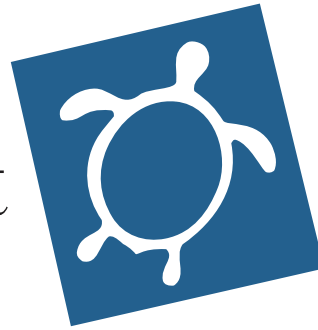


Environment



Hawai'i

a monthly newsletter

Tilting at Windmills

For two decades, the turbines of Maui's very first wind farm have generated power for the Valley Isle, while also taking the lives of uncounted animals, including the state bird, the nēnē, and Hawai'i's only endemic land mammal, the hoary bat, 'ōpe'ape'a. Now, up against a deadline of early next year, Kaheawa Wind Power I must find a way to satisfy the Board of Land and Natural Resources that it should be allowed a new lease despite non-compliance with past terms of operation and also win approval of a new environmental impact statement, habitat conservation plan, and incidental take license.

It's an uphill climb, as our cover article describes in detail.

Also in this issue: an update on the Marconi development, news on the litigation over the Haleakalā trail, the Supreme Court agrees to take on a dispute over East Maui water, and more fighting over West Maui water.

BOARD TALK

Kaheawa Wind Farm Faces Tight Timeline To Mitigate Nēnē Takes Before Holdover Ends

Kaheawa Wind Power I, Maui's first wind farm, is facing the possibility of being shut down. That's the consequence if it fails to comply soon with mitigation requirements for its excessive take of nēnē, the Hawaiian goose that is federally listed as threatened and listed by the state as endangered.

With its 20-year lease for state Conservation District land set to expire on January 31, 2025, the company came close to losing its authority to continue operating the 20 wind turbines that make up the 30-megawatt project. But at its December 13 meeting last year, the state Board of Land and Natural Resources granted the company's request for a one-year holdover permit.

That holdover expires on January 31, 2026. In the meantime, the company must complete an environmental impact statement for a new lease and obtain all required approvals for a new habitat conservation plan (HCP) and incidental take license (ITL).

Whether it can achieve that remains to be seen. A draft EIS was released on August 8. And based on discussions at meetings last month of the state Endangered Species Recovery Committee and the Land Board, the draft HCP is far from acceptable.

Under a new ITL, the company seeks to take 69 nēnē, 38 'ōpe'ape'a (Hawaiian hoary bat), 28 'ua 'u (Hawaiian petrel), 10

continued on page 5

IN THIS ISSUE

2

New & Noteworthy: Court Rebukes BLNR, A Re-Do for CWRM

3

Judge Seeks Briefings on Automatic Approval, SMA Appeal Process in Marconi Point Case

8

Supreme Court to Decide If ICA Erred in East Maui Permit Decision

10

State Commits to Survey, Mark Haleakalā Trail Under Stipulation to Stay Injunction Order

11

Kapalua Golf Courses, Homeowners Sue MLP Over Ditch Management



Kaheawa wind farm, Maui. CREDIT: KAHEAWA WIND POWER I HCP.

Environment

Volume 36, No. 3



Hawai'i

a monthly newsletter
September 2025

NEW AND NOTEWORTHY

Court Rebuke for BLNR: The Hawai'i Supreme Court has issued its ruling in the challenge brought by several Kaua'i groups to the state Board of Land and Natural Resources' issuance of a revocable permit to the seed company Syngenta Hawai'i, LLC.

The challenge, first brought in 2017, alleged that the BLNR should have required the preparation of an environmental assessment before approval of the permit. The Department of Land and Natural Resources had determined – and the BLNR agreed – that the land disposition was allowed under one of the exempt activities in the agency's approved exemption list.

Over the next few years, the lawsuit, brought by Ke Kauhulu o Mānā, Hawai'i Alliance for Progressive Action, Surfrider Foundation, Koholā Leo, and Punohu Kekaulua III, was heard by the 5th Circuit Environmental Court, which upheld the BLNR action, and the

Intermediate Court of Appeals. In April 2024, the ICA remanded the issue to the lower court, with instructions that it consider whether the EA exemption was appropriate.

The plaintiffs appealed to the Supreme Court, arguing that the ICA erred when it ordered the remand instead of finding that an environmental assessment was required as a matter of law.

"We agree with Ke Kauhulu," the high court wrote in its ruling, which held that the BLNR did not follow appropriate procedures or consider appropriate factors in its EA exemption declaration. For this reason, "an EA is required as a matter of law."

The ruling returned the matter to the environmental court "for further proceedings consistent with this opinion, which includes requiring the BLNR to prepare an EA regarding possible environmental impacts from use of the land for seed research."

The September 2024 edition of *Environment Hawai'i* has a lengthy and detailed report on this litigation.

According to CWRM deputy director Ciara Kahahane, the committee will probably meet in September to select candidates to fill two positions. Before scheduling the meetings, she said, she needed to find out if candidates who had previously asked to be interviewed outside of public view would still be interested now that all candidate interviews will have to be public.

There are two vacancies to be filled. At present, Aurora Kagawa-Viviani, whose first term expired June 30, is continuing to serve on the commission as a holdover appointee. She also has submitted her name as a candidate.

Environment Hawai'i reported on the Nominating Committee's secret interviews in our July edition: "Water Commission Nominating Panel Runs Afoul of State's Sunshine Law."

Environment Hawai'i

421 Ka'anini Street
Hilo, Hawai'i 96720

Patricia Tummons, Editor
Teresa Dawson, Managing Editor

Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$70 individual; \$120 non-profits, libraries; \$150 corporate. Send subscription inquiries, address changes, and all other correspondence to:

Environment Hawai'i
421 Ka'anini Street, Hilo Hawai'i 96720.
Telephone: 808 933-2455.
E-mail: ptummons@gmail.com
Web page: <http://www.environment-hawaii.org>
Twitter: Envhawaii

Environment Hawai'i is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: Mark Taketa

Copyright © 2025 Environment Hawai'i, Inc.
ISSN 1050-3285

Directors

Patricia Tummons, *President and Treasurer*
Laura Schuster, *Vice President*
Teresa Dawson, *Secretary*
Deborah Chang, *Director*

A Re-Do for CWRM: The state Commission on Water Resource Management's Nominating Committee – convened for the purpose of forwarding to the governor a list of qualified candidates for vacancies on the commission – is now going to hold all its interviews in public.

Quote of the Month

"They were given an assignment. They did not complete it. Now they're here in court requesting passing marks."

— *Patricia Sendao, corporation counsel for the City & County of Honolulu on Marconi Point companies arguing for automatic subdivision approval*

Shop at Foodland and make a donation to:

ENVIRONMENT HAWAII

77036

Foodland will match a portion of your gift!

