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Environment Hawai‘i

a monthly newsletter

Going, Going, Gone?

For the last decade and a half or so, the ‘Aina Le‘a development has been struggling. A few multi-unit buildings went vertical a decade ago. Since then, the landowner has gone through several different corporate reorganizations, has devised some unusual financing schemes, and, two years ago, emerged from Chapter 11 bankruptcy.

But absent the sudden appearance of an angel investor or an 11th hour bankruptcy filing, it seems likely that on October 7, the first foreclosure auction sale of a chunk of ‘Aina Le‘a property will be confirmed in a Kona courtroom.

What this will mean for the overall development remains to be seen. One thing is certain: it will only add to the dismaying confusion that has surrounded this project for most of the three-plus decades since it was first proposed.

IN THIS ISSUE

‘Aina Le‘a Is on the Verge of Losing Land Designated for Affordable Housing

What’s been happening recently with ‘Aina Le‘a, the development that has been proposed for around 1,000 acres across Queen Ka‘ahumanu Highway from the Mauna Lani resort, along the Kohala Coast of Hawai‘i Island?

Fasten your seat belts. It’s a lot. And you might want to keep a scorecard handy.

A short and admittedly incomplete summation was provided in a Bankruptcy Court filing in late June from the company’s largest creditor, Bridge ‘Aina Le‘a, LLC:

“The undisputed facts are that: ‘Aina Le‘a remains in material default of its obligations under the [Bankruptcy] Plan; ‘Aina Le‘a is losing the Subject Property and neighboring parcels to foreclosure proceedings in State Court; ‘Aina Le‘a’s unpaid real property tax bills are ballooning; ‘Aina Le‘a has made no discernible progress under the Plan; ‘Aina Le‘a lacks any credible way forward under the Plan….

“‘Aina Le‘a’s familiar and empty assurances aside, … the Plan has failed, and there is no real chance of ‘Aina Le‘a succeeding.”

And now, barring an angel investor coming up with the capital needed to bail out ‘Aina Le‘a, the company will likely lose title to the 38-acre parcel where 12 years ago it began building townhouses to satisfy the affordable housing condition placed on the development. It’s the only parcel of the four owned by the company that has seen any vertical construction at all in the 14 years ‘Aina Le‘a has owned the land.

On October 7, Judge Wendy DeWeese will hold a hearing to confirm the foreclosure sale of the parcel to a Canadian company that is owed more than $13 million by ‘Aina Le‘a.

Background

For years, ‘Aina Le‘a, Inc., has been running on fumes, with promises of big payouts and capital infusions just around the corner.

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These affordable units built by ‘Aina Le’a more than a decade ago are still not ready for sale.

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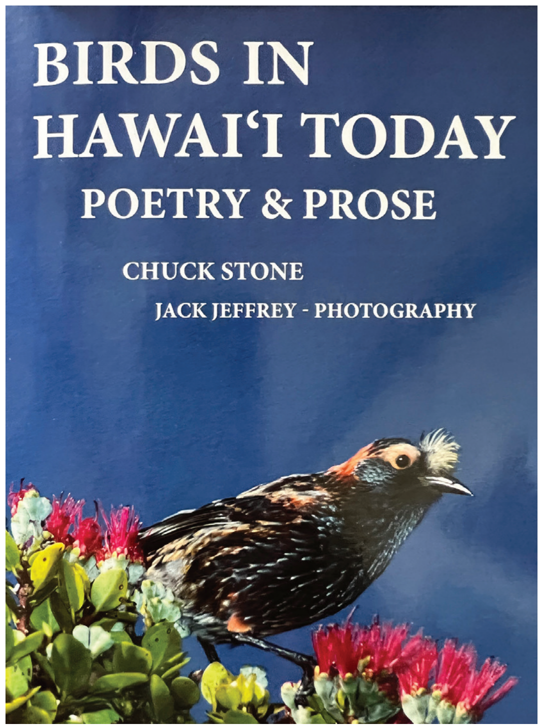
NEW AND NOTEWORTHY

Poems and Pinions: One of the heaviest, most serious tomes in any reputable library of a Hawaiʻi conservation biologist is *Alien Plant Invasions in Native Ecosystems of Hawaiʻi,* edited by Charles Stone, Cliff Smith, and Tim Tunison.

And now that same Chuck Stone has authored one of the lighter volumes on the conservationist's bookshelf: *Birds in Hawaiʻi Today: Poetry & Prose,* with photographs by renowned photographer Jack Jeffrey.

But it's intended not only – or even mainly – for the conservationist. As Stone writes in the preface, the target readers are non-scientists "curious about the biology, conservation, and status of birds in Hawaiʻi," whether they live in the islands or elsewhere.

Stone advises his book isn't a detailed guide. Nonetheless, readers of the poems he has written for 20 species, both native and



introduced, are chock-full of information on the birds' histories and habits. Essays on each of the various types of birds – such as sea birds, water birds, forest birds – introduce the main sections of the book, with short write-ups on each bird in each category.

The quatrain poems are long, running from 14 to 20 verses. Shakespeare it isn't, but there's still a lot of emotion packed into them. The ode to the ʻiʻiwi, for example, mourns their vulnerability to avian pox and malaria, with the incidence of disease increasing with the warming climate:

Luckily, ʻiʻiwi adapt
To captive breeding and release.
New populations may begin
From birds bred for resistant genes.

Like ʻamakihi, some ʻiʻiwi
Could develop immunity.
But that might take substantial time –
For ʻiʻiwi, an eternity….

EPA Oversight Questioned: The Office of Inspector General for the Environmental Protection Agency has launched an investigation into the agency's oversight of programs that the EPA has delegated to the state. Specifically, the OIG states, "our objective is to determine, by analyzing the sequence of events that led to drinking water contamination at the Red Hill Site … whether the EPA's oversight of relevant authorized state programs effectively has addressed the potential for contamination at the site."

The investigation was opened following a preliminary inquiry by the OIG of the regional EPA administration's response to the contamination. That inquiry included "interviews, data gathering, and analysis of issues such as adherence to policies and procedures for underground storage tank leak detection, drinking water quality monitoring, and oil spill reporting."

The investigation was announced on March 21. No final report has been released.

A Clarification: *Environment Hawaiʻi* has seen no evidence that the principals of Waikoloa Mauka/Waikoloa Highlands were in any way involved in the apparent kickback scheme that Alan Rudo and other co-defendants are accused of orchestrating. No reports in *Environment Hawaiʻi* about what federal prosecutors have described as the "Waikoloa Scheme" should be taken to suggest that Waikoloa Highlands principals were anything other than its victims.

Quote of the Month

"This is the first Na Wai ʻEhā item I've ever been on with support from everyone. For me, there's hope …"

— Mike Buck, Water Commissioner

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Commission Gives Hui Permit to Rebuild Waiheʻe ʻAuwai Destroyed by 2018 Flood

On February 18, 2018, a massive flood ripped away a 500-year-old ʻawuai that fed dozens of acres of loʻi kalo in North Waiheʻe in Central Maui. Although hundreds of people from across the island gathered in the days that followed to rebuild the stone ʻauwai so that farming could resume, they could only lift and carry so much by hand.

Kapuna Farms owner Mikiʻala Puaʻa-Freitas, who grew up at the foot of the ʻauwai and whose family has been maintaining it for generations, testified at the meeting last month of the state Commission on Water Resource Management that she's now been growing only dryland kalo, which is "a whole other style of farming. When the flood happened, my world was turned upside down."

Kalo farmer David Lengkeek, who used to sell to Aloha Poi in Wailuku, said he's also been without water since the flood.

The native Hawaiian community group Hui o Nā Wai ʻEhā, which has spearheaded efforts to return flows into the streams and loʻi in the region, has been toiling for the past four years to change that. Three months ago, hui president Hōkūao Pellegrino filed a stream diversion works permit application with the Water Commission to allow for the construction of a more formidable ʻauwai and for the diversion of nearly 1.4 million gallons of water a day through it.

