

Environment



Hawai'i

a monthly newsletter

Rough Waters

To describe the disputes over East Maui streams as long-running doesn't quite do them justice. And they are as bitter as they are long-lived.

The network of tunnels, pipes, and ditches that convey water from East Maui to the central plains is necessary to keep Maui green, say representatives of Alexander & Baldwin, the former sugar giant and now champion of diversified agriculture.

But to many of the small communities of East Maui that rely on the same water to irrigate their taro fields and supply them with water for drinking and other uses, that's no excuse for lax management of the company's diversion permits.

A contested case hearing over temporary permits allowing A&B to keep diverting the streams has been requested. If granted, it would represent just the latest development in the dispute. Few would argue it would represent the last, however.

Sierra Club Seeks Contested Case On Diversion Permits for East Maui

Just how strict should the state be on Alexander & Baldwin, Inc. (A&B), and its subsidiary, East Maui Irrigation Company, Ltd. (EMI), when it comes to policing the permits that allow them to divert tens of millions of gallons of water a day from East Maui watersheds?

With the closure of Hawaiian Commercial & Sugar's sugarcane plantation in December 2016, the companies don't need to divert anywhere near the volume of water they used to. Recognizing that, the Commission on Water Resource Management decided in June to require either full restoration or the maintenance of 64 percent of median base flows in about two dozen East Maui streams that were the subject of a contested case hearing initiated nearly two decades ago.

But the pressure to keep A&B's 36,000 acres in Central Maui green has led the Board of Land and Natural Resources and the department it advises to simply take the companies' word that they have complied with permit terms. That, at least, is what the Sierra Club of Hawai'i, the Office of

Hawaiian Affairs, and an attorney with the Native Hawaiian Legal Corporation argued at the board's November 9 meeting, where it approved the renewal of holdover permits to EMI and A&B to continue their diversions in four state license areas for another year.

To address some of the concerns about A&B's and EMI's compliance, the board conditioned the approval on the establishment of a small advisory group to facilitate communication among the companies, residents of East Maui, and state experts on aquatic life over the next year and, perhaps, beyond.

But that fell too short for the Sierra Club, which had warned the board earlier in the meeting that it would seek a contested case hearing on the permits if the board failed to include conditions adequate to protect public trust resources. On November 19, the group filed a written petition with the Department of Land and Natural Resources requesting a contested case hearing.

"In public testimony, we presented

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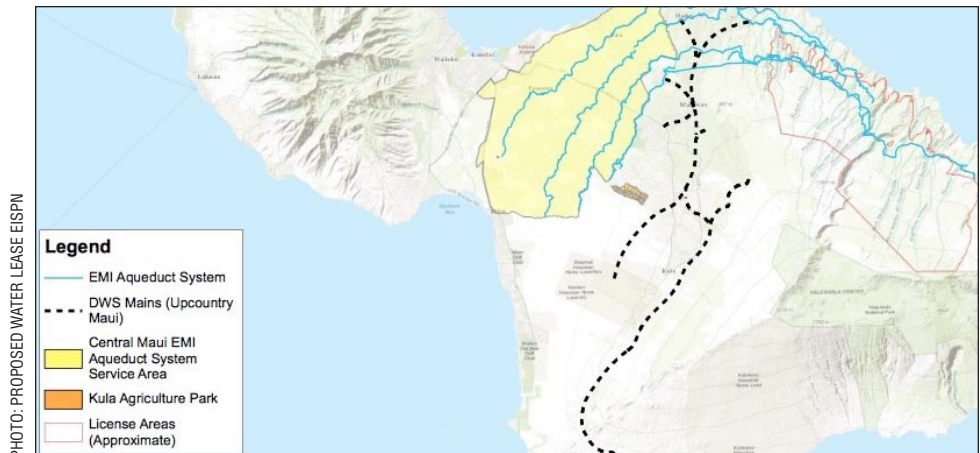
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Alexander & Baldwin says it diverts 20 to 25 million gallons of water a day from East to Central Maui via its extensive ditch system.

Environment

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NEW AND NOTEWORTHY

Maui Goes to Court: Maui County is asking the U.S. Supreme Court to review – and overturn – the decision of the 9th U.S. Circuit Court of Appeals last February that found the county was operating its Lahaina wastewater treatment plant in violation of the federal Clean Water Act.

In its petition for cert, filed in late August, the county labels the appellate court's decision as a "radical expansion of point source permitting" and repeatedly refers to a "bright-line test" to distinguish between point source and nonpoint source pollution. "Without this Court's intervention," the county's attorneys, based in Richmond, Virginia, state, "a wide array of sources previously regulated outside the [National Pollutant Discharge Elimination System] point source program, like the underground injection control (UIC) wells at issue here, will be brought suddenly within it."

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Filing amicus briefs in support of the county are the conservative Pacific Legal Foundation and a group of 17 state governments and the governors of Kentucky and Mississippi. A third amicus brief was filed by the National Association of Counties, the National League of Cities, and a host of organizations representing municipal sanitation agencies and other interested parties.

Opposed to the petition are the Hawai'i Wildlife Fund, the Sierra Club—Maui Group, the Surfrider Foundation, and the West Maui Preservation Society. These groups are the original plaintiffs.

In the brief filed by their attorney, David Henkin of Earthjustice, they dispute the county's claim that the lower court's decision, if upheld, will increase the number of facilities requiring NPDES permits "by several orders of magnitude." "The determination whether an indirect discharge 'is the functional equivalent of a discharge into the navigable water' is fact-specific," Henkin writes, to be made on a case-by-case basis.

"Even should the number of facilities requiring permits increase," Henkin argues, many, if not most of them, could qualify for general permits, "which greatly reduce the administrative burden." Of the 137,455 facilities nationally that have NPDES permits, he notes, more than two-thirds operate under such general permits.

Maui Is Taken to Court: Another case involving Maui County is on appeal to the highest court in the nation – this one brought by Douglas Leone, one of the richest men in the country. Leone and his wife, Patricia Perkins-Leone, own coastal property in Makena, Maui. The county denied them permission to build a single-family residence on the lot. Leone appealed in state court, with the county's denial ultimately upheld by the state Supreme Court in October 2017. (For details, see the cover article in the November 2017 edition of *Environment Hawai'i*.)

Once again, the Pacific Legal Foundation is weighing in with an amicus brief, on behalf of itself, the Cato Institute, the Owners' Counsel of America, the Southeastern Legal Foundation, University of Hawai'i law professor David Callies, the Land Use Research Foundation of Hawai'i, and the NFIB Legal Center. Also supporting Leone are briefs from the U.S. Chamber of Commerce and the conservative Center for Constitutional Jurisprudence.

