Evaluation of Proposed Hawai‘i Noncommercial Marine Fishing Registry, Permit, and License Design Scenarios & Policy Recommendations for Resolving Potential Conflicts with Native Hawaiian Rights

prepared for Conservation International Foundation - Hawai‘i

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I. Introduction

A. Scope of Work

Conservation International Foundation – Hawai‘i (CI) commissioned a series of reports to aid in determining the feasibility of a statewide adoption of a comprehensive fisheries licensing program that would ultimately contribute to protection, regulatory enforcement, enhancement and restoration of Hawai‘i’s precious marine resources.

This work builds upon an initial report submitted to CI that surveyed traditional and customary Hawaiian rights applicable to access, use, and regulation of marine resources in Hawai‘i. This submittal consists of an evaluation of several fisheries registry, permit, and license (RPL) system design scenarios provided by CI that are co-developed with various stakeholders serving as members of a project Study Group and in consultation with the State Department of Land and Natural Resources (DLNR). The evaluation of each design scenario will entail an identification of any conflicts with traditional and customary Hawaiian rights and the options available for resolving each conflict. Following this analysis are recommended policy actions based upon feedback provided by the Study Group.

B. Summary of the Study Group’s Work

On June 28, 2016, I met with the Study Group to conduct a two-part presentation on (1) my analysis on traditional and customary Hawaiian rights applicable to access, use, and regulation of marine resources in Hawai‘i and (2) a broad evaluation of elements identified in the several RPL design scenarios presented by CI. In preparation for the meeting, I submitted several handouts and delivered a powerpoint presentation for the Study Group. Those handouts are attached here as an incorporation of the report and for any future outreach work provided by Conservation International.

Since that time, the Study Group has met monthly and is about to conclude its work. As discussions ensued and the Study Group contemplated each RPL scenario, it became evident to its members that more outreach work might be needed. One of the Study Group members hosted a conversation among several Native Hawaiian lawai‘a (fishers) who engage in traditional, subsistence fishing and do community-based resource management work. Input from this sampling of lawai‘a confirmed that more mana‘o (input) needs to be considered and that there may be additional models from which to draw inspiration from.

Based on these new developments, I have provided some additional recommendations and suggested policy actions below that reflect a more long-term vision and entails broader outreach work among stakeholders, community, policy- and decision-makers.

C. Framework for Legal Analysis, Evaluation, and Policy Recommendations

This report is divided into several parts. The first part provides an overview of non-commercial fishing RPL scenarios provided by CI for evaluation. The second part addresses the over-arching legal issues relevant to each or several RPL scenarios. The third part is an evaluation of the impact of each RPL design scenario on Native Hawaiian rights and practices, and specific recommendations to minimize those impacts. The fourth part provides policy recommendations that would best address Native Hawaiian concerns as well as the concerns of other stakeholders, policy- and decision-makers. It suggests strategies that will likely bring about a positive outcome for all interests and especially for the sustainability of Hawai‘i’s precious fisheries.

II. Overview of Non-Commercial Fishing Licensing Scenarios

As a starting point for discussion amongst a Study Group of various stakeholders representing different fishing interests as well as those in key agency positions responsible for the management of Hawai‘i’s fishery resources, four (4) fisheries RPL scenarios were presented for assessment and evaluation. They are as follows:

Design #1: Registry (No Fee)
Rather than a license system, a free registry for all fishers above a certain age.

Design #2: Simple Flat-Fee License with Multiple Exemptions
A fee-based annual license for most fishers. Fees would differ between those with resident and non-resident status and also differ depending on time length for nonresidents. Fee exemptions may be granted to certain categories of fishers that would likely require specific accommodations. For example, other states exempt fishers with disabilities; military personnel on leave from active military duty; veterans; anglers on charter boats; anglers fishing from public fishing piers; senior citizens; low income individuals or those eligible for food stamps; persons under government care or residents of institutions; and/or federally recognized Native American tribes.

Design #3: Low-Fee Base License with Permit & Tag Fees
A general low-cost, fee-based license; with optional purchase of additional special permits, tags, or stamps for special activities. The permits, tags, or stamps would allow a fisher to use certain gear types, fish in more restricted areas, or target higher value species. Fishers under a certain age may be entitled to an exemption. Certain categories of eligible fishers may also obtain a free license. All other fishers would pay, at minimum, for a low-fee base license.

Design #4: Free License with Permit & Tag Fees
A free basic annual license offered to all fishers. Fishers who opt to acquire additional fishing permits, tags, or stamps for special activities will be charged. The permits, tags, or stamps will entitle fishers to use certain gear types, fish in more restricted areas, or target higher value species. Fishers under a certain age would be exempt from obtaining a license. All other fishers would be required to have at least the basic free license to fish legally.

Preliminary strengths and weaknesses for each design scenario were provided, as well as examples of other States utilizing these various licensing systems. CI provided an initial general legal analysis as a starting point to support discussion among the Study Group members.

The Study Group then explored the potential for a noncommercial fishing license that fulfills three (3) main objectives:

1. To fill data gaps on resource impacts from noncommercial fishing within State waters (3 miles from shore).

2. To improve compliance with fishing regulations.

3. To increase funds marine resource management and enforcement.

In addition to maintaining these three objectives, the Study Group is also tasked with determining if there is a workable RPL system, that supports or, at minimum, avoids infringing upon Native Hawaiian rights and practices associated with the fisheries. To best prepare the Study Group to deal with the complexities and nuances found in Native Hawaiian law, it makes best sense to approach this analysis and evaluation more broadly. Firstly, this approach entails addressing some general, over-arching legal issues relevant to consideration of any fisheries license design scenario. Whether the Study Group gravitates to one or several of these scenarios or brainstorms and considers other models, it will at least be armed with the right legal tools from which to evaluate impacts to Native Hawaiian rights and make the necessary adjustments to avoid potential conflict.

III. Over-Arching Legal Issues Relevant to Fisheries RPL Design Scenarios

Before considering each RPL scenario individually, it makes sense to first consider several overarching issues that arise when evaluating the efficacy of any statewide non-commercial fishing licensing program and potential impacts to native Hawaiian rights. These overarching questions are:

- Would any kind of statewide non-commercial fishing RPL program automatically threaten Native Hawaiian rights and practices?
- May the State exercise its regulatory authority to create a non-commercial fishing RPL program even if it may cause harm to Native Hawaiian rights?
- What are the sensitive areas to be aware of when contemplating a RPL scenario?

- How can the RPL system respect and protect Native Hawaiian rights and also avoid criminalizing Native Hawaiians who are exercising their rights?

The following discussion attempts to answer each of these questions.

A. Would any kind of statewide non-commercial fishing RPL program automatically threaten Native Hawaiian rights and practices?

Short Answer: No.

Discussion: The intent of a non-commercial RPL program is to provide adequate data on the fishery health as well as possibly fund additional monitoring and enforcement efforts. This is a form of mālama (conservation and stewardship) that is aligned with Hawaiian cultural beliefs and practices.

Furthermore, in ancient times, the Hawaiian people followed the kapu system. Under the kapu system, conservation measures were imposed by konohiki, those who were appointed in ancient times to oversee the agricultural and maricultural activities, and governed natural resource uses within the ahupuaʻa (traditional land division). Conservation decisions and kapu (restrictions) were imposed based on the konohiki's expert knowledge of ecological processes, and the life cycles and reproductive periods of key plant and animal species along the phases and cycles of the moon. The konohiki's role was to inspire and motivate makaʻāinana (the common people) to be mahiʻai (farmers) of land and sea, to cultivate ʻāina momona (abundance) as evidenced in contoured taro terraces that helped to direct water flow and aid in maximum absorption, feeding taro patches and creating spring lines below and along the coastline, which in turn fed more crops and created the important estuarine conditions and microhabitat for fish farming in loko iʻa (fishponds). Beyond specific kapu, the people lived an ethic of mālama, caring for land and sea by exercising self-restraint, to take only what they needed to feed their families and to ensure abundance for future generations.

The former konohiki system in ancient Hawaiʻi and as codified under Hawaiian Kingdom law assured abundance. The nearshore fishing areas served particularly as critical nursery and feeding grounds for fish and other marine species; harbored important estuarine habitats that fed limu (seaweed) beds, attracted herbivores, and facilitated life cycles of diadromous species. These rich nearshore fisheries also served as the "ice-box" for hoaʻāina (ahupuaʻa tenants) who maintained priority rights over their ahupuaʻa resources and were assured through wise konohiki management and their own ethic of mālama, a fishery capable of sustaining successive generations.

The illegal overthrow, U.S. annexation, and statehood brought a seismic shift to Hawaiʻi's marine tenure system. The 1900 Organic Act condemned and deprivatized nearshore ahupuaʻa fisheries under the konohiki system and threw them into the public domain as a matter of right under a western framework with none of the associated responsibilities to mālama, as understood from a Kanaka (Native Hawaiian) perspective. These events brought about a tragedy of the commons.

Today, the State of Hawai‘i has taken on the role of trustee and konohiki of depleted fishery resources. DLNR is the State agency with primary authority to manage Hawai‘i’s natural environment as well as cultural heritage. DLNR’s Division of Conservation and Resources Enforcement (DOCARE) is charged with enforcing State laws and regulations on natural resource protection. DLNR is chronically underfunded and understaffed, leaving Hawai‘i’s natural and cultural resources under constant threat.

The Study Group has taken on this issue proactively by exploring the potential of implementing a non-commercial fishing RPL system in Hawai‘i that could simultaneously fill data gaps in monitoring fishery health, while bringing in additional revenue to assist DLNR/DOCARE in better marine management, enforcement, and compliance. A RPL system that could achieve these goals is also in alignment with Native Hawaiian mālama values that stress resource health over unlimited resource extraction.

B. May the State exercise its regulatory authority to create a non-commercial fishing RPL program even if it may cause harm to Native Hawaiian rights?

Short Answer: Yes and No.

Discussion: Article XII, Section 7 of the Hawai‘i State Constitution describes the State’s legal obligation to Native Hawaiians. It reads as follows:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[1]

The language is clear. While the constitution requires State agencies like DLNR to protect Native Hawaiian rights, agencies may also regulate these rights. The Hawai‘i Supreme Court rationalized that “ancient Hawaiian usage was self-regulating” and on this basis the State may also “impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits” it issues.[2]

However, the State, in exercising its regulatory authority over Hawaiian rights, must weigh and “reconcile competing interests.”[3] Even when certain types of permits may “interfere[ ] with [Native] rights” the State and/or its political subdivisions may still issue these permits in instances where preserving and protecting Native rights would result in “‘actual harm’ to the ‘recognized interests of others.’”[4]

While the State and counties may regulate Hawaiian rights, they are still “obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.”[5] Moreover, government has an “affirmative duty”[6] to preserve native rights and “does not have unfettered discretion to regulate [such] rights . . . out of existence.”[7]

The State has jurisdiction over waters extending out to three miles from shore. Within this section of ocean, the State has created various marine designations for management, which

includes prohibitions on access and certain uses.

Marine Life Conservation Districts ("MLCDs") are established for the purpose of conserving marine resources and provide a prolonged rest period from fishing in order to facilitate resource replenishment. The controlling statute for MLCDs is H.R.S., Chapter 190 which prohibits the taking of living material (fish, eggs, shells, corals, algae, etc.) and non-living habitat material (sand, rocks, coral skeletons, etc.). Non-consumptive uses such as swimming, snorkeling, and diving are generally allowable in MLCDs. DLNR may impose certain gear restrictions if some fishing is allowed. Examples of MLCDs: Hanauma Bay, Pūpūkea, Waikīkī on Oʻahu.

Fishery Management Areas ("FMAs") are managed with the intent of conserving both marine and estuarine species located near harbors and in bays and have been compromised by recreational fishing pressure. FMAs are used as a tool to diffuse user conflicts and competition over finite resources. H.R.S. §§ 187A-5, 188-53, 188F-2 provide the legal basis for DLNR to impose regulations in FMAs, primarily restrictions on fishing gear, seasons, time of day, bag limit, species, etc.

Bottomfish Restricted Fishing Areas ("BRFAs") address the alarming decline in in commercial fish landings and increased harvests of sexually immature bottomfish. H.R.S. § 13-94 restricts taking of bottomfish species (ʻulaʻula koaʻe or onaga; ʻulaʻula or ehu; kalekale; ʻōpakapaka; ʻūkīkiki or gindai; hāpuʻu; and lehi) in designated BRFAs during closed season, except by permit. Also includes minimum size for onaga and ʻōpakapaka (one pound); non-commercial bag limits; and gear restrictions (trap, trawl, bottomfish longline, or net other than scoop net or Kona crab net).

Natural Area Reserve System ("NARS") under H.R.S. Chapter 195 are unique environments designated for protection due their important geologic and volcanic features, as well as rare aquatic and terrestrial species. An example of a NARS site is ʻAhihi-Kinaʻu on the island of Maui. Access is prohibited in this 1,238 acre property comprised of lava fields fed from Mt. Haleakalā, sensitive anchialine ponds, wetlands, native plants, and pristine coral reef habitat.

Kahoʻolawe Island enjoys special protections today in the aftermath of naval bombing exercises that greatly damaged the landscape, destroyed the aquifer, and impacted the surrounding ocean waters. As the U.S. Navy returned management to the State, certain legal protections were imposed on the island. H.R.S. § 6K-4 and H.A.R. § 13-260 bans all marine uses out to two nautical miles around Kahoʻolawe for the purpose of protecting its cultural, educational, scientific, and environmental assets. The State is holding Kahoʻolawe in trust for the future recognized, Native Hawaiian nation.

Community Based Subsistence Fishing Areas ("CBSFAs") are sites either designated legislatively or through the petitioning of DLNR by communities interested in co-managing nearshore fishery resources with the State. The law governing CBSFAs arose out of an important subsistence study[8] on the island of Molokaʻi. The study revealed the importance of maintaining the health of natural resources and ecosystems to supporting Native families and contributing to the island's unique subsistence economy. One of the main initiatives proposed by

the Hawaiian Homestead community was to protect its nearshore fishery from overfishing and returning to traditional values and management methods. For this reason, the legislature passed Act 271, codified as H.R.S. § 188-22.6 which imposes special protections on fisheries statewide that "reaffirm[ ] and protect[ ] fishing practices customarily and traditionally exercised for purposes of Hawaiian subsistence, culture, and religion."[9] Other communities like Miloli'i[10] on the Big Island and Hā'ena[11] on Kaua'i were legislatively designated as CBSFAs. After 20 years since the passage of the CBSFA law in 1994, Hā'ena was the first community to have their customized rules for traditional management passed. There are 19 other communities statewide vying for designation and rules approval.

Ocean Recreation Management Area ("ORMA") is a type of designation initiated by the DLNR Division of Boating and Ocean Recreation (DOBOR) to manage recreational use and avoid user conflicts in high activity areas. Under H.R.S. § 13-256, DOBOR issues permits for commercial vessel, water craft, and water sports equipment operators.

DLNR engages communities directly in ocean stewardship and regulatory compliance efforts. For example, the **Makai Watch** program enlists community volunteers to conduct resource monitoring work, education and outreach. Community members trained by DLNR report regulatory violations to DOCARE for better compliance and improved resource health.

Communities may also partner with DOBOR to **Adopt-A-Harbor**. This work entails having volunteers care for and upkeep their local harbor or pier, boat ramp, and facilities area.

The highly effective **Community Fisheries Enforcement Unit (CFEU)** program was launched in 2013 as a pilot project in north Maui. A dedicated vessel and team of DOCARE officers works with the Makai Watch Coordinator and patrols 13-miles of shoreline to issue citations, enforce rules, and educate people about fishing regulations. The Harold K.L. Castle Foundation and Conservation International provided funding for this program. DLNR hopes to expand this successful program statewide.

While there haven't been any legal challenges as yet by Native Hawaiian cultural practitioners against marine designations and permitting processes, especially those that appear to be most restrictive in terms of access and use (e.g., MLCDs and NARS), informal communications with DLNR personnel reveal that there are instances in the field where Native Hawaiians have challenged DOCARE officers attempting to enforce regulations within these designated areas. One common type of scenario that DOCARE officers experience are blanket challenges made by Native Hawaiian commercial fishers who state by virtue of being Native Hawaiian by blood they have a right to fish whenever they want, wherever they want, and for however many fish they want. These types of blanket statements do not reflect Hawaiian practice.

There are however certain practices that would trigger legal protections for Native Hawaiian rights. A series of questions would need to be asked of fishers claiming to be Native Hawaiian who are conducting prohibited activities within marine designated areas. This leads to the next issue regarding what sensitive Hawaiian rights issues need to be addressed when contemplating a non-commercial fishing RPL program.

Why is this important? It may just be a matter of time that Native Hawaiians file a formal lawsuit challenging a number of these kinds of marine designations. For those legitimately exercising customary fishing and mālama practices, especially within their own ahupuaʻa or otherwise traditional fishing grounds, a deeper legal analysis is warranted.

C. What are the sensitive areas to be aware of when contemplating a licensing scenario?

Short Answers:

(1) Hoaʻāina (ahupuaʻa tenant) practices, particularly within their ahupuaʻa fisheries, are the most important and most sensitive issue to consider when reviewing whether a non-commercial fishing RPL scenario would be unduly harmful to Native Hawaiian rights.

(2) Any attempt to further regulate konohiki fisheries that survived condemnation proceedings in the aftermath of the 1900 Organic Act and were deemed "vested" through successful registration with and acknowledgement by the circuit court, should not be further regulated under a non-commercial fishing RPL system. These vested konohiki fisheries are deemed private and subject to management and customized rules imposed by konohiki (whether they are "landlords" within a western property construct or a landlord who also possesses comprehensive traditional knowledge of marine resources, their life cycles, habitat and ecosystem dynamics necessary for wise management decisions).