Please provide our 5-digit organization code and your Maika'i Member number when making your donation.

Now through September 30

give aloha
Foodland's Annual Community Matching Gifts Program

Judge Seeks Briefings on Automatic Approval, SMA Appeal Process in Marconi Point Case

Should the Honolulu Department of Planning and Permitting's delay in acting on an agricultural subdivision permit for lands result in an automatic approval?

And is there a process by which a landowner can appeal a determination by the DPP that a Special Management Area permit is required?

At an August 29 hearing on a motion for summary judgment (and a motion to defer hearing that motion) in a federal lawsuit filed two years ago by companies owned by the developer of the Marconi Point Condominiums on O'ahu's North Shore, U.S. District Judge Jill A. Otake found that she needed further briefings on those two questions.

The companies' complaint alleges that corruption within the DPP prompted the agency to reverse what they argue was the DPP's position that a Special Management Area permit was not needed for development of the agricultural condominium property regime. And by requiring an SMA permit before further development could proceed, the DPP violated the companies' rights, they argue.

Those companies — Makai Ranch, RCA Trade Center, MP Unit 21 and Marconi Farms — have since shifted their focus away from the corruption allegations, but still argue that their roadway subdivision and agricultural subdivision applications should have been approved without needing to go through the SMA permitting process.

Automatic Approval

Makai Ranch submitted on February 14, 2020, its application to subdivide its 96 acres into four 20- to 23-acre agricultural lots with roadways.

At the hearing last month, Otake asked Patricia Sendao, corporation counsel for the city, about when the clock started ticking on the 30-day timeline for automatic approval.

Hawai'i Revised Statutes Chapter 91-13.5 requires agencies to "take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved." And DPP subdivision rule 2-202(b) establishes a 30-day window for its director to act on a preliminary subdivision map.

That rule suggests that unless the DPP grants a deferral beforehand, its director has 30 days to decide on the application for a ten-



Marconi Point Condominiums property. CREDIT: PETER FOWLER/ENDURE FILMS.

tative subdivision approval before it's deemed automatically approved.

The DPP did not grant a deferral until April 24, 2020. In its deferral letter, the agency listed 14 conditions that Makai Ranch needed to satisfy before the application could be tentatively approved. The initial deadline to meet those conditions was July 24, 2020, but it was later extended at Makai Ranch's request to January 23, 2021.

On August 27 and 28, Makai Ranch attorney Greg Kugle and consultant G70 addressed, but did not exactly meet, the 14 deferral conditions. Instead of satisfying the condition requiring consultation with DPP staff about compliance with the Special Management Area ordinance, Kugle argued against having to meet it. With regard to conditions requiring evidence of compliance with other agency requirements, they argued that the state Department of Agriculture's lack of response to Makai Ranch's Ag Feasibility Study amounted to acceptance of it. With regard to a memorandum of agreement to preserve the property's historic structures required by the state Historic Preservation Division, Kugle said it was being finalized, when, in fact, it was not approved until almost a year later.

After months went by with no response from the DPP, Kugle wrote the department on January 22, 2021, a day before the subdivision application was to expire. He argued

that the DPP's failure to respond to the August letters within 30 days constituted an automatic approval of the application.

At the hearing last month, Otake wanted to know why, if the application was submitted in February and the deferral letter not issued until April, the application wasn't automatically approved in March. Did Makai Ranch somehow waive the automatic approval? she asked.

Sendao said that COVID may have had a role in the delay in the city's response and that under DPP rules, automatic approval did not apply to tentative subdivision approvals.

She also argued that by July, the plaintiffs had assented to proceed with the deferral period deadline.

Sendao ultimately agreed that the February application date started the clock ticking on automatic approval, but said Makai Ranch waived the 30-day deadline when it assented to the timeline set forth in the April deferral letter.

In the city's memorandum supporting its motion, its counsel stated that the Hawai'i Supreme Court held in its 2014 decision in *Kauai Springs, Inc. v. Plan. Commission of County of Kaua'i* "that a party can assent to extending an automatic approval deadline based on that party's conduct before the automatic approval deadline. Public policy favors allowing such extensions to enable counties

to thoroughly and accurately consider the merits of an application, as 'the public should not have to suffer the consequences of having an ill-advised or harmful project go forward.'"

They continued, "Plaintiffs' conduct would lead any reasonable person to believe that they assented to an extension. Plaintiffs requested an extension of the deferral period before the alleged automatic approval deadline on September 30, 2020. DPP then extended the deferral period six months until January 25, 2021. Plaintiffs did not assert that automatic approval occurred until January 22, 2021—days before the deferral period ended and almost four months after the alleged automatic approval date. Before the expiration date, plaintiffs admittedly 'continued to meet with DPP and other agencies to discuss and resolve the deferral comments.'"

They added in a footnote: "Ironically, in a **December 4, 2020** letter, plaintiffs wrote DPP to reinstate expired building permits and requested leniency because of COVID-19 delays."

To Otake, Sendao added that the August letters from Kugle and G70 could not reset the automatic approval deadline. To start with, they did not comply with the deferral conditions, she said. And, she argued, basing the trigger date on the letters would mean that new deadlines could be set "every time they submit correspondence."

"They were given an assignment. They did not complete it. Now they're here in court requesting passing marks," she said.

At the hearing, Kugle did not argue that the agricultural subdivision was automatically approved in March 2020. "It is correct to say we treated their deferral letter seriously," he said. "Our automatic approval argument focuses on the August 28, 2021, letters in which my office and G70 planners provided information." He said they believed they had complied with the conditions and that those letters triggered the running of the 30-day deadline.

He also reiterated how months passed without a response from the DPP.

Otake later asked Sendao why Kugle was wrong, adding that the DPP "sat on their hands for months."

Sendao replied that the plaintiffs had not established that a piece of correspondence would trigger the approval deadline.

Still, Otake took issue with the DPP's delay, asking "Why is that an acceptable process?"

Sendao conceded that it was not acceptable by customer service standards, but argued that did not mean an incomplete application should be automatically approved. She

reiterated the city's position that the plaintiffs had not complied with the deferral conditions.

SMA Determination Appeal

Years before Makai Ranch filed its agricultural subdivision application, in early 2017, the DPP issued a deferral letter on the company's application for a roadway subdivision. The letter included 13 conditions that needed to be met, including compliance with the Special Management Area ordinance.

Again, Makai Ranch resisted and eventually withdrew the roadway subdivision application.

One of the counts in the complaint alleges that the DPP violated the companies' due process rights by withholding approval of the subdivision applications.

