

February 27, 2020

Board of Land and Natural Resources
State of Hawai'i Department of Land and Natural Resources
Kalanimoku Building, Room 132
1151 Punchbowl Street
Honolulu, Hawai'i 96813
Email: blnr.testimony@hawaii.gov

RE: TESTIMONY IN STRONG SUPPORT OF AGENDA ITEM D-15

Amend Prior Approval as Amended of Item D-1, May 24, 2019, Grant of Term, Non-Exclusive Easement to Wai'oli Valley Taro Hui, Inc. for Surface Water Diversion and Irrigation Purposes, Wai'oli, Hanalei, Kaua'i, Tax Map Key: (4) 5-6-002:001 (portion).

Issuance of Revocable Permit to Wai'oli Valley Taro Hui, Inc. for Use of State Water from Wai'oli Stream for Taro Irrigation Purposes, Wai'oli, Hanalei, Kaua'i, Tax Map Key: (4) 5-6-002:001.

Aloha Chair Case and Members of the Board of Land and Natural Resources,

My name is Ashley Kaono and in my capacity as an advocate, a law student, and a Native Hawaiian, I respectfully urge the Board to grant the Wai'oli Valley Taro Hui's request for a perpetual easement and revocable permit, both gratis.

While I grew up in Honolulu, O'ahu, many of my 'ohana are from Koholālele in Hāmākua on Hawai'i Island. I share that to, of course, provide you with some background about myself, but to also express something very simple, and also very special. That is: to know the place I come from, where my 'ohana comes from, and where many of them remain today. This knowledge is not something I always possessed; it was something I learned much later in life. That is not the case, however, with most of the farmers from Wai'oli Valley. For them, and their 'ohana, farming in Wai'oli Valley has been a way of life for generations, where they continue to steward the same lands and farm kalo on the same 'āina, with the same kuleana, because they know how important this is to their 'ohana, their communities, and to all of Hawai'i nei.

Now, in my last year of law school, I'm working as a clinician with both our Native Hawaiian Rights and Environmental Law Clinics to learn more about the practical effects the law has on our communities, and our Native Hawaiian community in particular. What I've come to appreciate, but also struggle with, is how complex the law is in these arenas. It is difficult to comprehend, let alone navigate, which is why it is important for me to submit this testimony in strong support of the Hui's request.

The law can be convoluted and at times ambiguous; yet, many of the principles that our laws have been developed around are clear and manifest. Here, instream, in-watershed cultivation of kalo in a traditional manner has special protection and respect in our State Constitution, our Water Code, and in Hawai'i case law, where it has been elevated to a mandate.

The work of the Wai'oli Valley Taro Hui is an example of kalo cultivation practiced in a traditional manner, which the black letter of our laws claim to protect. But to come to life, on the ground and in this Kaua'i community, such protection requires action from you: our state decisionmaker. Please vote today to support the important work of kalo farming in Wai'oli Valley so that it, and these communities, can continue to live our culture and be a model of indigeneity and sustainability for the generations yet to come.

I appreciate the opportunity to briefly share my thoughts and express strong support for a perpetual easement and revocable permit, both gratis, to the Wai'oli Valley Taro Hui.

Mahalo for your time and consideration,

Ashley B. Kaono

COUNTY COUNCIL

Arryl Kaneshiro, Chair
Ross Kagawa, Vice Chair
Arthur Brun
Mason K. Chock
Felicia Cowden
Luke A. Evslin
KipuKai Kualii



OFFICE OF THE COUNTY CLERK

Jade K. Fountain-Tanigawa, County Clerk
Scott K. Sato, Deputy County Clerk

Telephone: (808) 241-4188
Facsimile: (808) 241-6349
E-mail: cokcouncil@kauai.gov

Council Services Division
4396 Rice Street, Suite 209
Lihu'e, Kaua'i, Hawaii 96766