Discussion:

- **Protecting Hoaʻāina Practices and Rights**

Hoaʻāina rights date back to the unwritten customary laws around ancient land tenure prior to the establishment of the Hawaiian monarchy and kingdom. A more generalized term for the common people of the land is makaʻāinana. Hoaʻāina is a more specific term for those makaʻainana who were specifically connected to a certain ahupuaʻa. This term is more commonly understood today in the field of Native Hawaiian law given that hoaʻāina continue to maintain priority rights within their ahupuaʻa.

In early Hawaiʻi, ʻohana (extended families) within the ranks of the makaʻāinana worked the land under the chiefs and konohiki (resource managers). If fairly treated by the aliʻi, ʻohana maintained their tenancy on the land from generation to generation, thrived, and expanded in numbers within their ahupuaʻa and moku.[12] The extended ʻohana lived inland (ʻohana ko kula uka) and along the shore (ʻohana ko kula kai).[13] Some ʻohana maintained rights in ʻili which consisted of either contiguous or non-contiguous (ʻile lele) land segments within an ahupuaʻa or several ahupuaʻa. The more general, contiguous ʻili were typically narrow land strips running vertically from mountain to sea.[14] For families, ʻili served a functional purpose to best meet their needs. Families maintained rights to use, cultivate, and mālama their ʻili.[15] Ideally, ʻili comprised a mauka (mountain, inland) piece noted as the ʻumeke ʻai ("that which filled the poi bowl") and a makai (shoreline, nearshore) section called the ipukai ("meat bowl") where a rich source of fish was provided.[16]

Hoa‘āina were most intimately connected to their place and held extensive knowledge of palena (natural and human-made features that served as cognitive boundary markers) of both land and sea.[17] The people had names for varied features of shoreline to open sea:

- *Pu‘eone* for the sandy seashore, sand dunes, and sandbar.
- *Kai pualena,* where rivers and streams transporting minerals from the land collide with the sea, mix and churn the water with a golden hue.
- *Kai koholai* for the shallow lagoons located close to shore within the reef’s protection.
- *Po‘ina nalu* and *kai po‘i* where the waves break along the reef.
- *Kai ele,* the deep, dark blue ocean
- *Kai-popolohua-mea-a-Kāne*, the sea associated with the god Kāne with its vibrant purple-blue and red-brown tones.[18]

For ahupua‘a geographically located along the coastline, their boundaries extended into the ocean to include a fishery by which hoa‘āina had priority access and use rights.[19]

While hoa‘āina had the right or privilege (described as one part of the equation of the Hawaiian word “kuleana”) to engage in subsistence fishing and gathering, they also had the kuleana (responsibility) to mālama (care for) the resources that sustained them. According to Hawaiian Studies professor Carlos Andrade, ahupua‘a fisheries were tended to in a similar way as the maka‘āinana cultivated the “gardens filling coastal plains, stream-lined valleys, and forest clearings in the uplands.”[20] Limu (seaweed) were plucked carefully, with at least an inch of growth left above the holdfast or “roots” that connected to stones and other substrate in the water. Initial cleaning of limu took place onsite which encouraged the release of spores and new growth.[21] Certain reef patches and blue holes are identified by traditional names, especially ko‘a, rich fishing grounds. Their names are passed from generation to generation among fishing families. On Moloka‘i, some reef patches are named after ancient women who originally tended them as ocean gardens.[22] Even evidence of coral plantings extending outward from the mākāhā (sluice gates) of loko kuapā (walled fishponds made of stone) has been discovered on Moloka‘i. Fish houses made of stacked stone are also constructed to attract manini (*Acanthurus triostegus*, convict tang). The top stone of the hale manini (manini house) is lifted during low tide to allow for hand harvesting of the fish.[23] “Pruning” coral to increase niche areas and attract more fish is a traditional practice in Kahalu‘u Bay on Hawai‘i Island that continues on to this day.[24]

The people not only possessed a thorough knowledge of the nearshore fisheries, but also were very familiar with deep sea fisheries. Ka Nupepa Kuokoa articles written in the 1800s by expert lawai‘a (fisherman) Daniel Kahā‘ulelio of Lahaina, Maui recount his knowledge passed down to him by his father of a hundred deep ocean fishing grounds.[25] Even today, there are Native fishing families who continue to maintain knowledge and a relationship with deep sea fishing ko‘a (rich fishing grounds).

Some ko‘a are fed palu (chum). For example, native communities who fish ‘ōpelu (*Decaperus spp.*, Mackerel Scad) hānai (adopt) or mālama (care for) ko‘a for ‘ōpelu and prepare vegetable-based palu for herbivorous fish. Titcomb described the common practices that lawai‘a (fishers) observed in feeding ko‘a and harvesting responsibly:

> Fishing grounds were never depleted, for the fishermen knew that should all the fish be taken from a special feeding spot *(koʻa)* other fish would not move in to replenish the area. When such a spot was discovered it was as good luck as finding a mine, and fish were fed sweet potatoes and pumpkins (after their introduction) and other vegetables so that the fish would remain and increase. When the fish became accustomed to the good spot, frequented it constantly, and had waxed fat, then the supply was drawn upon carefully. Not only draining it completely was avoided, but also taking so many that the rest of the fish would be alarmed. At the base of this action to conserve was the belief the gods would have been displeased by greediness or waste.[26]

This understanding was later codified into written laws under the Kingdom of Hawaiʻi. King Kamehameha III officially recognized konohiki fishing rights and traditional Hawaiian fishing customs and practices in the Constitution and Laws of June 7, 1839.[27] This law was reaffirmed in 1840. The law recognized that the king, the konohiki (a word altered to generically describe chiefs and landlords regardless of expert knowledge on natural resource management),[28] and hoaʻāina possessed fishing rights.[29] The Kingdom crafted several versions of the fishery law, but they did not reflect any major substantive changes from earlier iterations.[30]

Kingdom law standardized aspects of ancient custom in the fisheries, preserving exclusive rights of piscary (fishing rights) to konohiki and hoaʻāina within their ahupuaʻa from the shoreline to the outer edge of the reef. If the ahupuaʻa fishery possessed no reef, then the law designated the boundary of the fishery to extend one mile from shore. Konohiki had a right to kapu one fish for his/her exclusive use, receive from hoaʻāina one-third of their catch, and temporarily rest areas during certain periods of the year to allow for replenishment. The waters beyond the reefs and the open ocean were granted to all the people.[31] These were the kiloheʻe grounds (described as the waters shallow enough to wade or see the bottom by canoe with the aid of kukui oil to harvest heʻe or octopus), the luheʻe grounds (the deeper waters where octopus was caught by line and with a cowrie lure), the mālolo grounds (characterized by rough currents and choppy seas where the mālolo or flying fish frequent), and beyond into deeper waters.[32]

Subsequent case law during the Kingdom period confirmed hoaʻāina fishing rights:

> Every resident on the land, whether he be an old hoaaina, a holder of a Kuleana title, or a resident by leasehold or any other lawful tenure has a right to fish in the sea appurtenant to the land as an incident of his tenancy.[33]

In 1893, the Hawaiian monarchy was illegally overthrown by a group of missionary born sugar barons backed by the U.S. military. The American government followed with the annexation of Hawaiʻi in 1898 by Joint Resolution of the House and Senate. This was followed by U.S. Congress' passage of the Organic Act in 1900. The Organic Act had the effect, among other things, of deprivatizing the konohiki fisheries (with the exception of fishponds) and placing them into the public commons. Section 95 of the Organic Act repealed konohiki "exclusive fishing rights" and made these private fisheries "free to all citizens of the United States subject, however to vested rights."[34] Section 96 of the Act clarified that these rights were "vested" only if the owner of the konohiki fishery successfully petitioned the circuit court within a two-year period.[35]

Even if vested, the Territory of Hawai‘i could exercise the option to condemn a konohiki fishery in favor of public use, provided it justly compensate the owner.[36]

How did the Organic Act affect hoa‘āina piscary rights? Jurisprudence in this area is cloudy with conflicting judicial decisions. A 1927 decision, *Smith v. Laamea,*[37] issued by the Supreme Court of the Territory of Hawai‘i acknowledged the rationale set forth in *Haalelea v. Montgomery,* an 1858 case issued by the Supreme Court of the Kingdom of Hawai‘i:

> Those persons who formerly lived as tenants under the konohikis but who have acquired fee simple title to their kuleanas, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as hoaainas under the old system.[38]

However, in 1930, just three years after the *Smith v. Laamea* decision, the Territory of Hawaii Supreme Court altered its perspective on hoa‘āina, particularly those who assumed ahupua‘a tenancy after 1900. In *Damon v. Tsutsui* (1930) the Court ruled that vested rights statutorily created under Kingdom law was the equivalent to a contractual transaction whereby an “offer” to convey piscatory rights was made, but no longer available for acceptance given the passage of the Organic Act.[39]

A further eroding of the understanding of Hawaiian custom and the unique body of jurisprudence in Hawai‘i continued with *Bishop v. Mahiko* (1940),[40] a case heard during the Territorial period which involved the Makalawena ahupua‘a fishery. The fishery was not timely registered within the two-year period under the Organic Act and the Estate of Bernice Pauahi Bishop lost the private fishery of the ahupua‘a of Makalawena. The Bishop Estate as konohiki and the hoa‘āina of Makalawena ahupua‘a filed suit[41] challenging the constitutionality of Sections 95 and 96 of the Organic Act as an unlawful taking of the private fishery without due process of law and just compensation in violation of the 5th amendment of the U.S. Constitution.[42] While the court acknowledged that the konohiki fishery statutes established during the Kingdom period created vested konohiki and hoa‘āina rights of piscary, it justified the taking of the Makalawena fishery for public use because there was no record of the metes and bounds for the ahupua‘a and fishery.

This ruling controverted the common practice in Hawai‘i’s courts from the Kingdom period, through the Territory days and up to the present day under Statehood to “allow reputation evidence by kama‘āina witnesses in land disputes:”[43]

> It was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon ... With the Great Mahele in 1848, these kamaainas, who knew and lived in the area, went on the land with the government surveyors and pointed out the boundaries to the various divisions of land. In land disputes following the Great Mahele, the early opinions of this court show that the testimony of kamaaina witnesses were permitted into evidence. In some cases, the outcome of decisions turned on such testimony.[44]

Absent in the konohiki fisheries’ decisions made by the Supreme Court of the Territory of Hawai‘i is a regard for Native Hawaiian custom and usage which was made part of Kingdom law and survived as a statute in both the Territory period and today as a State. In *Bishop v. Mahiko*

the Supreme Court for the Territory of Hawai‘i saw no reason to concern itself with reviewing "the respective rights of piscary enjoyed by konohikis and common people in ancient times," rather it confined its analysis to the "written laws" or statutes promulgated under Kingdom law and held over by the Republic of Hawaii.[45]

This ruling was in direct opposition to the Federal District Court opinion in *United States v. Robinson* issued in 1934, just six years prior to *Bishop v. Mahiko*. The Federal District Court in *Robinson* opined:

> [I]f a fee-simple title to a portion of the ahupua‘a originated even as late as approximately 1924 (certainly long years after the repeal of the fishing laws of 1900) the owner of such parcel of land would become entitled, upon acquiring title, to an appurtenant right of fishery.[46]

When a judiciary was founded in 1847 under Kamehameha III, it was granted the authority to "cite and adopt '[t]he reasonings and analysis of the common law, and of the civil law [of other countries] … so far as they are deemed to be founded in justice, and *not in conflict with the laws and usages of this kingdom.*'"[47] On November 25, 1892, the Kingdom passed the Judiciary Act which states:

> Section 5. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, *or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage*, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.[48]

When Hawai‘i was annexed to the United States, the statute was adopted by the Territorial government.[49] This provision also survived into Statehood as H.R.S. § 1-1.[50]

The Hawaiian custom and usage clause of H.R.S. § 1-1; the Kuleana Act (1851) now codified as H.R.S. § 7-1 which protects hoa‘āina rights to gather certain enumerated items in the ahupua‘a for home use; and the protections of traditional and customary rights of ahupua‘a tenants afforded under Article XII, § 7 of the Hawai‘i State Constitution have contributed to a unique body of jurisprudence that continues to develop and evolve in ways that favor the protection of traditional hoa‘āina rights on both public and private "undeveloped"[51] and "less than fully developed"[52] lands. In this sense, the term "lands" encompasses a broader definition that accounts for the unique manner in which coastal ahupua‘a were known to include the adjacent fishery as an appurtenance. Thus, the Native rights of hoa‘āina and their practices associated with access, use, and mālama within their respective ahupua‘a fishery[53] and/or other fisheries they may have customarily utilized beyond their ahupua‘a of residence[54] must be reasonably protected. Any non-commercial fishing RPL system would need to take those rights into account.

- **Recognizing Vested Konohiki Fisheries Where Konohiki Practices are Still Exercised and Kapu Prescribed.**

An exact accounting of konohiki fisheries prior to the Organic Act is unknown.[55] The best estimate is somewhere between 1,200 – 1,500 konohiki fisheries based on the number of coastal ahupua‘a and ‘ili throughout the islands.[56] After annexation and the passage of the Organic Act in 1900, there were between 360-720 fisheries classified as private.[57] In the decade just preceding statehood in 1959, an estimated 300-400 konohiki fisheries were registered, 248 were unregistered and considered having "waived"[58] their rights, and 37 were condemned for government use.[59] In a practical sense, the vast majority of konohiki fisheries were deprivatized, lost, and/or condemned.

In a legal sense, the body of jurisprudence on konohiki fisheries in the aftermath of annexation is laden with discrepancies and conflicting outcomes. Generally, the Hawai‘i Supreme Court of the Territory of Hawai‘i consistently ruled that the irrefutable intent of the Organic Act was "to destroy, so far as it is in [the U.S. Congress'] power to do so, all private rights of fishery and to throw open the fisheries to the people"[60] as a public commons. Any konohiki who failed to timely petition a private fishery before the circuit court was deemed to have "waived" his or her rights to that fishery.[61] According to the Territorial Court, the only way for a konohiki to have a "vested" right in the private fishery was to timely and successfully petition his/her rights before the circuit court.[62] Failing to do so would relinquish the private fishery to the public for "the free use and enjoyment of all citizens of the United States."[63]

In contrast, the United States Supreme Court was less willing to dismiss vested rights in the konohiki fisheries despite the passage of the Organic Act:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however, anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.[64]

The U.S. Supreme Court similarly ruled in *Carter v. Hawaii* that a claim for vested rights based on ancient prescription and statutes succeeds if the "effect" of the statutes involved "created vested rights."[65] The Court reasoned that if the intent was clear to grant a konohiki fishing right as appurtenant to the land, then it is vested.[66]

Despite the U.S. Supreme Court decisions which clearly continued to recognize the vested rights of konohiki through ancient prescription and then by Kingdom statute, regardless of the passage of the Organic Act and its registration requirements, the State of Hawai‘i appears to lend greater import to the Territorial Supreme Court rulings. Only konohiki fisheries that successfully registered within the two-year window required under the Organic Act, and which were not subsequently condemned by the government are considered "vested." Today, the State of Hawai‘i constitutionally protects "vested rights" within that limited understanding:

> All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, *subject to vested rights* and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use.[67]

In addition to constitutional protections of vested fishing rights, the State has reaffirmed Hawaiian Kingdom laws governing konohiki fisheries that were successfully registered, pursuant to the requirements of the Organic Act.[68] The boundaries of the konohiki fisheries are set similarly to the Kingdom laws. They encompass the coastal waters from the beach at low watermark to the reefs, or up to one mile seaward where no reefs are present.[69] The konohiki fishery is held "for the equal use by the konohiki and the tenants" of the ahupua'a.[70] Ahupua'a tenants may only take from the konohiki fishery what they need for subsistence, and not for commercial use.[71] Konohiki may, through posting notice, exercise a right to kapu one fish or other aquatic species for a specified period of time,[72] or in the alternative kapu the taking of one or a variety of species for several months each year.[73] During open fishing season, the konohiki may claim one-third of the catch by ahupua'a tenants, so long as notice is given.[74]

DLNR responded to inquiries of whether any successfully registered konohiki fishery are being actively managed today through placing of kapu and restricting harvests of certain fish during their spawning periods. One DOCARE officer recalled the La'ie, O'ahu fishery as the last known konohiki fishery that used to post notices of kapu in the past, but it hasn't done so for a long time now.[75] When asked if DLNR has an inventory of registered konohiki fisheries that have not been condemned by the State, the response was they were unaware of a definitive list and needed to do more research on that.[76]

The 1954 Kosaki report expressed this difficulty as well as a 1978 report to the legislature from James Shon:

> At present, all of the major konohiki rights have been condemned and acquired by the state. The remaining [vested] fisheries are assumed to be abandoned, since owners have not attempted to bar the public from fishing in their areas.[77]

The Kosaki report also references legislative committee recommendations in 1939 to delay condemnation of registered fisheries due to lack of Territorial government funds and also in the hope that the remaining konohiki fisheries would lose their value over time such that compensation would be nominal or unnecessary:

> Experts have told us that, within the next eight or ten years, the value of these fisheries will be reduced to a comparatively low figure as, at the present rate, most of the fish which are still found in large numbers in these fisheries, will have disappeared by reason of depletion.[78]

Indeed, the breakdown of the konohiki system of managing resources, as it was practiced anciently has caused an erosion of Native Hawaiian cultural values of mālama and subjected Hawai‘i’s fishery to a tragedy of the commons.

While it is still unclear whether vested konohiki fisheries still exist today, the law is clear in their protection. Thus, any non-commercial fishing RPL system should be configured in such a way that it expressly acknowledges the presence of certain vested konohiki fisheries and avoids infringement on their customized management and utilization by present-day konohiki and ahupua‘a tenants.

D. How can the RPL system respect and protect Native Hawaiian rights and also avoid criminalizing Native Hawaiians who are exercising their rights?

