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Environment Hawai'i
a monthly newsletter

The Terminators

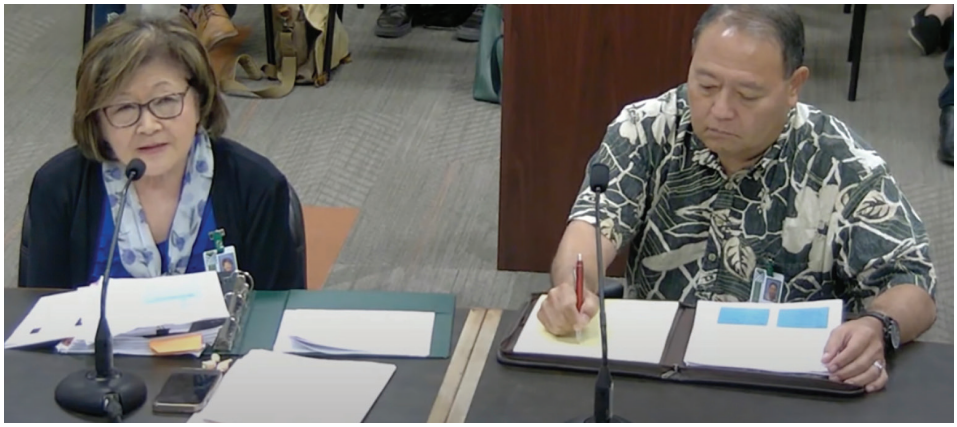
Who would have thought that $10 million would be so hard to spend? Yet despite the Department of Agriculture's long to-do list and its crying need to bolster its inspection staff, it has encumbered just 10 percent of that amount six months into the fiscal year.

What's more, the 10 percent that has been encumbered – in a contract to Terminix – raised serious questions among legislators as to the equity and effectiveness of that expenditure. Why, the senators and representatives at the hearing asked, should a private firm be given the ability to decide how public funds are spent?

The inability of Sharon Hurd, DOA director, to answer questions forthrightly and intelligibly brings to the fore concerns of long-standing that the DOA, beholden as it has been for years to the plant industry, may not be the right agency in which the state's biosecurity efforts and funds are vested.

IN THIS ISSUE

Ag Department Director Takes Heat Over Spending of Biosecurity Funds



Sharon Hurd, DOA director, and Dean Matsukawa, deputy DOA director, face legislators in a hearing on biosecurity January 17.

Last year, the state Legislature awarded the Department of Agriculture nearly $20 million to allow it to carry out more aggressive efforts to deal with invasive species. Governor Josh Green pared that back by half. Still, $10 million for biosecurity was more than three times what the department had received the year previous.

On January 17, a joint session of the Senate Committee on Agriculture and Environment and the House Committee on Agriculture and Food Systems met to understand generally what state agencies were doing to address biosecurity.

Not surprisingly, most of their attention focused on the DOA's use of the funds awarded to it last year in Act 231. DOA director Sharon Hurd was in the hot seat for nearly an hour of the two-and-a-half-long meeting, during which she was subject to unsparing questioning and criticism of her department's stewardship of Act 231 funds.

In her introductory remarks, she stated that of the $10 million actually awarded to her department, 65 percent had been obligated and 52 percent actually encumbered. She said she expected to have all funds encumbered by June 30, when the fiscal year ends and unencumbered funds would lapse. The only hesitation concerned the 44 new positions that the Legislature authorized. Whether the Department of Human Resources Development, the state civil service agency, would conclude its review and classification of the positions in time to advertise the positions by the end of the fiscal year was out of Hurd's hands, she said. Still, she told the lawmakers, she was hopeful this could be done.

The Legislature had allocated more than $3 million to pay for the new positions, leaving around $7 million for the department to address the other items called out in Act 231. The three largest items called out in the long list of issues in the act were, before the governor halved the appropriations: little fire ants, $2.5 million; public awareness campaign, $2 million; and tech upgrades, $2 million.

Rep. Nicole Lowen of Kona started off the questioning, asking about the funding for everything other than personnel.

"Sixty-five percent is obligated," Hurd

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NEW AND NOTEWORTHY

A Voice for Ka'u Is Lost: On January 24, Julia Neal, founder and editor of the *Ka'u Calendar,* passed away in Pahala. In 2002, she founded the newspaper, which was distributed in print to residents of the Ka'u District on the Big Island. The newspaper and the associated on-line Ka'u News gave residents local news, increasingly hard to come by when the two Big Island dailies have cut staff and rarely cover events in the rural areas of the county. With her death, the *Ka'u Calendar* will be closed. Its last issue will be published on February 14.


Julia Neal

The most recent postings included a report on a community meeting on filing land claims, news of a Na'alehu woman's gold medal for a win in her age class of a national track-and-field competition, an announcement of a poetry contest to celebrate Volcano Month, and a coming presentation at the Na'alehu Community Center on the Cultural Evolution of Lua.

Neal's work helped the community strengthen ties at a time when many much larger publications seem to have abandoned any interest in that mission. She will be missed.

Papahanaumokuakea Sanctuary: On January 16, the *Federal Register* carried a notice stating that the Papahanaumokuakea Marine National Monument has been designated a national marine sanctuary. The monument already protected waters around the Northwestern Hawaiian Islands out to the limit of federal waters. The sanctuary will encompass all that, in addition to the waters of the Midway Atoll National Wildlife Refuge and the Hawaiian Islands National Wildlife Refuge. Altogether, the area included in the sanctuary comes to 582,570 square miles.

No commercial fishing is allowed. The final rule "exempts non-commercial fishing … provided that certain requirements are satisfied. Those requirements are that the fish harvested, either in whole or in part: (1) are not intended to enter commerce and shall not enter commerce through sale, barter, or trade, and that the resource is managed sustainably; and (2) are not intended to be sold and shall not be sold for any purposes, including, but not limited to, cost-recovery."

"Sustenance fishing" for bottomfish or pelagic species is allowed, if all catch is consumed within the sanctuary.

Permits are to be granted for Native Hawaiian practices, subject to several conditions. Those include that the activity is non-commercial and that "the purpose and intent of this activity is appropriate and deemed necessary by traditional standards in the Native Hawaiian culture (pono), and demonstrates an understanding of, and background in, the traditional practice and its associated values and protocols." Also, any living resource taken in the sanctuary must be consumed in the sanctuary, and the activity "supports or advances the perpetuation of traditional knowledge and ancestral connections of Native Hawaiians to the Northwestern Hawaiian Islands."

According to NOAA, the sanctuary's marine habitat "includes several interconnected ecosystems, including coral islands surrounded by shallow reef, deeper reef habitat characterized by seamounts, banks, and shoals, mesophotic reefs with extensive algal beds, pelagic waters connected to the greater North Pacific Ocean, and deep-water habitats such as abyssal plains 5,000 meters below sea level."

The sanctuary provides essential habitat for rare species, including the threatened green sea turtle, the endangered Hawaiian monk seal, and more than 14 million seabirds. Twenty species of whales and dolphins are found in the waters of the sanctuary. Of the 7,000 known marine species found in the area, at least a quarter of them are found nowhere else on Earth.

