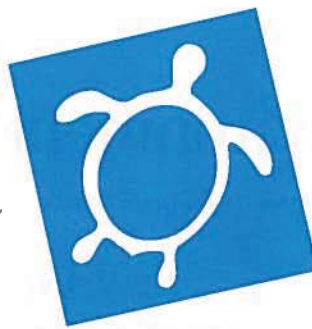


Environment



Hawai'i

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Sea Turtles In the Soup

What's good news for the vessels that chase swordfish could be bad news for the loggerheads and leatherbacks that cross paths with them.

The latest biological opinion by the National Marine Fisheries Service pretty much clears the way for more effort directed to swordfish. And, apparently in keeping with the view that if you didn't see it, it didn't happen, the NMFS is inclined to remove the requirement that observers be present every time a swordfish vessel leaves the docks. Whether this puts paid to the ever-present threat of litigation over turtle protections is anyone's guess.

New Biological Opinion on Turtles Pleases Hawai'i Swordfishing Fleet

In the end, the longliners were worried for nothing. In fact, things may now get a little easier for them.

On January 30, the National Marine Fisheries Service issued its new biological opinion (BiOp) on the effects on sea turtle populations that would result from removing fishing limits on Hawai'i's shallow-set longline fleet.

Its conclusion: lifting the limit is not likely to jeopardize any of the six federally listed species that interact with the fishery, including endangered loggerhead and leatherback sea turtles.

The BiOp grew out of a lawsuit filed in December 2009 by the Center for Biological Diversity, the Turtle Island Restoration Network and KAHEA: the Hawaiian-Environmental Alliance over the NMFS's adop-

tion of a council proposal — known as Amendment 18 — to lift the effort limit on the Hawai'i-based shallow-set longline fleet.

The amendment also nearly tripled the number of allowable interactions with loggerheads, a change that flew in the face of the impending uplisting of loggerhead sea turtles from threatened to endangered, the groups argued.

To avoid lengthy litigation, the NMFS agreed to suspend the implementation of those portions of Amendment 18 and its associated biological opinion that related to the two turtle species while it prepared a new BiOp.

In the new BiOp, the NMFS determined that the Hawai'i swordfish fishery will likely

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Abercrombie, Inouye Offices Accused Of Interfering with Hearing on Telescope

The long contested case hearing over the proposed \$300 million Advanced Technology Solar Telescope (ATST) on Maui took an unusual twist last month, with the hearing officer alleging "inappropriate ... pressure and activity by U.S. Senator Inouye's and the Governor's offices."

As a result, on March 23, the Board of Land and Natural Resources, which had appointed attorney Steven B. Jacobson to hear the contested case, met to decide what to do next. In an order addressing the issue, Land Board chairperson William Aila set forth possible actions:

1. Striking the report ... from the record;
2. Discharging the hearing officer, Steven

Jacobson, as the hearing officer in this case; and

"3. Retaining a new hearing officer to review the record of the proceedings ... and to issue a new hearing officer's report and proposed findings of fact, conclusions of law, and decision an order. The new hearing officer would be authorized to conduct additional fact finding as necessary."

A Drawn-out Hearing

Until March 15, the contested case had followed a pretty normal course. The decision prompting the contested case occurred in December 2010, when the Land Board ap-

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Telescope from page 1

proved the award of a Conservation District Use Permit for the construction of the ATST, a project of the National Science Foundation to be built at what is called Science City, atop Haleakala. The area, which is state land under the control of the University of Hawai'i, has been built up over the years with several telescopes and ancillary buildings.

For as long as the telescope has been proposed, a group calling itself Kilakila O Haleakala (Majestic is Haleakala) has opposed it. On February 11, more than two months after the CDUP was granted, the board approved the appointment of a hearing officer—although it stopped short of deciding whether Kilakila was entitled to a contested case. As Jacobson later wrote, “the hearing officer’s designated duties included (i) holding a preliminary hearing on standing, and preparing proposed findings, conclusions, and a recommended decision on standing, and, if appropriate, (ii) holding a hearing, and preparing proposed findings, conclusions, and a recommended decision, on the merits of the CDUA.”

