



# Native Hawaiian LEGAL CORPORATION



## NATURAL AREA RESERVE SYSTEMS COMMISSION MEETING Relating to Agenda Item No. 5

June 18, 2023

11:00 a.m.

via Zoom videoconference

Aloha e Chairperson and Commissioners:

The Native Hawaiian Legal Corporation (“**NHLC**”) offers the following testimony regarding Agenda Item #5, which pertains to the ‘Āhihi-Kīna‘u Natural Area Reserve special use permit application by members of the Lu‘uwai ‘ohana, Kānaka Maoli that have multi-generational traditional cultural fishing practices specific to the ‘Āhihi-Kīna‘u area.

The Natural Area Reserve Systems (“**NARS**”) Commission (the “**NARS Commission**”) should approve the Lu‘uwai ‘ohana’s Special Use Permit application. The NARS Commission has issued permits for the exercise of Native Hawaiian traditional and customary practices in the past, applying strict eligibility requirements and heavy restrictions. Doing so has allowed the Commission to fulfill its affirmative duty to protect traditional and customary practice rights while also fulfilling its duties to the management and protection of the Reserve. The Lu‘uwai ‘ohana has respected that approach, acted in good faith to comply with what the NARS Commission and the Board of Land and Natural Resources (“**BLNR**” or the “**Board**”) have required, and responsibly continued their multi-generational practices in the Reserve, where their ‘ohana has practiced since at least the mid-1800s. The current practicing generation of their ‘ohana is seeking permits with the same mindset, understanding, and intent. They should be afforded the same or a similar approach as the NARS Commission has taken in the past, so that their practices specific to ‘Āhihi-Kīna‘u are not extinguished forever.

The NARS Commission has dual, constitutionally-rooted duties to protect traditional and customary Native Hawaiian practices and the Reserve. In its past permitting decisions for the ‘ohana the Commission has demonstrated that both can be done. Those past solutions provide ways forward now.

### **BACKGROUND**

Mogul Lu‘uwai and his ‘ohana come from a long line of traditional Hawaiian fishermen and is one of the few Hawaiian fishing families that has continued to reside in the Makena area since at least the mid-1800s. The traditional fishing practices passed down through generations of their family were interrupted with the establishment of the ‘Āhihi-Kīna‘u Reserve in 1973. The

Lu‘uwai ‘ohana, having learned these practices from their kūpuna, now bear the kuleana to pass that specialized traditional knowledge to their children and grandchildren.

On March 1, 2023, Mogul Lu‘uwai submitted an application for the renewal of a special use permit, pursuant to Hawai‘i Administrative Rules (“**HAR**”) § 13-209-5, requesting to engage in traditional and customary fishing practices in the ‘Āhihi-Kīna‘u Natural Area Reserve. *See* Lu‘uwai 2023 Application (Attachment A). Leina‘ala Vedder on behalf of the Kuloloio ‘ohana, relatives of the Lu‘uwai ‘ohana, submitted an application on March 13, 2023.

On June 21, 2023, DOFAW staff met with the Lu‘uwai and Kuloloio ‘ohana to discuss their permit applications, the limited take of marine life requested, and the potential of additional applications for special use permits for traditional cultural fishing within the Reserve. A total of three permit applications were submitted,<sup>1</sup> one of which was later withdrawn.

In or around early October 2023, Mr. Lu‘uwai was informed that his permit application would go before the NARS Commission for decision making at a Commission meeting scheduled for October 17, 2023. Before the October 17 meeting, DOFAW published its submittal regarding the applications and ultimately recommended that the Commission “[d]isapprove requests for special use permits for traditional and customary practice, in the case that the requests include take of marine life, in which those activities and associated take can be carried out elsewhere.” *See* DOFAW October 17, 2023 Submittal (Attachment B). In response to DOFAW’s recommendation to deny the three permits, and after earnest discussion with the Lu‘uwai ‘ohana, the third applicant withdrew his special use permit application.<sup>2</sup>

