

Ho'ohana Aku, a Ho'ōla Aku:

A Legal Primer for Traditional and Customary Rights in Hawai'i



*David M. Forman
Susan K. Serrano*

Ka Huli Ao Center for Excellence in Native Hawaiian Law

William S. Richardson School of Law

University of Hawai'i at Mānoa

Printed with funding from the Office of Hawaiian Affairs

Ho'ohana Aku, a Ho'ōla Aku:

A Legal Primer for Traditional and Customary Rights in Hawai'i

David M. Forman
Susan K. Serrano



KA HULI AO
Center For Excellence in Native Hawaiian Law
William S. Richardson School of Law
University of Hawai'i at Mānoa



Acknowledgements

Mahalo nui loa to the Office of Hawaiian Affairs for supporting the publication of this primer and community outreach efforts to empower Kānaka Maoli on these and other issues.

Mahalo piha to Ka Huli Ao’s ‘ohana, especially D. Kapua‘ala Sproat and Melody Kapilialoha MacKenzie, for their invaluable edits and suggestions; Lehua Ka‘uhane and J. Michael Howell, for their research and editing assistance; and law students Kanoe Pu‘uohau and Sasha Hamada, for their research and citation checking.

Mahalo nui to the many others who generously assisted with this publication, including Isaac Moriwake and Marti Townsend, for reviewing and commenting on drafts; Kai Markell and the Sproat ‘ohana, for allowing Ka Huli Ao to borrow their beautiful photographs; Cayce Greiner for her assistance with the Glossary and Appendices; and Thomson Reuters/West Reporter (especially A.J. Halagao), for permission to reprint the Hawai‘i Supreme Court decisions in Appendix B.

Copyright © 2012 David M. Forman & Susan K. Serrano
All rights reserved

Cover image compliments of the Sproat ‘ohana

Printed in Honolulu, Hawai‘i
Published in December 2012

A publication of Ka Huli Ao Center for Excellence in Native Hawaiian Law

Ka Huli Ao Center for Excellence in Native Hawaiian Law is an academic center that promotes education, scholarship, community outreach and collaboration on issues of law, culture and justice for Native Hawaiians and other Pacific and Indigenous peoples.

www.kahuliao.org

Table of Contents

I.	Introduction	1
II.	Legal Overview and Framework	3
A.	Traditional and Customary Rights in Ancient Hawai‘i.....	3
1.	A System of Trails and Access.....	4
2.	Gathering in Upland to Lowland Areas	5
B.	Western Impacts on Traditional and Customary Rights	6
1.	Social, Political and Economic Transformations	6
2.	The Māhele: A Revised Model for Land Use in Hawai‘i.....	7
C.	Reaffirming Traditional and Customary Rights	8
1.	The Kuleana Reservation in Property Deeds.....	9
2.	Hawai‘i Revised Statutes section 7-1	9
3.	Hawai‘i Revised Statutes section 1-1.....	9
4.	Hawai‘i Constitution Article XII, Section 7.....	10
III.	Reconciling Traditional and Modern Land Use Systems	11
A.	Judicial Clarification of Traditional and Customary Rights.....	11
1.	Based Upon Residence in an Ahupua‘a	11
2.	Exercised Beyond the Boundaries of the Ahupua‘a of Residence.....	12
3.	Exercised on Less Than Fully Developed Land	14
4.	The Obligations of State Agencies to Protect Such Rights	16
5.	Additional Cases Reaffirming the Traditional Gathering Rights of Ahupua‘a Tenants.....	17
B.	Enforcing Traditional and Customary Rights	19
1.	Burdens of Proof.....	19
a.	Factors Establishing Constitutionally Protected Native Hawaiian Rights.....	19
b.	Judicial Standards for Balancing Native Hawaiian Practitioners’ Interests Against the State’s Interests in Regulating Such Practices	20
2.	Analytical Framework for State Agency Actions	21
3.	Environmental Review: Cultural Impact Assessments	22
C.	Judicial Clarification of Access Rights.....	23
1.	Preserving Access to a Landlocked Kuleana.....	24
a.	Express grant of an easement	25
b.	Implied grant of an easement	25
2.	Access Between Ahupua‘a or Districts.....	26
a.	Access rights on government lands.....	26
i.	Public Highways and Trails	27
ii.	Nā Ala Hele: Statewide Trail and Access System.....	27

b.	Access rights over private property.....	28
i.	Historic or Customary Use of Ancient Trails.....	28
ii.	Implied Dedication of Public Right-of-Way.....	29
iii.	Public Trust Doctrine.....	29
IV.	Potential Legal Handles for Preserving Traditional and Customary Rights.....	31
A.	Monitoring Permit Applications and Proceedings.....	31
1.	The Environmental Review Process.....	31
2.	Proceedings Before the State Land Use Commission.....	32
3.	Proceedings Before County Land Use Decision-Making Authorities.....	35
a.	Special Use Permits.....	37
b.	Special Management Area Permits.....	38
4.	The Board and Department of Land and Natural Resources.....	41
a.	Water Resources.....	43
b.	The Shoreline Certification Process.....	44
c.	Shoreline Setback Requirements.....	46
d.	Ocean Leasing; Marine Resource Management Areas.....	50
e.	‘Aha Moku Advisory Committee.....	52
B.	Monitoring Legislative Proposals.....	53
C.	Citizen Complaints Regarding State and County Agencies.....	54
D.	Public Access Preservation.....	54
E.	Conservation Land Trusts.....	55
F.	Litigation.....	56
V.	Conclusion.....	58
	Glossary of Terms.....	59
	Appendix A: Resources.....	70
	Appendix B: CD of Constitutional Provisions, Statutes, Admin. Rules and Cases	

I. INTRODUCTION

He ali‘i ka ‘āina; he kauwā ke kanaka.

The land is a chief; man is its servant.

Land has no need for man, but
man needs the land and works it for a livelihood.¹

Aloha mai kākou!

This primer provides an introduction to Hawai‘i law governing traditional and customary Native Hawaiian rights for those wanting to better understand the overall legal and cultural landscape. While it cannot resolve all questions regarding traditional and customary rights in these islands, it is designed to summarize major Hawai‘i laws and issues, and direct those with additional questions to available resources, legal or otherwise. Although this primer is intended to provide helpful information, it is not a substitute for and does not provide individualized legal advice. If you have legal questions, please consult an attorney who specializes in this area.

Part II overviews the current legal framework, beginning with a discussion of communal land tenure principles in ancient Hawai‘i, as well as an examination of Western impacts on traditional and customary practices. After exploring legal foundations supporting the transition to a modern property rights regime, this part briefly notes the judicial recognition of ongoing gathering and access rights. Part II concludes by reviewing constitutional and statutory provisions that govern the protection and regulation of traditional and customary rights for subsistence, cultural, and religious purposes.

Part III focuses on judicial efforts to reconcile ancient and modern systems of land use, briefly describing court cases that have gradually begun to clarify the scope of traditional and customary gathering rights. To better understand how the interests of practitioners are balanced against the interests of landowners, this part first discusses the requirements for identifying or establishing traditional and customary rights, then provides a framework for understanding the government’s obligation to protect and reasonably regulate such practices.

This Part also addresses more general rights of access involving two major categories: access rights to landlocked kuleana parcels, and access rights between two or more ahupua‘a.

¹ MARY KAWENA PUKU‘I, ‘OLELO NO‘EAU HAWAIIAN PROVERBS & POETICAL SAYINGS 62 (3d ed. 1983) [hereafter PUKU‘I] (no. 531).

Discussion of the first category focuses on common law easements, and briefly describes court cases recognizing that kuleana owners possess express or implied interests in neighboring lands ensuring continued access to their kuleana. It also describes the second category of access rights by reviewing relevant statutory and constitutional provisions governing trails and rights-of-way over both government and private lands.

Part IV provides tools that may be available to the community or other groups seeking to ensure the protection of traditional and customary rights, including monitoring permit applications and proceedings, monitoring legislative proposals, citizen complaints regarding state and county agencies, public access preservation, conservation land trusts, and litigation.

In addition to original material and other cited works, this primer borrows liberally from the forthcoming book, *NATIVE HAWAIIAN LAW* (second edition of the *NATIVE HAWAIIAN RIGHTS HANDBOOK*) with the editors’ blessing and approval. A number of resources and references are also included. A glossary explains some of the legal, scientific and cultural terms of art. Appendix A includes contact information for relevant legal resources, and county, state and federal agencies. Appendix B is a compact disc that provides ready access to significant legal resources, such as Hawai‘i constitutional provisions, laws, administrative rules, and Hawai‘i Supreme Court decisions.

Although independent review of applicable laws is always best, this primer will hopefully provide a better understanding of traditional and customary gathering and access rights, and direct the reader to additional resources to ensure that vital cultural practices are preserved for present and future generations. Ho‘ohana aku, a ho‘ola aku: Use it, and let it live!²

2 2 ORAL HISTORY INTERVIEWS: KA HANA LAWAI‘A A MENA KO‘A KAI ‘EWALU 1200, 1225 (2003), quoted in Wayne Tanaka, *Ho‘ohana aku, a ho‘ola aku: First Steps to Avoiding the Tragedy of the Commons in Hawai‘i’s Nearshore Fisheries*, 10 *ASIAN-PAC. L. & POL’Y J.* 235, 235 & n.1 (2008) (citing Group Interview by Kepā Maly with Louis “Buzzy” Agard, Valentine Ako, John Dudoit, Eddie Nāmakani, E. Kāwika Kapahulehua, & Walter Keli‘iokekai Paulo, Kūpuna (Oct. 27, 2003)).

II. LEGAL OVERVIEW AND FRAMEWORK

Hana ‘i‘o ka ha‘ole!

The white man does it in earnest!

Hawaiians were generally easygoing and didn’t order people off their lands or regard them as trespassers. When the whites began to own lands people began to be arrested for trespassing and the lands were fenced in to keep Hawaiians out.³

Traditional and customary rights are rooted in the customs, practices, and privileges of the original and still primary Native Hawaiian social unit, the ‘ohana, or extended family. In ‘Ōlelo Hawai‘i, the mother tongue of these lands: ‘āina means land, or “that which feeds;” maka‘āinana are the common people who attend the land, or the “eyes of the land;” and, ho‘āina are native tenants or “caretakers.” The cultural and spiritual identity of the Hawaiian people derives from their relationship with the ‘āina; because the land is part of their ‘ohana, traditional Hawaiian customs and practices emphasize respect and care for the ‘āina and surrounding resources. Accordingly, the traditional and customary practices of the Hawaiian people include gathering, hunting, and fishing in a manner that allows natural resources to reproduce and replenish themselves.

A. Traditional and Customary Rights in Ancient Hawai‘i

At the time of Western contact in about 1778, the Native Hawaiian people “lived in a highly organized, self-sufficient, subsistent society based on a system of communal land tenure with a highly sophisticated language, religion and culture.”⁴ Access along the shore, between adjacent ahupua‘a (loosely defined as watersheds), to the mountains and the sea, and to small areas of land cultivated or harvested by native tenants, were all necessary parts of early Hawaiian life. Gathering activities supplemented everyday food and medicinal supplies, while cultural and religious practices sustained the people in a variety of ways.

Prior to 1839, ancient Hawaiian custom and usage governed the islands. In the face of expanding foreign influence, King Kamehameha III sought to ensure the political existence of the kingdom by developing a system of codified laws that incorporated protections for ancient tradition, practice and usage. These laws survived later political transformations and continue to

3 PUKU‘I, *supra* note 1, at 55 (no. 455).

4 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (Joint Resolution of Congress acknowledging the 100th anniversary of the overthrow of the Kingdom of Hawai‘i and offering an apology to Native Hawaiians).

apply as background principles of private property law in the State of Hawai‘i.

This section begins by examining two basic examples of ancient Hawaiian custom and usage: the trail system and traditional gathering practices.

1. A System of Trails and Access

Foot travel along trails was the only means of transportation over land for early Hawaiians. Trails ran primarily in two directions. Vertical trails within an ahupua‘a running from the sea to the mountains provided ahupua‘a residents with access inland to tend to their lo‘i kalo (wetland taro terraces) or other cultivated crops, as well as for hunting, gathering, and religious purposes. Horizontal trails running through more than one ahupua‘a primarily along the shoreline, served as thoroughfares for people traveling from one ahupua‘a to another. The alahele (pathway) or alaloa (long road) trails ran along the shoreline, circling each major island. Use of Hawai‘i’s trails was open to all classes of people; where possible, the ali‘i (chiefs) appear to have preferred travel by canoe, rather than by foot.⁵



There are no detailed rules and regulations governing the use of trails in Hawai‘i’s written history. Thus, any restrictions placed on trail use were an extension of the kapu system (legal prohibitions sanctioned by religious belief and enforced by the king) or general restrictions defined by the Hawaiian culture—such as the prohibition on outdoor night activity during certain moon phases and the kapu moe, a kapu requiring prostration in the presence of chiefs. The lack of rules and regulations may also be attributed to a sixteenth century edict issued by Kūali‘i, ruler of the island of O‘ahu, which provided that old men and women could sleep in safety along O‘ahu highways. This law was later adopted by Kamehameha I in the Māmalahoe, the “life-giving law” that, among other things, “[l]et the old men, the old women, and the children sleep [in safety] on the highway” throughout the islands.⁶

5 RUSSELL A. APPLE, TRAILS: FROM STEPPINGSTONES TO KERBSTONES 1 (Bernice P. Museum Special Publ’n No. 53, 1965).

6 SAMUEL MANAIAKALANI KAMAKAU, KA PO‘E KAHIKO: THE PEOPLE OF OLD 14-15 (Dorothy B. Barrère ed., Mary Kawena Puku‘i trans., Bernice P. Bishop Museum Special Publ’n No. 51, 1964).

2. Gathering in Upland to Lowland Areas

Access rights were essential for gathering activities in early Hawai‘i.⁷ Hawaiians gathered both cultivated and non-cultivated items, depending upon availability in their particular ahupua‘a. In the uplands above the plains and in the lower forests, Hawaiians usually cultivated plants such as kalo (taro), ‘uala (sweet potato), ‘ōlena (turmeric), ‘ohe (bamboo), olonā (an endemic plant used for cordage), wauke (paper mulberry), and ‘awa (giant pepper). These items supplemented the tenants’ lifestyle at home. Other plants, such as ‘ōhi‘a lehua (used for images, spears and mallets) and ‘awapuhi (ginger) were gathered growing in the wild. These items had medicinal, ornamental, practical, aesthetic, and ceremonial uses. In Hawai‘i’s streams, Hawaiians would gather ‘o‘opu (goby), ‘ōpae (shrimp), and hīhīwai or wī (snails) for food. Hunting of feral pigs was also considered a form of gathering. Along the seashore and in the ocean, Hawaiians would gather items such as limu (seaweed), ‘opihi (limpets), wana (sea urchin), and other marine products to support their daily diet. Hawaiians also gathered their primary source of protein—i‘a (fish)—in areas ranging from coral reefs to deep water.

Although early Hawaiians may have cultivated only small areas compared to the total acreage on each major island, they were able to utilize much greater land areas through gathering. Tenant farmers supplemented their subsistence lifestyle with plants and animals that either did not grow or could not be supported on or near the tenant’s house lot or cultivated plot of land. They also gathered items for medicinal and religious purposes. During times of famine, gathering helped the people to survive. When crops or sea life had diminished significantly due to drought or other adverse climate conditions, gathering or foraging for food became the primary means of survival. When called upon by the resident chief, ahupua‘a tenants would retrieve large products from the land for communal purposes, such as a tree for a canoe or rafters for a hālau (meeting house).

Restrictions on gathering practices were also an extension of the kapu system, which not only held religious significance, but also served as an efficient means of conserving resources. For instance, with regard to makai gathering practices, there was a kapu placed during spawning season on deep-water fishes such as aku (ocean bonito) and ‘ōpelu (mackerel). Because these fish bear their young in the open ocean, they were susceptible to overfishing—as compared with the manini (tang), uhu (parrotfish), palani (surgeonfish), and kala (unicornfish) in protected tidal pool areas. The resident chiefs could impose kapu regulating the size, type, and number of items gathered, as well as the manner in which they were gathered—subject to being overruled by a higher-ranking chief.

7 E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKU‘I, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT* (Bernice P. Bishop Museum Bulletin No. 233, 1972), and MARGARET TITCOMB, *NATIVE USE OF FISH IN HAWAII* 4 (2d ed. 1972).

The earliest attempt to establish uniform gathering practices on all islands emerged with the codification of laws beginning in 1839. Many of these early laws were a carry-over from the kapu system. In the laws of 1839, gathering practices were established for both the uplands and the sea.⁸ The law allowed a tenant the use of the ahupua‘a to gather items, subject to several reservations. First, the konohiki was allowed to reserve for exclusive use one kind of tree that was non-cultivated and growing in the wild. A tenant who took a tree of the type reserved by the konohiki was required by law to split the haul equally with the konohiki. A second reservation was imposed by Kamehameha III and prohibited the taking of sandalwood until such time as the decree was lifted. A third reservation prohibited tenants (and, presumably, the konohiki as well) from taking any tree that was so large a man could not place his arms completely around it, unless the tree was taken to make a canoe or paddles. Finally, the native ‘ō‘ō and mamō birds were reserved exclusively for the king.

B. Western Impacts on Traditional and Customary Rights

This section briefly discusses western influences on traditional and customary practices, then describes the political motivations behind transforming Hawai‘i’s ancient communal land tenure system to a private property regime. It also provides a more detailed analysis of gathering and access rights under state law as interpreted by Hawai‘i courts.

1. Social, Political and Economic Transformations

The introduction of goats and pigs by Captain Cook in 1778 had a devastating impact on native ecosystems and crops. These animals facilitated the invasion of aggressive weeds and aided in the dispersal of disruptive alien plants. Sheep introduced by the British in the 1790s soon damaged the native forests of Mauna Kea and Hualalai, while failing as an economic enterprise. In 1794, Captain George Vancouver gifted King Kamehameha with a second small herd of cattle (the first small herd died and/or were eaten), and encouraged the king to place this second herd under a kapu lasting until 1830—the kapu also protected sheep, along with other European animals introduced to the wild. The flourishing cattle herd destroyed native crops, ate the thatching on houses, and sometimes hurt or killed people. These and other animals introduced into the wild also caused significant erosion. While native plants disappeared, non-native species planted as cattle feed began to dominate the landscape.

Another major change to Hawaiians’ subsistence economy took place in the early 1800s, following the discovery of sandalwood as an exportable crop to Asia. Native tenants were sent

8 See, e.g., An Act to Regulate the Taxes (June 7, 1839), ch. III, §§ 8 (Free and prohibited fishing grounds), 20 (Tabooed articles on the mountains); 1842 KING. HAW. LAWS 18, 25-27 & 35, reprinted in THE FUNDAMENTAL LAW OF HAWAII 12, 21-23 (Free and prohibited fishing grounds), 32-33 (Tabooed articles on the mountains) (Lorrin A. Thurston ed., 1904).

into the uplands to harvest and transport the sandalwood to the trading ships. Increasing foreign demand for sandalwood eventually forced many tenants to neglect their own fields.

Following the introduction of horses in 1803, many ancient trails were enlarged to accommodate travel by horse and, later, vehicular traffic—both modifications were accompanied by adverse environmental impacts. In 1839, the Hawaiian government later imposed a labor tax requiring all able-bodied men to work three days a week on government roads.

The introduction of sugar, then pineapple (which eventually became Hawai‘i’s major cultivated export crops), also had transformational impacts on these islands. Many ahupua‘a were cleared to provide the large tracts of lands required for these crops, destroying native tenants’ planting sites as well as uncultivated areas rich in plants and herbs used by Hawaiians. Massive ditch systems were developed to irrigate these crops by diverting water from wet Windward communities to arid Central and Leeward plains. In addition to the development of ground water wells, the commodification of water that resulted from these irrigation systems created conflicts between Native Hawaiians and plantation interests.

2. The Māhele: A Revised Model for Land Use in Hawai‘i

Before 1820, foreigners who acquired land in Hawai‘i conformed to the islands’ traditions and customs regarding property; however, these conditions eventually changed and foreigners began to violate Hawaiian custom by denying the government’s ability to dispossess them of land and transfer it to others. For example, British Consul Richard Charlton claimed a valuable piece of land based upon a purported 299-year lease obtained from the husband of dowager Queen Ka‘ahumanu (whose retainers had continued to occupy parts of the land since 1826). In 1840, Kamehameha III rejected Charlton’s claim for a variety of reasons including absence of legitimate authority to make the grant. Following further adverse decisions by the king and the Hawaiian courts, and under threat of violence from a British warship, the sovereignty of the islands was overthrown for a period of more than five months in 1843—until restored by British Rear Admiral Richard Thomas.

In an attempt to ensure the political survival of the kingdom, King Kamehameha III continued the process of transforming Hawai‘i’s ancient communal land tenure system to a modern property regime incorporating western concepts of private property rights. The king established a Board of Commissioners to Quiet Land Titles (Land Commission) in 1845, designed to settle all claims by dividing the land between the king, the chiefs, and the people. The Land Commission began its work by recognizing that the king, the konohiki and the ho‘āina all held vested interests in the land. “[T]he people’s lands were secured to them by the Constitution and laws of the kingdom,

and no power [could] convey them away, not even that of royalty itself.”⁹ Thus, the land division, or Māhele, which took place from around 1845 to 1855, was expressly qualified by the fact that all lands of the king, government and chiefs were given subject to the rights of native tenants.¹⁰

C. Reaffirming Traditional and Customary Rights

E ho‘ā‘o no i pau kuhihewa.