February 24, 2020

TESTIMONY OF MASON K. CHOCK
COUNCILMEMBER, KAUAI COUNTY COUNCIL
BEFORE THE
BOARD OF LAND AND NATURAL RESOURCES
(Via E-Mail Only: blnr.testimony@hawaii.gov)
February 28, 2020

Dear Chairperson Case and Board Members:

RE: Item D.15. Amend Prior Approval as Amended of Item D-1, May 24, 2019, *Grant of Term, Non-Exclusive Easement to Wai'oli Valley Taro Hui, Inc. for Surface Water Diversion and Irrigation Purposes, Wai'oli, Hanalei, Kaua'i, Tax Map Key: (4) 5-6-002:001 (portion)*

Thank you for this opportunity to provide testimony in strong support of the Grant of Term, Non-Exclusive Easement to Wai'oli Valley Taro Hui, Inc. for Surface Water Diversion and Irrigation System purposes in Wai'oli. My testimony is submitted in my individual capacity as a Member of the Kaua'i County Council.

Taro farming has existed in Wai'oli Valley since time immemorial. Wai'oli Valley Taro Hui, Inc. ("Wai'oli Hui") is a nonprofit group of taro farmers who have perpetuated ancient Hawaiian farming techniques, have cultivated taro in Wai'oli Valley, and have provided opportunities for interested persons to participate and learn about sustainable farming the ancient way.

I urge the Board of Land and Natural Resources ("BLNR") to approve the proposed amendments to this non-exclusive easement to Wai'oli Hui and allow the organization to continue its efforts towards building the foundation for cultural preservation of Wai'oli Valley, as well as fostering traditional Hawaiian practices and activities that nurture the natural environment of Wai'oli Valley. Wai'oli Hui was devastated by the April 2018 flooding event on Kaua'i's north shore, and the County of Kaua'i has supported the organization's efforts to recover its agricultural operations. A formal process for the BLNR to award water leases to viable organizations such as Wai'oli Hui is vital to the continuation of the agriculture economy in the surrounding Hanalei area, and I humbly urge the BLNR to work

Board of Land and Natural Resources
RE: Item D.15. (Wai'oli Valley Taro Hui, Inc.)
February 24, 2020
Page 2

aggressively towards establishing this much-needed process throughout the State of Hawai'i.

Thank you again for this opportunity to provide testimony on this matter. Should you have any questions, please feel free to contact me or Council Services Staff at (808) 241-4188.

Sincerely,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

MASON K. CHOCK
Councilmember, Kaua'i County Council

cc: Ian Hirokawa, DLNR Special Project Coordinator
(Via E-Mail Only: ian.c.hirokawa@hawaii.gov)
Professor D. Kapua Sproat, (Via Email Only: kapuas@hawaii.edu)
A. U'ilani Tanigawa Lum, Esq., (Via Email Only: anelatan@hawaii.edu)

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MASON K. CHOCK
Councilmember, Kaua'i County Council

cc: Ian Hirokawa, DLNR Special Project Coordinator
(Via E-Mail Only: ian.c.hirokawa@hawaii.gov)
Professor D. Kapua Sproat, (Via Email Only: kapuas@hawaii.edu)
A. U'ilani Tanigawa Lum, Esq., (Via Email Only: anelatan@hawaii.edu)



Hanalei Watershed Hui

February 24, 2020

State of Hawaii Board of Land and Natural Resources

Testimony Re: Wai'oli Valley Taro Hui

Feb. 28, 2020

Item D.15

Change easement to "perpetual", increase the area covered in the easement and add TMK: (4)5-5-008:018

Aloha Board members,

We previously, May 2019, provided supportive testimony for this easement and now enthusiastically provide this testimony in support of these requested changes to the easement.

The Hanalei Watershed Hui has worked on resource management in this place for twenty years and fully appreciates the critical contribution the farmers make to the health, wealth and resilience of the community in which they toil. They know the place and their place in it.