On October 16, 2023, the Lu‘uwai and Kuloloio ‘ohana learned that the NARS Commission cancelled the meeting it had scheduled for the next day. Despite the last-minute cancellation, interested State entities (namely DOFAW staff, the Department of Land and Natural Resources (“**DLNR**”) Chair and Land Deputy, and staff from the Division of Aquatic Resources (“**DAR**”)) met with the two ‘ohana on October 17, 2023 to discuss DOFAW’s recommendation to deny the applications without prior consultation with any of the affected ‘ohana. At the meeting, DLNR staff and the ‘ohana also discussed how to proceed in light of the Lu‘uwai and Kuloloio ‘ohana’s constitutionally protected rights and past demonstrations of good faith in exercising those rights.

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<sup>1</sup> After the Lu‘uwai and Kuloloio ‘ohana submitted their applications, Justin Kekiwi submitted a special use permit application to engage in traditional cultural fishing practices in the ‘Āhihi-Kīna‘u Natural Area Reserve. Mr. Kekiwi’s application was the third submitted to DOFAW/the NARS Commission in 2023.

<sup>2</sup> Mr. Kekiwi expressed in his testimony submitted for the October 17, 2023 meeting that “[i]t is very disturbing to see the recommendation sent to the commission to deny all applicants especially Leina‘ala Vedder and Mogul Lu‘uwai as they are direct descendants of Kūpuna who worked so hard to obtain the previous permits years back for traditional and customary practices regarding take.” Mr. Kekiwi further expressed concerns about the Commission’s management of the Reserve given the few studies or data available to properly issue allowable take for lineal descendants, and the lack of consultation with lineal descendants to inform proper management of the Reserve’s resources. *See* Justin Kekiwi’s Testimony (Attachment C).

On December 21, 2023, the Lu‘uwai and Kuloloio families met with DOFAW staff again to discuss take limits that might apply to special use permits for traditional cultural fishing within the Reserve. There, DOFAW and DAR introduced the idea of a cumulative take limit that they proposed would apply to any/all permits within the Reserve. DOFAW staff presented a spreadsheet with recommendations for take limits and asked the Lu‘uwai ‘ohana to opine on the recommendations in the meeting. The Lu‘uwai ‘ohana requested time to review DOFAW’s recommendations before providing further feedback. While DOFAW shared this “Cumulative Take Analysis,” which included bag limit recommendations, it did not provide written explanations or otherwise discuss with our client and his ‘ohana the rationale/justifications for its recommendations. After the December 2023 meeting, the Lu‘uwai ‘ohana retained NHLC as counsel to assist in navigating discussions with DOFAW and the Commission and advancing the permit application process, while also ensuring their constitutional rights are not violated.

On February 15, 2024, the Lu‘uwai ‘ohana met again with DOFAW via videoconference. Prior to the meeting that same day, NHLC emailed DOFAW staff the Lu‘uwai ‘ohana’s Cumulative Take Analysis and Recommendations – which requested increased bag limits for certain species, annual limits for individual permits, removal of “eaten on site” limitations, and an articulation of the State’s reasoning for recommendations contained in its “Cumulative Take Analysis” provided in December 2023 so the ‘ohana could evaluate the context of the requests they were making regarding take. *See* Lu‘uwai Take Analysis (Attachment D). With NHLC as their counsel present, the Lu‘uwai ‘ohana further discussed take limits and inquired about the requirements their ‘ohana needed to fulfill to receive approval of their permit application. DOFAW staff stated that they would create and share a collaborative take chart that DOFAW and the Lu‘uwai ‘ohana could edit; DOFAW staff also agreed to provide their rationale in the chart and meet with the Lu‘uwai ‘ohana again in two weeks to continue discussion about take limits.

On March 5, 2024, Mr. Lu‘uwai, his ‘ohana, and their NHLC counsel met with DOFAW staff via video conference to further discuss proposed take limits for their permit application.

