

**Legal Appendix for the Health Impact Assessment of the  
Mo‘omomi Community Based Subsistence Fishing Area (CBSFA)  
Part I**

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**I. Overview**

The purpose of this legal section is to add another layer of understanding to the Health Impact Assessment (HIA) for the proposed Mo‘omomi Community Based Subsistence Fishing Area (CBSFA). This document describes the legal rights possessed by the Native Hawaiian<sup>1</sup> community who are most dependent on the nearshore fishery of Moloka‘i Island’s north shore from ‘Ilio Pt. to Pelekunu (hereinafter referenced collectively as “Mo‘omomi” or “Mo‘omomi Fishery”) for traditional subsistence.

The Native Hawaiian homesteaders of the Ho‘olehua area of Moloka‘i rely primarily on Mo‘omomi for subsistence fishing.<sup>2</sup> In the early 1990s, several homesteaders formed Hui Mālama O Mo‘omomi to care for and advocate for the restoration of Mo‘omomi. Its leader, Uncle Mac Poepoe, is the konohiki<sup>3</sup> (traditional resource manager) of Mo‘omomi. He monitors the marine resources daily, utilizes the Hawaiian moon calendar (its phases and cycles) to track growth and reproduction of key species, and employs indigenous-based mental modeling as a tool for determining cyclic processes and ecosystem health. The last two decades under Uncle Mac’s konohiki-based management have yielded positive and measurable improvement in fishery health and increased fish biomass. Hui Mālama O Mo‘omomi has been working with the State to promulgate customized rules that are founded on konohiki management strategies that reflect place-specific environmental needs and conditions and support the continuance of indigenous, subsistence practices.

Hui Mālama O Mo‘omomi has encountered a number of procedural and legal hurdles to achieving full designation and approval of their proposed management plan and rules package. State resistance to CBSFA designation and rules approval may be attributed to two things: (1) a lack of understanding and appreciation for the significant contributions that traditional ecological knowledge and indigenous methodologies bring to fisheries health and restoring resource abundance; and (2) a failure or lack of capacity to implement a legal framework that fulfills constitutional and statutory mandates that protect the public trust and traditional and customary Hawaiian rights.

The purpose of this paper is to address the first issue within the context of how State law acknowledges kama‘āina<sup>4</sup> expertise, the emplaced, indigenous ‘ike<sup>5</sup> (knowledge) of those who know their ‘āina<sup>6</sup> (land) most intimately. And secondly, to survey the body of unique laws and jurisprudence in the State of Hawai‘i that are informed by ancient custom and provide greater context and instruction to how CBSFAs should be established.

## Respecting Native Hawaiian Law and Protecting Hoāina Rights in the Nearshore Fisheries

Native Hawaiian law finds its genesis in the ancient land tenure system. The law originates particularly within the nature of how land was traditionally divided into ahupua‘a<sup>7</sup> (unit of land typically extending from the mountain tops down to the sea) to sustain hoāina,<sup>8</sup> native tenants residing within these land divisions. The hoāina labored upon the ‘āina (land) and cared for the resources. They developed a deep connection to and knowledge of their place over successive generations, and maintained special, priority rights of access and resource utilization for their subsistence.<sup>9</sup>

Customary laws from ancient times were codified under Hawaiian Kingdom Law in the 1800s and survive to present-day in Hawai‘i State constitution and statutory provisions that protect traditional and customary Hawaiian rights and the public trust.<sup>10</sup> These laws reflect the trustee-beneficiary relationship between the ali‘i<sup>11</sup> (chiefs) and maka‘āinana<sup>12</sup> (common people). These laws particularly acknowledge the special rights afforded to ‘ohana<sup>13</sup> (extended families) with long-standing, multi-generational relationships to their ahupua‘a and resources therein for sustenance and daily living.

The CBSFA law is also grounded in hoāina relationships; particularly with respect to nearshore fishery resources that are critical to sustaining successive generations of ‘ohana. The law provides a process by which the State Department of Land and Natural Resources (DLNR) may designate protected subsistence fishing areas and promulgate customized administrative rules in co-management with native Hawaiian communities in order to “ensure that subsistence fishing areas continue to be available” to them.<sup>14</sup>

### Administrative Delays Hamper Native Communities Seeking CBSFA Protection

The State’s implementation of the CBSFA law has become mired in administrative and bureaucratic delays that unduly burden Native Hawaiian communities. Currently, there are nineteen communities statewide that are interested in CBSFA designation and administrative rules approval.<sup>15</sup> Yet, only one legislatively designated CBSFA in Hā‘ena, Kaua‘i has been successful in passing a rules package.<sup>16</sup> For Hā‘ena, this achievement took eight years and was a very difficult and “arduous” undertaking. Kaua‘i-born University of Hawai‘i Professor Mehana Blaich Vaughan worked closely with the Hā‘ena community and confirmed:

[T]here were more than 60 meetings and 20 drafts of the rules, which were shaped by input from various segments of people with an interest in access, from recreational users like surfers and kiteboarders to commercial operations, fishermen and Hawaiian families.<sup>17</sup>

For Mo‘omomi, the wait has been even longer – twenty-two years since the passage of the CBSFA law in 1994, several governors and governor appointees leading the helm at DLNR, loss of institutional knowledge and wavering State commitment to see Mo‘omomi protected as a traditionally-managed subsistence fishery.

## Loss of Cultural Knowledge -- An Ongoing Threat to Native Hawaiian Communities

In the process of conducting this Health Impact Assessment, we met with the Ho‘olehua Hawaiian Homesteaders who rely most on the Mo‘omomi fishery as their “ice-box.” We asked them what have been the impacts to their community as they wait for the CBSFA rules to pass. Here are some of their responses:

“This places an unbearable strain on Uncle Mac [Poepoe].”

“The rules would allow us to perpetuate our konohiki and cultural practices.”

“Without rules in place, we will continue to see a depletion of the resources.”

“We will have to reteach the next generation.”

“The rules are our legacy. They will ensure that even if the knowledge is lost, the legacy of mālama (care for the resources) will remain.”<sup>18</sup>

The Ho‘olehua homesteaders are not the only community suffering. There are numerous other native communities throughout Ka Pae ‘Āina o Hawai‘i (the Hawaiian Islands) that are struggling to preserve ancestral knowledge entrusted to them to care for their special places while aged kūpuna<sup>19</sup> (elders), the ‘ike (knowledge) holders of their ‘āina, pass away.

## Improving the Administrative Implementation for CBSFAs

This paper describes how the CBSFA law originated around proposed protections for Mo‘omomi as a traditional, subsistence fishery. It explores the possible reasons the State allowed the Mo‘omomi demonstration project to sunset despite the community’s strong commitment and effective indigenous-based management.

Next, this document (1) examines customary practices of mālama<sup>20</sup> i ke kai<sup>21</sup> (ocean resource management) by konohiki (traditional resource managers) and hoa‘āina (native tenants) as cultural practitioners, and observances of kapu<sup>22</sup> (prohibitions and self-restraint) as a system of conservation; (2) explains the konohiki fisheries law under the Hawaiian Kingdom that codified customary fishing practices; (3) considers native vested rights attached to Hawai‘i’s ahupua‘a fisheries in the aftermath of the overthrow of Queen Lili‘uokalani, Hawai‘i’s annexation as a territory of the United States and eventual statehood; (4) covers the legal relevance of the CBSFA law in acknowledging these vested rights; (5) explores the sources of Native Hawaiian law and the public trust which speak to these vested rights; and (6) critiques and suggests improvements to the current administrative implementation of the CBSFA law.

Finally, this paper suggests a pathway forward for government and native communities as they seek to co-manage nearshore fishery resources important to traditional subsistence. It is a pathway that lends credence and respect to both western and indigenous sciences.

This paper instructs government actors in easy and concrete ways how to interpret, administer, and enforce the CBSFA law. It provides recommendations on how to evaluate potentially competing stakeholder interests regarding CBSFA applications, fulfill constitutional due process obligations, while also enforcing constitutional and statutory mandates that protect the public trust and traditional and customary Hawaiian rights and practices. This paper also seeks to inform and assist the Ho‘olehua homesteaders and other native communities throughout Hawai‘i who are courageously taking on the kuleana<sup>23</sup> (responsibility) to mālama (steward) their ahupua‘a fisheries for the benefit of present and future generations.

## II. Origins of the CBSFA Law and the Mo‘omomi Pilot Project

The CBSFA law was passed by the Hawai‘i State legislature in 1994. This legislation came from an initiative by former Governor Waihe‘e who authorized a task force to document the importance of subsistence practices on the island of Moloka‘i.

The *Governor’s Moloka‘i Subsistence Task Force Final Report* found that subsistence serves as a vital and sustainable sector of Moloka‘i’s economy. With high unemployment and public assistance rates, “[t]he ability to supplement meager incomes through subsistence is very important to maintaining the quality of life of families on the island.”<sup>24</sup> Through extensive community surveys and focus groups, the task force identified problems that were making it harder for the community to engage in subsistence fishing, hunting, and gathering practices. Overharvesting, the use of improper harvesting methods, and the degradation of subsistence values, customs, methods, and practices were found to be the critical threats to subsistence fishing practices.<sup>25</sup> The fishery along the northwestern coast of Moloka‘i experienced a rapid decline and near collapse of its kumu (white saddle goatfish, *Parupeneus porphyreus*) and ula (spiny lobster, *Panulirus marginatus*) populations. The Hawaiian homesteaders of Ho‘olehua rely on this fishery for subsistence.

