Native Hawaiian LEGAL CORPORATION

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NATURAL AREA RESERVE SYSTEMS COMMISSION MEETING
Relating to Agenda Item No. 3

June 18, 2023 11:00 a.m. via Zoom videoconference

Aloha e Chairperson and Commissioners:

The Native Hawaiian Legal Corporation ("NHLC") offers the following comments regarding Agenda Item **#3**, "Request Approval of Terms, Conditions, and Guidance in Consideration of Applications for Speecial Use Permits for Traditional and Customary Fishing Practice in ʻĀhihi-Kīnaʻu Natural Area Reserve" ("**Proposed Permit Guidelines**"). The Proposed Permit Guidelines include cumulative catch limits that would apply to special use permits for traditional and customary Native Hawaiian practices that have never been applied before. In short, NHLC respectfully requests that the Commission defer decision making on this topic until necessary diligence, analysis, and consultation has been completed to ensure State compliance with constitutional and statutory mandates requiring the protection and *reasonable* regulation of Native Hawaiian traditional and customary rights. The guidelines before the Commission at this time were not drafted in compliance with the requirements of article XII § 7 and *Ka Paʻakai*; propose a cumulative take limit scheme that will be difficult to operationalize and foster unnecessary competition between practitioners; and do not identify any feasible actions that the State may take to reasonably protect Native Hawaiian rights from the impact of these new restrictions.

More information is provided below regarding the history of special use permitting for Native Hawaiian practitioners in the Reserve and the law relevant to the Commission's actions on this matter.

BACKGROUND

After brothers Rudolph and Robert Luʻuwai, with NHLC as their counsel, applied to DOFAW for a Special Use Permit to practice traditional cultural fishing within the boundaries of the ʻĀhihi-Kīnaʻu Reserve in 1997 ("**1997 Luʻuwai Permit Application**"), the Natural Area Reserves System ("**NARS**") Commission (the "**Commission**") established an advisory working group to develop guidance regarding the application and the accommodation of traditional and customary rights within the Reserve. The working group shared its findings in an October 1998 report, The Question of Perpetuation of Traditional and Cultural Fishing Practices, ʻĀhihi-Kīnaʻu Natural Area Reserve (the "**T&C Fishing Report**"), which proposed a special permitting process for traditional cultural fishing.

As recommended in the T&C Fishing Report, eligibility for a Special Use Permit would require that a practitioner-applicant:

1. provide evidence of continuously exercised traditional fishing practices, since November 25, 1892, which were interrupted only when the Reserve was established in 1973;
2. demonstrate a genealogical connection to the Honua‘ula District; and
3. be a Native Hawaiian, meaning a descendant of an inhabitant of the Hawaiian Islands prior to 1778.

Additionally, under the program:

a. only one permit could be issued per eligible family unit,
b. the permittee and ‘ohana that accompany the permittee must be permanent residents of Maui, and
c. permits must be renewed annually.

The T&C Fishing Report also set forth the State’s responsibilities in the program, including that that “DLNR will develop procedures for monitoring the resource populations as a necessary means to know if AKNAR resources are being placed in jeopardy.” T&C Fishing Report, at 6.[1]

Informed by the T&C Fishing Report, the Commission recommended that the Board approve the 1997 Lu‘uwai Permit Application in March 1999 with numerous conditions, including:

- restricting fishing frequency to four times per year;
- imposing specific catch limits for fish and other natural resources within the Reserve; and
- requiring that practitioners monitor resources within the Reserve and report their findings to DOFAW.

Following the recommendations of the NARS Commission and DOFAW, in a June 1999 meeting, the Board unanimously voted to approve the 1997 Lu‘uwai Permit Application with these conditions.

In March of 2023, the Lu‘uwai and Kululoio ‘ohana (both descendant family units of the Lu‘uwais permitted in 1997), submitted separate applications for the renewal of a special use permit, pursuant to Hawai‘i Administrative Rules § 13-209-5, requesting to engage in traditional and customary fishing practices in the ‘Āhihi-Kīna‘u Natural Area Reserve.

The State Department of Land and Natural Resources, Division of Forestry and Wildlife (“**DOFAW**”) recommends that the NARS Commission impose cumulative annual take limits for special use permits for traditional and customary practices “as applied to all permits combined.” This would impact the Lu‘uwai and Kululoio ‘ohana, as well as any other Native Hawaiian practitioners that may seek permits for constitutionally protected practices in the area.

[1] *See also id.* at 10 (describing, at the time, the lack of existing management planning for the Ahihi-Kinau Reserve and the difficulties in establishing “what the true impacts [of traditional cultural fishing] will be” in the Reserve).

THE PROPOSED CUMULATIVE TAKE APPROACH UNDULY BURDENS PRACTITIONERS AND PRACTICES

There are numerous concerns with the proposed cumulative take limit approach:

- A cumulative take scheme fosters a competitive take limit scheme where access to exercise constitutional rights is afforded on a first come, first served basis.
- Cumulative take limits risk pitting ʻohana against each other to unnecessarily compete for resources.
- The enforcement of cumulative take poses criminal risks for ʻohana members who may not be able to ascertain whether the cumulative take limit for a species has been met.
- A cumulative take limit for all permits may be administratively burdensome for the State to monitor and enforce.
- A cumulative take scheme promotes a binary ("all-or-nothing") approach to resource management, which (1) suggests that any/all human contact will adversely impact the Reserve, and (2) erases the history of Native Hawaiians' responsible management of environmental resources, including those in the Reserve. Such an approach strays from the Reserve's management policy that rejects "a strict biological focus" for natural resource protection.
- A cumulative take limit may be employed as a tool to assist in resource management, but the State must nevertheless determine permit limits and conditions based on the circumstances before the State to fulfill its duties under the Hawaiʻi constitution.

