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Environment Hawaiʻi

a monthly newsletter

An Inside Job

In one sense, it's old news. The whining and excuses that Kitty Simonds, executive director of the Western Pacific Fisheries Management Council, has made in defending her agency's sloppy – to say the least – use of federal funds, should surprise no one. She's been doing this for years.

In another, though, Simonds' appeal of a finding that Wespac had misspent more than $1 million over five years – an appeal apparently drafted by the head of the council's scientific advisory committee – is breathtaking in its revelation of the contempt in which Simonds holds the public and the government employees who are charged with ensuring federal funds are spent according to federal rules.

Although *Environment Hawaiʻi* can't be certain, we would not be surprised if the long delays in responding to our Freedom of Information Act request for the appeal had as much to do with Simonds' ability to bully her federal overseers as it does with her long-standing aversion to any public scrutiny of her conduct.

IN THIS ISSUE

Council Insider Gets Contract to Help Wespac Appeal Findings of Audit

For a few days last June, the website of the Western Pacific Fishery Management Council carried, under the rubric of news releases, a notice that it was seeking "private legal counsel and/or other relevant outside services" to assist the council in responding to an audit that determined the council had inappropriately spent more than $1.2 million from its Sustainable Fisheries Fund.

It took nearly a year for *Environment Hawaiʻi* to learn the identity of the party awarded the contract and the amount he would be paid. But finally, on May 19, the National Oceanic and Atmospheric Administration responded to the Freedom of Information Act requests we filed to learn details.

And the winner is — drum roll, please:

Jim Lynch, an attorney but also chair of the council's Scientific and Statistical Committee. Lynch was to be paid $25,000 for his work relating to the audit appeal. This would be in addition to the payment he receives from the council for his work as chair of the SSC. (Currently, as an SSC member, he receives $500 per day for his attendance at SSC meetings as well as his attending council meetings, where he presents the committee's recommendations to the full council membership.)

The audit, conducted by the Department of Commerce Office of Inspector General, had been released in November 2021. The council responded to the audit the following month, contesting its findings. In February, the National Oceanic and Atmospheric Administration's Acquisition and Grants Office, Grants Management Division (GMD) reviewed the audit and the claims against it, upholding the OIG findings and rejecting the council's excuses.

And so the council appealed once more. While the February letter stated that the appeal needed to be filed within 30 days, NOAA eventually set the deadline to August

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Date	Deliverable Activities and Targets	Payment
[redacted] (b) (4)		
TOTAL		$25,000

The parties hereto executed this contract as of the day and year of the last signature dated indicated below:

Approved by: [redacted] (b) (6)
Kitty Simonds, EXECUTIVE DIRECTOR — Date

Accepted by: [redacted] (b) (6) — 7/27/2022
James M. Lynch — Date

Redactions in the Wespac contract with Jim Lynch.

Environment Hawai'i
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NEW AND NOTEWORTHY

Koai'a Sanctuary: The Department of Land and Natural Resources has applied to Hawai'i County to subdivide a large parcel of land now leased to Parker Ranch in order to extend a sanctuary for *Acacia koai'a,* the smaller cousin of the koa tree. The proposal would expand an existing 13.5 acre reserve along the mauka side of Kohala Mountain Road by 374 acres, extending the protected area up to the Pu'u o Umi Natural Area Reserve.

Koai'a once were plentiful in the leeward Kohala area. Now they are relegated largely to gulches that offer some protection from browsing cattle and other ungulates.

The existing small koai'a sanctuary dates back to 1951. The proposal to extend it by carving out acreage from the Parker Ranch lease dates back more than 13 years, when, in November 2009, the Board of Land and Natural Resources approved the proposal.

Side-by-side images of the koai'a sanctuary show new growth in sanctuary area. CREDIT: DLNR

A spokesman for the DLNR explained the delay in this way: "We have lacked the administrative capacity to process the formal paperwork for this to occur. Instead, we have devoted our limited capacity to doing on-the-ground field work, including fencing and planting thousands of native trees in the area. DLNR has partnered with The Kohala Center and many community volunteers to restore this area."

Milestones: We are sad to take note of the recent deaths of several friends, all of whom were outstanding in their fields of expertise and whose legacy in Hawai'i will continue long after their passing.

Derral Herbst may be best known as co-author of the seminal two-volume work *Manual of the Flowering Plants of Hawai'i,* for which he and co-authors Warren Wagner and Sy Sohmer were awarded in 1990 the Engler Medal for outstanding contributions to plant taxonomy by the International Association for Plant Taxonomy. During the course of his long career in Hawai'i, he was employed by the Army Corps of Engineers, the Fish and Wildlife Service, and the University of Hawai'i.

Lawrence McCully Judd – Cully – was an early champion and adopter of alternative energy and solar power in Hawai'i, founding Inter-Island Solar Supply and co-founding the Hawai'i Solar Energy Association. His life partner, Carol Silva, died in January.

Robert Shallenberger also worked for the Army Corps for a time before joining the Fish and Wildlife Service, where for many years he headed up its Division of Refuges in the Pacific. When the FWS opened Midway Atoll to tourists, Rob headed up that operation, later helping to found the Friends of Midway Atoll and writing *Hawaiian Birds of the Sea: Na Manu Kai.* After retiring, he was the Hawai'i Island program manager for The Nature Conservancy of Hawai'i and a board member of the Friends of Hakalau National Wildlife Refuge.

We join their friends and family in mourning their loss while remembering their substantial contributions.

Quote of the Month

"I've been here since 9 o'clock this morning. I don't get paid for this. I have two small children at home. I take my time out of my day to contribute to our state and I take accusations that I or anybody else on this board has been paid to make any decision very personally. So please be thoughtful when you make accusations like that. It's very offensive."

— Aimee Barnes, Land Board

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Council Still Owes Feds $837,355 After Appeal of Fisheries Fund Audit

In November 2021, the Department of Commerce Office of Inspector General determined that the Western Pacific Fishery Management Council had inappropriately spent about 28 percent — $1,237,671 of $4.5 million — of monies drawn from its Sustainable Fisheries Fund over the period from federal fiscal year 2015 to fiscal year 2019.

Of that $4.5 million, the audit tested roughly two-thirds of the expenses — $3,038,496 — in claimed costs, so that the actual percentage of inappropriate expenditures identified by the OIG came to 40 percent of the examined expenses.

Most of the money in the fund comes from fines and forfeitures levied against foreign vessels fishing in U.S. waters in the Pacific and annual fees paid by the Hawai‘i-based longline fleet in return for receiving a portion of the bigeye tuna allocation assigned to the U.S. territorial governments in the Pacific.