The city has argued that no taking of property rights occurred and that DPP did not violate the plaintiffs' procedural or due process rights. It has also argued that the plaintiffs' claims are unripe because the DPP "never issued a final discretionary decision, and plaintiffs have no legally protected interests in their subdivision applications."

"Plaintiffs could have exercised their opportunity to be heard by appealing to the Zoning Board of Appeals. They did not. And DPP's valid use of discretion to protect the SMA does not make its actions arbitrary," the city's counsel wrote.

The plaintiffs' attorneys, however, argue that Makai Ranch had no avenue to appeal the DPP's determination that an SMA permit was required.

"By rule, the Zoning Board of Appeals may hear an 'action of the director,' defined as 'a decision rendered on an application

pursuant to the Land Use Ordinance or the Subdivision Ordinance.' If, as defendants argue, an appeal to the ZBA was available to plaintiffs then DPP has reached a final decision on the matter. Conversely, if DPP has not reached a final decision, the ZBA would have no jurisdiction to hear an appeal, leaving plaintiffs without a meaningful opportunity to be heard. Defendants cannot have it both ways," they wrote.

Briefs

Following the hearing, Judge Otake directed the parties to submit supplemental briefing addressing the following questions:

"(1) Given that defendants [the City & County of Honolulu and DPP] conceded at the hearing that plaintiffs' February 14, 2020 agricultural subdivision application triggered the 30-day deadline for a response, ... and also conceded that DPP did not 'take action to grant or deny' the application within those initial 30 days, did defendants somehow waive the automatic approval contemplated by HRS § 91-13.5? Alternatively, is there a reason HRS § 91-13.5 does not apply to the agricultural subdivision application?"

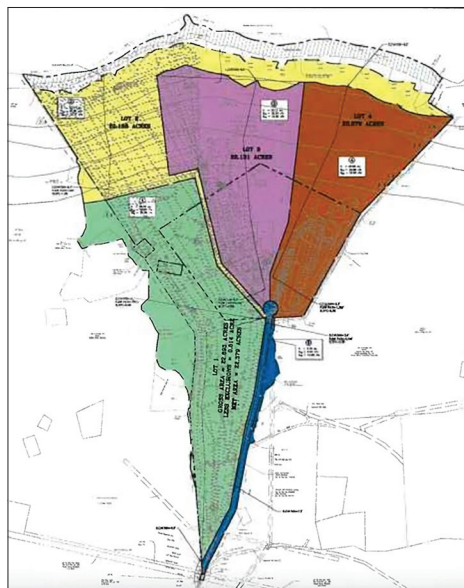
"(2) At the hearing, when asked whether plaintiffs had an avenue to appeal the determination that plaintiffs were required to obtain a Special Management Area permit, counsel for defendants pointed to chapter 25 of the Revised Ordinances of Honolulu. In their Motion for Summary Judgment, defendants instead cited to ROH § 22-3.7(a). How, if at all, does ROH § 25-10.1 affect any of the arguments before the court, in particular the motion for summary judgment's attack on plaintiffs' due process claim and plaintiffs' suggestion that they were forced into withdrawing the roadway subdivision application?"

ROH § 25-10.1 states, "If any person is aggrieved by an order issued by the director pursuant to §25-9.1 and 25-9.2 [which deal with enforcement of SMA rules], the person may appeal the order in the manner provided in HRS Chapter 91; provided that no provision of the order shall be stayed on appeal, unless specifically ordered by a court of competent jurisdiction."

ROH § 22-3.7(a) states, "An applicant aggrieved by an action of the director in the administration of the subdivision ordinance or rules and regulations may appeal to the zoning board of appeals within 15 days after receipt of the notice of such action."

Briefs are due September 12.

— Teresa Dawson



Makai Ranch's proposed subdivision of the Marconi Point Condominiums property.

Kaheawa *continued from page 1*

‘a’o (Newell’s shearwater), and 10 ‘akē‘akē (band-rumped storm-petrel), as well as “impacts of up to 23.2 acres of suitable habitat for the *Assimulans* yellow-faced bee,” according to a DOFAW report.

Even if a final EIS and HCP are accepted and approved in time, there is still the matter of non-compliance with the old HCP.

At the board’s December 13 meeting, the Department of Land and Natural Resources’ Division of Forestry and Wildlife expressed concerns about the facility’s impacts on protected species, especially nēnē.

The estimated cumulative nēnē take at the time of the meeting was 55. But as of April 5, 2024, mitigation by KWP had only earned it 22.6 credits, allowing the take of no more than 23 birds.

“Since April 5, 2024, KWP has diligently worked with DOFAW to raise their mitigation credits through creative solutions and the funding of propagation work. As of October 2024, KWP has approximately 45 credits and needs to complete approximately 10 more credits to mitigate their current cumulative take of 55. Nevertheless, per the HCP, KWP needs a total of 60 mitigation credits prior to the expiration of their HCP and ITL in January 2026 in addition to an additional 5 credits to mitigate lost productivity due to delayed mitigation,” DOFAW’s report to the Land Board stated.

In written testimony, KWP assured the Land Board, “Any impacts to threatened and endangered species during the holdover term ... have either already been mitigated for or will be mitigated for by ongoing programs.”

By the end of fiscal year 2025 (June 30), cumulative estimated nēnē take had increased to 56, according to a DOFAW report last month to the Endangered Species Recovery Committee.

The report continues that as of December 2024, DOFAW and the U.S. Fish and Wildlife Service had allocated KWP 145.68 nēnē mitigation offsets “from management that increased adult survival and fledgling production at Haleakalā and Pi‘iholo Ranch Nēnē Pens.” It was also anticipated that additional offsets from the FY 2025 breeding season would bring the company’s total mitigation offset to “50.3 adult-equivalent nēnē,” the report states.

Despite the improvement, an August 22 DOFAW submittal to the Land Board states that it is “biologically infeasible” for the wind farm to fully offset its nēnē take



Nēnē. CREDIT: TYLER R. STEPHENS.

before the holdover permit expires.

Even so, at the Land Board meeting that day, members voted unanimously to approve a recommendation by DOFAW to hold a public hearing on a draft HCP for a proposed new 23-year incidental take license.

Before voting, Land Board members discussed at length what would happen if the wind farm cannot meet its mitigation requirements under the old HCP.

“Let’s say they don’t make it. They don’t meet the deadline. What happens then?” Maui board member Doreen Canto asked DOFAW administrator David Smith.

“We just try to negotiate down to get some kind of mutually acceptable thing that meets the law. So we try to work with them rather than just shutting people down. ... They need to be showing good faith,” he replied.

