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Environment Hawai'i
a monthly newsletter

Setting Boundaries

For decades, the state's system for managing growth has put the Land Use Commission in the driver's seat, determining which areas are appropriate to develop. The state planning agency rides shotgun, recommending changes to the LUC in line with overall state goals. The counties are at the back of the bus, chafing at the law that restricts them to zoning.

Time and again, counties have proposed changing the law to give them greater powers while diminishing, or even abolishing, the LUC. This year they seem to have gained an ally in the state Office of Planning and Sustainable Development.

It's impossible to predict the fate of any bill at this stage, but the OPSD's latest attempt at a statewide boundary review, as well as its testimony to the Legislature, do make one wonder what lies ahead, even absent legislative action.

IN THIS ISSUE

LUC Grills State Planning Office Over Stealth District Boundary Review

One of the key features of the Hawai'i planning law is the placement of all land in the state into one of four land use districts: Conservation, Agricultural, Rural, or Urban. And another key feature, until last year when the law was changed, was the requirement that every five years, the state's planning office would undertake to review the classifications and propose boundary amendments as appropriate.

But at the time the law was changed, it had been nearly three decades since the previous five-year district boundary review had occurred. The 1992 review by the Office of State Planning was possibly the most comprehensive inventory and assessment of lands in the state ever undertaken, yet resulted in only a handful of boundary amendments.

Last year, in a bow to reality, the Legislature amended the law mandating those reviews, Section 205-18 of *Hawai'i Revised Statutes*, so that now the state planning agency is not required to carry out periodic analyses of the appropriateness of existing land classifications. Instead, it may choose to conduct a boundary review at its leisure.

Should it decide to undertake a boundary review, the agency – now the Office of Planning and Sustainable Development (OPSD) – is to submit its report to the Land Use Commission, governor, Legislature, and appropriate state and county agencies. There is, however, no requirement that the public at large, or even the private landowners whose property may be proposed for redistricting, be given notice or an opportunity to comment on the recom-

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PHOTO: FOREST AND KIM STARR

An aerial view of Olowalu, Maui, where a proposed Urban development drew widespread public opposition. In 2016, the developer asked the Land Use Commission to halt processing of its petition for redistricting.

Environment Hawai'i

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NEW AND NOTEWORTHY

Whales on the Line, I: Last year, the Hawai'i-based longline tuna fleet hooked five false killer whales inside the Exclusive Economic Zone around Hawai'i. All of the animals were determined to have been mortally or seriously injured (M/SI) by the interaction with fishing gear.

Under a formula that factors in the extent of observer coverage of the fleet and an assessment of the number of animals that can be removed from the population without jeopardizing its ability to recover, the National Marine Fisheries Service sets a limit on the number of animals that can be killed or seriously injured inside the EEZ. If that number is hit, the National Marine Fisheries Service is to close to longliners a large area of fishing grounds south of the islands – the so-called Southern Exclusion Zone (SEZ) -- amounting to about 17 percent of the ocean inside the EEZ. The closure is to remain in place until the end of the year. In recent years, the trigger for closure of the SEZ has been set at four M/SI.

But with the fourth and fifth takes occurring on November 19 and December 8, and with NMFS taking weeks to determine that the animals were grievously injured or killed, the fleet avoided any consequences for having exceeded the limit. Once January 1 rolled around, the meter was reset to zero.

By January 24, the longliners had already taken three false killer whales, one of which was inside the EEZ. Although NMFS had not made an official injury determination by press time, almost certainly the interaction will be judged an M/SI, given that the fishing crew released the animal by cutting the line, leaving it with about eight meters of line trailing from its mouth.

Whales on the Line, II: In response to the high number of takes in 2021, the False Killer Whale Take Reduction Team met by video conference on February 3, one day before NMFS announced the two interactions that occurred in January.

Much of the discussion focused on the level of observer coverage last year. The lower the level, the fewer the number of animals that are allowed to be taken. On vessels with no observers, it is assumed (correctly) that captains do not report interactions with false killer whales. So to arrive at a truer picture of the full extent of interactions, the actual number of observed interactions is divided by the overall percentage of observer coverage fleet-wide.

In recent years, observer coverage has been around 20 percent, or one in five trips. So, as an example, if four whales are observed to have been taken and seriously injured or killed, that would suggest the actual number is closer to 20 (five times the observed number). This exceeds the limit on the number of animals that can be removed from the population without harming its ability to reproduce, the so-called Potential Biological Removal (PBR). For 2021, the PBR was set at 16, meaning the PBR was exceeded by four.

Take those same four M/SI interactions but reduce the observer coverage to 16 percent, and the imputed actual number of M/SI interactions becomes 25, exceeding the PBR by more than 33 percent.

Dennis Heinemann, senior advisor for fisheries policy to the Marine Mammal Commission, spelled out the problem. "For the first three quarters [of 2021], the overall coverage was 17.6 percent. … If coverage is less than 18.8 percent for the year, the trigger [for SEZ closure] is three. In order to get to 18.8 percent, the fourth quarter observer coverage would have to be 23.7 percent or greater, which would be highly unusual."

Kevin Brindock, of NMFS' Protected Resources Division, said that last year was the first time this problem – of late-year serious interactions – had occurred. The agency was going to try to shorten the time between the hooking and the injury determinations, he said: "We can't achieve real-time, but something closer to that."

Heinemann criticized the use of the calendar year in setting and lifting the closure of the SEZ. "The closure was designed to achieve certain outcomes … providing incentives for the fishery to do better and also to protect the whales…. And yet, because it's tagged to the calendar year, the later that trigger is reached in the year, the less the incentive becomes…. The fact that the SEZ was triggered last year means nothing in terms of management outcomes."

Quote of the Month

"Commissioners can weigh in on this, but I'm pretty sure everyone thinks it's more important to get the water going than measure it at this point."

— Suzanne Case

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Commission Tweaks Nā Wai 'Ehā Order To Ensure Flows to Kuleana Permittees

On February 15, the state Commission on Water Resource Management amended its June 2021 decision in the Nā Wai 'Ehā contested case hearing on water use permits. The change means that Waikapū Properties now is responsible for providing water to the South Waikapū kuleana 'auwai.

Under the original decision and order, Wailuku Water Company, LLC, was required to deliver 265,000 gallons a day into the mile-long, unlined 'auwai that serves South Waikapū kalo farmers with priority water rights.

Following a complaint filed last August by Hui o Nā Wai 'Ehā that the farmers were not receiving the water they were due, commission staff determined that WWC was providing the required amount, but it just wasn't enough to reach the kuleana users.

Hui president Hōkūao Pellegrino testified to the commission last month that the farmers had been without water from their 'auwai for 482 days, well before the commission's order last year.