Following release of the OIG audit, the council responded, taking exception to its findings. The National Oceanic and Atmospheric Administration's Grants Management Division then reviewed both the audit's findings and Wespac's exceptions.

In February 2022, Arlene Simpson Porter, GMD director, informed Kitty Simonds, executive director of Wespac, that it agreed with the OIG audit and that the council would be required to repay the misspent funds. Simonds was invited to "enter into a repayment agreement" with NOAA. Alternatively, it could appeal.

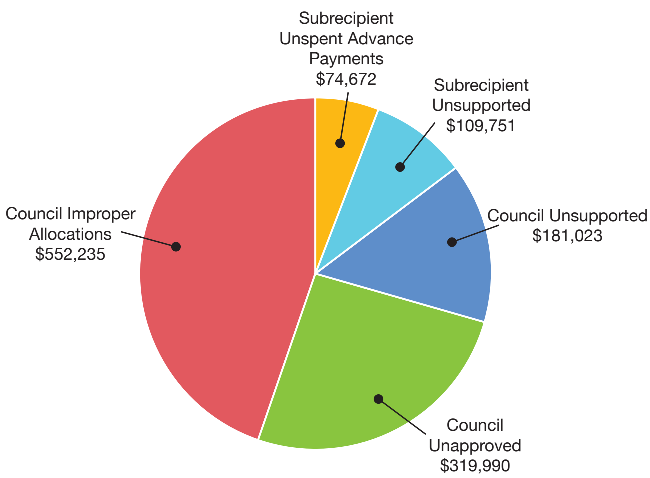
"The appeal must contain a detailed explanation concerning the pertinent facts and the applicable legal authorities of your dispute with this Audit Resolution Determination," Porter wrote. The appeal, she continued, "is your last opportunity to provide information to supplement a dispute of the debt. There are no other administrative appeals available within the Department of Commerce concerning this matter. WPRFMC would have to go to court to continue its dispute of the legal validity of the debt."

Wespac sought several time extensions to, among other things, obtain legal representation. The final deadline for filing its appeal was eventually set at August 30.

On that date, Simonds submitted to the hearing officer, Jeffrey Thomas, the director of NOAA's Acquisition and Grants Office, a 19-page "appeal and statement of mitigating factors." In addition, to support its appeal, the council provided "numerous financial documents and records" via Dropbox to NOAA. "These documents and records contain confidential, personally identifiable information and should not be disclosed," council chair Archie Soliai stated in a covering letter.

Last December, Thomas notified Wespac of NOAA's "final determination" on the council's appeal. Thomas accepted the council's arguments for expenses of $400,315.41, leaving $837,355.59, which NOAA would seek to recover.

Breakout of Questioned Costs



Source: OIG analysis of WPSFF costs claimed by the Council

The council "will receive a revised bill in the amount of $837,355.59," Thomas wrote, adding that the council would have "30 days from the receipt of this letter to make payment of the remaining principal balance, the accrued interest, penalties, and administrative charges or to establish a repayment schedule with NOAA Finance."

The council's "failure to pay the debt in full, to negotiate an installment payment plan or other arrangement acceptable in form and substance to NOAA may result in payments being withheld under any current [Department of Commerce] awards to it and to its subsidiaries and in the suspension or termination of such awards."

As of mid-May, Wespac had not paid any portion of the amount due.

Politics and Polemics

It took nearly nine months following the appeal's filing for *Environment Hawai‘i* to obtain a copy. A Freedom of Information Act request for the document was filed in late June, anticipating the August 30 deadline. NOAA did not release the document until May 18.

The appeal relies on many of the exhibits provided to NOAA via Dropbox; none of these was released.

Fewer than five of the 19 pages address the disputed expenditures. The discussions and arguments in this section rely heavily on the Dropbox exhibits.

Most of the appeal is given over to efforts to contextualize the council's behavior.

At the outset, Simonds launches into a long discussion of what she describes as "mitigating factors."

First, she tries to throw responsibility back onto NOAA. The council "consistently sought advice from NOAA Grants Management staff in determining how best to administer federal grants," she states, and "relied on this advice to comply with grant requirements."

Second, she argues that the funding provided by NOAA grants "directly supports programs that benefit [Pacific Island] communities, and the lack of grant funding significantly impacts such communities, particularly now in view of rising food prices and fuel costs."

A third mitigating factor can be briefly described as NOAA picking on Wespac:

"The council operates under the scrutiny of several federal oversight agencies, as well as public and political processes," Simonds writes. "This fact is demonstrated by the number of audits the council has experienced over the past 45 years. None of these audits, including the latest audit associated with the [Audit Resolution] Determination, has ever identified any fraud or legal malfeasance on the part of individual council members or its staff. The facts suggest the [council] has been unfairly subjected to more audits of its financial practices than any other fishery management council, and possibly more than all other councils combined. This also suggests that the [council] has been singled out for audits for political reasons in order to frustrate [its] implementation of the [Magnuson-Stevens Act] to benefit affected island communities reliant on fishery resources."

A footnote further expands on this argument. Simonds points out that the National

Marine Fisheries Service, "directly involved in the grants at issue in this Determination," has not been subjected to any proposed sanctions. "This raises fairness issues," she writes, "and suggests the council has been unfairly singled out. A full inquiry into the basis for this audit and those involved in requesting it are warranted." (The audit came on the heels of the publication of a series by *Honolulu Civil Beat* on the council's expenditures from the sustainable fisheries fund.)

Then there is the "considerable time and financial resources" that the council spent in addressing the audit and the Determination. "Council staff have responded to each and every inquiry in writing and have provided thousands of pages of receipts, records, and other documents in an attempt to respond to this inquiry. … The emotional cost of this proceeding cannot be underestimated, and again points to unfair tactics designed to frustrate the purpose of the MSA," Simonds says.

In any case, she continues, "Grant funds that were spent by grantees were used to further the goals of the MSA and its national policy objectives, providing the intended benefits of the grant. As a result, it is likely that no lawful remedy exists to recover grant money because the purpose of the grant award was accomplished, benefits were received, and any recovery would result in an unjust enrichment of the U.S. government."

Standards of Review

Simonds then provides the appeals officer with a long list of the standards that he should use in reviewing the Grants Management Division's findings.