To this, Hawai‘i island Land Board member Riley Smith said, “I’m assuming that based on this conversation that there are no consequences for non-compliance.”

“I wouldn’t say there are no consequences. ... It comes down to prosecutorial discretion. ... We could sue them. We could fine them. We could shut them down,” DOFAW’s Smith said.

Land Board chair and DLNR director Dawn Chang, a former deputy attorney

general, suggested that the state’s options were more limited. Non-compliance with an existing HCP “is a basis upon which we cannot consider a new HCP, which would be traumatic because that would mean they would shut down,” she said.

“But you would definitely have their attention. They would understand the consequences of non-compliance,” board member Smith said.

“And that’s what the attorney general’s office did in this case,” DOFAW’s Smith replied. “They came in. There was very little movement on the applicant’s part. The attorney general’s office came in and got them moving based on reading them various options that we had.”

While he wanted to avoid having to shut down any wind farm for non-compliance, Smith said that KWP I dug its own hole.

“I don’t have a lot of sympathy for them. ... If they fail ... it’s on them,” he said, adding, “We’re bending over backwards to try to work with them.”

In testifying before the board, Earth-justice attorney David Henkin argued that the wind farm was already in breach of its current HCP.

Under Hawaii Revised Statutes 195D-21(d)1, he said, “this board is supposed to suspend their existing HCP unless

they have cured the breach in a timely manner, which doesn't sound like they have. And in any event, they need to cure the breach and be in compliance by the end of the permit term, which we know is biologically infeasible."

(HRS 195D-21(d) states, "Notwithstanding any other law to the contrary, the board shall suspend or revoke the approval of any habitat conservation plan approved under this section if the board determines that: (1) Any parties to the plan, or their successors, have breached their obligations under the plan or under any agreement implementing the plan and have failed to cure the breach in a timely manner, and the effect of the breach is to diminish the likelihood that the plan will achieve its goals within the time frames or in the manner set forth in the plan.")

With regard to the draft HCP, Henkin noted that the ESRC was meeting that very same day to discuss and make recommendations on it. Earthjustice attorney Harley Broyles was attending the ESRC meeting. In written testimony, she noted, among other things, that the draft HCP proposed implementing low wind speed curtailment — where turbines do not spin in low wind — when winds were less than 5.5 meters per second. This, despite ESRC guidance that cut-in speeds be no less than 6.5 m/s to minimize bat take.

"Kaheawa I's draft HCP fails to comply with the mandate to minimize take to the maximum extent practicable. The draft HCP proposes implementing LWSC cut-in speeds of 5.5 m/s annually, from February 15 through December 15, as the facility has done since 2014. It is well established, however, that a 5.5 m/s cut-in speed results in significant harm to 'ōpe'ape'a at Kaheawa I, with five documented 'ōpe'ape'a fatalities at the facility since it implemented LWSC with a cut-in speed of 5.5 m/s. ... Additional fatalities and other take undoubtedly have occurred but have not been documented," Broyles wrote.

Indeed, at the ESRC meeting that day, one of its recommendations for bat take minimization was to "explore smart curtailment (activity by time of night) and higher wind speed cut off."

The committee was scheduled to visit the facility this month.

In his written testimony to the Land Board, Henkin suggested, "Before the board commits to a public hearing, with the associated demands on the board's and the public's limited resources, it should wait to hear whether the ESRC recommends approval of this draft HCP."

Testifying before the board, he added, "Much as we'd like to have them have a [incidental take] permit, we want to see a legal permit and this draft is going to change a lot, so going forward with a public hearing at this point just seems premature."

"Whether this applicant should have permission to harm our native species given their lousy track record ... will ultimately be up to this board to decide," he said.

In response to Henkin's testimony, DOFAW's Smith said that he couldn't see the benefit of cancelling the HCP at this point. "The board can do it if they want. We would rather try to work with them," he said.

"It's been argued that they aren't going to be able to make it [nēnē take credits] up by the end of their permit term and I have been advised that puts them into breach. But I also think that you could argue it's not a breach until their permit term is up. ... I know there's been very smart people who have argued against me on that. That is where I'm coming from. I think they're not actually in violation until the end of the permit," Smith continued.

Land Board member Riley Smith agreed.

"You shouldn't cite someone for non-compliance until the time runs out. If [Kaheawa] makes a good faith effort to get there but doesn't get there, but then there's some assurance that [it] will be able to comply, whether through a bond or some other obligation that has consequences to it, I think there's a way the state's interest can be

protected and puts the applicant on a path to being in compliance.

"All our meetings are public record. I'm surprised Kaheawa isn't here, but I'm sure they're going to watch this, and they're going to listen to all the comments that we're making," he said.

Ian Hirokawa of the DLNR's Land Division, which is processing Kaheawa's request for a long-term lease, said his agency is working to get a new lease to the board for approval before the holdover expires.

"We're potentially looking at how we can address [the HCP] in the lease knowing there is sort of an uncertainty," he said.

Chang repeated that if the wind farm is not in compliance with the HCP, "arguably they're in breach, and, therefore, we may not be able to issue them a lease."

To this, Hirokawa said the department could look at including a bond requirement in the lease.

"Or we could just have them shut it off," Chang said. "I think what we've been trying to do is insure uninterrupted service so that they don't shut off, but the burden has been back on Kaheawa. They've known this as of a year ago when their lease expired and the board took an extraordinary action to issue a holdover to give them that additional time for an EIS and an HCP. It's not that they're not aware. The department has done everything that it can."

Afsheen Siddiqi, DLNR seabird and waterbird recovery coordinator, noted that HCPs require funding assurances, usually a letter of credit, but "it can be a bond."



'Ōpe'ape'a (Hawaiian hoary bat). CREDIT: DLNR.

"That is for the purpose if they don't meet the mitigation criteria, we can actually take money from the bond, so there is a mechanism. We have never actually taken that. And I don't know the details of this specific HCP, what those numbers look like," she said.

"If they're not going to make the mitigation, then they should be talking about the bond," Chang said, adding that those kinds of conversations with Kaheawa should start no later than October or November "to make sure that they're in compliance so Land Division can even consider a new lease."



Public Hearing Approved for KIUC Habitat Conservation Plan

The Kaua'i Island Utility Cooperative has been harming or killing protected species with its power lines and street lights for decades without an approved habitat conservation plan and incidental take license from the state. But that may soon change.

At the Land Board's August 22 meeting, the DLNR's Division of Forestry and Wildlife requested that the board approve a public hearing on a second draft HCP that KIUC had prepared in its effort to obtain both a federal incidental take permit and a state ITL.