"They have not been able to cultivate kalo. Lo'i have completely dried up, cracked and are full of weeds," he said.

Waikapū Properties also receives water from WWC's ditch system, which diverts water from the four streams in the area known collectively as Nā Wai 'Ehā (the four streams). Last October, Waikapū Properties manager Mike Atherton offered to connect a 4" pipe to his company's 8" pipe so that water could be directed into a lower reach of the 'auwai, thereby minimizing some of the water loss and relieving WWC of the responsibility of meeting the kuleana users' needs.

On February 20, with Atherton's proposal formally incorporated into the commission's decision and order, Waikapū Properties began piping water into the 'auwai.

While the water actually reaches the lo'i now, problems remain, Pellegrino told *Environment Hawai'i*.

"There are very serious issues with the pipeline," he said, referring to Waikapū Properties' main 8" line. The line is mostly underground and is somehow not providing enough water into the 'auwai.

"They're saying it wasn't well-maintained. There are a lot more issues than originally thought," he said, adding that the company is having to hire an outside contractor to fix it.

"We're very grateful. No doubt about that. This system is going to be more efficient," he said.

In the meantime, the kuleana users are getting nearly half of the water they're supposed to. And in addition to the pipeline problems, the many months without water has left the ground parched.

Pellegrino said it took more than half a day for the water diverted into the 4" pipe to reach the first lo'i kalo.

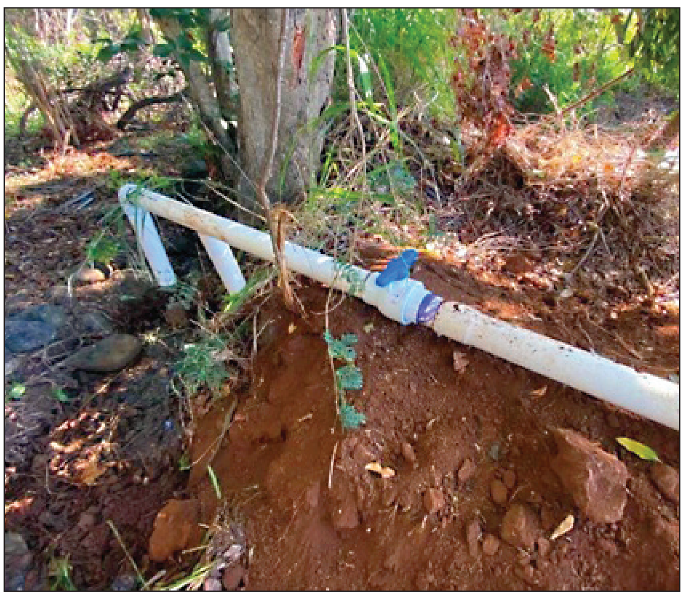

PHOTO: CWRM

The 4" line into the South Waipakū kuleana 'auwai.

"There's so much loss. The flow is low. The ditch hasn't seen water in 16-plus months. There's bound to be some normal saturation that needs to occur," he said.

That goes for the lo'i, as well. Although the water now reaches the first one, it's not enough to fill it, he added.

Delays

"This really is going to be a short-term solution. We're not just reliant on Waikapū Properties, but on Wailuku Water Company as well," Pellegrino said.

Fixes to the delivery system can be expensive and right now, he said, Waikapū Properties appears willing to take on that burden. However, the Hui's primary goal is to revive the traditional 'auwai that taps Waikapū Stream directly.

At the commission's meeting last month, the Alves family, which has a water use permit for 75,000 gallons a day to grow kalo, complained in written testimony about WWC's apparent reticence to relinquish control over the stream water resources without certain conditions being met.

"Our lack of hope that the water allocations will actually be [upheld] has gone on long enough. Just when we thought the lo'i would again feel river water and breathe back life, we encountered another roadblock. With urgency we ask that you make it clear to all parties that the release of water into the ready pipes will happen now and not later," the family wrote.

Before the February meeting, Avery Chumbley, president of WWC, had stated in correspondence with Water Commission deputy director Kaleo Manuel that until there was a "clear and documented understanding between all parties (CWRM, WWC, Waikapū Properties, all kuleana users) as to who is responsible for possible ruptures, leaks or failures of the piping, WWC will not allow for the tie-in off of the filter station distribution point."

In a later email to commission chair Suzanne Case, Chumbley stated that he had informed all of the parties involved that a functioning meter needed to be installed where Waikapū Properties' 8" pipe ties in at a filter station "prior to a delivery conversion to the pipe for the kuleana 'auwai users." A second meter needed to be on the 4" line before the point where water use permit holder Clayton Suzuki receives water, he said. The difference in the amount of water flowing through the first meter and the second meter would be what Waikapū Properties should be taking for itself, around 1,800 gallons a day under the decision and order.

"These are obligations on the users under the D&O but not under our direct control of WWC and need to be complied with, as does the reported monthly usage by all permit holders off of this system," Chumbley wrote.

Continued on next page

At the February meeting, Chumbley repeated his argument that Waikapū Properties needed to install a functioning meter at the 8" pipe before it could take over delivering water to Suzuki and the kuleana users.

Given that the commission had expressed support at its October 19 meeting for Waikapū Properties's proposal to install a pipe to deliver water into the 'auwai, Commissioner Neil Hannahs asked Manuel why it was now being asked to amend the decision and order to reflect that.

"Why does this have to come back to us again? It seems like it delays the solution. It seems like a ministerial matter," Hannahs said.

"Out of caution and reassurance," Manuel replied. He added that later in the meeting, the commission would be asked to delegate its authority to the chair to implement the commission's order, consistent with its intent.

"Just for clarity, we're bringing something more formal to the commission so all users understand what's expected of them in order to meet the intent of the commission," he said.

"That's the nice way of putting it," chair Case added. "We think we have this authority and that you want us to do this, but to the extent anyone thinks it's not clear, we're bringing this back to finalize it and asking for delegation to make it crystal clear."

To Chumbley, Case asked, "What would stop us from ensuring that the pipe is turned on tomorrow or today?"

Chumbley argued that because the commission's decision and order requires permittees to report their water usage, an operational meter at the filter station would be important for reporting purposes.

"Commissioners can weigh in on this, but I'm pretty sure everyone thinks it's more important to get the water going than measure it at this point," Case said.

She added that WWC had up until recently been providing water from Waikapū Stream to Kumu Farms, which is not authorized by the decision and order, and without it being measured by WWC. "And now we're kind of arguing about not providing water to people who are authorized to have it until we're triple sure all the meters are working right?" she said.

Chumbley corrected her, "The water delivered to Kumu Farms was measured. It was being measured at a lower filter station."