Mahalo for your recognition of these requested changes and your positive consideration of them.

Me ka pono,

Makaala Kaaumoana
Executive Director

E malama kumu wai ~ Protect the source

5299C Kuhio Hwy, P. O. Box 1285, Hanalei, Kaua'i, HI 96714

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The Hanalei Watershed Hui is an equal opportunity employer and provider.



DEPARTMENT OF PUBLIC WORKS
THE COUNTY OF KAUAI

DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHLIG, MANAGING DIRECTOR

LYLE TABATA
DEPUTY COUNTY ENGINEER

VIA EMAIL TRANSMITTAL

February 26, 2020

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State of Hawai'i Department of Land and Natural Resources
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Chair Case and Board Members,

I am writing in support of the applicant Wai'oli Valley Taro Hui, Inc. (the "Hui") a 501(c)(3) domestic nonprofit corporation that represents a collective of taro farmers located on privately owned lands in Hanalei, Kaua'i. The various taro farms are irrigated via surface water from the Wai'oli stream via a diversion and ditch system located on State parcel (4) 5-6-002:001. Wai'oli irrigation system, Hanalei, Kaua'i. The system was damaged during the heavy rains and flooding in April 2018. The County of Kaua'i is engaged in funding the repairs of the damage to the system caused by the severe weather. The Hui is requesting an easement from the Board in order for its members to conduct ongoing maintenance and repair as needed to ensure continued irrigation of the downstream taro farms. Such activities include cleaning the system of silt, rocks and other debris. Additionally, regular maintenance and repair must be conducted after periods of heavy rainfall. The primary intake diversion from the stream is an impermanent structure that has been engineered to break apart during times of heavy rains in order to prevent flooding of the wetland taro farms. As the system provides water for the benefit of the taro farmers, staff is supportive of the Hui's request for the easement and revocable permit ("RP"). Although it is not clear who originally built the system, based on research conducted by the State Office of Hawaiian Affairs, the system was likely constructed pre-contact. Additionally, the system has served the



cultivation of wetland kalo long before statehood. Furthermore, the Hui has consulted with the Commission of Water Resource Management ("CWRM") and the Office of Conservation and Coastal Lands ("OCCL") on this matter. The diversion is registered with CWRM, and Land Division, Engineering Division, CWRM and Attorney General staff have conducted site inspections of the system. Moreover, OCCL has determined that a Conservation District Use Application was not required.

I have committed to support this effort via the County of Kaua'i Department of Public works as its Deputy County Engineer taking the lead on the repairs, and dedicating funds and staff support from the County of Kaua'i. We have worked together with the Environmental Law Clinic through Kapua Sproat this semester to expedite this effort. The County of Kaua'i Engineering Division of Public Works has contracted with Esaki Surveying to perform the survey work to document the extent of the irrigation system towards this easement which is in the final stages of completion.

The County has received the permitting as required through the US Army Corps of Engineers ("USACE") for the maintenance required to restore the traditional lo'i kalo system in Wai'oli, which has been utilized since time immemorial. In recent memory, the use of Wai'oli's lo'i kalo for subsistence and cultural purposes is recorded in Land Commission Awards as early as 1850. The system's manowai (traditional intake from the main stream channel), po'owai (secondary diversion to traditional irrigation ditches), and 'auwai (traditional kalo irrigation ditches) structures are now located on State Conservation lands. The Hui seeks a permanent, non-exclusive easement for these structures so that its members may continue to utilize them to perpetuate their cultural practice of wetland kalo cultivation, as their ancestors have for many, many generations. The submittal also recommends an RP for their water use. Our staff support the issuance of both the easement and the RP and hope you will grant them.

Finally, I wanted to be there in person, but will be unavailable on the day of this Land Board hearing.

Sincerely,

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Lyle Tabata
Deputy County Engineer

LT/at

February 27, 2020

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RE: TESTIMONY IN STRONG SUPPORT OF AGENDA ITEM D-15.