DOFAW administrator David Smith explained, "Currently there's no permit. Not a federal or a state permit. That's why we're trying to rush. We really want to get a permit because, technically, they're not even liable for their damages at this point unless we take them to court. We just have prosecutorial discretion. We just haven't done that because we're working with them."

He added that although the HCP has yet to be approved, mitigation work is already being done. "They have really *really* good people working on it. ... Everybody's decided to hold fire against going against them because one of the alternatives would be [to] shut down all the power lines on Kaua'i, or make them take it down. I don't know what the alternative would be."

Earthjustice attorney David Henkin testified, "We have also been exercising our prosecutorial discretion because citizens can sue them under the Endangered Species Act."

He said that while he was also eager for KIUC to obtain a take permit, he thought that the state's Endangered Species Recovery Committee should at least have a chance to review and make recommendations on the

second draft before it is presented at a public hearing.

"The ESRC has never met to evaluate the scientific adequacy of the second draft KIUC HCP. The ESRC reviewed an earlier draft of this HCP over two years ago (on February 28 and March 1, 2023) and raised serious questions at that time regarding whether its conclusions about take minimization and mitigation were scientifically justified. Since that time, KIUC has lost access to the Upper Limahuli Preserve at the National Tropical Botanical Garden, which was a key component of KIUC's mitigation strategy, calling into question whether the current draft HCP satisfies legal requirements. The ESRC should review the adequacy of KIUC's revised draft HCP at a formal meeting (at which the public, including scientific and other technical experts, can provide input) and make its recommendations before the board makes any decision about whether to proceed with a public hearing," he stated in written testimony.

"You should know before you put this out for public hearing whether the science is good," he said.

"One of the cornerstones of mitigation [in the draft HCP] is the preservation of the upper Limahuli Preserve on National Tropical Botanical Garden property. Some issues have arisen with the contractor that KIUC brought in that started introducing little fire ants and weeds into the upper Limahuli preserve. They currently do not have access to that property," he said.

Former NTBG CEO and a current member of its board of trustees Chipper Wichman also expressed concern about the draft plan.

"We've been in discussion with KIUC since April. ... I'm not sure we're any closer than we were four months ago. Our property has more Newell's shearwater nests than all the other sites combined. It's a critical part of the HCP and I would hope that the public would be able to know whether that property is in or out when they comment on the draft. We want to be part of it, but we need assurances we'll be treated fairly and the contractor will respect our biosecurity policies," he said.

According to KIUC's Dawn Huff, the public hearing, if approved, would likely be held on September 16.

Smith also noted that one reason his division is pushing to hold the public hearing without having to wait for the ESRC to weigh in is to keep up with the federal ITP process.

Afsheen Siddiqi, DLNR seabird and waterbird recovery coordinator, added that the division also doesn't want to go to a public hearing saying the ESRC has already decided on the plan.

Should the ESRC ultimately reject the plan, the Land Board would not be able to approve it. It would then need approval from two thirds of the state Legislature. Or, KIUC could present a third draft to the ESRC and the board.

Henkin informed the board that even if the federal government approved an ITP and the HCP, the permit would not be valid until the state issued its ITL.



Land Board Gets Two New Members

The Land Board has two new members replacing former members Vernon Char and Aimee Barnes.

Denise Iseri-Matsubara is the new member for O'ahu. Calvin Young is the new at-large member.



Denise Iseri-Matsubara
CREDIT: DLNR.

Iseri-Matsubara is the executive director of Catholic Charities Housing Development Corporation, which, according to a press release from the governor's office, is "focused on developing and managing affordable housing

for seniors and disadvantaged communities. She previously led the Mayor's Office of Housing for Honolulu and served as executive director of the Hawai'i Housing Finance and Development Corporation, where she also sat as a board member."



Calvin Young. CREDIT: DLNR.

Young is a partner at the lawfirm Goodsill Anderson Quinn & Stifel and a past president of the Hawai'i State Bar Association.

Both are graduates of Kamehameha Schools.

— Teresa Dawson

Supreme Court to Decide If ICA Erred in East Maui Permit Decision

Last month, the Hawai'i Supreme Court granted applications for a writ of certiorari from both sides of a case involving the state Board of Land and Natural Resources' renewal of permits to Alexander & Baldwin and East Maui Irrigation Company that allowed the continued daily diversion of tens of millions of gallons of stream water from East Maui to Central and Upcountry Maui.

Oral arguments will not be held.

In this case and older, related cases, the Sierra Club of Hawai'i has argued that the Land Board violated its trust duties by allowing the companies to divert more water than they need, while lower reaches of some of the East Maui streams that supply the water are left dry most of the time.

Late last year, the court heard oral arguments over an April 2024 Intermediate Court of Appeals ruling that the Sierra Club of Hawai'i was not entitled to a contested case hearing on permits granted to A&B and EMI by the Land Board for stream diversions through 2021, and that the Environmental Court erred in modifying the amount of water that could be diverted under those permits.

The high court has still not issued a decision when, on April 30, the ICA issued a similar ruling in a case involving the Sierra Club's appeal of the Land Board's November 2022 approval of permits to the companies for stream diversions through 2023, as well as the board's denial of the group's contested case hearing request.

The recent ICA decision vacated rulings by the Environmental Court, which had found that the Sierra Club was entitled to a contested case hearing and which had lowered the amount of water that the companies could divert in the meantime.

The ICA also reversed the lower court's ruling that the Sierra Club was entitled to attorney's fees from A&B and EMI.

The ICA found that the Sierra Club had standing to request a contested case hearing, but was not entitled to one.

"Here, in addition to the 2020 trial [on earlier permits] and BLNR's 2020 public meeting discussed in Sierra Club I, Sierra Club has participated in a contested case hearing on the 2021 and 2022 permits, and presented evidence and testimony at BLNR's 2022 public meeting and 2022 hearing on the petition," the ICA wrote. "BLNR's June 30, 2022 contested case order on the 2021 and 2022 permits was issued just four months

before its public meeting on the 2023 permits and its hearing on Sierra Club's [contested case] petition. BLNR considered the same issues about water usage and loss, alternative resources such as groundwater, mitigation measures such as placing liners in reservoirs, and a pending [Commission on Water Resource Management interim instream flow standards] decision, Sierra Club raises here. ...

"We again conclude that the minimal additional protection a contested case would have provided to Sierra Club under the circumstances of this case are outweighed by the fiscal and administrative burdens a contested case would impose on BLNR, the County of Maui, and potentially on those living or working in Upcountry Maui. We hold that Sierra Club was not denied constitutional due process by BLNR's denial of its petition for a contested case hearing on the 2023 permits," the ICA wrote.

