Administrative Testimony
Testimony of Kamanaʻopono Crabbe, Ph.D
Ka Pouhana, Chief Executive Officer

Board of Land & Natural Resources
Submittal Item D-1
GRANT OF TERM, NON-EXCLUSIVE EASEMENT TO WAIʻOLI VALLEY TARO HUI, INC. FOR SURFACE WATER DIVERSION AND IRRIGATION SYSTEM PURPOSES, WAIʻOLI, HANALEI, KAUAʻI, TAX MAP KEY: (4) 5-6-002:001 (PORTION).

May 24, 2019 9:15 a.m. Conference Room 132

The Administration of the Office of Hawaiian Affairs (OHA) **SUPPORTS** the staff recommendations for the issuance of a gratis, 55-year easement as described in agenda item D-1, which would provide meaningful recognition and protection of public trust purposes in the surface waters of Waiʻoli.

As an initial matter, OHA commends the tireless efforts of the Waiʻoli Valley Taro Hui (Hui), to perpetuate kalo farming traditions and practices that have persisted in spite of the tremendous changes to Hawaiʻi's environment, economy, and political landscape that have occurred over the last two centuries. The Hui's continued resilience and perseverance, particularly after last year's devastating floods, as well as their ability to evolve and adapt to changing governmental bureaucracies and requirements in pursuit of their ultimate goal – to continue traditional kalo cultivation in the footprint of our ancestors[1] – provides inspiration and hope that our practices, knowledge, and values will continue well into the 21st century and beyond.

OHA further expresses its deep appreciation and gratitude to the professors and students of the William S. Richardson School of Law, whose environmental law clinic has provided invaluable assistance to the Hui in navigating complex and sometimes unclear legal processes and overlapping jurisdictions as a means of protecting and perpetuating Waiʻoli's farming traditions. OHA likewise thanks the administration and staff of the Department of Land and Natural Resources (DLNR) and its divisions, for working with the Hui and the law clinic, and for now bringing the instant submittal before the Board of Land and Natural Resources (BLNR).

OHA supports and respectfully urges the BLNR to adopt the staff recommendations contained in the submittal for agenda item D-1, proposing the issuance of a gratis, 55-year easement to the Hui as a means of facilitating its maintenance and continued use of a centuries-old ʻauwai system, and allowing the continued cultivation of loʻi kalo in Waiʻoli Valley. While

[1] As illustrated in the attached report by OHA Research Analyst Natashja Tong, historical documentation demonstrates that the ʻauwai, mānowai, and poʻowai relied on by the Hui and subject to the proposed easement is part of a traditional irrigation system that existed since time immemorial, to support an agricultural complex of no less than 41 separate kuleana ʻapana containing loʻi kalo at the time of the Māhele, of which no less than 12 referred to this particular ʻauwai as part of their metes and bounds description. *See* Attachment A.

the perpetuation of traditional lo‘i kalo cultivation and the facilitation of watershed enhancement efforts provide ample justification for the proposed easement, OHA offers the following additional points relating to the public trust doctrine, for the BLNR’s consideration.

1. The easement will recognize and protect critical public trust purposes in the surface waters of Wai‘oli.

By formally recognizing the ongoing public trust purposes served by the Hui’s activities, the proposed easement represents an unprecedented step towards the formal and meaningful protection of the public trust in Wai‘oli’s surface waters. Notably, the easement will provide a means of ensuring that any future disposition of these waters acknowledge and take into account the public trust purposes served by the Hui’s traditional agricultural activities, including their domestic subsistence agricultural uses of surface water; their perpetuation of Native Hawaiian traditional and customary practices, including kalo cultivation, dependent on the same; and their stewardship of biocultural watershed resources and functions closely intertwined with stream flow and the maintenance of waters in their natural state.[2]

Since time immemorial, water in our islands has been recognized as a public trust resource, and our constitution, State Water Code, and case law accordingly reaffirm the importance of protecting and carefully administering our limited water supply for the public good, with the highest consideration given to specifically enumerated public trust purposes. Unfortunately, in many regions throughout Hawai‘i, the public trust in water has been neglected for generations, as stream diversions and private wells allowed sugar and pineapple plantations to monopolize our water resources for their private, commercial gain; this effective privatization of our water supply has had and continues to have profound and deleterious effects on our environment as well as Native Hawaiian subsistence lifestyles and traditional and customary practices otherwise protected under the public trust. While recent developments have been encouraging, the public trust purposes of water, including Native Hawaiian traditional and customary practices and the domestic uses of the general public, continue to not be given appropriate consideration in most land use activities and decisionmaking that impact our water resources.