"The area of the sanctuary is also a sacred place to Native Hawaiians, who regard the islands and wildlife as kupuna, or ancestors," NOAA stated in the notice.

The designation does not become effective until the end of a review period. That review period starts on the date the notice is published (January 16) and concludes "after the close of … forty-five days of continuous session of Congress." In that period, the governor of Hawai'i "may certify to the Secretary of Commerce that the designation or any of its terms is unacceptable, in which case the designation or any unacceptable term shall not take effect in state waters of the sanctuary."

Environment Hawai'i asked Governor Green's office if he would be objecting to the designation. No response was received by press time.

Quote of the Month

"You don't actually have a plan for how the private contractor is going to allocate the funds."

— Sen. Jarrett Keohokalole

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State Agencies Seek Additional Funds To Help With Biosecurity Measures

While much of the January 17 joint legislative briefing was given over to discussion of the Department of Agriculture, other agencies also were given the opportunity to discuss their challenges, achievements, and financial needs.

Ryan Kanakaole, deputy director of the Department of Land and Natural Resources, told members of the House Committee on Agriculture and Food Systems and the Senate Committee on Environment and the Senate Committee on Agriculture and Environment that the DLNR's Division of Forestry and Wildlife was in need of an appropriation almost double the $4 million included in Governor Josh Green's proposed budget.

The money — $7.45 million — is needed to support firefighting efforts as well as fire prevention efforts, including outreach and clearing of invasive grasses.

Unomia stolonifera. CREDIT: DLNR.

Kanakaole went on to describe the needs of the Division of Aquatic Resources. "This past year has been one of the busiest years for rapid response" by DAR staff, he said, with "numerous outbreaks of particularly invasive soft corals and anemones," with the primary cause of new aquatic species introductions to the state being ballast water and hull fouling.

A new law allows DAR to work with the Coast Guard in trying to intercept potentially invasive aquatics. "However, DAR lacks a team to perform these types of inspection. This gap in capacity is particularly concerning for us, because there is a growing continuing threat of stony coral tissue loss disease, which is a devastating coral disease currently present in the Caribbean."

In southeast Florida, he added, that disease is responsible for more than a 50 percent decline in coral cover since 2015. "A boat traveling from these affected areas could easily introduce that disease to Hawai'i, and we know now that Hawaiian corals are susceptible to that disease."

In addition to introductions from vessels, Kanakaole noted the role that is played by releases of species brought in to the state by the aquarium trade.

"Since 2020, DAR has responded to 20 reports of new introduced species in state waters and has removed nine of them with no new detections," he said. Of the 20 new species, "fourteen were likely aquarium trade introductions."

One of the worst examples he said was an invasive soft coral, *Unomia stolonifera,* also known as pulsing coral, which has spread over 80 acres of the seafloor in Pearl Harbor. "While that invasion is outside of the state's jurisdiction and in federal waters," he said, DAR is monitoring it to ensure it doesn't spread into state waters.

Another serious invasive aquatic is the Majano anemone, discovered in Kane'ohe Bay in 2024 at a site associated with another aquarium release. "This anemone is a high concern because it's been observed growing on native coral. It has the potential to smother the coral reef," he added. DAR has been working with stakeholders to develop a strategy to remove this species, and funding is needed for rapid intervention to prevent further spread, he said.

"Increasing the capacity for our DAR aquatic invasive species team, especially in our leadership roles, will allow for the team to continue and improve upon prevention and rapid response efforts. So we have a legislator-introduced bill – Senate Bill 19 – that would establish an aquatic biologist position to help oversee the aquatic invasive species team."

Matthew Kurano, head of the Department of Health's Environmental Health Services Division, told the committees that Hawai'i has "a long history of diseases that were spread by invasive species. … What is particularly of concern to us is the intersection of climate change into this as a threat multiplier."

The DOH, he said, was not asking for very much in the way of assistance with invasive species monitoring and control this year. However, he added, "our vector control program is asking for a single position."

The coconut rhinoceros beetle (CRB) response team from the University of Hawai'i College of Tropical Agriculture and Human Resources gave the last presentation of the day.

Michael Meltzer, a researcher at CTAHR with a specialty in agricultural biosecurity, reminded the legislators that CRB was first detected on O'ahu in 2013, and by 2014, a multi-agency program had been established to attempt to stop its spread. Almost all of its funding now comes from the U.S. Department of Agriculture, with the Department of Defense adding a bit more. The money comes with strings, he added. "These are emergency funds, and they're typically for eradication."

On O'ahu, he said, "some areas have tremendous damage, where we're getting traumatic losses." Most damage so far as been outside of urban areas, but "we're going to start seeing it in the urban areas soon, … particularly in Honolulu and East O'ahu."

Eradication has been unfeasible on O'ahu for about the last three years. As a result, funds designated for eradication dried up. "We had to pull back from activities on O'ahu because eradication was no longer an option," he said. Activities on O'ahu now are limited to trapping, with a focus on ports of entry, airfields and seaports.

Funds from the Department of Land and Natural Resources have allowed his team to conduct some work on the other islands where use of federal funds isn't allowed.

"Unfortunately, Kaua'i is not too far behind O'ahu. … CRB is basically widespread at this point and most estimates are that erad-

ication is not feasible," even though CRB was not found on the island until 2023.

The lone good news Meltzer could cite was on Maui, where 17 live CRB larvae were found on one coconut tree at a Kihei golf course in 2023. Since then, no further detections have been made.

As for the Big Island, "we still have a nascent population in Waikoloa," he said. "Every once in a while we'll find a beetle over there," he added, but there's still "a good chance at eradication." No CRB detections have been made yet on Moloka'i and Lana'i.

Metzler did not have a specific budget request for the Legislature. But he noted that federal grants require matching funds. For years the university work was supported with federal dollars, "so we never asked for state funding."

"That changed," Metzler said, "when our working group decided we had to pull back on what we could do on O'ahu. … Last year DLNR supported us with about $250,000 to do some of these activities that we couldn't do with our federal funds. … Having matching state funds is critical for pursuing some of those federal funds."

The coconut rhinoceros beetle is known to have been spread to islands other than O'ahu in the transport of mulch and other plant material that harbors CRB larvae.

For years the Department of Agriculture, which can restrict the shipment of plant material and invasive animals from one island to another, did not adopt rules relating to the transport of materials known or likely to harbor CRB larvae.

The first pest advisory relating to the beetle was issued by the DOA in May 2014, about five months after the first detection was made at Joint Base Pearl Harbor-Hickam. Not until 2022 were interim rules promulgated to ban the movement of plant material likely to harbor larvae or adults. Almost two years passed before the DOA adopted final rules in November 2024.

Coconut rhinoceros beetle. CREDIT: DLNR.

On January 20, the DOA's final rules on CRB quarantine took effect.

— Patricia Tummons

Agriculture *continued from page 1*

said. "By obligated, we mean we've done an RFP [request for proposals], given an award. So the funding is tied up. Nobody else can get it. It belongs to HTM for [coconut rhinoceros beetle], belongs to Terminix for [little fire ant]." Contracts for each of these came to $1.1 million."

