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Environment Hawai'i
a monthly newsletter

The Twisted Roots Of Kaua'i Water Woes

Dozens of farms and residents in Moloa'a, Kaua'i, stand to lose their only source of water next month. The tale of how things got to this dire point is a long and winding one that goes back decades.

Last month, the man who has long controlled that source — a well on state land — decided he doesn't want to spend the money to fix the leaky system that delivers the well water, and definitely doesn't want the liability that comes with operating a potable system that is vulnerable to contamination.

Despite the harm that may occur if the water stops before a new source comes online, the state says it can't force someone to keep a permit.

IN THIS ISSUE

Abandonment of Water Well Permit Highlights Problematic Growth at Moloa'a Ag Subdivision

On October 5, dozens of tenants within the Moloa'a Hui agricultural subdivision on Kaua'i — including residents, farms, and businesses — will be cut off from the well water that they've relied on for years.

Some of those tenants testified to the state Board of Land and Natural Resources at its meeting on August 23 that losing the water before their impending backup well is online would be devastating.

"If we lose our water on October 5, it's going to be one of the worst scenarios that anyone in this state has probably seen, as far as I'm concerned," Louisa Wooton told the board. Wooton is the general manager of the Moloa'a Irrigation Cooperative, which distributes well water purchased from a neighboring landowner, Jeffrey Lindner.

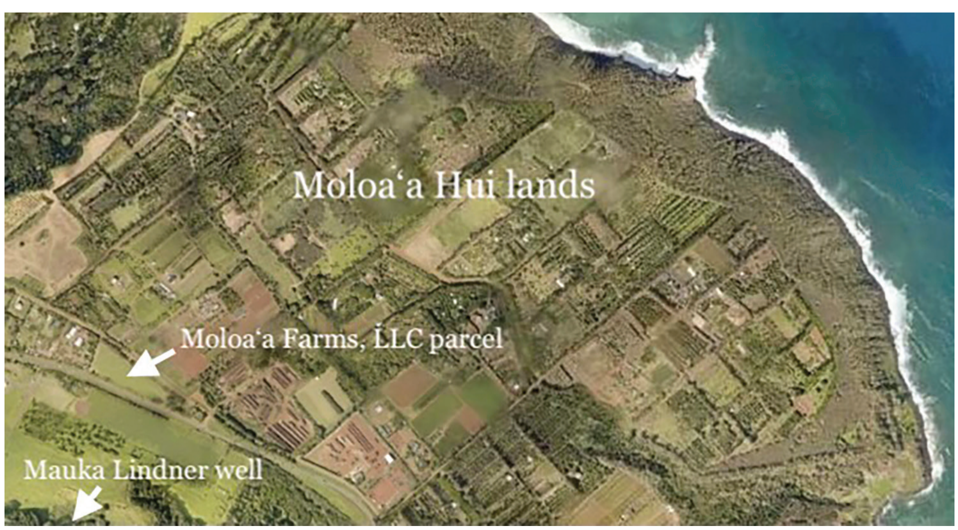
In written testimony, the cooperative's members reported, "At present, the water that we purchase from Mr. Lindner is our sole source of water. (MIC) distributes this water to 70 metered connections which serve between 250–300 people on a daily basis. We rely on the use of the water for domestic purposes, business needs, and irrigation on 45 commercial farms in the system."

Megan Fox, executive director of the non-profit Malama Kaua'i, also submitted written testimony speaking to the potentially disastrous effects premature water cessation would have.

"Our non-profit operates our island's food hub from a facility on the Moloa'a Irrigation Cooperative's land that was just recently built and opened in February of this year. This facility cost over $3M, over $500k of which was funded by the State. We distribute for over 100 local farmers and food producers across our island and the state, host two facility food business users, and employ over 5 staff at the facility.

"Interruption of water would be immediately halting businesses and jobs with all of

continued on page 8



The Moloa'a Hui lands and the Moloa'a Farms, LLC parcel used to be part of one large parcel that was subdivided years ago.

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NEW AND NOTEWORTHY

For Hoʻokipa: On August 6, the state Bureau of Conveyances recorded a Unit Deed transferring ownership of Unit 1 of the Marconi Point Condominiums from Yue-Sai Kan to the North Shore Community Land Trust.

For years, the trust has been restoring a conservation easement owned by the Turtle Bay Resort that abuts Unit 1.

The 4.7-acre oceanfront parcel on Oʻahu's North Shore is where a nesting Laysan albatross known as Hoʻokipa was killed by one of Kan's landscapers last year. As part of a settlement agreement approved by the Board of Land and Natural Resources on April 26 to resolve violations Department of Land and Natural Resources staff brought against Kan for that incident, as well as unauthorized fence building in the Conservation District and land clearing that decimated valuable native yellow-faced bee habitat, Kan committed to donating the lot to the land trust.


Hoʻokipa.

She paid $3.6 million for the property in 2021, but was never able to build a farm dwelling and faced violations from the Honolulu Department of Planning and Permitting for unauthorized improvements.

Give Aloha, Please: 77036. That's Environment Hawaiʻi's registration number for Foodland's Give Aloha program this month. The annual drive, which ends September 30, allows shoppers to donate to local charities at checkout. Foodland will match donations of up to $249.

If you forget our number, just look us up on the list of charities at each checkout station.

Aquarium Ruling: On August 28, the Hawaiʻi Supreme Court issued a 4-1 ruling supporting findings by the Environmental Court that the final environmental impact statement produced by the Pet Industry Joint Advisory Council for the West Hawaiʻi commercial aquarium fishery was adequate.

"The Court's ruling in *Kaupiko v. BLNR* effectively ends a de facto ban on commercial collection that has been in place since an earlier Supreme Court decision in 2017 mandated public disclosure and analysis of the aquarium pet trade's effects," the law firm Earthjustice stated in a press release. The firm represents the plaintiffs.

In her dissent, Justice Sabrina McKenna found that the EIS lacked "any discussion of the significant differences in fish abundance in open areas versus protected areas. Further, the RFEIS fails to provide any meaningful comparison between open areas and protected areas to disclose the cumulative impacts of aquarium collection required under HEPA. To the contrary, the RFEIS selectively uses open area population data from 2017 and 2018 to evaluate its proposed catch quotas."

She added that the document fails to meet Hawaiʻi Environmental Policy Act's requirement to include mitigation measures.

"[I]f BLNR begins issuing commercial aquarium permits in West Hawaiʻi, I hope the [Division of Aquatic Resources] will carefully monitor fish populations to determine whether annual permits should be renewed or whether catch quotas need to be modified," she concluded.

As Earthjustice stated in its press release, on August 23, the Board of Land and Natural Resources "was poised to approve terms and conditions for eventual permits, but the Board's decision was contested by West Hawaiʻi community members, effectively halting any Board decision on permits until the contested proceeding is resolved."

Quote of the Month

"We hope that the there can be a more humane and sensible alternative to this timeline than to create a situation that compromises the health and livelihood for so many of Kauaʻi residents."

— Moloaʻa Irrigation Cooperative

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Launiupoko Irrigation Co.'s Reports to PUC Show Income Set Aside for Loan Repayments

What is happening with the Launiupoko Irrigation Company?

To judge from its most recent financial statements provided to the Public Utilities Commission, the company seems to have done little more than collect payments from customers and salt away most of its income for eventual payments of interest on loans it has received from majority owner Peter K. Martin.

The company's July financial report, for example, shows LIC received $46,361 in income from its customers, while it put on its books as an expense all of that, and more -- $50,395.21 – in the category "Interest Expense Shareholder."