Last July and August, the hearing itself was held over three days, with witnesses called and testimonies submitted. Following that, the University of Hawai'i (which had applied for the permit) and Kilakila were given time to submit their proposed findings of fact and decision, which Jacobson then was to take into account in preparing his own.

That process took a long time. In an article on the ATST that appeared last October in *Nature*, Jacobson was quoted as saying he would issue his recommendation before that month’s end. In December, Jacobson told *Environment Hawai'i* his decision would be issued “soon,” and in no case later than year’s end.

It was not until late February that Jacobson turned in what he now calls his “interim” decision—a rambling, disorganized, and (by

projects like Big Wind. They have their agenda and FIT is not at the top of their list.”

Once the PUC completes its two-year review of the program, it may or may not release another chunk of capacity. But if the reliability standards working group finds that no other projects should be allowed, that issue is moot, he says.

Whether or not the group will be ready to make such a recommendation in time is unclear. Moriwake says that with regard to the group’s overall goal of finding solutions in a short time frame, it hasn’t made any progress.

— T.D.

Jacobson’s own, later admission) incomplete document that was replaced by a more succinct report on March 12. The most significant finding in both reports was unchanged, however: that Kilakila was not entitled to a contested case hearing in the first place, and that the Land Board’s award of a CDUP to the university stood. (In the second report, Jacobson did propose several additional conditions to those that attached to the Land Board’s original permit, mostly setting limits on construction operations.)

Ex Parte Communication

Three days after submitting his amended report, Jacobson sent an email to Lisa Munger and other attorneys who represented the university in the contested case hearing.

“Now that my report and recommended decision are out,” Jacobson wrote, “I need to address the question of whether certain disclosures are required.

“Because of inappropriate ex parte pressure and activity by U.S. Senator Inouye’s and the Governor’s offices, I was essentially required to file the incomplete report and recommendation you received in late February.

“Those pressures did not affect the contents of the interim report, other than its obvious incompleteness, and had no effect whatsoever upon my final report and recommended decision, other than to delay their issuance. I am not about to sacrifice my integrity or breach my ethical responsibilities to make a Senator or Governor happy.”

Jacobson goes on to say that he had consulted “the appropriate ethical offices,” which have advised him that “no disclosures are required as long as (1) neither UHIfA [the university Institute for Astronomy] nor its counsel had anything to do with what the Senator’s and Governor’s offices were doing, (2) the Board and courts disregard the interim report and recommendations and consider only the final report and recommendations (to the extent they consider them at all), and (3) Kilakila is not prejudiced by being short-changed in time to respond to the final report and recommendations.”

He concluded by asking Munger and her colleagues directly “whether any of you had anything to do with what the Senator’s and Governor’s offices were doing.”

Instead of replying to Jacobson, Munger forwarded his email to Linda Chow, deputy attorney general assigned to represent the Land Board.

Jacobson prepared a statement for the Land Board to consider at its March 23 meeting, in which he elaborated on his claims of political interference.

While preparing his decision, Jacobson

wrote, “considerable ex parte pressure was placed upon me to simply spit out a recommended decision quickly.” That pressure included requiring him to make daily reports to the Health Department and the board’s chair, as well as a suggestion that Chow be given a role in completing the decision.

“I was advised that the pressure was generated by a staffer in U.S. Senator Inouye’s office, and applied through the Governor’s office. I was not asked to recommend a particular result, although the result Senator Inouye’s office wanted from the Board was clear,” Jacobson wrote.

At the Land Board’s March 23 hearing, attorneys for the university and Kilakila urged the board to discharge Jacobson and dismiss his reports from the record.