Short Answer: In order for a non-commercial fishing RPL system to avoid criminalizing Native Hawaiians, particularly hoa‘āina engaging in traditional subsistence and/or religious or ceremonial rites within their ahupua‘a fishery, some form of identification should be provided that would alert DOCARE officers patrolling State marine waters that these individuals are exercising their rights. These rightholders should also be exempt from purchasing a non-commercial fishing RPL, particularly for conducting traditional subsistence fishing and native mālama practices within their own ahupua‘a fishery.

Discussion: A recent opinion issued by the Hawai‘i Intermediate Court of Appeals (ICA) dismissing criminal charges against a Native Hawaiian defendant who was arrested for pig hunting on private lands within his ahupua‘a and without benefit of a State hunting license would be comparable to and problematic in a situation requiring Native Hawaiians to acquire a non-commercial fishing license even for continuing to exercise traditional, subsistence and religious practices within their own ahupua‘a fishery.

In *State v. Palama* the ICA affirmed the trial court’s dismissal of criminal charges against a Native Hawaiian defendant who was arrested for pig hunting on private property located within his ahupua‘a of Hanapepe, Kaua‘i.[79] Palama maintains a taro patch in Hanapepe on kuleana ancestral lands. He often walks throughout Hanapepe ahupua‘a, including across privately owned sections, to inspect the river flow and water quality for his kalo. He often hunts in Hanapepe for subsistence. At trial Dr. Jon Osorio, a cultural expert and Hawaiian Studies professor, testified that pig hunting has been a traditional practice well before 1892 and is also is a customary form of mālama in the protection of taro a potato gardens from foraging animals.[80] Palama learned how to hunt as a child and this knowledge was passed down through the family. A Native Hawaiian hunter from Hanapepe also offered kama‘āina expert testimony at trial and confirmed Palama and his ‘ohana’s long tenancy in Hanapepe and as subsistence hunters for successive generations. One day, Palama went pig hunting with a mule and his dogs. He successfully killed a wild pig with his knife and was subsequently arrested for trespass and for hunting on private lands.

The court applied a three-part *Hanapi*[81] test that a criminal defendant must meet to assert a constitutionally protected native Hawaiian right. Namely, the defendant must prove that he is a descendant of “native Hawaiians who inhabited the islands prior to 1778”;[82] second, that his

"claimed right is constitutionally protected as a customary or traditional native Hawaiian practice";[83] and third, "that the exercise of the right occurred on undeveloped or 'less than fully developed property.'"[84] Based on the testimony provided, the court found Palama had satisfied this three-part test.

The appeals court affirmed pig hunting as a traditional and customary Hawaiian right. The court also agreed that the Defendant's constitutionally protected hunting privilege was reasonably exercised. The court found substantial evidence in the record that Palama hunted in a reasonable manner, in alignment with cultural subsistence values and with a mindset for traditional conservation in that he protected his taro patch by hunting pig in the surrounding area.

Under Article XII, Section 7 of the Hawai'i State Constitution, government must protect Native Hawaiian rights, but may reasonably regulate them to the extent feasible.[85] However, this provision does not give the State "the unfettered discretion to regulate the rights of ahupua'a tenants out of existence."[86] Additionally Article XII, Section 7 of the Constitution "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies 'the power to protect these rights and to prevent any interference with the exercise of these rights.'"[87]

In criminal cases where the constitutional privilege of exercising a valid Native Hawaiian right succeeds under the three-prong *Hanapi* test, an additional requirement is a "balancing test" that requires the court to "look to the totality of the circumstances and balance the State's interest in regulating the activity against the defendant's interests in conducting the traditional or customary practice."[88]

In *Palama,* the State successfully requested judicial notice be taken of the DLNR Game Mammal Hunting Regulations, Hawaii Administrative Rules (HAR), Title 13, Chapter 123 specifically for the island of Kaua'i which informs hunters of public hunting grounds where pig hunting is allowed. In doing so, it challenged the trial court's finding that this regulation served as a "blanket prohibition or extinguishment of [Palama's] protected [Hawaiian] practice."[89] The State reasoned that Palama could easily have acquired permission from the landowner or obtained a hunting license to hunt on public lands as provided for by State regulations.

Palama argued that the State's implementation of H.R.S., § 183D-26 would impermissibly delegate to private landowners "the absolute power to grant or deny Native Hawaiians their constitutional privileges."[90] The trial court also found the State's rationale to be flawed. Focusing specifically on whether the State's enforcement of the regulation infringed on Palama's right to hunt on the subject private property in Hanapepe ahupua'a (where he is a hoa'āina), the appeals court ruled that this action would "operate[ ] as a summary extinguishment of Palama's constitutionally protected right to hunt pig on the subject property."[91]

The *Palama* case was decided within a criminal trespass context and places the burden on the Native Hawaiian defendant to prove s/he was practicing a constitutionally protected traditional and customary Hawaiian right. Rather than leave Hawaiians vulnerable to criminal prosecution during DOCARE ocean patrols, the more appropriate approach is to ensure that a non-

commercial fishing RPL program is structured in a manner that affirmatively protects Native rights and practices that are inextricably tied to healthy marine resources and ecosystems.

IV. Evaluation of Fisheries RPL Design Scenarios, Their Impact on Native Hawaiian Rights, and Recommendations

For ease of review, the following table is provided describing four non-commercial RPL scenarios, their potential impacts to Native Hawaiian practices and rights, and comments and recommendations to ameliorate unintended negative consequences for indigenous cultural practitioners.

A. Overview Table

RPL Design Scenarios	Comments and Recommendations Re: Impacts to Native Hawaiian Rights
Design #1: Registry (No Fee) **A registry rather than a license.** Registration is **free** and **mandatory for all fishers** over a certain age.	Likely no impact to Native Hawaiian Rights. Article XII, § 7 of the Hawai‘i State Constitution protects Native Hawaiian traditional and customary rights. However, it also acknowledges the State's authority to regulate those rights. The regulation must be reasonable to the extent feasible, but must not extinguish Native Hawaiian traditional and customary rights. An across the board registry for all fishers over a certain age, required at no-cost to fishers, is a reasonable regulation of Native Hawaiian traditional and customary rights and would likely pass constitutional review.
Design #2: Simple Flat-Fee License with Multiple Exemptions A **fee-based annual license with exemptions** for certain categories of fishers and different fee structure among different groups. **Fee Structure Differences** ▪ residents ▪ nonresidents (and possibly licenses for different lengths of time for nonresidents). **Exempt categories** (no license required, no data to be provided by these users) ▪ blind or disabled anglers ▪ military personnel on leave from active duty ▪ anglers on charter boats ▪ anglers fishing from public fishing piers	On its face, this is a reasonable regulation as to Native Hawaiian rights and the State has a right to regulate Native Hawaiian traditional and customary rights under Article XII, § 7 of the Hawai‘i State Constitution. However, if a Native Hawaiian fisher is cited, arrested, and/or prosecuted for ▪ subsistence fishing without a license within the nearshore fishery of his/her ahupua‘a where he/she physically resides (from shoreline to edge of reef, or up to one mile from the shoreline out to sea where there is no reef) ▪ subsistence fishing without a license within another nearshore ahupua‘a fishery where he/she may not physically reside, but has genealogical ties, historical and multi-generational connections to that place, and/or is accompanying a Native Hawaiian ahupua‘a tenant as a guest fisher ▪ conducting cultural, ceremonial, or religious practices in either the nearshore fishery or the open ocean (e.g., feeding ko‘a with palu, tending to reef patches and other fishing grounds that are part of his/her family's cultural tradition and kuleana, visiting underwater heiau, making ho‘okupu or offerings, etc.). a court will likely hold in favor of the Native Hawaiian defendant as having successfully raised a constitutional privilege.

Licensing Design Scenarios	Comments and Recommendations Re: Impacts to Native Hawaiian Rights
Exempt categories (no license required, no data to be provided by these users) (continued) ▪ resident seniors ▪ low income or food stamp eligible ▪ individuals under government care or residents of institutions ▪ members of federally recognized tribes	**Recommendations**: ▪ Provide a free license, but with some kind of notation that fisher may freely fish in certain areas where his/her rights attach: ahupua‘a fishery where fisher physically resides and/or other fishing areas where he/she and ‘ohana have traditionally fished and/or conducted cultural, ceremonial, or religious practices. ▪ If Native Hawaiian fisher wants to fish in other areas outside of his/her ahupua‘a and traditional fishing grounds, and/or fish on neighbor islands as the rest of the general public may freely access, then he/she should pay the regular license fee.
Design #3: Low-Fee Base License with Permit & Tag Fees ▪ **Low-cost, fee-based license** ▪ For **additional fees** - option of purchasing special permits, tags, or stamps **for special activities** ▪ Special activities to include: o use certain gear types o fish in more restricted areas o target higher value species. ▪ **Fishers under certain age exempt** from license requirement ▪ **All other fishers** required to have at least the **low-fee base license**. **Free license** available **for certain categories of eligible fishers**.	Same assessment and recommendations as provided for Design #2 Additional comments and recommendations: ▪ **Fees** of any kind and especially increased fees for special activities may also be problematic if it completely infringes upon or causes extreme hardship on Native Hawaiians to engage in subsistence fishing activities. o **Recommendation**: if Native Hawaiian subsistence fisher is indigent/low-income; consider exempting him/her from paying for both the low-cost license and special activities licenses that require additional fees. ▪ **Special activities**: o **Gear types:** it depends on what kind of gear. If the gear is designed for taking large harvests or more closely resembles commercial gear, then there is likely no infringement on Hawaiian rights. If the gear is for subsistence fishing (modern gear included) or is crafted traditionally (e.g., leho he‘e – octopus lure with cowry shell) this might unreasonably infringe on cultural practices and should probably be exempted. o **Fishing in more restricted areas:** it depends on what areas are being considered. If the restricted area may include a Native Hawaiian fisher’s ahupua‘a fishery or other traditional fishing grounds, any cost may infringe on the indigenous user’s rights. o **Target higher value species:** it depends on what higher value species are being considered and whether that particular species is critical to a Native Hawaiian fisher’s subsistence diet or other traditional practice (e.g., a Hawaiian kapa cloth maker traditionally gathers ‘opihi and hā‘uke‘uke for imprinting designs on kapa, yet these species are listed as high value requiring a special license and additional fees, that may infringe upon the Hawaiian cultural practitioner and “summarily extinguish” that person’s practice in violation of constitutional protections). **Recommendations:** 1) Provide a list of special gear, special restricted areas, and high value species that will be subject to additional fees. 2) Provide an option for a Native Hawaiian practitioner to identify any listed gear, restricted area, and high value species on the list that may impact his/her traditional subsistence, other cultural, and/or ceremonial/religious practices.

Licensing Design Scenarios	Comments and Recommendations Re: Impacts to Native Hawaiian Rights
Design #3: Low-Fee Base License with Permit & Tag Fees (continued)	3) Issue for free special permit, tag, and/or stamp for applicable special activities. 4) Train DOCARE officers to not cite, arrest, or recommend prosecution of any Native Hawaiian individuals who may not have registered for a license, special permit, tag, and/or stamp if that person explains to the DOCARE officer s/he is exercising his/her traditional subsistence, other cultural, and or ceremonial/religious practices.
Design #4: Free License with Permit & Tag Fees ▪ **Basic annual license free to all fishers** ▪ For **additional fees** - option of purchasing special permits, tags, or stamps **for special activities** ▪ Special activities to include: o use certain gear types o fish in more restricted areas o target higher value species. ▪ **Fishers under certain age exempt** from license requirement ▪ **All other fishers** required to **have at least the basic free license** to fish legally.	Same assessment as provided for Design Scenarios # 2 and # 3

B. Discussion

1. Evaluation of Impacts & Recommendations for Specific RPL Design Scenarios

Design Scenario 1: Registry (No Fee). The first design scenario would require that all fishers over a certain age enter their names into some kind of registry. No fees would be attached and rather than serve as a license, it would merely be a mandatory register for tracking purposes.

Native Hawaiian traditional and customary rights are statutorily and constitutionally protected. Government, however, may exercise regulatory authority to ensure the "reasonable exercise" of cultural practices.[92] While the efficacy of a free registry in actually protecting fishery resources is questionable, its free, no-cost and general application to all fishers over a certain age, is a reasonable regulation of Native Hawaiian traditional and customary rights and would likely pass constitutional review.

Design Scenario 2: Simple Flat-Fee License with Multiple Exemptions. The second design scenario would charge annual license fees to fishers with a varied fee structure based on residency status and possible exemptions based on other categories such as: disability, military status, low income/food stamp eligible, elderly/senior age and those receiving government care,

anglers on charter boats and using public fishing piers, and federally-recognized tribal Indian status.

This design scenario for the most part appears harmless on its face and within the State's authority to regulate Native Hawaiian rights. However, it is foreseeable that in certain circumstances Native Hawaiians legitimately and reasonably exercising traditional, subsistence fishing rights and practices may be vulnerable to criminal prosecution under this licensing scenario.

As described in greater detail in Section III. C. there are certain hoa'āina and konohiki fishing and mālama practices that the law protects, especially within their respective ahupua'a of residence or other fishing grounds for which they have customarily accessed and utilized for subsistence and to engage in active stewardship. If a Native Hawaiian fisher is cited, arrested, and/or prosecuted for

- subsistence fishing without a license within the nearshore fishery of his/her ahupua'a where he/she physically resides (from shoreline to edge of reef, or up to one mile from the shoreline out to sea where there is no reef)
- subsistence fishing without a license within another nearshore ahupua'a fishery where he/she may not physically reside, but has genealogical ties, historical and multi-generational connections to that place, and/or is accompanying a Native Hawaiian ahupua'a tenant as a guest fisher
- conducting cultural, ceremonial, or religious practices in either the nearshore fishery or the open ocean (e.g., feeding ko'a with palu, tending to reef patches and other fishing grounds that are part of his/her family's cultural tradition and kuleana, visiting underwater heiau, making ho'okupu or offerings, etc.).

a court will likely hold in favor of the Native Hawaiian defendant as having successfully raised a constitutional privilege.

To avoid the potential risk of criminalizing Native Hawaiians with this type of licensing scenario, consider providing a free license, with a notation that the Native Hawaiian fisher may freely fish in certain areas where his/her rights attach. The exercise of such rights are paramount in the fisher's own ahupua'a fishery where s/he physically resides and/or other fishing areas where s/he and 'ohana have traditionally fished and/or conducted cultural, ceremonial, or religious practices.

In the instance that a Native Hawaiian fisher wants to fish in other areas outside of his/her ahupua'a and traditional fishing grounds, and/or wants to fish on neighbor islands as the rest of the general public may freely access, then he/she should pay the regular license fee. The reason for this is that Native Hawaiian rights are place-based, and relationship-based. These rights are not applicable to all places. When a Native Hawaiian identifies his/her 'āina, s/he is literally referring the specific land that feeds him/her. The association to one's 'āina can be likened to one's own mother. Thus, the rights attach to the 'āina for which one has been nurtured by and has cultivated a long and reciprocal relationship with.

Design Scenario 3: Low-Fee Base License with Permit & Tag Fees. This scenario provides the same low-cost, fee-based license structure as Scenario 2. All fishers would be required to have, at minimum, a low-fee base license except for fishers of a certain age who would be exempt. A free license would likely be available for certain categories of eligible fishers as described in Scenario 2. However the difference here would be an offering of optional, additional fees for special permits, tags, or stamps for special activities. Special activities include the use of certain gear types; fishing in more restricted areas; and fishing for higher value species.

The same assessment and recommendations provided for Scenario 2 are applicable here. Namely, to avoid situations that would criminalize Native Hawaiians reasonably and legitimately exercising their customary fishing and mālama practices. Further, fees of any kind and especially increased fees for special activities may also be problematic if it completely infringes upon or causes extreme hardship on Native Hawaiians to engage in subsistence fishing and mālama activities. For low-income or indigent Native Hawaiians extracting resources from their ahupuaʻa or other ahupuaʻa that they lack genealogical and customary connections in order to supplement a subsistence livelihood should be considered for an exemption both for the low-cost license and special activities licenses that require additional fees.

Hawaiian rights may or may not be affected by certain special activities. With respect to gear types, it depends on what kind of gear. If the gear is commercial in nature or designed in a manner that extracts huge harvests and/or harvests indiscriminately, then it stands to reason that those types of gear are not aligned with Hawaiian practice. Native Hawaiian cultural practices and fundamental beliefs are grounded in kuleana which means right, privilege, and responsibility in one. For Hawaiians, one cannot separate responsibility from right and privilege. They are intertwined and engender an expectation of reciprocity and respect for all things, both inanimate and animate, and including the natural and cultural resources that sustain the people physically and spiritually.

If the gear is for subsistence fishing (modern gear included such as a spear, throw net, etc.) or is crafted traditionally (such as a leho heʻe, an octopus lure with cowry shell) then restrictions on their use or the imposition of added fees for a hoaʻāina might unreasonably infringe on his/her cultural practices and should probably be exempted.

Another special activity for which added fees are contemplated in this license scenario is fishing in more restricted areas. Again, it depends on what areas would be considered as more restricted. If the restricted area may include a Native Hawaiian fisher's ahupuaʻa fishery or other traditional fishing grounds, any cost may infringe on hoaʻāina rights.

Finally, this license scenario identifies targeting higher value species as a special activity warranting additional fee costs. Once more, it depends on what higher value species are being considered and whether that particular species is critical to a Native Hawaiian fisher's subsistence diet or other traditional practice. Kahuna lāʻau lapaʻau (experts in Hawaiian medicinal healing) sometimes prescribe certain fish to their patients to assist in their healing. If it so happens that the prescribed fish is a high value target species, this may impact a traditional practice. Another example may be if ʻopihi and hāʻukeʻuke are deemed high value species, other

culutral practitioners such as kapa cloth makers utilize these species in their cloth designs. The law cautions against regulating Native rights out of existence as a violation of the constitution.[93]

The attractive part of this licensing scenario is that it provides a fee structure commensurate with the degree of use and impact on fishery resources. Base license fees and additional fees for special activities could greatly build DLNR's capacity to manage natural resources and ensure effective enforcement.