Although in the normal course of events, the appeals officer, like an appellate judge, would restrict review to the documents before him or her, Simonds argues that it would be appropriate for Thomas to scrutinize the Grants Management Division's Determination. "Given the appearance of undue political influence," she writes, "the appeals official should undertake a de novo review of the Determination, meaning the Appeal Official should review GMD's determination anew, as if GMD had not rendered a decision. Under this standard, the Appeals Official should give no deference to GMD's conclusions."

Also, Thomas should give weight to the reasonableness of the contested expenditures, she suggests. Here Simonds seems to argue that, whether or not regulations and guidelines were strictly observed, the expenditures themselves were reasonable.

She also reminds Thomas that "agency decisions must not be arbitrary or capricious, must be clearly explained, and must be based on information contained in the administrative record before the agency renders a decision." Thomas should use the record supplied by the council "to determine if the claimed costs were necessary and reasonable," she advised.

"In considering this appeal… it is also useful to consider U.S. Department of Justice enforcement policies that outline factors to consider in determining the exercise of prosecutorial discretion for purported violations," Simonds continues. Those factors include the seriousness of the offense, the party's "willingness to cooperate with investigators," their "timely and voluntary disclosure of wrongdoing, and remedial actions taken by a party, including any efforts to implement an adequate and effective compliance program or to improve an existing one."

Simonds goes on to suggest that the council has been handicapped by NOAA's failure to disclose all of the records that were relied upon in the Inspector General's audit and the Grants Management Division ruling. "[T]he council has repeatedly requested access to audit documentation … including emails and other communications that lead [sic] to the Determination," she writes. "Notwithstanding these requests, such audit documentation has not been provided to council, nor has any legitimate basis been provided for withholding such documentation. … The lack of disclosure also raises Due Process considerations under the Constitution."

She does own up to some past shortcomings on the council's part and insists that "it is not the intent of the council to cast aspersions towards OIG or GMD officials. … [T]he council has acknowledged that certain documentation was not retained during the required 3-year records retention period, and that recordkeeping practices should be improved." Nonetheless, she writes, the funds were "clearly used by grant recipients for legitimate activities that further the purposes of the MSA and provided benefits to grantees as intended by the federal government."

Disputed Expenses

The Inspector General's audit and the confirming Determination by the Grants Management Division disallowed more than half a million dollars drawn from the Sustainable Fishing Fund to pay for contributions to employee 401(k) plans, office rent, and employee salaries. Simonds defends these expenses as reasonable, based on "advice provided by a NOAA Grants Management Division employees [sic]." The employees who benefited worked on implementing and overseeing projects supported by the fund, and the office lease payments of $108,341 represented just 8.7 percent of the total lease amount over the period examined in the audit, she writes.

Other disputed expenses were associated with travel for which advance approval from NOAA was not obtained. "However," Simonds writes, the Grants Management Division "provided post action approval thus allowing for the expenditure. In addition, the council also noted that it was acting consistently within grant requirements for reprogramming which did not require GMD approvals."

In defending many of the questioned expenditures, Simonds refers to guidance she says came from NOAA allowing reallocation or "reprogramming" of up to 10 percent of funds allocated and approved for given projects. "This 10 percent threshold is a guideline previously communicated by GMD staff to council staff." (The Inspector General audit disallows this reprogramming, noting, however, that "the council believed that moving funds between awards was allowable if less than 10 percent of the total award." Later, the Grants Management Division, in its Determination, states: "the council understands that the 10 percent threshold applies to funds being transferred between funding classes within a single award. Future transfers between funding classes will follow this threshold.")

Closing Argument

After setting forth her defenses to the challenged expenditures, Simonds provides what might be thought of as a closing argument.

The Grants Management Division, she writes, "lacks the authority to withhold grant funds." Since the council has no source of funds other than the federal government, "in order to recover grant funds that have been spent, GMD would necessarily need to hold back future grant funding from the federal government that is earmarked by Congress for the Council's obligations under the MSA."

Then Simonds invokes the issue of mootness. Because there is "no reasonable expectation that the purported misuse of grant funds will occur again," the appeals official should determine that the issue is moot.

In the absence of a finding of moot, the appeals official "should exercise discretion to find that the voluntary steps taken by the council address the alleged technical violations of agency regulations, and that 'repayment' of grant funds … is not necessary or appropriate."

In a footnote, Simonds discloses that the council "is presently working with GMD and NOAA to change the way grant funds are provided to councils. That is, the council is advocating for 'programmatic grants' to be provided to the council that will enable fewer administrative burdens. The intent of such programmatic grants is to recognize the unique relationship of the council to NOAA that was created under the MSA and to increase the efficiency of grant funding to island communities and other parties dependent on grants for key functions."

Final Decision

Thomas, the appeals officer, issued his finding in December. His letter to Simonds provides greater detail on the disputed expenses than were to be found in Simonds' appeal itself.

While the OIG identified $181,023 in undocumented or poorly documented expenses, Thomas adjusted that amount downward by $31,750, of which $20,000 was accounted for by payments to Pacific Rim Concepts in support of a 2017 Puwalu conference.

Of the $552,235 in administrative costs that the OIG found to have been made without sufficient basis, Thomas adjusted that downward by $18,118.41, reflecting only Wespac's purchases of office supplies.

The OIG determined $319,990 in Sustainable Fishing Funds were spent without necessary approvals from NOAA, including more than $65,000 in travel associated with the 2016 and 2017 Puwalu conferences. Thomas reversed this in part, allowing the Puwalu travel and around all but $132,612 in other expenses.

Thomas reversed the OIG on the matter of $109,751 spent on a parking lot in the Commonwealth of the Northern Mariana Islands, on the basis of documentation provided by the council following the OIG audit.

Finally, with respect to $74,672 that the OIG disallowed because it was unspent, the council obtained reimbursement of most of that from grant recipients. More than $21,000 remained disallowed.

Non-Financial Findings

"The council did not address the non-financial findings in its appeal response to NOAA," Thomas found. "However, the council did provide a copy of its Financial Management System Protocols and Guidance, dated August 30, 2022, which outlines the council's internal control policy and procedure processes for procurement, subrecipient, record retention, and disbursement of funds."

Thomas noted that in its initial response to the OIG audit, the council said it would engage an independent auditor to monitor its Sustainable Fisheries Fund awards for compliance with federal regulations and NOAA award conditions. In the February Grants Management Division Determination, "NOAA pointed out that this function is already performed by the council's annual single audit."

"While an apportionment of the specific costs originally questioned in the audit have been reconsidered by NOAA, the associated review reveals [the council's] pattern of failure to comply with the Department of Commerce Standard Terms and Conditions" and other federal regulations, he wrote.