Exploring the Abyss: Craig Smith of the University of Hawai'i's School of Ocean and Earth Sciences and Technology will be the featured speaker at *Environment Hawai'i's* annual dinner, to be held January 18 in Hilo's 'Imiloa Astronomy Center. Smith will describe the jaw-dropping finds he and his team made when exploring the seafloor of the Clarion-Clipperton zone. That area, which lies between Hawai'i and Mexico, has been proposed for deep-ocean mining of manganese nodules.

In addition to a buffet dinner, the evening will include live music by Jazz X 2 and a silent auction. The cost is \$70 a head, which includes a \$35 tax-deductible donation.

Reserve your place now. Call 808 934-0115 to charge your order, or mail a check to the office: 190 Keawe Street, #29, Hilo HI 96720.

Quote of the Month

"Before you stop the war, you have to have a cease-fire meeting."

—Stanley Roebrigg, Land Board

Land Board Grants New Permit For Hotel's Use of Kahala Parcel

The Kahala Hotel & Resort didn't get everything it wanted, but it did get the Board of Land and Natural Resources to condone — albeit conditionally — what many consider to be commercial uses under a permit that had long been restricted to recreational and maintenance uses.

On November 9, the Land Board unanimously approved a new revocable permit to the hotel that allows the setting of clamshell loungers and cabanas — which cost \$100 and \$200 a day to rent — and various other types of beach-related equipment on a state parcel fronting the sandy beach, so long as the City & County of Honolulu also allows it.

A month earlier, city Department of Planning and Permitting acting director Kathy Sokugawa informed the hotel that the items, which had been there for years, were within the Special Management Area (SMA) and considered development under the city code. Concerned members of the public had pressed the city to weigh in on the matter, which had been raised during the hotel's efforts months earlier to obtain the Land Board permit.

"Without a SMA permit, [the items] are not allowed under applicable City and State laws," Sokugawa wrote, adding that if they weren't removed by November 1, her department would issue a notice of violation. The cabanas, which sat on large concrete pavers along the beach, would require a shoreline setback variance, an environmental assessment, and a building permit, she added.

The hotel acquiesced. Its month-to-month permit from the Land Board requires compliance with all applicable laws, and appealing to the board for a new one while at loggerheads with the city would be problematic.

The result: "They cleared it. It looked beautiful yesterday. It looked peaceful. Everybody was coexisting," Land Board member Keone Downing said at the board's meeting.

"Most of us in the community are quite pleased with the current condition of the property. What we see today is what we've been trying to push the hotel to do, [create] an open, unencumbered area ... free of cabanas, free of the restaurant," testified James Nicolay, a member of the public who opposed the terms of the proposed new permit.

Whether the parcel stays clear remains to be seen. Jennifer Lim, one of the attorneys representing the hotel's parent company, Resorttrust Hawai'i, told the board that she is working on getting clarification on the city's requirements to determine what can be put back.

"The city has been well aware of what's been going on on the property for decades ... It's never been an issue," she said of the activities conducted there in the past, such



A decades-old view of the sparse beach fronting the Kahala Hotel & Resort.

as weddings, restaurant service, and cabana and lounge rentals. "There are a handful of people who have been in touch with the city and been putting pressure on the city to take some action," she said. Some of those same people have also appealed to the Land Board.

Given the city's October letter, Lim said the cabanas would not likely return, at least not with the concrete pavers beneath them.

Land Board member Chris Yuen noted that getting city approval of a SMA minor permit for the other structures would be relatively simple, but if the city held to its position that a shoreline setback variance and environmental assessment would be required for the cabanas, that was "kind of a big deal."

Lim agreed. "To go through the agony for a shoreline setback variance would be pretty foolish [for a revocable permit]. ... Ultimately, it's a business decision. A variance is a pretty big ask," she said.

Even so, she asked the Land Board to include cabanas in the list of the 40 types of items that would be allowed on the parcel under the new permit.

Board members were open to the idea, but wanted to make sure that the configuration of the equipment and furniture didn't discourage public access. The rows of clamshell loungers, for example would have to include two 20-foot-wide gaps to allow the public to maneuver throughout the parcel.

"You gotta keep the beach side open. If we allow clamshells right at the beach, you're already telling the public you can't sit there. We've got to give them a place to sit," Downing added, before offering to help the hotel set things up.

The board considered granting the hotel's request to expand its Seaside Grill seating onto the parcel during peak visitor periods, but ultimately passed on the idea because Downing said it might impede lateral access. Board member Yuen also said he thought it was hard to argue that restaurant seating was a recreational use.

The board struggled with how to set rent for the new permit. The DLNR's Land Division said an appraisal would be done, but Downing asked how that would work when commercial uses aren't allowed without city approval.

While Land Division administrator Russell Tsuji seemed to think the market value of the property — which is considered "reclaimed land" — would be valued at somewhere around 50 percent of the value of the hotel's property, Yuen argued that an appraiser should consider how important it is for the hotel to control the site.

"If a private owner owned this piece of property and a hotel owner was going to develop next to it, [and] there was some deed restriction you couldn't build anything, but you had to let the public go across it, I think the hotel would pay a lot of money to buy it. ... That's a high-end way of looking at the value," Yuen said.

Downing, however, had done his own estimation of the revenue the hotel has generated from its use of the property and came up with a proposed rent of \$6,300 a month or three percent of gross receipts, whichever is greater. He said he included the percentage rent option to force the hotel to disclose how much they're making off the property. "I only want to charge what's fair," he said.

Because the city has taken the position that no commercial uses are allowed without its approval, the board decided that the

new rent, as proposed by Downing, would only kick in if and when the hotel received permission from the city to conduct commercial activities on the parcel. Until then, the hotel would continue to pay its previous rent of \$1,244 a month.



Contested Case Denial Clears Way For New Permit

Before the board voted on the Kahala permit, it had to dispense with the matter of a contested case hearing request made in September by David Kimo Frankel. Frankel testified at a board meeting that month that hotel staff had tried to prevent him from traversing the permit area during a wedding that was taking place last year.

In his petition for a contested case, Frankel argued that the new permit proposed by the DLNR's Land Division — or even the renewal of the old one — would adversely affect his recreational, aesthetic and environmental interests.

At the board's November 9 meeting, Land Division administrator Russell Tsuji reported that the Department of the Attorney General found that Frankel had no constitutionally protected property interest

in the permit and, therefore, the contested case request should be denied.

Tsuji added that Frankel had ample opportunity to testify before the board on the matter and granting a contested case hearing would be burdensome on the department. What's more, it would likely extend beyond the permit term of one year.

"We've all been through Mauna Kea. That was a very expensive process," Tsuji told the board, referring to the months long contested case hearing over the development of the Thirty Meter Telescope on the mountain.

In written testimony, Frankel excoriated the rationale being used to reject his request. He argued that the state's land use law is, indeed, an environmental law and that the Land Board must comply with state laws relating to the Special Management Area and environmental reviews.

