

Via electronic submittal

Natural Area Reserves Commission Meeting

Tuesday, June 18, 2024

11:00 AM via Zoom

RE: Request Consideration of Application of For Special Use Permit For Traditional and Customary Fishing Practice In 'Āhihi-Kīna'u Natural Area Reserve, Applicant M. Luuwai

Aloha distinguished members of the Natural Area Reserves System Commission,

Mahalo for the opportunity to testify on Agenda Item #5. I am in strong support of granting a special use permit for the Lu'uwai 'Ohana to exercise our traditional and customary fishing rights.

As the 1998 working group report titled, "The Question of Perpetuation of Traditional Cultural Fishing Practices, 'Āhihi-Kīna'u Natural Area Reserve" (1998 Report) explained when Robert and Boogie Lu'uwai first applied for the special use permit, this is a request to perpetuate traditional cultural fishing in the 'Āhihi-Kīna'u area, not for subsistence fishing. The Lu'uwai permit application aligns with traditional cultural fishing in that it limits the amount of take of a species below the legal limits, agrees to no take of certain species that are otherwise allowed to be taken for subsistence, and places time (frequency and time of day) limits on fishing.

The Lu'uwai 'Ohana permit should be granted because the conditions for the permit demonstrate that the use is traditional and reasonable. While the exercise of traditional and customary Native Hawaiian rights are constitutionally protected under article XII, § 7 of Hawai'i's constitution as well as legal precedent under *Public Access Shoreline v. Hawaii County Planning Com'n* (1995) and its progeny, the state retains the ability to regulate such rights and exercise must be grounded in tradition and reasonable. The methods for fishing under the permit that the Lu'uwai 'Ohana has agreed to rely on traditional ways of fishing, including by hand gathering, net casting, and sling spearing.

The permit application also demonstrates a reasonable exercise of traditional and customary Native Hawaiian fishing practices. The conditions on take mutually agreed upon with NARS staff, described above, clearly demonstrate that this request is a reasonable exercise. Therefore, the grant of the Lu'uwai 'Ohana permit should be granted.

Our 'ohana has complied with all the requests made by NARS staff, including attending meetings and submitting drafts of our requested take. We have also included other

extended family members in the process. When my brother originally planned to submit an application on behalf of our family, he also notified our aunty, Leinaala Kuloloi Vedder, so that her ‘ohana might also consider reapplying if interested. He has also included them in all of the meetings we have had with staff, whether staff included them or not. He has demonstrated his willingness to cooperate with staff and the Kuloloio ‘Ohana throughout this process.

I would be remiss if I also did not share some serious concerns with the NARS staff submittal:

- The submittal omits a key element discussed at the October 17, 2023 meeting. The submittal omits the fact that staff provided a recommendation to the Commission to deny the permit without sharing this recommendation with the family prior to it being published online. This was extremely hurtful to the families and rolled back trust with the agency that was previously agreed upon, including keeping the families apprised of any decisions or recommendations staff would make to the Commission. With regard to the issue of cumulative take, the submittal also omits Chair Chang’s explicit directive that discussions about the permits proceed and that cumulative take is a completely separate issue that need justify the further delay of any permit review. These omissions are concerning because they misinform the Commission.
- In stating the constitutional duty to protect public trust resources, the submittal ignores important legal precedence under the *In re Waiāhole Ditch Combined Contested Case Hearing (2000)* expressly maintaining “the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.” Thus, aside from the highest constitutional protection of traditional and customary Native Hawaiian rights that are reasonably exercised under article XII, § 7, Native Hawaiian and traditional and customary rights are also protected under article XI, § 1. This is problematic because the staff submission appears to frame the decision to grant or deny any permit application as siding with either one or the other constitutional protection, but the decision instead requires a balance, which the Lu‘uwai ‘Ohana has reached with the staff.
- Another serious concern is the submittal’s omission of any mention of a *Ka Pa ‘akai* analysis. First, it fails to acknowledge that a *Ka Pa ‘akai* was not done at the time the NAR was created. Although not required at the time the NAR was created, the staff submittal should at least have acknowledged that impacts on traditionally and customary Native Hawaiian rights were not considered, especially in light of the current status of the law, including constitutional, statutory, and judicial provisions. Last, the agency is required to conduct a *Ka Pa ‘akai* analysis on a going forward basis, which it has not done here. Thus, the Commission is not in compliance with

the law. However, the 1998 Report analysis is the equivalent of a *Ka Pa 'akai* analysis and nothing has substantially changed since that report was completed. Therefore, I recommend that the Commission adopt this analysis.

Mahalo for the opportunity to share my mana'ō on this important matter.

Respectfully submitted,

Kaulu Lu'uwai