In its June 26 application for a writ of certiorari, the Sierra Club argued, "The ICA's conclusion is primarily based on two false premises. First, the ICA erred in finding that the Sierra Club was obligated, and failed, to provide new evidence. Second, the ICA overlooked the importance of cross examination."

David Kimo Frankel, the Sierra Club's attorney, stated that the organization was barred from cross examining the Water Commission about new groundwater data on sustainable yields of the aquifers available to the companies and A&B about its groundwater use.

The group was also "unable to rely on cross examination to undermine the credibility of A&B's witnesses who had previously testified falsely under oath about how much water was needed for historic/industrial uses. The Sierra Club was unable to ask questions about CWRM's determination as to how much water was actually needed for diversified agriculture, the conflict between how much water A&B claimed was needed for diversified agriculture in 2022 and how much was actually used, how long it would take to implement the measures CWRM determined are needed to protect streams, and from which streams A&B was planning to increase its diversions. BLNR denied the Sierra Club the ability to cross examine witnesses about this new evidence, cross examine witnesses about the credibility of prior statements in light of the new evidence, or obtain information that only A&B possessed.

"Consider just this one example: BLNR's June 2022 decision concluded that groundwater was not available to irrigate crops, but new evidence demonstrated that groundwater is being, and can be, used. At BLNR's decision-making meeting, A&B claimed that it could not rely on groundwater. The Sierra Club was not given an opportunity to cross examine EMI's Mark Vaught as to his false claim that groundwater information was 'old data.' A&B's final EIS, published just a year earlier, contained current data and states that the sustainable yield is 32 mgd. Even more importantly, CWRM came to the same conclusion after the 2021-22 contested case hearing. A&B's Meredith Ching complained to BLNR that 'Mahi Pono is not the only user of that aquifer.' But the Sierra Club was not given the opportunity to cross examine her or show that all the other users of water use less than 1 mgd combined."

In its application for a writ of certiorari, the state, represented by deputy attorney general Miranda Steed, argued that the ICA erred when it found that the Sierra Club had standing to seek a contested case. Also, Steed argued that the Land Board lacked the authority to grant the relief the Sierra Club sought. Increasing stream flows, she argued, fell under the exclusive jurisdiction of the Water Commission, which establishes the minimum amount to water that must remain in streams.

"The 'cause' of Sierra Club's alleged environmental injury is insufficient stream flow protection—not the existence of water users with Board permits. Only CWRM may increase IIFS or implement other stream protections," she wrote.

"Sierra Club essentially seeks to have the cap [for the] amount of water for the 2023 [revocable permits] lowered. Lowering the cap would not guarantee that the permittees would divert less water from any given stream. In fact, the permittees could increase water diverted from some streams even with a lower cap. This is because the cap applies to the total amount of water diverted, not how much water may be diverted from a specific stream (as opposed to the IIFS). Thus, Sierra Club's alleged injuries in too much water being diverted from any given stream could occur even with the cap the Environmental Court imposed," she continued.

She stated that while the Land Board acknowledges its public trust obligations, its authority to grant dispositions for water and

impose conditions “does not extend to independently regulating stream flows, system losses, and alternative sources in a manner that would effectively duplicate or potentially conflict with CWRM’s regulatory authority.”

She asked the high court to determine whether the ICA erred in concluding that the Sierra Club had standing and that it had protected property interests under the state Constitution’s article XI, section 9 as defined by Hawai’i Revised Statutes 171-55, the state law governing the Land Board’s issuance of water permits, and Chapter 343, the state’s environmental review law.

In the Sierra Club’s response, Frankel called the state’s application “audacious,” adding, “It demonstrates a remarkable betrayal of its trust duties.”

The Land Board was arguing that it “lacks the authority to protect our streams and require the conservation of water. Its argument is inconsistent with the law and its own practice, and demonstrates how far it has strayed from fulfilling its trust duties. The premise of BLNR’s claim that it is powerless to provide relief is flawed for nearly a dozen reasons,” he stated.

He went on to list ten reasons, first pointing out that under the Hawai’i Supreme Court’s 2014 decision in the *Kaua’i Springs* case, in which a private water bottler sued the Kaua’i Planning Commission, trust obligations to protect water resources “are imposed on all agencies, not just CWRM.”

“Just as the Kaua’i Planning Commission needed to ensure that the applicant implemented mitigation measures, so too did BLNR. Just as the Kaua’i Planning Commission was obligated to require that a commercial applicant demonstrate the absence of alternative water sources, so too was BLNR. Just as the Kaua’i Planning Commission was required to ‘preserve the rights of present and future generations in waters of the state,’ so too was BLNR,” he wrote.

He also pointed to a 2003 decision by 1st Circuit Judge Eden Hifo, in which she held that the Land Board could not just rubber-stamp Water Commission decisions and was “obligated to make a truly independent investigation as to whether it’s in the state’s best interest to authorize the diversion of water from East Maui streams.”

And for 2016, Frankel continued, the Land Board included a condition in its approval of water permits that year for A&B and EMI that no diversion of water would be permitted from Honomanu Stream. He added that in 2007, the Land Board ordered A&B to allow 6 million gallons a day to flow in Waiokamilo Stream.

“These isolated efforts demonstrate



A stream diversion in East Maui. CREDIT: SIERRA CLUB OF HAWAII.

that BLNR has the authority to protect our streams. BLNR cannot blow hot and cold. It is judicially estopped from arguing that it lacks the power to protect streams,” he wrote.

In the Land Board’s response to the Sierra Club’s opposition, Steed noted that the Sierra Club “claims injury because its ‘members live along and draw water from the streams in the license area for their own residential and farming purposes.’

“However, Sierra Club’s arguments focus entirely on how water is managed after it is diverted from streams, not on how much water remains in the streams. Sierra Club disputes how efficiently the permittees use water and whether end-users (not the permittees) should be required to line ditches. None of these measures address Sierra Club’s core alleged injury—insufficient water remaining in streams. The BLNR mandates that diverted water be put to reasonable beneficial use, but this is a separate issue from how much water remains in the streams.

“Sierra Club’s alleged injury can only be remedied by increasing the amount of water that must remain in streams—i.e., by adjusting instream flow standards. Only CWRM has authority to establish and modify instream flow standards under HRS § 174C-71. The BLNR cannot order more water to remain in streams; it can only regulate the

terms under which already-authorized diversions occur.”

Although the permits involved in this case have expired, any decision by the Hawai’i Supreme Court may affect current and future permits. The Sierra Club appealed the Land Board’s decision late last year to grant a new stream diversion permit to A&B and EMI for 2025 and to deny the group’s contested case hearing request.