None of the July expenses went for repairs and maintenance, water testing, well reading, or fuel. The company did report electrical costs of $916, office rent of $548 (to an affiliated company), merchant fees of $411, and accounting costs of $969. Also, it paid out $10,390 for insurance.

Altogether, subtracting income from expenses, the company reported a net loss of $19,063.60 for the month. But for the "interest expense," it would have seen a net profit. And, even after paying out $12,232 in July operational and administrative expenses, there would have still been more than $34,000 left over to be invested in the kind of work that was promised in the rate case, and which the PUC had expected would be undertaken.

The 12-month total in logged interest expenses (August 1, 2023 to July 31, 2024) came to $602,792.74, eating up almost exactly three-fourths of the total reported income of $803,768.66. If the interest expense was not booked, and income was used only to pay for operational and administrative expenses, then LIC would have posted a net income of $635,052. Instead, it reported to the PUC a loss of $972,329.78.

In May 2022, when the PUC gave conditional approval to a temporary rate hike requested by the company, one of the conditions was that the company "shall not use the additional revenues permitted by this order for any purpose other than restoring normal service to its customers, such as paying off unapproved loans."

Driving home the point, the order went on to state, "The commission will not look kindly of any evidence that Launiupoko spent its increased revenues on anything other than restoring normal services to its customers."

Just last month, LIC insisted to the PUC that it "has not used any of the additional revenues to pay loans or interest related to its loans."

But effectively, by not using income to pay for the improvements required to restore normal service and instead banking it against the day that LIC pays off Martin, the company would appear to be out of compliance with the conditions of the LIC temporary rate approval.

Environment Hawai'i asked LIC to explain how these expenses comported with the Public Utilities Commission's prohibition on interest payments.

"LIC has not used additional revenues to pay loans or interest expense related to the loans," the company replied. (The reply was anonymous.) Instead, the company said, it uses the accrual basis for accounting, plugging in each month as an accrued expense the amount that is owed to Martin. (The company then kindly provided an explanation, from AI, of the difference between cash and accrual bases of accounting. Also, it expressed puzzlement "that you have access to the bimonthly reports when they are not on the PUC website." In fact, the PUC website is the source of all of the information used in our reporting.)

There's a history to the prohibition on loan payments, described more fully in the July issue of *Environment Hawai'i.* We reported that in its general rate request, which is still pending, LIC had sought permission from the PUC to pay off around $10 million in loans from Martin, none of which had received the prior required PUC approval. In a related rate case brought by sister company Launiupoko Water Company, in which similar after-the-fact approval of loans had been sought, the PUC turned down the company's request, stating that the company would be required to produce audited financial statements if it wanted to continue seeking PUC approval of the loans. After that decision, Launiupoko Irrigation Company withdrew from its general rate application the request that the PUC approve the Martin loans.

No Pumping

In May of 2022, the PUC approved a temporary rate hike for LIC that increased customer rates by around 129 percent. The hope was that this would allow the company to make improvements that would restore normal service to customers that had seen frequent curtailments and low water pressure for months.

But since last December 19, the company has pumped no water from its irrigation wells. At that time, it notified the PUC that it would stop pumping groundwater to recharge its reservoirs and would rely on stream water alone "until such time as a supplemental temporary rate or general rate is approved that will allow LIC to at least break even."

As a result of relying entirely on stream flows, customers have received whipsawing notices as to the availability of irrigation water. On July 15, customers were told, "There has not been enough rain in the mountains to maintain stream flows above the instream flow standards. Kaua'ula Reservoir (upper most reservoir) is empty. Makila and Launiupoko reservoirs still have some water. The majority of LIC's customers will experience low to no pressure."

The two "farm dwellings" on this condominiumized lot together consume an average of 6,339 gallons per day of potable water. A breakdown on non-potable water use was not available. The general irrigation standard for diversified agriculture is 2,500 gallons per acre per day.
CREDIT: IMAGE PROVIDED TO PUC BY LAUNIUPOKO WATER COMPANY.

Then, on July 26, this was the alert: “Rain in mountain [sic] has increased stream flows to levels above the required instream flow standards, allowing LIC to divert and distribute irrigation water. Please use non-potable water while it is available.”

Three days later, yet another notice: “There has not been enough rain in the mountains to maintain stream flows above the instream flow standards. Makila Reservoir is empty, Kaua‘ula and Launiupoko reservoirs still have some water. The majority of LIC’s customers will experience low to no pressure. Hopefully there will be rain soon that will increase stream flows so that LIC is able to divert water and deliver irrigation water to its customers.”

What happens when customers, most of them owners of expansive estates with thirsty lawns and gardens, have no irrigation water?

With potable water still available in unlimited quantities from LIC’s sister company, Launiupoko Water Company, drinking water is used instead of the non-potable irrigation water. Of the 407 customers of LIC, 375 are also customers of LWC.

In testimony to the PUC, Glenn Tremble, general manager of the water company, described the effect that curtailments of irrigation water have had on the draw of potable water. When irrigation water was rationed, this caused “customers with approved cross connections to use potable water for irrigation purposes, which artificially increased LWC’s demand for potable water.” (That testimony was in connection with the Launiupoko Water Company’s application last December for a rate increase. In June, the PUC determined that the company would need to amend the request and refile it. Since then, LWC has submitted nothing new.)

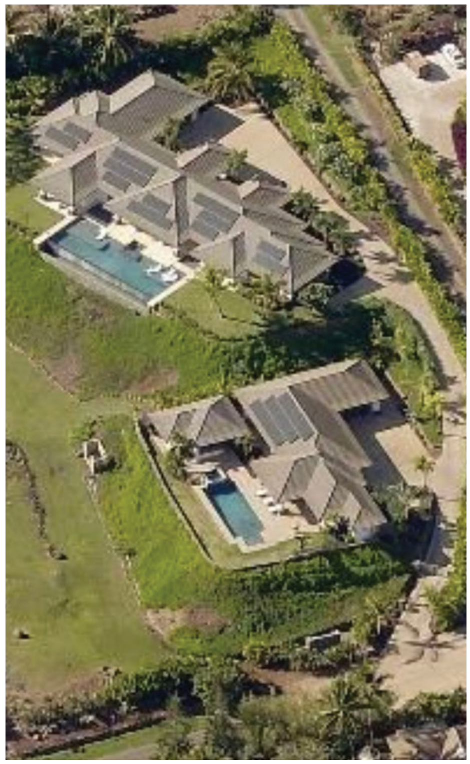
Water Conservation

For the better part of four years, the irrigation company has also had a rate increase application pending before the PUC, and now the relationship between LIC and LWC is receiving heightened scrutiny from the commission, as well as other aspects of its financial reports.

On August 7, the PUC submitted five information requests to LIC, all but one of which involved multiple questions.

The first of these requests concerned LIC’s Water Conservation Policy, filed with the PUC in June 2022. That same month, staff with the Commission on Water Resource Management had reported that, “At every site visit staff has recorded multiple properties in Launiupoko irrigating lawns during midday hours.”

The PUC noted that under state administrative rules, “all [water use] permittees, unless exempted by the [Commission on Water Resource Management], shall submit a water shortage plan … subject to approval or modification” by CWRM. The irrigation company’s own rule regarding “Conservation Measures and Interruption of Water Supply” allows the company to restrict the use of water “by any reasonable method of control. In determining the priorities in restricting the use of water, the health and safety of the public shall be given first consideration over other uses.” In the case of “negligent or wasteful use of water,” the company may discontinue the service.”