*Try it and rid yourself of illusions.*¹¹

When creating private interests in land, laws were also adopted that prohibited the government and the konohiki from disposing of or selling undeveloped or vacant land in a manner that would leave native tenants destitute.¹² Although the courts were authorized to rely upon principles of common law adopted in other jurisdictions, they could do so only where such interpretations would not conflict with native usage or kingdom law. Decisions of the Land Commission were also required to be consistent with native customs. As a result, traditional and customary rights survived the transition from communal land tenure to a western system of private property rights.

9 Kekiēkie v. Dennis, 1 Haw. 42, 43 (1851), cited in Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission (PASH/Kohanaiki), 79 Hawai‘i 425, 443, 903 P.2d 1246, 1264 (1995), cert. denied, 517 U.S. 1163 (1996).

10 Misinterpretations of an early decision by the Kingdom of Hawai‘i’s Supreme Court cast a troubling shadow over traditional and customary rights for more than a century. In *Oni v. Meek*, 2 Haw. 87 (1858), a native tenant asserted the right to pasture horses on lands leased by the defendant from the konohiki Haalelea. Meek seized (and sold) two of Oni’s horses for allegedly trespassing in the ahupua‘a of Honouliuli on land covered by one of the defendant’s three leases with Haalelea. The hoā‘aina Oni asserted three alternative grounds for his lawsuit seeking to recover the value of his horses: *contract*, *statute*, and *custom*. It is unclear from the record whether Oni resided in the ahupua‘a as a kuleana tenant or otherwise. In any event, the Supreme Court rejected all three of Oni’s claims. The court’s decision was mistakenly read by some as having eliminated all traditional and customary rights not specifically enumerated in section 7 of the 1850 Kuleana Act. Properly understood, however, *Oni* did not foreclose the viability of future claims involving traditional and customary practices beyond pasturing horses in the ahupua‘a of Honouliuli.

Notwithstanding contrary interpretations of the decision in *Oni v. Meek*, the Supreme Court for the Kingdom of Hawai‘i subsequently recognized the existence of gathering and access rights in *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879). The court specifically acknowledged that the land ran from the seaside to the highlands, “thus affording the chief and his people a fishery residence at the warm seaside, together with products of the high lands . . . and the right of way to the same . . . and all the varied products of the intermediate land as might be suitable to the soil and the climate of the different altitudes from sea soil to mountainside or top.” 4 Haw. at 241.

11 PUKU‘I, supra note 1, at 35 (no. 283).

12 Joint Resolutions on the Subject of Rights in Lands and the Leasing, Purchasing and Dividing of the Same (Nov. 7, 1846), 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 70-72, cited in PASH/Kohanaiki, 79 Hawai‘i at 445, 903 P.2d at 1266.

1. The Kuleana Reservation in Property Deeds

All land grant awards during the Māhele were intended to be made subject always to the rights of native tenants, through either an explicit or implicit “kuleana reservation” substantially similar, if not equivalent to: “koe nae ke kuleana o na kanaka (koe na’e ke kuleana o nā kānaka).”¹³ The highest courts for the Kingdom of Hawai‘i, Territory of Hawai‘i and State of Hawai‘i each continued to recognize kuleana reservations.¹⁴

2. Hawai‘i Revised Statutes section 7-1

The Kuleana Act of 1850 was designed to ensure and provide native tenants residing in an ahupua‘a with the opportunity to obtain fee simple title to the lands upon which they resided and cultivated their crops. In this context, the term “kuleana” refers to a plot including lands that the ho‘āina actually cultivated along with a house lot of not more than one-quarter acre. Kamehameha III insisted upon including a provision in the law to protect the claims of native tenants to gather “firewood, house timber, aho cord, thatch or ti leaf” for private, non-commercial use, as well as their rights to “drinking water, and running water, and the right of way.” One year later, the provision was amended to delete language limiting such rights based upon “need,” as well as language requiring notification of and consent from the konohiki.



Although the other provisions have all since been repealed, the provision added by the king has remained essentially unchanged since 1851 and is currently codified as Hawai‘i Revised Statutes (H.R.S.) section 7-1. According to the Hawai‘i Supreme Court, this provision applies to any person who lawfully occupies a kuleana parcel or is a lawful tenant of an ahupua‘a. Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 9, 656 P.2d 745, 750 (1982).

3. Hawai‘i Revised Statutes section 1-1

The Hawaiian kingdom was governed until 1839 by a system of usage. Less than a decade later, the Act that created the Land Commission specifically directed that body to perform its

¹³ PAUL F. NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND TERMS 55 (1995).

¹⁴ See, e.g., *Kukiihau v. Gill*, 1 Haw. 54 (1851); *In re Territory (Kakaako)*, 30 Haw. 666 (1928); *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

duties “in accordance with . . . native usages in regard to landed tenures.” Likewise, judges were required to take ancient Hawaiian usage into account and were prohibited from issuing decisions that conflicted with the laws and customs of the kingdom. These provisions in the kingdom’s Civil Code were in effect until passage of the Act to Reorganize the Judiciary Department in 1892, which replaced them with a provision now referred to as H.R.S. section 1-1. The original provision referenced “established Hawaiian national usage” but the current statute now provides an exception to the adoption of English and American common law for “established Hawaiian usage[.]”

In Kalipi, the Hawai‘i Supreme Court held that the reference to Hawaiian usage in section 1-1 insures the continuance of a “range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in section 7-1 . . . so long as no actual harm is done thereby.” Kalipi, 66 Haw. at 10, 656 P.2d at 751. The court subsequently clarified that traditional and customary rights do not depend on land ownership. See Pele Defense Fund v. Paty (“Pele I”), 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), cert. denied, 507 U.S. 918 (1993). In each of these cases, the court expressly noted that “[t]he precise nature and scope of the rights retained by [section] 1-1 would, of course, depend upon the particular circumstances of each case.” Pele I, 73 Haw. at 619, 837 P.2d at 1271; Kalipi, 66 Haw. at 12, 656 P.2d at 752.¹⁵

4. Hawai‘i Constitution Article XII, Section 7

In November 1978, state voters approved an amendment to the Hawai‘i Constitution reaffirming “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.” Haw. Const. art. XII, § 7. The convention delegates explained that “in reaffirming these rights . . . badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.” The delegates further described these rights as “an integral part of the ancient Hawaiian civilization . . . retained by its descendants” and explained that they “did not intend to remove or eliminate . . . any rights of native Hawaiians . . . but rather . . . intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access or gathering.”¹⁶

15 The highest courts of the kingdom, territory and State of Hawai‘i, the Supreme Court of the Republic of Hawai‘i and the U.S. Supreme Court have also recognized the continuing vitality of traditional and customary rights. See David M. Forman, The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence, 30 U. HAW. L. REV. 319, 320-21 & nn.1-2 & 7-11 (2008).

16 STAND. COMM. REP. NO. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637 (1980), quoted in Kalipi, 66 Haw. at 5, 656 P.2d at 748.

III. RECONCILING TRADITIONAL AND MODERN LAND USE SYSTEMS

Ko luna pohaku no ke ka‘a i lalo, ‘a‘ole hiki i ko lalo pohaku he ka‘a.

A stone that is high up can roll down, but a stone that is down cannot roll.

When a chief is overthrown his followers move on,
but the people who have lived on the land from the days
of their ancestors continue to live on it.¹⁷

Hawai‘i’s courts have embraced the call for judicial guidance by the 1978 constitutional convention delegates. In a line of cases beginning just four years after Hawai‘i’s voters approved article XII, section 7 of the Hawai‘i constitution, the Hawai‘i Supreme Court has repeatedly reaffirmed traditional and customary rights.

A. Judicial Clarification of Traditional and Customary Rights

As recognized by the Hawai‘i Supreme Court, H.R.S. section 7-1 specifically protects the right to gather, although that right is limited to the items enumerated in the statute, including materials primarily used for constructing a house or starting a fire. H.R.S. section 1-1 offers broader protection for the exercise of traditional and customary practices; it extends those rights to the gathering of materials that are otherwise essential to a tenants’ lifestyle, such as medicinal plants, and may even protect limited upland subsistence farming as practiced by early Native Hawaiians. In addition, Hawai‘i courts have interpreted article XII, section 7 of the Hawai‘i Constitution to protect gathering rights exercised beyond the boundaries of the ahupua‘a of residence, and have held that “legitimate traditional and customary practices must be protected to the extent feasible in accordance with article XII, section 7.” The state does not have the “unfettered discretion to regulate the rights of ahupua‘a tenants out of existence[;]” however, the state can permit private property owners to exclude persons “pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner” or on private property that is “fully developed.”

1. Based Upon Residence in an Ahupua‘a

Lawful residents of an ahupua‘a may, for the purpose of practicing Native Hawaiian customs and traditions, enter undeveloped lands within that ahupua‘a to gather the items listed in H.R.S. section 7-1. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982). William Kalipi owned a lo‘i kalo in the ahupua‘a of Manawai and an adjoining house lot in the ahupua‘a of ‘Ohi‘a on the

¹⁷ PUKU‘I, *supra* note 1, at 198 (no. 1833).

island of Moloka‘i; he filed suit after being denied unrestricted gathering rights in both ahupua‘a. Kalipi had sought to gather certain items for subsistence and medicinal purposes.

The Hawai‘i Supreme Court held that gathering rights are protected by three sources in Hawai‘i law: H.R.S. sections 7-1 and 1-1, and article XII, section 7 of the Hawai‘i Constitution. The court held that residents of an ahupua‘a may—for the purpose of practicing Native Hawaiian customs and traditions—enter undeveloped lands within the ahupua‘a to gather the items enumerated in H.R.S. section 7-1: “firewood, house-timber, aho cord, thatch, or ki leaf.” The court also ruled that pursuant to article XII, section 7, courts are obligated “to preserve and enforce such traditional rights.” It further determined that H.R.S. section 1-1 ensures the continuation of Native Hawaiian customs and traditions not specifically enumerated in H.R.S. section 7-1, which may have been practiced in certain ahupua‘a “so long as no actual harm is done thereby.” Kalipi, 66 Haw. at 10, 656 P.2d at 751.

Although the court ultimately ruled against Kalipi, the case is important because it was the first in which the Hawai‘i Supreme Court recognized the modern legal bases of traditional and customary rights: H.R.S. sections 7-1 and 1-1, and article XII, section 7 of the Hawai‘i Constitution.¹⁸

In summary, the court ruled that:

- (1) mere ownership of property within an ahupua‘a is not sufficient to justify the exercise of traditional and customary rights in that ahupua‘a;
- (2) H.R.S. section 7-1 permits only hoā‘āina (native tenants) to gather in the ahupua‘a where they live;
- (3) H.R.S. section 7-1 permits only hoā‘āina to gather the items enumerated in that statute;
- (4) H.R.S. section 7-1 permits only hoā‘āina to enter undeveloped (rather than fully developed) lands for the purpose of exercising traditional and customary rights;
- (5) the interests of the property owner and hoā‘āina must be balanced; and
- (6) H.R.S. section 1-1 protects other traditional and customary practices that have continued without harm to property owners.

2. Exercised Beyond the Boundaries of the Ahupua‘a of Residence

Native Hawaiian rights protected by H.R.S. section 1-1 and article XII, section 7 of the Hawai‘i Constitution may extend beyond the ahupua‘a in which a Native Hawaiian practitioner

¹⁸ Despite ruling against the plaintiff under the particular facts of this case, the court rejected the defendant’s argument that *Territory v. Liliuokalani*, 14 Haw. 88 (1902), eliminated the possibility of establishing a claim of traditional gathering rights based upon a kuleana reservation. Instead, the court left open the question whether ahupua‘a residents retained traditional and customary rights pursuant to reservations traced back to the original land grants.

resides if those rights have been traditionally and customarily exercised in that manner. Pele I, 73 Haw. at 620, 837 P.2d at 1272.

Pele Defense Fund is a nonprofit membership organization formed to perpetuate Hawaiian religion and culture; the organization challenged the state’s decision to exchange “ceded” land (including lands within the Wao Kele o Puna Natural Area Reserve) for privately owned land on the island of Hawai‘i. Pele Defense Fund claimed that Native Hawaiians had historically gathered on the state lands involved and, after the land swap, its Native Hawaiian members seeking to exercise their traditional and customary rights for subsistence, cultural, and religious purposes were denied access to the undeveloped and now privately-owned land in the neighboring ahupua‘a.

Unlike Kalipi, where the claimed gathering rights were based on land ownership within the ahupua‘a, the plaintiffs in Pele I asserted such rights based on actual practice. Native Hawaiian residents of neighboring ahupua‘a submitted evidence to support their claims concerning the “traditional access and gathering patterns of native Hawaiians in the Puna region” and the continuation of the practice of “accessing the [Puna Forest Reserve] as a common area for gathering and hunting by tenants of the Puna district.” The Hawai‘i Supreme Court held that under article XII, section 7, traditional and customary rights could be exercised for subsistence, cultural, and religious purposes on undeveloped lands beyond the ahupua‘a of residence, provided that “such rights have been customarily and traditionally exercised in this manner.” Pele I, 73 Haw. at 620, 837 P.2d at 1272.

In determining whether rights have been customarily and traditionally exercised, the court looked to kama‘āina (native-born) testimony and affidavits describing the history and traditional practices of Native Hawaiians living in that geographic area. The court noted that the plaintiff had presented kama‘āina evidence, testimony from its members, and affidavits tending to show that “the traditional and customary rights associated with tenancy in an ahupua‘a extended beyond the boundaries of the ahupua‘a.” Pele I, 73 Haw. at 620-21, 837 P.2d at 1272.

In summary, the court held:

- (1) hoā‘āina can gather beyond the ahupua‘a in which they live, where such rights have been customarily and traditionally exercised in this manner;
- (2) hoā‘āina can gather what is needed for traditional and customary Hawaiian subsistence, cultural and religious purposes;
- (3) hoā‘āina may enter undeveloped lands to reasonably exercise their traditional and customary practices; and
- (4) the interests of the property owner and hoā‘āina must be balanced.

When the case went back down to the circuit court in Pele Defense Fund v. Estate of James Campbell, Civ. No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002), the Third Circuit Court ruled in favor of the Native Hawaiian plaintiffs. Because the plaintiffs based their claims on actual practice rather than land ownership, the court held that plaintiffs’ gathering activities were traditional and customary activities related to subsistence, culture and religion that had been practiced by Native Hawaiians in the Puna area prior to November 25, 1892,¹⁹ and were not limited to the ahupua‘a of residence or by common law concepts related to tenancy or land ownership. In addition, the trial court recognized the Native Hawaiian plaintiffs’ access rights to Hawaiian trails running through the private landowner’s property, based on the exercise of traditional and customary practices beyond the boundaries of the ahupua‘a where the plaintiffs resided.

3. Exercised on Less Than Fully Developed Land

For the purpose of practicing traditional and customary rights, practitioners may gather anywhere that those rights have been traditionally and customarily exercised in that manner—on land that is less than “fully developed.” Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission (“PASH/Kohanaiki”), 79 Hawai‘i 425, 903 P.2d 1246 (1995), cert. denied, 517 U.S. 1163 (1996).²⁰

Developer Nansay Hawaii (Nansay) submitted an application to the Hawai‘i County Planning Commission for a special management area permit (SMAP) to develop a resort complex within the shoreline management area in the ahupua‘a of Kohanaiki, on the island of Hawai‘i. The nonprofit organization Public Access Shoreline Hawai‘i (PASH) filed a request for a contested case hearing²¹ with the planning commission, seeking to oppose the developer’s application. The planning commission denied PASH’s requests for a public hearing on the proposed development and issued the permit. PASH filed suit. The trial court struck down the permit and directed the planning commission to hold a contested case hearing in which PASH would be allowed to participate. On appeal, the Hawai‘i Intermediate Court of Appeals (ICA) affirmed the trial court’s decision ordering a contested case hearing. Nansay asked the Hawai‘i Supreme Court to review the ICA’s decision.

19 In State v. Zimring, 58 Haw. 106, 115 n.11, 566 P.2d 725, 732 n.11 (1977), the court observed that “November 25, 1892 is the date by which ancient Hawaiian usage must have been established in practice.”

20 Native Hawaiian practitioners Marcel Keanaina, Malani Pai and Angel Pilago, were key participants in the case. Their rights and practices were central to the outcome (although the Hawai‘i Supreme Court did not directly address the rights that these particular practitioners asserted). For this reason, we have chosen to use the place name “Kohanaiki” in the short form of the case name.

21 A “contested case hearing” is a quasi-judicial proceeding before an agency that is similar to a civil trial in court; the purpose of such hearings is to protect the legal rights of persons who will be affected by the agency’s decision. M. CASEY JARMAN, MAKING YOUR VOICE COUNT: A CITIZEN GUIDE TO CONTESTED CASE HEARINGS 5 (WILLIAM S. RICHARDSON SCHOOL OF LAW, ENVIRONMENTAL LAW PROGRAM 2002).

The Hawai‘i Supreme Court emphasized that county and state agencies are obligated to “protect customary and traditional rights to the extent feasible under the Hawai‘i Constitution and relevant statutes.” The court determined that the Coastal Zone Management Act requires the Hawai‘i County Planning Commission “to give the cultural interests asserted by PASH ‘full consideration.’” Also, “both the CZMA and article XII, section 7 of the Hawai‘i Constitution (read in conjunction with HRS [section] 1-1), obligate the HPC to ‘preserve and protect’ native Hawaiian rights to the extent feasible when issuing a SMA permit.” PASH/Kohanaiki, 79 Hawai‘i at 452, 903 P.2d at 1273.

The court declared that the “western concept of exclusivity is not universally applicable in Hawai‘i[,]” and concluded that H.R.S. section 1-1 “represents the codification of custom *as it applies in our State*.” PASH/Kohanaiki, 79 Hawai‘i at 447, 903 P.2d at 1268. The court further clarified that no minimum Hawaiian ancestry blood quantum is required of those who assert valid traditional and customary rights, but left open the question of whether non-Hawaiian members of an ‘ohana may claim those rights.

Regarding the exercise of traditional and customary rights on developed and undeveloped lands, the court chose not to analyze the various degrees of property use “that fall between the terms ‘undeveloped’ and ‘fully developed.’” The Hawai‘i Supreme Court suggested, however, that “once land has reached the point of ‘full development’ it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property.”²² PASH/Kohanaiki, 79 Hawai‘i at 451, 903 P.2d at 1272. The court ruled that access is guaranteed only in connection with undeveloped lands, and preservation of those lands is not required. However, the government does not have the “unfettered discretion to regulate the rights of ahupua‘a tenants out of existence.” PASH/Kohanaiki, 79 Hawai‘i at 451, 903 P.2d at 1272.

22 In a later decision, the court clarified that “fully developed” property includes “lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure” and it is “*always* ‘inconsistent’ to permit the practice of traditional and customary native Hawaiian rights on such property.” *State v. Hanapi*, 89 Hawai‘i 177, 186-87, 970 P.2d 485, 494-95 (1998) (emphasis in original). However, the court reserved judgment regarding the question whether such rights may continue to be practiced on land that is “less than fully developed.” Earlier, a “study group” of stakeholders—convened by the state Office of Planning at the request of the Hawai‘i legislature following the PASH/Kohanaiki decision—produced a list of factors that distinguish undeveloped and “not fully developed” land from “fully developed” property. The study group determined that factors characterizing “fully developed” property include the following:

- all necessary discretionary permits have been issued;
- there is “substantial investment in infrastructure on or improvements to the property”; and
- the property owner’s expectations of excluding practitioners of traditional and customary rights are high, while the Native Hawaiian practitioner’s expectations of exercising those rights on the property are low.

PASH/KOHANAIKI STUDY GROUP, OFFICE OF STATE PLANNING, ON NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY PRACTICES FOLLOWING THE OPINION OF THE SUPREME COURT OF THE STATE OF HAWAII‘I IN PUBLIC ACCESS SHORELINE HAWAII V. HAWAII COUNTY PLANNING COMMISSION 29 (1998).

The court also addressed whether practitioners must prove that traditional and customary practices have been continuously exercised. The court ruled that “the right of each ahupua‘a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest.” PASH/Kohanaiki, 79 Hawai‘i at 450, 903 P.2d at 1271. PASH/Kohanaiki is an important case because it strongly reaffirmed the validity of traditional and customary rights.

In summary, PASH/Kohanaiki stands for the following:

- (1) ho‘āina can gather anywhere that such rights have been customarily and traditionally exercised in that manner;
- (2) ho‘āina can gather what is needed for traditional and customary subsistence, cultural and religious purposes;
- (3) ho‘āina can gather on land that is less than fully developed;
- (4) the government cannot regulate traditional and customary rights out of existence;
- (5) the interests of the property owner and ho‘āina must be balanced; and
- (6) the balance weighs in favor of the property owner against ho‘āina who exercise otherwise valid customary rights in an unreasonable manner.

4. The Obligations of State Agencies to Protect Such Rights

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. Agencies must make these inquiries independent of the developer or applicant.

In Ka Pa‘akai O Ka ‘Aina v. Land Use Commission (Ka Pa‘akai), 94 Hawai‘i 31, 7 P.3d 1068 (2000), a coalition of Native Hawaiian community organizations (named Ka Pa‘akai O Ka ‘Aina) challenged an administrative decision by the Hawai‘i Land Use Commission (LUC) to reclassify from conservation to urban use, nearly 1,010 acres of land in the ahupua‘a of Ka‘ūpulehu on the island of Hawai‘i. The reclassification would have allowed petitioner Kaupulehu Development to proceed with plans for a luxury development project including upscale homes, a golf course, and other amenities. Ka Pa‘akai argued that its Native Hawaiian members would be adversely affected by the LUC’s decision because the proposed development would infringe upon the exercise of their traditional and customary rights.