The hui has also been working with the state Historic Preservation Division to register the ʻauwai as a historic site.

The application described a plan for Mahi Pono, LLC, the company working to expand diversified agriculture on former sugarcane lands in Central Maui, to use an excavator to dry stack a 128-foot long stone ʻauwai along the left bank of Waiheʻe River, on lands owned by Michael and Dana Pastula. The wall's height would range between 6.5 and 7.5 feet; its width, between 4 and 8 feet.

The diverted water would feed nine acres occupied by farmers who hold surface water use permits granted by the commission in 2018.

At its September 20 meeting, the commission unanimously approved the permit.

Although community members had gotten some water to flow into the ʻauwai after the flood, "Waiheʻe is a very big, strong, powerful river. We need big pohaku to be stacked. That is the whole reason behind this permit. To set something up that will last for years to come," Puaʻa-Freitas said. She added that it's been difficult getting enough water to flow to the end of the ʻauwai.

The permit includes a condition that the hui notify the commission at least 48 hours before reconstructing any parts of the new wall that are damaged in the future

"If the rock wall must be relocated or enlarged, a request for determination shall be submitted to the Commission to determine if the reconstruction shall require a Stream Diversion Works Permit," the condition adds.

Also, within four months, commission staff will work with Wailuku Water Company and North Waiheʻe ʻauwai permittees to address and resolve water distribution and delivery responsibilities in the appropriate proceedings. Currently, the permits incorrectly state that permittees receive their water via WWC's Spreckels Ditch.

Pellegrino noted that North Waiheʻe was the largest kalo growing area in the region before the flood and that the loss of the kuleana ʻauwai "caused great pain." He thanked the landowners, commission and state historic preservation staff, hui members, and Mahi Pono's director of water resources, Mark Vaught, for all of their work on the project.

"It truly was a collaborative process. It took us four years to get to this point," Pellegrino said.

"This truly is a shining example and model of community initiative," added Earthjustice attorney Isaac Moriwake, who represents the hui.

Like Pellegrino and Puaʻa-Freitas, he also recognized Mahi Pono, which he said had committed in a 2019 stipulation and agreement to give back to the Waiheʻe community and assist in the ʻauwai restoration. The company has been often accused by those advocating stream restoration as diverting far more water than it needs and wasting much of it.

Finally, he read testimony given to the Water Commission some 15 years ago by kalo farmer Stanley Faustino, who passed away in October 2018. Faustino, born in 1939, lived at the top of the kuleana ʻauwai, which he said fed 18 loʻi kalo on his property. But in the 1980s, that kuleana ditch was altered so it no longer connected to the loʻi, which then became polluted with weeds and infested with snails.

"Now, instead of our entire land covered in loʻi, there are only three," he said.

He called for water to be restored to the loʻi, but not before it was restored to the river. The commission did order some water to be returned to the streams in 2010, which allowed some farms to grow, but the 2018 flood erased those gains made by those served by the ʻauwai.

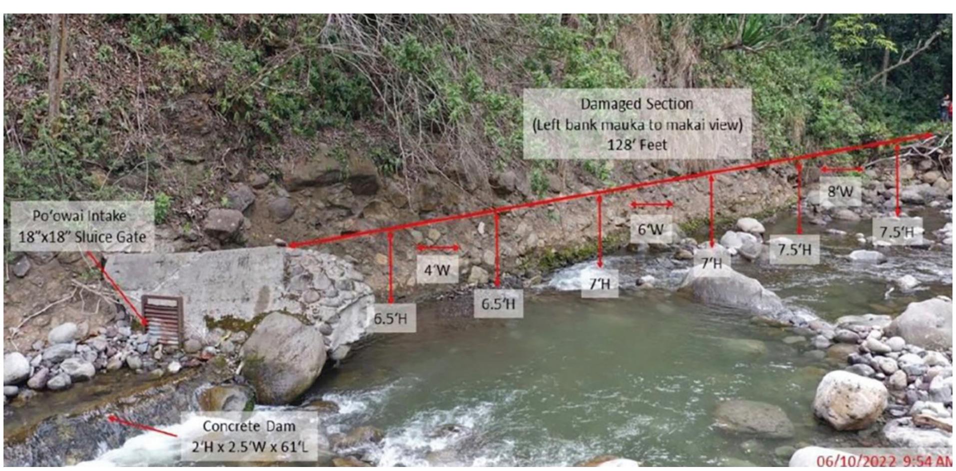
"Rest in power, Uncle Stanley. It's key we remember you when we bring it full circle," Moriwake said.

Puaʻa-Freitas noted that the water diverted into the ʻauwai will be returned to the river. She also thanked everyone involved.

"This ʻauwai has been a beacon of strength for my community. … People on different sides of the pendulum came together. … I look forward to growing loʻi kalo once again and feeding my community," she said,

Kely Rodrigues and his wife, Lindsey, hope to join her. They recently moved onto lands in Waiheʻe once owned by Kely's late uncle, Mike Rodrigues, one of the water permittees served by the ʻauwai.

"He passed away waiting for the water, too," Kely Rodriques told the commission. "I feel like it's our time, our responsibility, to



The proposed repairs to the 128-foot damaged section of the ʻauwai. CREDIT: CWRM take over and carry his legacy and keep his vision alive for the next generations after us. While he was here, he constantly called and cried about his water not being there and how much he missed it."

He plans to continue his uncle's passion as a kalo farmer and "get that 'auwai working so we can put our footprints in the lo'i and give back to what gave him so much joy and so much happiness while we here on earth. Our goal is to continue to make him happy while he's watching us and making sure his life was never forgotten," he said, adding, "We mahalo everybody here for listening to our little saying of what we had to say."

Commissioner Neil Hannahs corrected him, "It's not a little thing. It's a powerful contribution to our work, so thank you for testifying."

In 2018, the Water Commission issued its decision and order granting water use permits to new and existing users of waters from the Waihe'e River, Waikapū Stream, Wailuku River, and Waiehu Stream. Since then, the commission has struggled with instances where permittees aren't getting the water they're entitled to.

"In our endless hours of deliberation on Nā Wai 'Ehā, we knew there would be challenges in implementation. This is the first Nā Wai 'Ehā item I've ever been on with support from everyone. For me there's hope…," commissioner Mike Buck said.

The commission unanimously approved Buck's motion to approve the staff's recommendation with a few amendments.

After the vote, Hannahs echoed Buck's comments.

"Just as it takes stacking pohaku one by one to build a wall that fulfills a function, it's going to take the stacking of collaborative projects, one by one, to build the kind of water community that I think will lead us to [accomplish] the visions that we have for the protection of this resource and fulfillment of its function to provide a way of life for people and so many public trust uses," he said.

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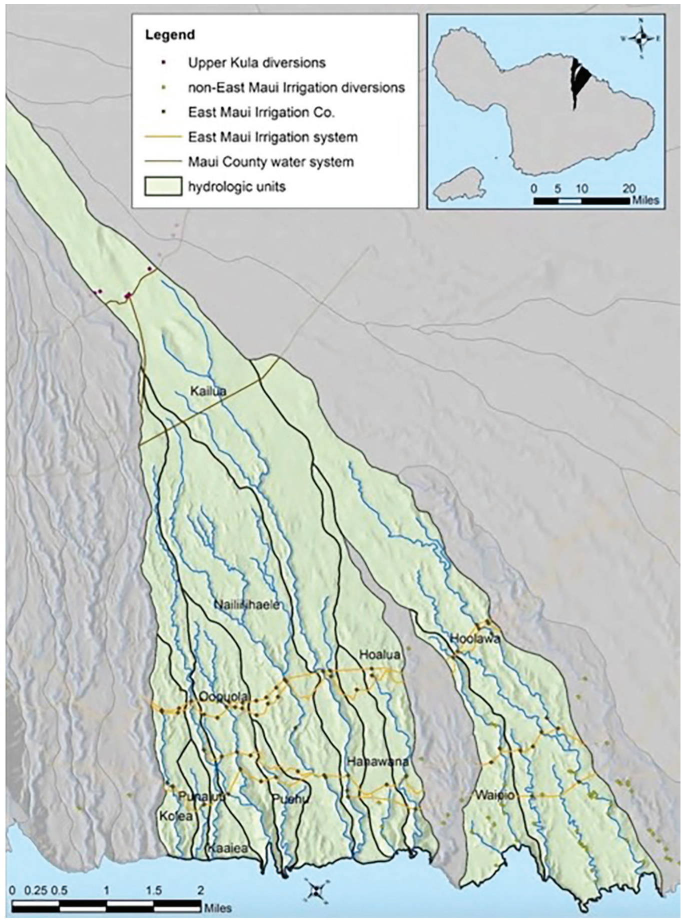
A Draft Plan to Address East Maui Water User Needs



Hydrologic units associated with the 2021 petitioned streams.
CREDIT: CWRM

In the near future, the Water Commission will be revisiting the interim instream flow standards (IIFS) for about two dozen East Maui streams that were the subject of a 2018 decision and order, as well as about a dozen that were not.