These two houses have an average daily consumption of potable water of 13,236 gallons, according to information provided to the state Water Commission. CREDIT: PHOTO PROVIDED BY LWC TO THE PUBLIC UTILITIES COMMISSION.

The information request asked the company to “provide any water shortage plan that LIC has submitted to CWRM,” and if none has been submitted, to provide “any written communication with CWRM about the formulation of such plan.”

The response, provided to the PUC on August 22, was lengthy – but the short answer is: “There is no written communication specifically relating to a water shortage plan.”

The PUC also asked how the company determines when to deploy special conservation measures and how it “determines the priorities in restricting the use of water.” The answer lists several factors that play into such determinations, including: availability of stream and groundwater, conditions of pumping infrastructure and fuel (“currently dependent on funds available given LIC’s financial state and the ongoing rate case”), and “consumption demand by customers.” But ultimately, the decision rests in the “Best judgment of the company, based on the above factors and others of how to allocate water in a way that serves all customers equitably.”

Referring to paragraph 5 of the company’s Termination of Service rule, the PUC asked the company to explain whether it has ever “refused to grant service or discontinue existing water service to any premises to protect itself against fraud, abuse, or unauthorized use of water.” (LIC replied with one word: “No.”)

Also, how does the company even determine whether “negligent or wasteful use of water exists on any premises,” the PUC wanted to know. “The definition of ‘negligent or wasteful use of water’ is currently under legal review in connection with the drafting of warning notices to heavy users,” the company replied.

Has the company ever received complaints about waste of water? the commission asked.

“To its best recollection, LIC received one complaint from a Pu‘unoa homeowner in 2023 about another lot owner watering his dirt. LIC investigated and found that the water use was for someone compacting soil for a new building pad and may have been potable water.”

Has LIC ever issued “written notices” to customers suspected of negligent or wasteful use of water? Answer: No.

Has it ever discontinued service due to negligent or wasteful water use? No.

Does it “regularly monitor” for this? “LIC has not monitored use on customer premises,” it answered, but it “is currently working with the meter software company on a new report to monitor ‘negligent or wasteful use of water’ based on metered use.”

Regarding the relationship between declines in irrigation water usage or availability and increases in potable water draws, the PUC asked the company to explain what guidance it has given customers about what they should do when LIC provides “little or no” water pressure. Has it “ever instructed customers to instead rely on potable water from affiliate Launiupoko Water Company, Inc. when LIC fails to provide water?” And how many customers have their irrigation systems cross-connected to the LWC potable water system?

Answer: “In 2018, subsequent to the [Commission on Water Resource Management’s] imposition of [interim instream flow standard] regulations limiting Kaua‘ula Stream water use, LIC provided guidance to customers on options to use potable water.”

The guidance, attached as an exhibit to the information request response, shows that it was actually the water company, not LIC, that provided this guidance. On April 12, 2018, LWC sent out a letter to customers headed “Mitiga-

continued on bottom of page 5

Driving Dissent Among Hawaiians

In the summer of 2020, members of Kia‘i Kauaula met with an archaeologist with Scientific Consulting Services. SCS had been retained by West Maui Land Construction to oversee excavation it was undertaking to install irrigation lines for Launiupoko Irrigation Company near Mill Street in Lahaina. The group consists of Native Hawaiians who conduct traditional practices, including "revering and protecting" iwi kupuna burials from desecration, according to a petition filed with the Public Utilities Commission.

According to an affidavit from Kaipo Kekona, one of the group's members, the archaeologist was informed that the waterline "would hit iwi kupuna burials based on the route they had determined to trench, which route would pass through Pioneer Mill Cemetery amongst other sensitive areas."

The trenching began according to plan, and Hawaiians began to protest near the work site.

On September 30, at a meeting of the Office of Hawaiian Affairs, the concerns over trenching arose, albeit obliquely, in a discussion over protection of burials more generally. Ceridwen Kahi McClellan, talking about an issue in Kahoma Valley, went on to say, "I just hope that OHA would investigate further into the people who are there occupying the land because they are not descendants of that particular parcel. … The whole occupation of different lands in Lahaina is really sensitive right now… I just wanted to acknowledge that there is another side to the story."

Charlene Rowland said she was concerned with the development "and the pipes that are being laid and the iwi kupuna. … It just hurts me to see these things that are going on."

As to McClellan, Rowland said, "I really hope that she would, you know, try to help the Hawaiians as well. Try to help us and not be against us and not demean… It seems to me that she's not helping anyone but herself."

Linda Magalianes weighed in, saying that maps of the trenching plans showed that "they're going to go through cemeteries that I knew as a little girl." She went on to accuse McClellan of having been hired by the developer, although she could not identify who had told her this.

OHA took no action on the matter.

On October 8, the Maui/Lana‘i Islands Burial Council heard testimony about the trenching and passed a motion calling for "the immediate cessation of all utility installation and work in the area of Pioneer Mill cemetery, Jacobson Cemetery and Puehuehuiki Cemetery in order to avoid burial sites and cemeteries associated from this area…"

On October 13, five Hawaiian women were arrested at the site. They were charged with trespass, although the county later dropped all charges, saying the matter was a civil matter.

Ten days later, at 9:45 a.m., an excavator removed a boulder from the trench floor, exposing what were determined to be bones from a human skull. Further trenching was stopped and a new route for the waterlines was selected.

For Launiupoko Irrigation Company, that was hardly the end of the matter.

Invoices and records of expenses provided to the Public Utilities Commission show it spent tens of thousands of dollars on legal services and archaeological consultants addressing the issue of "trespass" on the "AB waterline," the line that was being installed when human remains were exposed.

But those same records disclose payments made to Ceridwen McClellan as well, retained, evidently, to gather information on Hawaiian protesters and to attempt to spin public opinion in a direction favorable to LIC.

In a ledger showing "extra job costs" related to the A/B waterline, a payment shows up of $2,552.07 to McClellan, for "collect, record, identify people for trespass." McClellan was also paid $187.66 for unspecified services relating to "waterline complaint," $103.46 "for Facebook page 10/5/20," and $1,170 for a "presentation waterline stop 2019 Namauu/kapu Affida[vit]."

— Patricia Tummons

Launiupoko *continued from page 4*

tion Option for Irrigation Water." Both of the options described would allow potable water to be used in lieu of irrigation water, with the difference between the two options being whether or not the irrigation connection was disabled. (Disabling the connection would incur a fee, while keeping the irrigation connection would require more complicated installation of backflow preventers.)

And how many LIC customers have their irrigation systems cross-connected to the potable water system? LIC replied, "There are 62 approved cross-connections, but LIC suspects there are more that are not approved."

Financial Issues

The second information request concerned the company's use of additional revenues that were received as a result of the PUC approving a temporary rate increase in May 2022. In the orders approving that increase, "the Commission expressed concerns that LIC's statements ‘consistently showed that LIC seeks a temporary rate increase to staunch its financial losses, not to restore service to its customers.' The Commission ordered that LIC shall not use the additional revenues permitted by the temporary rate increase for any purpose other than restoring normal service to customers." Normal service would entail not just diversion of stream water but also pumping of groundwater, which LIC, as stated earlier, has not done since last December.

The PUC asked the company to "[p]lease explain whether LIC is complying with [the temporary rate increase order] given that LIC appears to no longer be providing normal service to customers" and to "elaborate on why LIC believes it has no other options than to discontinue groundwater pumping, especially in light of the fact that LIC has continued making payments to affiliated interests … for regular expenses."