The Hawai‘i Supreme Court agreed, noting that “[a]rticle XII, section 7 of the Hawai‘i 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.” Ka Pa‘akai, 94 Hawai‘i at 46, 7 P.3d at 1083.²³ The court held that the LUC did not provide a sufficient basis to determine “whether [the agency] fulfilled its obligation to preserve and protect traditional and customary rights of native Hawaiians” and, therefore, the LUC “failed to satisfy its statutory and constitutional obligations.”

The court then vacated the LUC’s grant of the developer’s application for a land use boundary reclassification and remanded the case to the LUC for specific findings and conclusions regarding:

- (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 LUC to reasonably protect native Hawaiian rights if they are found to exist.

(hereafter, the “Ka Pa‘akai framework”). Importantly, the court articulated this analytical framework “to effectuate the State’s obligation to protect native Hawaiian traditional and customary practices while reasonably accommodating competing private [property] interests.” The framework provides specific guidance to state and county agencies in considering land use and development projects and is discussed in greater detail below.

In summary, the court ruled:

- (1) the state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible;
- (2) agencies are obligated to make an assessment, independent of the developer or applicant, of impacts on customary and traditional practices of Native Hawaiians; and
- (3) the independent assessment must include the three factors (A, B, and C) listed above, otherwise known as the “Ka Pa‘akai framework.”

5. Additional Cases Reaffirming the Traditional Gathering Rights of Ahupua‘a Tenants

A series of water rights decisions by the Hawai‘i Supreme Court also recognized and

²³ The Court acknowledged a variety of traditional and customary rights asserted by the plaintiffs, including the gathering of sea salt, limu, kūpe‘e, Pele’s tears, and hā‘uke‘uke. It also recognized the “special religious significance” of the 1800–1801 lava flow in the ahupua‘a of Ka‘ūpūlehu, on the island of Hawai‘i. Ka Pa‘akai, 94 Hawai‘i at 43, 7 P.3d at 1080.

reaffirmed traditional and customary rights. For example, in In re Waiāhole Combined Contested Case Hearing (Waiāhole I), 94 Hawai‘i 97, 137, 9 P.3d 409, 449 (2000), the Hawai‘i Supreme Court upheld the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose (which has priority over private commercial uses). Therefore, the Commission on Water Resource Management (“Commission”) must “ensure that it does not ‘abridge or deny’ traditional and customary rights of Native Hawaiians.” Waiāhole I, 94 Hawai‘i at 153, 9 P.3d at 465 (citing H.R.S. §§ 174C-63, 101(c)).

In In re Wai‘ola o Moloka‘i, Inc. (Wai‘ola), 103 Hawai‘i 401, 409, 83 P.3d 664, 672 (2004), the court held that the Commission failed to adequately protect natural resources traditionally and customarily gathered by Native Hawaiians—specifically, several species of fish (*e.g.*, mullet, āholehole, and milkfish) and limu (*e.g.*, ogo, manuaea, ‘ele‘ele, and huluhuluwaena). The court also held that the permit applicant bears the burden to “demonstrate affirmatively” that the proposed project would not affect Native Hawaiians’ rights. In In re Kukui (Moloka‘i), Inc., 116 Hawai‘i 481, 486, 174 P.3d 320, 325 (2007), the court held that the Commission “impermissibly shifted the burden of proving harm” to individuals claiming a right to traditionally and customarily gather crab, fish, limu, and octopus on Moloka‘i. Instead, the burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices rests with the applicant. Finally, in In re ‘Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (Nā Wai Ehā), 128 Hawai‘i 228, 248-49, 287 P.3d 129, 149-50 (2012), the court held that the Commission failed to analyze the effect of reduced stream flow on Native Hawaiian traditional and customary practices such as kalo cultivation and other gathering rights, and failed to assess the feasibility of protecting those practices. For more information on water use and management, see D. KAPUA‘ALA SPROAT, *OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI‘I* (2009).



B. Enforcing Traditional and Customary Rights

It is important to recognize that many of the decisions detailed above were the direct result of practitioners who stepped forward to ensure that the government fulfills its obligations. This section describes the requirements for identifying or establishing traditional and customary rights, then provides a more detailed explanation of the Ka Pa‘akai framework that sets forth the government’s duty to protect these Native Hawaiian rights to the extent feasible, without regulating traditional and customary practices out of existence.

1. Burdens of Proof

As explained above, permit applicants bear the ultimate burden of demonstrating that their proposed use will not harm traditional and customary Native Hawaiian practices in the water law context. Thus, “simply pointing to an empty record and claiming no impact to indigenous rights will no longer suffice; permit applicants bear an affirmative burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices.”²⁴ Arguably, the burden of proof should be similarly allocated in other civil contexts including, but not necessarily limited to, applications for permission to develop land.

In the criminal context, the person claiming the exercise of the Native Hawaiian right must demonstrate that the right is protected. Hanapi, 89 Hawai‘i at 184, 970 P.2d at 492. Reasonably exercised, constitutionally protected Native Hawaiian rights qualify as a privilege in defending against criminal trespass charges. To establish that conduct is protected, a defendant must: (i) be Native Hawaiian; (ii) prove that the conduct is a protected customary and traditional practice; and (iii) establish that the exercise of the right occurred on undeveloped or “less than fully developed property.”

a. Factors Establishing Constitutionally Protected Native Hawaiian Rights

Constitutionally protected Native Hawaiian rights, “reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes.” State v. Hanapi, 89 Hawai‘i 177, 970 P.2d 485 (1998), recon. denied, 1999 Haw. LEXIS 34 (Haw. Feb. 8, 1999). Defendant Alapa‘i Hanapī resided in the ahupua‘a of Aha‘ino on the island of Moloka‘i, on property adjoining two fishponds, Kihaloko and Waihilahila. Attorney Gary Galiher purchased the land next to Hanapī’s property and proceeded to grade and fill the area near the ponds in apparent violation of U.S. Army Corps of Engineers (Army Corps) regulations governing wetlands. The Army Corps agreed

²⁴ D. Kapua‘ala Sproat, Where Justice Flows Like Water: The Moon Court’s Role in Illuminating Hawai‘i Water Law, 33 U. HAW. L. REV. 537, 576 (2011).

that Galiher should conduct a voluntary, unsupervised restoration of the property, subject to the advice and oversight of a consultant archaeologist.

Hanapī viewed Galiher’s actions as “the desecration of [a] traditional ancestral cultural site” and believed that it was his right and obligation as a Native Hawaiian tenant to perform religious and traditional ceremonies for the purpose of healing the land. Hanapī twice entered Galiher’s property to observe and monitor the restoration. On a third visit, Galiher’s on-site project supervisor ordered Hanapī off the property; when Hanapī refused to leave, he was arrested and charged with second-degree criminal trespass.

At trial, Hanapī represented himself and attempted to assert a defense of privilege based upon his constitutional rights as a Native Hawaiian. Ultimately, the district court rejected Hanapī’s claims and convicted him of criminal trespass. On appeal, the Hawai‘i Supreme Court affirmed Hanapī’s conviction. The court determined that “for a defendant to establish that his or her conduct is constitutionally protected as a native Hawaiian right, he or she must show, at minimum,” three factors:

- (1) Defendant must qualify as a “native Hawaiian,” as defined in PASH/Kohanaiki—that is, a descendant of Native Hawaiians who inhabited the islands prior to 1778, regardless of blood quantum; however, the Court set aside the question of whether non-Native Hawaiian members of an ‘ohana, or descendants of [non-Native Hawaiian] citizens of the Kingdom of Hawaii who were not inhabitants of the Hawaiian islands prior to 1778, may legitimately assert such rights.
- (2) Defendant must “establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice”—that is, through expert or kama‘āina witness testimony, connect the claimed right to a firmly rooted traditional or customary native Hawaiian practice (e.g., by providing an “explanation of the history or origin of the claimed right,” or a description of the “ceremonies” involved).
- (3) Defendant must prove that “the exercise of the right occurred on undeveloped or less than fully developed property,” where “fully developed” property includes, but is not limited to, “lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure.”

Hanapi, 89 Hawai‘i at 186-87, 970 P.2d at 494-95.

b. Judicial Standards for Balancing Native Hawaiian Practitioners’ Interests Against the State’s Interests in Regulating Such Practices

Once a practitioner satisfies the three Hanapi factors, the court will balance the practitioner’s

rights against the State’s interests to determine whether the claimed right qualifies as a defense of privilege to a criminal trespass charge. In State v. Pratt, 127 Hawai‘i 206, 277 P.3d 300, reconsideration granted, 127 Hawai‘i 233, 277 P.3d 327 (2012), the Hawai‘i Supreme Court confirmed that the three Hanapi factors are the minimum that a defendant must satisfy when claiming that his or her exercise of a Native Hawaiian right is constitutionally protected and exempt from prosecution. Defendant Lloyd Pratt, a Native Hawaiian who temporarily resided in Kalalau valley on the island of Kaua‘i, traveled into the valley on multiple occasions to clean heiau, cultivate native plants, and clear brush as well as garbage. He was cited three times for violating Hawai‘i Administrative Rules (H.A.R.) section 13-146-4 when he was found in a closed area of the valley.

The district court held (and the State conceded) that Pratt satisfied the three factors outlined in Hanapi, but required an additional balancing of a Native Hawaiian practitioner’s rights against the State’s interest in protecting the area. The State argued that its interest in keeping Kalalau a wilderness area—by limiting traffic and length of stay—preserved park resources and protected public safety and welfare. The court ruled that Pratt’s right to perform traditional and customary practices was outweighed by the State’s competing interests and convicted Pratt of criminal trespass. Pratt, 127 Hawai‘i at 218, 277 P.2d at 312.

On appeal, the Hawai‘i Supreme Court agreed. It adopted a “totality of the circumstances” test to balance the practitioner’s interest against the State’s interest in regulating the practitioner’s activity. The court then held that the balancing of interests weighed in favor of allowing the State to regulate Pratt’s activity.

2. Analytical Framework for State Agency Actions

Agencies responsible for protecting traditional and customary Native Hawaiian rights must complete the analysis outlined in Ka Pa‘akai to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way. As discussed above, the framework introduced in Ka Pa‘akai assists state and county agencies in balancing their obligations to protect traditional and customary practices against private property (as well as competing public) interests, by requiring specific findings and conclusions about:

- (1) 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;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the agency to reasonably protect native Hawaiian rights if they are found to exist.

This means that agencies may not delegate this constitutional responsibility to others by, for example, directing the applicant to independently attempt to protect traditional and customary rights.

Instead, agencies must actively research and consider the cultural, historical and natural resources of a subject property as they relate to Native Hawaiian rights, when determining what restrictions should be placed on land or water use. For example, in the Kukui and Wai‘ola cases discussed in section III.A.5. above, the court invalidated permits issued by the State Water Commission for new wells or expanded ground water pumping, based on Native Hawaiian practitioners’ concern that less fresh water flowing from coastal springs (as a result of the increased well pumpage) would negatively impact limu (seaweed), pāpa‘i (crab), i‘a (fish), ula (lobster), he‘e (octopus) and other resources necessary for their subsistence purposes.

An agency’s failure to condition permitted uses upon protection of Native Hawaiian traditional and customary practices is sufficient grounds for invalidating that agency’s decision to grant the underlying permit.

3. Environmental Review: Cultural Impact Assessments

Recognizing the fact that important Native Hawaiian cultural resources had been lost or destroyed in the past, the Hawai‘i State Legislature added a cultural impact assessment (CIA) requirement for proposed projects subject to the environmental review process. Act 50, § 1, 2000 Haw. Sess. Laws 93, 93 (codified as amended at H.R.S. § 343-2 (2005)). As a result, Environmental Assessments and Environmental Impact Statements (described in section IV.A.1 below) completed after April 6, 2000, must include an assessment of the impacts to community cultural practices together with “measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects[.]” among other requirements. See H.R.S. § 343-2.

The CIA requirement applies to major development projects proposed: on land classified as conservation or within the shoreline setback area (usually forty feet from the certified shoreline); within a historic site or district or the Waikikī Special District; that require zoning to be changed from agriculture, conservation, or preservation; that involve the use of state or county funds (subject to limited exceptions); as well as certain other specified uses. See H.R.S. § 343-5; H.A.R. §§ 11-200-5 to -8. In June 2004, the State Department of Health’s Office of Environmental Quality Control (OEQC) published a Guidebook for the Hawai‘i State Environmental Review Process (OEQC Guidebook)²⁵ containing specific guidelines for assessing cultural impacts that may be

²⁵ In 2012, OEQC updated its Guidebook. OEQC, Guide to the Implementation and Practice of the Hawaii Environmental Policy Act, 12 (2012 ed.), http://oeqc.doh.hawaii.gov/Shared%20Documents/Misc_Documents/

associated with proposed projects or actions. For example, a CIA should survey a geographical area greater than the area of proposed development, reference historical data dating back to the initial presence of the group whose cultural practices are being assessed, and may include “traditional cultural properties or other types of historic sites, both man made and natural, including submerged cultural resources, which support such cultural practices and beliefs.” More specifically, the developer should follow a detailed protocol:

- (1) Identify and consult with individuals and organizations with expertise concerning the types of cultural resources, practices, and beliefs found within the broad geographical area, e.g., district or ahupua‘a;
- (2) Identify and consult with individuals and organizations with knowledge of the area potentially affected by the proposed action;
- (3) Receive information from or conduct ethnographic interviews and oral histories with persons having knowledge of the potentially affected area;
- (4) Conduct ethnographic, historical, anthropological, sociological, and other culturally related documentary research;
- (5) Identify and describe the cultural resources, practices and beliefs located within the potentially affected area; and
- (6) Assess the impact of the proposed action, alternatives to the proposed action, and mitigation measures, on the cultural resources, practices and beliefs identified.

OEQC, Guide to the Implementation and Practice of the Hawaii Environmental Policy Act, 12 (2012 ed.). Because of the detailed methodology and content protocol established in the Guidelines, cultural assessments may be an effective tool for protecting the exercise of traditional and customary rights that may be impacted by major development projects or other proposed actions subject to the environmental review process. The State Environmental Council is in the process of drafting administrative rules on these and other topics, which may help to clarify these issues.

C. *Judicial Clarification of Access Rights*

***Ho‘ā ke ahi, kō‘ala ke ola. O nā hale wale no ka i Honolulu;
o ka ‘ai a me ka i‘a i Nu‘uanu.***

*Light the fire for there is life-giving substance. Only the houses stand in Honolulu;
the vegetable food and meat are in Nu‘uanu.*

... In olden days, much of the taro lands were found in Nu‘uanu, which supplied Honolulu with *poi*, taro greens, *‘o‘opu*, and freshwater shrimp. So it is said that only houses stand in Honolulu. Food comes from Nu‘uanu.²⁶

Access is necessary for the exercise of traditional and customary Native Hawaiian cultural practices for subsistence, cultural and religious purposes. This section summarizes the law on access rights in Hawai‘i.

1. Preserving Access to a Landlocked Kuleana

By definition, kuleana are smaller plots of land within the larger ahupua‘a that were occupied and cultivated by ho‘āina. As a result, many kuleana are landlocked, meaning they are surrounded by lands that are owned by others and without direct access to major thoroughfares. The right of access to landlocked kuleana is well established in Hawai‘i statutory and case law.

An easement for access (the right to cross another’s land for access to and from a public road) to a kuleana may be created either expressly, or impliedly based on prior existing use, or by necessity (described more fully below). *See, e.g., Rogers v. Pedro*, 3 Haw. App. 136, 642 P.2d 549, cert. denied, 64 Haw. 689 (1982). Access to a kuleana will usually be by way of a historic or customary trail, which may have been modified later for vehicular traffic. Implicit in the cases decided by Hawai‘i courts is that an easement for access may be enlarged or relocated to accommodate any reasonably foreseeable changes in the use of the kuleana parcel. Without evidence of historical use of a trail, a court may establish an easement to provide access to a landlocked kuleana parcel under H.R.S. section 7-1, which explicitly protects the right-of-way.

An owner’s intent to dedicate a public right-of-way may be express, implied-in-fact, or implied-in-law. Intent is express if it is reflected in a deed, or by any other oral or written statement that is consistent with the law. Intent to dedicate a public-right-of-way may be implied-in-fact if the public has used the trail or right-of-way for a period of time that is less than the prescriptive period (a certain number of years according to statute), but the owner has consented to the public use. A court may find an implied-in-law dedication where the owner has merely acquiesced to use, but the public has used the property for longer than the statutory prescriptive period and has enjoyed substantial benefit from the use of the land. Implied-in-fact dedication focuses on the owner’s intent, while the public’s actual use of the trail or right-of-way is the focus of implied-in-law dedication.²⁷

²⁶ PUKU‘I, *supra* note 1, at 109 (no. 1016).

²⁷ *See, e.g., Gion v. City of Santa Cruz*, 465 P.2d 50, 55-57 (Cal. 1970); *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. App. 1964); *see also* 14 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 84.01[5][b] (Robert G.

a. Express grant of an easement

During the Māhele, all awards of Government and Crown lands were subject to the rights of native tenants. Deeds executed to convey private interests in land usually contained the phrase “ua koe ke kuleana o na kanaka” or “reserving the rights of native tenants.”

A landowner can establish a right of access under H.R.S. section 7-1 if the parcel is landlocked and is a kuleana or other ancient tenancy whose origin is traceable to the Māhele. *Rogers*, 3 Haw. App. at 139, 642 P.2d at 551-52. In affirming a kuleana owner’s access rights, the Intermediate Court of Appeals held that the kuleana reservation contained in the plaintiff’s original grant expressly reserved an unrestricted right of access to the defendant’s landlocked kuleana. *Rogers*, 3 Haw. App. at 139, 642 P.2d at 552. Landowners who reside in a landlocked kuleana and wish to establish access rights should consider consulting with the Office of Hawaiian Affairs or attorneys who regularly practice in this area.

b. Implied grant of an easement

Even if an original land award did not expressly include a kuleana reservation, a landlocked kuleana owner has a right to access his or her parcel over the surrounding land by way of an easement based on necessity or prior use. An easement by necessity is created by implied grant or reservation,²⁸ and may be created either because of “strict” necessity—for example, where one of the parties is landlocked and the only access is over grantor’s land—or by “reasonable” necessity, as in a case where a way has been actually and continuously used and, although an alternate route is possible, it is very difficult or expensive. *Kalaukoa v. Keawe*, 9 Haw. 191, 194 (1893).²⁹

Even without evidence of a trail or roadway either on old maps or on the ground, ahupua’a tenants may still assert access rights to a landlocked kuleana parcel under H.R.S. section 7-1. Courts have the power to designate both the location and width of an access or right-of-way under such circumstances. Unfortunately, this is a time-consuming and expensive process, and many kuleana owners do not have the financial resources to pursue this type of court action.

Natelson ed., 2005); Michael Anthony Town & William Wai Lim Yuen, *Public Access to Beaches in Hawaii: “A Social Necessity”* 10 HAW. B.J. 5, 16-18 & 25-28 (Spring 1973).

28 See the last paragraph in section III.C.1. above.

29 In *Haiku Plantations Association v. Lono*, 1 Haw. App. 263, 618 P.2d 312 (1980), the ICA concluded that the right of access to a particular landlocked kuleana parcel did not include the right to park vehicles along an easement through a privately owned subdivision when there was no evidence that vehicles historically parked on the right-of-way at issue.

2. Access Between Ahupua‘a or Districts

State statutes protect access along trails running over government property, as well as public trails to the shoreline and forest areas. In addition, it is possible that access to ancient trails running over private property may be established by historic or customary use, implied dedication of a public right-of-way (see last paragraph in section III.C.1. above), or under the public trust doctrine.

a. Access rights on government lands

Native Hawaiians hold access rights to the mountains, seashore and other designated natural areas, in common with members of the general public. For example, “the right of public access to the sea, shorelines, and inland recreational areas, and transit along the shorelines” is guaranteed by H.R.S. section 115-1, which further “provide[s] for the acquisition of land for the purchase and maintenance of public rights-of-way and public transit corridors.” Similarly, the state is required to establish rights-of-way across public lands to provide public access to beaches, game management areas, public hunting areas, and forests. H.R.S. § 171-26. In addition, Hawai‘i’s Coastal Zone Management Act requires the state to protect and preserve historic, scenic and open space resources, which includes providing and managing public access to shoreline areas for recreational purposes. H.R.S. § 205A-2(b) to (c).

In addition to the “general” access rights described above, Native Hawaiians also have unique rights relating to the exercise of traditional and customary practices for subsistence, cultural and religious purposes. As detailed above in section II.C., these rights are derived from article XII, section 7 of the Hawai‘i Constitution and H.R.S. sections 1-1 and 7-1. The right to use ancient trails running through public or private lands for access between ahupua‘a is critical to the meaningful exercise of traditional and customary rights. One cannot gather if one cannot get to where the particular item may be found. Thus, among the “resources [that] are utilized for Hawaiian subsistence, religious, and cultural beliefs, customs, and practices” are “circulation networks includ[ing] trails and roads for lateral access and for mauka-to-makai access . . . [and those] affording access to the various resource zones within an ahupua‘a.”³⁰ These trails and roads facilitate access rights to sacred sites, mountain forests or shoreline areas, as well as entering or passing through private property in order to gather particular items for subsistence, religious or cultural purposes.