An $800,000 contract that had been issued to deal with green waste was "flawed," she said, since the RFP included hauling but not loading. But "we should have that RFP reposted in February," Hurd told the legislators.

Rep. Nicole Lowen

Lowen asked about the expenditures relating to little fire ant (LFA) and coconut rhinoceros beetle (CRB). "You said $1.1 [million] for LFA and $1.1 [million] for CRB. That's of that $10 million?"

Yes, Hurd answered. "With LFA, you gave us $1.5," she said, adding that the Department of Agriculture had held back $400,000 in reserve "for our work with nurseries, training, biochemicals. So $1.1 is what we awarded to Terminix to treat residences."

"Where are they going?" Lowen wanted to know.

Hurd said that Terminix would be treating 580 houses on O'ahu and 290 on the Big Island. "And then for Maui and Kaua'i, … they're gonna go survey, see what kinds of responses they are getting, do outreach, like actually show the people if you see this, do that."

The selection of Terminix to receive nearly the entire sum of funds that were to address problems associated with the little fire ant quickly became one of the themes of the hearing.

"How do you pick which homes get subsidies and other homes don't?" Lowen asked. To which Hurd said that the DOA had "a list of people," some self-reported, others identified by staff or by the different county invasive species committees (ISCs). "In fact," she added, "Terminix, they just talked to us today," wanting to get the list.

"I mean, there's more than that number of homes that have LFA problems just in my district alone. How do you choose who gets state money versus who has to pay for it themselves?" Lowen wanted to know.

"We're going to leave it up to Terminix," Hurd said. She said that the reason the department selected Terminix was because they already had the chemicals, the personnel, liability insurance, and could deal with people who have allergies or other special needs.

Lowen pressed the point. "There has to be some process for deciding who gets subsidized."

Hurd: "I'm going to have to ask Terminix and get back to you."

"Why would you leave it to Terminix to decide?" Lowen asked.

"Because the contract isn't done yet," Hurd said. "We have to – the scope, of how – how would you like us to decide?"

"There's all kinds of different ways you could approach it," Lowen said. "You could look at income, you could look at need, which communities have greater opportunities for prevention, or keeping it from spreading, where there have been more consistent problems, where the most claims have been. There's a ton of different ways."

Lowen pointed out that the Big Island had much greater need for LFA control than O'ahu, which was getting the lion's share of the benefit. "Of those 290 houses you mentioned, are they in Hilo, or Kona, or where are they?"

Hurd said that Terminix would be deciding what the best way is to "move in and actually attack the problem" in areas where surveys had shown LFA to be present.

Lowen objected once more to Terminix making those decisions. "If that's part of what they're supposed to be doing under their contract, is to determine how state funds are distributed to citizens –"

Hurd jumped in to say that the DOA's Plant Quarantine Branch would be involved in the decision, "but it's going to be something we have to talk to them about."

The idea of the state paying for the treatment of every homeowner with an LFA infestation would have been great if it had existed a decade ago on Hawai'i Island, Lowen said. "I understand you want to nip it in the bud on a new island … but on Hawai'i Island, it's widespread. … Two-hundred some homes, that's nothing.

"As you well know, LFA treatment is not a one-time thing. It's a long-term treatment, over months. … This just feels like throwing taxpayer dollars at some people through a private company, instead of investing in a long-term solution for the problem."

Rep. Lisa Marten wanted to know why Terminix was chosen, "when we have far more experienced entities, like the Hawai'i Ant Lab, that have done some training for Terminix but haven't shared all their deep knowledge. …

"They were not able even to apply to the RFP because you limited it to private pest control companies. I'm just super concerned we're leaving the experts behind who are trying to serve the public interest, and instead asking for-profit companies … to not only do the job but then even make policy decisions about who gets the benefits and who does not."

She asked Hurd again why the RFP was set up in a way that excluded the Hawai'i Ant Lab, or HAL.

Terminix, she said, has the licenses, businesses, registrations, the insurance needed, and trained applicators. "So the main concern we had was for kupuna, [people with] allergies, those who want only organic treatment…. They had the – I think the most important thing when we had our discussions was the liability. They know what they're doing in terms of the health and welfare of the people they're serving."

"You're suggesting they know more than the people that trained them?" Marten asked, referring to HAL.

"No, I'm suggesting they have more insurance, more access to chemicals – they have it probably in their warehouse – and the equipment," Hurd said.

"But, you know, there's another bucket of funding coming, hopefully. We'll learn from this, and say, for this size house, this many people, this is the amount of money we need for that."

Matthias Kusch, representing the Hilo area, asked Hurd, "Do you guys have any data you're acting off of, for Hawai'i Island? O'ahu has been referenced – data points, target areas. But has this happened on Hawai'i Island?"

Hurd launched into a discussion of the provision in Act 231 that called for spending $800,000 in tech upgrades. None of that had been spent, she said, because the state currently pays for the GIS program the department uses. "We're holding onto [the funds] in the event that the software that we have needs upgrading to do exactly what you're saying. We have the data. When we upload it, everyone will see where LFA is."

"So, you've done surveys?" Kusch asked.

"Oh, definitely. We've done many surveys."

"On Hawai'i Island?"

At this point, Jonathan Ho, plant quarantine manager for the DOA, jumped in.

"On Hawai'i Island? No."

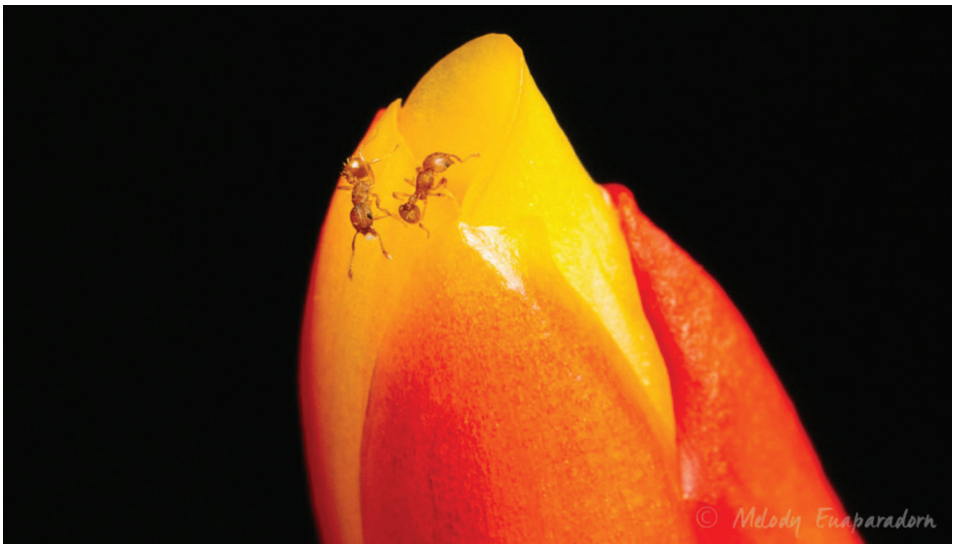
"So," Kusch said, "$1.1 million, and the Terminix contract is just kind of a fishing expedition."