That order was the culmination of a 2001 petition filed by the Native Hawaiian Legal Corporation and Maui Tomorrow and resulted in a significant amount of water, long diverted for sugarcane cultivation, being returned to streams that supported the growing of kalo and gathering by native Hawaiians.

Commission staff indicated in a briefing last month that that order is ripe for some amendments. What's more, it made clear its intent to recommend amendments to the IIFS streams in the Huelo license area that were not included in the 2001 petition, but are the subject of a 2021 petition filed by the Sierra Club of Hawai'i.

Huelo is one of four license areas across which Alexander & Baldwin and East Maui Irrigation Company are allowed to divert tens of millions of gallons of water a day (mgd) via revocable permits from the state Board of Land and Natural Resources. It's also the area from which the companies now draw the most water.

For decades, A&B and EMI have sought a long-term disposition for the water, which once served A&B subsidiary Hawaiian Commercial & Sugar's fields in Central Maui. After the plantation closed in 2016, Mahi Pono, which now co-owns EMI with A&B, has been working toward developing diversified agriculture on the former sugar lands.

Although the Land Board has accepted A&B's final environmental impact statement for a long-term water lease or license to be sold at public auction, a few obstacles need to be cleared before that can happen.

One of them is the reservation of water for use by the Department of Hawaiian Home Lands, which is a public trust use. The DHHL's development plans for Upcountry Maui would make it the largest Hawaiian homestead in the state. The agency also has plans to develop lands in Central Maui for commercial, light industrial, and agricultural use. The department has requested a little over 11 million gallons of water a day for its Pūlehunui (1.3 mgd) and Kēōkea-Waiohuli (9.8 mgd) lands.

To meet that request, as well as the needs of the county Department of Water Supply and Mahi Pono's activities on fields designated as Important Agricultural Lands, the Water Commission must reassess how much water needs to remain in East Maui streams. And as staff with the Water Commission revealed during its recent briefing, all of this must be done while in the face of a consistent decline in flow.

Balancing Act

For years, the Sierra Club has argued that with the current IIFS for the Huelo streams, A&B and EMI are free to drain them dry while stream life suffers, as do residents living along the streams who rely on the water for farming and domestic uses, and residents and visitors who recreate in them.

It has fought against the Land Board, which continues to authorize the diversion of more water than Mahi Pono actually uses, although only on the conditions that all of its uses are reasonable and beneficial and that no water is wasted.

The Sierra Club is currently appealing to the state Supreme Court the Land Board's most recent decision in a contested case over the companies' permits. A decision by the Water Commission to set new IIFS to protect instream uses may go a long way toward resolving that conflict.

Commission staff have assessed the diversions in the Huelo area and instream uses, ranging from recreation, to ecosystem maintenance, to Hawaiian traditional and customary practices. They have also evaluated trends in rainfall and stream and ditch flows over the past several decades, as well as planned growth in the island's center that will rely on diversions from East Maui.

Although East Maui receives the most rainfall on the island, CWRM hydrologist Ayron Strauch reported to the commission in August that mean annual rainfall has been decreasing, which has affected the base flows of some streams.

For example, median and low flows for Honopou Stream have dropped about 25 percent between the time periods of 1986-1996 and 2007-2016. For West Wailuaiki stream, median flows have declined 36 percent and low flows have declined 29 percent between those same periods.

The declines have been persistent and acute, and seasonal drought is becoming more intense and severe, Strauch said, adding, "Even in the middle of the wet season, this entire portion of the state is in some form of drought."

This does not bode well for Upcountry Maui. The Department of Water Supply system there relies 80-90 percent on surface water from East Maui that runs through water treatment facilities at Olinda, Piiholo, and Kamole. Well water use is limited, as some are contaminated with legacy pesticides from old pineapple plantations.

Well water is also expensive compared to high-elevation surface water, as it requires booster pumps to push it uphill, Strauch said, noting that it costs hundreds of dollars per thousand gallons.

The Upcountry population is expected to increase slightly by 2035, and, based on the planned development in the region — including Makawao, Paia, and Haiku — an additional 7.3 mgd will be required to feed it.

With regard to Mahi Pono's planned Central Maui expansion of diversified agriculture, including row and orchard crops, energy crops, and pasture, commission staff also estimated that the company will have a future surface water requirement of 41.3 to 49 mgd for its 20,000 or so acres.

Non-Mahi Pono agricultural uses will require 3.6-4.2 mgd, commission staff estimated.

Finally, Strauch noted the DHHL's December 16, 2020, petition to reserve a little over 11 mgd of diverted East Maui stream water to serve the developments planned for Pūlehunui and Kēōkea-Waiohuli.

Based on commission staff's assessment of ditch flows available following the 2018 IIFS decision and order, it found that only during median flows would there be enough water to meet all of the identified offstream needs. During times of low flow, there would be a deficit of nearly 49 mgd.

The staff's report included a caveat that the estimates did not include the possibility that nearly 5 mgd could be provided by recycled water if and when the Kahului wastewater treatment facility is upgraded. Infrastructure to transmit the water to various users would have to be installed, as well.

The estimates also did not account for any future amendments to the IIFS for the Huelo streams.

Draft Proposal

On September 20, commission staff presented its draft recommendations to address the Sierra Club's petition for the Huelo streams and the smaller portion of the DHHL's requested reservation.

The commission staff made recommendations for 11 hydrologic units/streams: Hoʻolawa, Waipiʻo, Hoalua, Hanawana, Kailua, Nailiilihaele, Puehu, ʻOʻopuola, Kaʻaiea, Punaluʻu, and Kōlea.

For each stream, the staff report described its physical characteristics, biota, diversions, historic rankings, and what, if any, modifications to the diversion system need to be made to help protect instream and public trust uses.