I ka Papa Alaka'i o BLNR, Aloha 'Oe;

“Wai'oli i ka ua 'Īlōlilehua.” Wai'oli amidst the Lehua speckling rain, is an ancient epithet for the Wai'oli area that speaks to the amount of water the area receives. The rain is so profuse that it causes the flowers to wilt and discolor because of all the moisture. It is this water that the people of Wai'oli have harnessed since time immemorial to irrigate the fields that have fed countless generations. The Wai'oli Taro Farmers are the product of these ancient people and have perpetuated these practices that have fed the whole of Hawai'i with the kalo and poi they have produced.

As a kupa, a long-time native of this area, I support a perpetual easement and revocable permit for the Wai'oli Valley Taro Farmers not only to protect this ancient practice, but to also protect this necessary right of people to be able to feed themselves in the ways in which they always have. Many of the families and people of Wai'oli are simple people, kama'āina, people of the land, and had no use or reason to get involved in government bureaucracy. The April 2018 floods changed that, and has required many of our families to become adept at forms and filings overnight, a monumental feat that has been overcome with time and support from many. By supporting this easement you will help to keep this practice, as well as this system, alive for many more generations. The importance of and access to this resource for the families will be “on the books,” ensuring that the next generation will not have to overcome the same hurdles and obstacles of their predecessors.

Mahalo nui for your time and support.

Devin Kamealoha Forrest
Kumu Hula, Hālau Hula 'o Ke'alalaua'eomakana



Hanalei Watershed Hui

February 24, 2020

State of Hawaii Board of Land and Natural Resources

Testimony Re: Wai'oli Valley Taro Hui

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RE: TESTIMONY IN STRONG SUPPORT OF AGENDA ITEM D-15.

Aloha nui kākou,

My name is U'ilani Tanigawa Lum and I'm from a small town in Makawao, Maui. I'm currently a Post-Juris Doctor Fellow at Ka Huli Ao Center for Excellence in Native Hawaiian Law where I help to teach the Environmental Law Clinic with Professor Kapua Sproat. I first came to the Board almost a year ago as a student in this same Environmental Law Clinic. As you may recall, I graduated last year with certificates in Native Hawaiian and Environmental Law and have since passed the bar and been sworn in as an attorney.

As a hula practitioner and while deeply passionate about Native Hawaiian and Environmental Law, I was often troubled to learn about and see our administrative agencies struggle with fulfilling their duties under the public trust. As a then, third-year law student navigating this process with and for the Hui, I was troubled to realize that it is so hard for our community to engage in this process; *especially*, when they are more than willing. At every step of the way, the Hui members were 'eleu, ready to undertake the necessary requirements to comply with the law. As a student, I was deeply moved by the farmers of the Wai'oli Valley Taro Hui and it was heartening to witness your Board not only grant the easement, but recommend amending it to a perpetual easement gratis.

Given the farmers' intimate and generational knowledge of the land and water in Wai'oli, the partnership between this Board and the Wai'oli Valley Taro Hui is a monumental step in managing and protecting our natural and cultural resources in a traditional manner. We often read about and look to cultural practices and traditions as "what used to be," but these farmers offer an unbroken link as fifth and sixth generation farmers of this area. Their lives center around and literally depend upon the responsible use of these resources.

Aside from the significant value that this Hui offers, these farmers are the epitome of 'auamo kuleana. When asked why they continue this work in the midst of the many challenges and lack of support, most of them reply: "just cause gotta," or, "who else going do um?" Though it may take some prodding to push past their humility and for them to articulate the importance of kalo farming, they are a shining example of undertaking kuleana – the burdens and the privileges. We have much to learn from these farmers and their practice.