30 Davianna McGregor, *An Introduction to the Hoā‘ina and Their Rights*, 30 HAWAIIAN J. HIST. 1, 21-22 (1996).

i. Public Highways and Trails

“All roads, alleys, streets, ways, lanes, bikeways, bridges, and all other real property related interests in the State, opened, laid out, subdivided, consolidated, and acquired and built by the government” or “built by private parties and dedicated or surrendered to the public use,” are public highways. H.R.S. §§ 264-1(a), (c). Trails and other non-vehicular rights-of-way that satisfy the requirements of a public trail are also included. H.R.S. § 264-1(b). Although no cases to date have interpreted this subsection with respect to public trails, the statute suggests that an ancient trail may become “public” if:

- (1) it was a public right-of-way at the time the Highways Act of 1892³¹ was passed;
- (2) it was built by the government; or
- (3) it became a public right-of-way subsequent to the passage of either the 1892 Act, or H.R.S. section 264-1(b) in 1988.

A trail became a public right-of-way under the Highways Act of 1892 if it was dedicated or surrendered to the government. H.R.S. § 264-1(c). Usually, dedication was by deed from a private landowner to the government. H.R.S. § 264-1(c)(1). Surrender or abandonment of a trail occurred when the private landowner did not exercise any act of ownership over the trail for a period of five years after the passage of the Act in 1892. H.R.S. § 264-1(c)(2). The government can acquire a public right-of-way over privately owned land only through condemnation (the legal process the government uses to acquire private property for public use) or by the owner’s express or implied consent. *In re Hawaiian Trust Co.*, 17 Haw. 523, 524-25 (1906).

ii. Nā Ala Hele: Statewide Trail and Access System

The Nā Ala Hele Statewide Trail and Access System (enacted in 1988, under H.R.S. Chapter 198D) is administered by the state Department of Land and Natural Resources (DLNR), which must:

- (1) inventory and classify all the existing trails located in the state, H.R.S. §§ 198D-3 and -4;
- (2) identify areas which have inadequate access, H.R.S. § 198D-5;
- (3) adopt rules to regulate the use of trails and accesses, H.R.S. § 198D-6; and
- (4) acquire additional trails and accesses in areas with inadequate access to enhance the state-wide trail and access system, H.R.S. § 198D-8.

31 This act defined public highways to include all existing trails as well as trails subsequently “opened, laid out, or built by the government” or by private parties who later dedicated or abandoned the trails to the public. The act authorized the state to claim trails that existed prior to 1892 pursuant to historical documentation as confirmed by a survey on the ground; creation of a cultural survey and management plan is also required, along with programs for trail restoration, maintenance and signage.

“Hawaiian cultural representatives or practitioners” must be appointed to the statewide and island advisory councils that assist DLNR in implementing the Nā Ala Hele program and also provide a venue for public input. H.A.R. §§ 13-130-4, -5. In addition, H.A.R. section 13-130-18 prohibits interference like blocking trails and accesses, making physical changes to a trail that impede use, threats against persons using trails, or other forms of intimidation.

DLNR maintains a website that provides maps and detailed information about Nā Ala Hele trails statewide; Appendix A includes the website and other contact information for Nā Ala Hele.³² Practitioners who experience difficulties with access relating to the exercise of their traditional and customary rights may consider seeking assistance from the Trails & Access Specialist located on their respective island.

b. Access rights over private property

There are at least three potential methods for securing access to ancient trails running over private property: historic or customary use, implied dedication of a public right-of-way, or the public trust doctrine.

i. Historic or Customary Use of Ancient Trails

As described above, practitioners can secure access to ancient trails based on historic or customary use under H.R.S. section 7-1. In Palama v. Sheehan, 50 Haw. 298, 301, 440 P.2d 95, 97-98 (1968), the court held that the defendants established access rights under H.R.S. section 7-1 because the previous owners of their property historically used a trail running through plaintiffs’ property. The trails provided access between the defendants’ taro patches, which were located mauka (inland) of the plaintiffs’ property, and their kuleana parcels at the seashore. The court held that defendants were entitled to a right-of-way across plaintiffs’ land by reason of necessity, because access via a more indirect route was prevented by flooding when it rained. The court also rejected an attempt to limit the defendants’ access to horse and pedestrian use, noting that the previous owner of plaintiffs’ property had enlarged the path in 1910 for vehicular access and that the present width of the easement did not unreasonably burden the land.³³

32 NĀ ALA HELE TRAIL & ACCESS SYSTEM, Homepage, <http://www.hawaiitrails.org/home.php> (last visited Nov. 7, 2011).

33 See also Breemer v. Weeks, 104 Hawai‘i 43, 64-65, 85 P.3d 150, 171-72 (2004) (the clearly marked trail on a 1908 survey map was sufficient to suggest that the trail was well defined, in existence for over ninety years and frequently traversed prior to 1908).

ii. Implied Dedication of Public Right-of-Way

Access along Hawaiian trails may also be protected through an implied dedication of a public right-of-way across private land. An implied dedication of a public-right-of-way is established when there is intention and an act of dedication by the property owner, and an acceptance by the public. The King v. Cornwell, 3 Haw. 154, 161 (1869). If public use is the only evidence of a dedication, then such use must be for the prescriptive period, which is now twenty (20) years, although it has changed over time. As described above, an owner’s implied intent to dedicate a public right-of-way may be implied-in-fact or implied-in-law. See last paragraph of section III.C.1.

iii. Public Trust Doctrine

The public trust doctrine is another legal theory that may secure access along ancient trails. Under this doctrine, all public lands and interests in such lands are held in trust by a state or municipality for the benefit of the people and must be preserved and maintained for public purposes.³⁴ The public trust doctrine is well-recognized in Hawai‘i law and has been applied to: (1) navigable waters; (2) shoreline lands below the upper reaches of the wash of waves; (3) lava extensions; and (4) water resources.³⁵

The public trust doctrine may independently establish public ownership of and the public’s right to access along ancient trails. Like all Hawaiian kingdom lands prior to the creation of private property, trails were held by the king in trust for the people. In adopting a private property system, the sovereign retained interests in all ancient trails for the benefit of the public. Such “sovereign prerogatives” for the common good could not be conveyed away, including the power “[t]o encourage and even to enforce the usufruct [right of enjoyment] of lands” and “[t]o provide public thoroughfares and easements, by means of roads, bridges, streets, etc.”³⁶

34 See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 477 (1970).

35 See King v. Oahu Ry. & Land Co., 11 Haw. 717, 723-25 (1899); County of Hawaii v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973), reh’g denied, 55 Haw. 677 (1973), cert. denied, 419 U.S. 872 (1974); State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977); Reppun v. Board of Water Supply, 65 Haw. 531, 544, 656 P.2d 57, 66-67 (1982), cert. denied, 471 U.S. 1014 (1985); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 186-87, 504 P.2d 1330, 1339, aff’d on reh’g, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962, cert. denied, 417 U.S. 976 (1974); In re Waiāhole Combined Contested Case Hearing, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000); In re Wai‘ōla o Moloka‘i, 103 Hawai‘i 401, 431, 83 P.3d 664, 694 (2004).

36 Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them (Aug. 20, 1846), 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 81, 85, reprinted in 2 REVISED LAWS OF HAWAII 2124, 2128 (1925).

Thus, the Principles adopted by the Land Commission in 1846 recognized that public trails and rights-of-way are specifically reserved to the government and may be deemed to be an important usage of lands for the common good. The public trust status attached to public trails, highways, and rights-of-way (as recognized by the Land Commission), continuing through the territorial period to the present. Although the Hawai‘i Supreme Court has never specifically applied the public trust doctrine to trails, it would be a logical extension of existing public trust law.

IV. POTENTIAL LEGAL HANDLES FOR PRESERVING TRADITIONAL AND CUSTOMARY RIGHTS

Despite the constitutional, statutory and other significant protections for traditional and customary Native Hawaiian rights, these guarantees are often relegated to law books and fail to come to life on the ground and in the communities with the greatest need for legal protection. This section outlines some of the opportunities available to ho‘āina seeking to protect their natural and cultural resources and the practices that they enable. While some legal handles are identified here, these tools can be difficult to utilize. Before attempting to do so, consider consulting with the Office of Hawaiian Affairs or attorneys who regularly practice in this area (including but not limited to Earthjustice or the Native Hawaiian Legal Corporation).



A. *Monitoring Permit Applications and Proceedings*

It is important to monitor governmental processes approving land or water use(s) and/or development permits, to ensure that the state and counties fulfill their obligations to protect traditional and customary practices. As detailed above in section III.A.4., state and county agencies—before considering land use and development projects—must complete the analysis outlined in Ka Pa‘akai to fulfill their obligation to protect Native Hawaiian traditional and customary rights. This section describes some of the potential legal handles that may be available to community members under various state and local laws to ensure protection of these rights. Although extensive, the list below is not comprehensive.

1. **The Environmental Review Process**

H.R.S. chapter 343, sometimes called HEPA (short for the Hawaii Environmental Policy Act), establishes an environmental review process to “ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.” H.R.S. § 343-1. This process must consider impacts on cultural resources, including those that support Native Hawaiian traditional and customary practices. See section III.B.3 above. H.A.R. section 11-200-8 identifies actions that are exempt from this process. Otherwise, state law specifically requires the preparation of an environmental assessment (EA) for a number of proposed actions including but not limited to:

- use of state or county lands or funds (except for feasibility or planning studies);

- use of lands within a conservation district;
- uses within a shoreline area;
- uses within any historic site; and
- reclassification of any land classified as a conservation district by the state land use commission under chapter 205.

H.R.S. §§ 343-5(a)(1) to (4), (7). When a public agency proposes an action that triggers environmental review, it must prepare an EA “at the earliest practicable time” to determine whether the project’s impacts may be significant and, if so, it must prepare a more detailed Environmental Impact Statement (EIS). H.R.S. § 343-5(b). When a private applicant proposes such an action, the agency receiving the request for approval determines whether the action may have a significant impact and whether an EA or EIS is required. H.R.S. § 343-5. Although the responsibility for complying with chapter 343 rests with the agency, environmental review documents such as EAs and EISs are often prepared by the developer or consultant seeking the permit or approval.

Closely monitoring this process and commenting on draft EAs and EISs is one tool to ensure that agencies consider potential impacts on the resources that support traditional and customary Native Hawaiian practices. The State Office of Environmental Quality Control (OEQC) publishes “the Environmental Notice,” a bi-monthly bulletin of draft and final EAs and EISs that are available for public review. You can access the Environmental Notice online at the OEQC website (<http://hawaii.gov/healthy/environmental/oeqc/index.html/>), which includes an online library of EAs and EISs that are searchable by title or by island map. The OEQC website also includes helpful information and guides on chapter 343. You can sign up for notification of new editions of the Notice by emailing oeqchawaii@doh.hawaii.gov. Additional contact information for OEQC is included in Appendix A.

Communities throughout Hawai‘i have successfully utilized this process to highlight concerns that proposed developments may have on traditional and customary Native Hawaiian rights and practices. In some cases, projects have been stopped altogether. Before taking action, community groups should seek input and advice from public interest law firms with expertise in this area, such as Earthjustice and the Native Hawaiian Legal Corporation.

2. Proceedings Before the State Land Use Commission

H.R.S. chapter 205 gives the State Land Use Commission (LUC) responsibility for preserving and protecting Hawai‘i’s lands and encouraging uses that are best suited for those lands. Volunteer commissioners are appointed to represent each of the four counties, along with five at-large commissioners. At least one of these nine commissioners must “have substantial experience or expertise in traditional Hawaiian land usage and knowledge of cultural land practices.” H.R.S. § 205-1.

The LUC establishes district boundaries (Urban, Rural, Agricultural and Conservation) for the entire state. It acts on petitions to reclassify district boundaries submitted by private landowners, developers, and state and county agencies, which involve lands within a conservation district, lands identified as important agricultural lands (or IAL), or other lands if greater than fifteen acres. H.R.S. § 205-3.1(a). The Hawai‘i Constitution requires the state to conserve and protect IAL, promote diversified agriculture, increase agricultural self-sufficiency, and assure the availability of agriculturally suitable lands. Haw. Const. art. XI, § 3. Legislative enactments in 2005 and 2008 created incentives for designating IAL consistent with this constitutional mandate.

One of the things the LUC is mandated to consider when reviewing petitions to reclassify district boundaries is “[t]he impact of the proposed reclassification on . . . [m]aintenance of valued cultural, historical, or natural resources[.]” H.R.S. § 205-17(3)(B). Six affirmative votes are required for any boundary amendment, which would change the designation of land within a particular district and affect the types of activities that will then be allowed on that land. H.R.S. §§ 205-1, -4(h). In addition, the LUC also acts on requests for special use permits involving parcels greater than fifteen acres, or important agricultural lands. H.R.S. § 205-6(d); H.A.R. § 15-15-95(a). Special use permits allow for certain “unusual and reasonable” uses within the Agricultural and Rural districts. H.R.S. § 205-6(a); H.A.R. § 15-15-95(b).

Traditional and customary practitioners should closely monitor proceedings before the LUC, including boundary reclassifications and applications for special use permits, in case cultural resources or access to those resources will be affected. If impacts are anticipated, or if the LUC or a permit applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even apply to be a party in the proceeding:

Parties have several procedural rights that are not available to the general public, such as the right to put on evidence both orally and in writing, to cross-examine other parties’ witnesses, and to rebut testimony presented by others. A party can also seek judicial review of an agency decision. But becoming a party means that you will have to be well-organized so that you can gather the information you need, arrange for witnesses, and meet deadlines for submission of material all in a timely manner.

Many members of the public choose simply to give their own testimony at a contested case hearing^[37] rather than to become parties. However, if you believe you have a strong interest in the outcome, you should seriously consider becoming a party; most agencies permit, and even encourage, parties to limit their participation in a contested case hearing to those issues most important to them. By doing so you lessen

37 See note 21 above (defining “contested case hearing”).

the amount of time and work you have to devote to the hearing while at the same time preserving your option to appeal the decision if you disagree with it.³⁸

To become a party in a LUC boundary amendment proceeding, file a “Notice of Intent to Intervene” with the Commission staff within thirty days of the date the petitioner files the boundary amendment petition. H.A.R. § 15-15-52(b).

The LUC usually gives the public notice of a petition in three ways:

1. publishing notice in the OEQC “Environmental Notice,” (more info on how to sign up for this notice is provided in section IV.A.1. above),
2. sending out notice to persons on their mailing list who have requested to be notified, and
3. publishing the formal notice of hearing on the petition in a newspaper.³⁹

To get on the LUC’s mailing list, contact Commission staff via the information listed in Appendix A.

Native Hawaiian cultural practitioners who “can demonstrate that they will be directly and immediately affected by the proposed change [such] that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.” H.R.S. § 205-4(e)(3); H.A.R. § 15-15-52(c)(2); *see Ka Pa‘akai*, 91 Hawai‘i at 42-44, 7 P.3d at 1079-81. Otherwise, leave to intervene shall be freely granted. H.R.S. § 205-4(e)(4); H.A.R. § 15-15-52(d). Again, requests to intervene must be filed within thirty days of the public notice that the underlying petition has been filed. H.A.R. § 15-15-52(b). A filing fee of fifty dollars is also required. H.A.R. § 15-15-52(h). Although the LUC or its appointed hearings officer⁴⁰ may deny intervention, those decisions may be appealed to the circuit court. H.R.S. § 205-4(e)(4); H.A.R. § 15-15-52(k).

Boundary amendment petitions are often granted subject to conditions, representations or commitments that must be followed by the landowner. If the landowner fails to make substantial progress within a reasonable period of time in accordance with these requirements, the LUC has authority to issue an “order to show cause why the property should not revert to its former

38 Jarman, *supra* note 21, at 8; *see also* H.A.R. § 15-15-58(b) (authorizing a representative of a citizen or community group to testify upon written application to be a witness prior to the hearing).

39 Jarman, *supra* note 21, at 13, 12-16 (providing more detailed information, in a very accessible format, about intervening in LUC proceedings); Appendix C (sample petition for intervention); Appendix E (sample witness and exhibit lists).

40 “The LUC . . . [has] the legal authority to appoint an individual, known as a hearings officer, to take all the evidence and make a formal recommendation to the decision-making body on what the decision should be and why.” Jarman, *supra* note 21, at 6-7; *see also* H.A.R. § 15-15-06.1.

land use classification or be changed to a more appropriate classification.” H.A.R. § 15-15-79(b). “Interested person[s],” including practitioners who are adversely affected by the landowner’s failure to comply with such requirements may seek to enforce the landowner’s commitments by filing with the LUC a motion for an order to show cause. H.A.R. § 15-15-93(a). If the LUC decides to issue this order, the agency must then conduct a hearing on the matter with notice to all parties involved in the previous boundary amendment proceeding. H.A.R. § 15-15-93(c). If an affected practitioner was not previously admitted as a party to the boundary amendment proceeding, he or she should consider applying for intervention in the hearing on the order to show cause by following the procedures identified in the paragraph above.

Unfortunately, only the agency can decide whether or not an order to show cause should be issued. See Kaniakapupu v. Land Use Comm’n, 111 Hawai‘i 124, 137, 139 P.3d 712, 724 (2006).

3. Proceedings Before County Land Use Decision-Making Authorities

Boundary amendment petitions involving lands less than fifteen acres in urban, rural or agricultural districts (but not involving IAL), are handled by the appropriate county land use decision-making authorities. H.R.S. § 205-3.1(b). These include the County of Hawai‘i Planning Commission (Leeward and Windward Planning Commissions), Maui Planning Commission, Moloka‘i Planning Commission, Lāna‘i Planning Commission, County of Kaua‘i Planning Commission, and the City and County of Honolulu City Council (Honolulu City Council). The considerations regarding intervention outlined in section IV.A.2. above, also apply to boundary amendment proceedings before county land use decision-making bodies. In this context, however, participation by members of the public will be governed by the rules of practice and procedure adopted by each county land use decision-making authority. See Appendix B.

For example, the County of Hawai‘i Planning Commission Rules of Practice and Procedure (HPC Rules) provide that a petitioner who submits a written request to intervene in a proceeding is entitled to a hearing and shall be admitted as a party, if the petitioner demonstrates that he or she is a “descendant[] of native Hawaiians who inhabited the Hawaiian islands prior to 1778, who practiced those rights which were customarily and traditionally exercised for subsistence, cultural or religious purposes.” HPC Rules § 4-6(b)(5). Requests to intervene must be filed at least seven days prior to the first scheduled hearing on the underlying petition, and must be accompanied by a filing fee of two hundred dollars (\$200). HPC Rules § 4-6(a). To receive notifications about relevant public hearings, contact the County of Hawai‘i Planning Commission via the information provided in Appendix A.

Similar to intervention petitions before the LUC, the denial of such a petition by the planning commission may be appealed to the circuit court via the agency’s rules. HPC Rules § 4-6(c).

The Maui Planning Commission Rules of Practice and Procedure (MPC Rules) governing intervention are substantially similar to the LUC’s rules as set out in both HRS §§ 205-4(e)(3) and (4), as well as the LUC’s administrative rules. See MPC Rules §§ 12-201-41(b) to -41(d), -46. One difference is that a request to intervene must be filed no less than ten days (excluding weekends and State recognized holidays) before the first public hearing on the boundary amendment proceeding or special use permit application. See MPC Rules §§ 12-201-18, -40(a). To receive notifications about relevant public hearings, contact the Maui Planning Department via the information listed in Appendix A.

You may also subscribe online for email and or text notifications, but will need to watch for annual announcements about the need to re-subscribe after the County resets all of its notification lists. See <http://hi-maui-county.civicplus.com/list.aspx?ListID=611> (clicking on “Email Notifications” on the left side of the Maui County website will take you to the page called “Notify Me”). Another difference between the LUC and MPC is that the filing fee accompanying a petition to intervene in proceedings before the MPC is established in the county budget. MPC Rules § 12-201-40(b). Through June 30, 2013, the filing fee for a petition to intervene is fifty dollars (\$50). Before the commission takes final action on the underlying application, it is required to hold a hearing on a petition to intervene. MPC Rules § 12-401-45.

The Moloka‘i Planning Commission’s Rules of Practice and Procedure (MoPC Rules) also require intervention petitions to be filed no later than ten days before the first public hearing date. MoPC Rules § 12-301-25. The commission must hold a hearing on a petition to intervene before rendering its decision. MoPC Rules § 12-301-30. The standards for intervention are substantially similar to chapter 205 (in H.R.S. §§ 205-4(e)(3) to (4)) and the LUC’s administrative rules. MoPC §§ 12-301-26(b), (c). Although the commission or its appointed hearing officer may deny intervention, MoPC § 12-301-26(d), such decisions may be appealed to the circuit court. MoPC § 12-301-31. There is no express provision requiring the payment of a fee for filing a petition for intervention. To receive notifications about relevant public hearings, contact the Moloka‘i Planning Commission via the information provided in Appendix A.

The Lana‘i Planning Commission’s Rules of Practice and Procedure (LPC Rules) also require applicants to file petitions for intervention no later than ten days before the first public hearing. LPC Rules § 12-401-40. The commission must hold a hearing on the petition before taking final action on the underlying application. LPC Rules § 12-401-45. The standards for intervention are substantially similar to chapter 205 (in H.R.S. §§ 205-4(e)(3), (4)) and the LUC’s administrative rules. See LPC §§ 12-401-41(b), (c). Although the commission or its appointed hearing officer may deny intervention, LPC § 12-401-41(d), such decisions may be appealed to the circuit court. LPC § 12-301-46. There is no provision requiring the payment of a fee for filing an intervention petition. To receive notifications about relevant public hearings, contact the Lana‘i Planning Commission

via the information listed in Appendix A.