"Right. It was measured, but not authorized, and so I'm not clear why we are arguing over this and not providing water while arguing over it," she replied.

After a few beats of silence she continued, "I just want to make real sure that whatever the commission does today makes it really clear you turn on the water to the 'auwai today."

The water was eventually turned on within a week, but to the Hui and the kuleana users, the whole process underscored the need to revive the traditional 'auwai.

Goodbye, Middlemen

At last month's commission meeting, Pellegrino announced that the Hui, the Alves family, and kuleana permittee Crystal Smythe had sent a certified letter to Chumbley and his wife asking for access through their personal property, where the traditional 'auwai is located.

They also asked the commission for its support and approval "to allow access for the restoration of the historical and traditional South Waikapū kuleana 'auwai not only as a means to be independent of Wailuku Water Co.'s system, but because it is their traditional and customary and appurtenant right that according to the Water Code 174C, shall be upheld and protected by this very commission."

The commission took no action on their request. And as of late last month, Chumbley had not responded to their letter, Pellegrino told *Environment Hawai'i*.

Back in 2017, when the Hui, the Maui Tomorrow Foundation, and the Office of Hawaiian affairs filed their joint proposed findings of fact, conclusions of law, and decision and order in the Nā Wai 'Ehā water use permit contested case hearing, they included a long section on access to kuleana water courses.

They noted, "kuleana in Waikapū historically up until the late 1940s received water through an 'auwai system directly connected to Waikapū Stream, but the plantation eventually redirected the 'auwai system to connect to the plantation's reservoir system instead."

WWC and Hawaiian Commercial & Sugar "have expressly and uniformly acknowledged and documented their obligations to satisfy kuleana rights in numerous written water agreements dating back almost a century. In the companies' original 1924 agreement dividing Nā Wai 'Ehā's stream flows, they expressly acknowledged that their diversions were 'subject to existing water rights of third parties therein,' including 'for all kuleana of such third parties,'" they wrote.

According to Earthjustice attorney Isaac Moriwake, who represents the Hui and Maui Tomorrow Foundation, kuleana water delivery had also been raised in the contested case hearing on Nā Wai 'Ehā's interim instream flow standards, which preceded the contested case on water use permits.

By 2017, "we had a solidly established record on this issue," he said.

Whether or not Chumbley will allow access to the traditional 'auwai remains to be seen. When the issue came up during the commission's October meeting, he referred to the alleged traditional 'auwai use and alleged po'owai on his property and claimed that the current topography wouldn't allow for its revival.

If he maintains that position, a fight in court could follow.

"This is new for our modern water rights legal framework," Moriwake said. Kuleana water access rights are "already established in terms of the legal principle … but as far as the Water Commission goes, the Water Code, it hasn't come up in a litigation context where the commission has had to make a call yet. That's where we're potentially headed."

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Commission Orders More Flow For Wailuku Town 'Auwai Users

Like Waikapū, the case of the Wailuku Town kuleana 'auwai is also one in which kuleana kalo growers were not receiving the water they're entitled to under permits the Water Commission granted them last year.

The commission's June 2021 decision and order in the Nā Wai 'Ehā contested case requires Wailuku Water Company to deliver 88,000 gallons a day into the 'auwai, which serves four permittees.

Since the commission issued the order, the three permittees at the end of the 'auwai had not been receiving enough water, or sometimes any water, for their kalo and other plants.

Last month, *Environment Hawai'i* reported on the growing conflict between WWC president Avery Chumbley and

Continued on next page

Robert Street, who farms on property owned by permittee Jordanella Ciotti. Street, who has argued he is exercising his rights to access water for his kalo, has been opening the chained valve that WWC uses to control the delivery of water into the 'auwai. Chumbley has accused Street of trespassing and vandalism. Both turned to the Water Commission to help resolve the matter.

Commission staff have said they need to better understand how much water is being lost as it travels along the 'auwai, which runs underground for some distance and is unlined elsewhere.

On February 15, the commission voted to issue an interim water use permit to the three permittees at the end of the line: Ciotti, Mary Ann Velez, and Greg Ibara. The commission required them to modify the 'auwai to ensure that Ibara receives 50 percent of the water after Kalua Road, Velez 40 percent, and Ciotti the remaining 10 percent.

The commission also ordered WWC to fully open the control valve where water enters the 'auwai at Waihe'e Ditch and the valve near the first permittee on the 'auwai, Imua Family Services. This is where WWC controls the amount of water that flows through the rest of the 'auwai.

The commission ordered the valves be immediately opened and to remain open up to 60 days to provide immediate relief to the permittees at the end of the 'auwai and to allow commission staff to assess system losses.

WWC also must provide photos of its flowmeter at the distribution point for the pipeline, "showing a fully opened valve, estimated at not less than 500 [gallons per minute]," according to a staff report. It also had to secure the 4" control valve "with a strong, anti-theft lock to prevent tampering while the commission investigates system losses."

Finally, the commission ordered Mahi Pono, LLC, to make improvements to Spreckels Ditch, which the 'auwai empties into, to remedy stagnant flow conditions.

A commission staff report points out that the three permittees have recognized appurtenant rights totaling 347,100 gpd and Velez and Ciotti have additional domestic use rights totaling 1,964 gpd. In contrast, other water use permittees that are downstream of the 'auwai have reported no problems receiving their allocated amounts from WWC's Waihe'e Ditch. All these permittees are commercial users, including Mahi Pono, Maui Tropical Plantation, MMK Maui, and Pohakulepo Recycling. Their total water allocations are close to 6 million gallons a day.

The report also states that the high volume of water delivered to Mahi Pono may be a factor in water backing up into the Spreckels Ditch "resulting in stagnant conditions makai of the Velez, Ciotti, and Ibara properties."

Before the commission voted to approve its staff's recommendations on the interim permits and system loss investigation, WWC's Chumbley expressed his concern about opening the valves for a full 60 days with a minimum flow of 500 gallons per minute, which is what staff had originally recommended.

"That's more than nine times the allocated amount," Chumbley said, He noted that except for a spike on January 12, flows in the Waihe'e River, the source for WWC's Waihe'e Ditch, have been low since the start of the year.

A flow of 500 gpd through the 'auwai "could be considered waste," he said, adding that he was happy to work with staff on conducting seepage runs. "We don't need to do it 60 days. … Delivering that much water to this 'auwai is going to cause more problems," he said.

Hui o Nā Wai 'Ehā's Pellegrino testified that problems with the Wailuku Town 'auwai are more complex than originally thought. Among other things, he said there are undisclosed, non-permitted users taking water from the system.

With regard to whether or not the valves needed to be fully open for 60 days, Pellegrino reminded the commission that the system had been left dry for months. It's going to take a lot of water to saturate the ground, he said.