Frankel pointed out that the Land Division's report to the board ignored the Honolulu Department of Planning and Permitting's October 9 letter, "which determined that the hotel's uses of the revocable permit parcel violated [Hawai'i Revised Statutes] chapter 205A — and that a proposed use requires the preparation of an environmental assessment or environmental impact statement pursuant

to HRS chapter 343."

In any case, Frankel wrote, "The property right protected by the constitution is shaped by these laws." He added that the Land Board's rules don't require him to identify the specific legal basis for a contested case hearing.

The Hawai'i Supreme Court's October 30 decision in the TMT case re-affirmed the principal that "any balancing between public and private purposes must begin with a presumption in favor of public use, access and enjoyment," Frankel wrote.

"Given the BLNR's trust duties, the BLNR requires much more information — which a contested case would provide (as outlined in my October 2 analysis) — before it can authorize this use of public land," he wrote.

With regard to the administrative burden a contested case hearing would have on the department, Frankel argued that the Land Division was exaggerating the potential effect.

"I have served as an attorney in several BLNR contested case hearings.... None of the hearings that I have been involved in have lasted five days. The comparison to the Mauna Kea hearing is absurd. ...

"[P]lease consider the burden BLNR will face if a contested case hearing is denied and I sue on the merits. ... Would it be less of a burden for the BLNR to face a trial (as it did in the Pohakuloa litigation) on issues such as its compliance with its public trust duties?" Frankel asked.

While some Land Board members supported the idea of granting a contested case hearing, they were not in the majority. The board voted 4-3 to deny Frankel's request.

— T.D.



Jennifer Lim, attorney for the Kahala Hotel & Resort, shows the Land Board where beach equipment and furniture would be stored on the state's property.

For Further Reading

- "New & Noteworthy: Kahala Update," November 2018;
- "Contested Case Request Halts Attempt to Condone Commercial Use at Kahala," and "Sen. Thielen: Use of Kahala Land Needs an Environmental Review," October 2018;
- "Board Talk: Kahala Hotel's Beach Use, Helicopters on Kaua'i," September 2018;
- "Kahala Hotel Beach Weddings Not Sanctioned by DLNR Permit," July 2017.
- All are available at www.environment-hawaii.org.

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eye-witness accounts and photographic evidence of dry streams where there should be water, large pieces of twisted metal in and along stream beds, and the lack of connection between severed parts of streams such that native species cannot complete their natural life cycle. We have demonstrated that the applicant has not complied with prior permit conditions and they should not be granted a renewed permit, at least not without ensuring complete compliance first," the petition stated. Whether or not the Land Board grants the contested case hearing remains to be seen. Even if it does, the diversions would likely continue while the case proceeds, absent a restraining order. As the DLNR's Land Division stated in a report to the board, the revocable permits that were in place before Act 126 went into effect are in "continued holdover status." (Act 126 was passed by the 2016 Legislature in response to a Circuit Court ruling invalidating the revocable permits the Land Board had been issuing to A&B and EMI for years. The legislation allowed those diverting water under revocable permits to continue to do so for up to three years, while they pursued long-term leases for their diversions.)

"Although the permits were invalidated by the Circuit Court, the ruling was stayed pending [an appeal to the Intermediate Court of Appeals]," the division wrote, adding that it was recommending approving the holdover permits under Act 126 anyway, "in an abundance of caution and in the event the decision is upheld on appeal."

Progress

At the board meeting, A&B vice president Meredith Ching and Darren Strand, the company's manager for diversified agriculture, reported on the company's efforts to transition its lands from sugarcane to diversified agriculture and to continue to provide the county with water for domestic and agricultural uses in Upcountry Maui. About 5,000 acres have been dedicated to raising cattle, the Maui County Council has approved the acquisition of just under 300 acres to expand its agricultural park, a lessee growing pongamia intends to expand to 250 acres, 600 acres have been set aside for a biogas and feedstock production partnership with the Kahului wastewater system, and the company has leases or partnerships with other farms spanning 800 acres, they said.

That said, they announced that A&B is pursuing a farming partner from California

that plans to grow food crops on nearly the whole footprint of the company's agricultural lands, "very similar to what we proposed," Strand said.

Ching said the group was in final stages of a feasibility analysis. Should it take over the company's lands, planting could begin as soon as next year, she said.

Whoever ultimately controls the lands, Ching, Strand, outgoing Maui mayor Alan Arakawa, and representatives for local farm bureaus all testified to the need to continue the diversion of stream water from East Maui.

Arakawa said the diversions, which provide cheaper water than the county can provide, are necessary to fulfill the community's goal of keeping the former plantation lands in agriculture. "We have to grow farmers. It doesn't happen overnight," he said.

With regard to the county Department of Water Supply's reliance on the diversions, Arakawa added, "Long-term, we're going to have to look to East Maui for water as continued growth on Maui occurs."

The county has an agreement with A&B that requires the company to provide water from its system to meet domestic and agricultural needs in Upcountry. Arakawa said it would cost too much for the county to develop its own diversion system or to condemn a portion of EMI's.

Instead, the county is exploring ways to install pipes in the EMI system using the state's authority. "The state has, by contract with A&B, the use of the EMI system, which is what I would like the state to convert to the county, so the county would have the ability to use the EMI ditch system," he told the board.

Ultimately, the county's goal should be to develop lateral tunnels that take subsurface water that can be piped to Central Maui, "but that's going to take billions of dollars and that's going to take decades to create," he said.

In the meantime, A&B reported that it has been diverting 20 to 25 mgd from East Maui, a portion of which is delivered to the county.

'Scout's Honor'

However important the diversions might be, East Maui resident Lucienne de Naie, who is also vice chair of the Sierra Club Hawai'i Chapter, had a problem with how the permits were being managed.

"Everyone supports sharing water on a reasonable basis, but I think that your job is to have accountability as you apportion public resources. We find the accountability

is sort of missing in this process," she told the Land Board, adding, "We really don't know a lot about how these conditions are being met. It's sort of a scout's honor kind of thing."

Under the permits approved in 2016 and 2017, A&B and EMI were not only prohibited from wasting diverted water, but they also had to take steps to ensure that aquatic organisms could migrate up and down streams that have diversion structures on them, and that garbage and debris in the permit areas were removed, among other things. What's more, Act 126 specified that the board could only approve a holdover permit if the use complied with the public trust doctrine.

In approving the first two holdovers under Act 126, the Land Board abstained from specifying an enforcement mechanism to ensure that, at the very least, the companies weren't wasting water.

Last month, the DLNR's Land Division revised its recommended conditions for the permit to mirror requirements imposed on the companies last June by the state Commission on Water Resource Management. At that time, the Water Commission amended the interim instream flow standards of the streams that were part of the contested case filed by Na Moku Aupuni O Ko'olau Hui in 2001. Rather than keep the previously approved cap of 80 million gallons per day, the Land Division was now recommending that "any water diverted under the revocable permits shall be for reasonable and beneficial use and always subject to compliance with the amended IIFS."