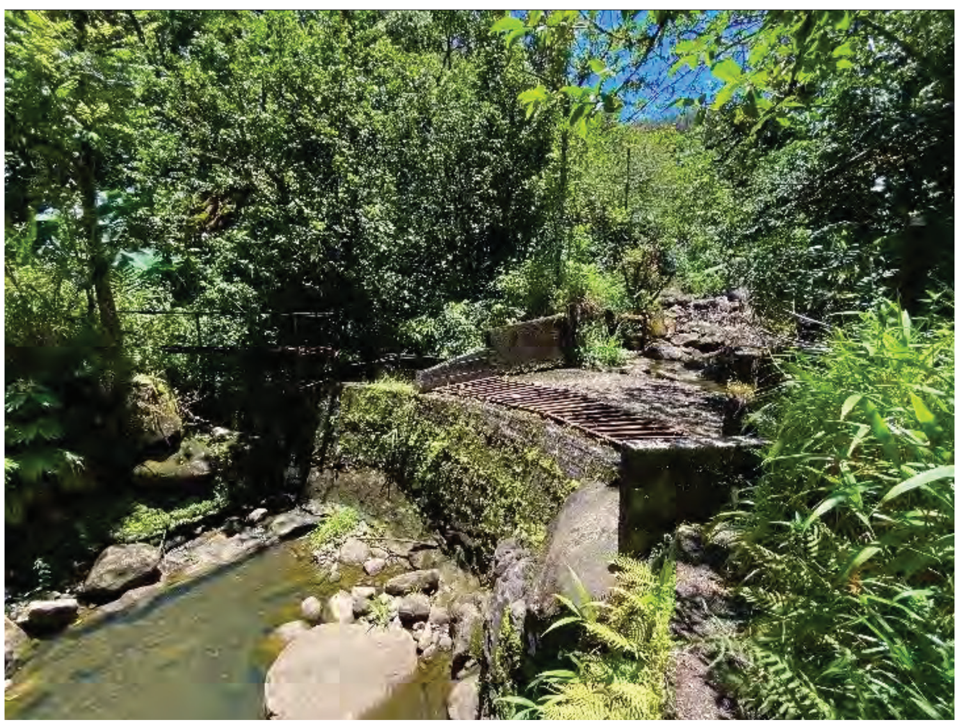
For Punaluʻu Stream, which flows through a very small watershed and ends in a waterfall, staff recommended that its waters be used for non-instream uses and the diversions left as is. No native species were found in the stream during 15 site visits.

Staff made similar recommendations for the Puehu and Hoalua hydrologic units.

For the rest, staff recommended modifications to diversions to provide for better aquatic habitat, recreational uses and/or riparian uses.

Kōlea Stream, for example, runs through a relatively small hydrologic unit, has low flows, is diverted by three ditch systems, and terminates in a waterfall. Although no native species were found in the streams during 16 visits, the endangered damselfly *Magalagrion pacificum* was seen in East Kōlea Stream above Wailoa Ditch. The damselfly was previously thought to be restricted to East Wailuaiki stream.

Staff aimed to increase the length of stream habitat for the endangered species,



Spreckels Ditch intake at ʻOʻopuola Stream where staff recommends placing a plate to improve connectivity..
CREDIT: CWRM

while protecting it from non-native predator fish species, the Mexican molly, in particular.

"If we increase connectivity, they will prey on them. The goal is to expand their habitat without expanding habitat of invasive species. It's tricky. … It's a nuanced dance," Strauch said.

To accomplish this, staff proposed modifying two diversion intakes "such that all flows up to 0.08 [cubic feet per second] remain in the stream without providing for connectivity."

To increase connectivity for native aquatic species such as 'o'opu in other streams, even if they terminate in waterfalls, staff sometimes recommended placing 18-inch plates across grate intakes.

In other cases, sometimes in addition to the installation of steel plates, staff recommended that diversions be abandoned, sealed, or otherwise modified so base flows in specified amounts could continue downstream.

Recognizing that these modifications will take years to complete, staff listed its top seven and committed to working with EMI over the next several months to develop an implementation schedule.

What's Next?

Based on average flows of the Huelo streams between 1984 and 2013 (except for Hanehoi and Honopou, which were part of the 2018 decision and order), staff predicted that the proposed ditch system modifications along Wailoa Ditch — the uppermost of EMI's ditches — will cause median stream flows to increase by 11.5 cfs (7.4 mgd). Low flows would increase by 2.9 cfs (1.87 mgd).

Modifications will also be made at the Spreckels, Center and Lowrie ditches so groundwater gains between Wailoa and Lowrie ditches remain in the streams.

In median flow situations, there's 28 cfs (18 mgd) available for non-DHHL offstream uses; at low flows, only about 5.5 cfs (or 3.55 mgd) would be left, Strauch reported.

"There's not enough water to meet the [full DHHL] reservation as requested," he said, referring to the Kēōkea-Waiohuli project, which will include about 1,800 parcels on more than 6,000 acres in Upcountry.

The commission has plans to revisit the 2018 D&O for the 27 streams that were part of the 2001 petition to address some concerns. In that process, Strauch said, staff will try to carve out enough water for the Kēōkea-Waiohuli project.

"There's more water available when we consider more streams," he said.

Dr. Jonathan Scheuer, representing the DHHL, said the department was initially taken aback when it saw that its entire request was not being taken up that day, but Strauch's explanation "helps a little bit."

Terminal waterfall at Ka'aiea Stream mouth. CREDIT: CWRM

He questioned whether staff proposals to close some diversions at higher elevations would provide enough water for offstream needs at higher elevations — such as DHHL's Kēōkea-Waiohuli development — to be met. "Upper elevation diversions are more valuable than lower elevation diversions," he said.

The Sierra Club's Lucienne deNaie suggested further modifications for some of the stream diversions to improve flow, but also testified that she was very glad the organization filed the petition for "very, very worthwhile streams … treasured by visitors and residents alike."

Strauch said the commission can amend the IIFS as necessary in the future. "We have a lot more information now than we did for the 2018 D&O regarding habitat use for particular streams, community needs …"

Commission deputy director Kaleo Manuel requested that commissioners and members of the public relay to Strauch any comments or questions they have on the staff's proposal.

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Water Co. Seeks to Abandon Diversion Infrastructure

At its meeting last month, the Water Commission took up four requests by Wailuku Water Co. (WWC) to abandon ditch intakes that draw water from North Waiehu Stream, Wailuku River, and Waikapū Stream.

The commission approved three of those requests and deferred one.

WWC president Avery Chumbley testified that his company wanted to abandon its intake on North Waiehu stream because it was subject to "vandalism and community self-help." He said WWC stopped using the intake in 2012.

Michele Ho'opi'i, whose family has drawn water from the North Waiehu ditch for use on its kuleana land, opposed the request.

"For generations, we've grown and raised kalo. Mr. Chumbley states that there is no traditional and customary practices being done, which is not true."

She explained that her family's water use is not recognized in the commission's 2018 decision and order for the Nā Wai 'Eha streams because her mother had chosen not to register her use or apply for a Water Use Permit.

Her mother has since passed and Ho'opi'i said that she is now the landowner and has applied for a permit.

Hōkūao Pellegrino, president of Hui o Nā Wai 'Eha, said that there are other kuleana users without registered uses or permits and asked the commission to defer the matter "until we can spend a little more time … ensuring all kuleana users have access to kuleana water."

Dean Uyeno, head of the commission's stream protection and management branch, said it would be better not to delay the abandonment, since the intake was part of a "fairly leaky system."

Chumbley agreed with Uyeno, adding that WWC is no longer the landowner on which a major portion of that ditch sits.

Earthjustice attorney Isaac Moriwake, who represents the hui, noted that a 2014 settlement called for WWC to provide water from the Waihe'e Ditch, instead of the North Waiehu Ditch, for these kuleana properties.

"WWC was supposed to supply the Ho'opi'i's with water from Waihe'e Ditch. That is still outstanding. … This is highlighting the need to follow up with that," he said.

Ho'opi'i said that she has no water coming through the property where she does subsistence farming, with her only source being what she trucks in.

"It has been a struggle and it is causing injury," she said.