Based on the public testimony, commissioner Hannahs recommended that the staff's recommendation be amended to require that the valves be open up to 60 days. "We don't want to waste water," he said. He also recommended changes to the staff's recommendation on fixes to the Spreckels Ditch to be more general.

The commission approved both recommendations.

Authority Delegation

To facilitate the timely resolution of problems surrounding the Water Commission's June 2021 decision and order in the Nā Wai 'Ehā contested case hearing, commission staff recommended last month that the commission delegate its authority to the chair to implement and/or modify the order.

Although parties to the contested case hearing have appealed the D&O to the state Supreme Court, the order "has not been stayed and as appropriate can be implemented and modified by the commission," a February 15 staff report states.

WWC's Chumbley testified that he did not think this was necessary. His attorney, James Geiger, suggested the commission consider removing the authority to modify the order.

The commission voted to approve its staff's recommendation as submitted. ***— Teresa Dawson***

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mended changes.

So eager, apparently, was the Office of Planning to exercise this new freedom that on April 19, more than a week before House Bill 1149 (the one amending Section 205-18, among other things) received final passage in the Legislature, and more than two months before the bill was signed into law by Governor David Ige, its director, Mary Alice Evans, sent a draft boundary review – titled the "State Land Use Review of Districts" – to the planning departments of the four counties, soliciting their comments.

The heart of the report – areas where the conditions of the land suggest a different state land use classification might be warranted – is very much a restatement of the 1992 recommendations. Those recommendations, published in several volumes and with detailed rationales, had taken years to prepare. Consultants were hired to work with the state planning office, known then as the Office of State Planning and headed up by Harold S. Masumoto. That report resulted in 10 district boundary changes that were approved, reclassifying around 21,000 acres statewide.

Of that acreage, the vast majority was on the Big Island. There, about 13,400 acres were placed into the Conservation District, and about 3,300 were shifted into the Urban District. Most of the

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land that was recategorized had previously been in the Agricultural District. On O'ahu, more than 1,600 acres were placed into Conservation, while just 67 were transferred into Urban. Maui saw 1,205 acres added to its Conservation District, while Kaua'i's Conservation lands gained just 67 acres. Neither Kaua'i nor Maui saw any gains to the Urban District.

Those changes represent just over 7 percent of the 140-plus recommended land district reclassifications called for in the 1992 boundary review.

So few were actually approved because each recommendation would have required the preparation of a boundary-review docket for presentation to the Land Use Commission. The LUC, in turn, would need to have a hearing on each one of these. Neither the Office of State Planning nor the LUC had the staff or the funds to consider each recommended land use district change included in the OSP's report.

What's more, gaining the support of landowners who might see the value of their land diminished if it were reclassified to Conservation was a tall order. Many of them claimed that existing uses, such as ranching, farming, or even residential uses, would no longer be possible. That ignored the fact that existing uses would be grandfathered. Several sought to subdivide parcels proposed for redistricting, thereby bolstering the argument that redistricting would amount to an unconstitutional "taking."

As a result, only the proposed reclassifications that were deemed most likely to succeed were formally pursued. For the most part, these were limited to areas where the state itself was the landowner.

Outside of the LUC redistricting process, in several instances where private land was recommended for reclassification, the OSP was able to negotiate concessions – such as conservation easements – that, although falling short of having all the protections that reclassification into the Conservation District would provide, still achieved much the same result. For example, on the Kona side of the Big Island, where water resources are limited, the OSP identified more than 113,000 acres as an "area of critical concern" suitable for inclusion in the Conservation District. Not one acre was redistricted, yet the boundary review recommendation resulted in the creation of the Kona Watershed Roundtable. From that effort, involving nearly all of the landowners in the area, grew a keen awareness of the importance of protecting the upland forests of the region – leading eventually to the establishment of the Three Mountain Alliance. That organization, involving around a dozen different public and private agencies, works to protect and increase the forests on the slopes of Kilauea, Mauna Loa, and Hualalai, or roughly half the entire area of the Big Island.

The 2021 boundary review proposes no new reclassifications. Instead, it states, "the previously proposed boundary amendment recommendations from the 1992 boundary review are retained for future reclassification actions." There is no analysis of the reasons why so many were not acted upon nor is there any review of whether the rationale for the 1992 recommendations continues to exist.

Updates

While the more recent review leaves intact the 1992 boundary amendment recommendations, it also provides a comparison of county urban growth maps with state land use district maps:

In Hawai'i County, the OPSD determined that more than 41,000 acres designated for urban expansion in the county's Land Use Pattern Allocation Guide (LUPAG) map are not within the Urban land use district. For the City and County of Honolulu, urban growth boundaries include 9,725 acres not in the Urban district; for Maui the number is 7,787; and for Kaua'i, it's 4,701. Altogether, 65,792 acres statewide lie within county areas where urban expansion has been planned but are not within the state Urban district.

The obverse condition – land within the Urban District but not within county urban growth areas – applies to just 22,313 acres for the entire state. More than 40 percent of this is found on O'ahu (9,279 acres), with 44 percent of that, in turn, located in the Ko'olaupoko District, primarily Kahalu'u and He'eia.

On Maui, 1,982 acres are in the Urban District but not planned for urban growth by the county; for Kaua'i, the number is 3,697; for the Big Island, 7,355.

Section 205-2 of *Hawai'i Revised Statutes*, the state's planning law, requires "a sufficient reserve area for foreseeable urban growth" to be included in the establishment of boundaries for the Urban District. "Lands that are in the Urban District but not included within the county growth boundaries would indicate that the counties are not considering urban growth and development of these lands in the foreseeable future," the OPSD report states. "Accordingly, subject to further inspection, these lands … could be candidates for downzoning to the Agricultural, Rural, or Conservation districts, as they are not needed by the counties for urban expansion."

Finally, the OPSD looks at land within the Urban District that is undeveloped – or, at least, appears to be so – and land within the Agricultural District that appears to be developed in non-agricultural uses. For this, the OPSD relies on maps based on the National Oceanic and Atmospheric Administration's Coastal Change Analysis Program (C-CAP).

Of all lands within the state Urban District – 203,699 acres – the OPSD states that 68,654 acres, or 33.7 percent, appear to be undeveloped. But, it adds, "the C-CAP aerial imagery analysis has limitations, but closer inspection can discern the large tracts which are planned but not yet developed by the private and public owners or reveal potential areas for infill development opportunities."

On Hawai'i Island, more than half – 55 percent – of Urban District land is undeveloped (30,740 acres out of 56,348). On Moloka'i, that percentage is even greater – 59 percent, or 1,352 undeveloped Urban acres out of a total of 2,287 Urban-designated acres.