Again, the division was silent on how permit conditions should be enforced. More than a decade ago, in the course of the contested case hearing, the Land Board tasked the division with the job of monitoring whether or not the companies were providing East Maui taro farmers with the amount of water the board had allocated on an interim basis. For various reasons, the scheme never really worked and dissatisfied members of Na Moku went so far as to open up one of the streams' diversions themselves.

At the board's meeting and in written testimony, the Office of Hawaiian Affairs (OHA) echoed the Sierra Club's concern about the lax enforcement.

"While the submittal does provide some holdover conditions that ostensibly seek to ensure that any diverted water is used responsibly and for 'beneficial uses,' the

Continued on next page

lack of mechanisms for monitoring and compliance verification risks rendering such conditions practically meaningless," OHA stated in its testimony to the board.

A&B's October 16 compliance report to the DLNR provided a single short paragraph with regard to the waste/beneficial use conditions. It simply stated, "Total water diverted from East Maui streams approximated 20-25 mgd throughout 2018. All water was used to meet the needs of the County of Maui for its Upcountry and Nahiku public water systems, the Kula Ag Park, and fire suppression needs, as well as for diversified agricultural needs on former sugar lands in Central Maui."

OHA complained that the Land Division's recommendations failed to require field inspections, water meters, or "publicly accessible, live reporting of diversion and consumption amounts." Also, the division's report provided no clear description of "what, where, and how diverted water may be used," OHA added.

De Naie also pointed out that A&B's and EMI's efforts to ensure the streams allow aquatic organisms to migrate — by simply installing pipes across diversions, in most cases — were inadequate.

"The pipe at Puolua stream, it does not allow for any fish. It's an 8-inch pipe. The fish would have to swim across the road. Someone should be out checking these things and giving you real factual information so that you know how those conditions are doing. The public could be a good step in that," she said.

She added that Hanehoi Stream, which A&B promised in 2016 to fully restore, had not been, and she showed photos to prove it.

"It has diversions at four different elevations. The only diversion that is open is the bottom gate. ... If it's supposed to be completely restored, you need a way of not diverting at those top three diversions. A&B tried to get a permit. It didn't happen for two years. Finally, in July of this year, it was decided that they could close those gates without a permit as a regular maintenance activity," she said. Even so, the other three diversions are continuing to divert water, she added.

In an October 24 letter to Land Board chair Suzanne Case, A&B's Strand reported that the company had received all necessary regulatory approvals to permanently abandon 15 of the diversions on streams that serve taro farmers. "That work will proceed immediately," Strand wrote.

Even so, OHA recommended that the

Land Board require the companies to post a performance bond or provide some other kind of financial assurance. Both OHA and the Sierra Club recommended several conditions that would satisfy their concerns.

"If you're going to say 'only use for ag services,' why not [have A&B] provide productivity reports?" asked OHA's Wayne Tanaka. "This is actually a really critical opportunity to look forward to the long-term lease," he added.

Other Streams

In addition to the reported problems with enforcing permit conditions, the Sierra Club, OHA and Alan Murakami of the Native Hawaiian Legal Corporation (which represents Na Moku) argued that the Land Board was failing to consider the impact the diversions have on those streams not addressed by the Water Commission's June decision.

Murakami said the board needed to assess the extent to which the diversions affect native Hawaiian traditional and customary practices "that may or may not be practiced by the members of Na Moku."

Dean Uyeno, head of the Water Commission's stream protection and manage-

so far that the Land Board does not have the information it needs to make informed decisions about the fate of these streams," Townsend stated.

Round Table

Given that a number of testifiers pointed to the need to allow the affected communities to help monitor and/or facilitate stream restoration efforts, Land Board member Stanley Roehrig suggested that a permit oversight committee be formed and include representatives from the East Maui community and the diverters.

Murakami said Na Moku would welcome something like that.

A&B's Ching had announced earlier in the meeting that there was no way the company would be able to secure a long-term lease before the permit expires and Act 126 sunsets at the end of 2019. Draft and final environmental impact statements for the lease still need to be completed, and that alone will take until the end of 2019, she said. After that, the DLNR needs to conduct an appraisal and prepare lease documents. "The process is going to extend to 2020," she said.

"You need to go back to Legislature?"

"I'm not in favor of endless conditions."

— Stanley Roehrig

ment program, testified that the IIFS decision dealt with only a third of the East Maui streams, and that the agency's goal was to eventually set new IIFS for the remaining ones.

"There are streams between Honopou and Maliko Gulch that are being diverted, as well, outside of the license area," he said.

In its petition for a contested case hearing, the Sierra Club's Marti Townsend noted that the Huelo license area has no public water supply and "communities there along Kailua, Hanawana, Hoaloe, Waipio, Waipio Iki, Mokupapa, Honokala and Ho'olawa streams need sufficient water in the stream year round for residents living downstream to use water from the stream to meet domestic and recreational needs as well as kuleana rights. None of these streams are included in [Na Moku's IIFS] petition."

"There are many more streams in this watershed, on public land, that need to be restored for the sake of the ecosystem and the people who rely on it. The Land Board is the only entity responsible for ensuring these additional streams are wisely used and fully protected. Yet it is clear from the record

board member Keone Downing asked.

"It appears that's necessary. Not only us, but nine others [water diverters] including farmers on the Big Island, the Kaua'i utility ..." she replied.

To this, Murakami said later that he was "totally against any extensions [of Act 126] in the Legislature."

Even so, Downing encouraged the parties involved to work together toward a long-term solution.

"We need to involve all community, all aspects of community... Not Honolulu, not the Legislature," he said. Otherwise, the fight over the water will continue. "It becomes billable hours for attorneys and consultants and we lose as Hawai'i. There's no gain for us. ... Please, let's try to move forward as a community," he said.

In making his motion to approve the holdover permits, Roehrig seemed to agree with some of the testifiers that A&B and EMI had fallen short in their duties. "I didn't hear one word from the applicant about how much water they're going to use and that disturbs me because they have the burden of proof," he said.

Continued on next page

Despite Record Number of Hooks, Bigeye Tunas Elude Hawai'i Fishers

Where are the bigeye?

According to recent reports from the fishing front, that question has been uppermost in the minds of the captains and crew of Hawai'i longline vessels for most of this year.

From January 1 to June 30, longliners took a record number of trips for that period and set a record number of hooks – more than 29 million. What's more, they substantially increased their effort inside the U.S. exclusive economic zone around the Main Hawaiian Islands (MHI); in 2017, they set 3.7 million hooks in that area for the first six months of the year, while in 2018, it was more than double that, 8.7 million hooks.

The fishermen “are struggling to find fish,” fisheries scientist Russell Ito told the committee that provides scientific and statistical advice to the Western Pacific Fishery Management Council when it met recently in Hilo.