LIC replied by stating that since the temporary rate application had been initially filed, in June 2020, "the cost of fuel had increased by 88 percent" and "the temporary rate was no longer sufficient to cover LIC's expenses." Still, with the temporary rate, "LIC was able to pump water from its wells when there was insufficient stream water until December 2023. At that point, LIC was no longer able to bear the financial costs related to pumping groundwater from its wells."

And, it insisted, "LIC has not used any of the additional revenues to pay loans or interest related to its loans."

Litigation Costs

The third set of information requests involved claims that the company made in a court case brought against it by Ke‘eaumoku Kapu and others who receive water from Kaua‘ula Stream as it is diverted by LIC infrastructure. Their traditional rights to stream water were recognized

continued on bottom of page 6

Groundwater Recharge Projections Vary Depending on Climate Downscaling Model

With global temperatures inexorably rising, how much groundwater pumping will the state's aquifers be able to sustain in the coming decades?

A study by the U.S. Geological Survey on groundwater recharge, released in May, may help the state Commission on Water Resource Management determine that, but revising the agency's sustainable yield estimates to account for climate change will be no simple task.

"Most of the data sets suggest a drier future for the Hawaiian islands," USGS hydrologist Heidi Kāne told the Water Commission last month during a presentation on her agency's final estimates for mid-century and end-of-century groundwater recharge for the Hawaiian islands.

Some models, however, suggest a wetter future, she added.

The divergence, also reflected in preliminary data the USGS released in 2022, is due to the two types of models used to predict how global climate changes will affect specific regions: statistical downscaling models use local weather data to help determine how a region might respond to global climate changes, while dynamical downscaling models rely on projected regional climate conditions derived from global climate models.

The USGS came up with several groundwater recharge scenarios for Maui, Hawai'i, O'ahu, Kaua'i, Lana'i, and Moloka'i aquifers using the two different approaches. The agency then narrowed its focus on two statistical downscaling scenarios (a projection for the years 2041-2071, and one for 2071-2099), as well as the "wettest" projections produced by the downscaling model. It also did a drought simulation for Lanai, as well.

These scenarios were chosen "to capture the widest range of wetting and drying," Kāne said. Those scenarios were then compared to a reference climate of 1978-2007 to quantify how much recharge a given area would gain or lose.

The statistical downscaling scenarios predicted overall declines in recharge on all islands, while the dynamical ones suggested that most of the aquifers throughout the islands would see greater recharge. However, even under the most favorable projection from the "wet" scenario, the island of Hawai'i was predicted to see an overall decrease in recharge.

For the aquifers in western and central Maui — where the county's development plans direct most of the future growth on the island — decreases in recharge as high as 72 percent

continued on page 7

Launiupoko *continued from page 5*

in an agreement that LIC signed in 2003.

In a court filing on July 15, the company claimed that it "continues to incur substantial additional costs to adjust LIC's water system" in order to provide water to Native Hawaiians and tenants of Kamehameha Schools. "Please verify where the ongoing 'substantial additional costs…' appear in LIC's bi-monthly reports," the PUC asked.

The reply stated that the costs were listed under the category "CWRM Field Operations." From August 2023 through July 2024, these costs totaled $58,882, as reported in the company's most recent filing. That's less than 10 percent of the amount paid under the rubric "Interest Expense Shareholder" over the same period.

CWRM Expenses

The fourth information request related to expenditures that LIC has made in connection with decisions of the Commission on Water Resource Management. Payments in this category were made to the law firm of Cades Schutte and also to companies affiliated with LIC, including Hope Builders, Inc., and West Maui Land Company. The PUC wanted to know how these expenditures would benefit the company's ratepayers.

The payments to Cades Schutte, totaling $1,620, were for the firm's work in connection with the litigation tied to water deliveries to the kuleana users, LIC stated. In addition, "Cades Schutte is LIC's legal counsel regarding the designation of the Launiupoko Aquifer as a surface water and groundwater management area."

The PUC also wanted to know why LIC's costs included work on water-use applications for new – and not just existing – customers. "New water use permits were completed and submitted together with existing water use permits for efficiency…. Concurrent review would shorten the review period before LIC could apply for a new groundwater use permit for its proposed LIC Well 2…. Provided CWRM approves the additional source, it could allow more opportunity for beneficial green space and irrigated spaces to mitigate fire risk."

LIC also submitted invoices from West Maui Land Company and Hope Builders that purport to detail date and amount of time for each employee who worked on issues associated with CWRM's designation of water management areas as well as work done in relation to a CWRM notice of alleged violation. However, LIC pointed out, "CWRM has not issued any Notice of Violation to LIC between September 10, 2003 (when LIC received its [PUC license]) to present. CWRM has never found LIC in violation of a CWRM order."

Maui Vacation Getaways

The PUC was curious about a payment for $701 that LIC made to Maui Vacation Getaways, LLC. How, it wanted to know, did that relate to the CWRM's decision to designate West Maui as a water management area?

In response, LIC stated that it had retained Becky Sparling as an independent contractor. Sparling's business is called Maui Vacation Getaways. "Ms. Sparling was hired to assist with various administrative tasks for LIC and other entities."

Invoices of services provided to LIC by West Maui Land suggest that, at least for LIC, Sparling was involved in responding to or cataloging emails. Invoices to LIC from West Maui Land in July 2023 include the task, "WMA photo request eblast/fwd all emails to Becky & respond." Her invoice to West Maui Land show she spent a total of 12.75 hours working on water management area issues on behalf of LIC. For this she was paid $55 an hour.

The last information request has just one question: "Has LIC ever sold water to any person or entities outside its service territory?" If so, the PUC wants details.

"No," it answered.

— Patricia Tummons

The July issue of Environment Hawai'i contains additional reporting on Launiupoko Irrigation Company and Launiupoko Water Company.

Recharge *continued from page 6*

were projected in the mid-century and the “dry” climate scenarios and, to a lesser extent, for the “wet” climate scenario, Kāne reported.

For the “wet” scenario, only the Ukumehame aquifer in the Lahaina aquifer sector was predicted to see a drop in recharge. The other five were predicted to see slight increases, of up to 9 percent. (The increases in recharge predicted for the Launiupoko and Honokowai aquifers — 0.9 percent and 5.1 percent, respectively — may be of little comfort to resource managers, given that commission staff determined in 2022 that total existing and authorized planned use for those aquifers exceed the sustainable yields by 115 percent and 170 percent, respectively.)

Under the mid-century and “dry” scenarios, all but three East Maui aquifers — Honopou, Waikamoi, and Kawaipapa — would see a drop in recharge. And the increases expected in those three aquifers were also slight, ranging from 0.6 percent to 3.4 percent.

The wet climate scenario projected greater recharge in East Maui’s aquifers, ranging from 13 to 21 percent.