On March 15, 2024, NHLC on behalf of Mr. Lu‘uwai sent an email to DOFAW to follow-up the March 5 meeting and discussion. The email provided additional explanation for the proposed limu and ‘ōpihi take limits, which DOFAW previously requested from the Lu‘uwai ‘ohana.

On March 19, 2024, DOFAW staff responded stating that “DOFAW still has concerns about [‘ōpihi and limu limits] and would like to talk more but in the interest of time it might also make sense to move forward with the process to get the request to the Natural Area Reserve System Commission.” DOFAW staff assured our client that it would meet internally to finalize its recommendation to the NARS Commission while keeping our client and his ‘ohana apprised of the State’s amended proposed limits.

On March 27, 2024, to determine whether additional discussion with DOFAW would be necessary, NHLHC asked DOFAW staff whether they had updates on the proposed take numbers and reasoning the Division would provide for the two outstanding species (‘ōpihi and limu) limits in its recommendation to the NARS Commission.

On April 12, 2024, Emma Yuen (Statewide Program Manager, Native Ecosystems Protection & Management) notified Mr. Lu‘uwai via email that a NARS Commission meeting was scheduled for June 18, 2024 via Zoom videoconference.

On April 25, 2024, DOFAW staff met with the Lu‘uwai ‘ohana via videoconference to explain the next steps in the permit application process. DOFAW staff informed the Lu‘uwai ‘ohana that the Division would recommend a cumulative take limit to apply to all permits, and that it would not provide a “recommendation” about whether the Commission should deny or approve the Lu‘uwai ‘ohana’s permit.

In May 2024, the Lu‘uwai ‘ohana, through Mr. Lu‘uwai’s counsel, informed DOFAW staff that they further amended (i.e., lowered) their proposed take limits for ‘ōpihi and limu. *See* Lu‘uwai Amended Proposed Take Limits (Attachment E).

DOFAW staff shared its draft submittals regarding cumulative take and the Lu‘uwai ‘ohana’s application with the Lu‘uwai ‘ohana on May 20, 2024 and final submittals in or around early June 2024. DOFAW’s submittals on both the Lu‘uwai and Kuloloio permit applications recommend that the Commission “[a]pprove or deny the subject application(s)[.]” *See* DOFAW Lu‘uwai Submittal (Attachment F); DOFAW Kuloloio Submittal (Attachment G).

### **DOFAW AND THE COMMISSION HAVE AN AFFIRMATIVE DUTY TO PROTECT NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY RIGHTS**

The State Department of Land and Natural Resources, Division of Forestry and Wildlife (“DOFAW”) and the NARS Commission, as agencies of the State, must independently consider the effect of their actions on Native Hawaiians’ traditional and customary rights in order to discharge their duties under article XII § 7 of the Hawai‘i 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<sup>3</sup> as well as Hawai‘i Revised Statutes (HRS) §§

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<sup>3</sup> 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.”

1-1 and 7-1.<sup>4,5</sup> Native Hawaiian traditional and customary rights are also a protected public trust purpose under article XI § 1 of the constitution,<sup>6</sup> which articulates Hawai‘i’s public trust doctrine.<sup>7</sup> This legal understanding is consistent with the way stewardship of the natural environment and its resources is built into Native Hawaiian cultural practices and is necessary to continue those cultural practices for future generations.

Importantly, while the State holds the power to 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.”<sup>8</sup> It must protect the reasonable exercise of traditional and customary rights of Native Hawaiians to the extent feasible.<sup>9</sup> Given this affirmative duty, State agencies “may not act

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<sup>4</sup> 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.

<sup>5</sup> *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).

<sup>6</sup> Under Article XI § 1:

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

All public natural resources are held in trust by the State for the benefit of the people.

<sup>7</sup> *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui*, 116 Hawai‘i 481, 508, 174 P.3d 320, 347 (2007).

<sup>8</sup> *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425, 451, 903 P.2d 1246, 1272 (1995) (“*PASH*”).