University attorney Lisa Bail argued that the Land Board could and should issue a decision on the existing record, provided that the parties be allowed to file exceptions. She said the university would not object to the appointment of a new hearing officer so long as the board set a reasonable time frame for a final decision.

It is “inexplicable” why Jacobson took so long to conduct the contested case hearing, Bail said, adding, “The goal is prompt resolution of this case.”

Sharla Manley, a Native Hawaiian Legal Corporation attorney representing Kilakila, had a different goal in mind.

“We’re talking about fairness,” Manley said. “The disclosures made this week call into question whether [Kilakila] can expect a fair hearing.”

After first expressing concern that no secretary or court reporter was present to record the oral arguments being made that day, Manley asked that the board strike other rulings Jacobson had made during the course of the hearing. She also asked for a new hearing officer and that Kilakila be allowed to provide live witnesses so the officer could observe their demeanor and assess credibility.

“Reading a transcript is not sufficient due process,” she said.

Finally, she urged the board to ensure that the actions referenced in Jacobson’s email and minute order response don’t continue to taint the process.

Her filing to the board notes that on March 20, Kilakila filed a state Uniform Information Practice Act request to review all emails and other communication from the university to either Inouye’s office or the Governor’s office.

As of the March hearing, the university had not responded to Jacobson’s original question to the university.

“The silence is deafening. The university has not disclosed what, if anything, they had to

do with what the Senator's or Governor's offices were doing," Manley said.

With regard to Jacobson's allegations about Chow's involvement in the hearing, "much of it is vague," Manley continued. "Our primary interest is to make sure that the things that have occurred are cleansed and we don't know how to do that without more information. ... What has happened is unconscionable. The group we represent is of modest means. We just want to make sure we have an even playing field."

Bail objected to Manley's request that all of Jacobson's orders be stricken and that Kilakila be allowed to present live witnesses. She added that the Land Board hearing was not the proper venue discuss whether the university had communicated with Inouye's or the Governor's offices.

Regarding the effect the political pressures had on Jacobson, "he has said they did not influence his decision. The board is entitled to respond to that," she said.

To this, Manley said it's not Jacobson's state of mind that matters. It's what the reasonable onlooker would think when they heard the facts of the case. Whether or not Jacobson felt his decision was biased because of the pressure doesn't matter under the law, she said.

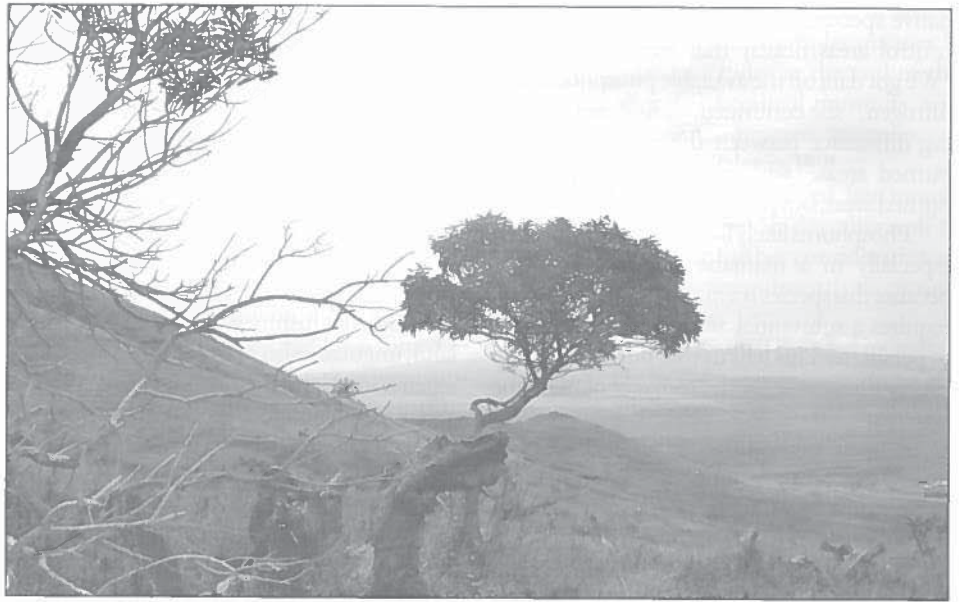
The Land Board's ruling on the matter was not released by press time.