Compounding their problems, he said, was the fact that “when they do catch fish, they're catching smaller ones.” While most full-size bigeye weigh in at 80 pounds or more, “now it's 20 to 30 pounds, maybe 40.”

The small fish fetch between \$3 and \$5 a pound at the auction, while the large fish can bring as much as \$12 a pound.

“Also,” Ito added, “it takes a lot more effort for a small fish than a big fish.” In hopes of increasing the auction price, he noted, some fishers stay at sea, waiting for a time when demand may be higher. “There have been quite a few auction days where folks stayed out at sea, with nothing at the dock.... There are days where it's awfully thin on the auction floor, with boats waiting two to three days to unload.”

“There are poor bigeye catches so far,” he told the Scientific and Statistical Committee. With fishers unable to find the fish, “it's been like a shotgun blast around the Main Hawaiian Islands. They've tried everything but can't figure it out. The water is warm. They go far north and still they're running into really warm water.”

Regardless of the “poor” bigeye catches, the fleet was nonetheless expected to hit its limit of 3,554 metric tons, established by the Western and Central Pacific Fisheries Commission, in November. By November 20, it had reached 99 percent of the quota and had begun catching against the allotment of the Commonwealth of the Northern Mariana Islands.

Regarding the increased effort inside the EEZ, Ito said he was at a loss to explain it. “I was pretty surprised at seeing so much effort in the Main Hawaiian Is-



PHOTO: NOAA

lands exclusive economic zone. There's a lot of concern about false killer whale interactions” inside the zone.

This localized effort could, as Ito suggested, account for the fact that the longliners have interacted with more marine mammals, including the endangered population of false killer whales found inside the MHI exclusive economic zone, than in previous years. In July, the determination that at least two of those interactions resulted in death or serious injury forced the National Marine Fisheries Service to close off to longliners a large swath of open ocean south of the islands known as the Southern Exclusion Zone.

Swordfish Bi-Op

In theory, the swordfish fleet, which sets hooks at a much shallower depth than the vessels targeting bigeye, could still fish in the Southern Exclusion Zone even after the tuna longliners were shut out. That fishery, however, was shut down last

Continued on next page

However, he balked at adopting the many conditions recommended by the Sierra Club and OHA. “We can't put too conditions on this RP. That's not our job and we wouldn't even get 'em right if we did. I'm not in favor of endless conditions. I'm in favor of a committee and you folks tell us what's important,” he said.

The Sierra Club had asked that such a committee, if formed, meet quarterly to discuss A&B's plans for stream restoration projects, but Land Board member Chris Yuen suggested that only one meeting be held during the permit period and that the Native Hawaiian Legal Corporation could be the point of contact for the taro farmers.

Yuen supported the idea of establishing a committee once a long-term lease is in place, but seemed hesitant to do it just for permits that will expire in a year.

To this, Downing pointed out, “This is not a short-term [permit]. Even though

it's an RP, we know it's going back to the Legislature. We start this process now, it's a process that could help the Legislature [and] maybe it helps the community that is in distrust.”

“Nothing's going to get done in one meeting. Questions are going to be asked, but that's it,” he said.

“Before you stop the war, you have to have a cease-fire meeting. Maybe it takes two before you get to talking about the serious matters,” Roehrig added. Like Downing, he seemed to think the committee should be formed sooner than later. “I'm not interested in waiting another year,” he said.

In the end, the board agreed to establish a five-member committee to discuss water issues in the license areas. OHA and NHLC would each designate members, as would the farm bureau, A&B, and the county. A staff member from the DLNR's Division of Aquatic Resources would be made available to provide expertise to the committee. The committee

would meet monthly for the first quarter of next year and meet quarterly thereafter.

With that added condition, the board approved the permits. (Maui board member James Gomes, whose employer works with A&B, recused himself.)

While the establishment of a committee seemed to address one of the Sierra Club's initial recommendations, the group was nowhere near satisfied. In its petition for a contested case hearing, Townsend argued that the holdovers were inconsistent with the public trust doctrine, among other things.

She reiterated many of the concerns raised at the November board meeting and asked that the permits be denied because the applicants had not justified their diversions. Should the permits be granted, the group asked that 11 conditions be imposed. They included measures to obtain more data on water use and stream restoration activities and to ensure enforcement of permit conditions, among other things. — **Teresa Dawson**

spring and remains closed for the duration of the year.

The lawsuit that ultimately led to the fishery's closure involved a challenge to the number of takes of endangered Northern Pacific loggerhead sea turtles allowed annually by the National Marine Fisheries Service.

Because the species is endangered in the Pacific, NMFS sets limits on just how many of these turtles can be hooked by the fishery in a given year. In 2012, NMFS increased the allowed take for North Pacific loggerheads to 34, exactly twice the number of the previously allowed take.

The agency was sued over the change in a lawsuit brought by the Turtle Island Restoration Network and the Center for Biological Diversity. That litigation reached the 9th U.S. Circuit Court of Appeals, which, last December, determined that the biological opinion NMFS had issued to justify the increase was arbitrary and capricious.

NMFS and the Hawai'i Longline Association, representing vessel owners, agreed to settle rather than appeal. By the time the agreement was struck in April, the fishery was just one loggerhead away from the new limit of 34 and it would have had to close soon anyway.

The settlement calls for NMFS to develop a new biological opinion and, until that is approved and new rules implemented pursuant to it, the old take limit stands.

The Scientific and Statistical Committee had expected to be able to review a draft biological opinion at its October meeting. But, as council staffer Asuka Ishizaki reported, the so-called bi-op was not yet ready.

The SSC did hear, however, from Pacific Islands Fisheries Science Center's T. Todd Jones, who has been conducting vulnerability assessments for Pacific populations of both loggerhead and leatherback sea turtles. Under the analyses conducted by his team, there was a "positive trend for loggerheads," with an annual growth rate of its population of around 2 percent.

For leatherbacks, the prognosis was more dire. Looking at a population of nesting females at two beaches in Irian Jaya, believed to represent the largest remaining nesting population, Jones said that at present, they were estimated to number 1,480. But at the current rate of decline – more than 5 percent per year – within 50 years, their num-

bers would almost certainly fall below half that. And a century from now, the chance that their numbers would fall below 12.5 percent of what they are now exceeded 90 percent.

That analysis, however, is almost certainly more optimistic than it would be if it took account of other factors, including the impact of hookings by foreign fleets and climate change. The U.S. longline fleet represents roughly 5 percent of the vessels in the Pacific that interact with leatherbacks; no good way exists to estimate takes by foreign vessels, which generally operate with far fewer restrictions



Olive ridley sea turtle.

PHOTO: BERNARD GAGNON

than U.S. vessels.

When Larry Crowder of Stanford University, a renowned expert on sea turtles, was asked to give his assessment of the work being done by Jones' team, Jones said, Crowder commented that "most of the modeling and analysis that has been done constitutes a valiant effort to compensate for a debilitating lack of data."