Update

On May 10, four members of Congress – Raúl Grijalva of Arizona, ranking member of the House Committee on Natural Resources; Jared Huffman, ranking member of the Subcommittee on Water, Wildlife, and Fisheries; Gregorio Kilili Camacho Sablan, the Democratic delegate to Congress representing the CNMI; and Ed Case, Democrat, representing Hawai'i's 1st Congressional District – wrote to NOAA administrator Richard Spinrad, inquiring about the status of Wespac's compliance with the final NOAA findings and other issues.

"We write to express our continued, deep concern with the pattern of mismanagement of federal resources by [Wespac] and its staff as well as the lack of oversight and accountability by the National Oceanic and Atmospheric Administration," they stated.

The letter goes on to note that the council had submitted two proposed actions for repayment of the misspent funds. "These are: 1) use additional federal funding to deliver on a repayment schedule, or 2) seek debt forgiveness through the Department of Justice," it says. "These actions are wholly inadequate and would result in zero accountability for an egregious act of misspent taxpayer dollars."

In addition, the congressmen draw Spinrad's attention to what they describe as improper lobbying by the council and its staff in opposing the proposed Pacific Remote Islands Area national marine sanctuary. The council and staff "have worked to oppose marine protections and designations for years, engaging in behind-the-scenes assistance to opponents of such designations and organizing rallies in opposition. These and other actions amount to improper lobbying with federal funds."

The congressmen ask Spinrad to address four questions by May 17:

1. What courses of action are NOAA and the federal government considering to hold the council accountable for the misspent funds?
2. What steps is NOAA taking to make sure Wespac "does not continue its gross pattern of failure and negligence in managing federal awards?"
3. How will NOAA make sure that council spending is ethical, transparent to the general public, and consistent with statutes and regulations, "including grassroot lobbying prohibitions," that govern the use of federal funds?
4. "What legislative and regulatory policy considerations does NOAA recommend to ensure the Western Pacific Sustainable Fisheries Fund supports marine conservation and management using the best available science?"

According to a congressional staffer with the Water, Wildlife, and Fisheries Subcommittee, Spinrad had not responded to the letter as of May 20.

— Patricia Tummons

The Cost of Puwalu

In the mid-2000s, the Western Pacific Fishery Management Council began underwriting meetings, or puwalu, of Native Hawaiians in an effort to enlist their support of the council's involvement in near-shore fishery management.

Environment Hawai'i reported on the early puwalu, which, even then, were funded in part by the council using grants that were intended by the National Oceanic and Atmospheric Administration to be used for other purposes.

Since 2012, the puwalu have been held under the auspices of the state 'Ahu Moku Advisory Council, but with ongoing substantial financial and administrative support of the council.

The most recent puwalu appears to have been held in 2017.

Expenses for two puwalu (2016 and 2017) were challenged in the OIG audit. According to the final ruling by Jeffrey Thomas, the NOAA appeals officer, Wespac spent about $86,500 in funds from the Sustainable Fisheries Fund over those two years. Some $65,500 of that was paid without NOAA approval, while Wespac could not provide substantiation for another $21,000.

While the OIG disallowed those expenses, Thomas reversed that determination, relying on additional documentation that Wespac provided.

(For more information on puwalu, see "FOIA Responses Shed Light on Council Support of Puwalu," May 2009 *Environment Hawai'i.)*

— Patricia Tummons

Kea'au Subdivision Gets Final Approval With No Affordable Housing Agreement

The query began with a phone call. What affordable housing conditions had been placed on a 35-lot subdivision in Kea'au, a stone's throw from the Kea'au High School, the caller wanted to know. Unable to find this information from any of the easily accessible sources, the caller turned to *Environment Hawai'i.*

We went to work.

As with several other housing projects that *Environment Hawai'i* has looked into on the island of Hawai'i, this one – Ola Hou – was developed by a company owned by Roland Higashi, his wife, and his daughter. By the time Graphic Images Hawai'i, Inc., acquired the 44 acres, it had already been rezoned for one-acre lots in an ordinance approved by the County Council in 2012.

At that time, the land was owned by Renaissance Development, LLC, a Honolulu firm whose two members, Henry Kwok and Robert Yoneoka, had purchased it in 2008 from KY International, Inc. The president and vice president of KY were (still are) Kwok and Yoneoka, respectively. Graphic Images acquired the land in 2017 in a Section 1031 tax-deferred exchange, as allowed by the IRS. The reported purchase price was $1.075 million.

In a recent county audit of the Hawai'i County Office of Housing and Community Development's award of housing credits in return for development of affordable units, the county auditor stated that Renaissance Development had "obtained" four credits and had purchased three more, for a total of seven credits, all of which were redeemed to satisfy the 20 percent affordable housing quota for a 35-lot subdivision.

So exactly how were these credits acquired?

Affordable housing agreements are to be filed with the state Bureau of Conveyances. None was for this subdivision. They are also to be filed with the county Planning Department and made a condition of subdivision approval. None was found in Planning Department files for this subdivision.

Environment Hawai'i then requested the AHA from the Housing Office.

The OHCD responded with assorted documents totaling 52 pages. None, however, was an affordable housing agreement.

Instead, there was a copy of a 1998 zoning ordinance, allowing a 37-lot development on the 44 acres. Then the 2012 ordinance amending that, which limited the number of lots to 35.

There's correspondence between the OHCD and Yoneoka regarding an effort to satisfy, in part, the affordable housing requirements by donating two lots to a non-profit. But that seems to have been contingent on the County Council amending the 2012 ordinance to allow two more lots (back to 37, as per the 1998 ordinance).

Yoneoka initiated the effort. In a letter August 12, 2014, to Alan Rudo, a county housing officer who last year pleaded guilty to fraud in relation to the award of housing credits, Yoneoka acknowledged that Renaissance is "required to provide a total of seven affordable lots," of the 35 total, the seven lots equal to 20 percent of the total number planned. Of that seven, he wrote, "three transfer credits were obtained," leaving a balance of four affordable lots. (The three were obtained from a company, DJAT, LLC, headed up by Allan Takase, that had earned a total of five credits in connection with building 18 units of housing intended for students in Hilo.)

"It is our intention to donate two finished lots to the county to fulfill the four-lot requirement, based on a 50 percent reduction of [the] requirement, according to Section 11-5(5)," Yoneoka wrote. That section of the Hawai'i County Code provides that developers who convey improved, finished lots to the county or a non-profit "shall be entitled to a 50 percent reduction of the affordable housing requirement."