"The contract is primarily focused on O'ahu," Ho said. "That's where the bulk of the money is. One of the goals with the contract is to really get a baseline idea of how much you can get done with a particular set of money, through a commercial standpoint. Ultimately, you can then take that number and extrapolate it against all of Hilo… At least we will have a quantifier – to do the rest of O'ahu, we can expect to need X dollars."

Sen. Jarrett Keohokalole of windward O'ahu questioned Hurd on the statements she made concerning fund expenditures.

"Director, you said the Terminix contract for LFA – you said the contract isn't done yet. You're still negotiating the scope of it," he said. "So you can you encumber money on a contract that's not done yet?"

Hurd replied, "The contract is in DAGS right now. It's ready to go." (DAGS is the Department of Accounting and General Services.)



Little fire ants on a ginger blossom. CREDIT: DLNR/MELODY ENAPARADORN.

"You don't actually have a plan for how this private contractor is going to allocate the funds to do treatment," he said, "even though the ISCs" – the island invasive species committees – "especially on O'ahu, in coordination with the Ant Lab, have a pretty standardized protocol for how to treat infestations that has proven successful on Maui, in Mililani, and is underway in at least ten of the 66 sites on O'ahu. You are aware of that, right?"

Hurd did not answer.

Referring to the slide Hurd had presented showing encumbrances, Keohokalole asked her, "Director did you intend to mislead the Legislature on how well you're doing on Act 231 encumbrances?"

"If I did, it wasn't intentional," she said. "I can tell you what is encumbered. There's a pest management systems contract – not contract, proposal – that we're working on with the University of Hawai'i, so that to me is considered encumbered because the money is…"

Keohokalole: "Considered encumbered, or encumbered? Because if it's encumbered and registered with the Department of Accounting and General Services as encumbered, then the money won't lapse on June 30. Is that what you intend when you say, on your slide, that 52 percent is encumbered?"

"Right," Hurd responded.

"So, director, I'm holding an email from Keith Regan, the comptroller and the director of the Department of Accounting and General Services, from 11:29 a.m. today. And what it says is that you have actually encumbered to date $1.1 million of Act 231 funding … and that you have spent zero dollars of that money to date. And we're six months in, and every dollar of Act 231 money that is not

spent by June 30 lapses back into the general fund. Is that correct?"

Hurd replied that she should have used the term obligated for pending arrangements. "When you encumber the funds, as what we're doing with the contract, it's encumbered, okay? Somebody has been awarded the funds."

Which contract was Hurd referencing, Keohokalole asked.

"Let's say HAL," Hurd said. "It's in DAGS right now. It's in DAGS right now.

"Director, this email is from 11:29 a.m. From Keith Regan."


Sen. Jarrett Keohokalole

"The comptroller is correct," Hurd said, apparently agreeing with Keohokalole.

"The only funds that are encumbered are $1.1 million – 10 percent of the Act 231 monies – and we are halfway through the year," Keohokalole said. "You're 0 for 44 on your positions, and you've turned over four of your five managers that are responsible for invasive species in the last year. The only one that hasn't turned over is still on probation. Things are going backwards right now."

Hurd: "Let me, let me—"

But Keohokalole continued: "Was it your intention to mislead the Legislature about how well you're doing because you're at risk of lapsing 90 percent of the Act 231 monies?"

Hurd insisted she did not intend to mislead anyone and that any confusion was just a matter of definition – ""encumber, obligate, award, expend."

"Obligate means nothing," the senator replied. "It means you think you know where you want it to go. Award means they know that you think you know where it wants to go and that it's supposed to go to them. Encumber means the money will not lapse in a year when you're coming back to ask for $28 million more."

Hurd repeated that the funds would be encumbered by the end of the fiscal year – all except, perhaps, those dealing with personnel.

Keohokalole wasn't quite done with Hurd: "I just have trouble with the community having confidence in your ability to allocate and encumber and get all this money out the door when what we're being told right now is not being validated by DAGS."

Rep. Scot Matayoshi, representing Kane'ohe and Mililani, told Hurd, "I'll be honest. I'm pretty irritated. … This process has been going way too slow. I have no idea why Terminix was – or why you did not allow Hawai'i Ant Lab to bid on the RFP for little fire ants. To say it was liability is very confusing to me. As far as I know, HAL has been treating and has the equipment and expertise to do it. Unless you're saying that they've been treating this whole time without proper insurance … then I'm not sure where your liability argument is coming from."

He continued: "I'm being told Hawai'i Ant Lab can do it at about 10 percent of the cost. This is not only a huge waste of state funds in my opinion, but also just not using our own guys to treat. Why?

"I understand that sometimes we contract out when we don't have the personnel to treat but here we're literally ignoring the people who are government employees to do this. It doesn't make any sense, and we're paying ten times the amount in order to do it.

"To me not only is that government waste, but it means we're not treating to the extent that we could by a very large margin. And when you have the kind of infestations like we have in our communities, we need every house we can get to be treated. So this kind of waste is very, very disturbing to me…

"Hawai'i Ant Lab is ready to go. I'm not sure why we have Terminix, who's asking for advice and trying to get their things in order in order to go out and treat when we have someone who's actively treating in the community right now and needs the resources to expand that."

Ho of the Plant Quarantine Branch once more came forward with the argument for liability. The issue isn't whether HAL has the expertise, he said. But it's small. "Terminix is this very large company. They have the people, and once the contract is issued and they are trained, we provide them with sites and they can start immediately…. HAL would need to do a little ramping up."

Matayoshi then suggested that the RFP with Terminix is faulty. "There seem to be things missing from it," he said. "Some disconnects here that need to be worked out. You pulled the other RFP because you forgot to put in loading. If it's a matter of re-issuing this, it seems like you have grounds to reissue the RFP and broaden it to allow organizations like HAL to bid…. Can you pull the RFP and reissue it?"

Hurd insisted there was no reason to do that. "The proposal that came in was vetted by the committee, the procurement office. They met every term, every piece of the scope of the RFP. So why would we pull it?"

Matayoshi then asked Chelsea Arnott, executive director of the multi-agency Hawai'i Invasive Species Council, to talk about funding for the Hawai'i Ant Lab and the furloughs it has undergone as a result of the lack of hard funding from the state.

Arnott said that the majority of HAL employees are on the Big Island, with about one and a half on O'ahu. The Hilo personnel "move across the islands to support communities across the state in LFA mitigation," she added.

"Can they hit the ground running? Of course. They're the ones who developed the monitoring and treatment control protocols. … They are definitely the experts in the field who know this system and have been assisting not just communities but also state agencies and other organizations."

Arnott praised what the Ant Lab has done and is continuing to do, albeit with reduced funding. "Because they have limited staff, they've been developing community action programs to enhance their capabilities… But we also need to increase the capacity of HAL so they can work more effectively across the state," she said. At present, HAL's entire program runs about $1.3 million a year for around 16 staff members, she added, and that includes equipment, general operations, and overhead.

Sen. Mike Gabbard of west O'ahu asked Hurd if any funding from Act 231 was being directed toward the island invasive species councils and the Ant Lab.