That appeal, which is ongoing, also raises the issues of new information and the need to cross examine witnesses.

— Teresa Dawson

For Further Reading

- “Water Roundup: Waihe’e ‘Auwai Restoration, East Maui Flow Standards, and More,” October 2022;
- “Water Commission Defers Scaling Back Restoration of Three East Maui Streams,” December 2022;
- “Court Orders Reduction in Diversions Of Water from East Maui Streams,” July 2023;
- “Court, Land Board Are Set on Same Day To Deliberate on East Maui Diversions,” December 2023; and
- “State Supreme Court Hears Arguments On Whether ICA Erred in East Maui Case,” December 2024.

State Commits to Survey, Mark Haleakalā Trail Under Stipulation to Stay Injunction Order

On July 25, two months after its basic terms had been worked out, a stipulation for a stay of an order for injunctive relief regarding access to the historic Haleakalā Trail was finally filed with the 2nd Circuit Court.

Public Access Trails Hawai'i and its founder, David Brown, initiated the lawsuit seeking injunctive relief, among other things, to wrest control over use of the state trail from Haleakalā Ranch Company. The trail bisects property owned by the ranch.

The injunction was initially set to take effect on April 1, but that start date was pushed to May 22, when the court was to hear a motion by the state to modify the injunction, as well as a motion by plaintiffs PATH and Brown for an order to show cause for civil contempt.

The injunction would have prohibited anyone other than pedestrians and cultural practitioners exercising their rights or practices from using the six-foot wide, three-and-a-half mile long trail.

Before the May hearing in support of its motion to modify, the state offered declarations from a number of people and entities — including The Nature Conservancy of Hawai'i, adjacent property owners, Mahi Pono and the state Division of Forestry and Wildlife — that require vehicular access to

Haleakalā Ranch's Olinda gate, which lies within the trail's path.

By that time, 2nd Circuit Judge Peter Cahill had modified the order to allow Maui Electric Company and the Maui Department of Water Supply access to the gate and portions of the trail to maintain utilities.

At the May hearing, Cahill made it clear that he wanted the historic trail surveyed and marked in accordance with the metes and bounds previously approved by the court. A declaration from Haleakalā Ranch's president and CEO J.Scott Meidell claimed that the trail was dangerous and impassable in places due to a steep 30-foot cliff and invasive gorse. Another by DOFAW administrator David Smith suggested that it would be impracticable for his staff to cross such terrain to conduct resource management activities.

Cahill, however, wanted the trail marked where it is first, with the resolution for users that need an easier route to be worked out later.

According to PATH's attorney Mike Biechler, the trail is not anywhere near as problematic as it had been made out to be.

PATH and Brown dispute that a cliff or gulch make the trail inaccessible by hikers.

Biechler, in an email to *Environment Hawai'i*, noted that more than a decade ago, the court adopted findings by surveyor Anthony Crook "as the basis for the trail's location following the 2014 trial and jury verdict [confirming that the state owned the trail]. Crook testified that the route he determined to be the historical trail in the area of the Kailua Gulch was 'passable by pedestrians or horses.' The dispute will likely be resolved soon as the plaintiffs and state entered, and the court approved on July 25, 2025, a stipulation to suspend the injunction to allow for the state to survey and mark the Haleakalā Trail by the end of 2025."

Biechler stated that the state's attorneys "have not shared anything with us indicating that they are moving forward" with the new survey. "We did a document request regarding the survey and are awaiting a response from DLNR to see if they are responsive documents," he added.

Biechler concedes that based on his own hikes attempting to locate

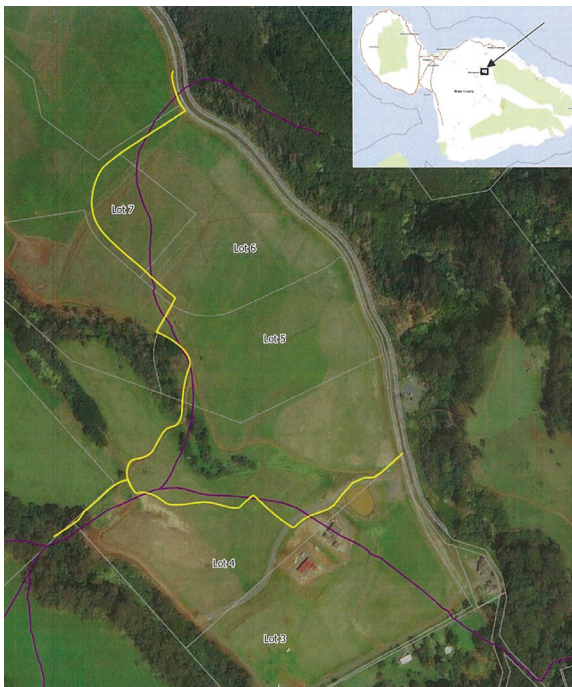
the trail using cell phone location services, GPS devices and drones, "yes, there is some gorse on the trail at certain points." However, he added, "I did not encounter any sections that were so large they were impassable while staying on the trail. However, there were large patches in the area where we believe the trail to be."

He pointed out that the July 25 stipulation, which stays the injunctive order until January 1, "does not require the state to maintain or clear the trail so, outside of a settlement, I do not think anything that comes from this stay and pending survey marking of the trail would result in any requirement for the state to clear and maintain the trail. They have been openly hostile to the idea of doing that for the entire litigation."

Although Crook's report identified two passable pedestrian paths across the gulch, Biechler stated that the trail's location is set by court judgment, "so there is no 'wiggle room,' but if the state and Haleakalā Ranch can reach an agreement (or if the ranch unilaterally allows the public to access certain areas to engage in recreational hiking of the trail), the public could be allowed to deviate onto ranch land to make using the trail more easy or convenient at certain locations. Right now, and for the foreseeable future, the only way the public can legally hike the trail (without being on a Sierra Club guided hike) is to stay on the state-owned 6-foot public right-of-way, so the public could not chose to go the second route to cross the gulch without trespassing and subjecting themselves to whatever civil and criminal liability goes along with that."

With regard to the need by many for vehicular access through parts of the trail, Biechler stated that this is "somewhat separate from the locating the trail issue. PATH has never been opposed to the gate/trail being used for other sorts of access besides pedestrians, i.e., water company, Baldwin family properties inside the gate, TNCH. PATH's position was that pedestrians must be allowed access and not be prohibited by a private company HRC from accessing public lands, that the state cannot allow HRC to prevent public pedestrian access, and that the HRC has de facto retained private ownership of the trail despite the previous court judgment."