And Still More Takes

On top of the problems longliners face as a result of their take of loggerheads, leatherbacks, and false killer whales, now scientists are seeing increased interactions with two more protected species: the olive ridley sea turtle and the black-footed albatross.

A team of scientists from Florida – Robert Ahrens, Zach Siders, and Nicholas Ducharme-Barth – has been looking at what factors might influence the take of the olive ridley turtles, which enjoy protection as a federally listed threatened species.

"In the last three years," they told the SSC, "olive ridley interactions in the

longline deep-set fishery are an order of magnitude higher than that for other turtle species." Among the factors that they have considered are the vessels' location at the time of the interactions, the sea surface temperature, cloud cover, ocean currents, weather, and lunar phases.

So far, no definite conclusions have been made. Their work is ongoing.

About the same time that the increased interactions with the olive ridley turtles were noticed, observers also began seeing a much higher incidence of interactions between the longliners and black-footed albatross, which are protected under the

Migratory Bird Treaty Act. According to Ishizaki, there have been four continuous years of higher levels of interactions with the albatross. While populations for both Laysan and black-footed albatross "are stable or slightly increasing," she said, "they're not increasing at the same rate as the increase in interactions."

Among the possible causes, she suggested, were "fleet dynamics" (where the vessels fish), "captain effects" (some captains have higher interaction rates than others), and "changes in black-footed albatross behavior" (the birds may be learning over time that the longliners are associated with prey or offal discards).

In September, the council held a seabird bycatch mitigation workshop, which looked at current mitigation measures and considered possible changes or additions to them. Increased training of captains and crew, heavier weights on branch lines, and the use of streamer lines to deflect birds were among the options that merit further consideration, Ishizaki said.

— P.T.

Hawai'i Supreme Court Upholds Permit to Allow Construction of TMT

In a long-awaited decision issued on October 30, the Hawai'i Supreme Court determined that the state Board of Land and Natural Resources did not err when it awarded a Conservation District Use Permit (CDUP) for construction of the Thirty Meter Telescope (TMT) near the summit of Mauna Kea.

The opinion was not unanimous. The majority decision was signed by Chief Justice Mark E. Recktenwald, Associate Justice Sabrina S. McKenna, and 1st Circuit Judge Jeannette H. Castagnetti, filling in for Associate Justice Paula A. Nakayama, who recused herself. Associate Justice Richard W. Pollock concurred in part and concurred in the judgment of the majority. Associate Justice Michael D. Wilson joined with part of Pollock's opinion, but dissented from the conclusion of the majority.

Before the high court were three consolidated appeals of the decision made more than a year earlier by the Land Board. On September 27, 2017, it had issued its Findings of Fact, Conclusions of Law, and Decision and Order (D&O for short) that contained 1,070 findings of fact and 512 conclusions of law. Altogether, the document ran to 271 pages.

That document itself was the result of a contested case hearing that ran for more than 40 days in 2016 and 2017, with retired judge Riki May Amano presiding over the quasi-judicial proceeding. Amano drafted her own recommended D&O and presented it to the Land Board. In crafting the final decision, the board accepted many of Amano's proposed findings, but rejected some as well.

Following the Land Board's decision to award the permit to the TMT, the 17 parties to the contested case who opposed the permit filed their appeals to the high court. (See separate box for a list of the parties who appealed the case.)

It took just over a year for the court to reach its decision. But once it was released, there was little suspense in the outcome. By the third paragraph, the majority justices disclosed the outcome of their deliberations:

"In this opinion, we address whether the BLNR properly applied the law in analyzing whether a permit should be issued for the TMT. Upon careful consideration

of the written submissions, the applicable law, and the oral arguments, and for the reasons explained below, we now affirm the BLNR's decision authorizing issuance of a Conservation District Use Permit (CDUP) for the Thirty Meter Telescope (TMT)."

The majority justices helpfully listed the "points of error" that were raised in the appeals, categorizing them in four general topics: disqualification issues; Native Hawaiian rights; public trust and land use; and other "procedural" issues. The last of these concerns technical arguments about the conduct of the contested case hearing, for the most part. Nearly every point raised by the opponents in this category was quickly dispensed with by the justices.

Disqualification Issues

The TMT opponents challenged the selection of Amano as the hearing officer, arguing that her membership in the 'Imiloa Astronomy Center compromised her ability to be impartial. The 'Imiloa is



PHOTO: TMT INTERNATIONAL OBSERVATORY
An artist's rendering of the Thirty Meter Telescope.

administratively attached to the University of Hawai'i at Hilo, which was the applicant for the CDUP. Opponents noted that the TMT organization had made a substantial donation to the 'Imiloa as well.

In defending Amano's selection, the BLNR compared membership in the 'Imiloa to museum membership. The justices agreed.

Opponents also argued that Amano's behavior in the contested case amounted to prejudice against them and was improper and that she had connections with a deputy attorney general (Amano attend-

ed law school with his wife).

The justices rejected the arguments. "Membership [in 'Imiloa] alone does not lead to a conclusion that a member supports a mission to build the TMT, even assuming that this is 'Imiloa's mission," they found.

TMT opponents had asked the BLNR to disqualify the deputy attorneys general who advised the board in the first contested case and appeal from having any advisory role in the more recent contested case. Again, the justices rejected the argument. The deputy attorneys general "have always been required to assist the BLNR in a manner to enable the board to perform its duties faithfully," they wrote. "Their duty never changed, and they have consistently represented the interests of the BLNR."

Finally, as to the matter of disqualifications, the justices considered the opponents' arguments that two Land Board members – Chris Yuen and Samuel Gon – should not have been allowed to vote on the contested case.

In the case of Yuen, they pointed to a 1998 interview he gave to *Environment Hawai'i*, in which he discussed telescopes atop Mauna Kea, among many other things. The opponents focused in on his statement that "I don't see what difference it would make to have a few more telescopes up there as long as you site them properly."

The justices noted, however, that Yuen's comments "also contained criticism of telescope projects" and that he "also stated that any future telescope project would need, at minimum, to be 'site[d] ... properly,' meet the demands of good stewardship, and leave intact habitat and archaeological and cultural sites."

"Thus," they found, "Yuen's comments, made in 1998, did not indicate he would approve all future telescope applications" and there was nothing to "reasonably cast suspicion on Yuen's impartiality." (The full interview appears in the July 1998 edition of *Environment Hawai'i*.)

As to Yuen's participation on the panel that selected Amano to be hearing officer, the justices found there to be "no due process violation."

Gon, the opponents argued, should have been disqualified because he had voted to approve the permit for the TMT the first time that it came before the Land Board. The justices dismissed this argument, noting that Mauna Kea I remanded

the case “for a second contested case hearing ‘before the board or a new hearing officer,’ not a new board. Moreover, there is no legal authority requiring a board member to be disqualified because he had approved a decision that is later vacated and remanded. If such authority existed, no vacated decision could ever be remanded to the same board or lower court judge.”