The same caveat about C-CAP imagery applies to the analysis of Agricultural District lands that appear to be developed. "This analysis includes both agricultural (cane haul roads and other roads used to transport machinery, crop yields, etc.) and non-agricultural roads," OPSD notes, adding that it was not possible to sift out only the agricultural roads "without also removing other types of roads and development associated with non-agricultural uses." In this section of the report, OPSD makes no estimate of acreage that has been developed in a manner inconsistent with permitted

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agricultural uses.

'Potential Approaches'

The OPSD states in its boundary review that it is not proposing any changes in district boundaries because "there are no resources available to pursue individual district boundary amendment petitions under the existing LUC reclassification procedures."

Instead, OPSD recommended changes to state law that would make it easier for counties and landowners to shift lands from one district to another. The document describes these variously as "options," "potential approaches" to which "consideration could be given…," stopping short of endorsing outright any one of the many strategies suggested for amendments to the district boundary review process.

County planning agencies have the authority to approve boundary amendments under 15 acres for land in the Urban, Rural, or Agricultural districts. Amendments involving the Conservation District land of any acreage and land in all other districts for parcels of 15 acres or more must be approved by the state Land Use Commission.

"To promote consistency of the Urban District boundaries with county plans," the OPSD's November 2021 draft report states, "consideration should be given to approaches that would simplify the redistricting of lands based on county plan designations." It offers "three potential approaches" to achieve this: There could be "expedited review" by the LUC for boundary amendment petitions that are consistent with county plans. The report doesn't spell out exactly how this should be accomplished, however. Second, the report suggests a "quasi-legislative decision-making" process to approve county redistricting petitions. Finally, the Legislature could "increase counties' authority to reclassify lands … to the Urban District if the petition area lies within the county planned growth area."

Similar approaches are proposed to address non-agricultural uses in the Agricultural and Rural land use districts.

The LUC Weighs In

On October 28, LUC executive officer Dan Orodenker sent a memo to OPSD director Evans, responding to her request to brief the full commission on the September draft of the "State Land Use Review of Districts."

It was harsh.

The report, Orodenker wrote, "has serious technical flaws" and fails to provide "useful guidance without significant revision."

Orodenker criticized the process by which the report was generated, stating that it was a "fatal flaw not to have engaged with the Land Use Commission at a very early stage in its development to get input."

In addition, "while the data analysis underscores that there is a significant amount of urbanized vacant land that remains vacant or undeveloped, there is no discussion as to why that is occurring, how it can be rectified, and the impact development of that land would have on the economy or housing inventory. Absent such analysis, any proposed changes to the process that would expedite the urbanization of additional lands would only serve to enhance sprawl, reduce agricultural lands needed for food sustainability, and significantly alter the infrastructure requirements for a designated area leading to long-term viability problems for water, sewer, and roadway infrastructure."

What's more, he wrote, the plan contains "no discussion of climate change and sustainability issues or a recognition of the requirements contained" within the state's 2050 Plan.

Orodenker also criticized technical aspects of the plan, noting a lack of "any nexus between the assembled data and the conclusions" in the section recommending possible options. The conclusions, he stated, "appear to be random and nothing more than the sentiment of the author," Rodney Funakoshi, who heads up the OPSD's Land Use Division. "Of significant concern is that there is no evidence to support the proposed resolutions to problems that may or may not exist," he wrote.

He continued: "even assuming the conclusions and recommendations are legitimately derived, there is no recognition of the *Towne* case and its impact on procedural requirements for agencies." That case, *Towne v. Land Use Commission*, resulted in the determination by the Hawai'i Supreme Court that decisions involving ownership rights had to be made through a quasi-judicial process – a contested case – and not legislatively.

Orodenker added, "Alarmingly, given the legal mandates of the LUC and the OPSD, there is no discussion of the duties imposed on government by the Public Trust Doctrine…. [F]ailure to address how these issues could and should be addressed is a significant flaw and impacts the usefulness of the document."

Orodenker also lit into the report's suggested simplification of the redistricting process as "lacking in any reference to or analysis of whether or not such a process is possible under various Hawai'i Supreme Court cases," including the *Towne* decision.

In particular, Orodenker described as "objectionable in its entirety" the recommendation that counties be authorized to reclassify land into the Urban district if the area proposed for redistricting lies within the county planned growth area. It is, he wrote, "a one-sided capitulation to the desires of the development community."

A Contentious Hearing

In response to Orodenker's comments, the OPSD appears to have added some language to the boundary review report acknowledging the *Towne* decision, but still suggesting that the LUC role could shift to "regional quasi-legislative decision-making with limited project-specific, quasi-judicial decision-making."

But on November 23, when Evans was given the opportunity to present the OPSD report to the full Land Use Commission, she was confronted with even more withering criticisms.

Commissioner Arnold Wong wanted to know why the OPSD had not sought community input as it prepared the plan. "We have a lot of community input," he said, referring to the LUC process. "Not only petitioners and intervenors, but also the public." Couldn't the OPSD have "zoomed to different islands," engaging the Sierra Club, Maui Tomorrow, and other groups? he asked.

"We're looking forward to receiving comments from as many stakeholders as possible, now that the draft is on our website," she replied. The plan "is not set in stone, it's still a draft. We made changes based on all four counties'

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comments, and also made changes from LUC staff when they were similar to the counties'. We look forward to getting comments and will make changes if they make sense."

Wong asked if the OPSD had included public-trust considerations in the report, noting that he had taken some classes about the public trust doctrine and found them helpful. Evans replied that she and staff had also taken training: "I don't think there's any conflict with the review and the native land law training that's been provided by the Richardson law school."

Other commissioners were also troubled by the apparent lack of public outreach. Nancy Cabral said she was "concerned that this is kind of being pushed ahead" without public engagement. "It's a massive report," she noted.

Gary Okuda warned of what could happen without broader community input. "If this plan goes forward without significant community engagement, you'll see the same kind of backlash that came through" when the City and County of Honolulu proposed designation of Important Agricultural Lands.

Commission chair Jonathan Scheuer stated it was not sufficient to merely post the report on the OPSD's website. "I share concerns about outreach and timeline," he said. If posting the report online "is your outreach plan, you need to do better."

Commissioners were also puzzled about the difference between the "options," contained in the report, and "recommendations," which Evans insisted were not.

As to those options, Scheuer said, "don't you think they'll be taken as recommendations?"

"That's for the Legislature to figure out if they want to," Evans replied.

As the hearing drew to a close, the commission voted to empower Scheuer to draft a letter listing the commissioners' concerns to the OPSD.