Accordingly, the proposed 55-year easement for the subject ‘auwai system, specifically tailored to accommodate the Hui’s instream, in-watershed, traditional agricultural activities, offers a unique and refreshing demonstration of land use decisionmaking that proactively upholds, rather than passively neglects, the public trust purposes in water. As suggested in the instant submittal, much of the Hui’s activities clearly and directly serve three of the four recognized public trust purposes, including through their stewardship and maintenance of Wai‘oli’s surface waters in their natural state, as well as the range of biocultural resources and functions that rely upon and support stream flow and mauka-to-makai connectivity; their

[2] While not all of the Hui’s activities and water uses fall clearly under current definitions of Native Hawaiian traditional and customary practices or domestic uses, the easement at issue is critical to the continuation of the substantial amount of activities and uses that do; moreover, the instream, in-watershed use of water to cultivate lo‘i kalo in a traditional manner, which perpetuates cultural knowledge and values while providing a source of locally produced food, would undeniably qualify all of the Hui’s activities as a reasonable beneficial use also consistent with and protected by the public trust doctrine.

agricultural subsistence and domestic uses of water;[3] and their Native Hawaiian traditional and customary practices including but not limited to loʻi kalo cultivation. Notably, both domestic and Native Hawaiian traditional and customary uses have been specifically recommended as meriting the highest priority for water allocation during water shortages by the hearings officer in the Nā Wai ʻEhā contested case hearing, currently pending before the Commission on Water Resource Management.[4] By providing the Hui with an express property interest to continue their activities, the proposed easement would therefore recognize and affirmatively uphold the public trust purposes they carry out or directly serve, including through the continuation of traditional, place-based agricultural practices that have endured for centuries or longer.

OHA notes that, in addition to expressly acknowledging the public trust purposes fulfilled by the Hui, the proposed land easement would also provide a layer of protection in any future decisionmaking that may have an impact on the water resources of Waiʻoli. For example, a formal easement would help to ensure that any future requests for water from Waiʻoli Valley be affirmatively justified and explicitly balanced with the Hui's public trust purposes and reasonable beneficial uses; applicants for private uses of water in particular would be clearly placed on notice of the Hui's activities, and the attendant need to meet their burden to "justify the proposed water use in light of the trust purposes" served by the Hui.[5] With an easement in hand, the Hui and its members may also have additional bases upon which to intervene in land use activities and decisionmaking that would impact their ability to maintain and use the mānowai, poʻowai, and ʻauwai covered by the easement, and thereby carry out the public trust purposes they serve.[6]

Accordingly, OHA believes that the proposed issuance of a 55-year easement to the Hui would not only facilitate the perpetuation of the timeless, place-based traditional agricultural practices of Waiʻoli, but also represents a long-awaited and much-needed step towards more proactive recognition and affirmative protection of the public trust in water.

2. **Nominal or gratis rents can ensure that public trust purposes are more appropriately balanced against competing private applicants for limited water resources.**

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[3] While there may be disagreement as to whether the public trust purpose of "domestic use by the general public" applies to certain uses, such as out-of-watershed diversions for the broad range of municipal uses, the in-watershed use of stream water for subsistence agriculture and related purposes, a component of many Hui members' activities, should clearly constitute a domestic use contemplated by and afforded the highest protections under the public trust.

[4] *See* Hearings Officer's Proposed Findings of Fact, Conclusions of Law, & Decision and Order, COL 154, 199-202, Commission on Water Resource Management CCH-MA15-01, November 1, 2017, *available at* http://files.hawaii.gov/dlnr/cwrm/cch/cchma1501/CCHMA1501-20171101-HO-D&O.pdf.

[5] Kauaʻi Springs, Inc. v. Planning Commission of Kauaʻi, 133 Hawaiʻi 141 (2014) (emphasis in original) (citing In re Water Use Permit Applications (Waiāhole I), 94 Hawaiʻi 97 (2000)). While these presumptions and burdens would apply regardless of the issuance of an easement, on a practical level, the easement itself would provide both applicants and agencies with clear notice regarding the Hui's activities and the public trust purposes being actively served by Waiʻoli's surface waters.