<sup>9</sup> *PASH*, 79 Hawai‘i at 451, 903 P.2d at 1272.

without independently considering the effect of their actions on Hawaiian traditions and practices.”<sup>10</sup>

The nature and scope of Native Hawaiian traditional and customary rights depend on the circumstances of each case.<sup>11</sup> 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.<sup>12</sup>

Before deciding whether to approve or deny special use permits for traditional and customary rights, the Commission must evaluate potential impacts to those rights under a *Ka Pa‘akai* analysis.

DOFAW’s submittal acknowledges that “the Division has a constitutional responsibility to facilitate and support the rights of native Hawaiians to engage in traditional and customary practice, as provided by law,” but does not further discuss the Lu‘uwai ‘ohana’s Native Hawaiian traditional and customary rights or the State’s duties or efforts to protect them to the extent feasible. Nor does the submittal mention the *Ka Pa‘akai* analysis – the key framework the Supreme Court has said must apply when State agencies make decisions that impact Native Hawaiian traditional and customary rights. The submittal fails to apply *Ka Pa‘akai* or suggest how the Commission may meet the analysis’ requirements.<sup>13</sup>

**THE ISSUANCE OF MR. LU‘UWAI’S LIMITED SPECIAL USE PERMIT IS A FEASIBLE ACTION BY THE GOVERNMENT THAT PROTECTS APPLICANT LU‘UWAI ‘OHANA’S TRADITIONAL AND CUSTOMARY RIGHTS IN THE RESERVE**

The Lu‘uwai ‘ohana’s traditional cultural fishing practices constitute a reasonable exercise of traditional and customary rights that can be feasibly protected within the Reserve, as

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<sup>10</sup> *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).

<sup>11</sup> *Kalipi*, 66 Haw. at 10, 656 P.2d at 751 (providing that “the retention of a Hawaiian tradition should in each case be determined . . .”).

<sup>12</sup> *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.

<sup>13</sup> The T&C Fishing Report, in essence, undertakes the *Ka Pa‘akai* analysis and proposes reasonable regulations of the practices that it identified would be impacted in the Reserve. Thus, T&C Fishing Report, though authored decades ago, provides a starting point and/or example for what an updated *Ka Pa‘akai* analysis might look like here.

demonstrated by the ‘Āhihi-Kīna‘u Reserve’s existing permitting program for Native Hawaiian traditional and customary practices and prior special use permit approvals.

Governed under HRS chapter 195, the NARS is a program administered by DOFAW. As established pursuant to HRS § 195-6, the NARS Commission acts in advisory capacity for the BLNR. HAR § 13-209-5 provides that the Board “with the approval of the commission . . . may issue permits to conduct activities otherwise prohibited . . . for research, education, management, or for any other purpose consistent with [HRS] chapter 195[.]”

Approved by the Board in May 1997, the Management Policies of the Natural Area Reserves System sets the criteria for evaluating special use permits submitted to DOFAW. The Policies provide that “[a]ny exception to established policies or rules requires a Special Use Permit.” The listed exceptions include “Gathering, including Native Hawaiian Religious and Customary Gathering Rights as permitted by law.”

In September 1997, brothers Rudolph and Robert Lu‘uwai, with NHLC as their counsel, applied to DOFAW for a Special Use Permit to practice traditional cultural fishing within the boundaries of the Reserve (the “**1997 Lu‘uwai Permit Application**”). In response to the Lu‘uwai brothers’ request, the Commission established an advisory working group to develop guidance regarding the application and the accommodation of traditional and customary rights within the Reserve. After eight meetings, the working group shared its findings in an October 1998 report, The Question of Perpetuation of Traditional and Cultural Fishing Practices, ‘Āhihi-Kīna‘u Natural Area Reserve (the “**T&C Fishing Report**”) (Attachment H), which proposed a special permitting process for traditional cultural fishing.

The working group emphasized that the permitting process should allow for traditional cultural fishing, not subsistence fishing, to allow the Lu‘uwai ‘Ohana to pass on their knowledge and protect their traditions and customs from being lost. The working group proposed narrow eligibility requirements for the permitting program. 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. Under this program, only one permit may be issued per eligible family unit, the permittee and ‘ohana that accompany the permittee must be permanent residents of Maui, and permits must be renewed annually.