A Searing Critique

The seven-page letter from Scheuer to Evans, dated January 10, left no doubt as to the commissioners' dissatisfaction with the OPSD review. Scheuer enumerated nine categories of concerns:

- The review's "options;"
- Public and agency participation and engagement;
- Need, purpose, and goals for the review;
- Lack of legal context and analysis;
- The public trust doctrine;
- Limitations of reliance on county general plans and community plans;
- Climate change and sustainability mandates;
- Undeveloped urban district land, county growth boundaries, and infrastructure;
- Disconnect between findings and "options."

The inclusion of recommendations – characterized as options – in the review "elevated all of the other concerns of the commission," Scheuer wrote. Had they not been included, other concerns would still have existed, but would be less consequential, he continued. The very use of the term "options," he wrote, "was a word choice designed to propose recommended actions to the Legislature while rhetorically removing any allocation of responsibility to OPSD. "Second," he continued, "the commissioners believed that the lack of community engagement, legal analysis, and other factors led to the proposed 'options' to be deeply problematic for the state, our people, and our resources."

The failure to meaningfully engage with the public meant that the community's concerns are not reflected in the review, Scheuer wrote, "and hence they are not recognized as concerns or examined." In addition, the LUC "does not feel that simply posting the document on the OPSD website will result in any meaningful input from the community."

The fact that the document, in nearly complete form, has already been published on the OPSD website "will additionally make meaningful engagement extremely difficult. Many stakeholders may believe, as the LUC was inclined to conclude, that their input would never be meaningfully considered," he added.

When LUC staff did raise concerns – as in Orodenker's October letter – they were only "incorporated into the plan where they 'matched the counties,'" Scheuer noted, quoting Evans' statement to the commission. "This would appear to render LUC concerns irrelevant."

Another puzzle was the timing. "Commissioners repeatedly requested clarification on why the review was done … and why there appears to be a rush to submit the report before the start of the next legislative session," Scheuer said. The review analyzes current conditions "but does not state its purpose in doing so, what the review is intended to accomplish, why the report has been developed, nor the issues that need to be examined… Since the report is no longer mandated, commissioners wanted OPSD to more clearly articulate why it feels compelled to move forward at this time."

Regarding the legal context, Scheuer wrote: "Of significant concern is the lack of legal analysis done on the 'options.' Commissioners expressed concern that the report does not recognize constitutional and case law constraints placed on reclassification of land. … The Legislature cannot simply change the process to 'streamline' the system. The commission is extremely concerned with regard to statements by OPSD that the Legislature can pass laws of questionable constitutionality or legality and then leave it to the Supreme Court to decide."

Similarly with respect to the public trust doctrine, Scheuer wrote, "During the discussion there appeared to be some confusion on OPSD's part as to the training provided by OHA [Office of Hawaiian Affairs] on Native Hawaiian issues and the public trust doctrine. Native Hawaiian issues … are only one component of any government agency's public trust obligations."

He added: "The public trust doctrine is much more complex and includes water, environmental and other issues not recognized in the OPSD Review. How those obligations can be met under the 'options' has not been analyzed or discussed."

The OPSD review was extremely deferential to county general plans, praising them as having wide public involvement and being closely in touch with the community's needs and desires. However, as Scheuer pointed out, this runs against the commission's own experience in at least two redistricting cases. "Any 'option' that relies on the general plans as including comprehensive agreements on expansion of the urban core is misguided," he wrote. Boundary reclassification petitions proposed in Olowalu, Maui, and North Kona – both rejected

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following wide community opposition – provided "evidence of the inadequacy of reliance on the county general plans, as urban growth lines clearly conflict with public trust concerns and community wishes."

Mandated state concerns related to sustainability and climate change were not properly addressed, Scheuer wrote. "The Hawai'i 2050 Sustainability Plan should be discussed and addressed," he stated. "Failing to do so is a significant omission. While not specifically identified in HRS Section 205-18 as one of the documents to focus on, it is one of the most significant current policy documents that will impact land use decisions now and into the future." Scheuer served as lead facilitator at the Office of Planning's public engagement sessions held during development of the plan.

The existence of large tracts of Urban district land that remain undeveloped raises numerous questions not addressed in the OPSD review, Scheuer noted. "Relatedly, there was no analysis of the reasons why housing promised on those lands has not been developed and a related blind faith that additional urbanization of lands would result in housing," he wrote.

Finally, "the commissioners believed there was little to no connection between the information contained in the review and the conclusions or 'options' then presented. The review recommends making it easier for the counties to reclassify more lands, even though the review does not show additional Urban District lands are needed or the problems that will be resolved if the 'options are adopted.' There is no useful information or discussion of infrastructure adequacy. … [T]he commission is concerned that the proposed options are not grounded in any factual analysis but seem to reflect the policy of the private sector developer community revolving around a position that the fewer protections for the public associated with the development process, the more housing will be built."

"Overall," Scheuer concluded, "the LUC is concerned if any of the proposed 'options' contained in the report may evolve into legislation." He went on to encourage the OPSD to engage in broader community outreach to "better scope out perceived problems."

"The commission feels very strongly that the review should be retracted until the process has been rectified and the community engaged."

Evans replied on February 7. In response to the criticism that the LUC had been given no opportunity for input early in the review's drafting, Evans stated that OPSD "has consistently solicited LUC staff comments" – a claim that Orodenker flatly denied in comments to *Environment Hawai'i*.

She expanded on the difference between "options" and "recommendations." The former, she wrote, "are plausible ways to address the discrepancy between county growth boundaries and state Land Use District classifications and we cannot at this time 'recommend' any one option over another."

As for public involvement, Evans said that outreach to groups and communities concerned with the land use classification process may be appropriate "in the development of county general plans. … But to apply this approach in the development of the boundary review that does not affect individual property rights or interests would be unwieldy and unnecessary."

She also defended the timing: "The GIS analysis [on which much of the review was based] was mainly completed in 2016 and legislators during recent sessions have asked about the review, therefore it is appropriate that OPSD to release [sic] the review while the Legislature is in session."

Regarding the *Towne* decision and the public trust doctrine, Evans wrote: "OPSD recognizes and expects that any of the possible approaches suggested … will require detailed refinement… However, discussion of possible alternatives should not prevented [sic] because of the potential impact of the *Town* [sic] decision on efficacy of certain options."

And as to the 2050 Sustainability Plan, Evans noted, as did Scheuer, that a discussion of this was not a requirement in the law authorizing boundary reviews. "Although not specifically stated, the review is consistent with sustainability principles," she wrote. "The suggested approaches toward consistence between state district boundaries and county growth areas is consistent with the sustainable practice of concentrating developments in areas with existing or planned infrastructure."