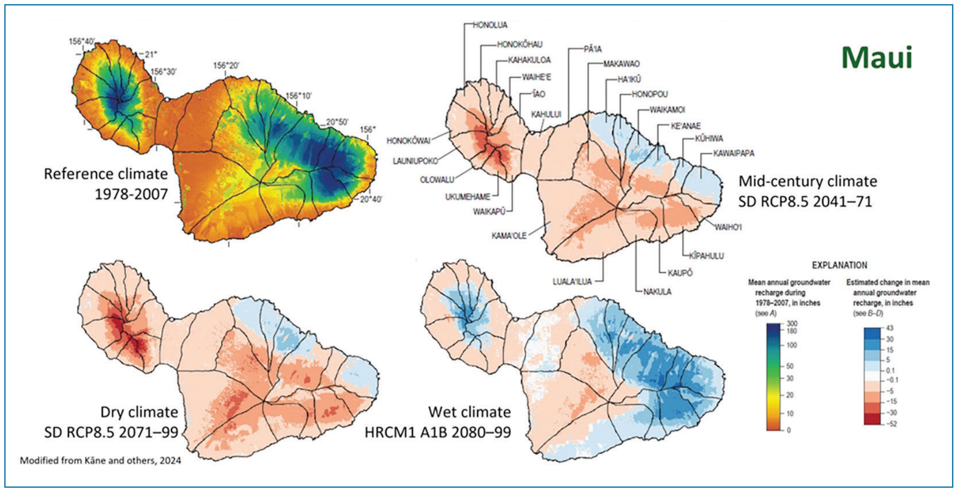
For Kauaʻi, all aquifers were predicted to see less recharge under the statistical downscaling scenarios, with the Kekaha aquifer suffering the most. Under the mid-century scenario, it would see a drop in recharge of 62 percent. That number would grow to 82 percent by the end of the century.

The wet climate scenario showed a drop in recharge of up 13 percent for three leeward aquifer systems (Napali, Waimea, and Wainiha) and wetting of up to 20 percent for the remaining aquifer systems on the island, Kāne reported.

Similarly on Oʻahu, the “wet” scenario found that only three aquifers on the island would see drops in recharge (Mokuleia, Makaha, and Lualualei), while the mid-century and dry scenarios predicted recharge declines in all aquifers, especially along the west and northwest coasts.

West Oʻahu’s Nanakuli aquifer was predicted to see the greatest drop in recharge: 66 percent by mid-century, and 84 percent by the end. Neighboring Lualualei aquifer was not far behind, with predicted drops of 65 percent and 81 percent, respectively.

Molokai was also expected to see extensive drying — up to 64 percent by the end of the century — on the western side of the island and no increases in recharge for any aquifers under the statistical downscaling scenarios. However, the “wet” scenario predicted increases in recharge of up to 62 percent in one aquifer, with only two aquifers — Kahanui and Haʻupu — getting drier.



Change in mean annual groundwater recharge. CREDIT: USGS.

Lanaʻi had the starkest contrast between the statistical and dynamical downscaling model results. The former projected decreases in aquifer system recharge as high as 71 percent estimated, which aligned closely with the USGS’s drought climate scenario for the island. However, groundwater recharge would increase as high as 73 percent indicated for seven aquifer systems in wet climate scenario, Kāne said.

Finally, Hawaiʻi island, like Maui, was projected to see an increase in rainfall along the north eastern coast under the mid-century and dry scenarios, but most of the island would see less rainfall. The “wet” scenario also showed drying across 16 aquifer systems, with wetting in just eight of them.

“These three scenarios tend to align better than they do on the other islands,” Kāne said.

Next Steps

When it came time to discuss the findings, commissioner Aurora Kagawa-Viviani seemed critical of the projections produced by the dynamical downscaling model, known as the Hawaiʻi Regional Climate Model (HRCM).

“This is a longstanding debate. They admit HRCM … does well simulating historical patterns over Hawaiʻi island, but it does poorly over Kauaʻi and, most particularly, Maui and Oʻahu. So there’s these two competing projections and that is often a source of discussion and confusion. But there’s a saying. I don’t want to say, ‘Garbage in garbage out,’ but the rainfall data that’s used is really influential when looking at projected recharge,” she said.

Kane conceded that there was greater uncertainty with the HRCM, noting that the model tries to predict what the climate conditions will be in the 2080-2099 time frame.

“They’re looking very far out into the future and there is some greater uncertainty in that,” Kane said.

Jonathan Scheuer, a consultant for the Department of Hawaiian of Hawaiian Home Lands, suggested a way forward.

“If we have two models and sometimes they agree and sometimes they disagree, let’s look only at where they agree,” he said.

Of the 110 aquifer systems in the state, there are five that all three models agreed would become wetter and 35 where they agreed it would become drier, he pointed out.

Commission chair and director Dawn Chang pointed out that the data will also be useful in guiding which of the Department of Land and Natural Resources’ forest lands that are included in agricultural leases planned for transfer to the state Department of Agriculture need to be retained.

“We want to keep a lot of those in forest reserve for water recharge. It does help us make those kinds of decisions now for future projection of our watershed,” she said.

When the commission will take any action based on the USGS data remains to be seen.

“[T]he Commission on Water Resource Management is in the beginning stages of discussions with the USGS and other stakeholder groups to determine how best to incorporate the new data and update sustainable yields statewide. The Commission is still assessing the report findings and has not made a determination on weighting any of the future recharge scenarios. Areas such as West Maui and West Hawaiʻi, where groundwater resources may not be fully understood, will likely be considered a higher priority,” the commission staff stated in an email to *Environment Hawaiʻi.*

— Teresa Dawson

Board *continued from page 1*

these entities, creating a disastrous economic hardship for many in our food system who rely on our work to make sales or have access to healthy local food. We serve hundreds of customers every week who rely on the food access we provide, including with programs such as WIC, SNAP and DA BUX," Fox wrote.

The coop members stated that while it was scheduled to have final pump tests toward the end of August, they were not confident that they could bring the well online by Lindner's October deadline.

For years, Lindner has sought a long-term water lease for the state well, which he has operated under a revocable permit since 1997. Although the permit was for agricultural water only, the state Department of Health determined in 2015 that the well needed to provide potable water to the subdivision, as it had grown to include dozens of residents.

On August 5, he informed the Department of Land and Natural Resources that he wanted to cancel his permit. He could not justify making large capital improvements to maintain the system without a long-term lease, and also worried about his liability exposure as a potable water purveyor, according to his email to DLNR director and Land Board chair Dawn Chang, and Kaua'i land agent Alison Neustein.

"I cannot in good conscience continue to operate a system that is in grave need of very expensive maintenance, and more important, exposes the community to very real health hazards. DOH recently inspected the water system and pointed out how essential the back flow preventer was in order to protect the potable water from any contamination flowing back from outside sources. I pointed out to them there are many leaks in the main pipeline. … The exposure to me and my estate far outweighs any benefit derived as I am not able to prevent contamination of water that may be consumed and I am not willing to deplete my assets, which likely exceed $1.5 million for the necessary maintenance and repair, with no more than a 30-day contract for these RPs," he wrote.

In the email, he tried to relinquish his RP rights that day and have 30 days notice to discontinue water distribution, but later decided to end water service on October 5, and then to let the permit expire on its own at the end of the year, which would give him time to cap the well, remove improvements and conduct the environmental site assessment that the permit requires upon termination.

> *"Interruption of water would be immediately halting businesses and jobs … creating a disastrous economic hardship for many in our food system."*
>
> **— Megan Fox, Malama Kaua'i**

The coop members asked that the well **not** be decommissioned before the end of the year, to allow time for the new well to start providing water.

"MIC has relied on this water source for 13 years since the coop was formed in 2011. Many of our present members relied on the water even before Mr. Lindner assumed the permit from AMFAC in 1996. MIC has paid Mr. Lindner $1,614,946.21 for water from August 2011 through our last billing for July 2024. We have also paid for a number of repairs to his delivery lines through the years. We furnished supplies from our own O&M inventory when emergency repairs were needed in order for him to continue service to us. We do not have records for costs for the water purchased from 1996-2010 when Mr. Lindner sold the water to MHL, Inc. and distributed to the farmers, but it should be a substantial amount.

