CONCURRING OPINION BY CIRCUIT JUDGE WILSON, J.

I agree with the opinion of the majority. I concur not to limit what is stated in that opinion, but to further address the imposition of intrinsic damages by the Board of Land and Natural Resources.

Pilaʻa relies on the position of its expert to contend there can be no intrinsic damage award because it is a value "by its very nature . . . **impossible to give a monetary value.**" (original emphasis). Accordingly, Appellant implies that the Board is without authority to award damages based on the intrinsic value of the damaged reef and bay. This argument fails to understand the importance of protecting the environment, and the natural resources upon which it depends, under the Hawaiʻi Constitution. Article XI, Section 1 of the Hawaii State Constitution is unique to Hawaiʻi. It mandates that the state "shall conserve and protect Hawaiʻi's natural beauty and all natural resources . . . ." Natural beauty, the value of nature, is necessarily intrinsic. It is not susceptible to valuation based on price in the marketplace. The value of Hawaiʻi's forests is not the market value of its board feet. The value of Hawaiʻi's coral reefs is different than the value of its harvest.

Indeed, as noted, intrinsic value is constitutionally mandated to be noticed and valued. And under the Hawaiʻi Constitution it is the Board of Land and Natural Resources that is empowered to steward and protect Hawaiʻi's natural beauty and its resources:

> The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State.
> Article XI, Section 2.

In accordance with this mandate the Board found intrinsic value in Pilaʻa Bay and beach:

> 7. . . . based upon the provision of the Hawaii State Constitution, reef and natural resources, including Pilaʻa beach, bay and reef, have value beyond that which can be measured by human use and price alone.

(Board's Decision, Damages, page 36, Finding 7.)

> 12. The value of Pilaʻa Beach, bay, and reef includes use value, option value, commodity value, existence

> value, bequest value, cultural values, including value to indigenous people, and intrinsic value. Economic and use (market) values alone cannot and do not capture the full value of Pilaʻa. Economic valuation alone understates the true social loss from natural resource damage. The intrinsic value of Pilaʻa is recognized by the Hawaiʻi constitution and state laws, including section 183-C-1, HRS. The BLNR holds Pilaʻa and all state property in trust[1] for the people of Hawaiʻi and for future generations.

(Board's Decision, Discussion and Conclusions, p. 44, Conclusion 12)

The import of Pilaʻa's position would be to deprive the Board of authority to award damages based upon the above finding and Conclusion. Under this view, the intangible nature of intrinsic value disqualifies it from economic valuation.

Per contra, the Hawaiʻi State Legislature provides unequivocal endorsement of the constitutional authority reposing with the Board of Land and Natural Resources to act on behalf of the community to set the intrinsic value of damage to Hawaiʻi's natural resources and sanction those who create such damage:

> In addition to the fines, administrative costs, and damages provided for hereinabove, for damage to or theft of natural resources, the board may also set, charge, and collect a fine that, in its discretion, is appropriate considering the value of the natural resource that is damaged or the subject of the theft. In arriving at an appropriate fine, the board may consider the market value of the natural resource damaged or taken and **any other factor it deems appropriate, such as the loss of the natural resource to its natural habitat and environment and the cost of restoration or replacement.**[2]

HRS Section 171-6(15)(D) (emphasis added).[3]

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[1] Protection of the reef and bay are subsumed within the public trust duty of the Board under Article XI, Section I of the Hawaiʻi Constitution. ("All public natural resources are held in trust by the State for the benefit of the people."). See County of Hawaii v. Ala Loop Homeowners, 123 Hawaiʻi 391, 411 (2010); In Re Water Use Permit Applications, 94 Hawaiʻi 97, 131-33 (2000).

[2] Consistent with his duty to understand the intrinsic value of Pilaʻa reef Hearing Officer Michael Gibson personally swam with diving equipment through the resource.

[3] Moreover, legislative and gubernatorial vetting must precede a boardmember's confirmation. See HRS Section 171-4 (a) and 26-34. Thus, the Board of Land and Natural Resources is the constitutionally empowered legislatively endorsed steward of the intrinsic values threatened by appellant's damage of Pilaʻa reef and beach.

The findings of fact and conclusions of law of the Board evince a clear understanding of its duty and its thorough completion. A public hearing was held. A qualified committed special master was appointed. A contested case hearing including expert testimony gave ample opportunity for all parties to be heard. The final decision of the Board reflects a careful adjustment of the Special Masters decision based on consideration of all the evidence and its legal duty:

> Finding 13
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> Given the elements of value discussed above and in consideration of all the facts and evidence, including but not limited to . . . the intrinsic value of Pilaʻa Bay and reef . . . the BLNR rejects the Hearing Officer's recommendation of damages. Circumstances of this case, the Hearing Officer's recommendation as to the amount of damages is too lenient to reflect the BLNR's duty to protect this valuable natural resource under constitutional and statutory law.

(Finding 13, page 44) Thus, I concur with this Court's decision that the Board's inclusion of intrinsic value in its calculation of damages is within its authority and is supported by substantial evidence.[4]

Acting Associate Judge

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[4] Inter alia:

> Finding 11
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> In general, the Pliaʻa system was a strikingly beautiful and productive area with extensive sandy beaches. (Exhibit 2, pages 14-18). The shallow reef area is an excellent site for swimming and snorkeling, except in times of heavy surf. The area was an important juvenile fish habitat, was abundant in octopus, lobster, and limu (edible seaweed), and was a productive fishing area. (Exhibit 2, page 21). (Finding 11, page 19).

Finding 12

Prior to November 26, 2001, Pilaʻa reef was one of the few remaining high value coral reef flats in the state that had largely escaped encroachment from development and stress from improper land practices. (Exhibit 2, page 21). (Finding 12, page 19).

Finding 14

The Pilaʻa reef is an extremely valuable resource. It is one of the few areas on the northeast coast of Kauai with an extensive shallow reef flat that is protected from ocean swell by the outer reef crest. A complex topographic relief in this sheltered area results in a wide range of reef habitats. Marine life is abundant and diverse with diverse coral cover in the deeper locations. Sandy beaches and the extensive wave-protected shallows are an ideal location for ocean restoration. (Exhibit 2, pages 21-22). Coral cover reached almost 14 percent. (Exhibit 1, page 34). (Finding 14, page19)

Finding 1

There is no definitive method of attaching a dollar value to the Pilaʻa beach, bay, and reef. There is no market in which such properties are traded; therefore the traditional market value of appraisal by comparison to recent sales of similar property cannot be employed.

(Finding 1, page 34)

Finding 3

Coral reefs have a number of elements of value, including . . . existence value...and cultural value.

(Finding 3, page 35)

Finding 4

"Use value" includes direct uses values and indirect use values. Direct use

values are those economic values associated with direct interaction with the coral reef. These can be either "consumptive" uses or "non-consumptive" uses. Consumptive uses involve extracting something from the reef. Such uses include coral mining, shell collection, and fishing. Non consumptive uses do not remove anything from the reef and include scuba diving, snorkeling, viewing the reef from a glass bottom boat or submarine, and sailing or kayaking over the reef. (Exhibit T, page 2; testimony of Dixon, transcript (8/13/04), pages 144-150).

(Finding 4, page 35)

Finding 5

Indirect use values include those uses or benefits from the reef that produce a benefit somewhere else. These values include shoreline protection, value of any fishery that is partly dependent on the reef for part of its life cycle even if caught elsewhere, and ecosystem value - that is the role of the reef in the larger coastal ecosystem. (Exhibit T, page 2-3; testimony of Dixon, transcript (8/13/04), pages 114-150).

(Finding 5, page 35)