The task force findings led the legislature to adopt Act 271, codified as Hawai‘i Revised Statutes, Section 188-22.6, which imposes special protections on fisheries statewide that “reaffirm[ ] and protect[ ] fishing practices customarily and traditionally exercised for purposes of Hawaiian subsistence, culture, and religion.”<sup>26</sup>

The Governor’s task force also successfully advocated on behalf of the homesteaders to designate Mo‘omomi as a demonstration site that would eventually become a permanent CBSFA. The legislature intended the demonstration project “to provide native Hawaiians with the opportunity to educate and perhaps guide Hawai‘i and the world in fishery conservation.”<sup>27</sup> Initially, the pilot project area was supposed to cover a five-mile stretch of Moloka‘i’s northwest coastline between Nihoa Flats and ‘Ilio Point and up to two miles offshore in order to protect resources from being overfished and to maintain traditional subsistence use.<sup>28</sup> However, the State DLNR narrowed the project to a one mile length to encompass two bays at Mo‘omomi and Kawa‘aloha.<sup>29</sup> The pilot project lasted for two years from July 1, 1995 to June 30, 1997 with the expectation that

administrative rules customized to the area and reflecting Hawaiian traditional knowledge of fishery resources would be promulgated within this time window.

Hui Mālama o Mo‘omomi has been leading the effort to permanently establish the CBSFA. Hui Mālama utilizes a Hawaiian, indigenous methodology to study and monitor resources. These methods and their successes in restoring fishery health are well-documented in several peer-reviewed scientific journals.<sup>30</sup> However, the State accepted only data acquired through conventional western scientific methods due to a failure on its own part to conduct an adequate amount of surveys for baseline data collection and monitoring.<sup>31</sup> Ultimately, DLNR allowed the project to sunset without the benefit of CBSFA designation and special regulations for fishery management. DLNR rejected Hui Mālama O Mo‘omomi’s management plan, finding that the proposed five mile management area was too broad and intimating a discomfort with the community being “too involved” in the pilot project.<sup>32</sup>

The strong community involvement alluded to by DLNR staff consisted of renewing cultural protocols and traditional, communal codes of conduct to conserve and respect the resources; teaching Hawaiian youth traditional practices in marine conservation; and monitoring marine biological processes such as fish spawning, aggregation, and feeding behavior along corresponding moon phases and cycles and through the use of Hawaiian scientific mental modeling or temporal framing of ecosystem dynamics.<sup>33</sup> This “[c]ommunity-based management is thought to be useful in overcoming what is seen as the distant, impersonal, insensitive and bureaucratic approach now characterizing the role of government in fisheries management.”<sup>34</sup>

The table below by Jokiell, et al. provides an accurate comparison between the traditional Hawaiian and western approaches to resource management:<sup>35</sup>

TABLE 1: Comparisons between major aspects of “Traditional Hawaiian” and “Western” management systems in Hawai‘i for inshore reef fisheries.

Management component	Western management system	Traditional Hawaiian management system
(1) Authority	Federal, state, and local laws and regulations implemented by various agencies or departments.	<i>Ali‘i</i> (chiefs)
(2) Access rights	Reef held in common, equal access to all.	Inhabitants of the ahupua‘a (district) in consultation with <i>Ali‘i</i> . Limited access by permission from chiefs and local villagers.
(3) Managers-stewardship	Trained professionals in multiple government agencies with responsibilities defined by law.	<i>Konohiki</i> (district manager) appointed by <i>Ali‘i</i> .
(4) Enforcement	Generally weak and inconsistent due to concern for “due process” and rules of evidence.	Authority in the hands of <i>Ali‘i</i> . Punishment is immediate and can be severe. Conservation ethic reinforced by ingrained cultural rules of social behavior and spiritual principles.
(5) Management focus	Commercial as well as recreational fishery, economic development, conservation, endangered species, environmental protection, sustainability, and maintain biodiversity.	Limit take to only what is needed by inhabitants to insure sustainable yield. Focus entirely on plants and animals used for food, medicine, selling and trade.
(6) Management theory	Established western science of management (e.g., Catch Per Unit Effort)—Accepted theory and practice subject to revision with new information.	Traditional management practices that were developed and applied locally over many generations of trial, experimentation, study, application and observation.
(7) Knowledge base	Published reports, records, data bases, documents, objective measurements and observations, and quantitative analyses of data.	Oral transmission with restricted access to information—knowledge generally kept within family lineage.
(8) Primary fishery management tools	“Regulated inefficiency” to reduce harvest. Restrictions on gear type, number of fishing days, and marine protected areas.	Intermittent complete reef closures of reefs as indicated with <i>Kapu</i> (forbidden take) of certain species at certain times.
(9) Fishery management target	Generally single species. Increasing focus on ecosystems.	Generally entire reef ecosystem with species specific <i>kapu</i> at certain times.
(10) Resource monitoring	Infrequent quantitative surveys of environmental parameters and stocks, direct underwater observations. Perception of “insufficient data” required for decisive management actions.	Continuous daily interaction with reef resources, perception that accurate knowledge of resource is held by the local master fishermen ( <i>po‘o lawai‘a</i> ), elders ( <i>kūpuna</i> ), and <i>hoa‘āina</i> of that place.

While the synergistic integration of Hawaiian traditional knowledge with contemporary fisheries management is ideal in that both contemporary western science and indigenous knowledge systems can serve to complement each other and help to fill knowledge gaps, there is political resistance to this kind of integration because it often “threatens to change power relations between indigenous groups and the dominant society.”<sup>36</sup>

A more thorough discussion in Section VI will reveal that a summary dismissal of indigenous expertise and custom improperly denies native Hawaiians their rights that are protected under the unique laws in this jurisdiction. Section VI will also explain why Hawaiian custom is the primary legal foundation for government actors to arrive at decisions and develop policies, especially around natural and cultural resource protection issues that are critical to Hawaiian traditional subsistence and religious practices. For these reasons, a survey of how fisheries were customarily managed by ancient Hawaiians up until the mid-20<sup>th</sup> century is informative for decision-makers evaluating CBSFA management plans and proposed rules.

### **III. Ahupua‘a Fisheries, Hoā‘āina and Konohiki Conservation Practices, the Ancient Kapu System, and Origins of Mālama ‘Āina A Me Ke Kai (Land and Ocean Stewardship)**

Prior to Kamehameha I’s unification of the islands under one rule, the islands were governed separately by several mō‘ī<sup>37</sup> (supreme chiefs), lesser chiefs at the moku<sup>38</sup> (regional) level called ali‘i ‘ai moku, and at the ahupua‘a level the ali‘i ‘ai ahupua‘a.<sup>39</sup> Konohiki, those who possessed special expertise in natural resource management, were designated by the ali‘i ‘ai ahupua‘a to oversee agricultural activities; to fairly allocate water among the maka‘āinana (common people of the land); to monitor fishery health; and enforce kapu. The kapu were strictures and regulations governing human behavior in a manner that preserved resource abundance and allowed for continued renewal.<sup>40</sup>

Traditional resource management by konohiki was place-based at the ahupua‘a level. Today, ahupua‘a are generally described as “wedge”<sup>41</sup> or “pie” shaped divisions of land “radiat[ing] from the interior uplands, claim[ing] a deep valley, and extend[ing] seaward past the shoreline.”<sup>42</sup> The State describes ahupua‘a as the “Hawaiian equivalent of a watershed . . . a land division with the streams and valleys serving as boundaries . . . includ[ing] the land from the mountains to the coast.”<sup>43</sup> They are also typically described as self-sustaining units of land running “from the mountain to the sea” and providing for the chief and his people “a fishery residence at the warm seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land. . . . [B]oth inland and shore fishponds were considered to be part of the ahupua‘a and within its boundaries.”<sup>44</sup>

In reality, ahupua‘a divisions are quite varied throughout the Hawaiian archipelago. Not all ahupua‘a are watersheds, nor possess a mauka-a-makai (mountain to sea) connection, nor sustained all the needs of the people.<sup>45</sup> The diverse configurations of ahupua‘a and the various types of ‘ili<sup>46</sup> (or smaller land strips within ahupua‘a) and ‘ili lele<sup>47</sup> (disconnected strips of land that, when consolidated, met the functional and daily

requirements for access to multiple resources) suggests a more complex, place-specific ahupua‘a-by-ahupua‘a management framework. Recent scholars have introduced more accurate working definitions of ahupua‘a to mean “culturally appropriate, ecologically aligned, and place specific unit[s] [of land] with access to diverse resources,”<sup>48</sup> or “a community-level land-division component that has been implemented in various ways, as part of a larger social-ecological system, with the aim of maximizing resource availability and abundance.”<sup>49</sup>

For ahupua‘a with coastal connections, Professor of Hawaiian Studies, Dr. Carlos Andrade describes ahupua‘a fisheries as having been well “cared for as if they were extensions of [ ] gardens” tended just as carefully and intentionally as the “gardens filling coastal plains, stream-lined valleys, and forest clearings in the uplands.”<sup>50</sup>

A common practice of Hawaiian limu<sup>51</sup> (seaweed) practitioners that has been passed down from ancient times is to pluck limu above the holdfast to allow for regrowth. Ripping limu from the holdfast or taking home rocks that contain limu growths are kapu. Other conservation practices include cleaning limu first in the ocean and rubbing the limu against one’s hands or legs like a scrubber or sponge. This stimulates spores to release and take hold on new substrate and helps to expand limu growing areas.<sup>52</sup>

Oral history interviews of kama‘āina, long-time native residents of Mana‘e, East Moloka‘i validate Dr. Andrade’s words. One kama‘āina attested to certain reef patches in the ahupua‘a of ‘Aha‘ino that are named after women on old Māhele maps from the 1800s.<sup>53</sup> The named reef patches were cultivated as gardens by these ancient women.<sup>54</sup> Another kama‘āina described the construction by his grandmother of upright configurations made of stacked stone that served as “manini hale”<sup>55</sup> or houses for the manini fish (*Acanthurus triostegus*, convict tang). The fish were harvested by hand by lifting up the top stone during low tide when the manini hale were left only partially submerged under water.<sup>56</sup>

Evidence of possible deliberate coral plantings by ancient kūpuna as a customary practice can be found in the ahupua‘a of ‘Aha‘ino on the island of Moloka‘i. Coral reef scientist Dr. Jim Maragos explained his observations to a kama‘āina from ‘Aha‘ino that a fishpond there possessed coral lanes extending out from the mākāhā (sluice gate) where fish congregate and access.<sup>57</sup> “Pruning” coral to increase niche areas and attract more fish is a traditional practice in Kahalu‘u Bay on Hawai‘i Island that continues on to this day.<sup>58</sup>

Uncle Mac Poepoe is aware of all the locations of onshore ko‘a<sup>59</sup> (fishing shrines) and the corresponding ko‘a (special, abundant fishing grounds) in the ocean along Moloka‘i’s northwest coast.<sup>60</sup> He can identify species-specific ko‘a at sea and monitors them regularly to determine resource health and any changes in patterns of recruitment and abundance.