[6] Again, while an easement may not be necessary for standing purposes, the rights conveyed by an easement may obviate complications arising from differing and inconsistent interpretations by state agencies and others regarding Native Hawaiians' and the general public's rights of intervention in matters involving the public trust.

Similarly, OHA strongly appreciates and supports the gratis rent proposed for the subject easement; as a policy matter, OHA notes that the provision of such favorable consideration may be a critical component in ensuring that public trust purposes are not inappropriately undermined by the greater financial capital that may be available to competing private applicants for water.

OHA notes that numerous arguments may support the proposed provision of gratis rent to the Hui. As a 501(c)(3) organization, the Hui would clearly qualify for such consideration under HRS Chapter 171's appraisal and public auction exceptions.[7] The Hui's watershed enhancement and infrastructure maintenance activities would further counsel the provision of favorable rental rates, as provided in other land dispositions that have come before the BLNR. The Hui's aforementioned direct support of public trust purposes, however, provides a particularly significant and compelling argument in favor of granting the proposed gratis rent.

As demonstrated by the Hui's activities, ensuring the fulfillment of public trust purposes in our limited water resources may involve or even require stewardship activities by community groups and nonprofit organizations with limited financial means, but with substantial community support or deep cultural ties. The public trust purposes themselves, such as domestic riparian uses and Native Hawaiian traditional and customary practices such as lo'i kalo cultivation, can by their very nature also require some form of land tenure by individuals and groups that may likewise have limited financial means. The imposition of cost-prohibitive rents that inhibit such entities' access to and use of public lands may therefore severely limit or preclude the fulfillment of public trust purposes in certain water resources. Meanwhile, private applicants seeking to utilize such water resources solely for their private gain – and whose desired profit-driven use of water may in turn further increase their ability to pay higher rents – would thereby face reduced challenges from community groups, Native Hawaiian practitioners, and others who lack the access and capital needed to maintain and defend such public trust purposes. Accordingly, the provision of nominal or gratis rent for the use of public lands that directly fulfills public trust purposes – as illustrated in the case at hand – may therefore be a critical means of ensuring that Native Hawaiian traditional and customary practices, domestic riparian agriculture, and other public trust purposes are adequately protected, and not inappropriately disadvantaged against competing private applicants with much greater financial means.[8]

Therefore, based on the foregoing reasons, OHA respectfully urges the BLNR to **APPROVE** the recommendations contained in the submittal for agenda item D-1. Mahalo for the opportunity to comment on this matter.

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[7] *See* HRS § 171-41.3.

[8] Gratis or nominal rent facilitates and appropriately supports the Hui's substantial public trust purposes and traditional and customary Native Hawaiian practices served by this easement; meanwhile, the contemplated water lease process described in the submittal provides ample opportunity for staff to continue to work closely with the practitioners and farmers on appropriate water rates.

ATTACHMENT A

The Indigenous Origin of the Native Hawaiian Irrigation System that Feeds the Loʻi Kalo in Waiʻoli, Kauaʻi

By Natashja Tong
Land, Culture, and History Research Analyst, Office of Hawaiian Affairs

The Waiʻoli Valley Taro Hui aims to restore its mānowai (traditional intake from the main stream channel), poʻowai (secondary diversion to traditional irrigation ditches), ʻauwai (traditional kalo irrigation ditches), and the related loʻi kalo system (wetland kalo patches), which were damaged by the devastaing and record-breaking flood that hit Kauaʻi in April of 2018. This report summarizes OHA's draft research, which concludes that this system existed in pre-contact times; i.e., prior to the arrival of Captain Cook in about 1778. This is based, in part, on the estimated birth and death years of the aliʻi referenced in the Native Register of Kuleana Claimants during the Māhele process.

Although OHA has not yet located historical documentation that specifically dates the creation of the mānowai or poʻowai, documentation of the ʻauwai (which moves water from its point of initial diversion to the loʻi kalo) is available in the Māhele records (between the years 1848-1860) that transitioned Hawaiʻi into a hybridized system of private land ownership. Forty-one separate Kuleana ʻapana (land parcels) were found that included loʻi kalo, and 12 Kuleana ʻapana (land parcels) were found that referred to the ʻauwai in their metes and bounds. A mānowai or poʻowai is necessary to supply water to an ʻauwai; thus, the existence of traditional intakes on Waiʻoli Stream is a given based on the existence of the lower portions of this particular ʻauwai system.