Native Hawaiian Rights

One of the most seminal decisions in the evolving history of Native Hawaiian rights is Ka Pa‘akai o Ka ‘Aina, which requires agencies to identify cultural resources and determine the extent to which Native Hawaiian rights are exercised in a given area, determine how those rights will be affected by a given action, and describe “the feasible action, if any,” that the agency will take to protect such rights if they are found to exist.

“The BLNR found no evidence ... of Native Hawaiian cultural resources, including traditional and customary practices, within the TMT observatory site area and the access way,” the justices noted.

In 2015, two ahu were erected by protesters on the unpaved road leading to the TMT site, but the “BLNR concluded that the two ahu ... did not constitute a traditional and customary right or practice.” A third ahu, consisting of a single upright stone and several support stones, was also of recent vintage. The justices agreed that the structures “are not protected as Native Hawaiian traditional or customary rights.”

As for the Native Hawaiian practices at the summit, the BLNR determined in its findings of fact that cultural and/or

spiritual practices had co-existed with astronomy facilities and that those practices would not be affected by the TMT, to be built 600 feet below the summit ridge.

Another aspect of Ka Pa‘akai prevents agencies from improperly delegating their duties to protect Native Hawaiian rights and practices to others. TMT opponents argued that two of the conditions approved in the BLNR’s decision did just this by requiring the university to consult with Kahu Ku Mauna, a group of Hawaiians that advises the university’s Office of Mauna Kea Management. The justices determined, however, that while these conditions “may appear to be delegations, they are not; they are outside and in addition to Ka Pa‘akai requirements, and were imposed to ensure that Native Hawaiian practices in the Mauna Kea area will continue to be protected.”

The Kihoi appellants argued that the TMT would impair their constitutional rights to practice their religion, amount to a violation of the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act of 2000. None of those arguments were compelling to the justices, who dismissed them as meritless.

The Temple of Lono argued that Ama-no erred when it refused to disqualify the University of Hawai‘i at Hilo as the applicant, inasmuch as the university had disrespected it with offensive statements that showed a hostility to what it claimed was traditional Hawaiian faith.

“The Temple’s opening brief does not quote the allegedly offending language,” the justices wrote, but they seem to have found it in one of the university’s briefs.

In that brief, the university appears to accuse the Temple of fundamentalism, going on to note that the “problem with fundamentalism in religion – any religion – is its intolerance and inability to compromise... The Temple wants a religious servitude over all of Mauna Kea, for the purpose of advancing its own religious agenda.”

While the university argued that Mauna Kea could accommodate both the TMT and traditional Native Hawaiian Religion, “the Temple rejects that sharing of Mauna Kea,” the justices noted.

Neither the hearing officer nor the BLNR were required to disqualify the university as applicant, they went on to write. Still, they issued a mild reproof: “the tenor of the language in [UHH’s] memorandum was unnecessary.”

One of the arguments raised frequently, and vainly, in the contested case had to do with the legitimacy of the current government of Hawai‘i. On appeal, Harry Fergerstrom challenged the dismissal of his efforts to raise this point.

He had no better luck with the Supreme Court: “The BLNR is bound by the United States Supreme Court’s and this court’s precedents regarding the legal status of the state of Hawai‘i,” the justices wrote. “Therefore, the hearing officer did not err by excluding the proposed evidence.”

Public Trust and Land Issues

Sixteen pages of the majority opinion are given over to discussion of public trust and land issues. First the justices considered the Conservation District permit and BLNR decision in light of Article XI, Section 1 of the Hawai‘i Constitution and public trust principles. Next they held them up against the BLNR’s own administrative rules governing permitted uses in the Conservation District.

Near the outset of the discussion, the justices make a definitive statement: “The plain language of Article XI, Section 1 provides that all public natural resources, including land, are held in trust by the state for the benefit of the people. We therefore now hold that conservation district lands owned by the state, such as the lands in the summit area of Mauna Kea, are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1.”

The same constitutional provision also “requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand,

The Appellants

The Supreme Court consolidated three separate appeals made by the parties who were admitted as petitioners to the Thirty Meter Telescope contested case hearing. Here is the breakdown:

Appellants Mauna Kea Anaina Hou, Kealoha Pisciotto, Clarence Kukaokahi Ching, the Flores-Case Ohana, Deborah Ward, Paul Neves, and KAHEA: The Hawaiian Environmental Alliance. They were represented before the high court by Richard Naiwieha Wurdeman. (Wurdeman had also represented them in motions before the contested case began, but dropped out before it started.) These were the same parties who appealed the BLNR’s decision to grant the CDUP in April 2013. That appeal resulted in the Supreme Court’s first decision on this subject, Mauna Kea I, handed up on December 2, 2015. In that decision, the court remanded the matter to the Land Board, determining that it had erred by voting on the permit before holding a contested case hearing.

Appellants Temple of Lono, Mehana Kihoi, Joseph Kualii Camara, Leina‘ala Slight-holm, Kalikolehua Kanaele, Tiffnie Kakalia, Brannon Kamahana Kealoha, Cindy Freitas, and William Freitas were represented by Gary Z. Zamber.

Intervenor-Appellant Harry Fergerstrom represented himself.

Dwight J. Vicente, one of the parties to the contested case, also filed an appeal, but was dismissed from the case owing to his failure to file an opening brief.

and the development and utilization of these resources on the other in a manner consistent with their conservation.”

The Land Board rejected the opponents’ argument that the use of the land by the TMT, a private organization, violated the presumption that favors public use, access, and enjoyment – established in the Supreme Court’s Waiahole I decision in 1994.

The Supreme Court agreed with the Land Board. “The TMT project does not involve the irrevocable transfer of public land to a private party,” it found, going on to note that the TMT’s use of the land is for a limited term. Other conditions imposed by the board require it to undertake improvements to natural resources, including funding of the “re-naturalization” of the closed road on Pu’u Poli’ahu, among other things. Off-site benefits associated with the project, the justices noted, include a “substantial community benefits package” and a “workforce pipeline program.”

On the matter of compliance with the administrative rules setting forth eight criteria that need to be met for Conservation District Use Permits, the justices note that the Land Board “made extensive FOFs [findings of fact] and COLs [conclusions of law]” regarding each criterion.

Opponents’ arguments focused on alleged violations of three of those: the fourth condition, which prohibits a proposed use if it will cause “substantial adverse impact to existing natural resources;” the fifth condition, which addresses the proposed use’s compatibility with its surroundings; and the sixth condition, requiring that the “existing physical and environmental aspects of the land ... will be preserved or improved upon.”