Some ko‘a along the coastline of other islands are fed palu<sup>61</sup> (chum). For example, native communities who fish ‘ōpelu (*Decaperus spp.*, Mackerel Scad) hānai<sup>62</sup> (adopt) or mālama (care for) ko‘a for ‘ōpelu and prepare vegetable-based palu for herbivorous fish. The

people of Miloli‘i, Hawai‘i have maintained their traditions of feeding their ‘ōpelu ko‘a.<sup>63</sup> They prepare the palu into a porridge-like substance and place it in a handkerchief for hand-feeding the fish.<sup>64</sup> The fish are trained to feed on the palu, become tame, and congregate in large numbers at the ko‘a over time.<sup>65</sup> After consistent feedings the ko‘a is open for sustainable harvesting. When harvesting season begins, families who cared for the ko‘a have first priority to the catch.<sup>66</sup>

Titcomb described the common practices that lawai‘a<sup>67</sup> (fishers) observed in feeding ko‘a and harvesting responsibly:

Fishing grounds were never depleted, for the fishermen knew that should all the fish be taken from a special feeding spot (*ko‘a*) other fish would not move in to replenish the area. When such a spot was discovered it was as good luck as finding a mine, and fish were fed sweet potatoes and pumpkins (after their introduction) and other vegetables so that the fish would remain and increase. When the fish became accustomed to the good spot, frequented it constantly, and had waxed fat, then the supply was drawn upon carefully. Not only draining it completely was avoided, but also taking so many that the rest of the fish would be alarmed. At the base of this action to conserve was the belief the gods would have been displeased by greediness or waste.<sup>68</sup>

These kinds of practices that persist today reflect *hoā‘āina* values of *mālama*. They also reflect the ancient *kapu* system that served as a set of conservation measures placed by *konohiki*. There were *kapu* for terrestrial, aquatic, and marine resources. For example, water use was regulated through a complex set of *kānāwai*<sup>69</sup> (laws). This entailed the fair allocation of water and honoring time slots among *mahi‘ai*<sup>70</sup> (farmers) for opening and closing *‘auwai*<sup>71</sup> (irrigation ditches) leading from the main stream to a vast network of *lo‘i kalo*<sup>72</sup> (taro patches). *Konohiki* or *lunawai*<sup>73</sup> (water managers) enforced the *kānāwai* and exacted capital punishment on those who disobeyed the law.<sup>74</sup>

Similarly, *kapu* were also integrated into fisheries management and conservation. *Konohiki* oversaw the fishing activities within each *ahupua‘a*. They ordered the people to alternate fishing areas to avoid depletion and allow for replenishment. They also issued species-specific *kapu* to correspond with fish spawning periods.<sup>75</sup>

According to respected Hawaiian historian, Mary Kawena Pukui, the *kapu* system in the *Kā‘ū* district of Hawai‘i Island was practiced in the following manner:

When inshore fishing was *tabu* (*kapu*), deep sea fishing (*lawai‘a-o-kai-uli*) was permitted, and vice versa. Summer was the time when the fish were most abundant and therefore the permitted time for inshore fishing. Salt was gathered at this time, also, and large quantities of fish were dried ... In winter, deep sea fishing was permitted. A *tabu* for the inshore fishing covered also all the growths in that area, the seaweeds, shellfish, as well as the fish. When the *kahuna*<sup>76</sup> had examined the inshore area, and noted the condition of the animal and plant growths, and decided that they were ready for use, that is, that the new growth had

had a chance to mature and become established, he so reported to the chief of the area, and the chief ended the tabu. For several days it remained the right of the chief to have all the sea foods that were gathered, according to his orders, reserved for his use, and that of his household and retinue. After this, a lesser number of days were the privilege of the konohiki (overseers of lands under the ali'i<sup>77</sup>). Following this period the area was declared open (noa) to the use of all.<sup>78</sup>

At the end of a fishing expedition, the lawai'a would make an offering of the first catch before the altar of Kū'ula; prized catch were set aside for the ali'i and his household; then apportionment to the kahuna and konohiki; and finally among the fishermen and those who were in need.<sup>79</sup> As Titcomb describes,

Division was made according to need, rather than as reward or payment for share in the work of fishing. Thus all were cared for. Anyone assisting in any way had a right to a share. Anyone who came up to the pile of fish and took some, if it were only a child, was not deprived of what he took, even if he had no right to it. It was thought displeasing to the gods to demand the return of fish taken without the right.<sup>80</sup>

Ali'i (chiefs) were not immune from societal expectations related to sharing. While technically speaking the catch belonged to the ali'i when fishing was done by or for him, the ali'i was obligated to share generously with the people.<sup>81</sup> A well known legend of Chief Ha-la-e-a of Ka'ū, Hawai'i portended the likely fate of ali'i who are motivated by greed. Chief Ha-la-e-a's habit of keeping all the fish for himself was his undoing. One day at sea, the lawai'a inundated the chief's canoe with all of the day's catch, and left him to sink and perish in his own avarice.<sup>82</sup>

Dr. Lilikalā Kame'eiehiwa, a professor of Hawaiian Studies at the University of Hawai'i at Mānoa, explains that the source of reciprocity and interdependence between ali'i and maka'āinana is embedded within the obligation to mālama 'āina. Ali'i were charged with providing the leadership and organization to make the land bountiful and, in turn, capable of sustaining a growing population. The maka'āinana (common people) through their labor fed and clothed the ali'i. If a commoner failed in his kuleana to mālama the portion of 'āina allotted to him, he was dismissed. A konohiki (resource manager) was also discharged of his duties if he failed to properly direct the people in their labor. If the land suffered and the people starved, it was perceived as the fault of the ali'i for displeasing the gods and not following religious protocols. Negligence in mālama 'āina (land stewardship) signaled also a breakdown in the relationship between ali'i and maka'āinana.<sup>83</sup>

Similarly, a system of rights to one's fishery and responsibility to mālama and manage the resources enhanced fish stocks and sustained Hawai'i's traditionally large pre-contact population of nearly one million.<sup>84</sup> At the end of the 19th century when the Hawaiian Kingdom was illegally overthrown and annexed to the United States, Hawai'i's konohiki fisheries were dismantled and thrown into the commons to better align with an imperialistic and capitalistic agenda. Sadly, with the same population numbers today,

Hawai‘i’s fisheries are devastated and imperiled as a tragedy of the commons.<sup>85</sup>

#### Adoption of a Code of Conduct at Mo‘omomi

An important part of Hui Mālama O Mo‘omomi’s work has been to reverse the effects of near erasure of core and foundational cultural values around kuleana which interlink and balance rights and privileges to access and utilize natural resources with a responsibility to mālama – to care for and maintain resource health. The Hui brought together eight kupuna (elders) and master lawai‘a (fishermen) from Ho‘olehua Homestead to re-establish a code of conduct reflective of the conservation aspects of the ancient kapu system and Hawaiian cultural norms and values to guide fishery restoration work.<sup>86</sup>

The code of conduct is as follows:

Rule 1. Take only what you need. Share the catch with the kupuna [elders] and underprivileged families.

Rule 2. Reserve inshore areas for children and novice swimmers and fishermen. Not to be used for commercial purposes.

Rule 3. Education. Utilize traditional practices and science-based methods. Harvest resources in proper biological and ecological context.

Rule 4. Community governing board. Responsible for creating, implementing, judging, and seeing that guidelines are carried out correctly.

Rule 5. Mālama. Mālama ka ‘āina; mālama nā po‘e; mālama na mea; na‘i ka ‘āina a me ke kai; “Care for the land; care for the people; care for all things; understand the land with the ocean.”<sup>87</sup>

#### **IV. The Konohiki Fisheries – The Hawaiian Kingdom’s Codification of Customary Laws**

After Kamehameha I unified the islands and established the Hawaiian Kingdom in 1810, he divided the land among his high chiefs, as was the custom, and did not significantly alter the land tenure system. The people continued to live under unwritten, but well-understood customary laws that came with the ancient land tenure system, Hawaiian religion, and observances of kapu.

The missionaries arrived shortly after Kamehameha II abolished the kapu system, dedicating themselves not only to religious conversion of the Hawaiian people, but influencing the Kingdom with western views on governance, property, and capitalism. Despite these influences, they did not completely alter nor superimpose completely their foreign laws on Hawai‘i. Hawaiian custom and usage remained the supreme law above the common law of America and England:

The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 [sic] and then *subject to judicial precedents and Hawaiian national usage*.<sup>88</sup>

The legislature of the Kingdom of Hawai‘i actually passed the statute recognizing the supremacy of Hawaiian judicial precedent, custom and usage on November 25, 1892.<sup>89</sup> Today, that law survives under State law as Hawai‘i Revised Statutes, section 1-1.<sup>90</sup> Up until 1839 when the first Constitution of the Kingdom was established, Hawai‘i operated “*without other system than usage, and with a few trifling exceptions, without legal enactments.*”<sup>91</sup>

### The “Konohiki Fisheries” – Kingdom of Hawai‘i Adopts Written Laws Standardizing Customary Understandings and Usage Rights within Ahupua‘a Fisheries

Under Kamehameha III’s reign, written laws of the Kingdom reflecting the customary laws of ancient Hawai‘i as well as the influence of foreigners began to emerge. In the Constitution and Laws of June 7, 1839, the king formally recognized konohiki fishing rights and traditional Hawaiian fishing customs and practices.<sup>92</sup> In 1840, a law reaffirming this proclamation was enacted. The law divided fishery rights among three classes of people: the king, the konohiki (landlords), and the common people.<sup>93</sup> It acknowledged the resource rights and practices within traditional ahupua‘a fisheries that give priority to hoā‘āina as ahupua‘a tenants and acknowledges special privileges to chiefs and konohiki as “landlords” in managing the resources.