This Hui represents the longstanding and understated work ethic of kalo farmers across Hawai'i, and also illustrates our collective success. The Hui regularly thanked us for helping them navigate this process. But in actuality, this process with the Hui transcends law. I am grateful to experience a little part of their amazing community. Our collective efforts are found

not only at the law school with students, fellows, and Professors lending their time and expertise, but also at the County and State levels, as well.

Mahalo nui for your service and work for our collective Hawai'i. This was the reason I decided to go to law school; to see government, our communities, and our practices not only coexist, but to excel. The Wai'oli Valley Taro Hui was the first time I saw the utility and importance of my law degree on the ground and in our communities. I respectfully ask you to vote today and grant the perpetual easement and revocable permit (both gratis).

Mahalo nui,

U'ilani Tanigawa Lum



OFFICE OF HAWAIIAN AFFAIRS
Administrative Testimony

Testimony of Sylvia M. Hussey, Ed.D.,
Ka Pouhana, Chief Executive Officer

Board of Land & Natural Resources
Submittal Item D-15

AMEND PRIOR APPROVAL AS AMENDED OF ITEM D-1, MAY 24, 2019, GRANT OF TERM,
NON-EXCLUSIVE EASEMENT TO WAI'OLI VALLEY TARO HUI, INC. FOR SURFACE WATER
DIVERSION AND IRRIGATION SYSTEM PURPOSES, WAI'OLI, HANALEI, KAUA'I, TAX MAP
KEY: (4) 5-6-002:001 (PORTION).

Pepeluali 28, 2020

9:00 a.m.

Conference Room 132

The Administration of the Office of Hawaiian Affairs (OHA) **SUPPORTS** the staff recommendations to amend and make perpetual the easement granted to the Wai'oli Valley Taro Hui (Hui), which would provide further recognition and indefinite protection of appropriate public trust purposes and reasonable beneficial uses of the waters of Wai'oli.

As described in the attached previous testimony dated May 24, 2019, the issuance of a 55-year easement to the Hui last year recognized and protected ongoing public trust purposes and reasonable beneficial uses, including their traditional cultivation of lo'i kalo as well as the various watershed services provided through their stewardship of Wai'oli Valley. OHA greatly appreciates the action taken by the Board of Land and Natural Resources (BLNR) at that time, and further appreciates the concurrent discussion regarding the potential conversion of the 55-year easement to a perpetual one.

OHA reiterates that a perpetual easement, as now proposed in the instant submittal, may be a particularly appropriate disposition, given the fact that it would only enable the continued use of traditional Hawaiian irrigation infrastructure as has occurred since time immemorial –and at least for a longer time period than the existence of the state, the Territory, and the Kingdom of Hawai'i combined. OHA also notes that the maintenance of 'auwai to convey water for the agricultural activities of the nonprofit Hui is in many ways tantamount to a utility use, for which perpetual easements are routinely granted. Accordingly, the contemplated conversion of the Hui's term easement into a perpetual one, with clarifying amendments of the easement's boundaries, would be consistent with the public trust, as well as the BLNR's own practices with regards to utility easements.

Therefore, based on the foregoing reasons, OHA respectfully urges the BLNR to **APPROVE** the recommendations contained in the submittal for agenda item D-15. Mahalo for the opportunity to comment on this matter.



OFFICE OF HAWAIIAN AFFAIRS

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, HANAIEI,
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 ancestors¹ – 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 ʻāpana 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 lo‘i 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 ‘Ehā 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 Wai‘oli. For example, a formal easement would help to ensure that any future requests for water from Wai‘oli 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, po‘owai, and ‘auwai 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 Wai‘oli, 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.

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/cwr/cch/cchma1501/CCHMA1501-20171101-HO-D&O.pdf>.

⁵ *Kaua‘i Springs, Inc. v. Planning Commission of Kaua‘i*, 133 Hawai‘i 141 (2014) (emphasis in original) (citing *In re Water Use Permit Applications (Waiāhole I)*, 94 Hawai‘i 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 Wai‘oli’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.