"We hope that the there can be a more humane and sensible alternative to this timeline than to create a situation that compromises the health and livelihood for so many of Kaua'i residents," they wrote.

While recognizing the potential impacts of Lindner stopping his operation of the well before the new source comes online, Land Division agent Ian Hirokawa told the board, "We can't force him to keep a permit."

Attorney Nicole Lam, representing Lindner, told the board that while the Kaua'i Department of Water Supply expressed interest early on in taking over the well from Lindner, the agency never followed through with the necessary feasibility studies.

Chang asked her whether Lindner would provide the DWS with access through his property to the well now, noting that she had spoken with the county and the agency was still interested in operating the well.

Lindner later responded that he would not.

"From Day One, it wasn't reasonable that I would give them access because I would have to pay the facilities reserve charge [that the county charges for new water development]. It would cost me a million or two dollars based on the density that I had. That is still the case. And so, no, I am not prepared to do that," he said.

Board member Vernon Char asked Hirokawa why the state could not offer Lindner a long-term lease for the well.

Hirokawa replied that certain requirements need to be met first, including compliance with the state's environmental review law, a reservation for the Department of Hawaiian Home Lands, and a watershed plan. He said that he understood at one point that Lindner was going to start fulfilling those requirements, but then later changed his mind.

In addition to seeking a long-term lease for the well on state land, Lindner, through his company Moloa'a Farms, LLC, has been trying to secure water from the MIC's portion of the water system, which includes a tank fed by his well and will eventually include the new well.

For years, Lindner has been trying to subdivide and develop his own land, which was

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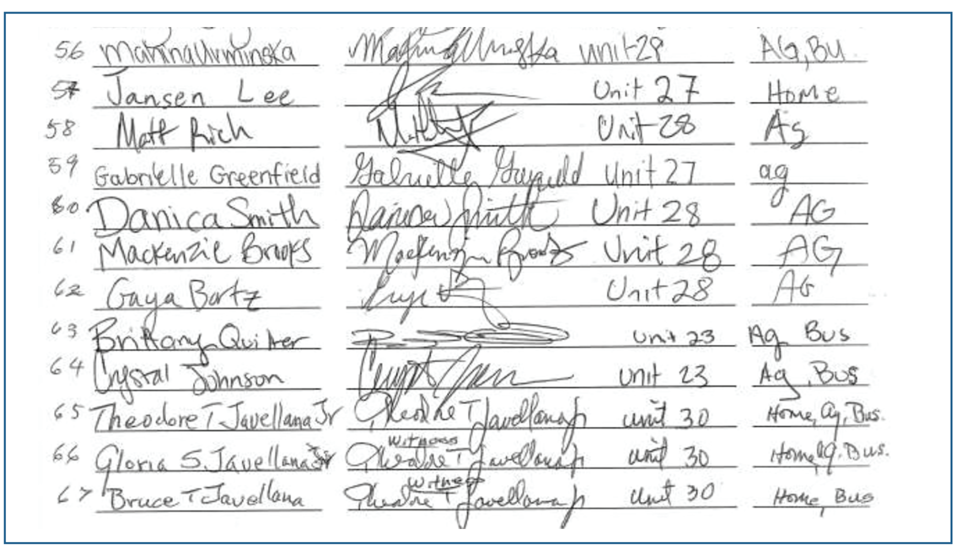

56	[illegible]	[illegible]	unit 28	Ag, Bu
57	Jansen Lee	[illegible]	Unit 27	Home
58	Matt Rich	[illegible]	Unit 28	Ag
59	Gabrielle Greenfield	[illegible]	Unit 27	ag
60	Danica Smith	[illegible]	Unit 28	AG
61	Mackenzie Brooks	[illegible]	Unit 28	AG
62	Gaya Bartz	[illegible]	Unit 28	AG
63	Brittany Quitter	[illegible]	Unit 23	Ag Bus
64	Crystal Johnson	[illegible]	unit 23	Ag, Bus
65	Theodore T. Javellana Jr	[illegible]	unit 30	Home, Ag, Bus.
66	Gloria S. Javellana	Witness [illegible]	unit 30	Home, Ag. Bus.
67	Bruce T. Javellana	Witness [illegible]	unit 30	Home, Bus

Part of a list of the 70+ people served by Jeffrey Lindner's well. CREDIT: MIC.

Supreme Court to Hear Challenge To BLNR Approval of Syngenta Permit

Seven and a half years ago, on February 24, 2017, the then-chairperson of the Board of Land and Natural Resources, Suzanne Case, signed off on an exemption notification. This memorialized her agreement with Department of Land and Natural Resources' staff that the issuance of a new revocable permit to Syngenta Hawai‘i, LLC, for use of around 61 acres of state land on Kaua‘i would not trigger a requirement that an environmental assessment or environmental impact statement be prepared.

The notice stated that the action was exempt since it fell into one of the categories of action – Exemption Class No. 1 – for which no further compliance with Hawai‘i's environmental policy law, Chapter 343 of Hawai‘i Revised Statutes, would be required. Exemption Class 1 covers the BLNR's issuance of permits, licenses, registrations and rights-of-entry "involving negligible impacts beyond that previously existing."

The new occupant was going to be continue growing the same crop – seed corn – that the previous permittee, Syngenta Seeds, LLC, had been cultivating for years. "As such," the exemption statement read, "staff believes that the proposed issuance of a revocable permit for the same use to a new entity would involve negligible or no expansion or change in use of the subject area beyond that previously existing." In addition, the area covered by the RP would be expanded from 43 acres to 61.

The board's action was challenged in court by five groups: Ke Kauhulu o Mana, Hawai‘i Alliance for Progressive Action, Surfrider Foundation, Kohola Leo, and Punohu Kekaualua III. Their complaint was that the board's approval of the revocable permit violated Chapter 343. In addition to the Land Board, Syngenta Seeds and Syngenta Hawai‘i were named as defendants.

The Environmental Court issued summary judgment against them, a ruling that was then appealed to the Intermediate Court of Appeals.

It took a few years, but on April 30, the ICA finally issued its decision. It found that the lower court erred in its analysis of the BLNR's decision in light of the Supreme Court's decision in *Umberger v. Department of Land and Natural Resources. Umberger* holds that an environmental assessment is required if three conditions are satisfied: first, that the activity meets the HEPA definition of action; second, that the proposed action involves at least one of the nine categories of land use or administrative acts listed in HEPA; and third, the action falls outside the exempt uses in the department's approved list of exempt activities. The environmental court had determined that conditions 2 and 3 of *Umberger* weren't met, and for that reason, it granted the motion for summary judgment sought by Syngenta.

In faulting the lower court's analysis of the *Umberger* conditions, the ICA found that there was indeed a material factual dispute, thus precluding the issuance of a summary judgment. What's more, it found that the record before the court was "insufficient to support the 2017 Exemption Notification's determination that there was 'no expansion or change in use of the subject area beyond that previously existing.'"

"Appellants" – the community groups – "presented evidence of what they claimed were environmental impacts from Syngenta's seed research operation, which included, inter alia, harm to marine life, insects and native plants, soil, and an increase in certain types of illnesses from Syngenta's use of pesticides. That evidence created genuine issues of material fact which should have precluded summary judgment," the ICA held.

The issue was then remanded to the Environmental Court of the 5th Circuit (Kaua‘i) "for further proceedings in accordance" with this opinion.