"I can't say if the ISCs are getting any dollars," she replied. "We asked Hawai'i Ant Lab to submit a proposal. I threw out a number, that maybe they can submit a proposal for $75 thousand. We recently got a proposal from the University of Hawai'i at $150. So we're looking at funding that. We have not yet begun the process."

The Ant Lab is run as a project of the university's Pacific Cooperative Studies Unit, but its funding comes from competitive or discretionary grants and donations.

Arnott went on to describe the Ant Lab as "a critical piece of not just LFA mitigation, but other invasive ants. And they are soft-funded, like the island invasive species committees. We're trying to find a way to institutionalize them, give them long-term, stable funding."

Hurd noted the DOA had supported the Ant Lab in the past. From 2014 to 2021, she said, the department had awarded it funds totaling just over $3 million, money that came from the fee the DOA collects on incoming cargo. "So, yeah, we've been collaboratively funding each other," she said.

— Patricia Tummons

Loans Voided by PUC Continue to Show Up In Launiupoko Water Rate Hike Request

On December 20, the Launiupoko Water Company filed an amended request for a rate increase. The filing, an amendment to the request filed in late December 2023, was in response to the Public Utility Commission's determination last June that the company would not be able to include repayment of loans from its majority owner, Peter K. Martin, in applying for a rate hike. The loans had been issued to the company without prior approval from the LUC.

At the same time the PUC voided the loans, it ordered the company to file an amended rate request and more accurate assumptions for the test year – the costs and revenues for the 12-month period on which the rate request is based.

The original request had sought a rate hike of 64.7 percent. In this amended request the proposed rate hike has been reduced to just over 48 percent.

Much of the increase in revenue in the current proposed rate hike derives from an increase in the standby charge for meters. For meters with the smallest, 5/8-inch connections, standby fees would increase 23.3 percent (from $35 a month to $43.15). For the largest connection in the system, 1.5 inches, the charge would rise from $57 to $215.75. According to the company, the proposed rates reflect multiples of "meter equivalents," so the standby charge for the largest connection is five times that of the smallest.

Standby fees have no effect on usage, so conservation is unaffected by this proposed change.

The company is proposing no or minimal change in usage rates for the customers in the three lowest rate categories, up to 40,000 gallons per month. This, too, has no effect on water conservation – especially given that there are few, if any customers, in these three categories.

For customers using more than 40,000 gallons per month, rates would go from $3.28 per thousand gallons to $6.05. The estimated daily usage per water meter in 2024, according to the amended rate filing, is 1,680 gallons per day, or more than 50,000 gallons per month.

This new rate structure, the company says, "is designed to create a financial incentive for consumers to use water more efficiently and to avoid or minimize excessive consumption."

But this, too, may not have any effect on consumption. Most of the 375 meters provide water to multi-million-dollar homes with pools, spas, water features, and lush landscaping. Given that, it is unclear how sensitive customers would be to something less than a doubling of their usage rates.

The amended application consists of four volumes of records, affidavits, reports, and supporting documents that LWC has adduced to justify the request for the substantial interest in customer rates.

A house in one of the gated Launiupoko subdivisions is listed for sale at $6.8 million. CREDIT: HOMES.COM.

Craig Nakanishi, one of the lawyers representing the company in the rate case, states in his opening letter to the commission that the company has "not issued any promissory notes" and it has "no other indebtedness."

But the loans that form the very reason why LWC has had to amend its original request – the denial of LWC's inclusion in its proposed rate base of loans of $1.3 million from Martin and $6,000 from general manager Glenn Tremble – continue to figure into the utility's justification for the rate hike.

Specifically, the consultant analyzing the company's finances in order to determine a proper rate of return to the owners has relied on a balance sheet in which the loans are included. By including the indebtedness in calculating the company's financial health – and its potential attractiveness to investors – the suggested rate of return is, as a result, higher than it would be without the debt.

The 40-page report from Matthew Howard of Framingham, Massachusetts, concludes that LWC should be receiving a rate of return of 11 percent of income. This, he says, is based on a "hypothetical" capital structure of half long-term debt (to which he assigns a hypothetical interest rate of 8 percent) and half equity investment (which he figures at 14 percent). Taking the weighted average of capital costs, he arrived at the 11 percent figure.

Although the title page of Howard's report describes it as "amended," it is word-for-word, page-for-page identical to the report that was included as part of LWC's original rate hike application.

Howard, who advises investor-owned utilities on rate-of-return questions, based his analysis on a review of the finances of six investor-owned utilities, all orders of magnitude larger than LWC. This he described as the "utility proxy group," but, he acknowledged, LWC has little in common with any of them.

Relying on a balance sheet summary showing the company's financial position at the end of 2022, Howard wrote: "the company's debt balance is over twice the value of its assets," with assets at $584,796, and debt at $1,251,629. By comparison, "the utility proxy group companies are in good standing from a creditor perspective." The average equity ratio for that group is 50.27 percent, he wrote.

Another difference between the proxy group and LWC is the fact that both debt and equity are held by the same parties.

"The company's financial situation … impacts equity investors because debt holders are senior to equity holders," he wrote. "Because that is the case, the company is obligated to address debt-holder claims first, i.e., paying down its accrued interest and making regular payments on its outstanding debt prior. It is clear LWC faces significantly increased risk compared to the utility proxy group, and as a result, requires an increased return."

This is true for publicly traded companies, where debt has a stronger claim on a company's revenue than investment. But LWC's debt, and presumably the unpaid,

accumulated interest on it, has been voided by the LWC – a fact that does not enter into Howard's "amended" report. If debt had been eliminated from the analysis, LWC's financial picture would look much rosier.

Environment Hawai'i asked Howard whether he was aware of the PUC's order voiding loans. We did not hear back by press time.

Another factor plays into Howard's recommended return on investment, and that is the very small size of the company. The models he used to calculate this add a premium of 3.9 percent in the proposed rate of return to account for the risk inherent in investing in small enterprises. He wrote that using the average of three different models applied to the proxy utility group, he determined the appropriate return on investment to be in the range of 9.6 percent to 10.6 percent. He then added a "size premium" of 3.9 percent "which takes into account both LWC's smaller size and significant risks relative to the utility proxy group, resulting in a recommended [return on equity] range applicable to LWC of 13.5 percent to 14.5 percent."

As for the cost of debt, Howard recommended 8 percent be allowed for that. "As indicated by the company, the interest rate on all outstanding debt is currently 8 percent," a rate he described as reasonable.

In the balance sheets appended as exhibits to the amended rate increase request, the loans and accumulated interest continue to be reflected, months after the PUC order.

The most recent balance sheet is dated October 31, 2024. It shows that unpaid interest on Tremble's loan stood at $2,699.45 on this date. Unpaid interest on Martin's loan of $1,269,000 amounted to $294,738.60.

On January 21, the PUC issued an order finding that the application was complete, as of December 20. Within six months, that is, by June 20, the commission must make a decision on it.

The PUC will hold a public hearing on the rate request March 3, 5:30 p.m., at Lahaina Intermediate School.