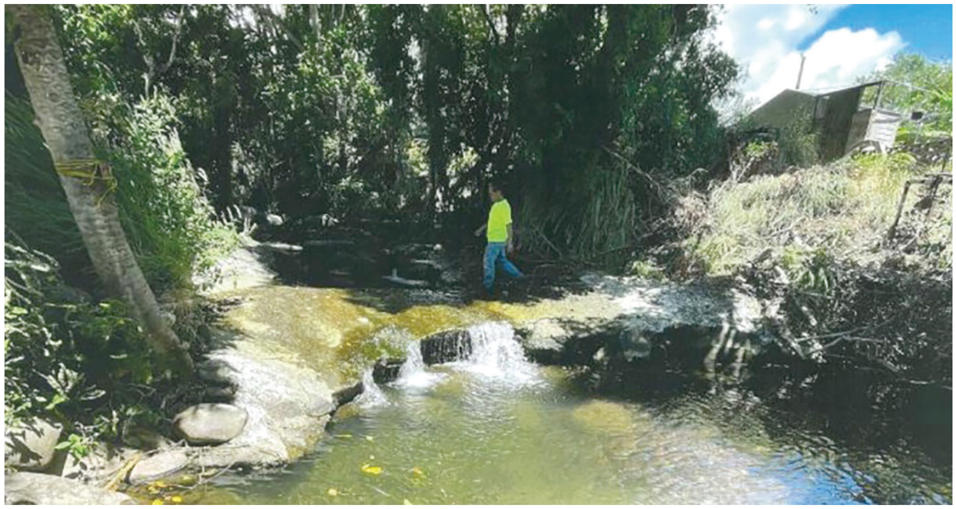
Commissioner Mike Buck said that when it finalized its D&O, the commission knew there were potential applicants who chose not to participate in the contested case hearing.

"We didn't build in extra water, but knew people would come in," he said. Still, he noted that abandoning the North Waiehu intake would not affect or deter anyone form receiving water from Waihe'e in the future.

The commission approved the abandonment request, as well as those for the Kama Ditch intake on Wailuku River, and the Everett Ditch intake on Waikapū Stream.

When it came to the request to abandon the Reservoir 6 intake, also on Waikapū Stream, Chumbley argued against the commission's recommendations regarding what WWC would be required to do.

Staff recommended that WWC remove an overhanging concrete lip at the downstream edge of a concrete apron that spans the stream, seal a tunnel at the control gate, and remove the gate infrastructure.



Commission staff recommend removing the lip of this concrete apron in Waikapū stream to provide better connectivity. CREDIT: CWRM

Chumbley said that being forced to break up the concrete apron to remove the lip could allow for more rocks and debris to flow past and collect around two supports for Honoapi'ilani Highway that sit within the stream. He said he had just recently seen Department of Transportation crews clearing out rubble around the posts.

Chumbley suggested that the concrete be left alone, especially since bringing heavy machinery in the stream could do more harm than good.

There was some discussion about whether or how to remove steel rails embedded in the concrete, and whether if they are left in place there should be some signage to warn people who may be walking in the stream. Chumbley argued that the rails should be left in place.

Uyeno noted that his staff had not consulted with the DOT about the potential effects the concrete removal would have on the highway and said it would be a good idea to do so.

The commission voted to defer the matter to give staff time to work through the issues that had been raised.

—Teresa Dawson

'Aina Le'a *continued from page 1*

When it exited Chapter 11 bankruptcy proceedings in August 2019, the company had expectations of a $42 million loan from Summit Financial Resources of Utah. Another lender, Iron Horse Credit, had provided a $5 million loan, maturing in just one year, that was to keep the company afloat until the Summit funds came through.

Terms of the Iron Horse loan were harsh. As 'Aina Le'a CEO Robert Wessels acknowledged in a Bankruptcy Court hearing, the effective rate of the Iron Horse loan was "22 or 23 percent, all in, I guess."

Yet the Summit loan never materialized. And the Iron Horse loan went into default well before the note matured.

The 'Aina Le'a litigation over the last few years may well be remembered as having more court action than the Wimbledon games. There is the ongoing foreclosure litigation in 3rd Circuit Court, including the confirmation of the pending foreclosure sale. There's 'Aina Le'a's appeal of the 3rd Circuit Court's grant of one foreclosure action now before the Intermediate Court of Appeals, even as others have stalled out in Circuit Court, with a trial date set for next January.

Meanwhile, the federal Bankruptcy Court has been asked, twice now, to reopen the 'Aina Le'a case, most recently as a result of 3rd Circuit Judge DeWeese's acknowledged confusion over what the Bankruptcy Plan requires.

Finally, there was the decision by Judge Susan Oki Mollway of the U.S. District Court of Hawai'i in late May. Mollway tossed out the company's claim that the state owed it more than $360 million as a result of the Land Use Commission's vote a decade earlier to revert the land from the Urban District to the Agricultural – a decision that was reversed on appeal.

With that, Wessels may well have lost his best, last hope of an infusion of capital sufficient to pay off the company's creditors, collectively owed more than $40 million, to say nothing of the long promised development of more than 2,000 units of housing.

Iron Horse Sues

Well before Judge Mollway's ruling, the creditors had been circling. From the spring of 2017 until late August 2019, they were kept at bay while 'Aina Le'a went through Chapter 11 reorganization. When, finally, a reorganization plan was approved, most of the creditors' claims were stayed for varying periods of time.

But that didn't prevent Iron Horse, the creditor of last resort, from suing for foreclosure in October 2020. And since Iron Horse's claims on the secured properties were junior to those of Bridge (owed $20 million plus 10.2 percent per year interest), Romspen Investment Corporation (a Canadian lender owed around $13 million plus interest), and Libo Zhang (a resident of China owed around $6.5 million plus interest accruing at 12 percent per year), all those parties were drawn into the litigation as well.

In December 2021, Judge DeWeese found that ‘Aina Le‘a was in default of the Iron Horse loan. ‘Aina Le‘a appealed that judgment to the ICA, where it is pending. (Iron Horse has transferred its interest in the litigation to another company, SDCK I, LLC, which is now the appellee in the case.) The appellate court case notwithstanding, Iron Horse/SDCK I is still moving forward with its foreclosure, with a sale date tentatively set for November 30.

Bankruptcy Court, Part II

Nudged into action by the Iron Horse lawsuit, in late November 2020, Romspen sought relief from the Bankruptcy Court. With ‘Aina Le‘a having defaulted on the Iron Horse loan, Romspen argued, it was clear that ‘Aina Le‘a had materially breached terms of the Bankruptcy Plan, which had taken effect in August 2019. The relief Romspen sought was to put ‘Aina Le‘a out of business, converting the Chapter 11 relief, which allowed the company to reorganize, to Chapter 7, in which the company would be dissolved.

U.S. Bankruptcy Judge Robert Faris held a hearing on Romspen’s request on February 22, 2021. ‘Aina Le‘a’s attorney, Steve Jakubowski of Chicago, argued that in fact, his client’s assets – found almost entirely in the value of the land – approached $100 million, more than sufficient to fully satisfy the creditors.

Judge Faris took note of the several points raised by Jakubowski that favored ‘Aina Le‘a, including the change in county administration with the election of Mitch Roth as mayor. But, Faris said, what he “was really hoping to see today, or before today, was the commitment letter from Summit … and there’s still no commitment from Summit.”

The Iron Horse default, Jakubowski acknowledged, was “definitely an issue.” But, he added, “when we negotiated over this plan, nobody – the debtor was certainly not going to agree that a default under the Iron Horse agreement, if it was only one year, would trigger an acceleration of all of the other secured debt. We never would have agreed to that.”

Given the dim prospects of financing, Faris was skeptical about ‘Aina Le‘a’s ability to find the capital it needed to satisfy not just the Iron Horse indebtedness, but also that of Romspen, whose note would be coming due a mere six months from the hearing date. In addition, he was concerned over the company’s failure to keep current with property taxes.

Despite his misgivings, Faris denied Romspen’s motion, saying that state court would be the appropriate venue to hear the foreclosure claims. Yet he expressed serious doubts about ‘Aina Le‘a’s prospects to become a viable company. “It wouldn’t surprise me anyway to see this debtor and/or its subsidiaries back in Chapter 11 at some point in the next – in the future. It wouldn’t shock me in the slightest. But, you know, given the circumstances of this case, I think that’s actually – that actually may be the only way to get Bankruptcy Court relief for the problems this debtor faces.”

Romspen Prevails

It was a short-lived victory for ‘Aina Le‘a. Sure enough, when the Romspen note came due in August 2021, Romspen was back in state circuit court to reopen the foreclosure action that had been on ice since 2017, when ‘Aina Le‘a filed for bankruptcy protection.