Earlier Meddling

Jacobson's allegations of meddling by Senator Inouye's office are not the first to have surfaced in connection with construction of the ATST. In a declaration that was submitted by Kilakila to bolster its case, Marilyn Parris, former superintendent of Haleakala National Park, stated that she "was well aware of Senator Inouye's displeasure with my statements/comments against construction of the ATST. His staff assistant, James Chang, office [sic] placed heavy pressure on me to mute objections that the National Park Service had regarding the impacts of the ATST. For example, in a meeting with Mr. Chang he strongly encouraged me to go along with the construction of the ATST project. When I stated it was my job to guard against such extreme impacts to this majestic national park, he indicated they would go to the Secretary of the Interior to override my objections."

Chang now works with the National Oceanic and Atmospheric Administration. He declined to discuss the ATST and referred the question to Peter Boylan, Inouye's press secretary. Neither Boylan nor Donalyn Dela Cruz, spokeswoman for Abercrombie, returned calls for comment by press time.

—*Patricia Tummons and Teresa Dawson*



A view from the Pelekane watershed looks out over the vast landscape that once was covered with dry forest vegetation. This is one of several areas where partnerships are working to restore the Hawaiian dry forest.

Researchers Focus on the Birds, Bees, Flowers, Trees of Hawai'i's Dry Forests

For years, Susan Cordell has been studying Hawai'i's dry forests and looking for ways to break what she calls the "grass-fire cycle." Broadly speaking, that is when grasses get the upper hand over native dry-forest vegetation through the double-whammy of grazing animals and fires.

But now, she told the 200 or so people attending the sixth annual Nahelehele Dryland Forest Symposium, she and colleagues at the U.S. Forest Service's Institute of Pacific Islands Forestry (IPIF) and the University of Maryland have come upon "a natural fire cycle."

"The current dogma," she said, "is that wildfire was a rare disturbance factor in shaping succession and community structure in dry forests. Fires occurred in forests prior to human arrival, yet little is known about the fire history."

To gain a better understanding of the role of fire in dry forests before the arrival of humans, Cordell, Amanda Uowolo, of IPIF, and Kealoha Kinney of the University of Maryland painstakingly excavated soil pits in an area of Pohakuloa Training Area, in the saddle between Mauna Kea and Mauna Loa on the Big Island. Their work, which examined charcoal from the pits to determine the composition of plants, took them back in time to the Pleistocene era, when plant communities consisted of either low-stature shrubs and grassland or mamane woodland.

"In the last 200 years," Cordell said,

"there's been a huge amount of fires that we see in the system – a lot of anthropogenic disturbance, a lot of non-native grasses and the like. But also, over time, there's been a change back and forth between high and low amounts of charcoal, indicating that fire has played a role over the last 8,000 years. We were pretty surprised by that."

She and her co-workers speculate the area of native grassland they studied "served as a highway for lava flows," with the mamane shrubland possibly persisting in areas that were more isolated from the effects of lava flows.

Eight millennia in the past, evidence of the presence of alaha'e was found in the charcoal. The finding, Cordell said, was "very strange. This is very much outside the predicted range of alaha'e."

Either the finding is in error, or "the climate is very different now from what it was eight thousand years ago," she said.

The research has led Cordell and colleagues to think that "the role of nutrients is probably more important than we originally thought," a hypothesis that was supported by research conducted after the devastating 2010 fire that occurred in the mamane woodland area adjoining the Saddle Road.

"After the fire, we thought it was the perfect opportunity to look at post-fire restoration," she said. "The ground was covered with mamane seeds." She and her colleagues fenced off several areas and seeded them with