The fourth condition, the Land Board found, was addressed inasmuch as the TMT would be improving much of the area that, over the years, had been damaged by development and the university was agreeing to remove two additional telescopes and not seek permits for other telescopes to replace any of the total of five telescopes that are to be taken out of service.

In light of these findings, the justices wrote, “the BLNR did not clearly err in concluding that the TMT will not have a substantial adverse impact to natural resources within the surrounding area...”

Regarding the fifth condition – compatibility with surroundings – the BLNR found that the TMT would be sited half a mile from the summit area and near 11

other astronomy facilities. “Therefore, on these facts,” the justices wrote, “we cannot say that the BLNR erred” on this point.

The sixth condition, requiring the proposed project not degrade the natural beauty or open space of a site, was deemed to have been met by the board inasmuch as the university “formally committed that this is the last new area of Mauna Kea where a telescope project would be sought.” Here again the justices determined that the Land Board’s findings “are not clearly erroneous.”



Pollock Would Expand Public Trust Protections

Associate Justice Richard W. Pollock agreed with the three Hawai'i Supreme Court justices who authored the opinion approving the Board of Land and Natural Resources’ award of a Conservation District Use Permit for building the Thirty Meter Telescope.

Agreed – to a point.

In a separate opinion, concurring in part but also concurring in the judgment, Pollock described his views on where the majority justices failed in their analysis of the principles at issue in the litigation over the CDUP.

The focus of Pollock’s attention in his 37-page opinion is the reach of the public trust doctrine, especially its applicability to land in the Conservation District. In Pollock’s opinion, the majority justices did not go far enough in describing the public-trust protections for such land,

even though they have fully framed those same safeguards as they applied to water. The result, as Pollock expresses it, is “different measures of protection” for land as opposed to water.

“But,” he continues, “neither the text nor the history of Article XI, Section 1 [of the Hawai'i Constitution] provides for differing levels of protection for individual natural resources ... and this court should not establish artificial distinctions without a compelling basis for doing so.”

The high court was in effect refusing “to demarcate the outer limits of the public trust doctrine” and was, instead, “applying the fundamental principles ... through case-by-case adjudication.” When water resources were concerned, he argues, the court did rise to the occasion in a case it decided four years ago: “Our evolving caselaw applying constitutional public trust principles to water usage was collected and summarized by this court in *Kaua'i Springs*... [W]e distilled from our precedents a framework of inter-related principles applicable to agencies and applicants in discharging their respective obligations.”

To show just what he means, Pollock cites a finding of the hearing officer, Riki May Amano. Amano, Pollock writes, “stated that ‘the scope of the public trust doctrine has traditionally been limited to water resources, and the reliable, credible and substantial evidence establishes that the TMT project will not restrict or otherwise impair any water resources.’” On that basis, he says, “the hearing examiner concluded that ‘the public trust doctrine does not apply to consideration of the TMT project.’”

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Amano's conclusion runs up against an earlier Supreme Court decision, *Zimring*, in which the court determined that public trust principles apply to public land, Pollock contends.

In any event, the Land Board rejected this conclusion of Amano's, making it unnecessary for the court to consider it.

However, Pollock goes on to say the Land Board itself "made a number of conclusions that are not wholly consistent with established law," including its conflation of language relating to the ceded land trust, the University of Hawai'i trust, and the public trust relating to management of natural resources. "[I]n some instances," Pollock opines, "the trusts may share assets in common, as in the present case ... But each of the three trusts is distinct... Accordingly, when a contemplated action may affect property in which multiple trusts hold common title, the state is obligated to consider the impact of its actions on the separate purposes of each trust that is implicated."

Basically, by holding up the proposed use of the land against the language of its administrative rules rather than against that of the public trust doctrine as expressed in the state Constitution, the Land Board fell short of undertaking the appropriate analysis, Pollock seems to argue.

Pollock does not disagree with the final decision of the majority justices. But, as a consequence of what he sees as their failure to provide a framework for determining compliance with public trust protections, he describes as "unclear" the basis for the finding that the BLNR fulfilled its constitutional public trust obligations.

In addition, he seems to have a problem with the manner in which the Land Board – and his colleagues – pointed to the TMT's promise of off-site benefits in justifying the decision that its construction would not violate the constitutional protection of public trust resources or Conservation District rules.

"In addressing the presumption in favor of public use, access, enjoyment, and resource protection," he writes, referring to the presumption expressed in Article XI, Section 1, "the majority cites the various grants, scholarships, and career training the operators of the TMT will offer the community... as well as the sublease rent that will be paid to the university of Hawai'i. ... Although donations or payments to the state and community that are unrelated to the actual use of a resource may be somewhat relevant to whether the proposed use of the conservation land is being put to a reasonable and a beneficial use, they have no bearing on whether the proposed use is itself public in nature. Were this not the case, virtually any use of a natural resource could be converted to a public use ... simply by coupling it with sufficient auxiliary payments to the state or community."

Pollock nonetheless concurred with the majority opinion. "Although it misconstrued its duties under Article XI, Section 1, the findings and conclusions that the BLNR made regarding the public trust and other matters are sufficient to evaluate whether the board satisfied the obligations outlined in the *Kaua'i Springs* framework," Pollock writes. "BLNR's factual findings on these issues appear to be supported by substantial evidence and thus are not clearly erroneous and an appellate court is therefore obliged to accept them."



Justice Wilson's Dissent: "The Degradation Principle"

In his 36-page dissent, Justice Michael Wilson posits what he calls "the degradation principle" and argues that this is what the Land Board employed when approving the Conservation District Use Permit for the Thirty Meter Telescope. The moniker is a play on the principle of non-degradation that

has been formulated to defend natural resources against further harm when they have already suffered substantial degradation.

"The degradation principle portends environmental and cultural damage to cherished natural and cultural resources," Wilson writes in his dissent, filed 10 days after the majority justices published their opinions.

(As an aside, the opponents had 10 days in which to file a request for the court to reconsider its decision. Because Wilson had announced his dissent but had not published it, the opponents asked the court to extend the period in which they could file their request for reconsideration. The Supreme Court granted the request, extending the period for filing by another 10 days. The requests were filed November 19.)

In a footnote, Wilson calls out what he sees as a contradiction in the majority opinion: "The majority states that the 'BLNR does not have license to endlessly approve permits for construction in conservation districts, based purely on the rationale that every additional facility is purely incremental. It cannot be the case that the presence of one facility necessarily renders all additional facilities as an incremental addition.'" But despite this, Wilson continues, "the increment with the great impact of all telescopes, TMT, is deemed not to cause a substantial adverse impact because prior increments of telescope construction cumulatively caused a substantial adverse impact."

Wilson also says that the majority decision violates the principle of "intergenerational equity."

"The degradation principle removes the need to consider the impacts of TMT on the existing resource... In this way the BLNR ignores the rights of future generations to the protections specifically afforded them" by the Land Board's administrative rules, he states.

— *Patricia Tummons*