The Housing Office was agreeable to the plan. On August 19, Stephen Arnett,

continued on page 7

Lynch *continued from page 1*

30. In the meantime, the council sought permission from NOAA to obtain outside counsel, which normally the council would not be allowed to do under federal regulations. Permission was granted on June 13, setting the stage for the council's request for proposals that briefly appeared on its website.

As *Environment Hawai'i* reported last August, the notice, posted on June 17, stated that the selected contractor was to begin work on June 25, "or as soon as available."

Neither NOAA nor the council would say who had been selected or how much they were to be paid. *Environment Hawai'i* then filed a Freedom of Information Act request, which was finally fulfilled on May 19.

The FOIA request asked for all proposals "received by the council in response to the RFP." If the council claimed confidential information, then we sought "a list of individuals and/or entities responding to the RFP." No such list was provided.

Instead, the NOAA Grants Office provided just one contract, executed on July 27, for "legal services for preparation of council appeal to GMD Audit Resolution Determination."

The table describing "deliverable activities and targets" has been redacted, citing exemption (b)(4) of the Freedom of Information Act. That exemption allows agencies "to withhold trade secrets and commercial or financial information obtained from a person which is privileged or confidential."

A statement of work requires the contractor to "review documents, correspondence, records, and provide advice related to" the council's appeal of the Grants Management Division's decision upholding the OIG audit findings.

The contractor was required to execute a "confidentiality agreement" because, the council stated, "the records, documents and files associated with the scope of this contract includes [sic] confidential information and/or Personally Identifiable Information."

Although the contract specified payment of $25,000 to Lynch, it left open the possibility of additional work and "contract modifications."

"In the event negotiations over a repayment plan become necessary, or other significant, unforeseen tasks arise, the parties will meet and confer and assess if contract modifications are required," the contract states.

— Patricia Tummons

Housing *continued from page 6*

housing administrator at the time, responded to Yoneoka. "Upon fully executing and recording a written agreement with the County of Hawai'i, whereby Renaissance Development, LLC, agrees to convey two finished lots to a non-profit of the OHCD's choice … the OHCD will notify the Planning Department that … the subject property qualifies for the 10 percent density bonus…"

Attached to the letter to Yoneoka was a "sample agreement" between the OHCD and EWM Enterprises, LP. This agreement, signed the previous year, allowed EWM to donate a finished lot to satisfy affordable housing requirements for a development in Kohala.

The plan was contingent on the county allowing two more lots to be developed in the subdivision, however. The OHCD pursued this, to the extent of drafting language to replace the 2012 ordinance and asking the then-planning director, Duane Kanuha, to propose it.

The OHCD had determined that the Ola Hou Estates subdivision could qualify for a "10 percent bonus density" if the number of lots was increased back to 37, Arnett told Kanuha. The ordinance adopted in 2012 "effectively eliminated the bonus density," he noted. "Renaissance Development, LLC, is working with the OHCD to donate the two additional lots to a non-profit to provide more affordable housing in Puna and satisfy their affordable housing requirement."

Nothing came of that proposal, leaving at four the number of housing credits that Renaissance – and later Graphic Images Hawai'i – was required to earn.

Susan Kunz, OHCD administrator, acknowledged last month that there was, in fact, no affordable housing agreement for the Ola Hou subdivision.

The EWM Agreement

But more needs to be said about the EWM affordable housing agreement and how the use of the lot-donation option can fall short of addressing affordable housing needs.

In June 2013, the Housing Office and EWM Enterprises executed a housing agreement intended to satisfy affordable-housing requirements for a 10-lot subdivision in the district of North Kohala.

The Housing Office determined that EWM could meet the requirements of Chapter 11 by donating one developable lot to Hope Services Hawai'i, Inc. The affordable housing agreement – the same that

Houses on one-acre lots in the Ola Hou subdivision.

was proffered as model language to Renaissance – included a statement that beyond that donated lot, the developer would "bear no responsibility for actual development of affordable housing units."

"This agreement shall run with the land of the property … and be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns," it states. "This agreement shall be recorded against the land … by developer at the Bureau of Conveyances."

Less than a month after the agreement was signed, EWM conveyed the property to Hope Services. The deed makes no mention at all of the restrictions called out in the affordable housing agreement.

The agreement does allow for release of the property from these conditions once they are fulfilled – which, in this case, apparently meant after the transfer of a lot to Hope Services. In August 2014, EWM recorded a release from the affordable housing conditions.

In June 2015, Hope Services sold the one-acre lot at 54-401 Kapua Place for $150,000. The buyers were two married couples from California. They proceeded to build a small but elegant tiny house on the property. In 2019, the property was sold again – to a couple living in Montana. The recorded purchase price: $350,000.

No affordable housing whatsoever was built as a result of the agreement the county worked out with the developer.

Rudo Sentencing Delayed to September

The sentencing of Alan Rudo, the former county housing staffer who last summer pleaded guilty to federal charges of wire fraud, has been continued to September 19. The pretrial conference for his three associates – Rajesh Budhabhatti and attorneys Gary Zamber and Paul Sulla Jr. – has been set for July 24 before Magistrate Judge Kenneth J. Mansfield in Honolulu.

In a related development, the federal government has recognized the leasehold claim of Honua'ula to seven acres of land in Kealakehe that is proposed for an affordable housing development.

West View Development, one of the companies set up by Rudo, Budhabhatti, Zamber, and Sulla as part of their fraudulent schemes, remains the owner of record. Hawai'i County has filed a petition with the federal court arguing that it should receive title to the land as well as around $940,000 in cash seized from Rudo and 45 affordable housing credits.

The court has yet to rule on that petition. Meanwhile, property taxes on the West View land have gone unpaid since February 2022.

— Patricia Tummons

BOARD TALK

Board Denies Petition for Contested Case On Mosquito Control Suppression Project

The state Board of Land and Natural Resources' May 12 meeting began at 9:15 a.m. and stretched well past dinnertime. As the board heard public testimony on one of its last agenda items, board member Aimee Barnes could not let the insulting innuendo from one testifier go without a response.

The Department of Land and Natural Resources' Division of Forestry and Wildlife had requested that the Land Board deny a petition for a contested case hearing filed in April by the nonprofit Hawai'i Unites and its president and founder, Tina Lia of Maui.

Lia is a vocal opponent of plans by state, federal, and private entities to release into the forests of East Maui house mosquitoes carrying a different strain of the *Wolbachia* bacteria than what's carried by mosquitoes in the wild. The incompatible bacteria strains will render any offspring inviable, and, hopefully, result in a reduction in the mosquito population and transmission of avian malaria, which has devastated native bird populations.