Kuleana are a type of Land Commission Award (LCA) given to native tenants during the Māhele. Native tenants who were seeking a Kuleana award would submit a Native Register (NR) – a statement that explained the extent of their land claim – to the Land Commission, the Board tasked with confirming title during this process. Typically, the Native Register included information on how many ʻapana (land parcels) the applicant was claiming and what was being cultivated at the time. The Native Register also detailed from whom the applicant derived their interest (i.e., who gave the claimant the right to cultivate those lands), which was usually a konohiki or aliʻi, and/or the year or time period that aliʻi was in power typically in the form of "I ke au iā" or "during the time of" followed by the name of the aliʻi.

For example, the NR for LCA 8196 to Hakui notes, "e hoike imua o oukou no koʻu kuleana mai ka wa mai ia Kaikioewa a hiki i keia la" ("I make known before you my interest [in this land] from the time that Kaikioewa ruled until today"). Kaikioewa died in 1839,[9] and was a contemporary and kuhina (advisor) of Kamehameha I (1758-1819).[10]

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[9] Lilikalā Kameʻeleihwia, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?*, (Honolulu: Bishop Museum Press, 1992), 109.
[10] These years represent estimated life span, not political reign. Samuel Kamakau, *Ke Kumu Aupuni*, (Honolulu: Ke Kumu Lama, 1996) 2-3; 87; 206-216.

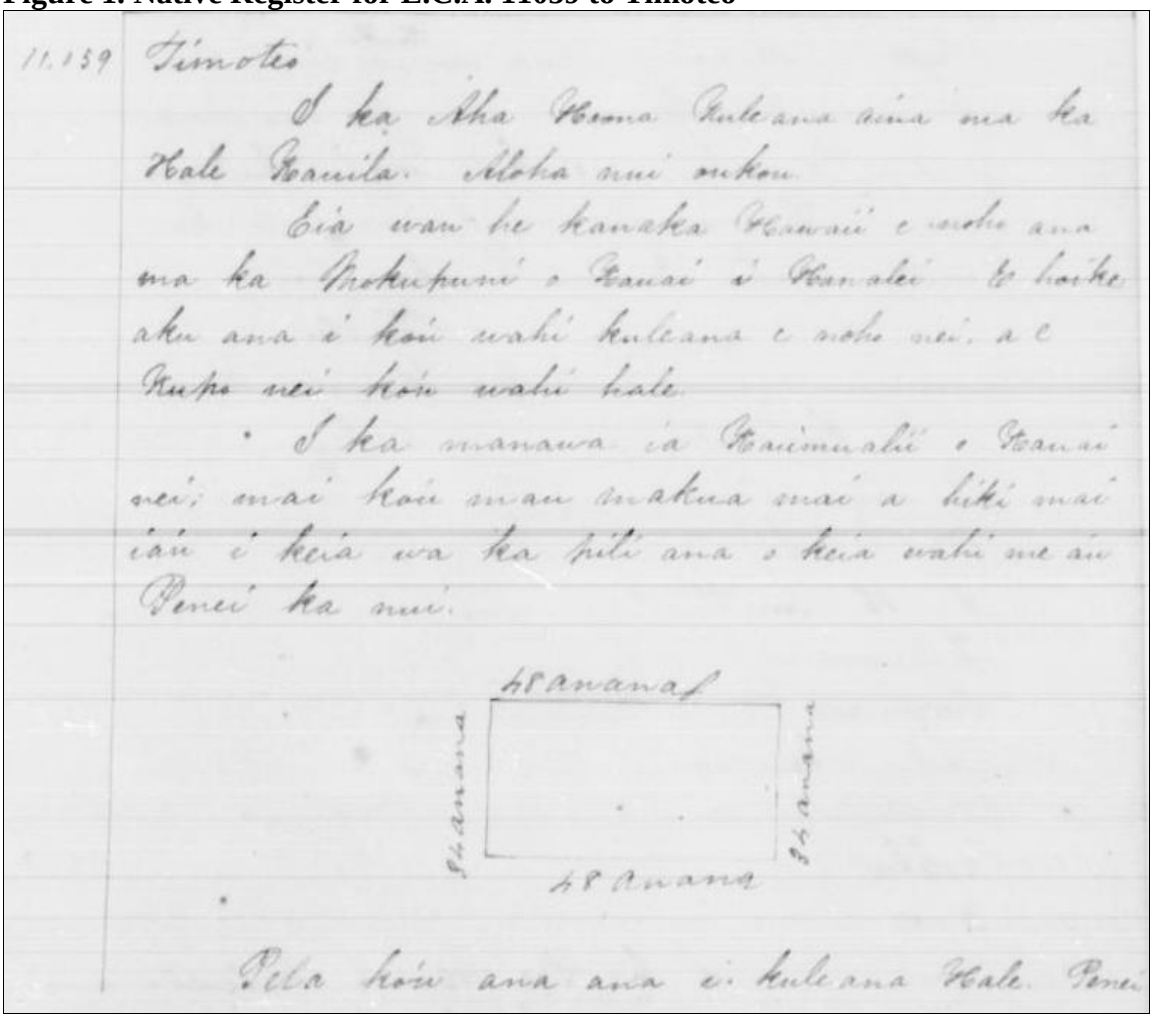
Kaumualiʻi, also a contemporary of Kamehameha I, is referenced many times as he is the aliʻi nui of Kauaʻi during that period. For example, the NR for LCA 9276 for Kiolea states, "Penei ke kuleana ana mai a Kaumualii mai a hiki i ka makahiki 1848" ("Such is the interest in this land from Kaumualiʻi until the year 1848"). Kaumualiʻi, who died in 1824,[11] was the mōʻī of Kauaʻi who negotiated a treaty with Kamehameha during his campaign to unite the islands under one rule. Similarly, the NR for LCA 9275 to Koenapuu explains, "Penei ke kuleana ana mai a Kaumualiʻi mai a ia keia manawa" ("Such is my interest from Kaumualiʻi until now"). As yet another example, the NR for LCA 11059 (seen below in Figure 1) to Timoteo proclaims, "I ka manawa ia Kaumualii o Kauai nei, mai koʻu mau makua mai a hiki mai iaʻu i keia wa ka pili ana o keia wahi me au" ("During the time of Kaumualii's rule, from my parents until me during this time, is the connection of this place with me").