At a hearing on February 15, not attended by any representative of ‘Aina Le‘a, 3rd Circuit Judge Wendy DeWeese found in Romspen’s favor, instructing its attorney, Jordan Kimura, to prepare the order.

On April 6, the court issued the default judgment of foreclosure against Lulana Gardens (the subsidiary holding the “affordable housing” parcel), ‘Aina Le‘a, Inc., Emerald Hawai‘i Services, Inc. (the entity, controlled by ‘Aina Le‘a, that manages the interests of the several hundred Asian investors who purchased “undivided land fractions” in the ‘Aina Le‘a property), and CEO Wessels himself, as a guarantor of the loan.

George “Rick” Robinson of Kona was appointed commissioner. On August 16, his report was filed with the court.

Robinson stated that he found the property “maintained, gates secured, and a newly delivered sewage treatment plant on site. The existing units are secured and security is provided by Lulana Gardens via a live-on-site caretaker.”

Robinson attempted to obtain a title report for the property “from several title companies with one title company declining the request and the other title company agreeing yet not delivering that report to date.”

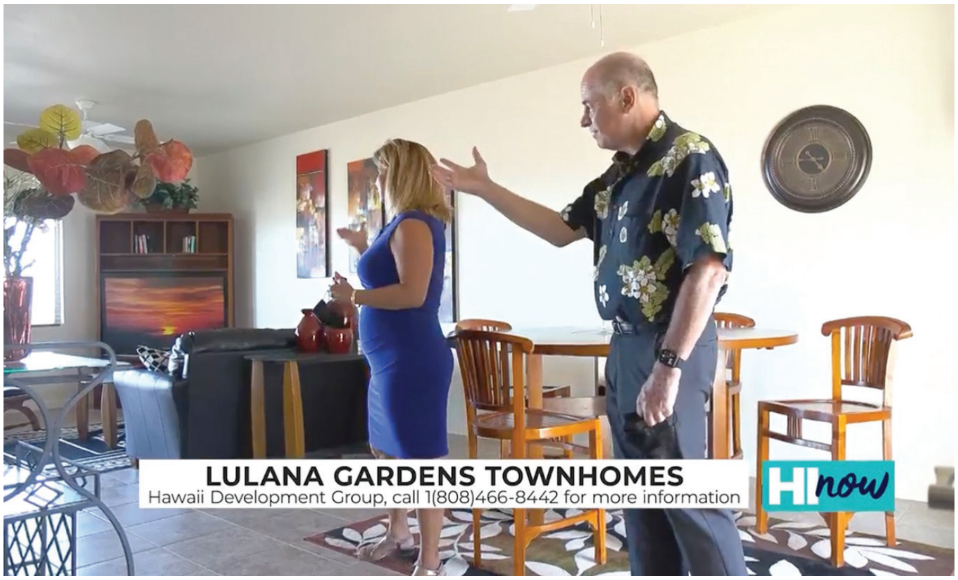
Notice was published in *West Hawaii Today* of open houses, allowing prospective buyers to inspect the property. On August 8, when Robinson held the sale at the flagpole fronting the Kona courthouse, nine people were present, but just one – an agent of Romspen – offered a bid of $13 million. “After repeatedly soliciting higher bids and receiving none,” Robinson wrote, “your commissioner declared the property sold to Romspen for a $13 million credit bid, subject to confirmation thereof by the court.”

As of mid-September, Romspen’s motion to have the court approve the sale was set to be heard October 7.

For Further Reading

Environment Hawai‘i has been reporting on the ‘Aina Le‘a development for years. Here is a list of some of the longer articles. All may be read on our website, www.environment-hawaii.org.

- “‘Aina Le‘a Controversies on Three Fronts: Federal Court, Bankruptcy Court, and County,” May 2018;
- “As Its Creditors Close In, ‘Aina Le‘a Files for Bankruptcy Court Protection,” July 2017;
- “‘Aina Le‘a Makes $200 Million Claim Against State over Stalled Development,” April 2017;
- “‘Aina Le‘a Update: A Settlement, an Overdue Note, and a Possible Suitor,” March 2017;
- “Whatever Happened to the Villages of ‘Aina Le‘a?” January 2016;
- “Supreme Court Rejects Most Findings of Lower Court in ‘Aina Le‘a Appeal,” January 2015;
- “State Supreme Court, Federal Appeals Court Schedule Hearings over ‘Aina Le‘a Dispute,” June 2014;
- “Judge Halts Work at ‘Aina Le‘a and Orders Supplementary EIS,” February 2013;
- “LUC Takes Another Step Forward in Reversion to Ag of ‘Aina Le‘a Land,” April 2011;
- “A Frustrated LUC Orders Reversion to Agriculture of ‘Aina Le‘a Land,” February 2011;
- “‘Aina Le‘a Seeks Two-Year Extension of Deadline for Affordable Housing,” October 2010;
- “Under New Management, ‘Aina Le‘a Is Given Yet Another Chance by LUC,” October 2009;
- “After Years of Delay, LUC Revokes Entitlements for Bridge ‘Aina Le‘a,” June 2009;
- “Two Decades and Counting: Golf ‘Villages’ at Puako Are Still a Work in Progress,” March 2008.



Hawaiʻi mayor Mitch Roth helping showcase one of the staged units in the Lulana Gardens complex built by ʻAina Leʻa.

But even if Romspen does take title to the Lulana Gardens property, that does not mean that its claims against ʻAina Leʻa have been fully satisfied. Attached to the motion seeking court approval of the foreclosure sale is an affidavit from Peter Oelbaum, managing partner of Romspen, that places the full amount owed to Romspen by ʻAina Leʻa entities and Wessels at $18,361,388.89, as of mid-August. Some $13.3 million was owed at the time ʻAina Leʻa emerged from bankruptcy. Since then, under terms of the note, interest at 12.5 percent annually for two years added $5,061,388.89 to that amount, Oelbaum stated.

Robinson also was appointed commissioner for the Iron Horse/SDCK I foreclosure sale, now tentatively set for the end of November.

Bankruptcy Court, Yet Again

Throughout 2021 and into the current year, the foreclosure litigation initiated by Iron Horse continued in the courtroom of Wendy DeWeese, even after the judge had granted Iron Horse its motion to foreclose and as Romspen was pursuing its own foreclosure action in a separate docket. Creditors Bridge and Zhang continued to seek relief from DeWeese in the form of a judgment of foreclosure against ʻAina Leʻa.

But that was not forthcoming. ʻAina Leʻa attorney Michael Matsukawa opposed their motions, arguing, as before, that terms of the Bankruptcy Plan meant that Bridge and Zhang would have to wait until five years after the date the bankruptcy plan took effect – until August 2024, that is – to obtain any relief, including foreclosure.

Earlier this year, Zhang and Bridge filed their second motions for summary judgment, seeking to address concerns that DeWeese had raised in response to their first such motions. But both were frustrated by DeWeese's apparent hesitancy to make a call on disputed claims as to the meaning of the Bankruptcy Plan.

As the April order denying Bridge's second motion for summary judgment states, DeWeese allowed as how she "has jurisdiction to interpret" the Bankruptcy Plan, but then went on to say that the plan is ambiguous when it discusses the term "liens," how that term affects Bridge's right to foreclose through these proceedings, if at all; what events might allow Bridge to foreclose before the fifth anniversary of the date the plan took effect; and what concessions Bridge might have made in agreeing to the plan, among other things.

Those "ambiguities," she found, "raised issues of material fact precluding summary judgment in Bridge's favor."

In late May, Bridge filed a motion with the Bankruptcy Court, asking it to issue a clarifying order. The Bankruptcy Plan, Bridge argued, did not preclude Bridge from exercising its right to foreclose, especially in light of the Iron Horse grant of foreclosure and the ballooning property taxes on the ʻAina Leʻa property – both of which, Bridge stated, amounted to material defaults of the plan.