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. The Lu‘uwai ‘ohana agreed to those and

additional conditions, further limiting the scope of their rights, including that a special use permit is valid only for one year from the date of issuance.

In turn, DOFAW similarly recommended that the Board approve the 1997 Lu‘uwai Permit Application with conditions, and it explained the significance of this permitting program:

The Lu‘uwai Family has acknowledged the State’s role to regulate their rights in a manner that is consistent with the management objectives of the Reserve and is willing to work with the State in this regard. The permit has been crafted with this in mind as it represents an opportunity for Resource managers and Native Hawaiians to work together to do better in managing natural resources. We cannot turn the clock back, yet we have an opportunity to integrate some of the historical Hawaiian natural resources values to help us better manage our public trust natural resources today and in the future. It is in that spirit we recommended that the Board approve this special use permit[.]

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.

The considerations contemplated by the working group in the T&C Fishing Report, the NARS Commission, and DOFAW align with the mandate of the Hawai‘i Supreme Court’s *Ka Pa‘akai* decision which followed shortly thereafter in 2000. In considering the Lu‘uwai’s request for Special Use permit, the working group identified the rights impacted within the Reserve and how they might be impaired if a Special Use Permit is not approved. Based on the working group’s findings, the Commission subsequently took feasible action to reasonably protect those rights by issuing a limited Special Use Permit. Ultimately, the Commission determined, and the Board agreed, that the Special Use Permit adequately protects the reasonable practice of traditional cultural fishing in a way that complies with the law and does not compromise the Reserve’s integrity.

The 1998 T&C Fishing Report and 1997 Lu‘uwai Permit application approvals are instructive of the ways forward that will enable DOFAW and the Board to fulfill their dual duties to the Reserve and traditional and customary practice rights in determining the path forward for the permit applications today. The working group report and the Commission’s approval of past permits of this type, for the Lu‘uwai and Kuloloio ‘ohana no less, support that Native Hawaiian traditional and customary rights can persist within the Reserve without significant adverse impacts to its resources. The circumstances surrounding the present permit applications remain substantially the same as those that existed when the first permits of these kind were approved. Moreover, today, as was true in 1997, “[t]his program [remains] an opportunity to affect a small reversal in the continuing loss of traditional Hawaiian culture.” *See* T&C Fishing Report, at 8. The Lu‘uwai ‘ohana’s Special Use Permit application should be similarly approved.

**APPROVAL OF THE SPECIAL USE PERMITS SUPPORTS THE POLICIES OF HRS CHAPTER 195 AND HAWAI‘I’S PUBLIC TRUST DOCTRINE**



The accommodation of article XII § 7 rights through the above permitting program is consistent with other constitutional and statutory provisions intended to protect and preserve Hawai‘i’s natural and cultural resources.

First, the exercise of traditional cultural fishing under the permitting program serves the purpose of NARS which is to protect and preserve in perpetuity Hawai‘i’s unique natural assets, both for the enjoyment of future generations, and to provide base lines against which changes in the environments of Hawai‘i can be measured.<sup>14</sup>

Published in 2012 to provide direction for future management of the Reserve, the ‘Āhihi-Kīna‘u Natural Area Reserve Management Plan explained a shift in the approach for resource management within the Reserve:

The NARS, as originally conceived, focuses on natural resource protection and enhancement. This plan builds upon this fundamental, legislative mandate, and reflects a broader shift in the approach and thinking of natural resource management efforts in Hawai‘i in moving away from a strict biological focus and toward an integrated biological and cultural focus.

The Plan also articulated an updated vision for the Reserve: “Through *kōkua* and *mālama*, the natural and cultural resources of ‘Āhihi-Kīna‘u Natural Area Reserve are respected and protected as a living legacy. *Aloha ‘āina*.” This “integrated biological and cultural” focus reflects a holistic, restorative justice approach that recognizes Native Hawaiians’ well-being is intrinsically tied to their traditional practices that, in turn, are inextricably tied to their ‘āina.