— Teresa Dawson



Trail location recommended by DOFAW staff in 2021 (yellow) and "apparent location digitized by trace" from 1872 registered map 603. CREDIT: DOFAW.

Kapalua Golf Courses, Homeowners Sue MLP Over Management of Ditch System

The allocation of water in west Maui is a complicated issue. In 2022, the state Commission on Water Resource Management voted to designate both stream and surface waters as management areas, with all existing and new users required to apply for water use permits – a process that is still ongoing, with no permits issued to date.

The Public Utilities Commission is involved as well, with an open docket in which the owner and operator of the two Kapalua golf courses – TY Management – seeks to require Maui Land & Pine to be regulated as a water service utility.

Now the courts are involved. On August 18, TY Management, associations of owners of homes in Kapalua, and Hua Momona Farms, LLC, collectively sued MLP in 2nd Circuit Court. They allege that MLP has been negligent in managing the legacy ditch system that supplies their irrigation water, breaching its legal obligations to them and causing them real harm.

Or, as the complaint states, “the Honokohau Ditch System, on which residents, farmers, and businesses in Kapalua and parts of West Maui all depend, is owned by an often-struggling, once-nearly-bankrupt, former plantation company. ... MLP is doing a terrible, actionable job of complying with its responsibilities. ... This must stop; water users cannot bear MLP’s incompetence any longer.”

Representing TY locally is the firm of Lung Rose Voss & Wagnild, as well as the Washington, D.C., firm of Perkins Coie, recently in the news as a result of being targeted by Donald Trump for having represented Hillary Clinton’s campaign in 2016.

Among other things, the lawsuit alleges that MLP is not abiding by its agreements with the plaintiffs to distribute water in a “non-discriminatory fashion.”

For most of the last year, the users of non-potable water supplied by MLP have been under restrictions, including, for much of the time since March, “Tier 4” restrictions, allowing water to be used only for fire-fighting purposes.

“As of the filing of this complaint,” the lawsuit states, “plaintiffs last had access to water for irrigation on July 24, 2025.”

Yet “simply looking at properties owned by MLP, as well as at properties like the Ritz-Carlton, Kapalua, reveals grounds that are lush and green. Those properties



Kapalua Bay Course #4 and #5 greens, December 19, 2024 (top) and August 12, 2025 (bottom).

CREDIT: 2ND CIRCUIT COURT COMPLAINT.

must still be receiving water, even though there has been no allowable use of irrigation water since July 24, 2025, for any of Kapalua’s businesses or residents,” the complaint states.

“Thus, MLP is not reducing irrigation water for existing users in Kapalua in a

‘nondiscriminatory manner’ as required by the water delivery agreements.”

TY alleges substantial financial harm as a result of curtailed water delivery. Because of the deteriorated state of the golf courses, the complaint states, “TY has had no choice

continued on page 12



Sign me up for a ☐ new ☐ renewal subscription at the
☐ individual (\$70) ☐ non-profits, libraries (\$120)
☐ corporations (\$150) ☐ economic downturn (\$45)

To charge by phone, call 808 933-2455

For credit card payments:



Account No.: _____ Exp. Date: _____

Phone No.: _____

Signature of account holder: _____

name _____

address _____

city, state, zip code _____

email address _____

Mail form to:

Environment Hawai'i

421 Ka'anini Street

Hilo, HI 96720

We are a 501(c)(3) organization. All donations are tax-deductible to the extent allowed by law.

MLP Sued *continued from page 11*

but to reduce the rate it charges,” from \$279 to \$99 at the Bay Course, and, at the Plantation Course, from \$469 to \$199. In addition, it says, “Due to the deteriorating condition of the courses, TY also expects that it will have no choice but to imminently close the courses.” In addition, it states that should the water not be restored to the courses, the PGA might decide to cancel its 2026 The Sentry tournament in Kapalua, scheduled to be held in early January. According to the lawsuit, this event “generates more than \$48 million for Maui’s economy, supporting small businesses, local jobs, and nonprofits.”

As for the other plaintiffs, they, too, allege that MLP has been negligent in maintaining its water delivery system and has breached its agreement with Hawai'i Water System, the purveyor that purchased MLP's water and wastewater services in 2021. As HWS customers and “third-party irrigation water users,” they have also experienced harm by MLP's curtailment of irrigation water, they state.

MLP had not filed a response to the complaint by the time *Environment Hawai'i* went to press.

Meanwhile, Courses Closed

In late August, TY announced it would, indeed, be closing both courses to play, starting September 2. The closures are expected to last at least two months.

In mid-July, Hawai'i Water Service, the privately owned utility serving Kapalua and other communities statewide, announced it would be lifting Tier 4 restrictions – the most restrictive, prohibiting all irrigation – in light of weather forecasts calling for rain. Tier 3 restriction allowed for irrigation at levels up to 40 percent of normal. By July 4, Tier 4 limits were in place once more, prohibiting all irrigation with non-potable water.

On August 23, the company an-



The Ritz-Carlton's lawns and landscaping appeared to be green and well-watered as recently as August 6, 2025. CREDIT: 2ND CIRCUIT COURT COMPLAINT.

nounced that the Commission on Water Resource Management “has allowed the temporary use of groundwater as a substitute for surface water during low (stream) flow periods, pending commission action on Hawai'i Water's water use permit application.

“Due to the above confirmation, we will be lifting our Tier 4 water conservation requirement and moving into a Tier 2 water conservation status, or 40 percent reduction of normal water use. We will be allowing non-potable water irrigation at Tier 2 until further notice.”

By August 29, the company said that, based on its meter readings, the restrictions were not being observed by all customers. “Unfortunately,” it said, “if customers do not immediately observe the conservation guidelines, we will be required to restrict irrigation to zero usage until the reservoirs can be refilled.”

Two days later, with ongoing non-compliance, the company issued the following announcement: “Due to serious drought

conditions, we are currently in the Tier 4 stage of conservation, which restricts ALL non-potable outdoor irrigation to zero usage. In order to provide adequate water supply for fire protection, we will interrupt the flow of water to any property that is not in compliance.”

Before the PUC

As *Environment Hawai'i* reported in May, TY Management had complained to the PUC about the sudden and drastic increase in rates that MLP had proposed. Since then, the PUC has opened a docket into the complaint, and both Maui County Department of Water Supply and Hawai'i Water Service have requested to participate in the docket.

At issue is whether MLP should be regulated as a public utility, a proposition that MLP has vigorously disputed. It also has objected to the participation of Hawai'i Water Service and Maui County DWS in the PUC proceedings.

— Patricia Tummons