An Unreported Loan

The application does not mention it, but Launiupoko Water Company has received a loan of $401,834.46 from the state's Drinking Water Treatment Revolving Loan Fund. According to the Department of Health's report to the Legislature on the fund finances for the 2023-2024 fiscal year, the loan is for a backup generator and SCADA upgrades (Supervisory Control and Data Acquisition). Olowalu Water Company, also controlled by Peter Martin, received a loan for the same purpose in the amount of $150,231.33.

Project No.	Project Name	Amount Obligated to Small System/Service Area ($)	Percentage of Funds Available for that SFY (%)
SFY 2023			
P-DW150-0002	Napuu Water System Improvements	1,572,484.20	3.35
P-DW328-0001	Honolulu BWS Metered Connection to Lot B (Kipapa)	271,156.80	0.58
DW434-0012	Kalaheo Water System Improvements	13,000,000.00	27.66
HDWS-PF23	Hawaii DWS Pro-Fi SFY 2023	1,520,533.37	3.24
	SFY 2023 TOTAL	*16,364,174.37*	*34.82*
SFY 2024			
P-DW209-0002	Backup Generator and SCADA Upgrades (Olowalu)	150,231.33	0.17
PDW251-0004	Backup Generator and SCADA Upgrades (Launiupoko)	401,834.46	0.46
HDWS-PF24	Hawaii DWS Pro-Fi SFY 2024	7,455,084.92	8.45
HDWS-0002	Emergency Well Repairs 2	621,822.10	0.70
P-DW437-0001	Repair/Replace 0.5 MG Tank (Moloaa Irrigation Coop)	2,388,168.26	2.71
	SFY 2024 TOTAL	*11,017,140.97*	*12.49*

The Department of Health report on loans for drinking water system improvements lists loans to two Peter Martin-controlled companies, including Launiupoko Water Company. CREDIT: DOH.

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Irrigation Company Responds To Information Requests

On December 18, the Public Utilities Commission asked a series of questions to the Launiupoko Irrigation Company, which, like the Launiupoko Water Company, is another company closely held by Peter Martin and which covers the same service area of around 3,300 acres of West Maui. Like LWC, the irrigation company has a pending rate hike request before the PUC. Also, like the water company, the irrigation company also has outstanding loans issued to it by Martin, loans that were not approved in advance by the PUC.

Unlike LWC, the irrigation company's outstanding debt to Martin is more than $10 million. The company's regular financial reports to the PUC show that carrying charges on those loans amount to more than $50,000 a month, or, for 2024, $604,742.52.

Following the PUC's determination that the loans from Martin to the Launiupoko Water Company were void, on June 21, the irrigation company informed the PUC that it was withdrawing its request for approval of the loans in its own rate case.

"In the event that the commission deems the loans void, LIC submits that there is no impact to the rate case numbers as filed," Arsima Miller, attorney for the company, stated in her letter. The "hypothetical" capital structure used in the rate case … is comprised of 47 percent debt and 53 percent common equity."

In September, *Environment Hawai'i* reported that the company continued to include carrying charges related to the Martin loan on its balance sheets. In nearly every month, the "Interest Expense Shareholder" line item, logged as a debt, prevented the company from showing a net profit.

An intervenor in the LIC rate case, Na Aikane o Maui, then asked that the PUC clarify whether the inclusion of interest on unapproved loans affected the commission's consideration of the reasonableness of the requested rate increase. It also asked the PUC to require the utility to resubmit all reports that included interest charges against the unapproved loans.

In October, LIC began submitting two versions of its financial reports. One included the interest charges; the other without them. By December, however, the company filed just one version – the one with the interest charges.

On December 11, the PUC declined to require refiling of any profit and loss statements. It did however, affirmatively void the Martin loans.

It also asked parties to the docket to say whether LIC should be required to return to ratepayers any part of the increases paid under the temporary rate hike the PUC granted to the company in 2022.

All of the parties agreed in their responses that figuring out how much, if any, of a rebate customers should receive was impossible to calculate, given facts on hand.

A week after its December 11 order, the PUC issued questions about the company's system efficiencies and finances. The PUC referred to a number of previous statements

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Lawsuit Challenges Green's Selection Of Rodrigues to Fill Loea Seat on CWRM

A community organization, Hui Kānāwai 'Oia'i'o, has sued Governor Josh Green, the state Commission on Water Resource Management, and two individuals, arguing that the governor's appointment of one of them – Vincent Hinano Rodrigues – to a position on the Water Commission should be nullified.

Hinano Rodrigues.
CREDIT: HAWAII NEWS NOW.

As *Environment Hawai'i* has reported, Green appointed Rodrigues in late October. Because the appointment was made outside of the legislative session, Rodrigues immediately took the seat on the commission that is reserved by law for someone with expertise in traditional Hawaiian practices.

The complaint, filed by Earthjustice on January 27 in 1st Circuit Court, seeks a declaratory judgment that Green lacked legal authority to disregard the nominees for the seat that were initially presented to him following a nominating process in early 2024. Instead, Green re-initiated the nominating process in August, resulting in the selection of Rodrigues to fill the *loea* seat.

In addition, Earthjustice is asking the court to issue a writ of *quo warranto* declaring that Rodrigues "cannot hold the office of *loea* commissioner and forbidding Defendant Rodrigues to exercise the authorities and duties of that office."

The complaint recites the history behind Rodrigues's appointment. It notes that the first nominating committee sent the governor a list of four individuals for the *loea* position. "Yet, Defendant Green stalled on making a selection for months, then claimed that the process needed to be restarted from the beginning because two nominees had withdrawn."

Green then "renominated one of the purportedly withdrawn nominees, Defendant James Kimo Falconer, to a newly reconstituted nominating committee to produce a new list of nominees in October 2024." Falconer, a former supervisor for the Pioneer Mill in West Maui who now runs a coffee farm in Ka'anapali, was Green's first choice to fill the position, the complaint says. But after hearing "significant concerns and objections through direct informal communication," Green instead "decided not to send any nomination to the Senate throughout the duration of the 2024 legislative session."

The Green administration "asked, invited, or arranged for Defendant Falconer to withdraw from the list sent by the original nominating committee," the complaint says. The administration and Falconer then "reached an understanding or arrangement that Defendant Falconer would in turn be appointed to the reconvened nominating committee."

The three other original nominees consisted of Hannah Kihalani Springer, Lori Buchanan, and reportedly Ed Makahiapo Cashman. "It is undisputed that all these candidates meet the prescribed qualifications for the *loea* commissioner," the complaint states. All three submitted applications to the second nominating committee.

The committee's meeting to select a new slate of candidates was held on October 21 and 22. By law, it was supposed to be open to the public. Yet the public was not given a list of all the candidates interviewed. In addition, if a candidate chose to be interviewed in private, the committee entered into executive session to accommodate the candidate's wishes.

"Five of the applicants were identified by name, including Springer, Buchanan, and Cashman," the complaint says. "Interviews for the named applicants were conducted publicly. Interviews for the remaining three unnamed applicants were conducted in executive session, closed from the public. At no time did the nominating committee inform the public of the identities of these other candidates or explain or justify why their interviews were behind closed doors."