The kingdom standardized these practices by preserving ahupua‘a fisheries (from the shoreline to the outer edge of the coral reef) to the exclusive use of the landlord and ahupua‘a tenants. The landlord had the right to kapu for himself a specific species of fish and was entitled to one-third of the tenants’ catch. The waters beyond the reefs and the open ocean was granted to all the people.<sup>94</sup> These were the kilohe‘e<sup>95</sup> grounds (described as the waters shallow enough to wade or see the bottom by canoe with the aid of kukui oil to harvest he‘e or octopus), the luhe‘e<sup>96</sup> grounds (the deeper waters where octopus was caught by line and with a cowrie lure), the mālolo<sup>97</sup> grounds (characterized by rough currents and choppy seas where the mālolo or flying fish frequent), and beyond into deeper waters.<sup>98</sup>

One could speculate from the law that the people had a very thorough knowledge, not only of the nearshore fisheries, but also the deep sea. ‘Ohana<sup>99</sup> may also have had special relationships with ko‘a located beyond the reef. This is supported by Meller who wrote, “Fisheries located outside of the areas associated with the ahupua‘a and ili also had come to be well-recognized and included named areas in the open ocean.”<sup>100</sup> This being so, it is important to note that the fishery laws of the Kingdom did not necessarily negate ‘ohana relationships to fisheries existing beyond the reef or beyond a mile from the shoreline. Rather, the fishery law could be interpreted as providing at minimum, special

recognition of priority rights to konohiki and hoā'āina to nearshore fisheries most closely associated to ahupua'a and 'ili. The fishery law also made practical sense in that the nearshore fishery was most accessible and also most vulnerable to overuse and overharvesting. It would be important to preserve the "ice-box," as the old-timers fondly refer to readily available resources in their ahupua'a. The nearshore fishery ensured that keiki<sup>101</sup> (children) and other novice learners could safely acquaint themselves with their resources; where the kūpuna (elders) and physically challenged could still safely gather limu, harvest crab, and fish; and those without specialized gear, canoe and/or boats for deep-sea fishing could still find food. The nearshore fishing grounds also provided important interactions for marine life seeking the muliwai<sup>102</sup>, the interface between fresh and ocean water sources, to complete various stages of their life cycles, to spawn, and to serve as a nursery. Konohiki management and priority rights to hoā'āina, as was the custom, afforded the best protection and conservation strategy for a healthy ahupua'a fisheries.

Several iterations of the fishery law appeared in subsequent years, but these changes were minor and essentially preserved the fishing rights as described above.<sup>103</sup> Through 1897, the law governing konohiki fisheries generally encompassed the following:

- 1) Private konohiki fisheries spanned the ahupua'a shoreline at low tide to the reef's outer edge. In areas where there were no reef, the konohiki fishery extended from the beach at low water mark to one geographical mile seaward.
- 2) The konohiki and hoā'āina within the ahupua'a had exclusive and joint rights to the private fishery.
- 3) The konohiki had the authority to regulate the fishery in the following ways:
  - a) Placing a kapu on one species of fish for his/her exclusive use
  - b) Receive from all tenants one-third of their catch within the fishery
  - c) Place temporary fishing prohibitions during certain periods of the year<sup>104</sup>

### Fisheries Jurisprudence During the Kingdom Period

The konohiki fisheries, now classified as private property could be leased, or the fee transferred by purchase or through inheritance. Piscatory (fishing) rights, however, were reserved for native tenants, by law and per ancient custom. The Māhele and the dilution of the traditional land tenure system in Hawai'i through the introduction of private property concepts led to an erosion in the understanding of konohiki as a person skilled in managing natural resources; who placed kapu on certain species and fishing areas to allow for reproduction and renewal; and who was responsible not only for the sustenance of the hoā'āina (common people living within the ahupua'a or 'ili), but for distributing portions of the catch to the ali'i and their households. Over time the skill and the kuleana to mālama ahupua'a fisheries were subsumed by notions of konohiki as mere "landlords" and the common people as "tenants."<sup>105</sup>

All cases interpreting the konohiki fisheries laws placed greater emphasis on western constructs that characterize konohiki as property owners rather than those selected for their 'ike (knowledge, expertise) and an ethic for conservation. Similarly, *hoa'āina* were perceived as mere tenants with piscatory rights, regardless of whether they fulfilled *kuleana* (responsibility) to *mālama* (care for) the resources.

In *Haalelea v. Montgomery* (1858)<sup>106</sup>, the plaintiff Ha'alelea received from his deceased wife Kekau'ōnohi ownership of Honouliuli ahupua'a, and claimed the right of konohiki over the ahupua'a fishery. Defendant Montgomery received a deed conveying Pu'uloa in fee. Pu'uloa is a portion of land within Honouliuli ahupua'a. Montgomery claimed that the deed to Pu'uloa gave him the right to deny *hoa'āina* access to fish there. The court held in favor of Ha'alelea and recognized his status as konohiki as well as the right of *hoa'āina* to fish within the entire ahupua'a, including Pu'uloa. This right of the *hoa'āina* to access and utilize the fishery was enforceable against the konohiki. The court found Montgomery to be an ahupua'a tenant of Honouliuli with a piscatory right as well, but not the authority of konohiki to subject other tenants to any *kapu* or tax for use of the fishery. That authority rested in Ha'alelea alone as the konohiki.

In *Hatton v. Piopio* (1882),<sup>107</sup> the parties disputed over rights to the same ahupua'a fishery as in *Haalelea*. Plaintiff Hatton leased the konohiki fishing rights to Honouliuli ahupua'a. Defendant Piopio, who resided on his employer Dowsett's land in Pu'uloa within the ahupua'a of Honouliuli, went fishing within the waters off of Pu'uloa. Hatton brought suit for trespass against Piopio, claiming the defendant was not a tenant and therefore did not have a piscatory right to fish in the ahupua'a. The Court confirmed the findings and holding in *Haalelea*, and further held that the defendant Piopio was a lawful tenant with fishing rights in the ahupua'a:

Every resident on the land, whether he be an old *hoaina*, a holder of a *Kuleana* title, or a resident by leasehold or any other lawful tenure has a right to fish in the sea appurtenant to the land as an incident of his tenancy.<sup>108</sup>

Another challenge Hatton had brought was to Piopio's commercial sale of fish from the ahupua'a fishery. The court found that despite Section 1477 of the Civil Code (1859) which identified specific rights of *hoa'āina* to gather "firewood, house timber, aho cord, thatch and ki leaf from the land from which they live for their own private use, but they shall not have a right to take such article to sell for profit[,]" the law did not explicitly prohibit the sale of fish taken from the ahupua'a fishery.<sup>109</sup>

Rather than look to Hawaiian custom as a guide, the court dismissed customary practice as belonging to "primitive days" when "there was no trade or commerce and no currency."<sup>110</sup> The court found it repugnant for Hatton to "appropriate the fruit of another man's skill and labor" and asserted that "fishing in the open sea off our coasts does not tend materially to lessen the supply unless extraordinary means are used and the fish taken in spawning season."<sup>111</sup>

While the court continued to recognize the customary right of tenants to fish within their ahupua‘a, its underlying rationale to neglect Hawaiian conservation practices and traditional subsistence and sharing customs in favor of European and American notions of commerce foreshadowed the entire dismantling of the Konohiki Fisheries that would take place less than two decades after the *Hatton* opinion.

## V. Dismantling the Konohiki Fisheries Under American Rule

### The Organic Act (1900)

In 1893, the Kingdom of Hawai‘i was illegally overthrown by a group of missionary businessmen backed by the U.S. Navy.<sup>112</sup> Five years later, via Joint Resolution the U.S. Congress annexed Hawai‘i as a U.S. Territory.<sup>113</sup> In 1900, Congress passed the Organic Act<sup>114</sup> which, among other substantive changes in governance, de-privatized the konohiki fisheries to make them available as a commons for all. With the exception of “fish pond[s] [and] artificial inclosures” [sic], Section 95 of the Organic Act repealed konohiki “exclusive fishing rights” and made these private fisheries “free to all citizens of the United States subject, however to vested rights.”<sup>115</sup> Section 96 of the Act clarified that these rights were “vested” only if the owner of the konohiki fishery successfully petitioned the circuit court within a two-year period.<sup>116</sup> Even if vested, the Territory of Hawai‘i could exercise the option to condemn a konohiki fishery in favor of public use, provided it justly compensated the owner.<sup>117</sup>

Shortly after the passage of the Organic Act, a 1904 adjudication, *In re Fukunaga*, signified definitively the Territorial Supreme Court’s opinion that Congress intended to “destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people.”<sup>118</sup>

The exact number of konohiki fisheries affected by this law was not documented.<sup>119</sup> Ahupua‘a fisheries were known from memory by hoā‘āina and konohiki resource managers and their locations were not always mapped or specified in writing.<sup>120</sup> Latter calculations based on the number of coastal ahupua‘a and ‘ili, and inland ‘ili possessing fishery rights estimate that there were originally between 1,200 – 1,500 konohiki fisheries.<sup>121</sup> Of those fisheries, between 360-720 were classified private in 1900.<sup>122</sup> By 1953, approximately 300-400 konohiki fisheries were registered, 248 were unregistered (and subsequently lost), and 37 were condemned for government use.<sup>123</sup>

### Jurisprudence on the Constitutionality of Sections 95 and 96 of the Organic Act and Vested Rights in the Konohiki Fisheries

The provisions in the Organic Act respecting konohiki fisheries resulted in much confusion and conflicting decisions between the Supreme Court of the Territory of Hawai‘i, the federal district court, and the U.S. Supreme Court. Several questions arose from varied cases:

- Did the konohiki and hoa‘āina have vested rights in their respective ahupua‘a fishery? And if so, how did the Organic Act affect these vested rights?
- If a person is deprived of ownership of a private konohiki fishery for failure to petition the circuit court within the two-year window required under Section 96 of the Organic Act, is that a violation of constitutional due process and a taking of property without just compensation?