While the ICA decision was obviously not the outcome preferred by Syngenta and the state, neither did it find favor with the

continued on page 10

Board *continued from page 8*

once part of the parcel served by MIC. He has argued that an agreement signed when he purchased the property, as well as the subdivision's declaration, requires the owners to provide water to his property. The owners disagree.

About a week before the Land Board meeting, the Intermediate Court of Appeals issued a ruling supporting Lindner's argument that the parties were required to resolve the water access issue through mediation.

At the board meeting, MIC vice president Ray Maki, who is also part of the association of owners being sued by Lindner, requested a contested case hearing if Lindner was not going to keep operating his well through the end of the year.

Lindner, however, seemed comfortable leaving it to the county water department to use its trucks to bring water to irrigation tanks that serve the area.

"They're delivering water to their tank, which they have the ability to do," he said, before asking, "Why didn't the subdivision have potable water to begin with? Why did the county waive particular things?"

He said he was not willing to extend water service until the end of the year.

"I am taking the position the department of water is responsible for that water. And the department of water is able to do that and I am not going to accept the liability, the responsibility of contaminating somebody. That system is severely contaminated," he said.

He added that he has been serving the Moloa‘a farmers for 27 years. "They have not extended that water system with the tank. They have not fed me water for 27 years, so it's very one-sided."

Chair Chang pointed out that his permit does require him to provide water to the county, at least. Lindner said that he was doing that, but the pipeline serving the department, which runs through his property, leaked and the county is not allowed to fix it or pay him to fix it. As a result, he said, "They've been hauling water for five months."

"There is no water agreement. I told them I'm prepared to enter into a water agreement. They chose not to do that," he said.

With regard to the MIC's request for a contested case hearing, board member Char pointed out that it doesn't really achieve anything given that a hearing would not likely occur anytime soon and the permit will expire on December 31.

Whether the parties will come to some kind of agreement to keep water flowing remains to be seen. It appears that MIC is still pursuing a contested case hearing. Also, attorneys for some of the Hui defendants in the Moloa‘a Farms case have sought an extension of time to file an application with the Hawai‘i Supreme Court for a writ of certiorari.

— Teresa Dawson

plaintiffs. On May 20, they asked the state Supreme Court to review the case and find that the ICA "gravely erred by holding a genuine issue of material fact existed," thus preventing them from "obtaining summary judgment on the validity of the 2017 exemption and the board's obligation to prepare environmental documents."

On July 30, the Supreme Court granted cert.

History

The history of the Syngenta revocable permit goes back more than four decades.

In 1981, Kekaha Sugar applied for a Conservation District Use Permit for agricultural purposes on 61 acres of land in the Limited subzone that lay just mauka of a racetrack and which had been at one point considered as a potential landfill site by Kaua‘i County.

The state Office of Environmental Quality Control Bulletin published notice of the application, stating: "The applicant proposes to clear brush from the land and improve the sandy soil for the purpose of raising sugar cane. This would be done by incorporating mud press, settling basin mud and cane trash." At the time, a negative declaration was issued for the use – a finding that the proposed activity would have no significant environmental effects.

Following publication in the OEQC Bulletin, Pride Company, a division of the seed corn giant Northrup King Company, was added as a co-applicant. When the Land Board voted to approve the CDUP in April 1982, it specified that Kekaha Sugar was to use 17 acres for growing seed cane, while Pride was going to be using the remaining 43 acres "for growing of research seed stock, such as corn seed, sunflower, and soybean seed."

On December 3, 1982, the Land Board approved issuance of revocable permits to Kekaha Sugar and Pride, with the monthly rents reflecting the portions of the total 61 acres each company occupied ($117 per month and $290 per month, respectively, or around $6.80 per acre).

In 1993, the Land Board consented to the assignment of the Pride revocable permit, RP 5983, to Northrup King, its parent company. According to the history of the RP prepared by DLNR staff, Northrup changed its name to Novartis Seeds in December 1997.

In 2000, Kekaha Sugar's parent company, Amfac, announced its Kaua‘i operations would be ceasing as of November 17. On October 27, the Land Board approved issuance of two revocable permits to a coalition of entities that would be taking over some of the state lands that the sugar company had occupied and the irrigation system that it had managed.

Syngenta parcel on Kaua‘i. CREDIT: DLNR.

Novartis was among the parties participating in these coalitions – but the properties identified as now being encumbered by revocable permits to these groups did not include the 43-acre RP to Novartis.

Two months later, the board was asked to change the name of the permittee participating in the management of land and irrigation infrastructure surrendered by Kekaha – the subject of the October 2000 action – from Novartis to Syngenta Seeds, Inc. In the staff history given to the Land Board in 2017, this action is presented as though it related to RP 5983, although in fact it had nothing to do with that revocable permit.

Nor, in fact, was it merely a name change. In November 2000, Novartis merged with AstraZeneca to form an entirely new company, Syngenta.

Other than the name change registered in that 2000 action relating to irrigation, the board seems never to have consented to or been made aware of the transfer of the revocable permit to Syngenta.

On December 31, 2015, Syngenta Seeds, Inc., effected a corporate reorganization, converting from a Delaware corporation to a Delaware LLC to be known as Syngenta Seeds, LLC. It then spun off Syngenta Hawai‘i, LLC, as a wholly owned subsidiary. A footnote in the DLNR staff report says that this change would not require any board consent since "board consent is not expressly required for stock or membership interest transfers of a permittee."

At some point, Syngenta expanded its operations onto the adjoining 17 acres that had been part of Kekaha Sugar's operations under RP 5966. This wasn't known to DLNR staff, apparently, until staff began to prepare the February 2017 report to the board. As that report states, "in preparing this submittal, staff realized that SSL has been using a larger area … than is indicated on RP 5983. The permit authorizes the use of 43.6 acres. However, since December 4, 2007, SSL has utilized a total of 61.2 acres."

Exactly how the Land Division staff was able to pin down the exact date Syngenta's occupancy of the additional 17 acres commenced isn't explained. But the report does refer to an executive order from 2003, which was to set aside to the state Agribusiness Development Corporation more than 12,000 acres of land that had been part of the Kekaha Sugar operations. After Kekaha Sugar surrendered its RP 5966 in February 2001, the staff report states, "the Agribusiness Development Corporation, who thought it had control over the 17.6 acres pursuant to Executive Order No. 4007 … entered into the license with [Syngenta] for agricultural purposes. ADC believes but has yet to verify that SSL has paid approximately $16,991 in rent for the 17.6 acres from December 2007 through January 2017, or approximately $8.77/acre per month." (The ADC rental rate amounts to roughly half of the DLNR rental rate.)

The Land Board approved the staff recommendation to transfer the permit to Syngenta Hawai‘i and also to expand the area included in the RP to 61 acres. No one testified in person against this. Gary Hooser, who has been fighting Syngenta's use of pesticides for years, did submit written testimony in opposition, however.

In the staff report, mention is made of a Land Board decision the previous October that approved properties on Kaua‘i to be set aside to the Department of Agriculture. The 43 acres that were then under RP to Syngenta Seeds were among the properties listed.

In the months following the approval of the new RP to Syngenta Hawai‘i, Hartung Brothers purchased the Syngenta assets on Kaua‘i and is continuing with similar agricultural operations. The RP for Hartung Brothers, which included the additional 17 acres, did not take effect until December 1, 2017. The land under the RP is still on the Department of Land and Natural Resources' inventory of encumbered lands. Annual rent is just shy of $16,000.

Before the Supreme Court

The Intermediate Court of Appeals' remand of the lower court's ruling might have seemed to some as vindication.