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 Lo‘i Kalo in Wai‘oli, Kaua‘i

By Natashja Tong

Land, Culture, and History Research Analyst, Office of Hawaiian Affairs

The Wai‘oli Valley Taro Hui aims to restore its mānowai (traditional intake from the main stream channel), po‘owai (secondary diversion to traditional irrigation ditches), ‘auwai (traditional kalo irrigation ditches), and the related lo‘i kalo system (wetland kalo patches), which were damaged by the devastating and record-breaking flood that hit Kaua‘i 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 ali‘i 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 po‘owai, documentation of the ‘auwai (which moves water from its point of initial diversion to the lo‘i kalo) is available in the Māhele records (between the years 1848-1860) that transitioned Hawai‘i into a hybridized system of private land ownership. Forty-one separate Kuleana ‘apana (land parcels) were found that included lo‘i kalo, and 12 Kuleana ‘apana (land parcels) were found that referred to the ‘auwai in their metes and bounds. A mānowai or po‘owai is necessary to supply water to an ‘auwai; thus, the existence of traditional intakes on Wai‘oli Stream is a given based on the existence of the lower portions of this particular ‘auwai 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 ‘apana (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 ali‘i, and/or the year or time period that ali‘i was in power typically in the form of “I ke au iā” or “during the time of” followed by the name of the ali‘i.

For example, the [NR for LCA 8196](#) to Hakui notes, “e hoike imua o oukou no ko‘u 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

⁹ Lilikalā Kame‘eleihwā, *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.

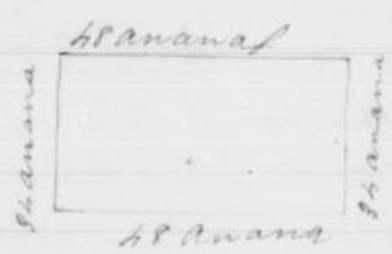
Kaumuali‘i, also a contemporary of Kamehameha I, is referenced many times as he is the ali‘i nui of Kaua‘i during that period. For example, the [NR for LCA 9276](#) for Kiolea states, “Penei ke kuleana ana mai a Kaumualii mai a hiki i ka makahiki 1848” (“Such is the interest in this land from Kaumuali‘i until the year 1848”). Kaumuali‘i, who died in 1824,¹¹ was the mō‘ī of Kaua‘i 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 Kaumuali‘i mai a ia keia manawa” (“Such is my interest from Kaumuali‘i 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 ko‘u mau makua mai a hiki mai ia‘u 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 Wai‘oli were given during the reign of Kaikioewa and Kaumuali‘i, both contemporaries of Kamehameha I who lived through and experienced “contact” with Captain Cook in 1778, that the mānowai, po‘owai, and ‘auwai system required to support the lo‘i 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 Hawai‘i 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 ‘Āina Konohiki. Under the mentorship of Lilikalā Kame‘eleihiwa, Ph.D., Pua Kanahale, 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 Wai‘oli mānowai, po‘owai, and ‘auwai are Native Hawaiian in origin and were established before the arrival of Europeans in Hawai‘i.

¹¹ Kame‘eleihwia, *Native Land and Foreign Desires*, 109.

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

11.159	<p>Timoteo</p> <p>I ka Iha Hoona Kule ana aia ma ka Hale Hoani. Aloha nui oukou.</p> <p>Eia wau he kanaka Hoani e noho ana ma ka Mokupuni o Hawaii i Kanalei to hoke aku ana i koi wahi kule ana e noho nei, a e kupa nei koi wahi hale.</p> <p>I ka manawa ia Hoaniwai o Hoani nei; mai koi mau makua mai a hiki mai ia i keia wa ka pili ana o keia wahi me ai Penei ka nui.</p> <div style="text-align: center;">  </div> <p>Pela koi ana ana i kule ana Hale. Penei</p>
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