**Conflicting Rulings on the Nature and Status of Hoa‘āina Vested Rights.** The Supreme Court of the Territory of Hawai‘i considered in *Smith v. La‘amea* (1927) the defendant La‘amea’s claim of adverse possession of an ‘ili parcel of Maunalua on the island of O‘ahu and a common right of piscary.<sup>124</sup> The court found that the defendant did not satisfy the criteria for adverse possession and that his occupancy was permissive as evidenced by an annual payment of one dollar to the konohiki for a right to fish there. However, the Court in its opinion mentioned that one who successfully acquires a portion of an ahupua‘a through adverse possession becomes “an occupant or tenant and [is] entitled to the common right of piscary . . .”<sup>125</sup> The court reaffirmed the foundational case, *Haalelea v. Montgomery* (1858) issued during the Kingdom of Hawai‘i period which stated:

We understand the word tenant, as used in this connection, to have lost its ancient restricted meaning, and to be almost synonymous at the present time with the word occupant, or occupier, and that every person occupying lawfully any part of an ahupua‘a is a tenant within the meaning of the law. Those persons who formerly lived as tenants under the konohikis but who have acquired fee simple title to their kuleanas, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as hoainas under the old system.”<sup>126</sup>

In this manner, the Court recognized that hoa‘āina vested rights originated as ancient, unwritten customary laws which were then codified under statute. The fact that this ruling took place two decades after the passage of the Organic Act is significant in that the court still acknowledged ancient custom.

Three years later, the Territory of Hawaii Supreme Court made an about-face in *Damon v. Tsutsui* (1930). The Court upended hoa‘āina fishing rights when it ruled that those who became ahupua‘a tenants post-1900 “did not have any ‘vested’ rights within the meaning of the Organic Act and therefore the repealing clause [in section 95] was operative as against them.”<sup>127</sup> The Court likened vested rights statutorily created under Kingdom law to a contractual transaction whereby an “offer” to convey piscatory rights was made, but no longer available for acceptance given the changes wrought by the passage of the Organic Act.<sup>128</sup>

**Confusion Re: the Nature and Status of Konohiki “Vested Rights” and the Constitutionality of Sections 95 and 96 of the Organic Act.** The consolidated cases of *Carter v. Territory* and *Damon v. Territory* (1902) were brought by two individual

plaintiffs claiming vested konohiki fishing rights from “time immemorial . . . ancient custom and prescription” and via Royal Patent grants conveying fee simple title to nearshore fisheries of Waialae-iki and Moanalua, respectively.<sup>129</sup>

These type of land grants issued at the time of the Māhele often were identified in name only, but their palena (boundaries denoted by special features on the land) were well known by the kama‘āina (old-timers) who held extensive place-based knowledge of the uses and borders of their ahupua‘a.<sup>130</sup> A Boundary Commission was established in 1862 to resolve ahupua‘a and ‘ili boundaries which were typically granted in name only. These boundaries were certified through documenting kama‘āina attestations.<sup>131</sup> As one of the early Hawaiian Kingdom Supreme Court decisions indicates, land surveys and plots alone would not suffice without supporting evidence of kama‘āina authentication.<sup>132</sup>

Other cases describe ahupua‘a generally as running “from the mountain to the sea” and providing for the chief or konohiki and hoa‘āina “a fishery residence at the warm seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land. . . . [B]oth inland and shore fishponds were [also] considered to be part of the ahupua‘a and within its boundaries.”<sup>133</sup>

The Carter and Damon Court opted to neglect the law directing Hawaii’s courts to defer to Hawaiian custom and usage in adjudicatory proceedings and rely on kama‘āina expert testimony to determine the nature of specific Hawaiian customs. Had it followed this methodology, the Court would have known that adjacent fisheries were considered part of the ahupua‘a and special rights were conferred as an incident to trusteeship and management responsibilities of the konohiki, hoa‘āina tenancy, resource use, and mālama. Instead, the Territorial Supreme Court improperly upheld the American common law, here the western precept that places the navigable servitude as a public right superior to ancient custom regarding fisheries use and management.<sup>134</sup>

The next inferential step for the Court was to look solely to the statutory laws of the Kingdom as a justification for nullifying ancient custom pre-dating the first written fishery law in 1839. Thus, any fishery rights available to the konohiki stemmed only from Kingdom law and not custom.

The Court then analyzed the fishery laws of the Kingdom to determine whether specific property rights to the fisheries were conveyed within the language of these laws. It referenced the express language in the 1851 statute as the government’s intent to convey “to the people certain rights of piscary” in “[a]ll fishing grounds” that “are hereby forever granted.”<sup>135</sup> The court construed this statutory language to be inadequate to grant a property conveyance with exclusive fishing rights.<sup>136</sup> It found the Kingdom fishery statutes to confer “but a privilege to take fish from [an] area of water, if caught while there, a mere theoretical species of property at best.”<sup>137</sup> Further, these laws were subsequently repealed by Congress in 1900 which laid the foundation for throwing konohiki fisheries into the commons.

The U.S. Supreme court accepted *certiorari* and reversed the decision in *Damon v. Hawaii* (1904).<sup>138</sup> Finding language in the fishery statutes of the Kingdom that conveyed “private property,” the high Court concluded these statutes plainly “mean[t] what they sa[id] . . . [and] [t]here [was] no color for a suggestion that they created only a revocable license. . . . If the Hawaii statutes did not impart a grant, it is hard to see their meaning. . . . [Thus], such rights as the plaintiff claims, and . . . as . . . he and his predecessors in title have been exercising for forty years, have been recognized as private property.”<sup>139</sup>

The U.S. Supreme Court addressed the reluctance of the Territorial Court to accept *konohiki* fisheries as private property and protecting vested rights:

A right of this sort is somewhat different from those familiar to the [American] common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff’s claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit . . . [A]nomalous as it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.<sup>140</sup>

The Territory of Hawaii then argued that the royal patent issued to the appellant was defective by failure to distinctly grant the fishery despite the description in the royal patent of *ahupua’a* metes and bounds and a reference to a fishing right in the adjoining sea bounded by certain named islets.

The Court disagreed:

[I]t does not follow that any particular [words] are necessary to convey [the fishery] when the intent is clear. When the description of the land granted says that there is incident to it a definite right of fishery, it does not matter whether the statement is technically accurate or not . . .<sup>141</sup>

Having resolved the issue in *Damon v. Hawaii* regarding vested rights in fisheries granted by royal patent to private individuals, the U.S. Supreme Court turned to the issue of rights to nearshore *ahupua’a* fisheries conferred by statute. The Court held in *Carter v. Hawaii* that vested rights may also be conferred by statute.<sup>142</sup>

Decades later, the Hawaii Territorial court ignored the U.S. Supreme Court’s cautionary approach in protecting vested rights.

The *Bishop v. Mahiko* (1940)<sup>143</sup> case involved the Estate of Bernice Pauahi Bishop as *konohiki* of Makalawena *ahupua’a*. The subject *ahupua’a*, including its fishery was originally awarded to Akahi via land commission award in 1855 and royal patent in 1884. Title then passed from Akahi to her niece, Bernice Pauahi Bishop.<sup>144</sup> As was typical at the time of the *Māhele*, the award of Makalawena did not describe the *ahupua’a* and

fishery by metes and bounds, but in name only. This being so, the court assumed according to ancient custom that the fishery belonged to the ahupua‘a.<sup>145</sup>

The trustees for the Bishop Estate sued on behalf of the Estate as well as the ahupua‘a tenants. J.H. Mahiko and Ane Una personally appeared as tenants on their own behalf and to represent the other hoā‘āina of Makalawena.<sup>146</sup> The parties’ fishery interests were not timely registered in circuit court pursuant to Section 96 of the Organic Act. The parties challenged the constitutionality of Sections 95 and 96 of the Organic Act as a deprivation of private property without due process of law and a taking of private property for public use without just compensation under the fifth amendment of the U.S. Constitution.<sup>147</sup>

The Supreme Court for the Territory of Hawai‘i saw no reason to concern itself with reviewing “the respective rights of piscary enjoyed by konohikis and common people in ancient times,” rather it confined its analysis to the “written laws” or statutes promulgated under Kingdom law and held over by the Republic of Hawaii.<sup>148</sup> The Court reviewed the Kingdom konohiki fishery statutes and in its analysis recognized the statutorily created vested rights of piscary. However, hinged on the absence in the record of metes and bounds for the ahupua‘a and fishery of Makalawena as a reason for justifying the whole-scale condemnation of the fishery for public use:

The inherent incidents of private fishing rights, the manner and circumstances of their creation, their exclusion from the application of all laws of the Kingdom of Hawaii and its successors, the Provisional Government and Republic of Hawaii, conferring original title to lands, the absence of official records by which their boundaries might be identified, the source of the information of the facts and the declared purpose to make all of the sea waters of the Territory free to the citizens of the United States, are ample justification for the procedure prescribed, both for the segregation and final condemnation of private fishing rights. . . . [W]e conclude that, even though statutory rights to private fisheries in the sea waters of the Territory of Hawaii at the time of annexation of the Hawaiian Islands to the United States were vested rights and the titles of the owners thereof were entire, complete and not inchoate, in the absence of official records of the boundaries of such private fisheries, it was within the power of the Congress of the United States, in accomplishment of its declared purpose to make all sea fisheries in the sea waters of the Territory not included in any fish pond or artificial enclosure free to the citizens of the United States.<sup>149</sup>

The Court concluded that the Organic Act effectively “repealed all of the pre-existing laws of the Republic of Hawaii which conferred exclusive fishing rights[.]” and provided a process by which to legally remove vested rights of piscary.<sup>150</sup>

Ultimately the Court upheld the constitutionality of sections 95 and 96 of the Organic Act. Section 95 which provided a three year window before the Organic Act would take full effect in repealing exclusive fishing rights that had not adequately “vested” in accordance with section 96 registration requirements was held to be “reasonable and

constitute due process.”<sup>151</sup> Further, the Court deemed that the plaintiffs’ failure to timely petition before the circuit court their exclusive fishing rights in the Makalawena ahupua‘a within the two-year window, pursuant to the requirements of section 96 of the Organic Act, effectuated a waiver of the parties’ constitutional rights and a waiver of compensation upon condemnation of the fishery:

Holding as we do that the establishment of a private fishery is but the preliminary step provided in the proceedings in condemnation authorized by section 96 of the Hawaiian Organic Act, the failure to establish a private fishing right constitutes, in legal effect, a waiver to compensation. The failure of the trustees and tenants to take the necessary proceedings to establish the fishing right of Makalawena was tantamount to a waiver of any compensation to which they might have been entitled upon condemnation.