There are ways to both support a robust licensing system and protect Native Hawaiian rights. With respect to special activities, the State could provide a list of special gear types, special restricted areas, and high value species that will be subject to additional fees. The State could then provide an option for a Native Hawaiian practitioner to identify any listed gear, restricted area, and high value species on the list that may impact his/her traditional subsistence, other cultural, and/or ceremonial/religious practices. The specific gear, restricted area(s), and high value species that the Native cultural practitioner identifies and provides a clear foundation for authenticating the customary practice may be issued an exemption or free special permit, tag, and/or stamp for the applicable special activities.

Another safeguard for the continued exercise of Native Hawaiian rights and practices in the fisheries would entail training DOCARE officers to not cite, arrest, or recommend prosecution of any Native Hawaiian individuals who may not have registered for a license, special permit, tag, and/or stamp if that person explains to the DOCARE officer that s/he is exercising his/her traditional subsistence, other cultural, and or ceremonial/religious practices. Since this issue is prevalent for any type of license scenario. Further discussion on how DOCARE officers should be trained is provided below in Section IV. B. 2.

Design Scenario 4: Free License with Permit & Tag Fees. This design scenario is very similar to scenarios 2 and 3, except that the basic annual license is free to all fishers and only special activities are subject to additional fees.

Due to the similarities, my analysis of the potential impacts to Native Hawaiian rights for scenario 4 is the same as I described for scenarios 2 and 3. Thus my recommendations are also the same.

2. General Recommendations

Train DAR personnel and DOCARE officers in the rights guaranteed to Native Hawaiian fishers and ocean stewards. It may not always be the case that a Native Hawaiian registers as a fisher or acquires a non-commercial fishing license. Does that mean s/he should be cited for fishing without registration or for failure to acquire a license?

No.

The history behind the original Kuleana Act of 1850 and its subsequent amendment in 1851 is instructive here. During the time of the Māhele when the Kingdom of Hawai‘i were crafting the law that allowed for hoa‘āina to make claims to small kuleana parcels that provided a house lot for their family and some arable land for subsistence cultivation, a provision within the act also

recognized basic hoa‘āina access and gathering rights. The act expressly identified hoa‘āina rights of access to water from springs and streams; to freely traverse upon the trails and roads; and to gather ti leaf, aho cord, firewood, and house timber for subsistence. This provision was critically important to King Kamehameha III who expressed to his privy council, “A little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value.”

The King’s words bore truth the following year, when hoa‘āina expressed distress over a part of the Kuleana Act which required that they first acquire permission from the chiefs or landlords of their respective ahupua‘a before gathering the articles they needed for their daily living. One such petition in 1851 from 54 hoa‘āina from Kane‘ohe, O‘ahu captures the crisis the people were suffering by chiefs who barred access:

> We who live on lands which have no forests, we are in trouble. The children are eating raw potato because of no firewood, the mouths of the children are swollen from having eaten raw taro. We have been in trouble for three months; the konohikis with wooded lands here in Kaneohe have absolutely withheld the firewood and la‘i [ti leaves] and the timber for houses ... We urge you to let the nobles know immediately, and to let us have firewood and la‘i and timber ... You make haste these days, or the children will be dead from starvation because of no firewood with which to cook food.[94]

This incident was not an isolated one, but all too common.[95] It led to an amendment of the Kuleana Act a year after its passage, which essentially removed the requirement to ask permission of the landlords and chiefs to access and gather the resources. It is this version that was adopted by the State as H.R.S., § 7-1.

Just as King Kamehameha was mindful of the basic needs of the hoa‘āina and amended the Kuleana Act to remove the real hardships the people faced when dealing with greedy chiefs and landlords who no longer honored custom and their trust responsibilities, it is important here to protect hoa‘āina from laws that may unjustly persecute them because they failed to seek official “permission” through registration and/or licensure. Further, the *Palama* case reflects the court’s reluctance to prosecute hoa‘āina exercising traditional subsistence hunting in their ahupua‘a for lack of a hunting license.

It may be difficult for DOCARE officers seeking to enforce fishing laws to determine whether they may be infringing on Native Hawaiian fishing and mālama rights if some individuals possessing the right do not have a form of identification that a registration card or license would more easily convey. It may be a simple formality at low- or no-cost to the hoa‘āina to register and/or acquire a noncommercial fishing license, but the lack of registration or license should not be a basis for prosecution. The best way, then, is to provide both DAR personnel who promulgate administrative rules for the care of natural resources and DOCARE officers who enforce these regulations with appropriate training on Native Hawaiian rights and practices with respect to the fisheries. The training could entail a series of questions or inquiries that DOCARE officers can make when encountering a Native Hawaiian claiming to be exercising a valid customary fishing and/or mālama practice in the ocean.

In *State v. Pratt*,[96] a case in which the defendant raised a constitutional privilege as a Native Hawaiian exercising traditional and customary practices of mālama on ancestral lands in Kalalau Valley in the Nā Pali Coast State Wilderness Park. Mr. Pratt cared for heiau (temples) on the land and removed invasive plants and rubbish from the area. He replanted native vegetation, vegetables, and fruit trees in Kalalau Valley. The State cited him for illegally living in a closed area within the wilderness park. While the court eventually upheld Pratt's conviction based on the reasonableness of park regulations to require acquisition of a camping permit for which Pratt failed to apply for; the case is useful for our purposes because it cites Dr. Davianna McGregor's expert testimony describing "six elements essential to traditional and customary native Hawaiian practice." Based on Dr. McGregor's testimony and other facts on the record, the court acknowledged that Pratt's practices were valid Native Hawaiian cultural practices. The six elements described by Dr. McGregor to validate the cultural authenticity of the practices were:

> (1) the purpose is to fulfill a responsibility related to subsistence, religious, or cultural needs of the practitioner's family; (2) the practitioner learned the practice from an elder; (3) the practitioner is connected to the location of practice, either through a family tradition or because that was the location of the practitioner's education; (4) the practitioner has taken responsibility for the care of the location; (5) the practice is not for a commercial purpose; and (6) the practice is consistent with custom.[97]

Dr. McGregor further identifies foundational 'ohana cultural values and customs for subsistence and mālama. They include but are not limited to the following:

1) Only take what is needed.
2) Don't waste natural resources.
3) Gather according to the life cycle of the resources. Allow the native resources to reproduce. Don't fish during their spawning seasons.
4) Alternate areas to gather, fish and hunt. Don't keep going back to the same place. Allow the resource to replenish itself.
5) If an area has a declining resource, observe a kapu on harvesting until it comes back. Weed, replant and water if appropriate.
6) Resources are always abundant and accessible to those who possess the knowledge about their location and have the skill to obtain them. There is no need to overuse a more accessible area.
7) Respect and protect the knowledge which has been passed down inter-generationally, from one generation to the next. Do not carelessly give it away to outsiders.
8) Respect each other's areas. Families usually fish, hunt, and gather in the areas traditionally used by their ancestors. If they go into an area outside their own for some specific purpose, they usually go with people from that area.
9) Throughout the expedition keep focused on the purpose and goal for which you set out to fish, hunt, or gather.
10) Be aware of the natural elements and stay alert to natural signs, e.g. falling boulders as a sign of flash flooding.
11) Share what is gathered with family and neighbors.
12) Take care of the kūpuna who passed on the knowledge and experience of what to do and are now too old to go out on their own.
13) Don't talk openly about plans for going out to subsistence hunt, gather, or fish.

14) Respect the resources. Respect the spirits of the land, forest, ocean. Don't get loud and boisterous.
15) Respect family 'aumakua. Don't gather the resources sacred to them.[98]

DAR personnel could draft administrative regulations that align to these 'ohana cultural values and customs as well as the six elements to authenticate Native Hawaiian cultural practice. DOCARE officers could approach individuals claiming Native hoa'āina rights with a series of similar questions to determine the authenticity of their practice and to avoid issuing citations inappropriately.

Always reference the *Ka Pa'akai* framework in decision-making. The Hawai'i Supreme Court in *Ka Pa'akai O Ka 'Aina v. Land Use Commission* ("*Ka Pa'akai*")[99] provided a legal framework that would "maintain a careful balance between native Hawaiian rights and private interests" and also fulfill the State's constitutional mandate to "reasonably" and "feasibly" protect Native Hawaiian rights.[100] This framework applies to all State and County agencies reviewing permit, licensing, zoning applications, and other types of land use approvals. In order to affirmatively protect Native Hawaiian rights, State and County agencies must make an independent assessment of the following:

(A) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
(B) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
(C) the feasible action, if any, to be taken … by the [State and/or its political subdivisions] to reasonably protect native Hawaiian rights if they are found to exist.[101]

Within the context of reviewing each non-commercial fishing license scenario, the State must independently:

- assess the traditional and customary Hawaiian practices taking place in State waters;
- evaluate the impacts each proposed non-commercial fishing licensing scenario may have on the resources for which Native Hawaiians depend on; and
- determine the feasible action to reasonably protect existing native Hawaiian rights

The table above utilizes this legal framework to determine the potential negative impacts to Native Hawaiian rights under each non-commercial fishing RPL scenario and recommends approaches to ameliorate those threats.

3. Recommended Long-Term Strategy and Policy Actions

The important work of the Study Group is coming to a close. Its members have created a good momentum and have made significant headway in its analysis of various RPL scenarios. They have concluded that more outreach work is needed to create a successful outcome that achieves several ends: fills data gaps on resource impacts from noncommercial fishing; improves

compliance with fishing regulations; and increases revenues for marine resource management and enforcement.

My initial scope of work for CI in support of the Study Group process consisted of several deliverables: (1) an analysis of traditional and customary Hawaiian rights applicable to access, use, and regulation of marine resources in Hawai‘i; (2) a broad evaluation of elements identified in several non-commercial fishing license scenarios; (3) a policy brief; and (4) an updated integration of the three reports into a cohesive whole. The first deliverable is complete and deliverable 2, this evaluative piece, is provided here.

The third deliverable was ultimately envisioned as a synthesis of the Study Group's findings and final recommendations to support a policy brief that would ultimately guide the preparation of any subsequent legislative package. Given that more community outreach work is needed, the third deliverable, a policy brief, warrants greater thought and some restructuring. At this juncture, it is premature to provide guidance for a bill intended for the next legislative session in January 2017. Without further community and stakeholder outreach, as recommended by the Study Group, an RPL effort may face a greater risk of public backlash and undo the good progress and momentum already achieved.

The Study Group has, therefore, refined its scope of work to providing an objective analysis of all RPL scenarios, rather than undergoing an intense vetting process to select a single model. The Study Group's final report is envisioned, then, as a resource for broader community outreach and education efforts in the future that can inform possible stakeholder, community, and political consensus on a viable program. Keeping in line with the Study Group's objectives, I believe the broader community engagement work will be better served by a policy analysis that provides long-term strategic recommendations.

Utilize the ‘Aha Moku system as a unifying entity for broader education and outreach. An ideal tool and vehicle for education, outreach, and decision-making on the local level is the island ‘aha moku system. Some islands are more developed than others, but the statutory and administrative infrastructure is fully in place now for all islands to build a strong foundation for local leadership at the moku (regional) level and communicate their concerns and recommendations to the Statewide ‘Aha Moku Advisory Committee (AMAC) for resolution within the DLNR and its various divisions.

In 2007, the State legislature passed Act 212 which "initiat[ed] a process to create a system of best practices that is based upon the indigenous resource management practices of moku (regional boundaries), which acknowledges the natural contours of land, the specific resources located within those areas, and the methodology necessary to sustain resources and the community."[102] In 2012, the legislature followed with the passage of Act 288 to establish the ‘Aha Moku Advisory Committee (AMAC) within the State Department of Land and Natural Resources (DLNR) for the purpose of integrating traditional Hawaiian resource conservation practices on all islands.

Specifically, these Acts charge AMAC with:

1) Integrating indigenous resource management practices with western management practices in each moku;
2) Identifying a comprehensive set of indigenous practices for natural resource management;
3) Fostering the understanding and practical use of native Hawaiian resource knowledge, methodology, and expertise;
4) Sustaining the State's marine, land, cultural, agricultural, and natural resources;
5) Providing community education and fostering cultural awareness on the benefits of the ʻAha Moku system;
6) Fostering protection and conservation of the State's natural resources; and
7) Developing an administrative structure that oversees the ʻAha Moku system.[103]

Just last month, on October 20, 2016, the AMAC passed its Final Rules of Practice and Procedure. My law students and I were responsible for making substantive revisions to the original draft that included four months of gathering input from the local island ʻaha councils, respected kupuna, and cultural practitioners with comprehensive knowledge of the ʻāina, natural, and cultural resources.

The rules inform DLNR of Hawaiian Indigenous methodologies and provide the procedural pathway to communicating and resolving concerns from island ʻaha moku councils, to AMAC, and the respective DLNR divisions and other state, county, and federal agencies that have kuleana for managing natural and cultural resources in Hawaiʻi. The rules reflect the ʻike (traditional knowledge) shared by Hawaiian cultural practitioners and kūpuna throughout Ka Pae ʻĀina (the Hawaiian Islands). The rules also reaffirm statutory and constitutional protections of Native Hawaiian traditional and customary rights and practices and the public trust. The rules uphold international law, namely, the United Nations Declaration on the Rights of Indigenous Peoples with the ʻAha Moku system serving as a customary decision-making process and vehicle for respecting free, prior, and informed consent.

Last month, one of the Study Group members hosted a conversation among several Native Hawaiian lawaiʻa (fishers) who engage in traditional, subsistence fishing and do community-based resource management work. Some of the initial comments from this small group of lawaiʻa and traditional resource managers was that a non-commercial fishing RPL system may not be the only model, nor the best model, to achieve the overarching goal of restoring resource abundance and healthy fishery ecosystems. This group suggested that rather than uphold an ineffective, centralized, top-down governance structure for regulating the fisheries, a decentralized, community-based, bottom-up process utilizing Hawaiian traditional knowledge systems might be more effective. Some members of this group were integral to the leadership that achieved the promulgation of customized regulations for Hāʻena as a Community Based Subsistence Fishing Area (CBSFA). They had to work with many stakeholders, charter boats and tourism interests, recreational users, and commercial fishermen to compromise and come up with rules that everyone could live by.

The level of community engagement at the grassroots level with multiple stakeholders that Hāʻena achieved for CBSFA designation and rules approval is a great model to follow. The

ʻAha Moku system can be initiated to achieve similar ends. Local leadership within the island ʻaha moku councils can be utilized to facilitate meetings with Native Hawaiian communities and multiple stakeholders, policy- and decision-makers. Findings and recommendations coming out of the island ʻaha councils could then be advanced to the statewide AMAC and review by DLNR and its appropriate divisions. From there, a strong legislative package endorsed by Native communities and other stakeholder groups could be submitted for approval and passage into law. In this manner, the kind of backlash that was experienced in the past when similar legislative proposals were introduced could be avoided through comprehensive education and coordinated outreach efforts beforehand.

V. Conclusion

In summary, the proposed RPL scenarios provide a good starting point for discussion and impact analysis on Native Hawaiian traditional and customary rights. This legal rights analysis combined with data gathered by CI and the preliminary findings and recommendations of the Study Group comprise an important resource for communities on each island who utilize their own local networks and make best use of the ʻaha moku system as a self-empowered and self-governing vehicle for promoting systemic change from the bottom-up.

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[1] HAW. CONST. art. XII, § 7 (1978).
[2] *Public Access Shoreline Hawaii. v. Hawaii County Planning Commission* (*PASH*), 79 Hawaiʻi 425, 451, 903 P.2d 1246, 1272 (1995).
[3] *Id.* at 447, 903 P.2d at 1268.
[4] *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43 (citing *Kalipi v. Hawaiian Trust Co.,* 66 Haw. 1, 12, 656 P.2d 745, 752 (1982).).
[5] *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43.
[6] *Ka Paʻakai O Ka ʻAina v. Land Use Commission (Ka Paʻakai),* 94 Haw. 31, 45, P.3d 1068, 1082 (2000) (citing Stand. Comm. Rep. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 639 (1980)).
[7] *PASH*, *supra* note 2, 79 Haw. at 451, 903 P.2d at 1272.
[8] Jon Matsuoka, Davianna McGregor, Luciano Minerbi, & Malia Akutagawa, *Governor's Molokai Subsistence Task Force Report* 20 (1994).
[9] Haw. Rev. Stat. § 188-22.6(a).
[10] Haw. Rev. Stat. § 188-22.7 (2005).
[11] Haw. Rev. Stat. § 188-22.9 (2006).
[12] E.S. CRAIGHILL HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KAʻU, HAWAIʻI 5 (1998).
[13] *Id.* at 4.
[14] *Id.*
[15] KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION, 43 (2014).
[16] HANDY & PUKUI, *supra* note 66, at 4.
[17] BEAMER, *supra* note 15, at 32-33 (the palena created "spaces of attachment and access . . . [they] delineated the resource access of makaʻāinana and aliʻi on the ground, literally connecting people to the material and spiritual resources of these places." The knowledge of these palena known "visually and cognitively" by hoaʻāina was shared orally from one generation to the next).
[18] E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 56-57 (rev. ed. 1991) [hereinafter HANDY, HANDY & PUKUI].
[19] *Application of Kamakana,* 58 Haw. 632, 638-39, 574 P.2d 1346, 1350 (1978). (citing *In re the Boundaries of Pulehunui*, 4 Haw. 239, 241 (1879) and *Harris v. Carter*, 6 Haw. 195, 197 (1877) and describing ahupuaʻa as land running "from the mountain to the sea" and providing for the chief and his people "a fishery residence at the warm

seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land." Also describing "both inland and shore fishponds" as "part of the ahupuaʻa and within its boundaries.").

[20] CARLOS ANDRADE, HĀʻENA THROUGH THE EYES OF THE ANCESTORS, 30 (2008).

[21] These limu traditions and practices are known to author through personal experience via direct knowledge transmission from her grandmother Katharine "Kitty" Akutagawa of Molokaʻi who learned this art from her Hawaiian kūpuna (elders).