The complaint notes that the Sunshine Law does allow commissions to close meetings "to consider the hire, evaluation, dismissal, or discipline of an officer or employee." But that provision does not extend to volunteers, such as those serving on the Water Commission.

In a statement posted on the Earthjustice website, attorney Harley Broyles said, "The governor's likes and dislikes do not justify him disregarding the legally mandated process and making up his own rules. The Legislature intentionally established this process for commission nominations as a check on partisanship by the governor. The law does not allow the governor to scrap the committee's recommendations because they do not suit his political agenda."

— Patricia Tummons

For More Background:

The December 2024 edition of *Environment Hawai'i* has extensive reporting on the selection of Rodrigues. See these articles:

- "The Fraught Process of Selecting the Loea;"
- "Newly Appointed Commissioner Is Subject of Ethics Complaint;" and
- "Green Attacks Critics of Rodrigues as Ideologies."

Launiupoko *continued from page 8*

from the company to the effect that work needed to restore normal operations awaited approval by the PUC of the pending rate request. It then asked the company to identify any lawful debts the company has incurred "that may stall or prevent LIC from obtaining any financing" for needed projects.

Company attorney Arsima Muller replied by letter dated January 3, "LIC has not incurred any debts that may stall or prevent LIC from obtaining financing…"

The PUC also wanted documentation of loan applications or other correspondence submitted to lenders regarding bringing electricity to wells or completing a required archaeological inventory survey.

Responding to this, Muller provided an email describing a December 11 phone conversation between Tremble and a vice president of First Hawaiian Bank, but no loan application.

Finally, the PUC wanted to know why, for the first nine months of 2024, the company reported no expenses related to diesel fuel, but in October and November, recorded diesel fuel expenditures of $11,746 in October and $19,597 in November.

"LIC stopped pumping in December 2023 because it no longer had the financial ability to continue pumping operations… After LIC discontinued pumping ground water in December 2023 and limited its operations, it was finally able to pay off its debt to [the diesel fuel provider] in April 2024.

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BOARD TALK

Maunalua Bay Fisheries Management Area Wins Approval After Years of Negotiation

"Part of the reason we were able to come to an understanding of the need to do something is that the science is showing Maunalua Bay has some of the most degraded fish biomass stocks in the state. And when you talk to fishers, they also find that fishing stocks … are down in Maunalua Bay. The longer they've been fishing Maunalua Bay, the greater that decrease they see," Doug Harber, executive director for the non-profit Malama Maunalua, told the Board of Land and Natural Resources at a briefing last year on proposed rules that would establish a fisheries management area within O'ahu's Maunalua Bay.

He explained that in 2017, a hui of stakeholders that included fishers, conservation groups, and researchers formed "after a previous proposal was found to not be as inclusive as we felt it should be." He said the hui started a new process with a larger stakeholder group. "Since then, we've had over 200 meetings," he said.

With the Land Board's blessing, the Department of Land and Natural Resources' Division of Aquatic Resources presented proposed rules that grew out of those meetings at a public hearing on October 2.

The rules, if adopted, would prohibit the take of 'alakuma (7-11 crab), horned helmet, Triton's trumpet, ula (spiny lobster) and ula pāpapa (slipper lobster).

"These are resources identified by the stakeholders as depleted compared to what they used to be. We want to start with protecting these," DAR's David Sakoda told the board during last year's briefing.

Also under the proposed rules, between a half hour after sunset and a half hour before sunrise, the use or possession of any spear while diving, the possession of both diving equipment and a spear at the same time, and the possession of both diving equipment and any specimen of speared aquatic life at the same time would be prohibited. Transiting vessels in possession of these restricted items during that period would be exempt.

The fishing restrictions would remain in place until June 30, 2036.

On January 24, the Land Board unanimously approved the proposed rules for the Maunalua Bay Fisheries Management Area, which received overwhelmingly supportive written and oral testimony from the public.

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Board Extends Moratorium For Pāku'iku'i in West Hawai'i

On December 13, the state Board of Land and Natural Resources unanimously approved a two-year extension of a moratorium on the take of pāku'iku'i from the West Hawai'i Regional Fishery Management Area that was set to expire on December 18. West Hawai'i populations of the reef fish, also known as Achilles tang, have declined significantly over the years. They're also smaller than they used to be.

Fishers harvest them for food, and the their striking bluish-black, orange, and white coloring have made them a popular target of the aquarium trade.

During a hybrid public hearing held November 13, the Department of Land and Natural Resources' Division of Aquatic Resources sought comments on proposed amendments to the agency's rules regarding the area. The division proposed establishing a fishing registry, as well as a two-year extension of the existing no-take moratorium, plus a 10-year moratorium with a bag limit of zero, which essentially amounted to a 12-year moratorium. (DAR had proposed back in September setting the bag limit at 4, but the Land Board voted to reduce it.)

Only 18 members of the public offered testimony, mostly against the 12-year moratorium. One written testimony, from University of Hawai'i Richardson School of Law student Abigail Mawae, questioned the fairness of such a long no-take period. "This new rule, while trying to restore and preserve the population, unfairly burdens kānaka who fish for

continued on page 11

West Maui Water Permits

It has been 18 months since the Commission on Water Resource Management required applications to be submitted by parties wishing to use groundwater and/or surface water resources in West Maui.

The commission had determined in August 2022 that the conditions of water resources in that area met the requirements for designation set in state law. Water users were given a year to submit their applications to have their use permitted.

Since then – crickets.

Environment Hawai`i inquired as to when permits might be decided.

Here is the response from CWRM:

To the question as to the status: "Staff is reviewing all applications for completeness before the commission takes action on them."

As to the anticipated schedule for CWRM action: "We are still working to provide a timeline for commission action."

Will there be public notice of the award of permits? "Public notice will be given when applications are accepted."

Asked to clarify, CWRM responded: "Determinations on permits – approval or denial – will be made by the commission at a public meeting."

— Patricia Tummons

Launiupoko *continued from page 9*

"In the meantime, settlement discussions were ongoing between the parties… LIC anticipated that a final settlement would be approved by all parties within a matter of months, which would coincide with the wetter months, where surface water was more readily available. As a sign of good faith to its customers, LIC began limited pumping on a trial basis… LIC notes that the pumping is occurring at the sacrifice of other entities. The aging accounts for West Maui Land and Hope Builders continue to grow." (Both those companies are also owned by Martin.) "If LIC is unable to keep up with payments for the diesel fuel provider, LIC will either further reduce the pumping hours or cease pumping altogether."

— Patricia Tummons

pāku'iku'i for subsistence purposes and punishes them for the act of aquarium harvesters," she wrote.

Several testifiers, however, supported the two-year extension "to give DAR additional time to gather data and develop a more robust, data-driven management plan," the division's report to the board states. A number of written testimonies encouraged the division to take steps to enhance pāku'iku'i populations while allowing Native Hawaiians to continue subsistence fishing.

Considering the public testimony, DAR's recommendation to the Land Board last month was to just do a two-year extension of the moratorium.