"The concerns that this [Bankruptcy] Court expressed more than a year ago over the Plan's viability and ʻAina Leʻa's failure to perform its obligations are now full-blown," Bridge said in its Bankruptcy Court filing. "Since this Court heard the [Romspen] motion to reopen and convert and denied it, ʻAina Leʻa has: (a) continued to fail to pay its real property taxes …; (b) had judgment entered against it and in favor of Iron Horse … (c) had judgment entered against it and in favor of Romspen…

"ʻAina Leʻa has not made any progress on developing the subject property or the neighboring parcels pursuant to the Plan, and ʻAina Leʻa no longer has any means of doing so."

It was necessary to ask the Bankruptcy Court to make clear the meaning of the Bankruptcy Plan, wrote Bridge attorney John D. Ferry III, because "the State Court's inability to interpret the Plan is, effectively, an endorsement of ʻAina Leʻa's misinterpretation of the Plan and its effect on Bridge's rights. According to ʻAina Leʻa, the Plan stripped Bridge of its substantive rights … and left Bridge with only a priority 'Lien' on the subject property and a right to payment by August 14, 2024. … Therefore, ʻAina Leʻa argues, Bridge must wait to seek any relief until August 14, 2024 (when ʻAina Leʻa inevitably defaults on its obligation under the Plan to pay Bridge's secured claim for $20,000,000 plus interest). In the meantime, ʻAina Leʻa claims that the Plan entitles ʻAina Leʻa to materially breach the Plan with impunity."

Ferry concluded: "ʻAina Leʻa simply wants to delay the inevitable, for as long as possible, for no good reason. The plan has failed, spectacularly, and has no viable chance of success."

Faris, the Bankruptcy Court judge, set a hearing date of July 1. On June 24, Bridge filed its reply memorandum to ʻAina Leʻa's statement of position. In it, Ferry quoted back to Faris a statement Faris had made in the January 2021 hearing on Romspen's request that he convert ʻAina Leʻa's bankruptcy into a Chapter 7 proceeding.

"[T]he [Bankruptcy] Plan changed the party's payment rights and preserved their millions, but it didn't expressly strip off loan covenants and other obligations," Ferry quoted from the hearing transcript. "If nothing else, stripping off the covenants would arguably eliminate the right to foreclose on non-payment, and that simply can't be the result."

Following that hearing, Judge Faris was to issue a ruling on the question posed by Bridge. The attorney for ʻAina Leʻa, Jakubowski, was instructed to prepare the order. As of mid-September, that order had not been posted. The foreclosure actions of Bridge and Zhang in state court are pretty well on hold until that occurs, or until ʻAina Leʻa returns to Bankruptcy Court, seeking its protection from creditors once again.

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Conflicting Claims

In court filings, 'Aina Le'a has represented that it will have few problems satisfying its creditors' claims once it is able to start – or, rather, resume – work on the construction of the townhouses planned for the Lulana Gardens portion of its overall development plan. The first couple of buildings in what is to be a 432-unit townhouse complex were put up more than a decade ago, when 'Aina Le'a was attempting to demonstrate to the state Land Use Commission that it could comply with conditions relating to satisfaction of its affordable housing requirement. For most of the intervening period, work on the townhouse was stalled as the company faced numerous financial, regulatory, and judicial hurdles.

Despite the mounting legal and financial troubles the company faces, the Hawai'i County administration under Mayor Roth has done everything it could to help Wessels out. Within days of Roth taking office in December 2020, Roth's planning director, Zendo Kern, informed the attorney for 'Aina Le'a that the county would no longer be insisting that the company prepare a new environmental impact statement for the development.

Since then, Roth himself has appeared in videos promoting the townhouses alongside the real estate agents that have been retained by 'Aina Le'a to sell at least some of the units.

Susan Kunz, appointed by Roth to head up the county Office of Housing and Community Development despite her earlier tenure in that position when several fraudulent housing agreements were signed, has also touted the Lulana Gardens project in statements to community groups.

In a presentation to a Big Island group, Vibrant Hawai'i, in June, however, Kunz herself expressed some skepticism as to the likelihood of the housing ever being developed. In enumerating the various affordable housing projects in the pipeline, Kunz put up a slide depicting an architectural drawing of what the townhouse development might look like. After acknowledging that the project had been on the books for 20 years or more, Kunz said, "I put this slide in here because I'm just being hopeful."

In April 2021, the county entered into an affordable housing agreement with 'Aina Le'a that committed the company to building 385 affordable units on the Lulana Gardens parcel, which – at the various specified levels of affordability – would earn the company 219.5 affordable housing credits. In addition to the affordable units, 47 market-rate units would be built. An addendum signed in June of that same year committed 'Aina Le'a to build 120 units of affordable housing on two more parcels – the 23-acre parcel that 'Aina Le'a has proposed for the Ho'olei Village development (encumbered by the Libo Zhang mortgage and secondarily by the Iron Horse mortgage), and the adjoining 383-acre parcel (encumbered by the Bridge mortgage and again Iron Horse as a junior lienholder).

Altogether, should the housing ever be built, the county committed to issuing 367 housing credits to 'Aina Le'a. (As an aside, the 2021 agreements specify that the credits are to be awarded "only after a unit has been constructed and made available for rental," thus precluding the possibility the credits could be sold before the housing is built, as occurred in the recently disclosed affordable housing scandal on the Big Island.)

By their terms, both the initial agreement and the addendum are to run with the land and "are binding upon the developer's successors in title and all subsequent owners and operators of the property."

After the first affordable housing agreement was signed, in May 2021, Wessels entered into a purchase and sale agreement covering the Lulana Gardens parcel with Lava Rock, LLC, a newly formed company registered in Delaware with an address in Palm Beach, Florida. Signing on behalf of Lava Rock was David Koch, who identified himself as sole member and authorized person of Saxon Holdings LLC, which in turn was the sole member of Lava Rock.

Lava Rock turns up again in the required annual report submitted by Wessels to the Land Use Commission and the county Planning Department at the end of 2021. In discussing the Lulana Gardens development, Wessels states, "Under an agreement with Lava Rock rental fund to provide 384 rental townhomes for 219.5 affordable housing credits, Lulana Gardens, LLC, projects requesting certificates of occupancy for the first 96 homes in the third quarter of 2022. Thereafter Lulana Gardens is committed to deliver 16 townhomes per month until all 384 homes are completed."

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TheTaxes

When 'Aina Le'a exited bankruptcy in August 2019, it was briefly current on county property taxes.

In February last year, as Judge Faris of the Bankruptcy Court considered Romspen's request to liquidate 'Aina Le'a's assets, he expressed concern over the company's failure to pay property taxes since then.

Jakubowski, 'Aina Le'a's attorney, suggested that given the value of the company's assets – which Wessels had placed at $100 million or more – the tax obligation was a mere bagatelle.

Faris disagreed. "I do think that the failure to pay the taxes is clearly a default," he opined. "I'm inclined to say that it's a material default. It's true that the amount is small relative to the value of the property, but it's equally true that it is, I would say, infinitely larger than the debtor's capacity to pay it."

Since then, the tax burden has only grown. As of the end of September, county records show, it stood at $1,256,326.19.

— Patricia Tummons

Mayor Mitch Roth outside the Lulana Gardens units during a promotional broadcast on HI Now.

Aerial Spraying Could Extinguish Little Fire Ant Infestations on Maui

“They’re miserable little things that we need to get rid of,” Brooke Mahnken of the Maui Invasive Species Committee said, referring to the little fire ant *(Wasmannia auropunctata),* which first invaded Maui in 2009.

The invasive ants’ stings can cause painful, itchy welts in humans and blindness in pets. The ants, originally from Central and South America, were first seen in Hawai‘i in 1999 and are believed to have been inadvertently introduced to Hawai‘i island years earlier.

“[T]he ants were present on nearly 40 acres by the time they were first detected,” according to stoptheant.org, a website dedicating to controlling the ant’s spread in Hawai‘i.