[22] Malia Akutagawa, Shaelene Kamakaʻala, Harmonee Williams, & the Native Hawaiian Rights Clinic, *Traditional & Customary Practices Report for Manaʻe, Molokaʻi* 54-55, 83-84 (2016).

[23] *Id.*

[24] *Id.* (citing Interview with Dr. Kaipo Perez, Recreation Specialist I, City & Cty. of Honolulu, in Honolulu, Haw. (Jul. 1, 2015).

[25] DANIEL KAHĀʻULELIO, KA ʻOIHANA LAWAIʻA: HAWAIIAN FISHING TRADITIONS 55 (M. Puakea Nogelmeier ed., Mary Kawena Pukui trans., 2006).

[26] MARGARET TITCOMB, NATIVE USE OF FISH IN HAWAII 12-13 (2d. ed. 1972).

[27] 1 KEPĀ MALY & ONAONA MALY, KA HANA LAWAIʻA A ME NĀ KOʻA O NĀ KAI ʻĒWALU: SUMMARY OF DETAILED FINDINGS FROM RESEARCH ON THE HISTORY OF FISHING PRACTICES AND MARINE FISHERS OF THE HAWAIIAN ISLANDS 243 (2003) [hereinafter 1 MALY & MALY, KA HANA LAWAIʻA].

[28] *Territory of Hawaii v. Bishop Trust Co., Ltd.*, *supra* note 53 at 361-62 (describing that konohiki were traditionally considered agents of the chief responsible for ili, land subdivisions within an ahupuaʻa, but later written laws referenced konohiki as chiefs or landlords. Hoaʻāina who traditionally labored on the land to provide for their families and for the chiefs were later referenced under the law as tenants of an ahupuaʻa.).

[29] *Id.* at 244 (citing Act Regulating Taxes (June 7, 1839) (amended Nov. 9, 1840), ch. III, § 8(1)).

[30] Alan T. Murakami & Wayne Chung Tanaka, *Chapter 10: Konohiki Fishing Rights,* 618, n. 34 *in* NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie, Susan K. Serrano, D. Kapuaʻala Sproat, Ashley Kaiao Obrey, & Avis Kuʻuipoleialoha Poai, eds., 2015) (noting minor changes to the fishing laws that reflected "transient shoal fish reserved for the king and also the fish reserved by each konohiki, and the areas in which the restrictions applied" but that there were no substantive changes in terms of fishing rights.).

[31] *Id.*

[32] TITCOMB, *supra* note 26 at 15 (describing the meanings of the different fishing grounds named in the fishing law.).

[33] *Hatton v. Piopio*, 6 Haw. 334, 336 (1882).

[34] Section 95 of the Organic Act reads in full:

> **§ 95. Repeal of laws conferring exclusive fishing rights.** That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established hereinafter provided.

[35] Section 96 of the Organic Act reads in full:

> **§ 96. Proceedings for opening fisheries to citizens.** That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law. That if such fishing right be established the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

[36] *Id.*

[37] *Smith v. Laamea*, 29 Haw. 750 (1927).

[38] *Id.* at 755 (citing *Haalelea v. Montgomery,* 2 Haw. 62, 71 (1858).).

[39] *Damon v. Tsutsui*, 31 Haw. 678, 693 (1930).

[40] *Bishop v. Mahiko*, 35 Haw. 608 (1940).

[41] *Id.* at 614.

[42] *Id.* at 617-18.

[43] *In re* Ashford, 50 Haw. 314, 316, 440 P.2d 76, 77 (1968) (citing *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879) and *Kanaina v. Long*, 3 Haw. 332 (1872).)
[44] *Id.*
[45] *Id.* at 615.
[46] RICHARD H. KOSAKI, HAW. LEGIS. REFERENCE BUREAU, REP. NO. 1, KONOHIKI FISHING RIGHTS 27(1954) (citing *United States v. Robinson,* Civ. No. 292 (D. Haw. 1934)).
[47] *PASH*, *supra* note 2 at 437, n. 21, 903 P.2d at 1258, n. 21 (citing Act of September 7, 1847, ch. I, § IV; 2 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* (1847) (emphasis added)).
[48] L.1892, ch. 57, § 5, approved on November 25, 1892 states, "Section 5. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, *or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage*, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." (emphasis added).
[49] Section 1-1, R.L.H.1955, provides as follows:

> Common law of Territory; exceptions. The common law of England as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory.

[50] Haw. Rev. Stat. § 1-1 (2013) reads as follows:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage*; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

[51] *Kalipi v. Hawaiian Trust Co.,* 66 Haw. 1, 8, 656 P.2d 745, 749 (1982) (stating that ahupuaʻa tenants may exercise Native gathering rights on undeveloped lands within their ahupuaʻa).
[52] *PASH*, *supra* note 2, 79 Haw. at 450, 903 P.2d at 1271(finding that Native Hawaiian customary gathering practices may also be exercised on "less than fully developed" lands.)
[53] *See Kalipi, supra* note 50.
[54] *Pele Defense Fund v. Paty,* 73 Haw. 578, 620, 837 P.2d 1242, 1272 (1992) (holding "that native Hawaiian rights protected by article XII, § 7 [of the Hawaiʻi State Constitution] may extend beyond the ahupuaʻa in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.")
[55] Murakami & Tanaka, *supra* note 30, at 621, n. 78 (citing NORMAN MELLER, INDIGENOUS OCEAN RIGHTS IN HAWAII: SEA GRANT MARINE POLICY AND LAW REPORT 9-10 (1985).
[56] *Id.*, n. 79 (citing MELLER at 10).
[57] *Id.*
[58] *Bishop v. Mahiko*, *supra* note 40 at 678 (holding that "the failure to establish a private fishing right [within the two year window provided under the Organic Act] operated as an abandonment and waiver of all claims to and just compensation for such fishing right.")
[59] Murakami & Tanaka, *supra* note 30 at 622, note 81 (referencing table titled "KONOHIKI FISHERIES ACQUIRED, 1900-1953" *in* RICHARD H. KOSAKI, HAW. LEGIS. REFERENCE BUREAU, REP. NO. 1, KONOHIKI FISHING RIGHTS 13-14 (1954).
[60] *In re Fukunaga*, 16 Haw. 306, 308 (1904).
[61] *Bishop v. Mahiko, supra* note 57.
[62] *Id.*
[63] *Id.*
[64] *Damon v. Territory of Hawaii,* 194 U.S. 154, 158 (1904).
[65] *Carter v. Territory of Hawaii,* 200 U.S. 255, 256 (1906).
[66] *Id.*
[67] HAW. CONST. art. XI, § 6 (emphasis added).
[68] HAW. REV. STAT. § 187A-23 (2013).
[69] *Id.* § 187A-23(a).
[70] *Id.* § 187A-23(b).

[71] *Id.*
[72] *Id.* § 187A-23(c).
[73] *Id.* § 187A-23(d).
[74] *Id.*
[75] Personal communication with Guy Chang, DOCARE Officer (Dec. 11, 2014).
[76] Personal communication with David Sakoda, Law Fellow, DLNR Division of Aquatic Resources (Dec. 11, 2014).
[77] MELLER, *supra* note 60 (citing JAMES SHON, HAW. LEGIS. REFERENCE BUREAU, REP., HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE X, ARTICLE XI 117 (1978).
[78] KOSAKI, *supra* note 112 at 19 (citing Judiciary Committee of the 1939 Legislature for the Territory of Hawaii recommendation to table House Concurrent Resolution No. 10 "directing the attorney general to condemn all privately owned sea fisheries in the territory.").
[79] *State v. Palama (Palama)*, No. CAAP—12—0000434, 2015 WL 8566696 (Haw. Ct. App. Dec. 11, 2015).
[80] *Palama, supra* note 79 at 6.
[81] *State v. Hanapi (Hanapi),* 89 Haw. 177, 970 P.2d 845 (1998).
[82] *Palama, supra* note 79 at 4 (citing *State v. Hanapi,* 89 Haw. 177, 186, 970 P.2d 845, 894 (1998) (quoting *PASH,* 79 Haw. at 449, 903 P.2d at 1270).
[83] *Id.* (citing *Hanapi,* 89 Haw. at 186, 970 P.2d at 494).
[84] *Id.* (citing *Hanapi,* 89 Haw. at 186, 970 P.2d at 494).
[85] *PASH, supra* note 2 at 437, 903 P.2d at 1258.
[86] *Id.* at 451, 903 P.2d at 1272.
[87] *Ka Pa'akai, supra* note 6 at 45, 7 P.3d at 1082 (citing Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 639 (1980).).
[88] *Palama, supra* note 79 at 4 (citing *State v. Pratt (Pratt II),* 127 Haw. 206, 216-18, 277 P.3d 300, 310-312 (2012)).
[89] *Id.* at 8.
[90] *Id.*
[91] *Id.* at 8-9.
[92] *PASH, supra* note 2 at 442, 903 P.2d at 1263 (citing *Pele,* 73 Haw. at 618-21, 837 P.2d at 1269-72).
[93] *Id.* at 451, 903 P.2d at 1272.
[94] LINDA K. MENTON & EILEEN TAMURA, A HISTORY OF HAWAI'I 114 (1989) (citing Marion Kelly, Hawaiian Land Tenure Change (1982) unpublished).
Kelly, 1982).
[95] *PASH, supra* note 2 at 446, 903 P.2d 1267 (citing L. 1851, § 7, at 98 regarding the "many difficulties and complaints [that] have arisen from the bad feeling existing on account of the Konohiki's [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them.").
[96] *State v. Pratt,* 127 Haw. 206, 277 P.3d 300 (2012).
[97] *Id.* at 209, 277 P.3d at 303.
[98] DAVIANNA MCGREGOR, THE NATURE CONSERVANCY, CULTURAL ASSESSMENT FOR THE KAMAKOU PRESERVE, MAKAKUPA'IA AND KAWELA, ISLAND OF MOLOKA'I 16-17 (2006).
[99] *Ka Pa'akai, supra* note 6.
[100] *Id.* at 35, 7 P.3d at 1072.
[101] DAVID M. FORMAN & SUSAN K. SERRANO, HO'OHANA AKU, A HO'OLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAI'I 17 (2012) [hereinafter FORMAN & SERRANO, HO'OHANA AKU, A HO'OLA AKU] (citing *Ka Pa'akai*).
[102] Report to the Twenty-Fifth Legislature 2009 Regular Session: Final Report Aha Kiole Advisory Comm. at 7 (2008), *available at http://www.ahamoku.org/wp-content/uploads/2011/09/Final-Report-12-18-081.pdf* [hereinafter Aha Kiole Legislative Report 2009] (quoting Act 212, 2007 Leg., 24th Sess. (Haw. 2007)).
[103] HAW. REV. STAT. §171-4.5(d) (2013).

Traditional Sea Tenure in Ancient Hawai‘i, the Evolution of Fishery Laws from the Kingdom of Hawai‘i Period to Statehood, and Remaining Native Hawaiian Rights in the Fisheries

The Kumulipo

The night gave birth
Born was Kumulipo in the night, a male
Born was Po‘ele in the night, a female
Born was the coral polyp, born was the coral, came forth
Born was the grub that digs and heaps up the earth, came forth
Born was his [child] an earthworm, came forth
Born was the starfish, his child the small starfish came forth
Born was the sea cucumber, his child the small sea cucumber came forth
Born was his [child] an earthworm, came forth
Born was the starfish, his child the small sea cucumber came forth
Born was the sea urchin, the sea urchin [tribe]
Born was the short-spiked sea urchin, came forth

Born was the smooth sea urchin, his child the long-spiked came forth
Born was the ring-shaped sea urchin, his child the thin-spiked came forth
Born was the barnacle, his child the pearl oyster came forth
Born was the mother-of-pearl, his child the oyster came forth
Born was the mussel, his child the hermit crab came forth
Born was the naka shellfish, the rock oyster his child came forth
Born was the drupa shellfish, his child the bitter white shellfish came forth
Born was the conch shell, his child the small conch shell came forth

Hawaiian Cosmological & Genealogical Connections to the Sea

The Kumulipo - Hawaiian Creation Chant

The Kumulipo, a mele ko‘ihonua, is a genealogy chant honoring the birth of a chief, traced to the first ali‘i Hāloa, progenitor of the Hawaiian people, and younger brother to Hāloalaukapalili (taro plant). The Kumulipo links the human family to all of creation, from the beginning when there was only Pō (darkness) that gave birth to night and day, fashioned the hot Earth into a living planet, and brought forth corresponding plants and animals of land and sea over successive wā (eras). The Kumulipo describes the sea and the birth of coral as the “first stone in the foundation of the earth.” Following the birth of coral, other ocean species came into being such as shellfish, sea cucumber, sea urchin, mussels, barnacles, sea snails, and cowry.

Deification of the Sea, Kinolau (God Forms), Fishing Deities, and Aumakua (Family Deities) and Lessons of Mālama (Stewardship)

Kanaloa is the god of the ocean, currents, and navigation. His kinolau (physical manifestations) are present in the form of the he‘e (octopus), koholā (whale), nai‘a (dolphins), and coral. Other lesser gods are also known for having kinolau, such as the pig god Kamapua‘a who travels in the ocean in his fish form, the trigger fish called humuhumu-nukunuku-a-pua‘a.

Hawaiian families respect their ‘aumakua (ancestral deities) that assume the form of specific animals, plants, and natural phenomena. Common ‘aumakua from the sea are the honu (turtle), puhi (eel), and manō (shark). To avoid illness or even death, ‘ohana honor special kapu that forbids the killing and consuming of species in the same group of their ‘aumakua.

Hawaiian fishing lore is filled with the prowess of great lawai‘a (fishers) and their possession of mana kupua (supernatural powers) to haul in large harvests of fish and to cause them to multiply.

Ahupuaʻa and the Fisheries

Ahupuaʻa are defined by recent scholars as "culturally appropriate, ecologically aligned, and place specific unit[s] [of land] with access to diverse resources." (Gonschor & Beamer, 2014) Ahupuaʻa have also been defined as "community-level land-division component[s] that ha[ve] been implemented in various ways, as part of a larger social-ecological system, with the aim of maximizing resource availability and abundance." (Winter, 2015). Hawaiʻi's courts have understood ahupuaʻa to mean land divisions running from mountain to sea, providing for the chiefs and people "a fishery residence at the warm seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land" and including "both inland and shore fishponds ... within its boundaries." *Application of Kamakana*, 58 Haw. 632, 638-39 (1978). Ahupuaʻa fisheries were well "cared for as if they were extensions of gardens." (Andrade, 2008)

Foundations of Mālama

The islands were governed separately by several mōʻī (supreme chiefs), lesser chiefs at the moku (regional) level called aliʻi ʻai moku, and at the ahupuaʻa level the aliʻi ʻai ahupuaʻa. Konohiki, those who possessed special expertise in natural resource management, were designated by the aliʻi ʻai ahupuaʻa to oversee agricultural activities; to fairly allocate water among the makaʻāinana (common people of the land); to monitor fishery health; and enforce kapu. The kapu were strictures and regulations governing human behavior in a manner that preserved resource abundance and allowed for continued renewal.

The source of reciprocity and interdependence between aliʻi (chiefs) and makaʻāinana (the common people) is embedded within the obligation to mālama ʻāina. Aliʻi were charged with providing the leadership and organization to make the land bountiful and, in turn, capable of sustaining a growing population. The makaʻāinana through their labor fed and clothed the aliʻi. If a commoner failed in his kuleana to mālama the portion of ʻāina allotted to him, he was dismissed. A konohiki was also discharged of his duties if he failed to properly direct the people in their labor. If the land suffered and the people starved, it was perceived as the fault of the aliʻi for displeasing the gods and not following religious protocols. Negligence in mālama ʻāina signaled also a breakdown in the relationship between aliʻi and makaʻāinana. (Kameʻeleihiwa 1992)

Famous fishers Kūʻula-kai (red Kū of the sea), his wife Hina-puku-iʻa (Hina gathering seafood), and their son ʻAiʻai (Eat food) have been memorialized and deified. Whenever ʻAiʻai invoked his parents' names to bless a people and place, the fish would come and multiply. If ʻAiʻai found the people behaving in a greedy manner, he called upon his parents to remove the fish as punishment. ʻAiʻai inherited the kuleana (responsibility) of erecting all the Kūʻula (stone altars to attract and congregate fish) and creating koʻa lawaiʻa (fishing grounds) throughout the islands. ʻAiʻai taught various individuals who were pono (righteous and good) the effective methods of catching seafood, the locations of special fishing grounds, how to care for them and the religious protocols associated with this knowledge. He admonished them to share generously of their catch and sometimes gifted them with special stones and other objects that contained mana to call and capture large schools of fish.

Kūʻula stone altar at Kahaluʻu, Hawaiʻi Island.

This rich history of Maoli origins and the moʻolelo passed down through the centuries are very much alive today in the practices of Hawaiian fishing families throughout Hawaiʻi.

Lawaiʻa (fishermen) made hoʻokupu (offering) before the altar of fishing god Kūʻula after each fishing expedition. This practice still occurs today in culturally intact native communities. In ancient times, prized catch were also set aside for the aliʻi and his household; then apportionment to the kahuna and konohiki; and finally among the fishermen and those who were in need.

Mālama Practices of Hoaʻāina

- **Limu (seaweed):** pluck limu above the holdfast to allow for regrowth. Clean and "scrub" limu in the ocean which stimulates spores to release, settle on new substrate, and expand limu growing areas.

- **Coral:** coral lanes planted at mākāhā (sluice gates) to attract fish into fishponds and reef patches with the names of ancient women who tended them as found on old Māhele maps of ʻAhaʻino ahupuaʻa, Molokaʻi. Coral pruning in Kahaluʻu Bay, Hawaiʻi Island to open new habitat and niches for fish and other marine life.