Specifically on Maui, avian malaria has pushed the kiwikiu and 'ākohekohe to the brink of extinction.

Lia submitted her written request after the Land Board denied her oral request at its March 24 meeting and accepted an environmental assessment for the project.

An endangered kiwikiu, one of the native forest bird species suffering from the mosquito-borne spread of avian malaria. CREDIT: COURTESY OF DLNR

At the May meeting, Lia testified in opposition to DOFAW's recommendation. She argued, as she has in the past, that the project was experimental and could cause the extinction of the forest birds and have other devastating consequences. She argued that the Land Board needed to honor constitutional due process and grant a contested case hearing.

In recommending denial of her request, DOFAW noted in its report to the board that neither Lia nor Hawai'i Unites asserted a property interest that would trigger a due process analysis.

Among the testifiers who supported Lia's petition was Juhl Rayne. She argued that the mosquito release will do more harm than good, adding, "We definitely have to have this experimental thing looked into. … It's quite obvious any decision other than that is, I don't know, being paid for by someone."

Before the board moved onto the next testifier, Barnes asked to address Juhl's last point.

"This is an all-volunteer board. I've been here since 9 o'clock this morning. I don't get paid for this. I have two small children at home. I take my time out of my day to contribute to our state and I take accusations that I or anybody else on this board has been paid to make any decision very personally. So please be thoughtful when you make accusations like that. It's very offensive," she said.

The board ultimately voted to accept DOFAW's recommendation for the reasons given, noting that Lia and Hawai'i Unites had already filed complaint for declaratory and injunctive relief in Environmental Court.

The Lawsuit

In their complaint, filed May 8, Lia and Hawai'i Unites argue that the Land Board and DLNR violated the Hawai'i Environmental Policy Act by not requiring an environmental impact statement for the mosquito suppression project.

"Hawai'i Unites has repeatedly presented documented, compelling evidence of the risks and impacts of the biopesticide mosquito project to the BLNR. Rather than acknowledge and address the organization's concerns, the BLNR has acted in a consistently dismissive and disruptive manner towards this testimony," the complaint states.

"Tropical disease and vector expert Dr. Lorrin Pang, speaking as a private citizen, has expressed concerns about horizontal transmission ('horizontal spread' or 'horizontal transfer') of the introduced *Wolbachia* bacteria strain to wild mosquitoes and other insects, including other insect vectors of disease. … Peer-reviewed studies have shown *Wolbachia* bacteria in mosquitoes to cause increased pathogen infection and to cause mosquitoes to become more capable of spreading diseases such as avian malaria and West Nile virus," they continue.

"Male mosquitoes transmit bacteria and pathogens to females. Infected females can spread disease to birds (including endangered native birds), other animals, and humans," they stated.

The complaint also raises concerns over the impacts using drones to drop biodegradable packages of mosquitoes into the forest areas. There could be "up to 134 drone flights per week over the project area for the life of the plan — likely at least 20 years as stated in the final EA. … Drone hovering; risks of breeding birds being flushed from active nests; disturbances of day roosting Hawaiian hoary bats; and risks of disturbing bat pup rearing are all noted impacts," it states.

The state had not yet filed a response to the complaint as of late May. However, at the March 24 Land Board meeting, DOFAW administrator Dave Smith did address some of the concerns Lia and others have raised.

Smith pointed out that the species of mosquito and the strain of *Wolbachia* are already found in Hawai'i. He also noted that if some females are released along with the males, "even if the female bites you, they have *Wolbachia* already. It's not like they're giving you something. … The other thing with mosquitoes is they only live for a very short period of time. People say, 'What if a female got out that has this different *Wolbachia* strain?' We could just pause and they could be bred out of the population in a very short period of time."

A scheduling conference for the case has been set for August 3.

Board Approves Public Hearings On New Rules for Uhu, Kala, and More

Last December, the DLNR's Division of Aquatic Resources asked the Land Board to authorize public hearings on a rules package that would set new limits take of manini (convict tang), kole (goldring surgeronfish), kala (bluespine unicornfish), uhu (parrotfish), and papa pualoa (Kona crab).

Several commercial fishers complained that some of the more restrictive limits — the bag limit of two per person per day for kala and uhu, specifically — would put them out of business. Even though those fish are considered by scientists to be overfished, the Land Board deferred making a decision and directed DAR to craft accommodations to allow commercial fishing to continue, but not expand.

On May 12, DAR returned with a new rules package that would require commercial marine dealers of uhu or kala to register as such to purchase, possess, and sell those species.

For commercial fishers of uhu, the following would apply:

Only uhu palukaluka (initial-phase redlip parrotfish) would be allowed for commercial harvest and sale, and there would be a daily bag limit of 30 per commercial marine license (CML) holder;

Only fish between fourteen and twenty inches in length could be caught and sold, and commercial harvest and sale would be prohibited during the peak spawning months of February through May.

Fishers must obtain a valid Commercial Uhu Fishing Permit, which may be issued to anyone who holds a valid CML, pays a $100 permit fee, provides proper identification, and has caught and sold at least 340 pounds of uhu within the past twelve months as verified through commercial catch reports and/or commercial marine dealer reports.

Commercial fishers of kala would have a daily bag limit of 50 per CML holder and would also have to have a Commercial Kala Fishing Permit. The minimum size of kala caught would be the same as the proposed non-commercial size limit: 14 inches. Commercial harvest or sale would be prohibited during peak spawning months of April through July.

To obtain the commercial kala fishing permit, an applicant would have had to have caught and sold at least 100 pounds of kala within the past twelve months.

Those seeking commercial permits for uhu or kala who did not have documented sales would receive a probationary permit. If probationary permittees did not catch their minimum amount, they could not get a permit for the following season. Fishers who did not sell to dealers would need to report their cash sales to DAR.

Under DAR's proposed rules, only the only uhu that could be commercially caught and sold would be uhu pālukaluka (initial-phase redlip parrotfish).

DAR also proposed setting commercial annual catch limits for uhu and kala that represent approximately 75 percent of the average annual reported commercial catch over the past five years. For kala, that would be 10,000 pounds. For uhu, it would be 34,000 pounds.

If the ACLs are reached, then DAR would close the fisheries. However, dealers with valid receipts for the fish would still be allowed to sell them if the fisheries closed because ACLs were reached.

Despite all of the accommodations DAR proposed for the commercial fishers, several still testified in opposition. Some argued that the state's assessment of the abundance of the fish species was wrong, and that both uhu and kala were plentiful. Others testified that the bag limits would result in a lot of discarded, dead and, in their eyes, wasted fish.