The County of Kaua‘i Planning Commission’s Rules of Practice and Procedure (KPC Rules) provide that persons who “can demonstrate that they will be so directly and immediately affected by [a] proposed project that their interest in the proceeding is clearly distinguishable from that of the general public, shall be admitted as parties-intervenors upon timely written application for intervention.” KPC Rules § 1-4-1. Petitions to intervene must be filed at least seven days prior to a publicly noticed hearing. KPC Rules § 1-4-3. At the start of the hearing, “[a]ll persons seeking to intervene as parties shall be asked to identify themselves and their counsels.” KPC Rules § 1-6-11(a). Parties requesting intervention are entitled to be heard by the commission. KPC Rules § 1-4-7. Decisions must be made on all petitions to intervene prior to the start of the hearing on the subject application, and in writing. KPC Rules §§ 1-4-8, -9. The presiding officer may then reconvene the contested case hearing portion to complete the presentation of evidence. KPC Rules § 1-6-11(g). Any person aggrieved by a final order may appeal to the circuit court. KPC Rules § 1-6-18(i). To receive notifications about relevant public hearings, contact the Kaua‘i County Planning Department via the information provided in Appendix A.

Petitions for boundary amendments submitted to the Honolulu City Council are referred to the Honolulu Planning Department for evaluation and processing. Revised Ordinances of Honolulu (ROH) § 26-1.3(a). The Planning Department must hold a public hearing and make its recommendation to the City Council. ROH § 26-1.7. The Rules of Practice and Procedure for the Department of Planning and Permitting, City and County of Honolulu (“HonPD Rules”) do not provide for intervention, but allow both oral and written testimony by members of the public. HonPD Rules §§ 5-4(a), (b). The City Council must also hold public hearings on petitions for boundary amendments. ROH § 26-1.8. To receive notifications about relevant public hearings, contact the council or planning department via the information listed in Appendix A.

a. Special Use Permits

In addition to boundary amendment proceedings, county decision-making authorities have the power to issue special permits for “unusual and reasonable” uses not otherwise allowed in agricultural or rural districts. See H.A.R. § 15-15-95. As discussed above in section IV.A.2., the LUC must also approve special use permits for areas greater than fifteen acres. See H.A.R. § 15-15-95(a). In addition to proceedings before the LUC, practitioners exercising or seeking to exercise traditional and customary rights should also monitor permit applications before the county land use decision-making authorities, in case cultural resources or access to those resources may be affected. If impacts are anticipated, or if the agency or a permit applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even apply to

be a party in the proceeding. Section IV.A.3. above overviews the procedural considerations that may be different from the those applied by the LUC.

County authorities may impose protective conditions, H.A.R. § 15-15-95(e), presumably including the preservation of traditional and customary Native Hawaiian rights. For example, special use permit applications on Kaua‘i are specifically required to include “a statement addressing Hawaiian customary and traditional rights under Article XII, Section 7 of the Hawaii State Constitution[,]” among other things. KPC Rules § 13-4(2). The planning commission is required by law to conduct a hearing within sixty days from the date of accepting a properly filed and completed petition, unless extended by the applicant. KPC Rules § 13-5(a).

b. Special Management Area Permits

The Special Management Area (SMA) is the land extending inland from the shoreline as delineated on maps filed with the county planning commissions and the Honolulu City Council. H.R.S. § 205A-22. The county land use decision-making authorities have the power to issue “use” permits for SMAs. H.R.S. § 205A-29. An SMA use permit is required if the cost of the activity exceeds \$500,000 and may have a substantial adverse environmental effect, if the proposal involves:

- placing or erecting any solid material or any gaseous, liquid, solid or thermal waste;
- grading, removing, dredging, mining or extracting any materials;
- changing the density or intensity of use of land (including subdivision of land);
- changing the intensity of use of water, ecology related thereto, or of access thereto; and
- constructing, reconstructing or altering of the size of any structure.

These activities require only an SMA minor permit if the cost of the activity is less than \$500,000 and there is no substantial adverse effect. H.R.S. § 205A-22.

Before an SMA use permit application will be accepted, an environmental review is required under H.R.S. chapter 343 along with either issuance of a Finding Of No Significant Impact (FONSI),⁴¹ or acceptance of an EIS. See section IV.A.1. above. The Hawai‘i, Kaua‘i and Mau‘i County Planning Commissions issue SMA use permits; in addition, the Moloka‘i Planning Commission also issues SMA minor permits. On O‘ahu, both SMA use and minor permits are initially processed by the City and County of Honolulu’s Department of Planning and Permitting (DPP)—except in Kaka‘ako, where the state Office of Planning has permitting authority.⁴² Revised Ordinances

⁴¹ An agency issues a FONSI briefly presenting the reasons why an action for which the agency has prepared an EA will not have a significant effect on the environment and, therefore, will not require preparation of an EIS.

⁴² See H.R.S. § 206E-8.5; H.A.R. §§ 15-150-1 to -38. The Hawaii Community Development Authority has

of Honolulu §§ 25-5.1(a), (b). The DPP transmits its findings and recommendations to the Honolulu City Council for action.⁴³ See Revised Ordinances of Honolulu § 25-5.4. The planning departments on the neighbor islands process and issue SMA minor permits, except for Moloka‘i (as noted above) and Kaho‘olawe (where those responsibilities have been transferred to the Kaho‘olawe Island Reserve Commission). H.R.S. § 6K-6(7).

These authorities must give full consideration to cultural and historic values as well as the need for economic development. H.R.S. § 205A-4, cited in PASH/Kohanaiki, 79 Hawai‘i at 435, 903 P.2d at 1256.⁴⁴ Hawai‘i courts have also recognized that “a native Hawaiian who has exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands of an ahupua‘a has an interest in a proceeding for the approval of an SMAP [i.e., special management area permit] for the development of lands within the ahupua‘a which are clearly distinguishable from that of the general public.” PASH/Kohanaiki, 79 Hawai‘i at 434, 903 P.2d at 1255.

A Native Hawaiian fisherman and lā‘au lapa‘au practitioner successfully challenged the approval of a subdivision application in Leslie v. Board of Appeals, 109 Hawai‘i 384, 126 P.3d 1071 (2006). Practitioner Wayne Leslie resides in Napo‘opo‘o on Hawai‘i island; he engages in traditional and customary practices in and around the ahupua‘a of Kauleoli (i.e., fishing, gathering pilo and ‘uha loa for medicinal purposes, and picking opihi, limu and a‘ama). He challenged a decision by the Hawai‘i County Board of Appeals to approve a subdivision application submitted by developer Ki‘ilae Estates, LLC, involving 739 acres in Ki‘ilae and Kauleoli. A portion of the subject land area is included within the SMA, but is larger than twenty acres. Leslie, 109 Hawai‘i at 387, 389, 126 P.3d at 1074, 1076. Although subdivisions greater than twenty acres are generally excluded from the definition of “development[s]” that require SMA permits, see H.R.S. §§ 205A-22(12), -28, the subdivisions nevertheless came within the definition of “development” under H.R.S. § 205A-22(3) because the proposed activity “is or may become part of a larger project, the cumulative impact of which may have a significant adverse environmental or ecological effect on the [SMA] . . . and an SMA permit will be required.” HPC Rules § 9-4(10)(D), quoted in Leslie, 109 Hawai‘i

jurisdiction over Kaka‘ako.

43 In Sandy Beach Initiative Coalition v. City Council of City and County of Honolulu, 70 Haw. 361, 372-73, 773 P.2d 250, 258 (1989), the court held that the Honolulu City Council was not required by law to conduct a hearing when acting on individual SMA permits because it is a legislative body exempt from the Hawai‘i Administrative Procedures Act.

44 The Office of Planning of the Department of Business Economic Development and Tourism received a three-year grant from the National Ocean and Atmospheric Administration to develop a process for the Hawai‘i Coastal Zone Management Program to comply with the PASH/Kohanaiki decision. Pursuant to this grant, University of Hawai‘i researchers commenced a Kaua‘i County Pilot Project in order to develop a proposal in close consultation with the grassroots community, landowners, and local planners. To date, it appears that only the counties of Kaua‘i and Hawai‘i have implemented any significant portions of these recommendations.

at 389, 126 P.3d at 1076. Because of the proposed subdivision’s potential adverse effects on coastal resources, the Hawai‘i Supreme Court upheld the circuit court’s order reversing the Board of Appeals decision and instructing the Planning Director to require the project proponent to apply for and obtain an SMA permit before granting tentative approval of the proposed subdivision. Leslie, 109 Hawai‘i at 390, 398-99, 126 P.3d at 1077, 1085-86.

The Hawai‘i County Planning Commission has specifically incorporated the Ka Pa‘akai framework (see section III.A.4. above) in its rules concerning the shoreline management area; an SMA use permit may only be approved if, among other things, the agency determines:

The development will, to the extent feasible, reasonably protect native Hawaiian rights if they are found to exist, including specific factual findings regarding:

- (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 Authority to reasonably protect any valued cultural, historical or natural resources, including any existing traditional and customary native Hawaiian rights.

HPC Rules § 9-11(e)(4); see also HPC Rules §§ 9-10(b)(6)(A) to (C) (requiring the permit applicant to submit a written statement concerning anticipated impacts on traditional and customary native Hawaiian rights, in connection with the planning department’s required assessment of “uses, activities or operations proposed in the [SMA]”). Approval or denial of an SMA use permit is final and appealable to the third circuit court. HPC Rules § 9-11(f)(5).

Although the other county authorities have not formally incorporated the Ka Pa‘akai framework into their respective rules, the obligations outlined by the Hawai‘i Supreme Court apply with equal force. In any event, H.R.S. § 205A-6 provides the circuit courts with original jurisdiction to hear challenges to relevant actions taken by the county land use decision-making authorities concerning SMA permits.

Traditional and customary practitioners should closely monitor permit proceedings affecting SMAs, in case cultural resources or access to those resources will be affected. If impacts are anticipated, or if the agency or a permit applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even apply to be a party in the proceeding.

4. The Board and Department of Land and Natural Resources

Among a variety of areas potentially affecting traditional and customary rights, the Board of Land and Natural Resources (BLNR) and the Department of Land and Natural Resources (DLNR) have jurisdiction over lands in the Conservation District. H.R.S. §§ 183C-3, -6. This area includes land zoned P-1 (preservation) by the City and County of Honolulu. Conservation lands are classified into five subzones: protective, limited, resource, general and special. H.A.R. §§ 13-5-10(b)(1) to (5). DLNR’s Office of Conservation and Coastal Lands (OCCL) is responsible for overseeing approximately two million acres of private and public lands within the Conservation District. These lands are often in our most mauka and makai reaches where traditional and customary practices are exercised. For example, applications for use within the conservation district were recently reviewed for aquaculture projects in the open ocean and telescopes on Mauna Kea. In both cases, practitioners raised concerns about potential impacts to cultural resources and the practices that they enable.

Proposed uses of land in the Conservation District are allowed only if they are specifically identified and approved by DLNR and/or BLNR. H.R.S. § 183C-4(d); H.A.R. § 13-5-10(c); see also H.A.R. § 13-5-22 (protective); H.A.R. § 13-5-23 (limited); H.A.R. § 13-5-24 (resource); H.A.R. § 13-5-25 (general). Identified land uses require either: (i) no permit; (ii) a DLNR-approved site plan; (iii) a departmental permit approved by the DLNR Chairperson; or (iv) a board permit approved by the Board of Land and Natural Resources. Where required, a Conservation District Use Permit (CDUP) may be obtained by submitting a Conservation District Use Application (CDUA) to DLNR’s OCCL.

CDUA applications must include a draft EA or EIS consistent with the requirements described in section IV.A.1. above. H.A.R. § 13-5-31(a)(1). Practitioners of traditional and customary practices should closely monitor CDUA submissions in case cultural resources or access to those resources will be affected by the proposed land uses. If impacts are anticipated, or if the agency or a permit applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even request a contested case hearing.⁴⁵ Similar to proceedings before the LUC, as discussed in section IV.A.2. above, Native Hawaiian cultural practitioners who “can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.”⁴⁶ H.A.R. § 13-1-31(b)(2). DLNR must hold a hearing to determine parties

45 See note 21 above (discussing these quasi-judicial proceedings, which often resemble civil trials and require well-organized parties who can gather needed information, arrange for witnesses, and meet deadlines for submission of material all in a timely manner).

46 See H.A.R. § 13-5-34(d) (providing that a “person who has demonstrated standing to contest the board action may request a contested case hearing pursuant to chapter 13-1”). An oral or written request to hold a contested

to such contested cases. H.A.R. §§ 13-1-31(a), (f). A person whose request to be admitted as a party is denied may appeal that decision to the circuit court. H.R.S. § 91-14; H.A.R. § 13-1-31(h). In addition, any final order by DLNR may also be appealed to the circuit court. H.R.S. §§ 91-14, 183C-8; H.A.R. § 13-5-3.

DLNR must also hold a hearing on an application to change the boundaries of any zone. H.R.S. § 183C-4(f); H.A.R. § 13-5-40(a)(2). If a boundary amendment petition is approved because the agency exceeded the maximum time period for acting upon the application, one of the mandatory conditions imposed is that the “[p]etitioner shall preserve and protect any established gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural, and religious practices on the reclassified area.” H.A.R. § 15-15-90(e)(24).

“Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, the construction of a single family residence.” H.R.S. § 183C-5. The permitting requirements usually applicable to “harvesting” and “removing,” expressly *do not* apply to “the gathering of natural resources for personal, noncommercial use or pursuant to Article 12, section 7 of the Hawaii State Constitution or section 7-1, HRS relating to certain traditional and customary Hawaiian practices.” H.A.R. § 13-5-2(4) (defining “land use”). Even kuleana land uses, however, require a board permit when proposed in the protective subzone. H.A.R. § 13-5-22. DLNR is required by law to hold a hearing on applications requiring a board permit in the protective subzone. H.A.R. § 13-5-40(a)(3). Other uses requiring a board permit in the protective zone include;

- Basic data collection, research, education, and resource evaluation that involves permanent structures larger than 500 square feet or a land use causing significant ground disturbance or impact to natural resources;
- Restoration or repair of a fishpond under an approved management plan; where restoration is the act of returning the property to a state of utility through repair or alteration which makes possible an efficient contemporary use, such as aquaculture;
- Agriculture and a single family residence, if applicable, when such land use was historically, customarily and actually found on the property. Agriculture means the planting, cultivating, and harvesting of horticultural crops, floricultural crops, or forest products, and subsistence livestock;
- Land uses undertaken by the State of Hawai‘i or the counties to fulfill a mandated government function, activity, or service for public benefit and in accordance with

case hearing must be made to BLNR no later than the close of the board meeting at which the subject matter of the request is scheduled for disposition. H.A.R. § 13-1-29(a). The request must be accompanied by a \$100.00 nonrefundable filing fee or a request for waiver of the fee. H.A.R. § 13-1-30.

public policy and the purpose of the conservation district. Such land uses may include transportation systems, water systems, communication systems, and recreational facilities;

- Power generation from renewable sources (i.e. hydroelectric, wind generation, geothermal) under approved management plan and assuring minimization of impacts to natural, cultural, and recreational resources;
- Plant and wildlife sanctuaries, natural area reserves ... and wilderness and scenic areas, including habitat improvements under an approved management plan;
- Major alterations of existing structures, facilities, uses, equipment or topographic features;
- Subdivision of property into two or more legal lots of record which serves a public purpose and is consistent with the objectives of the subzone;
- Coastal erosion structures (i.e. seawalls and groins);
- Sand placement in excess of 10,000 cubic yards and any necessary structures to retain the sand or extract and transport sand to the area of replenishment.

H.A.R. § 13-5-22. A hearing is also required if the BLNR chairperson determines that the scope of the proposed use or the public interest requires a public hearing on the application. H.A.R. § 13-5-40(a)(4). Finally, DLNR must also hold a hearing on proposals to use land for commercial purposes. H.R.S. § 183C-6(c); H.A.R. § 13-5-40(a)(1).

If the proposed uses in any of these hearings may affect cultural resources or access to those resources, or if the agency or a permit applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even request a contested case hearing.⁴⁷ Although practitioners are not required to obtain legal representation, these legal processes can be difficult to navigate; therefore, it may be helpful to consult with the Office of Hawaiian Affairs or attorneys who regularly practice in this area (including Earthjustice or the Native Hawaiian Legal Corporation, among others).

a. Water Resources

For potential legal handles involving water resources (both surface and groundwater), *see* D KAPUA‘ALA SPROAT, *OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANGEMENT IN HAWAII*, at 30-35, 42-47. Digital copies are available online and print copies may be requested from Ka Huli Ao or OHA via the contact information listed in Appendix A.

⁴⁷ *See* note 21 above (discussing these quasi-judicial proceedings, which often resemble civil trials and require well-organized parties who can gather needed information, arrange for witnesses, and meet deadlines for submission of material all in a timely manner).

b. The Shoreline Certification Process

The term “shoreline” means “the upper reaches of the wash of the waves, other than storm or seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth [i.e., the ‘vegetation line’], or the upper limit of debris left by the wash of the waves [i.e., the ‘debris line’].” H.A.R. § 13-222-2. In Hawai‘i, the shoreline certification process is often used to determine which portions of the shoreline are available for public use, such as fishing, gathering, or hanging out at the beach. In addition, this process is necessary to decide how far a house or other building must be set back from the beach. The public must be notified about applications for shoreline certification via the Environmental Notice, a bi-monthly OEQC publication announcing the availability of EAs and EISs for public review. H.R.S. § 205A-42(b); H.A.R. § 13-222-12(a). It is helpful to monitor the Notice for applications that may affect the cultural practices of your ‘ohana. You can also send a written request to be added to DLNR’s mailing list if you would like to be notified about applications for, or proposed certification/rejection of, the shoreline. H.A.R. § 13-222-12(b). Information on how to be placed on DLNR’s mailing list is included in Appendix A. Applications for shoreline certification are available for public inspection at the district office where the property is located, at DLNR’s main office, and at the state land surveyor’s office. H.A.R. § 13-222-7(e). Comments on the application must be submitted to the state land surveyor postmarked no later than fifteen calendar days from the date of public notice. H.A.R. § 13-222-12(c).

Native Hawaiian cultural practitioners who can “demonstrate that they will be so directly and immediately affected by the proposed shoreline certification or denial, that their interest is clearly distinguishable from that of the general public” may appeal from a shoreline certification decision. H.A.R. § 13-222-26(a)(3). A notice of appeal must be filed with BLNR no later than twenty calendar days from the date of public notice concerning the proposed shoreline certification or rejection. H.A.R. § 13-222-26(c). A notice of appeal form is available online at <http://www.state.hi.us/dlnr/land/Forms/SC-NoticeOfAppeal.pdf>, and should be submitted to the contact information listed in Appendix A.

For example, in Diamond v. Board of Land and Natural Resources, 112 Hawai‘i 161, 145 P.3d 704 (2006), residents of Kaua‘i’s North Shore appealed a shoreline certification first to BLNR and later to the circuit court. The court rejected use of artificially planted vegetation to determine the shoreline. The court clarified that the so-called “vegetation line” trumps the “debris line” only when the vegetation line lies mauka of the debris line and furthers the public policy of extending to public ownership and use “as much of Hawaii’s shoreline as is reasonably possible.” Diamond, 112 Hawai‘i at 175-76, 145 P.3d at 718-19. This was critical in preserving as much shoreline as possible for Native Hawaiian traditional and customary practices and other public uses, while also combatting private property owners’ attempts to privatize the beaches in front

of their homes. At least until its scheduled repeal on June 30, 2013, Act 160 (2010) prevents private property owners from blocking shoreline access by planting or cultivating vegetation. After providing notice to the landowner, DLNR has authority to take enforcement action if the issue is not resolved within twenty-one days. H.R.S. § 115-10(b). Penalties of up to \$15,000 per violation per day may be assessed. H.R.S. § 183C-7(b). This section, however, does not prohibit any person from exercising Native Hawaiian gathering rights or other cultural practices. H.R.S. § 183C-7(c). Practitioners may consider asking DLNR’s OCCL division to take enforcement action if property owners are blocking shoreline access or areas necessary for the exercise of traditional and customary practices.



Generally, shoreline certifications are valid for no longer than twelve months, except for those portions of the shoreline fixed by man-made intact and unaltered structures—such as seawalls or groins—approved by appropriate government agencies, and for which engineering drawings exist that locate the interface between the shoreline and the structures. City and County of Honolulu Department of Land Utilization Rules Relating to Shoreline Setbacks and the Special Management Area (“DLU Rules”) § 13-4(b); MPC Rules § 12-203-08; MoPC Rules § 12-4-7; LPC Rules § 12-403-13(a)(1); Hawai‘i Planning Department (Hawai‘i PD) Rules 11-4(a). On Kaua‘i, shoreline certifications are valid for not more than six months pursuant to the Shoreline Setback and Coastal Protection Ordinance adopted in 2008, and subsequently amended in 2009. *See* Kaua‘i County Code § 8-27.3(a).