In considering the question of waiver we . . . conclude that . . . [t]he legal effect of failing to assert a claim to a private fishing right was not to vest the right in the United States in a proprietary sense but simply to relinquish the fishery subject thereto to the free use and enjoyment of all citizens of the United States – to convert an exclusive private fishing right into a public fishing right, the free use of which might be enjoyed in common by all citizens of the United States, including, if citizens, the trustees and tenants.<sup>152</sup>

The Court finally concluded that the fifth amendment’s taking clause was inapplicable here due to an abandonment of private fishing rights for failure to timely register a claim:

Considering the establishment of vested fishing rights in private fisheries solely as a provision for the segregation and separation of private fishing rights from public fishing rights, the failure to establish a private fishing right operated as an abandonment and waiver of all claims to and compensation for such fishing right, in the event of which the provision of the fifth amendment of the Constitution, in respect to the taking of property for public use without just compensation, does not apply.<sup>153</sup>

The major impacts of the *Bishop v. Mahiko* decision rendered by the Territorial Supreme Court are two-fold: (1) it interpreted the Organic Act as requiring both konohiki and hoa‘āina alike to register their fishery rights or these rights would no longer be considered “vested”; and (2) it left no recourse for konohiki and hoa‘āina alike to be compensated for loss of fishery property and the rights associated with them if they failed to timely register their claims within the short period afforded by the Organic Act. Only those who timely registered and successfully petitioned the court had vested rights and were entitled to just compensation upon formal condemnation proceedings initiated by the government.

The 1954 Kosaki legislative report, however, cites an earlier federal district court decision, *United States v. Robinson* (1934), that the Territorial court wholly ignored.<sup>154</sup> The *United States v. Robinson* case adjudicated the rights of Dowsett Co., Ltd., a tenant

possessing a hoāina right of piscary in Hoāeae fishery that was subject to condemnation proceedings related to developing Pearl Harbor on O‘ahu.

Kosaki interpreted the federal district court in *United States v. Robinson* to hold that “private fisheries in the name of the konohikis would, in legal contemplation, establish the vested right of tenants who are kuleana owners.”<sup>155</sup> The court further addressed the fishery registration issue as to hoāina:

A practical consideration bearing on this matter is the question whether Congress intended the many hundreds (or thousands) of tenants to validate each of their rights by proceedings in courts. I am loath to believe that Congress had any such drastic requirement in mind.<sup>156</sup>

The federal district court also confirmed that Dowsett Co., Ltd. was also entitled to compensation in a share of the sum to be paid for the Hoāeae fishery in an amount commensurate with “the value of its hoāina right of piscary.”<sup>157</sup>

The *United States v. Robinson* case also remarked on a matter similarly presented in the 1930 *Damon v. Tsutsui* case regarding the fishery rights of new tenants who move to an ahupua‘a after the Organic Act took effect. Where the territorial court in *Damon v. Tsutsui* held newcomers do not possess vested rights, the federal district court in *United States v. Robinson* found a discrepancy in this ruling from the prior *Smith v. Laamea* case issued in 1927. Favoring the *Smith v. Laamea* case, the federal district court opined:

[I]f a fee-simple title to a portion of the ahupua‘a originated even as late as approximately 1924 (certainly long years after the repeal of the fishing laws of 1900) the owner of such parcel of land would become entitled, upon acquiring title, to an appurtenant right of fishery.<sup>158</sup>

The full import of this decision is that had J.H. Mahiko and Ane Una, the hoāina parties in the *Bishop v. Mahiko* case, appealed and the U.S. Supreme Court reviewed the matter, it perhaps would have overturned the Territorial court’s decision and hold the Territory liable for an unconstitutional taking of the Makalawena fishery without just compensation.

<sup>1</sup> The term “Hawaiian” in this paper is defined as all persons descended from the Polynesians who lived in Hawai‘i prior to Captain James Cook’s arrival in 1778. This is in keeping with all federal statutes that have been enacted since 1970, which defines a “Native Hawaiian” as a person with any amount of Hawaiian ancestry. See, e.g., Joint Resolution to Acknowledge the 100<sup>th</sup> Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai‘i, Sec. 2, S.J. Res. 19, 103d Cong., 1st Sess., Pub. L. No. 103-120, 107 Stat. 1510 (1993); Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, 114 Stat. 2868 (2000), sec. 801(a).

<sup>2</sup> See generally Jon Matsuoka, Davianna McGregor, Luciano Minerbi, & Malia Akutagawa, *Governor’s Molokai Subsistence Task Force Report* (1994) [hereinafter Matsuoka et. al, *Molokai Subsistence Report*].

<sup>3</sup> MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 166 (rev. & enlarged ed. 1986) (*Konohiki*: Headman of an ahupua‘a land division under the chief; land or fishing rights under control of the konohiki) [hereinafter PUKUI ET. AL, *Hawaiian Dictionary*].

<sup>4</sup> *Id.* at 124 (*Kama‘āina*: Native-born, one born in a place, host; native plant; acquainted, familiar, *Lit.*, land child).

<sup>5</sup> *Id.* at 96 (*Ike*: To see, know, feel, greet, recognize, perceive, experience, be aware, understand).

<sup>6</sup> *Id.* at 11 (*‘Āina*: Land, earth).

<sup>7</sup> *Id.* at 9 (*Ahupua‘a*: [L]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pua‘a), or because a pig or other tribute was laid on the alter a tax to the chief.).

<sup>8</sup> *Id.* at 9 (*Hoa‘āina*: Tenant, caretaker, as on a kuleana).

<sup>9</sup> Davianna Pōmaika‘i McGregor, *An Introduction to the Hoa‘āina and Their Rights*, 30 HAW. J. HIST. 1, 16 (1996) (“In communities where traditional Hawaiian customs and practices have continued to be practiced, the ‘ohana respect and care for the surrounding natural resources. They only use and take what is needed. They allow the natural resources to reproduce. They share what is gathered with family and neighbors. . . . This ancestral knowledge about the land and its resources is reinforced through continued subsistence practices.”).

<sup>10</sup> HAW. CONST. art. 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.”). HAW. REV. STAT. § 1-1 (“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. . . .”). HAW. REV. STAT. § 7-1 (“[T]he 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>11</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 20 (*Ali‘i*: Chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander).

<sup>12</sup> *Id.* at 224 (*Maka‘āinana*: Commoner, populace, people in general; citizen, subject).

<sup>13</sup> *Id.* at 276 (*‘Ohana*: Family, relative, kin group; related).

<sup>14</sup> H.R. Rep. No. 441-94, 17<sup>th</sup> Leg. (Haw. 1994) (Standing Comm.).

<sup>15</sup> Jodi Higuchi, *Propagating Cultural Kipuka: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area*, 31. U. HAW. L. REV. 193, 195, n. 19 (2008) (citing Telephone Interview with Debbie Gowensmith, Dir., Haw. Cmty. Conservation Network (Mar. 4, 2008).

<sup>16</sup> Hawai‘i Administrative Rule §13-60.8.

<sup>17</sup> Lisa Asato, *Lawai‘a Pono: Hā‘ena fishing rules clears Land and Natural Resources Board*, KA WAI OLA, Dec. 2014, available at [https://issuu.com/kawaiola/docs/kwo1214\\_web](https://issuu.com/kawaiola/docs/kwo1214_web).

<sup>18</sup> Mo‘omomi Health Impact Assessment (HIA) scoping meeting, Lanikeha Commty. Ctr., Moloka‘i, Haw. (Jan. 26, 2015).