Based on my years of experience and research in this area, it is my professional opinion that if lands in Waiʻoli were given during the reign of Kaikioewa and Kaumualiʻi, both contemporaries of Kamehameha I who lived through and experienced "contact" with Captain Cook in 1778, that the mānowai, poʻowai, and ʻauwai system required to support the loʻi kalo claimed by those native tenants was also in place prior to contact.

To provide more context for this conclusion, I received a Bachelor's Degree in 2011 and my Master's Degree in 2014, both in Hawaiian Studies from the University of Hawaiʻi at Mānoa's Kamakakūokalani Center for Hawaiian Studies. While pursuing my degrees, I was one of a handful of students selected to train as an Ancestral Visions of ʻĀina Konohiki. Under the mentorship of Lilikalā Kameʻeleihiwa, Ph.D., Pua Kanahele, Ph.D., and others, I reviewed, and transcribed, thousands of Māhele documents, including LCAs, native registers, and native and foreign testimonies. Some of those documents are available on the avakonohiki.org website. That is but one example of my specific training in research and translations in this field. Moreover, as one of OHA's Land, Culture, and History Research Analysts, since 2014, my research has focused on land, water, and the Māhele process in particular. Given this and other background and training, I am confident that the Waiʻoli mānowai, poʻowai, and ʻauwai are Native Hawaiian in origin and were established before the arrival of Europeans in Hawaiʻi.

[11] Kameʻeleihwia, *Native Land and Foreign Desires,* 109.

Figure 1. Native Register for L.C.A. 11059 to Timoteo



11.159 Timoteo

O ka Aha Hoona Kuleana ana na ka Hale Kanila. Aloha nui oukou

Eia wau he kanaka Hawaii e noho ana ma ka Mokupuni o Kauai i Hanalei. E haiko aku ana i koi wahi kuleana e noho nei, a e Kupo nei koi wahi hale.

O ka manawa ia Kaimuali o Kauai nei; mai koi mau makua mai a hiki mai iau i keia wa ka pili ana o keia wahi me au Penei ka mui.

Pela koi ana ana i kuleana Hale. Penei