From Options to Bills

Although the review is still a draft and as of press time had not yet been formally presented to the Legislature, that hasn't meant that the Legislature is unaware of the "options" it lays out. Already, hearings have been held on bills that would implement some of the recommendations/options in the boundary review.

Take, for example, House Bill 1840. This measure, with 10 co-sponsors, would give to counties authority to approve redistricting of areas of up to 50 acres, under certain conditions, without holding a contested-case hearing and without requiring the approval of the Land Use Commission.

At a hearing on HB 1840 House Draft 1, on February 11, the OPSD submitted testimony favorable to the bill, as did the counties. What's more, the planning directors of Maui and Hawai'i counties presented their own legal analysis in an effort to refute the objections "presented by Land Use Commission staff," in particular "the concerns of the *Town* [sic] *v. Land Use Commission* case." (The counties argued that the quasi-judicial process required in *Towne* is applicable only to LUC dockets, while the land use district boundary procedures adopted by Maui and Hawai'i counties "are more akin to the City and County of Honolulu's special management area use permit procedures," upheld by the Hawai'i Supreme Court, which are more legislative.)

Orodenker, testifying on behalf of the LUC, laid out the opposing case. He noted that between 2000 and the present, "the LUC has approved over 40,000 homes with only a relatively small percentage actually built and/or have begun the development process." He called this a "clear indication that the state approval process is only a small factor in the housing problem facing the state."

The proposal to exempt the redistricting process from contested-case requirements "is likely a violation of due process property rights embedded in the Constitution … and a direct violation of due process rights embodied in law. As such, the section is likely [to be] rendered invalid and contested case hearings will still have to be held before any district boundary amendment can

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BOARD TALK

Land Board Imposes $17,000 in Fines For Unauthorized Driveway in Lanikai

"He knew what he was doing," Land Board member Tommy Oi said in support of his motion to approve a $17,000 fine against Lanikai residents Donald and Julianne King for unauthorized work in the Conservation District.

The couple, who own a hillside home in the area, constructed a rough driveway of thin concrete and gravel and installed landscaping on a 76-acre Conservation District lot adjacent to their own last year, without a permit from the Land Board.

On February 4, the Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL) recommended fining the couple the maximum fine of $15,000 for the Conservation District violations, plus $2,000 in associated administrative costs.

Shortly after the Kings bought the Conservation District lot in 2012, they wrote to the OCCL inquiring about getting a permit to build a "short paved access road, approximately 140' long by 12' wide, with a turn around area at the end."

Then-OCCL administrator Sam Lemmo informed them that they would need a Conservation District Use Permit from the Land Board and would also need to complete an environmental assessment.

PHOTO: OCCL

On the left is the unauthorized driveway constructed on Conservation District land owned by Donald and Julianne King.

Despite this, in 2016, they submitted an application for a site plan approval for the driveway, not a full CDUP. The OCCL returned the check that accompanied their application and reminded them that they needed to complete an EA and obtain a CDUP from the Land Board for their proposed driveway.

The couple submitted a site plan application for the access again in December 2020, which the OCCL returned in February 2021, with another reminder of what they were required to do.

Finally, last August, the Kings submitted a Conservation District Use Application. However, the photos included in the application showed that the work had already been done.

At the Land Board's February 4 meeting, the OCCL recommended the Kings pay $17,000 in fines and submit a new CDUA within 180 days.

Donald King apologized to the Land Board and OCCL staff for what had happened.

"I really regret I'm coming before you. … I'm really sorry for the amount of time you guys have had to put into this," he said.

He explained that in 2012, he and his wife were able to afford buying the Conservation land "because the designation and inability to build a home on the land reduced the value significantly. One of our goals in buying the land was to have it belong to a community member."

Another goal, he said, was to gain access and a permit for a driveway.

"Our youngest son has autism. My wife and I started a parent support group and founded the Hawai'i Autism Foundation," he added, noting that meetings

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be approved."

Phyllis Shimabukuro-Geiser, chairwoman of the state Board of Agriculture, testified that the Department of Agriculture was "concerned about the potential impact this bill may have on the state's prime agricultural land resource." While the bill leaves intact language that still requires the LUC to approve any redistricting involving designated Important Agricultural Lands, as of now, there are few such IALs in the state, so at this point, the requirement has little effect. Shimabukuro-Geiser suggested that the measure also exclude from the county redistricting process lands with an "A" or "B" productivity rating.

The Hawai'i Farm Bureau was far more critical of the bill. Brian Miyamoto, executive director, warned against the bill's "simplistic solutions to Hawai'i's housing problems." He added that the use of soil classification to determine land productivity is no longer a relevant standard. "Greenhouses, hydroponics, aquaculture, and aquaponics are just a few of the many types of agriculture that can occur on all classes of land," he testified. "Some of the best floriculture and hydroponic operations in Hawai'i are on C, D, and E lands."

The Sierra Club of Hawai'i also strongly opposed the bill, which, it warned, "may compromise the public's environmental, cultural, agricultural, and recreational interests in our islands' lands and waters."

With regard to the bill's intent to spur more affordable housing, the group noted, "[T]he LUC is not the apparent barrier to affordable housing production it is often purported to be. … If affordable housing development is a concern, Sierra Club encourages the committee to explore the potential expansion of the LUC's enforcement authority. Since 1980, more than 25 percent of all the housing authorized by the LUC has not yet been built, much of which was proposed to be affordable and workforce housing."

For some critics, the bill doesn't go far enough. The Hawai'i Association of Realtors generally supported the bill, but argued that the 50-acre limit was too stingy, suggesting instead that it be increased to 100 acres.

— Patricia Tummons

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are sometimes held at their house and that his son has a caregiver visit on regular basis.

"They would have nowhere to park," he said.

Street parking in Lanikai is highly restricted and is not allowed on three-day weekends.

He said the driveway he built is thin and could be removed with hand tools, if necessary. He added that he would ultimately like to install a proper, permanent cement driveway.

Two of the Kings' neighbors submitted written testimony in support of their efforts to build a driveway.

Only one member of the public testified at the board meeting. James Manaku, Sr., of Wai'anae, who often testifies before the Land Board on access issues, expressed his concern over what precedent might be set if the board were to go easy on the Kings.

"What I'm worried about is that if he can do this on his Conservation land, what about the other landowners? … Imagine what can happen on Conservation land on all the islands. … I'm sorry about his predicament, but what is important is our rights and preservation of all these lands," Manaku said.

Board member Kaiwi Yoon asked King what was going through his mind when he first began building the driveway. "You knew you had to have a permit," Yoon said.

King again expressed his remorse, and said he was just really slow in applying for the permit. He said he couldn't afford the cost of hiring a consultant to help him. "I decided to do it myself and I was just really slow in getting it done," he said.