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- <sup>19</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 186 (*Kupuna*: Grandparent, ancestor, relative or close friend of the grandparent's generation, grandaunt, granduncle).
- <sup>20</sup> *Id.* at 232 (*Mālama*: To take care of, tend, attend, care for, preserve, protect, beware, save, maintain; to keep or observe, as a taboo; to conduct, as a service; to serve, honor, as God; care, preservation, support, fidelity, loyalty; custodian, caretaker, keeper).
- <sup>21</sup> *Id.* at 114 (*Kai*: Sea, sea water; area near the sea, seaside, lowlands).
- <sup>22</sup> *Id.* at 132 (*Kapu*: Taboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; sacred, holy, consecrated; no trespassing, keep out).
- <sup>23</sup> *Id.* at 179 (*Kuleana*: Right, privilege, concern, responsibility, title, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province; reason, cause, function, justification; small piece of property, as within an ahupua'a).
- <sup>24</sup> Matsuoka et. al, *Molokai Subsistence Report*, *supra* note 2 at 20 .
- <sup>25</sup> *Id.* at 91.
- <sup>26</sup> HAW. REV. STAT. § 188-22.6(a).
- <sup>27</sup> Higuchi, *supra* note 15 at 207, n. 157 (2008) (citing S. Rep. No. 71-94, 17<sup>th</sup> Leg. (Haw. 1994) (Standing Comm.)).
- <sup>28</sup> *Id.* at 209, n. 174 (citing H.R. 3446, 17<sup>th</sup> Leg. (Haw. 1994) (Standing Comm.); Hui Mālama O Mo'omomi, Proposal to Designate Mo'omomi Community-Based Subsistence Fishing Area 1, 2, 23-24 (1995)).
- <sup>29</sup> *Id.*
- <sup>30</sup> See generally A. Friedlander, K. Poepoe, K. Poepoe, K. Helm, P. Bartram, J. Maragos and I. Abbott, *Application of Hawaiian traditions to community-based fishery management*, in Proceedings 9<sup>th</sup> Int'l Reef Symp., Bali, Indonesia 813 (2000) [hereinafter Friedlander, et al., *Application of Hawaiian traditions*]; See generally KELSON K. POEPOE, PAUL K. BARTRAM, AND ALAN M. FRIEDLANDER, *The Use of Traditional Hawaiian Knowledge in the Contemporary Management of Marine Resources*, in FISHER'S KNOWLEDGE IN FISHERIES SCIENCE AND MANAGEMENT 119 (Nigel Haggan, Barbara Neis and Ian G. Baird, eds. 2007) [hereinafter POEPOE, ET AL., *The Use of Traditional Hawaiian Knowledge*].
- <sup>31</sup> David Sakoda, *CBSFA Rulemaking*, Presentation to the Native Hawaiian Rights Clinic, Univ. of Haw. William S. Richardson Sch. of Law (Sep. 10, 2015) [hereinafter David Sakoda Presentation].
- <sup>32</sup> Higuchi, *supra* note 15 at 209, n. 177 (citing Mar. 5, 2008 phone interview with Francis Oishi, Program Manager, State of Haw. Dep't. of Land & Natural Res., Div. of Aquatic Res.).
- <sup>33</sup> Friedlander, et al., *Application of Hawaiian traditions*, *supra* note 30, at 815-817; POEPOE, ET AL., *The Use of Traditional Hawaiian Knowledge*, *supra* note 30, at 126-136.
- <sup>34</sup> Friedlander, et al., *Application of Hawaiian traditions*, *supra* note 30, at 818 (citing CHRISTOPHER DYER & JAMES R. MCGOODWIN, LESSONS FOR MODERN FISHERIES MANAGEMENT (1994)).
- <sup>35</sup> P.L. Jokiell, K.S. Rodgers, W.J. Walsh, D.A. Polhemus, & T.A. Wilhelm, *Marine Resource Management in the Hawaiian Archipelago: The Traditional Hawaiian System in Relation to the Western Approach*, 2011. J. MARINE BIO. 1, 8 (2010) (providing TABLE 1: Comparisons between major aspects of "Traditional Hawaiian" and "Western" management systems in Hawai'i for inshore reef fisheries).
- <sup>36</sup> POEPOE, ET AL., *The Use of Traditional Hawaiian Knowledge*, *supra* note 30, at 818 (citing FIKRET BERKES, SACRED ECOLOGY (1999)).
- <sup>37</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 251 (*Mō'ī*: King, sovereign, monarch, majesty, ruler, queen).
- <sup>38</sup> *Id.* at 252 (*Moku*: District, island, islet, section, forest, grove, clump, severed portion, fragment, cut).
- <sup>39</sup> E.S. Craighill Handy & Mary Kawena Pukui, *The Polynesian Family System in Ka'u*, HAWAI'I 5 (1998).
- <sup>40</sup> CARLOS ANDRADE, HĀ'ENA THROUGH THE EYES OF THE ANCESTORS, 30, 74 (2008).
- <sup>41</sup> E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 48 (rev. ed. 1991) [hereinafter HANDY, HANDY & PUKUI].
- <sup>42</sup> Lorenz Gonschor & Brenton Kamanamaikalani Beamer, *Toward an Inventory of Ahupua'a in the Hawaiian Kingdom: A Survey of Nineteenth- and Early Twentieth-Century Cartographic and Archival Records of the Island of Hawai'i*. 48 HAW'N. J. HIST. 69 (2014) (citing Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850 (Jun. 1956) (unpub. M.A. thesis, U. Haw.)).
- <sup>43</sup> HAWAI'I ASSOCIATION OF WATERSHED PARTNERSHIPS, <http://hawp.org/what-is-a-watershed> (last visited Jan. 29, 2015).

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- <sup>44</sup> *Application of Kamakana*, 58 Haw. 632, 638-39, 574 P.2d 1346, 1350 (1978). (citing *In re the Boundaries of Pulehunui*, 4 Haw. 239, 241 (1879) and *Harris v. Carter*, 6 Haw. 195, 197 (1877)).
- <sup>45</sup> See generally Gonschor & Beamer, *supra* note 42. Article provides empirical evidence that only 5.4% of Hawai‘i’s nearly 2,000 ahupua‘a qualify as true watersheds. Few ahupua‘a boundaries actually follow watershed boundaries; rather the boundaries may run along ridgelines or transect watersheds. Some ahupua‘a were landlocked and did not have the capability alone to provide for all the daily needs of the people. Other ahupua‘a span mid-mountain to sea rather than begin from the mountain peak; include coastal resources only; span both leeward and windward coasts and mountain ranges; or are split into ‘ili lele.
- <sup>46</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 97 (‘Ili: Land section, next in importance to ahupua‘a and usually a subdivision of an ahupua‘a).
- <sup>47</sup> *Id.* at 98 (‘Ili lele: Portion of an ‘ili land division separated from the main part of the ‘ili but considered a part of it).
- <sup>48</sup> Gonschor & Beamer, *supra* note 42 at 71.
- <sup>49</sup> Dr. Kawika Winter, *Applying Traditional Resource Mgmt. Philosophies to Contemporary Conservation Efforts on Kaua‘i*, Presentation to the Native Hawaiian Rights Clinic, Univ. of Haw. William S. Richardson Sch. of Law (Nov. 9, 2015).
- <sup>50</sup> ANDRADE, *supra* note 40 at 30.
- <sup>51</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 207 (*Limu*: general name for all kinds of plants living under water, both fresh and salt, also algae growing in any damp place in the air, as on the ground, on rocks, and on other plants).
- <sup>52</sup> These limu traditions and practices are known to author through personal experience via direct knowledge transmission from her grandmother Katharine “Kitty” Akutagawa of Moloka‘i who learned this art from her Hawaiian kūpuna (elders).
- <sup>53</sup> Malia Akutagawa, Shaelene Kamaka‘ala, Harmonie Williams, & the Native Hawaiian Rights Clinic, *Traditional & Customary Practices Report for Mana‘e, Moloka‘i* 54-55, 83-84 (2016) [hereinafter Akutagawa et. al, *Mana‘e Report*].
- <sup>54</sup> *Id.*
- <sup>55</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 238, 52 (*Manini*: Very common reef surgeonfish (*Acanthurus triostegus*), also called convict tang, in the adult stage; *Hale*: House, building, institution, lodge, station, hall; to have a house).
- <sup>56</sup> Akutagawa et. al, *Mana‘e Report*, *supra* note 53 at 207.
- <sup>57</sup> *Id.*
- <sup>58</sup> *Id.* (citing Interview with Dr. Kaipō Perez, Recreation Specialist I, City & Cty. of Honolulu, in Honolulu, Haw. (Jul. 1, 2015)).
- <sup>59</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 156 (*Ko‘a*: Shrine, often consisting of circular piles of coral or stone, built along the shore or by ponds or streams, used in ceremonies as to make fish multiply).
- <sup>60</sup> Interview with Mac Poepoe, Konohiki, Hui Mālama O Mo‘omomi, in Honolulu, Haw. (Sep. 25, 2015).
- <sup>61</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 312 (*Palu*: A relish made of head or stomach of fish, with kukui relish, garlic, chili peppers; fish bait made of fish head or stomach, also used for chumming).
- <sup>62</sup> *Id.* at 56 (*Hānai*: To raise, rear, feed, nourish, sustain).
- <sup>63</sup> Dr. Mehana Blaich Vaughan, lecture in HWST 458/NREM 491 Natural Resource Issues & Ethics in Hawai‘i, Kamakākūokalani Ctr. for Hawaiian Studies, Univ. of Haw. (Feb. 5, 2015).
- <sup>64</sup> *Id.*
- <sup>65</sup> *Id.*
- <sup>66</sup> *Id.*
- <sup>67</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 197 (*Lawai‘a*: Fisherman; fishing technique; to fish, to catch fish).
- <sup>68</sup> MARGARET TITCOMB, NATIVE USE OF FISH IN HAWAII 12-13 (2d. ed. 1972).
- <sup>69</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 127 (*Kānāwai*: Law, code, rule, statute, act, regulation, ordinance, decree, edict; legal; to obey a law; to be prohibited; to learn from experience).
- <sup>70</sup> *Id.* at 219 (*Mahi ‘Ai*: Farmer, planter; to farm, cultivate; agricultural).
- <sup>71</sup> *Id.* at 33 (‘*Auwai*: Ditch, canal).

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<sup>72</sup> *Id.* at 33 (*Lo'i*: Irrigated terrace, especially for taro).

<sup>73</sup> *Id.* at 216 (*Lunawai*: Water master, one in charge of water distribution).

<sup>74</sup> HANDY, HANDY, & PUKU'I, *supra* note 39 at 57-59.

<sup>75</sup> TITCOMB, *supra* note 68, at 13.

<sup>76</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 114 (*Kahuna*: Priest, sorcerer, magician, wizard, minister, expert in any profession (whether male or female)).

<sup>77</sup> *Id.* at 20 (*Ali'i*: Chief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander).

<sup>78</sup> TITCOMB, *supra* note 68, at 14.

<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.*

<sup>81</sup> HAWAIIAN FISHING LEGENDS xviii (Dennis Kawaharada, ed., 1992).

<sup>82</sup> *Id.* at xviii-xix.

<sup>83</sup> LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 30-31 (1992).

<sup>84</sup> 1 KEPĀ MALY & ONAONA MALY, KA HANA LAWAĪ'A A ME NĀ KO'A O NĀ KAI 'ĒWALU: SUMMARY OF DETAILED FINDINGS FROM RESEARCH ON THE HISTORY OF FISHING PRACTICES AND MARINE FISHERS OF THE HAWAIIAN ISLANDS iii (2003) [hereinafter 1 MALY & MALY, KA HANA LAWAĪ'A] ("It is staggering today, to contemplate that in ancient times, nearly every member of the Hawaiian population regularly participated in some form of fishing — and population figures in the islands, range from some 400,000 to 1,000,000 people in 1778. Native lore and early historical accounts tell us that though those traditional generations, the fisheries were resilient and healthy. This being a reflection on the relationship between people and nature, and the management system that evolved through ancient times. Today, only a very small percentage of the population of the Hawaiian Islands fishes, yet, as the methods of fishing and management systems have evolved away from the traditional system, the fisheries themselves have diminished at alarming rates.").