Second, the limited traditional cultural fishing practices Applicants propose to exercise within the Reserve present an opportunity for practitioners to support the public trust doctrine under Hawai‘i Constitution article XI § 1. In addition to providing invaluable knowledge about the ‘Āhihi-Kīna‘u area and its resources, approved practitioners’ traditional cultural fishing practices are grounded in stewardship. Applicants propose stewardship activities as a part of their practices, including tracking the strength and health of the management area throughout the year, examining conditions of trails within the Reserve, and disposing of ‘ōpala and debris. Further, practitioners would be subject to conditions that limit environmental impact and require reporting to the State, which can support data gathering/monitoring and inform management within the Reserve.

Third, the Lu‘uwai ‘ohana has agreed to restrictive take limits that are consistent with the NARS’ overall purpose and goals. The Lu‘uwai ‘ohana originally proposed take limits that aligned with recommendations from the T&C fishing report and past permits’ take limits. Over months of consultation with DOFAW staff and after learning the State’s reasoning for its proposed limits, the Lu‘uwai ‘ohana repeatedly lowered their proposed take to address concerns about the health of the Reserve and its surrounding areas as well as certain species inhabiting the Reserve. The

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<sup>14</sup> See HRS § 195-1.

Lu‘uwai ‘ohana believes that – just as DOFAW characterized the Kuloloio ‘ohana, their efforts, and their proposed take – “these requested levels are the result of the sincere desire on the part of the [Lu‘uwai ‘ohana] to contribute to effective conservation of marine life in the Reserve and to work with staff on concerns expressed regarding potential impacts on the marine resources.” See DOFAW Kuloloio Submittal, at 3.<sup>15</sup> It is also worth noting that past permit maximums were not met – evidencing that take limits have never functioned as quotas for cultural practitioners to reach but instead serve as allowable limits within which they can reasonably engage in practices necessary for the perpetuation of ‘ike kūpuna.

### **APPLICANT’S CULTURAL FISHING PRACTICES ARE SPECIFIC TO ‘ĀHIHI-KĪNA‘U**

The practices the Lu‘uwai ‘ohana seeks to exercise in the ‘Āhihi-Kīna‘u Natural Area Reserve are unique to ‘Āhihi-Kīna‘u and cannot be carried out elsewhere. Hawai‘i’s caselaw recognizes that Native Hawaiian traditional and customary practices (and thus traditional and customary rights) are place-based and resource-/context-specific. For instance, the Hawai‘i Supreme Court articulated in its 1992 *Pele Defense Fund v. Paty* decision that Native Hawaiian traditional and customary rights may be exercised for subsistence, cultural, and religious purposes on undeveloped lands, even those beyond a practitioner’s ahupua‘a of residence, “*where such rights have been customarily and traditionally exercised in this manner.*”<sup>16,17</sup>

Like other Native Hawaiian traditions and customs, fishing practices are based on the ahupua‘a in which they were exercised and “rel[y] upon the observations and knowledge of those intimately familiar with the local marine ecologies.”<sup>18</sup> Native Hawaiian fishing practices require decades of understanding environmental conditions specific to an area. Thus, the same general

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<sup>15</sup> It is unclear why DOFAW states that the record reflects intent to cooperate only by the Kuloloio ‘ohana despite both ‘ohana proposing comparable take limits, but this is likely attributed to a bias against our clients for retaining counsel. This bias - while it informs DOFAW’s submittal – cannot inform this Commission’s decisions or recommendations, which must be based on the law and pass constitutional muster.

<sup>16</sup> *Pele Defense Fund v. Paty*, 72 Haw. 578, 620, 837 P.2d 1247, 1272 (1992) (emphasis added).