Additionally, the scientific basis for the cumulative take limits being proposed is unclear, and as such might be arbitrary, ultimately resulting in unnecessary risk and burden on Native Hawaiian practices and practitioners.

Native Hawaiian practitioners share the goals of the Reserve to steward and prevent exhaustion of the natural resources of this special place. Indeed, if exhaustion occurs, the practices they hold dear and sacred would die, something their families have understood and protected against since time immemorial. However, as noted above, there are serious concerns with the cumulative catch limit approach and the impact that this approach—which has never been employed before—will have on traditional and customary practices. Additionally, from a legal perspective, there are also serious concerns that the State has not so far conducted the required *Ka Paʻakai* analysis and taken the steps necessary following such an analysis to comply with the law regarding the protection of traditional and customary Native Hawaiian practices.

ANY LIMITS OR CONDITIONS ON PERMITS MUST BE CONSISTENT WITH ARTICLE XII, § 7 AND ARTICLE XI, § 1 OF THE HAWAIʻI CONSTITUTION

DOFAW and the Commission have an affirmative duty to protect Native Hawaiian traditional and customary rights. Cumulative take limits for the subject permit applications, like any other State regulation, must not violate the State constitution.

The State and its political subdivisions have an affirmative duty to preserve and protect natural and cultural resources as well as traditional and customary Native Hawaiian practices under article XII § 7 of the Hawai‘i State Constitution[2] as well as Hawai‘i Revised Statutes (HRS) §§ 1-1 and 7-1.[3,4] While the State may regulate the exercise of customarily and traditionally Native Hawaiian practices, the Hawai‘i Supreme Court has stressed that "the State does not have the unfettered discretion to regulate the rights of ahupua‘a tenants out of existence."[5] It must protect the reasonable exercise of traditional and customary rights of Native Hawaiians to the extent feasible.[6]

State agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices."[7] Thus, regardless of whether the State adopts cumulative take limits, the Commission must independently consider each permit application to fulfill its legal obligations under article XII § 7 and *Ka Pa‘akai.*

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[2] Under Article XII § 7: "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."

[3] HRS § 1-1 codifies the doctrine of custom into Hawai‘i's common law:

> The Common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage[.]

HRS § 7-1 provides:

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

[4] *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm'n*, 94 Hawai‘i 31, 45, 7 P.3d 1068 (2000) ("[Article XII § 7] places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights[.]"); *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 7-8, 656 P.2d 745, 749 (1982) (affirming HRS §§ 1-1 and 7-1 as bases for traditional and customary rights). *See also Pai ‘Ohana v. United States*, 76 F.3d 280 (9th Cir. 1996) (recognizing that Native Hawaiian tenant rights derive from Haw. Const. article XII §7 and HRS §§ 1-1, 7-1).

[5] *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425, 451, 903 P.2d 1246, 1272 (1995).

[6] *PASH*, 79 Hawai‘i at 451, 903 P.2d at 1272.

[7] *Flores-Case 'Ohana v. Univ. of Haw.*, 153 Hawai‘i 76, 82, 526 P.3d 601, 607 (2023); *Ka Pa‘akai*, 94 Hawai‘i at 46, 7 P.3d at 1083 (citing *PASH*, 79 Hawai‘i at 437, 903 P.2d at 1258).

The Supreme Court's mandate is clear: the nature and scope of Native Hawaiian traditional and customary rights depend on the circumstances of each case.[8] Thus, to fulfill its affirmative duty, when an agency acts it must, at a minimum, make specific findings and conclusions as to:

> (1) the identity and scope of traditional and customary rights in the impacted area; (2) the extent to which those rights and resources would be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [State] to reasonably protect native Hawaiian rights [that] are found to exist.[9]

In recommending proposed take limits, the DOFAW submittal mentions article XII § 7 and *Ka Pa'akai* and highlights the State's right to regulate traditional and customary rights. But oddly, while admitting awareness of the law, it fails to employ the *Ka Pa'akai* analysis the law requires, instead proposing catch limits that risk what the law says the State can not do, that is, "regulate the rights of ahupua'a tenants out of existence."[10] DOFAW did not independently consider the effect of its actions on Native Hawaiians' traditional and customary rights and thus failed to discharge its duties under article XII § 7 of the Hawai'i State Constitution.

Before deciding whether to approve or deny DOFAW's proposed permit guidelines and the individual special use permit applications for traditional and customary rights under Agenda Items Nos. 4 and 5, the Commission must evaluate potential impacts to practitioners' rights under a *Ka Pa'akai* analysis.

Mahalo for the opportunity to testify.

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[8] *Kalipi*, 66 Haw. at 10, 656 P.2d at 751 (providing that "the retention of a Hawaiian tradition should in each case be determined . . .").

[9] *Flores-Case 'Ohana*, 153 Hawai'i at 83, 526 P.3d at 608 (cleaned up) (quoting *Ka Pa'akai*, 94 Hawai'i at 45, 47, 7 P.3d at 1082, 1084 (articulating the legal analytical framework the state must use to evaluate "whether it fulfilled its constitutional obligation to preserve and protect" Native Hawaiians' traditional and customary rights). *Flores-Case 'Ohana* held that that *Ka Pa'akai* applies to administrative rulemaking as well as in quasi-judicial contested case hearings.

[10] *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995).