- **Fish House Construction:** a wahine practice on Molokaʻi to stack stone shelters in the shallows for manini fish. The fish are harvested by hand at low tide by lifting the top stones.

- **Feeding koʻa:** a practice that is continued in Miloliʻi, Hawaiʻi Island for ʻōpelu, whereby families prepare palu (chum) into a porridge-like substance and place it in a handkerchief for hand-feeding the fish. The fish are trained to feed on the palu, become tame, and congregate in large numbers at the koʻa over time. After consistent feedings the koʻa is open for sustainable harvesting. When harvesting season begins, families who cared for the koʻa have first priority to the catch.

As Titcomb describes,

Division was made according to need, rather than as reward or payment for share in the work of fishing. Thus all were cared for. Anyone assisting in any way had a right to a share. Anyone who came up to the pile of fish and took some, if it were only a child, was not deprived of what he took, even if he had no right to it. It was thought displeasing to the gods to demand the return of fish taken without the right.

Aliʻi (chiefs) were not immune from societal expectations related to sharing. While technically speaking the catch belonged to the aliʻi when fishing was done by or for him, the aliʻi was obligated to share generously with the people. A well known legend of Chief Ha-la-e-a of Kaʻū, Hawaiʻi portended the likely fate of aliʻi who are motivated by greed. Chief Ha-la-e-a's habit of keeping all the fish for himself was his undoing. One day at sea, the lawaiʻa inundated the chief's canoe with all of the day's catch, and left him to sink and perish in his own avarice.

The Kapu System and Role of Konohiki

Kapu were integrated into fisheries management and conservation. Konohiki oversaw the fishing activities within each ahupuaʻa. They ordered the people to alternate fishing areas to avoid depletion and allow for replenishment. They also issued species-specific kapu to correspond with fish spawning periods.

According to respected Hawaiian historian, Mary Kawena Pukui, the kapu system in the Kāʻū district of Hawaiʻi Island was practiced in the following manner:

When inshore fishing was tabu (kapu), deep sea fishing (lawaiʻa-o-kai-uli) was permitted, and vice versa. Summer was the time when the fish were most abundant and therefore the permitted time for inshore fishing. Salt was gathered at this time, also, and large quantities of fish were dried … In winter, deep sea fishing was permitted. A tabu for the inshore fishing covered also all the growths in that area, the seaweeds, shellfish, as well as the fish. When the kahuna had examined the inshore area, and noted the condition of the animal and plant growths, and decided that they were ready for use, that is, that the new growth had had a chance to mature and become established, he so reported to the chief of the area, and the chief ended the tabu. For several days it remained the right of the chief to have all the sea foods that were gathered, according to his orders, reserved for his use, and that of his household and retinue. After this, a lesser number of days were the privilege of the konohiki (overseers of lands under the aliʻi). Following this period the area was declared open (noa) to the use of all.

The Konohiki Fisheries

Through 1897, the law governing konohiki fisheries generally encompassed the following:

1) Private konohiki fisheries spanned the ahupuaʻa shoreline at low tide to the reef's outer edge. In areas where there were no reef, the konohiki fishery extended from the beach at low water mark to one geographical mile seaward.

2) The konohiki and hoaʻāina within the ahupuaʻa had exclusive and joint rights to the private fishery.

3) The konohiki had the authority to regulate the fishery in the following ways:

a) Placing a kapu on one species of fish for his/her exclusive use

b) Receive from all tenants one-third of their catch within the fishery

c) Place temporary fishing prohibitions during certain periods of the year

Haalelea v. Montgomery (1858)

Recognized status of Haʻalelea as konohiki, having inherited ahupuaʻa from deceased wife. His authority included the ability to institute a kapu or tax to tenants utilizing the fishery. Court further held Montgomery to be a tenant, having received a deed conveying a portion of land within the ahupuaʻa. As such Montgomery possessed a hoaʻāina right of piscary (fishing).

Hatton v. Piopio (1882)

Court held Piopio, a person lawfully living on his employer's property in Puʻuloa within the ahupuaʻa of Honouliuli, to be a tenant with fishing rights within the ahupuaʻa: "Every resident on the land, whether he be an old hoaaina, a holder of a Kuleana title, or a resident by leasehold or any other lawful tenure has a right to fish in the sea appurtenant to the land as an incident of his tenancy."

Codifying Customary Fishing Laws During the Kingdom Period

Through conquest, Kamehameha I brought all the islands under one rule and established the Hawaiian Kingdom in 1810. The kingdom was governed primarily under oral, customary laws until Kamehameha III drafted the first constitution in 1839. In the Constitution and Laws of June 7, 1839, the king formally recognized konohiki fishing rights and traditional Hawaiian fishing customs and practices. In 1840, a law reaffirming this proclamation was enacted. The law divided fishery rights among three classes of people: the king, the konohiki (landlords), and the common people. It acknowledged the resource rights and practices within traditional ahupuaʻa fisheries that give priority to hoaʻāina as ahupuaʻa tenants and acknowledges special privileges to chiefs and konohiki as "landlords" in managing the resources.

The kingdom standardized these practices by preserving ahupuaʻa fisheries (from the shoreline to the outer edge of the coral reef) to the exclusive use of the landlord and ahupuaʻa tenants. The landlord had the right to kapu for himself a specific species of fish and was entitled to one-third of the tenants' catch. The waters beyond the reefs and the open ocean was granted to all the people. These were the kiloheʻe grounds (described as the waters shallow enough to wade or see the bottom by canoe with the aid of kukui oil to harvest heʻe or octopus), the luheʻe grounds (the deeper waters where octopus was caught by line and with a cowrie lure), the mālolo grounds (characterized by rough currents and choppy seas where the mālolo or flying fish frequent), and beyond into deeper waters.

Fisheries Jurisprudence During the Kingdom Period

All cases interpreting the konohiki fisheries laws placed greater emphasis on western constructs that characterize konohiki as property owners rather than those selected for their ʻike (knowledge, expertise) and an ethic for conservation. Similarly, hoaʻāina were perceived as mere tenants with piscatory rights, regardless of whether they fulfilled kuleana (responsibility) to mālama (care for) the resources.

The Impact of the Organic Act on the Konohiki Fisheries

Shortly after the passage of the Organic Act, a 1904 adjudication, In re Fukunaga, signified definitively the Territorial Supreme Court's opinion that **Congress intended to "destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people."**

The exact number of konohiki fisheries affected by this law was not documented. Ahupua'a fisheries were known from memory by hoa'āina and konohiki resource managers and their locations were not always mapped or specified in writing. Latter calculations based on the number of coastal ahupua'a and 'ili, and inland 'ili possessing fishery rights estimate that there were originally between 1,200 – 1,500 konohiki fisheries. Of those fisheries, between 360-720 were classified private in 1900. By 1953, approximately 300-400 konohiki fisheries were registered, 248 were unregistered (and subsequently lost), and 37 were condemned for government use.

Dismantling the Konohiki Fisheries Under American Rule

The Organic Act (1900)

In 1893, the Kingdom of Hawai'i was illegally overthrown by a group of missionary businessmen backed by the U.S. Navy. Five years later, via Joint Resolution the U.S. Congress annexed Hawai'i as a U.S. Territory. In 1900, Congress passed the Organic Act which, among other substantive changes in governance, de-privatized the konohiki fisheries to make them available as a commons for all. With the exception of "fish pond[s] [and] artificial enclosures" [sic], Section 95 of the Organic Act repealed konohiki "exclusive fishing rights" and made these private fisheries "free to all citizens of the United States subject, however to vested rights." Section 96 of the Act clarified that these rights were "vested" only if the owner of the konohiki fishery successfully petitioned the circuit court within a two-year period. Even if vested, the Territory of Hawai'i could exercise the option to condemn a konohiki fishery in favor of public use, provided it justly compensate the owner.

Summary of Konohiki Fishery Jurisprudence in the Territorial Period. The Hawai'i Supreme Court during the Territory period was very keen on extinguishing vested fishing rights, placing all fisheries in the commons, and upholding the constitutionality of sections 95 and 96 of the Organic Act against konohiki and hoa'āina alike who failed to timely register their rights.

In contrast, the federal district court and U.S. district court took a more cautionary approach in protecting konohiki and hoa'āina vested rights, even if they did not timely register their fishery. U.S. Supreme Court rulings in *Damon v. Hawaii* and *Carter v. Hawaii* indicate that whether by statute, grant, or Hawaiian custo5m vested fishery rights are recognized. The Organic Act cannot extinguish vested rights. This is controlling law despite contradictory rulings from the Territory Supreme Court.

Despite these discrepancies, the result on the ground was wholescale loss of konohiki fisheries throughout the islands as the Territorial government treated unregistered rights as waived and abandoned.

The U.S. Supreme Court has never ruled on prior "takings" challenges under the fifth amendment of the U.S. constitution with respect to konohiki fisheries as private property. The 1954 Kosaki legislative report, however, cites *United States v. Robinson* (1934), a case adjudicating the rights of Dowsett Co., Ltd., a tenant possessing a hoa'āina right of piscary in Hoaeae fishery that was subject to condemnation proceedings. The court held Dowsett Co. was entitled to compensation in a share of the sum to be paid for the Hoaeae fishery in an amount commensurate with "the value of its hoaaina right of piscary."

Hawai‘i Admission into Statehood (1959) and the Reaffirmation of Vested Fishing Rights

Hawai‘i became the 50th State of America in 1959 with the passing of the Admission Act. **Section 2 of the Act cedes to the State "all the islands, together with their appurtenant reefs and territorial waters."** The Act **transferred all public lands, including fisheries and marine waters to the new State of Hawai‘i, to be held in trust.** Section 5(f) of the Act, typically called the "ceded lands trust" identifies certain trust purposes for which revenue generation and any other disposition of public lands are to benefit. **One of the named public trust purposes is "for the betterment of the conditions of native Hawaiians,** as defined in the Hawaiian Homes Commission Act, 1920, as amended." Section 5(i) incorporates by reference certain federal laws including the Submerged Lands Act of 1953 which grants coastal states title to the submerged lands (marine waters) out to three miles.

Today, the State of Hawai‘i constitutionally protects vested rights:

> ***All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use.***

In addition to constitutional protections of vested fishing rights, the State has reaffirmed Hawaiian Kingdom laws governing konohiki fisheries that were successfully registered, pursuant to the requirements of the Organic Act. The boundaries of the konohiki fisheries are set similarly to the Kingdom laws. They encompass the coastal waters from the beach at low watermark to the reefs, or up to one mile seaward where no reefs are present. The konohiki fishery is held "for the equal use by the konohiki and the tenants" of the ahupua‘a. Ahupua‘a tenants may only take from the konohiki fishery what they need for subsistence, and not for commercial use. Konohiki may, through posting notice, exercise a right to kapu one fish or other aquatic species for a specified period of time, or in the alternative kapu the taking of one or a variety of species for several months each year. During open fishing season, the konohiki may claim one-third of the catch by ahupua‘a tenants, so long as notice is given. Haw. Rev. Stat. §187A-23.

Overview of Native Hawaiian Traditional and Customary Hawaiian Rights and the Public Trust

Key Points of Law

Article XII, Section 7 of the Hawai'i State Constitution

"The state reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."

Case Law:

In re Application of Ashford (1968)

"In this jurisdiction, it has long been the rule, based on necessity, to allow reputation evidence by kamaaina witnesses in land disputes."

A shoreline boundary dispute. The court considers the location of the makai (seaward) boundaries of a beachfront parcel in Kainalu, East Moloka'i with a royal patent issued that describes the property as running "ma ke kai" (along the sea). Ashford, the landowner, utilizes a licensed land surveyor employing U.S. geodetic survey techniques to provide expert evidence that in the long-run would characterize the beach as his own private beach. The court certifies a kama'āina (native born person) of Kainalu as an expert to interpret the meaning of "ma ke kai" according to the traditionally known location of the shoreline boundary founded on indigenous place-based knowledge of palena (geographical boundaries known to kama'āina with knowledge passed down inter-generationally).

The court finds:

"Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. . . . It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof."

Kama'āina witnesses may testify to the location of seashore boundaries dividing private land and public beaches according to reputation and ancient Hawaiian tradition, custom and usage.

HRS § 7-1

"Where landlords have obtained, or may hereafter obtain allodial titles to their lands, **the people on each of their lands shall not be deprived of the right to take firewood, house timber, ʻaho cord, thatch, or kī leaf, from the land upon which they live, for their own private use, but they shall not have a right to take such articles to sell for profit.** The people shall also have a right to drinking water, and running water, and the right of way. **The springs of water, running water, and roads shall be free to all,** on lands granted in fee simple; provided that this shall not be applicable wells and watercourses which individuals have made for their own use.

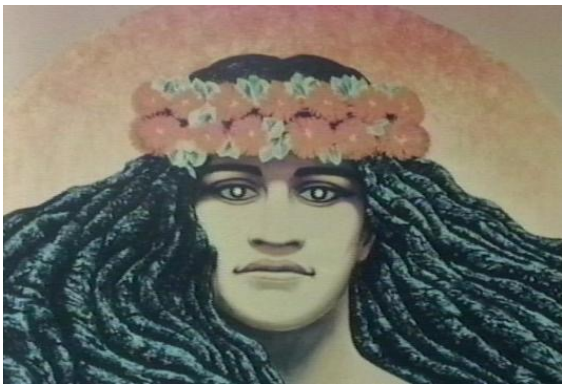
Kalipi (1982)

William Kalipi owned a kalo field in the ahupuaʻa of Manawai and an adjoining house lot located in the ahupuaʻa of ʻŌhiʻa on the island of Molokaʻi. He filed suit against the owners of the ahupuaʻa of Manawai and ʻŌhiʻa after he was denied kuleana gathering rights in both ahupuaʻa. Kalipi sought to gather certain items under HRS 7-1 for subsistence and medicinal purposes.

The Supreme Court determined that in order to assert a right to gather under HRS 7-1, three conditions must be satisfied:

(1) The tenant must physically reside within the ahupuaʻa from which the item is gathered; (2) the right to gather can only be exercised upon undeveloped lands within the ahupuaʻa; and (3) the right must be exercised for the purpose of practicing Native Hawaiian customs and traditions.

Pele Defense Fund (1992)



Native Hawaiian residents living in the Puna region of the Big island asserted gathering rights claims to certain ahupuaʻa outside of their physical residence.

The court held that Native Hawaiian rights protected by section 1-1 of the HRS and article XII, section 7 of the Hawaii State Constitution may extend beyond the ahupuaʻa in which a Native practitioner resides if those rights have been traditionally and customarily exercised in that manner.

The date by which Hawaiian usage must have been established is fixed at November 25, 1892.

Key Points of Law

Hawai‘i Revised Statute, Section 1-1:

Common Law of the State; exceptions:

Hawaiian Usage: The Hawai‘i Supreme Court determined that for the purposes of establishing custom and usage, the Hawaiian custom must have been established in practice by November 25th, 1892. **In plain terms, if the custom existed prior to this date it is considered customary, protected, and an exception to the common law of the State.**

Public Access Shoreline Hawaii (PASH) (1995)

A public interest group with Native Hawaiian cultural practitioners appeals the Hawai‘i County Planning Commission‘s denial of standing in a contested case hearing involving a special management area (SMA) permit application to develop a condominium in a shoreline area.

Hawaiians have unique and distinguishable rights from the general public that qualify them for standing in administrative hearings.

Protecting Hawaiian rights is not a taking of private property in Hawai‘i because not all the "bundles of sticks are included" (namely, the right to alienate and exclude others from one's property.)

The State cannot regulate Native Hawaiian rights out of existence.

Expanded Kalipi to include protection of Hawaiian Rights on less than fully developed lands.

Ka Pa‘akai O Ka ‘Āina (2000)

A Hawaiian coalition challenges the Ka‘ūpulehu resort development on Hawai‘i island, the reclassification of 1,000 acres of land from conservation to urban by the State LUC, and the agency's failure to protect customary and traditional practices there.

In order to affirmatively protect Native Hawaiian rights, State and County agencies reviewing permit, licensing, zoning applications, and other types of land use approvals must make an independent assessment of the following:

(1)The identity and scope of valued cultural and historical or natural resources in the petition area including the extent to which traditional and customary Native Hawaiian rights are exercised in the petition area.
(2) The extent to which those resources including traditional and customary Native rights will be affected or impaired by the proposed action; and
(3) The feasible action if any taken by the State to reasonably protect Native Hawaiian rights if they are found to exist.

Key Points of Law

Article XI, Section 1 of the Hawai‘i State Constitution:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Article XI, Section 7 of the Hawai‘i State Constitution:

“The State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.”

Protecting the Public Trust in Water, Ocean Resources, and Native Hawaiian Rights and Practices

McBryde (1973)

The Hawai‘i Supreme Court re-examines water law in Hawai‘i that had developed in the aftermath of the illegal overthrow and annexation by the U.S. of the Hawaiian Kingdom. Water jurisprudence during the U.S. Territory days characterized water as a commodity and the personal property of wealthy sugar barons. Water could be acquired “prescriptively” as a kind of adverse possession and diverted out of their original watersheds. Sugar plantation interests often severed reserved water rights associated with traditional taro cultivation (appurtenant water) to apply water originating from agriculturally productive windward valleys, to dry leeward plains where sugar crops flourished.

By 1959, Hawai‘i becomes the 50th State of the U.S. and the make-up of the State Supreme Court changes to reflect Native Hawaiian and local justices, as compared to U.S. mainland judges that dominated the bench during the Territorial period.

This case involved a water dispute between two sugar plantations on the island of Kaua‘i. Rather than look to the body of water law developed during the Territorial period of Hawai‘i, the Court turns to Hawaiian custom and usage and the King’s sovereign prerogatives over the lands and waters of the Hawaiian Kingdom to arrive at its decision in this landmark case. The Court makes the following findings:

The Hawaiian Kingdom and the Principles Adopted by the Board of Commissioners to Quiet Land Titles, 1846 (hereinafter, the “Land Commission”)

In the years that led up to the Mahele, the Land Commission was authorized to convey the king’s private or feudal rights in the land, but not his **sovereign prerogatives** as head of the Hawaiian Kingdom.