DAR biologist David Sakoda countered that the discarded fish aren't wasted, since they will remain in the ecosystem and get eaten by something.

In addition to the uhu and kala commercial catch provisions, DAR also proposed kole regulations that would allow the harvest by aquarium collectors of kole less than five inches in length "pursuant to the terms and conditions of a valid aquarium fish permit and other aquarium fishing regulations."

Despite the continued opposition from some commercial fishers, board member Kaiwi Yoon made a motion to approve DAR's request to send its new rules out to public hearings.

With regard to the opposing characterizations of the populations of the fish targeted by commercial fishers, Yoon said there was "a big delta between choke and not choke. I don't know what data set to internalize."

He noted that in the Hawaiian language, kala means "to forgive, to let go, to free. Interestingly enough, uhu means to restrain, to hold back, to pull. … Here we have these two fish trying to talk to us and somewhere in the middle is where the sweet spot is."

After an executive session, Yoon amended his motion to delete DAR's proposed rules regarding the commercial aquarium collection of kole. He said that the Land Board would deal with aquarium collection matters at another time.

With that, the board unanimously approved Yoon's motion.

For more background, see, "Efforts to Accommodate Commercial Fishing Delays Hearings on Proposed Catch Limits," from our January 2023 issue.

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Kala is considered to be experiencing overfishing.
CREDIT: NOAA

Opponents in Coco Palms Case To Argue Competing Motions for Summary Judgement

On June 7, opponents of the proposed redevelopment of the old Coco Palms resort on Kaua‘i will face off against the state before 1st Circuit Judge Lisa Cataldo.

Judge Cataldo will hear arguments on their motions for summary judgement regarding a complaint filed last November by I Ola Wailuanui. The nonprofit group, which seeks to pursue its own vision for the 32-acre site, has fought and is fighting county, state, and federal agencies over their decisions facilitating resort development there.

The Circuit Court case involves the state Board of Land and Natural Resources' October 2022 decision to renew revocable permits (RPs) for three parcels of state land that are part of the developer's larger plans to revive the dilapidated resort.

I Ola Wailuanui has argued that the Land Board improperly exempted the permit approvals from environmental review under Chapter 343 of Hawai‘i Revised Statutes, noting that the permit areas are included in county building permits for the larger project.

The group has asked the court to enjoin any further activity "on the basis of the Coco Palms RPs" until that chapter — as well as other state laws and the Hawai‘i constitution — are complied with.

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Sandalwood Seeds Sharing, Conservation Easement in South Kona

On May 12, the Land Board approved a request by DOFAW to enter into a memorandum of agreement with Haloa Aina LLC regarding the sharing of sandalwood seeds for use in the division's orchard planting efforts. And on May 26, the board approved the acquisition of a perpetual conservation easement over three parcels owned by the company in Kealakekua, South Kona, totaling 2,733 acres.

DOFAW's May 12 report to the board noted that Hawaiian sandalwood are "highly valued economically, ecologically, and culturally, and are threatened by habitat loss, predation, fire, and lack of regeneration."

To protect the trees, the division is establishing a network of sandalwood seed orchards on public and private lands throughout the state under a Landscape Scale Restoration (LSR) Agreement with the U.S. Department of Agriculture Forest Service (USDA-FS).

"The purpose of this project is to produce high quality, eco-region specific seed for native forestry restoration efforts. Haloa Aina LLC, a family-owned company that is dedicated to restoring native dryland forest, has expressed willingness in hosting a seed orchard site on their property," the report states.

The MOA with Haloa delineates the responsibilities of DLNR and the company with regard to the seed orchard site, Under the agreement, the seeds produced would be split 50-50 between the DLNR and Haloa.

With regard to the purchase of the conservation easement on Haloa's lands above the Hokukano Ranch subdivision, DOFAW is awaiting the results of an appraisal before it can expend funds received from the federal Forest Legacy program and the County of Hawai‘i's Public Access, Open Space, Natural Resources Preservation Fund. Haloa, previously known as Jawmin, LLC, purchased the three properties in 2009 for $9 million.

The easement is needed to "permanently protect 2,733.106 acres, more or less, of dry montane forest (4,500- to 5,500-foot elevation). … The project area's forest provides essential Hawaiian sandalwood," a DOFAW report states.

"In addition to historic declines, populations of ‘iliahi in the region continue to decline due to ongoing threats such as unsustainable logging, housing development, cattle grazing, invasive species, and low natural recruitment. With high land value in the region, active subdivision and land sales are happening immediately adjacent to Haloa Aina. The CE will forfeit the right of the landowner to subdivide, protecting the property from development in perpetuity and ensuring this property stays a working and recovering native forest. This forest will increase economic opportunities to rural valuable woods in the world.

"This project will connect over 400,000 contiguous acres of adjacent managed forests including two Forest Legacy project conservation easements also held by the state (Kealakekua Mountain Reserve and Ka‘awaloa), forested lands managed by Kamehameha Schools for forestry and conservation, and Hawai‘i Volcanoes National Park, creating a large contiguous managed forest landscape," it continues.

(For more background on the properties, see *Environment Hawai‘i's* October 2010 issue.)

Board Settles Fine For Violations On Duke Kahanamoku Beach

On May 26, the Land Board approved the settlement of a $65,000 fine it had imposed in May of 2021 for violations on Duke Kahanamoku Beach in Waikiki by Chris Sanger and Duke's Lagoon, LLC.

Sanger and his company had been presetting chairs and storing equipment on the beach, and also conducting commercial activities there.

After some delays in settlement talks due to changes in Sanger's and the state's counsel, the DLNR's Land Division recommended that the board settle the matter for $19,000.

Board member Kaiwi Yoon asked division administrator Russell Tsuji whether $65,000 was not a reasonable fine.

"I wouldn't say that. We're settling it … To get the $65,000, you have to file an action, go to court …," Tsuji said.

Board chair Dawn Chang noted that the department will be seeking greater enforcement of illegal commercial activities. "If you are found in violation, it may be a basis to terminate all other … commercial use permits," she said.

While the board approved the settlement, Yoon voted in opposition.

— Teresa Dawson

Part of the former Coco Palms resort lands to be redeveloped. CREDIT: GARY HOOSER

In exempting the permits for the three state parcels from environmental review, the group has argued that the Land Board improperly segmented them from the rest of the redevelopment, most of which will occur on private lands.