<sup>17</sup> See *State v. Pratt*, 127 Hawai‘i 206, 277 P.3d 300 (2012). In *State v. Pratt*, Dr. Davianna McGregor testified as an expert in the area of Native Hawaiian customary and traditional practices, as well as the source of protection of native Hawaiian rights. Dr. McGregor explained:

six elements [are] essential to traditional and customary native Hawaiian practices: (1) the purpose is to fulfill a responsibility related to subsistence, religious, or cultural needs of the practitioner’s family; (2) the practitioner learned the practice from an elder; (3) *the practitioner is connected to the location of practice, either through a family tradition or because that was the location of the practitioner’s education*; (4) the practitioner has taken responsibility for the care of the location; (5) the practice is not for a commercial purpose; and (6) the practice is consistent with custom.

*Id.* at 209, 277 P.3d at 303 (emphasis added).

<sup>18</sup> *Native Hawaiian Law: A Treatise* 617 (Melody Kapilialoha MacKenzie et al. eds., 2015).

fishing practice varies dependent on where an ‘ohana practices them and the conditions of that specific area.<sup>19</sup>

The Lu‘uwai ‘ohana’s proposed traditional cultural fishing practices are based in the ‘Āhihi-Kīna‘u area. Their ‘ohana have lived and fished in Honua‘ula for generations before the Reserve’s establishment. Their ‘ohana and their fishing knowledge and practices are unique to the environment of ‘Āhihi-Kīna‘u. Applicants seek to perpetuate their ‘ohana’s particular cultural practices and teach the next generations who live in Honua‘ula the cultural fishing techniques specific to ‘Āhihi-Kīna‘u – to pass on knowledge only their ‘ohana has acquired and kept for generations.

### **OUTCOMES**

For the foregoing reasons, the Commission should:

- recommend that the Board approve Applicants’ special use permit applications in a way that is consistent with the T&C Fishing Report, prior permits issued under this permitting program, and the Lu‘uwai ‘ohana’s updated proposed take limits (Attachment E).
- work with Applicants to develop permit conditions that will protect Applicant’s traditional and customary rights, consistent with the State’s constitutional duties, Hawai‘i’s public trust doctrine, and the ‘Āhihi-Kīna‘u Natural Area Reserve Management Plan .
- ensure that DOFAW and the NARS Commission adequately evaluates traditional and customary rights within the Reserve via a *Ka Pa ‘akai* analysis and provides applicants a meaningful opportunity to be heard and consulted with before making decisions that will impact Applicants constitutionally protected rights.<sup>20</sup>

Mahalo for the opportunity to testify.



Terina Fa‘agau, Staff Attorney  
Native Hawaiian Legal Corporation

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<sup>19</sup> See Margaret Titcomb, *Native Use of Fish in Hawai‘i* 5 (republished in 1972) (explaining how Native Hawaiian fishermen “had to know how to judge the weather, . . . and how to recognise the stars as indicators of time and direction, bird flights as indicators of schools of fish”); Emma Metcalf Beckley, *Hawaiian Fisheries and Methods of Fishing* 10 (1883) (“Every rocky protuberance from the bottom of the sea for miles out, in the waters surrounding the islands, was well known to the ancient fishermen, and so were the different kinds of rock fish likely to be met with on each separate rock. The ordinary habitat of every known species of Hawaiian fishes was also well known to them.”).

<sup>20</sup> See *Mauna Kea Anaina Hou v. Bd. Of Land & Natural Res.*, 136 Hawai‘i 376, 389, 363 P.3d 224, 237 (2015).

Testimony Regarding Agenda Item #5 – Lu‘uwai Permit Application  
June 18, 2023  
Native Hawaiian Legal Corporation

Encl.

Attachment A: Lu‘uwai 2023 Application

Attachment B: DOFAW October 17, 2023 Submittal

Attachment C: Justin Kekiwi’s Testimony

Attachment D: Lu‘uwai Take Analysis

Attachment E: Lu‘uwai Amended Proposed Take Limits

Attachment F: DOFAW Lu‘uwai Submittal

Attachment G: DOFAW Kuloloio Submittal

Attachment H: T&C Fishing Report