One of these sovereign prerogatives included the power “**to encourage and even to enforce the usufruct of lands for the common good.**”

All subsequent conveyances are subject to these sovereign prerogatives; namely here, the **right to use water [as] one of the most important usufructs of the land.**

Therefore, all of the waters flowing in natural water courses belong to the State in trusteeship for the people.

Key Points of Law

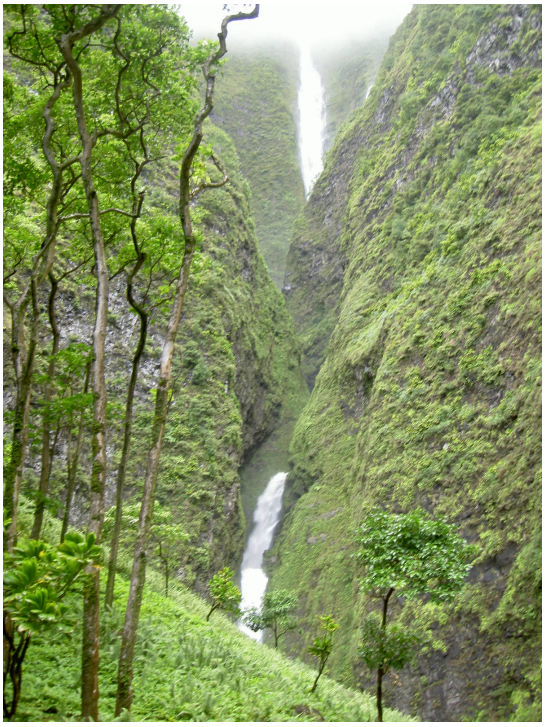
Precautionary Principle - A Standard for Managing Public Trust Resources (Waiāhole):

Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt "precautionary principles" in protecting the resource. That is, **where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation…In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.**

Waiāhole (2000)

Waiāhole Ditch captures surface waters from Kahana to Kahaluʻu, Windward Oʻahu and diverts 27 million gallons per day (mgd) of water to central and leeward plains for sugar. Taro farmers petitioned return of waters to windward valleys to sustain traditional agriculture, restore streams and estuaries. Nearly 20 other parties (County, State, Feds, private interests in large-scale agriculture and urban development) filed water use permit (WUP) applications and sought continued diversions. Parties entered into contested case hearing before State Commission on Water Resource Management (CWRM).

CWRM decision: over half of 27 mgd is allocated to leeward users and for a "proposed agricultural reserve" and "non-permitted ground water buffer." Windward streams are allocated the leftover amount.



Hawaiʻi Supreme Court overturns CWRM decision, remands to the agency to re-evaluate allocations in accordance with constitutionally mandated public trust obligations. Court orders CWRM to determine how much water must return to Windward streams to support native stream life, estuaries, and community uses.

The Court also makes the following findings:

• The State is obligated to protect, control and regulate the use of Hawai`i's water resources for the benefit of its people as a public trust.

• Private commercial use is not a public trust purpose.

• Retention of waters in their natural state does not constitute waste. Rather, a public trust interest exists in maintaining a free-flowing stream for its own sake.

• CWRM "inevitably must weigh competing public and private water uses on a case-by-case basis" but any balancing must "begin with a presumption in favor of public use, access, and enjoyment."

• Domestic uses and the exercise of Native Hawaiian and traditional and customary rights are public trust purposes.

<u>Waiʻola o Molokaʻi</u> (2004)

Molokai Ranch - Waiʻola requested to construct a well and obtain a Water Use Permit for an additional 1.25 mgd from the Kamiloloa aquifer for current and future domestic, commercial, industrial, and municipal water needs. Department of Hawaiian Home Lands (DHHL) intervenes to protect its current uses and reservation for future uses in the adjacent Kualapuʻu aquifer. Other intervenors: Hawaiian cultural practitioners claiming the proposed withdrawal would interfere with their traditional and customary rights of subsistence gathering of marine resources such as fish and limu (seaweed) along the Kamiloloa shoreline.

Water reservations for Native Hawaiian Homesteaders constitutes a public trust purpose. CWRM must not "divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers."

Recognized Molokaʻi's ground and surface water resources are interconnected. Ground water pumpage and use in one area has the potential to reduce water quality of wells and the discharge of freshwater into nearshore marine fisheries that support Native Hawaiian traditional and customary subsistence practices (e.g., gathering fish, limu, and other marine life).

State has an affirmative duty to protect Native Hawaiian traditional and customary rights.

Burden of proof rests on the permit applicant to demonstrate its use will not interfere with native Hawaiian rights and practices.

<u>Kelly v. 1250 Oceanside Partners</u> (2006)

Soil runoff caused by a developer's grading and grubbing activities on the land pollutes the pristine coastal waters of Kealakekua Bay on Hawaiʻi Island.

"[T]he plain language of Article XI, Section 1 [of the Hawaiʻi State Constitution] mandates that the County does have an obligation to conserve and protect the state's natural resources[,]" which includes protecting coastal waters from polluted runoff.

"The duties imposed upon the State are the duties of a trustee and not simply duties of a good business manager[;]"

[T]herefore, the agency was required "to not only issue permits after prescribed measures appear to be in compliance with [the appropriate] regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources."

Burden Shifting

Criminal Defendants Asserting a Constitutional Privilege for the Protection of a Traditional and Customary Hawaiian Right have the Burden of Proof

State v. Hanapi (1998)

Hanapi was arrested for criminal trespass when he walked onto to private property to express to his neighbor his concern that the neighbor's land clearing activities was causing harm to an ancient fishpond and constituted a desecration of this cultural site. Hanapi stated he was present on his neighbor's property to conduct cultural and religious ceremonies to heal the land. The Hawai'i Supreme Court affirmed Hanapi's conviction for criminal trespass.

In a criminal trespass context, "it is the obligation of the person claiming the exercise of a Native Hawaiian right to demonstrate the right is protected."

In order for a criminal defendant to establish that his or her conduct is constitutionally protected as a Native Hawaiian right, the defendant must:

(1) Prove that s/he is a Native Hawaiian (a descendant of the island inhabitants of Hawai'i prior to 1778)

(2) Provide an adequate foundation through expert or kama'āina witness testimony connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice.

(3) Show that the exercise of the claimed right occurred on undeveloped or less than fully developed land.

State v. Pratt (2012)

Native Hawaiian defendant Pratt camped in Kalalau valley, Kaua'i for prolonged periods without obtaining a camping permit. He spent time cleaning heiau (traditional temples), growing taro and native plants, clearing brush, and taking out garbage. He was convicted for illegally camping without a permit. The State asserted its interests in keeping Kalalau valley a wilderness area (through limiting traffic and length of stay), preserving park resources, public safety, and welfare.

The Hawai'i Supreme Court upheld the conviction despite Pratt having satisfied the 3-Part Hanapi test because the exercise of the State's regulatory authority in this instance was reasonable.

Article XII, Section 7 of the Hawai'i State Constitution grants the State the right to reasonably regulate Native Hawaiian rights.

Pratt's right to perform traditional and customary practices in Kalalau State Park were outweighed by the State's compelling interest to maintain public health and safety. These are reasonable State concerns. The state's requirement for users to obtain a camping permit to utilize state park lands is a reasonable regulation.

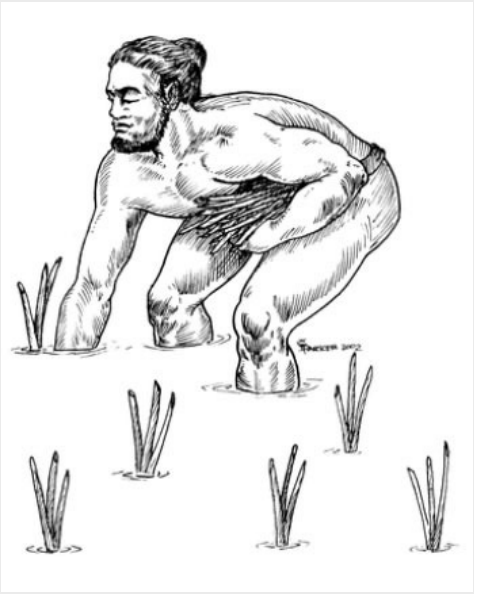
The court conducts a balancing test between the constitutionally protected Native Hawaiian traditional and customary right and the State's authority to reasonably regulate such rights. It will consider the facts on a **case-by-case** basis and will take into consideration the **totality of the circumstances.**

State v. Armitage (2014)

The petitioners asserted a Native Hawaiian privilege to access Kahoʻolawe Reserve for the purpose of reestablishing the Reinstated Hawaiian Government, but failed to apply for authorization to enter the Reserve from the Kahoʻolawe Island Reserve Commission (KIRC).

Haw. Admin. R. § 13-261-11 details the process for obtaining approval from KIRC for entrance into and activities within the reserve, by applicants seeking to exercise traditional and customary rights and practices.

The court held that "the balance weighs in favor of the State's interest in protecting the health and safety of those individuals who travel to Kahoʻolawe."



State v. Palama (2015)

A Native Hawaiian pig hunter and taro farmer from Hanapēpē ahupuaʻa on the island of Kauaʻi was cited for criminal trespass on private lands in Hanapēpē Valley when he went to hunt for pig with his dogs and a knife. The trial court dismissed the trespass charges against Palama and the Intermediate Court of Appeals (ICA) affirmed the decision. On appeal the State argued that its DLNR Game Mammal Hunting Regulations, HAR, Title 13, Ch. 123 for the island of Kauaʻi informs hunters of public hunting grounds where pig hunting is allowed. Palama could have obtained a hunting license and hunted on public lands or acquired permission from the landowner to hunt on private lands in Hanapepe.

Palama satisfied the 3-Part Hanapi test. The ICA agreed with the trial court that the expert evidence and kamaʻāina testimony presented demonstrated that pig hunting is a Native Hawaiian traditional and customary right and practice. Pig hunting was determined to be cultural practice of mālama ʻāina (caring for the land and resources) because it helped to keep the pig population down and deter pigs from destroying cultivated sweet potato and taro. The court also found that Palama exercised his hunting right in a reasonable manner.

The ICA agreed with Palama's argument that the State was impermissibly delegating to private property owners an "absolute power to grant or deny Native Hawaiians their constitutional privileges."

The court found that the State's action would "operate as a summary extinguishment of Palama's constitutionally protected right to hunt pig on the subject property — the ahupuaʻa of Hanapēpē for which Palama cared for his family's kuleana land, grew taro, and hunted. Palama and his ʻohana were clearly hoaʻāina (ahupuaʻa tenants) of Hanapēpē. The court recognized these priority hoaʻāina rights and found that the State's regulatory authority to foreclose Palama from hunting in his ahupuaʻa and delegating its authority to a private landowner would effectively extinguish Palama's rights or essentially "regulate" Palama's "right out of existence" —- a consequence the PASH court cautioned against.

Our past, our present, and whatever remains of our future, absolutely depend on what we do now.

- Sylvia Earle, Oceanographer

Marine Management in Hawai‘i

Marine Life Conservation Districts (“MLCDs”), H.R.S. Ch. 190
To conserve marine resources and allow for replenishment. Taking living material (fish, eggs, shells, corals, algae, etc.) and non-living habitat material (sand, rocks, coral skeletons, etc.) is prohibited. Non-consumptive uses are generally okay (e.g., swimming, snorkeling, and diving). The State Department of Land and Natural Resources (DLNR) may impose certain gear restrictions if some fishing is allowed. Examples of MLCDs: Hanauma Bay, Pūpūkea, Waikīkī on O‘ahu.

Fishery Management Areas (“FMAs”), H.R.S. §§ 187A-5, 188-53, 188F-2
To manage and conserve freshwater and marine life in impacted shoreline recreational fishing spots near harbors, in bays, and estuaries. Usually instituted to resolve user conflicts and competition. DLNR imposes regulations on fishing gear, seasons, time of day, bag limit, species, etc. Examples of FMAs:

- Manele Harbor, Lāna‘i – net ban in favor of local pole fishing for halalu.
- Kiholo Bay, Hawai‘i to protect sea turtles. DLNR allows aquarium fish permits and hand-fishing methods (e.g., spearfishing) since these activities are not harmful to turtles.
- West Hawai‘i Regional FMA – to resolve conflicts among aquarium fish collectors, commercial dive and snorkel tour operators, and recreational users. DLNR and community council designated 9 fishery replenishment areas (30% of West Hawai‘i Coastline) where aquarium collection and fish feeding is banned.

Bottomfish Restricted Fishing Areas (“BRFAs”), H.R.S. § 13-94
Law establishing BRFAs was passed due to alarming decline in commercial fish landings and increased harvests of sexually immature bottomfish. The law restricts taking of bottomfish species (‘ula‘ula koa‘e or onaga; ‘ula‘ula or ehu; kalekale; ‘ōpakapaka; ‘ūkikiki or gindai; hāpu‘u; and lehi) in designated BRFAs during closed season, except by permit. Also includes minimum size for onaga and ‘ōpakapaka (one pound); non-commercial bag limits; and gear restrictions (trap, trawl, bottomfish longline, or net other than scoop net or Kona crab net).

Community Based Subsistence Fishing Areas (“CBSFAs”)

- Act 271/HRS § 188-22.6. (1994) authorized DLNR to designate CBSFAs for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion. Also established a 2 year pilot project on NW coastline of Moloka‘i, Kawa‘aloa and Mo‘omomi Bays (HAR § 13-59, June 1995 – July 1997)
- Act 232 (2005)/HRS § 188-22.7 (2005) – Legislatively designated Miloli‘i as a CBSFA. DLNR shall adopt management strategies and rules consistent with CBSFA statute and that: (1) Ensure long-term sustainable populations of fish and other marine species; and (2) Encourage the scientific study and understanding of subsistence fishing management.
- Act 241/HRS § 188-22.9 (2006) – Legislatively designated Hā‘ena, Kaua‘i a CBSFA. This is the only place that has approved administrative rules for customized management of marine resources (e.g., no commercial fishing; no entry into Makua Pu‘uhonua; no collecting shells or ‘opihi until Nov. 2017, with a bag limit of 20 ‘opihi and shells from ‘Opihi Management Area thereafter; gear limits; and bag limits for lobsters, he‘e (octopus), and wana (sea urchin). Rules were adopted by BLNR in October 2014, Governor signed into law August 2015.
- Around 19 other communities statewide are vying for designation and rules approval.

Q: Why should we manage our resources now rather than later?

“We still have our resources. We still have something … After you run out [of fish], no more nothing, and then you like try fix the problem -- that’s not the time.”

Mac Poepoe, Konohiki of Mo‘omomi Fishery on Moloka‘i

We know that when we protect our oceans we’re protecting our future.

- President Bill Clinton

Natural Area Reserve System (“NARs”), H.R.S. Ch. 195
To protect important geologic and volcanic features and aquatic and terrestrial species associated with these unique environments. Example: ‘Ahihi-Kina‘u reserve, Maui – access is prohibited in order to protect 1,238 acres of lava fields from Haleakalā eruption, sensitive anchialine ponds, wetlands, native plants, and pristine coral reef habitat.

Ocean Recreation Management Area (“ORMA”), Act 272, H.R.S. § 13-256
To reduce conflicts among multiple ocean users especially in high activity areas. 10 ORMA sites were selected by the Division of Boating and Ocean Recreation (DOBOR) to manage recreational use. DOBOR provides a permitting process for operators of commercial vessels, water craft or water sports equipment.

