said he hadn't.

Nance later dismissed a notion Kaiama had raised that the TMT would disturb wind patterns and thereby disrupt the water regime at the summit area.

"I doubt it would be of any significance," was Nance's reply. — *Patricia Tummons*