A press release issued by the plaintiffs on May 6 praised the reversal. Punohu Kekaualua, a Native Hawaiian, stated, "We must stop poisoning our precious resources and lands." A representative of the Surfrider Foundation, Staley Prom, added, "Restricted use pesticide application's clear harm to Kaua‘i's nearshore waters warranted environmental review. Proper application of Hawai‘i's environmental review laws is essential for protecting community health and safety." And Anne Frederick, executive director of the Hawai‘i Alliance for Progressive Action, said, "The board should never have allowed Syngenta to use Kaua‘i's public trust lands without scrutinizing impacts on the lands and our communities."

Before the month was out, however, the plaintiffs' attorneys, Lance Collins and Bianca Isaki, had filed their application for a writ of certiorari with the state Supreme Court. Among other things, it argued that the ICA had "gravely erred" in two key issues.

The first of these concerned the ICA's decision to remand for trial the BLNR's decision to exempt the proposed award of the revocable permit to Syngenta Hawai‘i from the need to prepare an environmental assessment or environmental impact statement. Instead of ordering a remand and determining that this was a factual dispute, the ICA should have held that this was "an issue of law properly resolved by summary judgment."

The second issue also concerned the BLNR's exemption decision. Because the exemption decision "was procured upon procedural errors," again the ICA should have held that summary judgment was appropriate.

Both the BLNR and Syngenta filed briefs with the Supreme Court objecting to the plaintiff's request.

The BLNR suggested that the community groups should have been content with the remand. The board's attorneys disagreed that the ICA found that the board didn't follow proper procedures. Instead, they wrote, "the ICA concluded that the *Environmental Court,* in reviewing the Board's decision, had failed to consider all of the exemption factors." Thus, they argued, remand was proper.

Nor did the ICA find that the activity authorized by the RP "may" have significant environmental effects, contrary to the claim of the appellants, the state attorneys contended. Instead, the ICA merely held that the environmental effects of Syngenta's activities were a question of fact – something, again, that precluded issuance of summary judgment, they argued.

Attorneys for Syngenta made a similar argument. There was no "grave error" here, they wrote. Instead, the ICA "remanded the matter 'for further proceedings' to develop the necessary record upon which the factual and legal determinations could be made."

In response, the appellants basically said that this was precisely their point. It should not be left to the courts to develop the necessary record to justify an exemption.

"BLNR's exemption can only be sustained if its approval of the Syngenta RP 'will probably have minimal or no significant effect on the environment,'" the appellants' attorneys, Lance Collins and Bianca Isaki, wrote, quoting from the state's rules implementing Chapter 343. "If the action may have more than minimal or any significant impacts, exemption is inapplicable."

"The ICA gravely erred by ruling a trial is required because where, as here, a plaintiff raised a prima facie case for significant impacts, it is impossible for the agency to have correctly determined there would *probably* be minimal or significant impacts," they argued.

"Requiring the circuit court to find facts (i.e., hold a trial) on whether minimal or no significant impacts 'probably' exist subverts the legislative scheme of [Hawai‘i Revised Statutes] Chapter 343… *Agencies* must require EA preparation for actions. Courts review whether an exemption was proper or an EA should have been prepared. …

"The practical effect of directing circuit courts to find facts about significant impacts is to incentivize agencies to abdicate their obligations to require EA preparation, issue improper exemptions, and wait to see if plaintiff groups seek costly judicial review to challenge exemptions."

On July 30, the Supreme Court published its order agreeing to hear the case. No argument has been scheduled yet.

— Patricia Tummons

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County Council Plans to Visit Sites Near Area of Kona Three Development

Two conflicting visions for a 70-acre site in Holualoa, on the west side of the Big Island, were brought before the Hawaiʻi County Council for consideration last month.

On August 7, the council approved a resolution to authorize negotiations for the acquisition of, or a conservation easement over, the land, which was zoned for housing in the early 1980s. Nearly 100 people testified in support of the measure, which passed on a 6-3 vote.

On August 21, the council agenda included the third draft of a bill that would give new life to the zoning designation that would allow up to 450 units of housing to be built on the site. The development would complete the Kona Vistas project, which was first approved by the county and the state Land Use Commission in 1984.

A vote on that bill was postponed, subject to the call of the chair.

Should the council eventually approve the rezoning bill, it would not mean that acquisition of the land by the county would be off the table. The rezoning would, however, likely make it more valuable and almost certainly increase the cost to the county of acquiring it for preservation.

What the council did approved on August 21, on an 8-1 vote, was a motion that calls for the council to conduct a visit of sites adjacent to the area proposed for development in order that members have a better understanding of environmental and cultural concerns raised by community members.

No date has been set for the tour, described as a limited meeting at which members of the public are not allowed to attend. The state Sunshine Law, specifically Section 92-3.1, does give the council authority to conduct limited meetings when circumstances make it impractical for members of the public to attend.

The motion for the site visit was introduced by Council Member Rebecca Villegas, who represents the Kona area where the development is proposed. Council Chair Heather Kimball described how she and county attorneys had been in touch with the state Office of Information Practices to ensure that the proposed tour would not be in violation of the Sunshine Law. She explained that the tour would include stops along the shoulders of highways and roads and would pose a hazard if members of the public were to be able to follow along. She stated that every effort would be taken to allow testimony before the tour commenced and the tour itself would be documented by videotape.

Villegas has made no secret of her opposition to the rezoning bill. It was she who proposed the county negotiate with owner Kona Three, LLC, to protect the area from development, using the county's Public Access, Open Space, and Natural Resources Protection (PONC) Fund. At the time the resolution was considered in the council's Legislative Approvals and Acquisition Committee, on July 23, Daryn Arai, planning consultant for the developer, said his client took no position on the resolution.

New testimony in support of protecting the area by purchase with PONC funds was provided by the Kona Soil and Water Conservation District. In a letter July 2 to the county directors of Public Works and Planning, Jeff Knowles, the chair of the agency, wrote, "These parcels are traversed by flood corridors across both the northern and southern portions of the property and currently function to infiltrate stormwater, thus recharging aquifers, reducing sedimentation of reefs and pollution of coastal water." Knowles suggested that they tour the site "to see the value in designating a 'Kona Floodway Park' that would benefit the community, as well as creating a safer watercourse."

A week later, Mary Roblee, conservation assistant for the Kona SWCD, wrote to the same county officials, providing additional information to boost the case for protecting the area. "When we consider climate change, and the atmosphere's ability to hold greater and greater volumes of water, we can see from world events what happens when the atmosphere decides to release that water. Hawaiʻi island is not immune from the devastating events we have seen around the world, and creating riparian forest areas will help address this increase in rainfall."

Although the two letters from the Kona SWCD were dated in early July, the Planning Department did not apparently receive them until July 25. The letters weren't forwarded to the council until August 6.

Members of the community who oppose the development have continued to come out in force, with both written and oral testimony. For many of those testifying on August 21, it was the fourth or fifth time that they had spoken out against the project, going back all the way to December 2022, when the county's Leeward Planning Commission had its first hearing on the proposal.

No representative of Kona Three, LLC, which is proposing the development, testified at the August hearings.

In the discussion on whether to postpone a vote on the rezoning bill, Council Member Holeka Goro Inaba, who has been working closely with the developer in an effort to address community concerns, had a message for the developer.

Take advantage of the delay, he said. "In light of the postponement," he said, "I would ask the applicants in the meantime to really consider areas where this request could be improved, specifically around affordable housing. … There is a lot of room for improvement in what's being requested. Take this time and use it wisely."

— Patricia Tummons