Other marine areas protected under state and federal laws:

- **Kalapana Extension Act, 52 Stat. 781 *et seq.* (1938)** – U.S. Congressional act allows for lease of lands within the Kalapana extension to Native Hawaiians and recognizes their traditional subsistence fishing rights. The act reserves exclusive fishing rights of “native Hawaiian residents of said area or of adjacent villages and by visitors under their guidance.”
- **Kaho‘olawe Island, HRS § 6K-4, HAR § 13-260 (1993)** – all marine uses banned out to 2 nautical miles around Kaho‘olawe island in order to maintain integrity as a a cultural, educational, scientific, and environmental resource. It will eventually be transferred from the State to a recognized sovereign Native Hawaiian entity.
- **Papahānaumokuākea Marine National Monument** – Encompassing the Northwestern Hawaiian Islands, a total of 139,797 square miles. Reserve created via Presidential Proclamation 8031 (2006) under the Antiquities Act (16 U.S.C. 431-433) to protect in perpetuity the cultural significance, species diversity, and ecosystem health of Papahānaumokuākea.
- **Honolulu Harbor** and **Hilo Harbor** – for navigation
- **Marine Corps Base Hawai‘i, O‘ahu** – for military security – marine buffer zone along an 11-mile stretch of shoreline
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- **Kapa‘a Canal and Waika‘ea Canal, Kaua‘i** – commercial fishing ban imposed since 1951 to protect recreational users

DLNR & Community Partnerships for Ocean Stewardship and Enforcement:

- **Makai Watch** – Community volunteers conduct resource monitoring work, education and outreach, and reports regulatory violations to the Division of Conservation & Resources Enforcement (DOCARE) for better compliance and resource health.
- **Community Fisheries Enforcement Unit (CFEU)** – Launched in 2013 as a pilot project in north Maui. A dedicated vessel and team of DOCARE officers works with Makai Watch Coordinator and patrols 13-miles of shoreline to issue citations, enforce and educate people about fishing regulations. The Castle Foundation and Conservation International provided funding for this program. DLNR hopes to expand program statewide.
- **Adopt-A-Harbor Program** –
  Communities partnering with DOBOR to care for and upkeep harbor/pier, boat ramp, and facilities area.
  - **Kahana Kilo Kai, O‘ahu**
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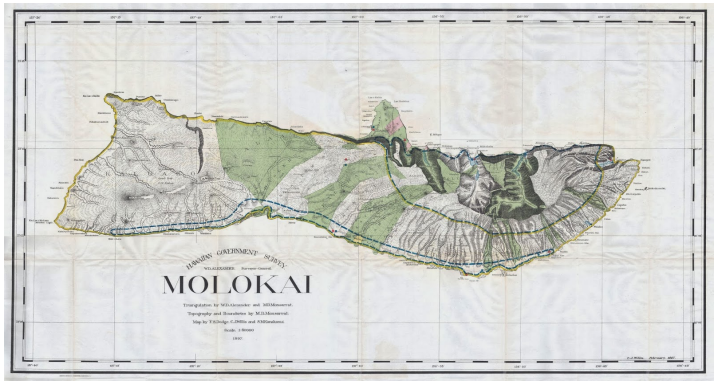
A FRAMEWORK FOR THE AHA MOKU SYSTEM AND COLLABORATIVE GOVERNANCE

HISTORY OF THE ‘AHA COUNCILS

“There is no man familiar with fishing least he fishes and becomes an expert. There is no man familiar with the soil least he plants and becomes an expert. There is no man familiar with hō`ola least he be trained as a kahuna and becomes expert at it."[1]

- Following this principle, leaders who govern people manage the resources should be those who are actual practitioners; i.e those who have gained a comprehensive and masterful understanding of the biological, physical, and spiritual aspects of the ‘āina. In traditional Hawaiian resource management, those with relevant knowledge comprised what were called the ‘Aka Kiole,[2] the people’s council.
    - **‘Aha** – The kūpuna metaphorically ascribed these councils and the weaving of various ‘ike, or knowledge streams, as an ‘aha. The individual aho or threads made from the bark of the olonā shrub were woven together to make strong cordage, called ‘aha. Thus the early Hawaiians referred to their councils as ‘aha to represent the strong leadership created when acknowledged ‘ike holders came together to weave their varied expertise for collective decision-making that benefitted the people, land, and natural resources.[3]
    - **Kiole** – The term kiole described the abundant human population, likened to the ‘iole or large schools of pua (fish fingerlings) that shrouded the coastline en masse. Thus, Molokai’s councils were called ‘Aha Kiole, the people’s council.[4]
- ‘Aha council leadership was determined by the people who collectively understood who the experts were in their community. These were experts in fisheries management, hydrology and water distribution, astronomy and navigation, architecture, farming, healing arts, etc.
- According to Kumu John Ka‘imikaua the purpose of the ‘aha councils was to utilize the expertise of those with ‘ike (knowledge) to mālama ‘āina, to care for the natural resources, and to produce food in abundance not just for the people, but for successive generations.



[1] *A Mau A Mau (To Continue Forever): Cultural and Spiritual Traditions of Moloka‘i* (Nālani Minton and Nā Maka O Ka ‘Āina 2000) [hereinafter *A Mau A Mau*].
[2] Id.
[3] Id.
[4] Id.

HOLISTIC PROBLEM SOLVING OF THE ANCIENT ‘AHA COUNCILS

1. Identify problem or issue
2. Critically examine potential solutions including potential effects upon the *āina* using eight resource realms. These realms provided the ethical foundation for the decision making process:[5]
    a. ***Moana-Nui-Ākea*** *– the farthest out to sea or along the ocean's horizon one could perceive from atop the highest vantage point in one's area.*
    b. ***Kahakai Pepeiao*** *– where the high tide is to where the lepo (soil) starts. This is typically the splash zone where crab, limu, and ‘opihi may be located; sea cliffs; or a gentle shoreline dotted with a coastal strand of vegetation; sands where turtles and seabirds nest; or extensive sand dune environs.*
    c. ***Ma Uka*** *– from the point where the lepo (soil) starts to the top of the mountain.*
    d. ***Nā Muliwai*** *– all the sources of fresh water, ground/artesian water, rivers, streams, springs, including springs along the coastline that mix with seawater.*
    e. ***Ka Lewalani*** *– everything above the land, the air, the sky, the clouds, the birds, the rainbows.*
    f. ***Kanaka Hōnua*** *– the natural resources important to sustain people. However, management is based on providing for the benefit of the resources themselves rather than from the standpoint of how they serve people.*
    g. ***Papahelōlona*** *– knowledge and intellect that is a valuable resource to be respected, maintained, and managed properly. This is the knowledge of the kahuna, the astronomers, the healers, and other carriers of ‘ike.*
    h. ***Ke ‘Ihi‘ihi*** *– elements that maintain the sanctity or sacredness of certain places.*
3. Implement solution with 3 considerations
    a. Honor ancestral past
    b. Address the needs of the present
    c. Set up future generations to have more abundance

Kumu John Ka‘imikaua expressed that this procedural management resulted in lōkahi, “the balance between the land, the people that lived upon the land and the akua (gods).” In turn, lōkahi manifested “pono, the spiritual balance in all things.”[6]

AHA MOKU SYSTEM UNDER STATE LAW

- **What is it?** - The aha moku system is a land, water, and ocean system of best practices that is based upon indigenous resource management practices of ahupua‘a and moku (regional) boundaries. Its goal is to find methods of sustaining, protecting and keeping the natural balance among the different ecosystems existing within the eight main Hawaiian Islands. It serves in an advisory capacity to the chairperson of the Board of Land and Natural Resources (BLNR). An important focus of the aha moku system is to bring regional concerns from island communities forward to the Department of Land and Natural Resources (DLNR) so issues can be addressed and if needed, mitigated.

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[5] Presentation by Dr. Kawika Winter, ethnobotanist and director of Limahuli Garden and Preserve on the island of Kaua‘i. Dr. Winter is a former hālau member of Hālau Hula o Kukunaokalā, led by the late Kumu John Ka‘imikaua, who re-introduced the history of the ancient ‘aha councils in his film *A Mau A Mau* and in educational workshops on Moloka‘i. It was Kumu John's wish to revitalize the ‘aha councils to restore pono to the land and people.

[6] *A Mau A Mau,* supra note 1.

The ʻaha were created under Act 288, which recognized that over the past 200 years, Hawaii has suffered through extensive changes to the Native Hawaiian culture, language, values, and land tenure system, resulting in the following:

- Over-development of coastlines;
- Alterations of fresh water streams;
- Destruction of watersheds;
- Decimation of coral reefs;
- The decline of endemic marine and terrestrial species[7]

In addition to these consequences, Act 288 recognized the value of cultural practitioners and their use of knowledge that has been passed down through kupuna, experienced farmers, and fishers to engage and enhance sustainability, subsistence, and self-sufficiency.[8]

Puwalu ʻEkahi – From August 15-17, 2006, representatives from 43 moku (regions) across the state and over one hundred Hawaiian cultural practitioners, including kupuna and acknowledged traditional experts, joined together to share their manaʻo and call on Native Hawaiians to begin a process to uphold and continue Hawaiian traditional land and ocean practices.[9]

Puwalu ʻElua – On November 8 and 9, 2006, educators, administrators, cultural practitioners, and kupuna discussed how to incorporate traditional Hawaiian cultural knowledge into an educational framework that could be integrated into a curricula for all public, private, charter, and Hawaiian immersion schools in Hawaii.[10]

Puwalu ʻEkolu – On December 19 and 20, 2006, policymakers and stakeholders engaged in protecting Hawaiʻi's ecosystems; Native Hawaiian practitioners with expertise in traditional sustainability methods; Native Hawaiian organizations, agency and legislative representatives in state government; and experts in education and environmental advocacy discussed existing programs and their successes and failures in community-building. Participants in Puwalu ʻEkolu, agreed that statutes, ordinances, and a framework for consultation with Hawaiian communities using the Hawaiian perspective and traditional methods such as the ahupuaʻa management system are needed, and that the ʻaha moku system should be established.[11]

From 2006 to 2010, three more puwalu were convened to gather additional community input on best practices in the area of native Hawaiian resource management. Integrating the manaʻo of farmers, fishers, environmentalists, educators, organizations and agencies, and governmental representatives, consensus was reached on the necessity of integrating the ʻaha moku system into government policy.[12]

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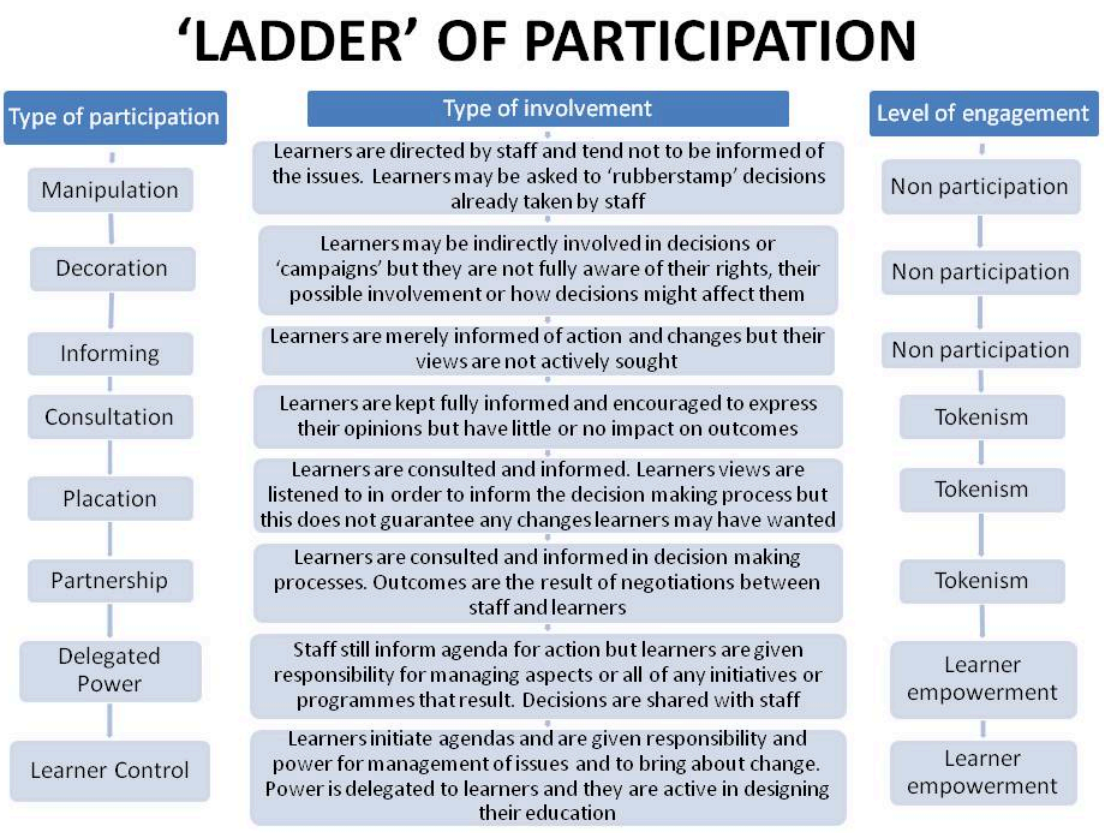
[7] 2012 Haw. Sess. Laws Act 288, § 1 at 1:1-8.
[8] 2012 Haw. Sess. Laws Act 288, § 1 at 1-8.
[9] 2012 Haw. Sess. Laws Act 288, § 1 at 2:8-3:7.
[10] 2012 Haw. Sess. Laws Act 288, § 1 at 3:8-19.
[11] 2012 Haw. Sess. Laws Act 288, § 1 at 3:20-4:10.
[12] 2012 Haw. Sess. Laws Act 288, § 1 at 4:11-22.

COLLABORATIVE GOVERNANCE

Collaborative governance, brings public and private stakeholders together in collective forums with public agencies to engage in consensus-oriented decision making.

Collaborative Governance stresses six important criteria:

(1) a forum initiated by public agencies or institutions,
(2) participants in the forum include nonstate actors,
(3) participants engage directly in decision making and are not merely ‘‘consulted’’ by public agencies,
(4) the forum is formally organized and meets collectively,
(5) the forum aims to make decisions by consensus (even if consensus is not achieved in practice), and
(6) the focus of collaboration is on public policy or public management. This is a more restrictive definition than is sometimes found in the literature.



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Collaborative governance allows those affected by decisions and those with relevant knowledge to have an influential say in the decision making process. Act 288 and creation of the ‘aha

13 Arnstein’s Ladder of Participation - https://talintuoh.files.wordpress.com/2013/03/ladder_-of-participation.jpg

councils are attempts to integrate collaborative governance processes through communication lines to DLNR and through annual reports.

PROS/CONS OF COLLABORATIVE GOVERNANCE	
PROS	CONS
May be cheaper/quicker than litigation	Power imbalances between stakeholders
Greater fulfillment for community from public discussion	Commitment needed by both public/private stakeholders
Educated decisions made by those who are most affected	Decisions may still be made contrary to suggestions of stakeholders
Decisions/deliberations made public	History of antagonism may impede process

WHAT AREAS OF EXPERTISE MAY THE 'AHA COUNCILS ADVISE ON?

The aha councils are allowed to provide advice on the following:

1. Integrating indigenous resource management practices with western management practices in each moku;
2. Identifying a comprehensive set of indigenous practices for natural resource management;
3. Fostering the understanding and practical use of native Hawaiian resource knowledge, methodology, and expertise;
4. Sustaining the State's marine, land, cultural, agricultural, and natural resources;
5. Providing community education and fostering cultural awareness on the benefits of the aha moku system;
6. Fostering protection and conservation of the State's natural resources; and,
7. Developing an administrative structure that oversees the aha moku system.

Within the DLNR, several divisions are related to these areas:

AQUATIC RESOURCES (DAR) Manages the State's marine and freshwater resources through programs in commercial fisheries and aquaculture; aquatic resources protection, enhancement and education; and recreational fisheries. **Issues fishing licenses**
BOATING AND OCEAN RECREATION (DBOR) Responsible for the management and administration of statewide ocean recreation and coastal areas programs pertaining to the ocean waters and navigable streams of the State which include 21 small boat harbors, 54 launching ramps, 13 offshore mooring areas, 10 designated ocean water areas, 108 designated ocean recreation management areas, and beaches encumbered with easements in favor of the public. Registers small vessels.
CONSERVATION AND COASTAL LANDS (OCCL) The Office of Conservation and Coastal Lands is responsible for overseeing private and public lands that lie within the State Land Use Conservation District. In addition, to privately and publicly zoned Conservation District lands, OCCL is responsible for overseeing beach and marine lands out to the seaward extend of the State's jurisdiction.

CONSERVATION AND RESOURCES ENFORCEMENT (DOCARE) Responsible for enforcement activities of the Department. The division, with full police powers, enforces all State laws and rules involving State lands, State Parks, historic sites, forest reserves, aquatic life and wildlife areas, coastal zones, Conservation districts, State shores, as well as county ordinances involving county parks. The division also enforces laws relating to firearms, ammunition, and dangerous weapons.
FORESTRY AND WILDLIFE (DOFAW) Responsible for the management of State-owned forests, natural areas, public hunting areas, and plant and wildlife sanctuaries. Program areas cover watershed protection; native resources protection, including unique ecosystems and endangered species of plants and wildlife; outdoor recreation; and commercial forestry. **Issues hunting permits.**
HISTORIC PRESERVATION DIVISION (SHPD) SHPD's three branches, History and Culture, Archaeology, and Architecture, strive to accomplish this goal through a number of different activities.

IS THERE A LEGAL BASIS TO REQUIRE COLLABORATIVE GOVERNANCE?

- Agencies responsible for protecting traditional and customary Native Hawaiian rights must conduct detailed inquiries into the impacts on those rights to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way.
    - This is the responsibility of the agency, not the developer![14]
    - The failure of a state agency to take appropriate measures may be a breach of constitutional obligations to protect Native Hawaiian interests and possibly an infringement upon due process rights.
- Ka Paʻakai O Ka ʻAina v. Land Use Commission (Ka Paʻakai),[15]
    - Supreme Court of Hawaii rules that "the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible."[16]
    - In a dispute brought by Native Hawaiian cultural practitioners opposed to a developer's request before the State Land Use Commission (LUC) to reclassify certain lands to urban zoning on Hawaiʻi Island in order to build a resort, the Hawaiʻi Supreme Court noted "[a]rticle XII, section 7 of the Hawaiʻi Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible when granting a petition for reclassification of district boundaries."[17] In order to satisfy these obligations the LUC needed to evaluate:
        - (A) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional

[14] David M. Forman & Susan K Serrano, Hoʻohana Aku, a Hoʻōla Aku: A Legal Primer for Traditional and Customary Rights in Hawaiʻi 15 (2012).

[15] 94 Hawaiʻi 31, 35, 7 P.3d 1068, 1071 (2000).

[16] See also Pub. Access Shoreline Hawaiʻi v. Hawai'i Cnty. Planning Comm'n, 79 Hawaiʻi 425, 450 n.43, 903 P.2d 1246, 1271 (1995).

[17] Ka Paʻakai, 94 Hawaiʻi at 46, 7 P.3d at 1083.

and customary native Hawaiian rights are exercised in the petition area; (B) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
        - (C) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.[18]
    - The Ka Pa‘akai ruling now mandates this legal framework be followed by all State and County agencies for the protection of traditional and customary Hawaiian rights.
    - The Statewide AMAC, with direction from local ‘aha councils on each island, could utilize their traditional knowledge and cultural expertise to provide advisories or guidance documents to the DLNR and its multiple divisions on protocol for engagement with Native Hawaiian communities and how to protect traditional and customary rights and practices on the ground.
- DLNR has consulted with ‘Aha Kiole o Moloka‘i (along with other Native Hawaiian groups, such as the Hawaiian Civic Clubs and OHA) on a variety of resource management issues[19] including in November 2012 when ‘Aha Kiole o Moloka‘i reached an understanding with the state about limiting cruise ship visits to the island following protests the previous year (and earlier, in 2007) that blocked landings at the Kaunakakai pier.[20]

[18] Id. at 47, 7 P.3d at 1084.

[19] Forman & Serrano, supra note 14, at 53.

[20] Id.