In the state's motion for summary judgment, filed on May 19, state deputy attorneys general Julie China, Daniel Morris, and Danica Swenson defended the Land Board's decision to exempt the permits.

One of the permits would allow for vehicular access. Another would be for parking and landscaping. The third permit would allow for a restaurant, landscaping, and related purposes.

The state attorneys argued that none of the permits cover "particularly sensitive environments." And because the board had renewed them for years, with no change in use, the attorneys argued that the permits were covered under the Department of Land and Natural Resources' list of exempt actions. Specifically, "permits … that are routine in nature, involving negligible impacts beyond that previously existing."

With regard to the plaintiffs' accusation of improper segmentation, the state's attorneys counter that the permit conditions only apply to the three state parcels and that the permits "have independent utility from any development." Therefore, they argue, the permits and the development on other lands do not constitute a "single action," as defined by administrative rules governing environmental assessments and impact statements.

"The Board has no authority to require an EA for the entire private development because (1) the Board is not the permitting entity and (2) the land use is not on state land. … Plaintiff conflates the action of the Board re-issuing the subject RPs with the permittees' development of their adjacent parcels," they wrote.

They added that the Land Board may be asked to approve permits for uses on adjacent lands in the Conservation District or along the shoreline. "However, that is speculative, has not yet occurred and, therefore, is not ripe for review," they wrote.

Also, they argued, it would be more appropriate for I Ola Wailuanui to challenge the permits issued by the county or other agencies for construction activities on the private lands.

They asked that the court reject the group's complaint on procedural grounds, noting that it should have filed a petition for a contested case hearing following the Land Board's decision to renew the permits.

The group's allegations that the Land Board violated its constitutional duties to protect native Hawaiian traditional and customary rights could have been addressed in a contested case. However, "Plaintiff's failure to exhaust its administrative remedies divests this court of jurisdiction," they wrote.

Finally, they argued that the Land Board properly determined that the permit renewals were in the best interest of the state. In addition to raising the rent to be consistent with market values, the board's decision kept the land encumbered "so as to keep it in good condition," they wrote.

"Current photographs of the subject RP parcels show that the parcels are in fact in good condition, protected from unlawful entry, and not accumulating debris," they stated.

In October, and during an April briefing on the permits, the Land Board addressed the fact that the permittee, Coco Palms Ventures, LLC, no longer existed and that Reef Capital Partners and its subsidiaries were the ones that would be using the state lands and redeveloping the former resort properties.

The state's attorneys argued that was not a breach of the board's fiduciary responsibilities.

"The Board re-reviewed the subject RPs on April 14, 2023, under harsh scrutiny from the public, including Plaintiff, at

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an informational briefing. … [T]he Board Chairperson indicated she … 'anticipate(s) that this matter will be brought back for action[…].' Therefore, the Board has fulfilled its fiduciary duties by monitoring the condition of the parcels, ensuring compliance with the RP terms intended to protect and preserve trust property, collecting market-value rent for the RPs, and continuing to conduct public sunshine meetings relating to the status of the subject RPs and the permittees," the state's attorneys wrote.

Should the judge fail to grant either motion for summary judgement, a settlement conference has been scheduled for next February. Should settlement talks also fail, a jury-waived trial would start in April.

(For background on this, see our May 2023 cover story, "Developers of Coco Palms Site Face Violation Allegations, Injunction Lawsuit.")

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Opponent of Mosquito Release Loses Case in Federal Court

On August 3, a scheduling conference will be held in the case Tina Lia and the nonprofit she founded, Hawai'i Unites, filed against the state Board of Land and Natural Resources over its acceptance on March 24 of an environmental assessment for the release of mosquitoes in East Maui to control avian malaria and protect critically endangered native honeycreepers.

While that case still has legs, a case brought by another opponent of the mosquito release project died in U.S. District Court on May 19, just days after he filed it.

On May 15, Jeffrey-Steven of the House of Jarret, a Utah resident with a Kula, Maui, post office box, filed an ex-parte motion for a temporary restraining order to halt the project.

"I do have the right to due process and to reject non-consensual medical experimentation. Being bit by a female mosquito infected with bacteria and/or other pathogens is exposure to experimentation and could be a crime against humanity," he wrote.

The house mosquitoes to be released in East Maui are intended to be non-biting males, although there may also be a small percentage of females. The males will carry a strain of the naturally occurring *Wolbachia* bacteria that will prohibit successful procreation with female mosquitoes already in the environment, thereby suppressing the overall biting-mosquito population in the area.

Steven's memo suggests that the mosquitoes to be released may be infected with harmful pathogens. He included as attachments screen shots taken from the Substack page of Pfizer COVID vaccine critic Karen Kingston that show a type of drone that can house and release "toxic" mosquitoes.

U.S. District Judge Jill Otake noted in her order denying Steven's motion that he failed to provide notice to the defendants, which include the state Department of Land and Natural Resources; its director and Land Board chair Dawn Chang; the state Department of Agriculture and its director, Sharon Hurd; the National Park Service and manager Natalie Gates.

Otake noted that Rule 65(b), the federal law governing injunctions and restraining orders, allows TROs to be granted without notice only if it clearly appears that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition," and that "the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required."

She found that Steven did not identify what immediate and irreparable injury, loss, or damage he would suffer before the defendants could be heard.

She also noted that it appeared that Steven did plan to serve notices on the defendants. However, no new filings had been entered in the case by the end of May.

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Judge: Board Should Have Granted Contested Case on Kaua'i Permits

On May 8, 1st Circuit Judge John Tonaki issued his final judgment in a case filed by Kia'i Wai O Wai'ale'ale and Friends of Maha'ulepu against the Land Board and the Kaua'i Island Utility Cooperative.

He found that the board's denial of the groups' requests for a contested case in 2021 and 2022 on revocable permits issued to KIUC for the continued diversion of Wai'ale'ale and Waikoko streams for its hydropower plant violated the groups' due process rights, as well as the state law on public procedures.

The judge found that the board's failure to enter findings of fact or conclusions of law "resulted in an inability to determine whether the board properly exercised the discretion vested in it by the constitution and statues in approving the permits."

He vacated and reversed the 2021 and 2022 permit approvals.

Even though the KIUC did not seek a renewal for 2023, the court found that the board's consideration of a new revocable permit for the same diversion "is capable of repetition should the ditch system be repaired," he wrote. He added, "This appeal presents a highly public issue of whether judicial review is available for the board's denial of contested case requests on KIUC's diversions of the waters of Wai'ale'ale and Waikoko, environmental review for the same, and the Board's public trustee obligations attending its decision."

— Teresa Dawson