"The proposed rules would affect Native Hawaiian subsistence fishing rights and cultural practices because the rules would restrict subsistence fishers' ability to gather pāku'iku'i for food for themselves and their communities. On the other hand, these rules are being proposed based on reports of the decline of pāku'iku'i from West Hawai'i waters, and these reports have come from West Hawai'i community members. Therefore, the purpose of these proposed rules is to take a precautionary approach to protecting pāku'iku'i populations so that traditional and customary fishing practices that involve pāku'iku'i are sustainable for future generations of Native Hawaiian fishers," the report continues.

At the board's meeting last month, member Kaiwi Yoon asked DAR staff "how we measure the accountability if we're wrong on this?"

DAR administrator Brian Nielson asked whether Yoon meant restricting pāku'iku'i harvest when the population is sustainable.

Yoon confirmed that is what he meant.

Nielson then replied, "I guess you have to weigh that against if we don't restrict harvest when maybe we should have."

In response to a question from board member Aimee Barnes about efforts to "continue to provide" Native Hawaiians their rights, Sakoda pointed out, "We can never take away those rights. Those rights exist, but they're very place-based."

He said that the only way those rights would be adjudicated is if a person was cited for a fishing violation. "They could raise [those rights] as a defense in court," he said.

Sakoda said his division has been trying to get authority from the state Legislature "for permitting those rights ahead of time so people don't have to risk a citation or going to court." He said the idea needs more outreach, noting that Native Hawaiians don't want to be required to obtain a permit. He said the permit would be voluntary and DAR would like it to be available to those who want it.

"I really encourage us to be proactive to think about how to address this so people aren't at risk of being arrested. I'm glad to hear there's some possibility of legislation in the mix," Barnes said.

Sakoda said that officers with the DLNR's Division of Conservation and Resource Enforcement could also be educated to ask questions to determine whether someone is exercising their rights "rather than using the Native Hawaiian card to exploit resources. That and building relationships with the community."

Former Land Board chair Suzanne Case, who has long argued for strict protections for the pāku'iku'i population in West Hawai'i, testified in support of DAR's recommendation to amend the rules to extend the moratorium.

She reminded the board that she had provided them with a chart showing that the 2008 baseline being used to highlight the population's decline "was already, in some places, over 90 percent declined from the last few decades."

"Nobody has an unconditional right, no matter whether Native Hawaiian or non-Native Hawaiian. The public trust doctrine is your obligation, is protection and sustainable use. That's your obligation," she said.

She continued that konohiki fishing rights that used to provide for local management were "wiped out in 1900 under new territorial law to provide for open public access. That's why we have overfishing. When you have open, public access, and a huge population, and modern fishing methods, there's just heavy-duty opportunity for the decline of fisheries."

The board voted unanimously to approve the two-year moratorium.

Before the vote, board members discussed with staff ways to include the meaning of pāku'iku'i in the rules or in some other official way. According to Hawaiian dictionaries and websites for the the Waikīkī Aquarium and Hawai'i Wildlife Fund state that pāku'iku'i describes the beating or slapping of water to scare fish into nets.

Sakoda said that his division is working on including references on its website regarding the meaning of the native Hawaiian names of aquatic species, as well as cultural uses.

A member of the public later requested a contested case hearing on the board's decision, but it was denied as such hearings are not considered to be the proper venue to challenge administrative rule changes.

—Teresa Dawson

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ICA Finds Land Board Failed to Meet Public Trust Duties Regarding Kahala Lot

The public trust doctrine is known to apply to water resources and to conservation lands in Hawai'i. And an August 2019 ruling by the Hawai'i Supreme Court further clarified that all public natural resources are held in trust by the state, as are ceded lands, which are held in trust for the benefit of Native Hawaiians and the general public.

"Accordingly, our constitution places upon the state duties with respect to these trusts much like those of a common law trustee, including an obligation to protect and preserve the resources however they are utilized," the high court wrote in its decision in a case *(Ching v. Case)* regarding the Department of Land and Natural Resources' management of the Pohakuloa Training Area on Hawai'i Island.

That ruling spurred Honolulu attorney David Kimo Frankel to ask the 1st Circuit Court to reconsider a ruling made earlier that year regarding the application of the public trust doctrine to an urban-zoned state parcel fronting the Kahala Hotel & Resort on O'ahu.

The court had rejected Frankel's argument that the Board of Land and Natural Resources failed to meet its public trust duties when it voted in November 2018 to approve a revocable permit to the hotel's owner, Resorttrust Hawai'i, LLC, that allowed for potential commercial use, as well as extensive presetting of equipment that hampered public use. This despite the fact that resort's agreement with the state allowing for the creation of the parcel (known as Lot 41) called for it to be used as a public beach.

In his minute order denying Frankel's motion for reconsideration, the judge Jeffrey Crabtree noted that even though the Hawai'i Supreme Court's decision regarding the Pohakuloa Training Area states that all pubic natural resources are held in trust, "If this broad language was intended to change the recent and specific cautionary language in TMT, surely the Supreme Court would have said so expressly."

The Intermediate Court of Appeals held a different view. In a ruling released on January 29, it unanimously agreed that because Lot 41 is ceded land, public trust principles apply, and that the Circuit Court erred in ruling that they did not.

Lot 41 in 2018, when the resort lined the parcel with rentable cabanas. CREDIT: DLNR.

The majority of the ICA also stated in its ruling, "The circuit court erred in denying Frankel's motion for partial summary judgment because the evidence, even when viewed in the light most favorable to the Board and Resorttrust, did not show that the Board (1) began with the presumption in favor of public use, (2) considered alternatives, or (3) provided a clear analysis when it issued a permit that compromised a public trust resource. …

"The circuit court … abused its discretion in denying Frankel's motion for reconsideration brought pursuant to Ching."

The ICA vacated the circuit court's August 6, 2019 order "denying Frankel's motion for partial summary judgment and August 20, 2019 orders granting the Board's and Resorttrust's motions for summary judgment," and remanded the case to the Circuit Court for "further proceedings consistent with this opinion."

Associate Judge Keith Hiraoka, however, dissented from the majority with regard to its findings that the Land Board failed to meet its public trust duties. He noted that in 2011, the Land Board approved a recommendation from the Department of Land and Natural Resources' Land Division to designate Lot 41 as one to be used for income generation.

He added, "The September 2018 DLNR staff submittal stated that Lot 41 was … 'unsuitable for public auction lease' because of the 'site issues' described in the submittal. This shows that BLNR did 'begin with a presumption in favor of public use, access, and enjoyment' for all 'lands and improvements under [its] control and management[,]' … ; balanced the need to generate revenue to fund the [Special Land Development Fund]; and decided that Lot 41 should be used to generate income that would fund global, long-term protection of all public lands."

Finally, he stated that the permit conditions imposed by the Land Board regarding the placement of equipment on Lot 41 "shows it considered, and complied with, its duty to protect the public's use of the trust resource while balancing the need to use the urban-zoned land for income generation."

Whether there will be an appeal to the Hawai'i Supreme Court remains to be seen. The current permit for Lot 41 held by Resorttrust does not allow for any resort equipment to be placed there, but does allow a shower to remain.

— Teresa Dawson