On Hawai‘i island, the ants are ubiquitous now. But on Maui, “Our goal is eradication,” said Mahnken, one of dozens of speakers at this year’s virtual Hawai‘i Conservation Conference held in July.

There are currently 18 infestations on Maui and the state Department of Agriculture regularly intercepts the ants at Maui’s ports, he said. Seven sites are actively being treated, six others are being monitored, and five have been eradicated.

For one of the more difficult sites, a 175-acres incursion in Nāhiku, MISC has been working with the Hawai’i Ant Lab since 2019 on spraying via helicopter “using a gel bait matrix containing s-methoprene (brand name Altosid),” his abstract states.

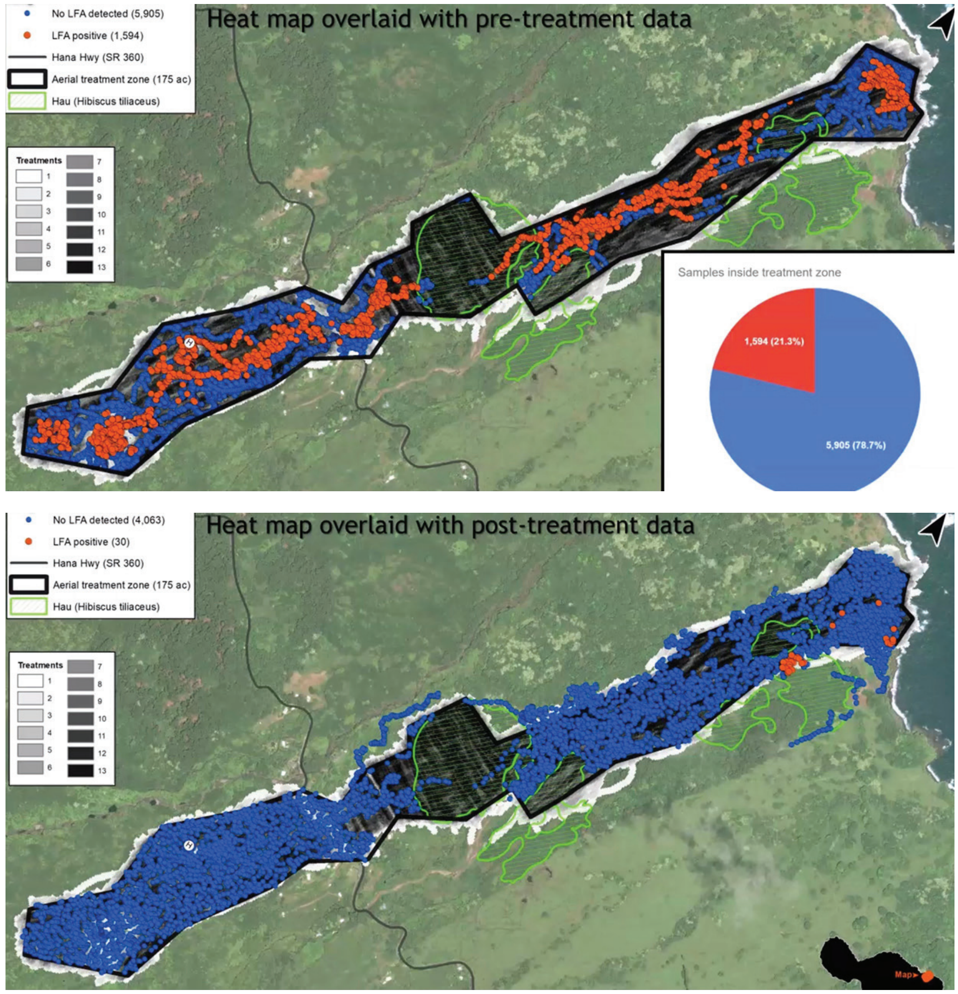
The area contains large thickets of hau, which are “impossible to move through,” he said. The ants are believed to have been introduced at a home 800 feet above sea level and spread by stream all the way down to the ocean.

“We knew we needed to do something other than traditional ground work,” he said.

The ant lab, based on Hawai‘i island, has a special needs permit that allows for the aerial treatments.

Using a custom-made “heli-squirter” the team disbursed the pesticide in 22-meter-wide swaths. Mahnken said the swaths were a bit haphazard and “not conducted in a uniform fashion.” But after 13 treatments over 19 months, MISC’s massive on-the-ground follow-up surveys offered signs of hope.

continued on page 12



Before (top) and After (bottom) maps indicating presence of little fire ants (orange).

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Hawaiʻi Conservation Conference *continued from page 11*

"It's working," Mahnken reported.

The team took four weeks to collect more than 7,000 samples from in and around the treatment area, crawling under hau, tromping through streams, and sliding down banks, he said.

Less than one percent of the samples had little fire ants and most of those positive samples were from just outside the treatment area, suggesting that there may have been an oversight in identifying the infestation boundary, or that the ants moved outside of it after treatment had begun, he said.

He noted that given the survey results, they have re-drawn the treatment zone. The new zone had six treatments between December 2021 and July 2022 and was scheduled to get one more last month.

Although the pesticide appeared to be effective in killing little fire ants as well as other species of ants found in the area, it doesn't appear to be having non-target effects, Mahnken suggested.

"There is no shortage of mosquitoes out there. … Our treatment not only has been effective, it has been extremely targeted. We will continue this work until no ants are detected or we run out of funding," he said. He added that Maui County has fully funded the project.

The Nāhiku methods could potentially be used to battle landscape-scale or intractable incursions elsewhere. The little fire ant has been detected on all of the inhabited Main Hawaiian Islands except Molokaʻi. Kauaʻi has had only two infestations, both on the north side of the island. One has been treated to undetectable levels and the other is actively being treated. On Lanaʻi, the ants were found in a single area with infested hapuʻu. No ants have been detected since it was treated.

Oʻahu, on the other hand, is grappling with two dozen sites that are undergoing boundary determination or treatment for the ants. The ants were eradicated from an additional seven sites.

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Drones Used to Spread Waiwi Biocontrol Agent

Strawberry guava, native to Brazil, is also one of the worst invasive species to settle in Hawaiʻi. It forms nearly impenetrable stands that inhibit groundwater recharge and choke out native species. And as with the little fire ant, resource managers here hope to control the plant's spread with assistance from the air.

At the Hawaiʻi Conservation Conference, University of Hawaiʻi at Hilo's Ryan Perroy described efforts to drop branches with leaves infected with the biocontrol insect *Tectococcus ovatus,* also known as the Brazilian scale, onto strawberry guava forests on Hawaiʻi island and, ultimately, statewide.

The scale creates galls on the plant's leaves, which "makes the plants a bit sick," he said.

He said repeated drops would not be required, but to move up to an aerial dispersal system that covers an island or the entire state will require approval from the Federal Aviation Administration.

He said his lab has been waiting for years to get FAA certification to do what are considered "agricultural aircraft operations."

"If you don't have this certification, you're really not supposed to be doing this type of aerial release, legally," he said. His lab has secured a short-term authorization that allows it to work in smaller experimental areas.

To conduct the test, his team has mounted sections of PVC pipe to drones. The pipes hold canisters made of recycled water bottles that each contain a small guava branch infected with the scale. The canisters are controlled remotely to release the branches at a desired location.

A drone with canisters built to release biocontrol agents onto invasive strawberry guava.
CREDIT: RYAN PERROY

So far, the lab has been able to load 16 canisters onto a single drone.

"Over larger areas, we really want to bring that to at least 64. … If we really want to scale up, we really need to go to helicopters," he said, adding that drones are able to better control where the infected branches drop.

The Hawaiʻi Forest Industry Association has supported some trials earlier this year, which are going to be tested against human delivery, he said. At some point, helicopter trials are anticipated, then "monitoring, monitoring, monitoring."

He noted that Timo Sullivan, drone program coordinator for Island Conservation, has developed high-imaging protocols to help identify leaf galls in treatment areas.

— Teresa Dawson