In addition, where the provisions requiring dedicated public access before final approval of a subdivision under H.R.S. § 46-6.5 are not applicable, the counties “shall purchase land for public rights-of-way to the shorelines, the sea, and inland recreational areas, and for public transit corridors where topography is such that safe transit does not exist.” H.R.S. § 115-2. For example, the Hawai‘i County Council passed a resolution in November 2012 authorizing a public access easement to the Papaikou Mill beach. One of the resolution’s proponents, Kalani Lyman, testified that the easement would facilitate cultural practices.⁴⁸ Practitioners in other

⁴⁸ *See* Peter Sur, *Council OKs plan for Papaikou access*, HAWAII TRIBUNE HERALD, Nov. 10, 2012, available at <http://>

areas may want to consider approaching their City Council representatives about the possibility of acquiring rights-of-way necessary to ensure safe access for the exercise of traditional and customary practices.

c. Shoreline Setback Requirements

As a general matter, DLNR’s OCCL is responsible for determining shoreline setback lines between twenty and forty feet inland from the shoreline, which define areas where houses or other buildings may be built. H.R.S. § 205A-43(a). However, the counties are permitted to establish larger shoreline setbacks. H.R.S. § 205A-45(a). More restrictive requirements will apply in case of a conflict between state law and a county ordinance. H.R.S. § 205A-48.

Traditional and customary practitioners should monitor proceedings before county authorities involving shoreline setback determinations and Shoreline Setback Variance (SSV) applications, in case cultural resources or access to those resources will be affected. If impacts are anticipated, or if the agency or a permit applicant has failed to identify potential impacts on cultural practices or resources, practitioners should consider whether to submit testimony or even apply to be a party in the proceeding. Section IV.A.3. above outlines considerations for practitioners thinking about intervening in a hearing on a particular SSV application, and Appendix A provides contact information for county authorities.

The County of Kaua‘i adopted its Shoreline Setback and Coastal Protection ordinance effective January 25, 2008.⁴⁹ Amendments to the ordinance were adopted the following year.⁵⁰ On Kaua‘i, setback lines are now a minimum of forty feet. Kaua‘i County Code § 8-27.4. Depending upon the average depth of a lot, the setback could extend as far as 100 feet, with the possibility of an even greater setback depending upon the building footprint and annual coastal erosion rate. Kaua‘i County Code §§ 8-27.3(b), (c). The Planning Director must notify the Kaua‘i County Planning Commission at its regularly scheduled meeting of any newly completed applications for shoreline setback determinations and any new determinations made by the Director. Kaua‘i County Code §§ 8-27.3(f)(1) to (2). Shoreline setback determinations are not final until accepted by the Planning Commission or, if appealed, until decision-making on the appeal is completed. Kaua‘i County Code § 8-27.3(g); see also Kaua‘i County Code § 8-27.13 (providing for appeal of

hawaiitribune-herald.com/sections/news/local-news/council-oks-plan-papaikou-access.html. Final approval will require another vote by the County Council, which remains hopeful that the landowners will instead come to an agreement with beach users.

49 Ordinance No. 863, Bill No. 2226, Draft 4 (approved Jan. 25, 2008).

50 Ordinance No. 877, Bill No. 2319, Draft 3 (approved Dec. 2, 2009). The Kaua‘i County Planning Department proposed additional amendments incorporating a Coastal Erosion Study through Bill No. 2736, but that measure failed in April 2011.

the director’s decisions to the commission by “[a]ny person who can show that a direct probable harm to his or her person or his or her property interest, or probable public harm could occur from the decision” under the procedures set forth in KPC Rules §§ 1-9-1 to -5). Any person affected by the Commission’s final order may appeal to the circuit court. KPC Rules § 1-6-18(i).

On O‘ahu, setbacks are usually forty feet from the certified shoreline. ROH § 23-1.4(a). Setback lines may be reduced to at least twenty feet to allow a minimum depth of buildable area of thirty feet from the lot’s inland edge. ROH § 23-1.4(b). However, the shoreline setback may not be adjusted after a shore protection structure (such as a seawall or groin) has been constructed. ROH § 23-1.4(c).

The Maui Planning Commission’s Shoreline Rules establish setbacks at least twenty-five feet, MPC Rules § 12-203-6(b), and up to a maximum of one hundred fifty feet from the shoreline. MPC Rules §§ 12-203-6(a)(ii)(C), (a)(iii). The Rules of the Moloka‘i Planning Commission Relating to the Shoreline Area establish setback lines forty feet from the shoreline, MoPC Rules § 12-4-6(a), with exceptions that provide for setbacks of twenty-five and one hundred fifty feet from the shoreline. MoPC Rules §§ 12-4-6(a)(1), (3). The Shoreline Setback Rules and Regulations for the Lāna‘i Planning Commission also establish setbacks forty feet from the shoreline, LPC Rules § 12-403-10(a), with exceptions that provide for setbacks of twenty-five and one hundred fifty feet from the shoreline. LPC Rules §§ 12-403-10(b)(1), (3). On Lāna‘i, setbacks not previously established can extend beyond one hundred fifty feet from the shoreline if necessary to satisfy SMA objectives and policies. LPC Rules § 12-403-10(d).

On Hawai‘i Island, the shoreline setback is established by the County of Hawai‘i Planning Department (Hawai‘i PD). HPC Rules § 8-3(f). All lots abutting the shoreline generally have a forty-foot setback. Hawai‘i PD § Rules 11-5(a). Some exceptions are allowed for twenty-foot setbacks when the average lot depth is 100 feet or less, or the buildable area of the lot would be reduced to less than fifty percent of the parcel if a forty-foot setback is required. Hawai‘i PD Rules §§ 11-5(b)(1), (2).

DLNR or the designated county authority must review the plans of all applicants who propose any structure, activity, or facility that would be prohibited without a variance. H.R.S. § 205A-43(b)(2). The prohibitions are listed in H.R.S. § 205A-44. Variances may be granted for the purposes listed in H.R.S. § 205A-46. However, no variance may be granted without appropriate conditions to “maintain safe lateral access to and along the shoreline or adequately compensate for its loss” and “minimize adverse impacts on public views to, from, and along the shoreline.” H.R.S. §§ 205A-46(c)(1) and (4); see also Kaua‘i County Code §§ 8-27.10(e)(1), (4); ROH §§ 23-1.9(a), (d); MPC Rules §§ 12-203-15(e)(1), (4); MoPC Rules §§ 12-4-11(e)(1), (4); LPC Rules §§ 12-403-19(c)(1), (4); HPC Rules §§ 8-11(c)(2), (5).

The relevant county authority must hold a hearing on an SSV application, see H.R.S. § 205A-43.5(a), except that requirement may be waived for:

- Stabilization of shoreline erosion by the moving of sand entirely on public lands;
- Protection of a legal structure costing more than \$20,000; provided the structure is at risk of immediate damage from shoreline erosion;
- Other structures or activities; *provided that no person or agency has requested a public hearing within twenty-five calendar days after public notice of the application*; or
- Maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or watersports recreational facilities, which result in little or no interference with natural shoreline processes.

H.R.S. §§ 205A-43.5(a)(1) to (4) (emphasis added); see also Kaua‘i County Code §§ 8-27.9(c), (d)(1)–(d)(4); ROH §§ 23-1.11(a)(1) to (5); DLU Rules §§ 17-5(a)(1) to (3); MPC Rules §§ 12-203-14(c), -14(d)(1) to (4); MoPC Rules §§ 12-4-12(c), 12(d)(1) to (4); LPC Rules §§ 12-403-18(d) and -18(e)(1)(A) to (C); HPC Rules §§ 8-10(a)(1) to (3), 8-12(e); Hawai‘i PD Rules §§ 11-11(a)(1) to (3), 11-13(c). Among other things, SSV applications must include a draft EA or EIS consistent with the requirements described in section IV.A.1. above. Kaua‘i County Code § 8-27.9(a)(3); DLU Rules §§ 17-2(b)(8), -3(c); MPC Rules §§ 12-203-13(a), -14(a)(3); MoPC Rules § 12-4-12(a)(3); LPC Rules § 12-403-18(a)(3); HPC Rules §§ 8-4(b)(4), 8-7; Hawai‘i PD Rules § 11-10.

On Kaua‘i, SSV applications are initially processed by the County Planning Department, then submitted to the County Planning Commission. Kaua‘i County Code §§ 8-27.9(a), (b). The Shoreline Setback and Coastal Protection ordinance applies to all lands within the County that abut the shoreline, or are located within 500 feet of the shoreline, unless the applicant demonstrates to the satisfaction of the Planning Director that the “proposed improvement will not be affected by coastal erosion or hazards, excluding natural catastrophes.” Kaua‘i County Code § 8-27.1(b). The planning department director is also charged with enforcing shoreline rules on Kaua‘i. Kaua‘i County Code § 8-27.11(a). The director may file a lawsuit to enforce civil fines and need only show that a notice of violation was served, a hearing was held or the time allowed for requesting a hearing had expired without such a request, that a civil fine was imposed and that the fine imposed has not been paid. Kaua‘i County Code § 8-27.11(c). An aggrieved person may appeal from the director’s order pursuant to H.R.S. chapter 91, Hawai‘i’s Administrative Procedure Act. Kaua‘i County Code § 8-27.11(e).

On O‘ahu, SSV applications are processed by the Director of the Department of Land Utilization (DLU Director).⁵¹ ROH § 23-1.10(a); DLU Rules § 17-2. The DLU Director is also

51 See also City and County of Honolulu Dept. of Planning and Permitting, Shoreline Setback Variance (SSV)

charged with enforcing shoreline rules on O‘ahu. DLU Rules § 18-2(a). Any person may petition to intervene in the SSV procedure no later than ten days before the date set for public hearing, or within twenty-five days after notification that the DLU Director has waived the public hearing. DLU Rules § 17-9(a). Petitions for intervention are to be handled in the same manner as DLU Rules § 12-4(e). DLU Rules § 17-9(d). In other words, petitions to intervene should be “freely granted” unless the proposed intervenor’s position is substantially the same as another party already admitted to the proceeding, or admitting additional parties would make the proceedings inefficient and unmanageable. DLU Rules §§ 12-4(e)(2)(A), (B). The Zoning Board of Appeals is charged with hearing and determining all appeals from the actions of the DLU Director. Revised Charter of the City and County of Honolulu § 6-1516.

The County of Maui’s Department of Planning processes SSV applications for the islands of Maui, Moloka‘i and Lāna‘i. MPC Rules § 12-203-14(a); MoPC Rules § 12-4-12(a); LPC Rules § 12-403-18. The Director of the Department of Planning enforces shoreline rules on Maui. MPC Rules § 12-203-16. The Director of Public Works and Waste Management upholds shoreline rules on Moloka‘i and Lāna‘i. MoPC Rules § 12-4-14; LPC Rules § 12-403-20. For Maui applications, appeals from the Director of Planning’s decision on an SSV application are made to the planning commission within ten days of receiving the decision, MPC Rules § 12-203-18, and the planning commission is required by law to hold a hearing. MPC Rules § 12-203-23. Any petition to intervene must be filed within ten days after the meeting at which the planning commission received notice of the filing of an appeal. MPC Rules § 12-203-23. For Moloka‘i applications, the rules do not expressly provide for appeals from the Director of Planning’s decision on an SSV application, although the right to appeal appears to be required by H.R.S. § 205A-42(a). For Lāna‘i applications, appeals from the Director of Planning’s decision on an SSV application by persons other than the applicant shall be made to the second circuit court. LPC Rules § 12-403-24(b).

On Hawai‘i Island, SSV applications are processed by the County of Hawai‘i Planning Department. HPC Rules § 8-13; Hawai‘i PD Rules § 11-9. An appeal from the administrative decision on an SSV application is made to the Board of Appeals. Hawai‘i PD Rules § 11-15. But see HPC Rules § 8-14 (providing under section on shoreline setbacks that commission decisions are appealable to the third circuit court).

If an SSV application may affect cultural resources or access to those resources, or if the agency or applicant has failed to identify potential impacts, traditional and customary practitioners should consider whether to submit testimony, request a contested case hearing, or intervene in an appeal.⁵² Although practitioners are not required to be represented by counsel in such

Application Instructions, available at <http://www.honoluluapp.org/downloadpdf/zoning/SHOREVAR.pdf>.

⁵² See note 21 (discussing these quasi-judicial proceedings, which often resemble civil trials and require well-

proceedings, the legal process can be difficult to navigate. So, before doing so, consider consulting with the Office of Hawaiian Affairs or attorneys who regularly practice in this area (including Earthjustice or the Native Hawaiian Legal Corporation, among others).

d. Ocean Leasing; Marine Resource Management Areas

Hawai‘i has a comprehensive framework for open ocean leasing. BLNR has, for example, issued a 35-year lease on a 237-acre deep ocean aquaculture site to a company raising kāhala (amberjack or yellowtail) in cages off of Hawai‘i Island. See H.R.S. ch. 190D. Open ocean leasing has raised concerns among some practitioners due to its impacts, e.g., excess fish food, disease, habitat destruction, etc. Given these and other issues, it may be helpful to monitor BLNR meetings where applications for open ocean leases arise.

Applicants for open ocean leases—for example, fish and shrimp farms—must submit, among other things, “[a]n initial description of current users . . . [including] cultural . . . [users] and their uses of the state marine waters requested for lease, including any practitioners of traditional and customary rights[.]” H.R.S. § 190D-11(a)(8). Once a completed application has been received, DLNR must provide notice of hearings and invite public comment. H.R.S. § 190D-11(c).

If such a lease may affect cultural resources or access to those resources, or if the agency or applicant has failed to identify potential impacts, practitioners should consider whether to submit testimony or even request a contested case hearing.⁵³ Although practitioners are not required to be represented by counsel in these proceedings, the legal process can be difficult to navigate; therefore, it may be helpful to consult with the Office of Hawaiian Affairs or attorneys who regularly practice in this area (including Earthjustice or the Native Hawaiian Legal Corporation, among others).

Native Hawaiian traditional and customary practices are expressly permitted within the Papahānaumokuākea Northwest Hawaiian Islands Marine Refuge, if they are consistent with the long-term preservation of the refuge resources and in accordance with applicable permit conditions. H.A.R. §§ 13-60.5-1(5), -5(b)(3). DLNR also recognizes “traditional and customary rights with regards to the wise and sustained use of . . . marine resources [in the Waiopae Tidepools Marine Life Conservation District] for subsistence, cultural, and religious practices, subject to the department’s authority to manage these marine resources to prevent their overuse.” H.A.R. §

organized parties who can gather needed information, arrange for witnesses, and meet deadlines for submission of material all in a timely manner).

⁵³ See note 21 above (discussing these quasi-judicial proceedings, which often resemble civil trials and require well-organized parties who can gather needed information, arrange for witnesses, and meet deadlines for submission of material all in a timely manner).

13-38-1. In addition, DLNR established the West Hawai‘i Regional Fisheries Management Area (WHRFMA) to improve the management of consumptive and nonconsumptive uses of aquatic resources from Ka Lae, Ka‘ū (South Point) to ‘Upolu Point, North Kohala, but not including Kawaihae commercial harbor. H.R.S. § 188-F-2. The administrative rules note that “Native Hawaiian (Kanaka Maoli) traditional and customary rights with regard to marine resources for subsistence, cultural, and religious purposes are recognized. Claims for traditional and customary rights will be decided by appropriate agencies when such a procedure is established.” H.A.R. § 13-60.3-2.

Likewise, Act 271 (1994) authorized DLNR to designate community based subsistence fishing areas (CBSFAs) to reaffirm and protect fishing practices customarily and traditionally exercised for Native Hawaiian subsistence, culture and religion. H.R.S. § 188-22.6(a). At least two CBSFAs have been established in Miloli‘i, Hawai‘i and Hā‘ena, Kaua‘i.⁵⁴ H.R.S §§ 188-22.7, -22.9.

Traditional and customary practitioners may consider submitting proposals to DLNR requesting designation of additional CBSFAs to reaffirm and protect the continued exercise of their rights in other areas. Although CBSFAs have many positive attributes, they have also been criticized. So, before seeking designation, consider talking with organizers from Miloli‘i or Hā‘ena to find out more about the administrative and other requirements and whether a CBSFA would be right for your community. CBSFA proposals require:

- (1) The name of the organization or group submitting the proposal;
- (2) The charter of the organization or group;
- (3) A list of the members of the organization or group;
- (4) A description of the location and boundaries of the marine waters and submerged lands proposed for designation;
- (5) Justification for the proposed designation including the extent to which the proposed activities in the fishing area may interfere with the use of the marine waters for navigation, fishing, and public recreation; and
- (6) A management plan containing a description of the specific activities to be conducted in the fishing area, evaluation and monitoring processes, methods of funding and enforcement, and other information necessary to advance the proposal.

Proposals shall meet community-based subsistence needs and judicious fishery conservation and management practices.

H.R.S. § 188-22.6(b).

⁵⁴ See Jodi Higuchi, Propagating Cultural Kipuka: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area, 31 U. HAW. L. REV. 193, 223 (2008).

e. *‘Aha Moku Advisory Committee*

Act 212 (2007) created an ‘Aha Kiole Advisory Committee to provide information on the creation of an ‘Aha Moku Council system to advise the state on Native Hawaiian resource management practices, to develop consensus on the creation of the council, and to submit a report to the state legislature. The committee’s December 2008 report, entitled “Best practices and specific structure for the cultural management of natural resources in Hawaii” is available online at <http://www.ahakiole.org/documents/Final%20Report%2012%2018%2008.pdf>.

Act 39 (2009) tasked the ‘Aha Kiole Advisory Committee with submitting annual reports, including any proposed legislation, prior to the 2010 and 2011 legislative sessions. The committee’s December 2010 Final Report is available online at <http://ahamoku.org/wp-content/uploads/2011/09/2011-Aha-Kiole-Legislative-Report-Final.pdf>. The committee recommended integration of the ‘Aha Moku System of natural and cultural resource management into the governance regime of Hawai‘i by establishing an ‘Aha Kiole Council that involves community consultation, community-based codes of conduct, education and the development of regulations that are responsive to actual environmental conditions and community design. Senate Bill 23 (2011) subsequently proposed to create an ‘Aha Kiole Advisory Commission (later, Council) within DLNR to advise the BLNR chairperson. However, on July 12, 2011, Governor Neil Abercrombie vetoed the bill. *See* Statement of Objections to Senate Bill No. 23, appended to Gov. Msg. No. 1364 (July 12, 2011).

The following year, Act 288 (2012) formally recognized the ‘aha moku system and established the ‘aha moku advisory committee within DLNR. The committee consists of eight members appointed by the governor and confirmed by the senate from a list of nominations submitted by the ‘aha moku councils on each island. H.R.S. § 171-4.5(b). The committee is authorized to provide advice on:

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

H.R.S. § 171-4.5(d).

Pending formation of the ‘aha moku advisory committee, 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. For example, in November 2012, ‘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. This community-based process could be emulated on other islands to help balance the interests of traditional and customary practitioners in the face of requests to use public resources for competing commercial or other purposes.

B. Monitoring Legislative Proposals

It is important to stay informed about legislative issues affecting traditional and customary rights. In 1997, two bills were introduced seeking to limit and regulate Native Hawaiian cultural practices, House Bill 1920 (HB 1920) and Senate Bill 8 (SB 8). SB 8 would have established an administrative process for registering Native Hawaiian cultural practices with the LUC, and allowed the termination or modification of those rights upon the petition of a landowner. HB 1920 sought to establish an expedited judicial process for resolving Native Hawaiian rights claims, also providing for modification or limitation on the exercise of those rights. Concerted community action, through oral and written legislative testimony and community activism, successfully blocked both bills. Since 1997, other bills continue to be introduced to limit the exercise of traditional and customary practices.

One way to keep informed about issues affecting traditional and customary rights is to get on the mailing, fax, or email list for relevant legislative committees, including, but not limited to the: Senate Committee on Hawaiian Affairs; House Committee on Hawaiian Affairs; Senate Committee on Water, Land, and Housing; and House Committee on Water, Land, & Ocean Resources. If you do not have internet access, you may call or write a letter to the appropriate committee chair’s office to be placed on the committee’s mailing list. You can also call the Senate Sergeant-at-Arms Office at (808) 586-6725 to be placed on the committee’s mailing or fax list. If you have internet access, an email notification system is available through the Hawai‘i State Legislature website at www.capitol.hawaii.gov. Click on the icon with a bullhorn marked “Hearing Notification.” You will be asked to fill in your email address and a password. Once registered, you can create personalized measure tracking lists, submit testimony without the need to re-enter required information, and receive hearing notices by snail mail.

A Citizen’s Guide to Participation in the Legislative Process (9th ed. 2011), is available online at <http://www.capitol.hawaii.gov/citizensguide.aspx>. The Public Access Room (PAR) is another helpful resource, free of charge to the public. PAR is equipped with computer terminals, telephones, access to legislative documents and reference materials, a fax machine, and a copy

machine. PAR Staff are available to assist those who come in for assistance or call in with questions. Classes and workshops are also given on the legislative process, reading legislative documents, writing and presenting testimony, and using relevant legislative websites. See State Capitol contact information in Appendix A.

Community-based groups such as the Sierra Club and Life of the Land closely monitor the legislative process and can be a great source of information on bills that affect natural and cultural resources. You can sign up for the Sierra Club’s Capitol Watch at www.sierraclubhawaii.com and get contact info for Life of the Land at www.lifeofthelandhawaii.org. OHA also tracks bills and sends email alerts regarding legislative measures impacting traditional and customary rights and practices. See OHA Contact information in Appendix A.