Board member Vernon Char suggested deferring the violation case and instead allowing the Kings to complete the permitting process.

"I am sympathetic to citizens getting caught in various governmental difficulties. No parking, things of that nature with the city, and just getting gridlocked with procedure. On the one hand I don't condone self help. … On the other hand I can sympathize with the frustration he has," Char said.

The OCCL's Michael Cain said that current Conservation District rules do not allow permits to be processed if there is a pending violation. He added that his office has not asked the Kings to stop using their illegal driveway, but is only seeking fines and a permit.

When board member Oi made a motion to approve the staff's recommendations as submitted, the board initially approved it 5-2, with Char and board member Doreen Canto voting in opposition.

However, in the middle of holding a roll-call vote to confirm the result, board member Chris Yuen suggested that the board discuss the case further, since some board members had opposed the motion.

Char said, "I think the applicant has come forward. He hasn't hidden anything. I would go along and vote for this just to get the violation over with but I would reduce the fine to $1,000."

Yoon disagreed. He recalled King's statement that he and his wife could afford the land because it was in Conservation.

"Whenever you purchase Conservation land or anything like that, and it's quite a bit of land, I would hope you would know what the rules and regulations are, the dos and don'ts, and in fact he admitted that he did," Yoon said.

"Then later, when I asked what was going through your mind, he said, 'We couldn't financially afford it.' To me, that's, I don't want to say disingenuous, but it's schizophrenic," he added.

Finally, he raised the same point Manaku did. "What's to stop other owners that have Conservation land who say, 'Well, I knew, but things weren't panning out so I did it anyway. Sorry.'?" he asked.

Yuen agreed with Yoon's arguments and said he could not support a fine as low as $1,000. However, Yuen suggested that the fine should reflect the damage that had been done and said he didn't think what the Kings had built was as bad as, say, an unauthorized seawall. Yuen said he could support a reduce fine of $10,000 plus the $2,000 in administrative costs.

To Oi, however, the OCCL's proposed fine was justified.

"He knew he was in violation. OCCL did send him a letter [describing] what he needs to do to get it done and he didn't do it and he did it on the side, like he's telling OCCL, 'We don't need you. We gon' do it on our own,'" he said.

In the end, Oi's motion passed, with Char, Canto, and Yuen voting in opposition.

King said he would not contest the fines.

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Feds to Help With Management Of Waiea Natural Area Reserve

Just because lands are in the state Agricultural District doesn't necessarily mean they're best used for farming or ranching. That's the message some Land Board members hoped to convey last

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Environment Hawai'i, Inc.
421 Ka'anini Street
Hilo, Hawai'i 96720

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month as they voted to enhance management of 1,269 acres in South Kona known as the Waiea Tract.

The Land Board voted last year to set aside the tract as a Natural Area Reserve.

Although the land was once part of a pasture lease, the last permittee surrendered the area, which is surrounded by a National Wildlife Refuge owned by the U.S. Fish and Wildlife Service. There is currently no access to the reserve except through the refuge.

"Waiea is part of a larger contiguous tract of 'ōhi'a-dominated forest containing rare forest bird habitat and endangered plant habitat. It is also essential watershed in the central Kona region. The forest in this region has an extraordinarily closed canopy, estimated at 50-75 percent canopy, far above the normal range for native Hawaiian forests. There also is montane mesic forest with mature stands of 'iliahi," states a September 2020 report by the Department of Land and Natural Resources' Division of Forestry and Wildlife supporting the NAR designation.

On February 11, the Land Board unanimously approved a request from DOFAW to authorize the board's chair to enter into a cooperative agreement with the U.S. Fish and Wildlife Service for management of both the Kona Forest Unit of the Hakalau Forest National Wildlife Refuge and the Waiea Tract.

Such an agreement will allow the FWS and DOFAW to combine their efforts in both areas. "This will be accomplished by coordinating the acquisition and habitat enhancement activity plans and pursuing joint funding opportunities where applicable. Coordinated management and shared resources would prevent duplicating or conflicting land management efforts by developing annual management and maintenance plans cooperatively and sharing annual reports of accomplishments," DOFAW states.

DOFAW's Emma Yuen noted that the Waiea Tract was one of the DLNR lands proposed by the Legislature to be transferred to the Department of Agriculture.

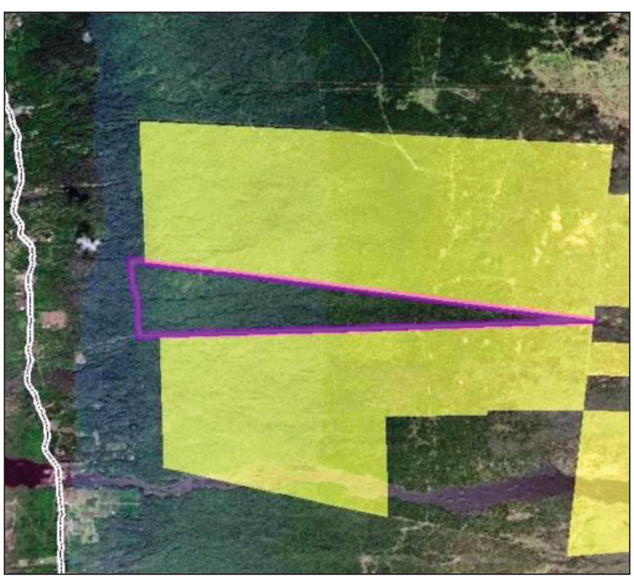

PHOTO: DOFAW

The Waiea Natural Area Reserve (in purple) is surrounded by a National Wildlife Refuge (in green).

"It was mostly used for access. Many years ago, the lessee did not renew their permit and it has just been unencumbered for a long time. It has very limited ag potential because it's land-locked," she continued.

"This is a big puka in the protected area in Kona that we're pulling together," board chair and DLNR director Suzanne Case added.

Yuen noted that DOFAW already has the materials to fence the area, where feral cattle are still found. "Really soon, we're going to be able to take care of that," she said.

PHOTO: DLNR

A feral bull in the Waiea Natural Area Reserve.

Board member Chris Yuen, who also happens to be Emma's father, said the board's action regarding Waiea "has some relevance to the ongoing debate at the Legislature about DLNR lands that are under RP [revocable permit] or pasture that have natural resource value. It's a good example of DLNR moving forward protecting a forest area that was once pasture. … We recognized it should not be grazed [and] now it will be managed as part of a very large contiguous ecosystem along with a Fish and Wildlife Service bird sanctuary in South Kona."

Currently a number of bills before the Legislature propose to expedite the transfer of lands included in DLNR pasture leases or permits to the DOA.

— Teresa Dawson

Overset

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