C. Citizen Complaints Regarding State and County Agencies

The Hawai‘i State Ombudsman is an officer of the legislature who independently and impartially investigates complaints against state and county agencies and employees. The Office of the Ombudsman cannot investigate actions of the governor, lieutenant governor, legislature (its committees or staff), judiciary, or county councils or mayors. The office encourages efforts to resolve complaints directly with the state or county agency first, but is authorized to receive inquiries on a confidential basis. If you believe an agency or official has taken action that will harm Native Hawaiian traditional and customary practices; or, has failed to take action to reasonably protect your rights or the resources upon which traditional and customary practices depend, consider filing a complaint with the Ombudsman’s office. Most complaints can be made by telephone without the need to fill out forms. The office is located in the Kekuanaoa Building (also known as the Territorial Office Building) at the corner of South King and Punchbowl Streets. See the Office of the Ombudsman contact information in Appendix A.

D. Public Access Preservation

The state and each of the counties have enacted laws and ordinances establishing dedicated sources of public funding for the acquisition of land to preserve public access. The state’s Legacy Land Conservation Program includes a land conservation fund to be used for the “acquisition of interests or rights in land having value a resource for the State” including, among other things, preservation of ocean and beach access and cultural and historic sites. H.R.S. §§ 173A-5(g)(1), (g)(2), (g)(4), (h)(1). The City and County of Honolulu’s land conservation fund was established to “facilitate the purchase or otherwise acquire lands or property entitlements for natural resource land conservation purposes in the city.” Revised Ordinances of Honolulu § 6-59.1. The County of Hawai‘i’s public access, open space and natural resources preservation fund must be “used for acquiring lands or property entitlements” for purposes “including access to beaches and mountains”

as well as “[p]reservation of historic or culturally important land areas and sites[.]” Hawai‘i County Code §§ 42-2-214(c)(1), (2). The County of Kaua‘i also has a public access, open space and natural resources preservation fund that “shall be utilized for purchasing or otherwise acquiring lands or property entitlements for land conservation purposes” including “access to beaches and mountains” as well as “[p]reservation of historic or culturally important land areas and sites[.]” Kaua‘i County Code §§ 14-6-14.1(a)(1), (2). The County of Maui’s open space, natural resources, cultural resources and scenic views preservation fund was also “established for the purpose of purchasing or otherwise acquiring lands or property entitlements for land conservation purposes” including “[p]reservation of historic or culturally important areas” and “[i]mproving . . . public access to, and enjoyment of, public land, open space and recreational facilities.” Maui County Code §§ 3.88.020(A)(2), (7).

Privately owned lands purchased with public monies for access purposes under these laws and ordinances would become public rights-of-way under the jurisdiction of the state or county. The preservation of Native Hawaiian sacred sites and access along ancient trails falls within the scope of these initiatives. The process of acquiring funds to protect cultural resources or access to those resources can be complex. For more information on how to engage in this process, contact OHA’s Land Division or the Trust for Public Land’s Hawai‘i Office. Contact information for these organizations is included in Appendix A.

E. Conservation Land Trusts

Conservation land trusts are non-profit organizations that actively work to conserve land by undertaking or assisting in land or conservation easement acquisition, or by stewardship of such land or easements. A “conservation easement” is:

an interest in real property created by deed, restrictions, covenants, or conditions, the purpose of which is to:

- (1) Preserve and protect land predominantly in its natural, scenic, forested, or open-space condition;
- (2) Preserve and protect the structural integrity and physical appearance of cultural landscapes, resources, and sites which perpetuate indigenous native Hawaiian culture;
- (3) Preserve and protect historic properties as defined in section 6E-2, and traditional and family cemeteries; or
- (4) Preserve and protect land for agricultural use.

H.R.S. § 198-1. Conservation easements are permanent, H.R.S. § 198-2, and may be held only by government agencies or private non-profit organizations that support the conservation purposes of H.R.S. chapter 198. H.R.S. § 198-3. Land trusts receive tax benefits in exchange for agreeing to maintain conservation easements in perpetuity. See, e.g., Internal Revenue Code §§ 170(h), 2031(c).

As of 2010, thirteen land trusts protected more than 20,000 acres of land in Hawai‘i.⁵⁵ Land trusts work in cooperation with private landowners and local governments to acquire conservation easements or fee-simple ownership of land with inherent or potential conservation value. In January 2011, land trusts representing all four counties—the Kaua‘i Public Land Trust, O‘ahu Land Trust, Maui Coastal Land Trust and Hawai‘i Island Land Trust—officially merged into a new statewide land conservancy called the Hawaiian Islands Land Trust (HILT). The organization’s mission is to “protect the lands that sustain us for current and future generations” in perpetuity.⁵⁶ HILT oversees 15,229 acres of conservation land across the state, including: 188 acres on Hawai‘i Island; 11,810 acres on Maui; 3,057 acres on Moloka‘i; and 174 acres on Kaua‘i.⁵⁷



A conservation land trust may include the maintenance of natural or cultural resources for traditional and customary Native Hawaiian uses or farming on kuleana parcels subject to a conservation easement.⁵⁸ Land trusts can also protect access to landlocked kuleana parcels or to ancient trails running through the land subject to a conservation easement; in addition, they can protect sacred sites or other resources necessary to sustain a living Native Hawaiian culture. For example, in 1998 and 1999, the Trust for Public Land worked with Moloka‘i community leaders and the Maui Open Space Trust to purchase land in Hālawā Valley. The Hālawā Valley Land Trust has restored ancient lo‘i and now stewards those resources for educational and cultural programs for at-risk youth. For more information on whether a land trust is the right option to protect resources in your community, contact the Trust for Public Land’s Hawai‘i Office. Contact information is included in Appendix A.

F. Litigation

As detailed above, many of the legal decisions upholding the exercise of traditional and

55 See LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS REPORT: A LOOK AT VOLUNTARY LAND CONSERVATION IN AMERICA 17 (2011), <http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report>.

56 HAWAIIAN ISLANDS LAND TRUST, <http://www.hilt.org/about-us/mission/> (last visited Nov. 25, 2011).

57 *Enduring force in Hawaii land conservation established*, HAWAII 24/7 (Dec. 31, 2010, 4:20 PM), <http://www.hawaii247.com/2010/12/31/enduring-force-in-hawaii-land-conservation-established/>.

58 See, e.g., Jocelyn B. Garovoy, “*Ua Koe Ke Kuleana O Na Kanaka*” (Reserving the Rights of Native Tenants): Integrating Kuleana Rights and Land Trust Priorities in Hawaii, 29 HARV. ENVTL. L. REV. 523, 551 (2005).

customary rights and practices were the direct result of practitioners who stepped forward to ensure that the government fulfills its obligations. In Citizens for the Protection of the North Kohala Coastline v. County of Hawai‘i, 91 Hawai‘i 94, 979 P.2d 1120 (1999), the Hawai‘i Supreme Court held—in a challenge to the issuance of an SMA permit for construction of a coastline resort with hotel and golf course—that the plaintiffs had shown personal and special interests sufficient to assert a claim under the declaratory judgment act, H.R.S. § 632-1, based upon the following assertions:

its members reside “in close proximity” to the proposed [Mahukona Harbor project in North Kona] and are “long time and frequent users” of the Mahukona coastline, [and] injury to its members’ quality of life is threatened. It asserts that the Mahukona area is the “primary ocean recreation area” and “the only place where people may access the water or safely launch a boat for approximately 29 miles of Kohala coastline.” According to Citizens, Mahukona is a “community recreational resource,” used for “picnics, ... swimming and boating ... Fishermen also use shore areas along the length of the project’s ocean frontage.” In addition, “Mahukona is ... the site of a major spiritual center,” a “navigational key-way for islands to the south,” and a locale for gathering Hawaiian plants and herbs. Citizens urges that the Mahukona project may cause irreversible changes to the North Kohala coastline, affecting vital fishing grounds and causing “degradation of the quality of the nearshore marine environment.” It argues, therefore, that because its members use the shoreline area “within dozens of feet” of [the developer’s] proposed structures, “such use is potentially harmed by the project.”

Citizens, 91 Hawai‘i at 101, 979 P.2d at 1127. Under this standard, Native Hawaiian traditional and customary practitioners can establish standing to bring a declaratory judgment action under H.R.S. § 632-1 challenging development proposals that threaten their cultural practices.

Practitioners also have a private right to sue under article XI, section 9 of the Hawai‘i Constitution (Environmental Rights) to enforce claims under H.R.S. chapter 205 (land use). County of Hawai‘i v. Ala Loop Homeowners, 123 Hawai‘i 391, 422, 235 P.3d 1103, 1134 (2010). Many of the provisions described in the preceding sections are “laws relating to environmental quality” within the meaning of article XI, section 9, and as such, an action may be brought based on failure to obtain government permit or approvals, and recovery of attorneys’ fees may be allowed under H.R.S. section 607-25.

While litigation can be a key tool, cases with bad facts make bad law. Before taking action, community groups should contact public interest law firms with expertise in this area, such as Earthjustice and the Native Hawaiian Legal Corporation, for input and advice.

V. CONCLUSION

Kalo kanu o ka ‘āina.

Taro planted on the land.

Natives of the land from generations back.⁵⁹

This primer traces the transformation from ancient land tenure principles to a modern property rights regime. Although Hawai‘i law has incorporated western principles of private property rights, the law preserves and embraces traditional and customary rights to exercise Native Hawaiian practices for subsistence, cultural, and religious purposes. Government efforts to reconcile the sometimes competing interests of practitioners and landowners must ensure protection of traditional and customary rights to the extent feasible, subject only to reasonable regulation. Ensuring continued access to the resources necessary to sustain cultural practices remains a crucial factor in the effort to perpetuate Native Hawaiian customs and traditions.

Hawai‘i courts gradually have begun to provide the “badly needed judicial guidance” called for in the 1978 Constitutional Convention that reaffirmed traditional and customary rights. However, the nature and scope of these rights depend upon the particular circumstances of each case. *See Kalipi*, 66 Haw. at 12, 656 P.2d at 752. Much remains to be done to ensure that governmental efforts to balance the respective interests and harm do not result in regulating traditional and customary rights out of existence. This primer aims to inspire action and provide advocates with tools to ensure that vital cultural practices are protected and appropriately managed for present and future generations. Ho‘ohana aku, a ho‘ola aku: Use it, and let it live!

⁵⁹ PUKU‘I, *supra* note 1, at 157 (no.1447).

GLOSSARY OF TERMS

A‘ama	“A large, black, edible crab (<i>Grapsus grapsus tenuicrustatus</i>) that runs over shore rocks.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 3 (1986 ed.) [hereafter HAWAIIAN DICTIONARY].
Aho	Aho chord is one of the five items enumerated in H.R.S. section 7-1 as an item protected under traditional and customary gathering rights.
Ahupua‘a	“Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (<i>ahu</i>) of stones surmounted by an image of a pig (<i>pua‘a</i>), or because a pig or other tribute was laid on the altar as tax to the chief.” HAWAIIAN DICTIONARY, <u>supra</u> , at 9.
‘Āina	“Land, earth. Cf. ‘ <i>ai</i> , to eat.” Often defined as that which feeds. HAWAIIAN DICTIONARY, <u>supra</u> , at 11.
Aku	“Bonito, skipjack (<i>Katsuwonus pelamis</i>), an important food.” HAWAIIAN DICTIONARY, <u>supra</u> , at 15.
Alahele	“Pathway, route, road, way to go, itinerary, trail, highway, means of transportation.” HAWAIIAN DICTIONARY, <u>supra</u> , at 17.
Alaloa	“Highway, main road, belt road around an island, a long road.” HAWAIIAN DICTIONARY, <u>supra</u> , at 18.
Ali‘i	“Chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander; royal, regal aristocratic, kingly; to rule or at as a chief, govern, reign; to become a chief.” HAWAIIAN DICTIONARY, <u>supra</u> , at 15.
‘Awa	“The kava (<i>Piper methysticum</i>), a shrub 1.2 to 3.5 m tall with green jointed stems and heart-shaped leaves, native to Pacific islands, the root being the source of a narcotic drink

of the same name used in ceremonies, prepared formerly by chewing, later by pounding. HAWAIIAN DICTIONARY, supra, at 33 (internal citations omitted).

‘Awapuhi

“Wild ginger (*Zingiber zerumbet*), a forest herb with narrow leaves arranged along a stalk 30 to 60 cm high, bearing on a separate stalk small yellowish flowers in an oblong head, and having aromatic underground stems; a native of India.” HAWAIIAN DICTIONARY, supra, at 34.

BLNR

Board of Land and Natural Resources, <http://hawaii.gov/dlnr/boards/blnr>.

**Board of Commissioners
To Quiet Land Titles**

The Act of April 27, 1846, pt. I, ch. VII, art. IV, created a Board of Land Commissioners to quiet title as part of the Māhele, or land division, that took place between about 1845 and 1855.

Common Law

“The body of law derived from judicial decisions, rather than from statutes or constitutions[.]” BLACK’S LAW DICTIONARY 313 (9th ed. 2009).

Condemnation

“The determination and declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a governmental entity.” BLACK’S LAW DICTIONARY, supra, at 332.

Contested Case

A legal procedure similar to trial “in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” H.R.S. § 91-1(5).

Cultural Impact Assessment

In 2000, the Hawai‘i State Legislature passed Act 50 amending Hawai‘i’s Environmental Impact Statement Law, H.R.S. § 343, to require Environmental Assessments and Environmental Impact Statements “include the disclosure of the proposed action on the cultural practices of the community and State” and to amend the definition of “significant effect” to include adverse effects on cultural practices.” Act 50, § 1,

2000 Haw. Sess. Laws 93, 93 (codified as amended at H.R.S. § 343-2 (2005)).

Declaratory Judgment

“A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.” BLACK’S LAW DICTIONARY, *supra*, at 918.

Dedication of a public right-of-way

Access along Hawaiian trails may be protected where there has been an implied dedication of a public right-of-way across private land. An owner’s intent to dedicate may be express, implied-in-fact, or implied-in-law.

DLNR

Department of Land and Natural Resources, <http://hawaii.gov/dlnr>.

Easement

“An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road).” BLACK’S LAW DICTIONARY, *supra*, at 586. *See also* “*Easement by necessity*” and “*Implied easement*” below.

Easement by necessity

“An easement created by operation of law because the easement is indispensable to the reasonable use of nearby property, such as an easement connecting a parcel of land to a road.” BLACK’S LAW DICTIONARY, *supra*, at 586. *See also* “*Easement*” above and “*Implied easement*” below.

Environmental Assessment (EA)

“[A] written evaluation to determine whether an action may have a significant effect.” H.R.S. § 343-2 (2008).

Environmental Impact Statement (EIS)

“[A]n informational document prepared in compliance with the rules adopted under [H.R.S.] section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.” H.R.S. § 343-2 (2008).

Finding of no significant impact (FONSI)

“[A] determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.” H.R.S. § 343-2 (2008).

Fully developed

“Fully developed” property includes “lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure[.]” State v. Hanapi, 89 Hawai‘i 177, 186-87, 970 P.2d 485, 494-95 (1998). Factors characterizing “fully developed” property may also include: all necessary discretionary permits have been issued; there is “substantial investment in infrastructure on or improvements to the property”; and, the property owner’s expectations of excluding practitioners of traditional and customary rights are high, while the Native Hawaiian practitioner’s expectations of exercising those rights are low. PASH/KOHANAIKI STUDY GROUP, OFFICE OF STATE PLANNING, ON NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY PRACTICES FOLLOWING THE OPINION OF THE SUPREME COURT OF THE STATE OF HAWAII IN PUBLIC ACCESS SHORELINE HAWAII V. HAWAII COUNTY PLANNING COMMISSION 29 (1998).

Hālau

“Long house, as for canoes or hula instruction; meeting house.” HAWAIIAN DICTIONARY, supra, at 52.

He‘e

“Octopus (*Polypus sp.*), commonly known as squid.” HAWAIIAN DICTIONARY, supra, at 63.

Heiau

“Pre-Christian place of worship, shrine; some *heiau* were elaborately constructed stone platforms, others simple earth terraces. Many are preserved today.” HAWAIIAN DICTIONARY, supra, at 64.

Hoāina

“Tenant, caretaker, as on a *kuleana*.” HAWAIIAN DICTIONARY, supra, at 73.

Implied Easement

“An easement created by law after an owner of two parcels of land uses one parcel to benefit the other to such a degree that, upon the sale of the benefited parcel, the purchaser

could reasonably expect the use to be included in the sale.” BLACK’S LAW DICTIONARY, supra, at 587. See also “Easement” and “Easement by necessity” above.

Intervention

“The entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome.” BLACK’S LAW DICTIONARY, supra, at 897.

Kāhala

A fish also known as “amberjack or yellowtail (*Seriola dumerilii*).” HAWAIIAN DICTIONARY, supra, at 110.

Kala

“Surgeonfish, unicorn fish, *Teuthidae*[.]” HAWAIIAN DICTIONARY, supra, at 120.

Kalo

“Taro (*Colocasia esculenta*), a kind of aroid cultivated since ancient times for food, spreading widely from the tropics of the Old World. In Hawai‘i, taro has been the staple from earliest times to the present, and here its culture developed greatly, including more than 300 forms. All parts of the plant are eaten, its starchy root principally as poi, and its leaves as *lū‘au*. It is a perennial herb consisting of a cluster of long-stemmed, heart shaped leaves rising 30 cm. or more from underground tubers or corms.” HAWAIIAN DICTIONARY, supra, at 123.

Kama‘āina

“Native-born, one born in a place, host; native plant; acquainted, familiar. *Lit.*, land child.” HAWAIIAN DICTIONARY, supra, at 124.

Kānaka Maoli

Historically meant “[f]ull-blooded Hawaiian person.” In modern times, this term is inclusive of all Native Hawaiians, regardless of blood quantum. See HAWAIIAN DICTIONARY, supra, at 127.

Kapu

“Taboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; scared, holy, consecrated; no trespassing, keep out.” HAWAIIAN DICTIONARY, supra, at 132.

Kapu moe

“Prostration taboo.” HAWAIIAN DICTIONARY, supra, at 133.

Ki	Ki or ti leaf is a plant and one of the five items enumerated in H.R.S. § 7-1 as available for gathering.
Konohiki	“Headman of an <i>ahupua‘a</i> land division under the chief; land or fishing rights under control of the <i>konohiki</i> ; such rights are sometimes called <i>konokiki</i> rights.” HAWAIIAN DICTIONARY, <u>supra</u> , at 166.
Kuleana	“The term kuleana originally referred to a right of property in any business or other matter but afterwards was applied to the land holding of the tenant or hoaina residing in the ahupuaa.” <u>Territory v. Bishop Trust Co., Ltd.</u> , 41 Haw. 358, 362 (1956). “The Hawaiian term ‘kuleana’ means a small area of land such as were awarded in fee by the Hawaiian monarch, about the year 1850, to all Hawaiians who made application therefor.” <u>Palama v. Sheehan</u> , 50 Haw. 298, 299 n.1 (1968) (citations omitted). “Kuleanas are small parcels of land within an ahupuaa.” <u>McBryde Sugar Co. v. Robinson</u> , 54 Haw. 174, 182 n.6 (1973) (citations omitted).
Lā‘au Lapa‘au	“Medicine. Lit., curing medicine.” HAWAIIAN DICTIONARY, <u>supra</u> , at 189.
Landlocked	“Surrounded by land, with no way to get in or out except by crossing the land of another.” BLACK’S LAW DICTIONARY 894 (8th ed. 2004); <u>see also</u> “ <i>Easement</i> ” above.
Limu	“A general name for all kinds of plants living under water, both fresh and salt, also algae growing in any damp place in the air, as on the ground, on rocks, and on other plants; also mosses, liverworts, lichens.” HAWAIIAN DICTIONARY, <u>supra</u> , at 207.
Lo‘i	“Irrigated terrace, especially for taro, but also for rice; paddy.” HAWAIIAN DICTIONARY, <u>supra</u> , at 209.
LUC	Land Use Commission, http://luc.state.hi.us/ .
Māhele	“Portion, division, section, zone, lot piece, quota, installment, bureau, department, precinct, category ... land division ...

[that took place from around 1845 to 1855.]” HAWAIIAN DICTIONARY, supra, at 219.

Maka‘āinana

“Commoner, populace, people in general; citizen, subject.” HAWAIIAN DICTIONARY, supra, at 224.

Makai

Towards the ocean. See HAWAIIAN DICTIONARY, supra, at 225.

Māmaki

“Small native trees (*Pipturus* spp.) with broad white-backed leaves and white mulberry-like fruit; the bark yielded a fiber valued for a kind of tapa, similar to that made from *wauke* but coarser. Often misspelled *mamake*.” HAWAIIAN DICTIONARY, supra, at 234.

Māmalahoe

“Name of a particular company of warriors of Kamehameha and the name of Kamehameha’s famous law of the splintered paddle (*lit.*, paddle fragment) which guaranteed the safety of the highways to all, as women, children, sick and aged; the law was so called because it was said to have been formulated after Kamehameha had been struck in the head with a paddle while his foot was trapped in a crevice. The law is often called Māmala hoa. According to one account Kamehameha threw a stone at two attackers; it hit a *noni* tree, pierced one of the attackers and hit a precipice where it is still lodged. Kamehameha’s supporters tortured and killed a ‘navigator’ who had failed to guard Kamehameha properly by pulling a spear back and forth through this body. Kamehameha wept and formulated his law.” HAWAIIAN DICTIONARY, supra, at 235 (internal citation omitted).

Mamo

A type of bird. “Black Hawaiian honey creeper (*Drepanis pacifica*): its yellow feathers above and below the tail were used in choicest featherwork. Formerly found only on Hawai‘i, not seen since the 1880s.” HAWAIIAN DICTIONARY, supra, at 235.

Manini

“Very common reef surgeonfish (*Acanthurus triostegus*)[.]” HAWAIIAN DICTIONARY, supra, at 238.

Mauka	Towards the mountains; inland. <u>See</u> HAWAIIAN DICTIONARY, <u>supra</u> , at 242.
Nā Wai ‘Ehā	The Four Great Waters of Waihe‘e River, along with Waiehu, ‘Īao, and Waikapū Streams in the heart of Central Maui.
‘Ohana	“Family, relative, kin group; related.” HAWAIIAN DICTIONARY, <u>supra</u> , at 276.
‘Ohe	“A native bamboo-like plant (<i>Joinvillea ascendens</i>), with stem about 3 m high, 2.5 cm or less in diameter, un-branched; leaf blades 60 to 90 cm by 8 to 13 cm, pointed and plaited; flowering panicle about 30 cm long.” HAWAIIAN DICTIONARY, <u>supra</u> , at 276.
‘Ōhi‘a lehua	“The flower of the <i>ōhi‘a</i> tree (<i>Metrosideros macropus</i>) The <i>lehua</i> is the flower of the island of Hawai‘i, as designated in 1923 by the Territorial legislature; it is famous in song and tale.” HAWAIIAN DICTIONARY, <u>supra</u> , at 199.
‘Ōlelo	“Language, speech, word, quotation, statement, utterance, term, tidings; to speak, say, state, talk, mention, quote, converse, tell; oral verbatim, verbal, motion (in early House of Nobles regulations).” HAWAIIAN DICTIONARY, <u>supra</u> , at 284.
‘Ōlena	“The turmeric (<i>Curcuma domestica</i> , also incorrectly called <i>C. longa</i>), a kind of ginger distributed from India into Polynesia, widely used as a spice and dye in foods, to color cloth and tapa, and medicinally for earache and lung trouble. A cluster of large leaves rises from thick, yellow underground stems, which are the useful part of the plant, either raw or cooked.” HAWAIIAN DICTIONARY, <u>supra</u> , at 284.
Olonā	“A native shrub (<i>Touchardia latifolia</i>), with large, ovate, fine-toothed leaves, related to the māmaki. Formerly the bark was valued highly as the source of a strong, durable fiber for fishing nets, for nets (kōkō) to carry containers, and as a base for ti-leaf raincoats and feather capes.” HAWAIIAN DICTIONARY, <u>supra</u> , at 286.

‘Ō‘ō	A type of bird. “A black honey eater (<i>Moho nobilis</i>), with yellow feathers in a tuft under each wing, which were used for featherwork[.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 290.
‘O‘opu	“General name for fishes included in the families Eleotridae, Gobiidae, and Blennidae. Some are in salt water near the shore, others in fresh water and some said to be in either fresh or salt water.” HAWAIIAN DICTIONARY, <u>supra</u> , at 290.
‘Ōpae	“General name for shrimp.” HAWAIIAN DICTIONARY, <u>supra</u> , at 291.
‘Ōpelu	A fish. “Mackerel scad (<i>Decapterus pinnulatus</i> and <i>D. maruadsi</i>); an ‘aumakua for some people.” HAWAIIAN DICTIONARY, <u>supra</u> , at 292.
‘Opihi	“Limpets. Hawaiians recognize three kinds[.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 292.
Original Jurisdiction	“A court’s power to hear and decide a matter before any other court can review the matter.” BLACK’S LAW DICTIONARY, <u>supra</u> , at 930.
Palani	“A surgeonfish (<i>Acanthurus dussumieri</i>), famous for a strong odor.” HAWAIIAN DICTIONARY, <u>supra</u> , at 309.
Pilo	“Some species of native shrubs, in the coffee family (<i>Hedyotis [Kadua]</i>), the leaves bad-smelling when crushed.” HAWAIIAN DICTIONARY, <u>supra</u> , at 331.
Prescriptive Period	A law that restricts the time within which legal proceedings may be brought. <u>See, e.g.</u> , H.R.S. § 657-31 (“No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within twenty years after the right to bring the action first accrued.”). To acquire title to property (such as an easement by prescription), one must use and occupy the claimed property “adverse to the true owner of the fee” for the prescriptive period, which is set by statute. <u>See Ryan v. Tanabe Corp.</u> , 97 Hawai‘i 305, 311, 37 P.3d

554, 560 (App. 1999). The prescriptive period in Hawai‘i is currently twenty years. HRS § 669-1.

Public Trust Doctrine

Principle embedded in Hawai‘i law that recognizes that some land is held in trust by the State of Hawai‘i for its present and future generations. “[F]or 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 an utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.” Haw. Const. art. XI, sec. 1.

Shoreline

The “upper reaches of the wash of the waves, other than storm or seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, or the upper limit of debris left by the wash of the waves.” H.R.S. § 205A-1 (2005); H.A.R. § 13-222-2.

Shoreline Setback Lines

The line established in H.R.S. §§ 205A-41 to -49 or by the county running inland from the shoreline at a horizontal plane. H.R.S. § 205A-41 (1995).

Special Management Area

“[T]he land extending inland from the shoreline as delineated on the maps filed with the authority as of June 8, 1977, or as amended pursuant to 205A-23.” H.R.S. § 205A-22. The “authority” refers to “the county planning commission, except in counties where the county planning commission is advisory only, in which case authority means the county council or such body as the council may by ordinance designate.” H.R.S. § 205A-22.

Special Use Permit

“[T]he county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified.” H.R.S. § 205-6(a).

Standing	“A party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY, <u>supra</u> , at 1536.
Traditional and Customary Rights	“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.” Haw. Const. art. XII, sec. 7.
‘Uala	“The sweet potato (<i>Ipomoea batatas</i>)[.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 362.
‘Uha Loa	“A small, downy American, weed (<i>Waltheria indica</i> var. <i>americana</i>), with ovate leaves and small, clustered yellow flowers. Leaves and inner bark of root are very bitter and are used for tea or chewed to relieve sore throat.” HAWAIIAN DICTIONARY, <u>supra</u> , at 363.
Uhu	“The parrot fishes, of which <i>Scarus perspicillatus</i> is among the most abundant and largest; <i>uhu</i> are plant eaters, the teeth are strong and beaklike, well fitted for clipping off food from coral.” HAWAIIAN DICTIONARY, <u>supra</u> , at 364.
Ula	“Spiny lobster (<i>Panulirus marginatus</i> and <i>penicillatus</i>).” HAWAIIAN DICTIONARY, <u>supra</u> , at 367.
Usufruct	“A right for a certain period to use and enjoy the fruits of another’s property without damaging or diminishing it, but allowing for any natural deterioration in the property over time.” BLACK’S LAW DICTIONARY, <u>supra</u> at 1684.
Wana	“A sea urchin, as <i>Diadema paucispinum</i> and <i>Echinothrix diadema</i> [.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 382.
Wauke	The paper mulberry (<i>Broussonetia papyrifera</i>)[.]” HAWAIIAN DICTIONARY, <u>supra</u> , at 382.

APPENDIX A: RESOURCES

LEGAL RESOURCES

Ka Huli Ao Center for Excellence in Native Hawaiian Law

William S. Richardson School of Law

2515 Dole Street, Room 203

Honolulu, Hawai‘i 96822-2328

(808) 956-8411

<http://kahuliao.org>

Native Hawaiian Legal Corporation

1164 Bishop Street, Suite 1205

Honolulu, Hawai‘i 96813

(808) 521-2302

(808) 537-4268 (fax)

<http://nhlchi.org>

Earthjustice, Mid-Pacific Office

223 South King Street

Suite 400

Honolulu, Hawai‘i 96813

(808) 599-2436

(808) 521-5841 (fax)

email: mpoffice@earthjustice.org

<http://www.earthjustice.org>

The Trust for Public Land

1136 Union Mall, Suite 202

Honolulu, Hawai‘i 96813

(808) 524-8560

(808) 524-8565 (fax)

Lea Hong

Hawaiian Islands State Director

County Agencies

CITY & COUNTY OF HONOLULU

City Hall

Honolulu, Hawai‘i 96813

<http://www.honolulu.gov>

Mayor (808) 768-4141
(808) 768-5552 (fax)

Managing Director (808) 768-6634
(808) 768-4242 (fax)

Planning and Permitting (808) 768-8000
Department Director (808) 768-6041 (fax)

Office of Counsel Services Director (808) 768-3809
(808) 768-1370 (fax)

Planning Commission
7th Floor, Frank F. Fasi Municipal Building
650 South King Street
Honolulu, Hawai‘i 96813
(808) 768-8007
(808) 768-6743 (fax)

COUNTY OF HAWAII

25 Aupuni Street

Hilo, Hawai‘i 96720

<http://hawaiicounty.gov>

Mayor (808) 961-8211
(808) 961-6553 (fax)

Planning Department Director (808) 961-8288
(808) 961-8742 (fax)

County of Hawai‘i Planning Department

Aupuni Center

101 Pauahi Street, Suite 3

Hilo, Hawai‘i 96720

(808) 961-8288

(808) 961-8742 (fax)

email: planning@co.hawaii.hi.us

or

74-5044 Ane Keohokalole Highway

Kailua-Kona, Hawai‘i 96740

(808) 323-4740

(808) 327-3563 (fax)

email: planning@co.hawaii.hi.us

COUNTY OF KAUA‘I

4444 Rice Street, Suite 235

Lihu‘e, Hawai‘i 96766

<http://www.kauai.gov>

Mayor

(808) 241-4900

(808) 241-6877 (fax)

Planning Department Director

(808) 241-4050

(808) 241-6699 (fax)

Kaua‘i County Planning Department

4444 Rice Street

Lihu‘e, Hawai‘i 96766

(808) 241-4050

(808) 241-6699

COUNTY OF MAUI

200 South High Street

Wailuku, Hawai‘i 96793

<http://www.co.maui.hi.us>

Mayor (808) 270-7855
(808) 270-7870 (fax)

Planning Department Director (808) 270-7735
(808) 270-7634 (fax)

Maui Planning Department
250 S. High Street
Kalana Pāku‘i Bldg. Ste. 200
Wailuku, Hawai‘i 96793
(808) 220-7735
(808) 270-7634 (fax)
email: planning@co.maui.hi.us

Moloka‘i Planning Commission
P.O. Box 526
Kaunakakai, Hawai‘i 96748
(808) 553-3221
(808) 553-5050 (fax)
or
c/o Maui Department of Planning
250 S. High Street
Kalana Pāku‘i Bldg. Ste. 200
Wailuku, Hawai‘i 96793
(808) 220-7735
(808) 270-7634 (fax)
email: planning@mauicounty.gov

Lāna‘i Planning Commission
c/o Maui Department of Planning
250 S. High Street
Kalana Pāku‘i Bldg. Ste. 200
Wailuku, Hawai‘i 96793
(808) 270-7735
(808) 270-7364 (fax)
email: planning@co.maui.hi.us

STATE AGENCIES

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM (DBEDT)

Physical address:	Mailing address:
No. 1 Capitol District	P.O. Box 2359
250 South Hotel Street	Honolulu, Hawai‘i 96804
Honolulu, Hawai‘i 96813	
http://www.hawaii.gov/dbedt/	

Land Use Commission (LUC)

Physical address:	Mailing address:
Leiopapa A Kamehameha	P.O. Box 2359
235 South Beretania Street, Room 406	Honolulu, Hawai‘i 96804-2359
Honolulu, Hawai‘i 96813	
(808) 587-3822	
(808) 587-3827 (fax)	
email: luc@dbedt.hawaii.gov	
http://luc.state.hi.us	

DEPARTMENT OF HAWAIIAN HOMELANDS (DHHL)

Physical address:	Mailing address:
91-5420 Kapolei Parkway	P.O. Box 1879
Kapolei, Hawai‘i 96707	Honolulu, Hawai‘i 96805
http://www.hawaiianhomelands.org	

Chairman	(808) 620-9501
	(808) 620-9529 (fax)

Public Information Specialist	(808)620-9592
	(808)620-9599 (fax)

DEPARTMENT OF LAND AND NATURAL RESOURCES (DLNR)

Physical address:	Mailing address:
Kalanimoku Building	P.O. Box 621
1151 Punchbowl Street	Honolulu, Hawai‘i 96809
Honolulu, Hawai‘i 96813	
http://hawaii.gov/dlnr	

Office of the Chairperson (808) 587-0400
(808) 587-0390 (fax)
Public Information Officer (808) 587-0320
(808) 587-0390 (fax)

Board of Land and Natural Resources

P.O. Box 621 (808) 587-0404
Honolulu, Hawai‘i 96809 (808) 587-0390 (fax)

Commission on Water Resource Management

1151 Punchbowl Street, Room 227 (808) 587-0214
Honolulu, Hawai‘i 96813 (808) 587-0219 (fax)

Division of Forestry and Wildlife

1151 Punchbowl Street, Room 325 (808) 587-0166
Honolulu, Hawai‘i 96813 (808) 587-0160 (fax)

Historic Preservation Division,
Hawai‘i Historic Places Review Board,
Island Burial Council

601 Kamokila Boulevard, Suite 555 (808) 692-8015
Kapolei, Hawai‘i 96707 (808) 692-8020 (fax)

Kaho‘olawe Island Reserve Commission

811 Kolu Street, Suite 201 (808) 243-5020
Wailuku, Hawai‘i 96793 (808) 243-5885 (fax)

Land Division

1151 Punchbowl Street, Room 220 (808) 587-0446
Honolulu, Hawai‘i 96813 (808) 587-0455 (fax)

Legacy Land Conservation Program

1151 Punchbowl Street, Room 325 (808) 586-0921
Honolulu, Hawai‘i 96813

Nā Ala Hele Trail and Access Program

1151 Punchbowl Street, Room 325 (808) 587-4175
Honolulu, Hawai‘i 96813

Hawai‘i Island:

19 East Kawili Street
Hilo, Hawaii 96720
(808) 974-4226 (fax)

Clement Chang (808) 974-4382
Trails & Access Specialist
(Ancient and Historic Trails)

Irv Kawashima (808) 974-4217
Trails & Access Specialist
ikawashima@dofawha.org

Kaua‘i:

3060 ‘Eiwa Street, Room 306
Lihu‘e, Hawaii 96766-1875
(808) 274-3433
(808) 274-3438 (fax)

Kawika Smith Dan.K.Smith@hawaii.gov
Trails & Access Specialist

Maui/Moloka‘i/Lāna‘i:

54 South High Street, Room 101
Wailuku, Hawai‘i 96793
(808) 873-3508
(808) 873-3505 (fax)

Torrie Nohara Torrie.L.Nohara@hawaii.gov
Trails & Access Specialist

O‘ahu:

2135 Makiki Heights Drive
Honolulu, Hawai‘i 96822
(808) 973-9782
(808) 973-9781 (fax)

Aaron Johnson Lowe alowe@hawaii.rr.com
Trails & Access Specialist

Natural Area Reserves Commission

1151 Punchbowl Street, Room 224 (808) 587-0063
Honolulu, Hawai‘i 96813 (808) 587-0064 (fax)

Office of Conservation and Coastal Lands

1151 Punchbowl Street, Room 131 (808) 587-0377
Honolulu, Hawai‘i 96813 (808) 587-0322 (fax)

Public Land Development Corporation

No. 1 Capitol District (808) 587-2766
250 South Hotel Street, Room 501 (808) 587-0390 (fax)
Honolulu, Hawai‘i 96813

Division of State Parks

1151 Punchbowl Street, Room 310 (808) 587-0300
Honolulu, Hawai‘i 96813 (808) 587-0311 (fax)

OFFICE OF ENVIRONMENTAL QUALITY CONTROL (OEQC)

Leiopapa a Kamehameha Building
235 South Beretania Street, Suite 702 (808) 586-4185
Honolulu, Hawaii 96813 (808) 586-4186 (fax)
email: oeqchawaii@doh.hawaii.gov
<http://hawaii.gov/health/environmental/oeqc/index.html>

Toll free numbers

Kaua‘i	(808) 274-3141 ext. 64185
Moloka‘i/Lāna‘i	1 (800) 468-4644 ext. 64185
Maui	(808) 984-2400 ext. 64185
Hawai‘i	(808) 974-4000 ext. 64185

OFFICE OF HAWAIIAN AFFAIRS (OHA)

711 Kapi‘olani Blvd., Suite 500
Honolulu, Hawai‘i 96813
<http://www.oha.gov>

Administrator	(808) 594-1892
Director, Board Services	(808) 594-1974

Public Information Officer (808) 594-1983
Director, Economic Development (808) 594-1911
Director, Native Rights, (808) 594-1945
Land & Culture

Island of Hawai‘i

East Hawai‘i

162-A Baker Avenue (808) 920-6418
Hilo, Hawai‘i 96720 (808) 920-6421 (fax)

West Hawai‘i

75-5706 Hanama Place, Suite 107 (808) 327-9525
Kailua-Kona, Hawai‘i 96740 (808) 327-9528 (fax)

Islands of Kaua‘i & Ni‘ihau

2970 Kele Street, Suite 113 (808) 241-3390
Lihu‘e, Hawai‘i 96766 (808) 241-3508 (fax)

Island of Maui

33 Lono Ave., Suite 480 (808) 873-3364
Kahului, Hawai‘i 96732 (808) 873-3361 (fax)

Island of Moloka‘i

P.O. Box 1717 (808) 560-3611
Kaunakakai, Hawai‘i 96748 (808) 560-3968 (fax)

Island of Lāna‘i

P.O. Box 631413 (808) 565-7930
Lāna‘i City, Hawai‘i 96763 (808) 565-7931 (fax)

OFFICE OF THE GOVERNOR

Governor, State of Hawai‘i

Executive Chambers, State Capitol

Honolulu, Hawai‘i 96813 (808) 586-0034
<http://hawaii.gov/gov> (808) 586-0006 (fax)

OFFICE OF THE LIEUTENANT GOVERNOR

Lieutenant Governor, State of Hawai‘i

State Capitol

Honolulu, Hawai‘i 96813

(808) 586-0255

<http://hawaii.gov/litgov>

(808) 586-0231 (fax)

OFFICE OF THE OMBUDSMAN

465 South King Street, 4th Floor

Honolulu, Hawai‘i 96813

Phone:

(808) 587-0770

TTY phone:

(808) 587-0774

Toll-free from the Neighbor Islands:

Hawai‘i

974-4000 (ext. 7-0770)

Maui

984-2400 (ext. 7-0770)

Kaua‘i

274-3141 (ext. 7-0770)

Moloka‘i/Lāna‘i:

1-800-468-4644 (ext. 7-0770)

Fax:

(808) 587-0773

Web address:

www.ombudsman.hawaii.gov

Email address:

complaints@ombudsman.hawaii.gov

STATE CAPITOL PUBLIC ACCESS ROOM

Room 401

415 South Beretania St

Honolulu, HI 96813

Phone:

(808) 587-0478

TTY phone:

(808) 587-0749

Toll-free from the Neighbor Islands:

Hawai‘i

974-4000 (ext. 7-0478)

Maui

984-2400 (ext. 7-0478)

Kaua‘i

274-3141 (ext. 7-0478)

Moloka‘i/Lāna‘i:

1-800-468-4644 (ext. 7-0478)

Fax:

(808) 587-0793

Web address:

www.hawaii.gov/lrb/par

Email address:

par@capitol.hawaii.gov

HOURS:

Session: M-F 8am - 6pm, Sat 8am - 2pm (beginning the third week of January, for sixty days)

Interim: M-F 9am - 5pm

FEDERAL AGENCIES

FOREST SERVICE, PACIFIC SOUTHWEST RESEARCH STATION

Institute of Pacific Islands Forestry

60 Nowelo Street (808) 933-8121
Hilo, Hawai‘i 96720 (808) 933-8120 (fax)

NATURAL RESOURCES CONSERVATION SERVICE

Pacific Islands Area

P.O. Box 50004 (808) 541-2600
Honolulu, Hawai‘i 96850 (808) 541-1335 (fax)

RURAL DEVELOPMENT

Hawai‘i State Office

154 Waiānuenuē Avenue, Room 311 (808) 933-8380
Hilo, Hawai‘i 96720-2452 (808) 933-8327 (fax)

Subarea I Office

Kaunakakai, Molokai

Molokai Kahua Huina Center, #4,

15 Kaunakakai Place

P.O. Box 527 (808) 553-5321
Kaunakakai, Hawai‘i 96748-0527 (808) 553-3739 (fax)

SATELLITE OFFICES

Hilo, Hawai‘i

154 Waiānuenuē Avenue, Room 327 (808) 933-8330
Hilo, Hawai‘i 96720-2452 (808) 933-8336 (fax)

Līhu‘e, Kaua‘i

4334 Rice Street, Room 106 (808) 245-9014
Līhu‘e, Hawai‘i 96766-1365 (808) 246-0277 (fax)

UNITED STATES GEOLOGICAL SURVEY

Pacific Islands Water Science Center

677 Ala Moana Blvd., Suite 415

(808) 587-2400

Honolulu, Hawai'i 96813

(808) 587-2401 (fax)

NOTES

NOTES

NOTES



KA HULI AO

Center For Excellence in Native Hawaiian Law
William S. Richardson School of Law
University of Hawai'i at Mānoa

2515 Dole Street
Room 207
Honolulu, Hawai'i 96822
(808)956-8411
nhlawctr@hawaii.edu
www.kahuliao.org



711 Kapi'olani Boulevard
Suite 500
Honolulu, Hawai'i 96813
(808)594-1835
www.oha.org



RECYCLED PAPER  ECO-FRIENDLY INKS PrintGreen 