<sup>85</sup> Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, December 13, 1968. Hardin discussed problems that cannot be solved by technical means, as distinct from those with solutions that require "a change only in the techniques of the natural sciences, demanding little or nothing in the way of change in human values or ideas of morality". He also out the problem of individuals acting in rational self-interest by claiming that if all members in a group used common resources for their own gain and with no regard for others, all resources would still eventually be depleted. By recognizing resources as commons in the first place, and by recognizing that, as such, they require management, Hardin believes that humans "can preserve and nurture other and more precious freedoms".

<sup>86</sup> Friedlander, et al., *Application of Hawaiian traditions*, *supra* note 30, at 817.

<sup>87</sup> *Id.*

<sup>88</sup> David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence* 30 U. HAW. L. REV. 319, 320 and note 2 (2008) (citing *Branca v. Makuakane*, 13 Haw. 499, 504-05 (1901) (emphasis added)).

<sup>89</sup> *Id.* at 321 and note 3 (citing *Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n*, 79 Haw. 425, 447 & n.39 (1995) [hereinafter *PASH/Kohanaiki*]); *see also id.* at 437 n.21, 903P.2d at 1258 n.21 (citing Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands, 1892, ch. LVII, § 5, 91 (King. Haw.)).

<sup>90</sup> HAW. REV. STAT. § 1-1.

<sup>91</sup> Forman, *supra* note 88 at 321, n.4 (citing *PASH/Kohanaiki* at 437 n.21, 903 P.2d at 1258 n.21 (quoting 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 (1845-46))); *see also Territory of Hawaii v. Bishop Trust Co., Ltd.*, 41 Haw. 358, 362-63 (1956) ("After this coming of the white man complications arose over land questions; remedial legislation began in 1839 and was brought to a climax during the decade following the adoption of the Constitution of 1840. The rights of the chiefs and others were based upon what we might term the old Hawaiian customs or laws. It is true there were no written laws in prehistoric days for there was no written language, but the customs both as to lands and fishing rights were regulated in a very complete manner and the boundaries of every division of land were well known.").

<sup>92</sup> 1 MALY & MALY, KA HANA LAWAĪ'A, *supra* note 84 at 243.

<sup>93</sup> *Id.* at 244 (citing Act Regulating Taxes (June 7, 1839) (amended Nov. 9, 1840), ch. III, § 8(1)).

<sup>94</sup> *Id.*

<sup>95</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 151 (*Kilo he'e*: One who fishes for octopus by looking through a glass-bottomed box; formerly the kilo he'e spit chewed kukui nut on the sea to calm the water, then examined (kilo) the sea bottom for octopus; to fish thus.)

<sup>96</sup> *Id.* at 214 (*Luhe'e*: Fishing for octopus with line and cowry lure; the octopus lure; to fish thus).

<sup>97</sup> *Id.* at 233 (*Mālolo*: General term for Hawaiian flying fishes (*Parexocoetus brachypterus* and others)).

<sup>98</sup> TITCOMB, *supra* note 68 at 15 (describing the meanings of the different fishing grounds named in the fishing law).

<sup>99</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 276 (*'Ohana*: Family, relative, kin group; related).

<sup>100</sup> NORMAN MELLER, *INDIGENOUS OCEAN RIGHTS IN HAWAII: SEA GRANT MARINE POLICY AND LAW REPORT 2* (1985).

<sup>101</sup> PUKUI ET. AL, *Hawaiian Dictionary*, *supra* note 3, at 142 (*Keiki*: Child, offspring, descendant, progeny, boy, youngster, son, lad, nephew, son of a dear friend).

<sup>102</sup> *Id.* at 256 (*Muliwai*: River, river mouth; pool near mouth of a stream, as behind a sand bar, enlarged by ocean water left there by high tide; estuary).

<sup>103</sup> Alan T. Murakami & Wayne Chung Tanaka, *Chapter 10: Konohiki Fishing Rights*, in *NATIVE HAWAIIAN LAW: A TREATISE* 618, n. 34 (Melody Kapilialoha MacKenzie, Susan K. Serrano, D. Kapua'ala Sproat, Ashley Kaiao Obrey, & Avis Ku'uipoleialoha Poai, eds., 2015) (noting minor changes to the fishing laws that reflected “transient shoal fish reserved for the king and also the fish reserved by each konohiki, and the areas in which the restrictions applied” but that there were no substantive changes in terms of fishing rights).

<sup>104</sup> *Id.*

<sup>105</sup> *Territory of Hawaii v. Bishop Trust Co., Ltd.*, *supra* note 91 at 361-62. Court states that konohiki were traditionally considered agents of the chief responsible for ili, land subdivisions within an ahupua'a, but later written laws referenced konohiki as chiefs or landlords. Hoa'āina who traditionally labored on the land to provide for their families and for the chiefs were later referenced under the law as tenants of an ahupua'a.

<sup>106</sup> *Haalelea v. Montgomery*, 2 Haw. 62 (1897).

<sup>107</sup> *Hatton v. Piopio*, 6 Haw. 334 (1882).

<sup>108</sup> *Id.* at 336.

<sup>109</sup> *Id.* at 336-37. Section 1477 of the Civil Code of 1859 was adopted by the State of Hawai'i as Hawai'i Revised Statutes, section 7-1. HAW. REV. STAT. § 7-1 (2013).

<sup>110</sup> *Id.* at 337.

<sup>111</sup> *Id.*

<sup>112</sup> Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i and to Offer an Apology to Native Hawaiians on behalf of the United States for the Overthrow of the Kingdom of Hawai'i, S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

“Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawai'i, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887; . . .

Whereas, in pursuance of the conspiracy to overthrow the Government of Hawai'i, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893 . . .

Whereas the Congress, through the Newlands Resolution ratified the cession, annexed Hawai'i as part of the United States, and vested title to the lands in Hawai'i in the United States; . . .

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States . . .”

<sup>113</sup> Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55<sup>th</sup> Cong., 30 Stat. 750 (1898).

<sup>114</sup> Hawai'i Organic Act, ch. 339, 31 Stat. 141 (1900) [hereinafter Organic Act].

<sup>115</sup> Organic Act, *supra* note 114. Section 95 of the Organic Act reads in full:

**§ 95. Repeal of laws conferring exclusive fishing rights.** That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no

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such vested rights shall be valid after three years from the taking effect of this Act unless established hereinafter provided.

<sup>116</sup> Organic Act, *supra* note 114. Section 96 of the Organic Act reads in full:

**§ 96. Proceedings for opening fisheries to citizens.** That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law. That if such fishing right be established the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

<sup>117</sup> *Id.*

<sup>118</sup> *In re Fukunaga*, 16 Haw. 306, 308 (1904).

<sup>119</sup> Murakami & Tanaka, *supra* note 103, at 621, n. 78 (citing NORMAN MELLER, INDIGENOUS OCEAN RIGHTS IN HAWAII: SEA GRANT MARINE POLICY AND LAW REPORT 9-10 (1985) [hereinafter MELLER]).

<sup>120</sup> *Id.* at 621.

<sup>121</sup> *Id.*, n. 79 (citing MELLER at 10).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 622, note 81 (referencing table titled “KONOHIKI FISHERIES ACQUIRED, 1900-1953” in RICHARD H. KOSAKI, HAW. LEGIS. REFERENCE BUREAU, REP. NO. 1, KONOHIKI FISHING RIGHTS 13-14 (1954)).

<sup>124</sup> *Smith v. Laamea*, 29 Haw. 750 (1927).

<sup>125</sup> *Id.* at 756.

<sup>126</sup> *Id.* at 755.

<sup>127</sup> *Damon v. Tsutsui*, 31 Haw. 678, 693 (1930).

<sup>128</sup> *Id.*

<sup>129</sup> *Carter v. Territory of Hawaii and Damon v. Territory of Hawaii*, 14 Haw. 465, 466-67 (1902).

<sup>130</sup> Brenton Kamanamaikalani Beamer, Huli Ka Palena (unpub., M. Geog. Thesis, U. Hawai‘i) 4, 14-21 (2005) (defining palena as moku, ahupua‘a, and ‘ili boundaries that were more than physical demarcations, but also represented people’s intimate relationship to the land. As such, the emotional and spiritual connections to place in addition to geographical locations were embedded in the people’s memory); KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION, 32-33 (2014). The palena created “spaces of attachment and access . . . [they] delineated the resource access of maka‘āinana and ali‘i on the ground, literally connecting people to the material and spiritual resources of these places.” The knowledge of these palena known “visually and cognitively” by kama‘āina was shared orally from one generation to the next.

<sup>131</sup> Gonschor & Beamer, *supra* note 42 at 60-61.

<sup>132</sup> *In re Boundaries of Pulehunui*, 4 Haw. 239, 251 (1879).

<sup>133</sup> *In re Kamakana*, 58 Haw. 632, 638-39, 574 P.2d 1346, 1350 (1978) (citing *In re Boundaries of Pulehunui*, 4 Haw. 239, 241 (1879) and *Harris v. Carter*, 6 Haw. 195, 197 (1877)).

<sup>134</sup> *Carter v. Territory of Hawaii and Damon v. Territory of Hawaii*, 14 Haw. 479, 466-67 (1902).

<sup>135</sup> *Id.* at 474.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 475.

<sup>138</sup> *Damon v. Hawaii*, 194 U.S. 154 (1904).

<sup>139</sup> *Id.* at 159-60.

<sup>140</sup> *Id.* at 158.

<sup>141</sup> *Id.* at 161.

<sup>142</sup> *Carter v. Hawaii*, 200 U.S. 255 (1906).

<sup>143</sup> *Bishop v. Mahiko*, 35 Haw. 608 (1940).

<sup>144</sup> *Id.* at 625.

<sup>145</sup> *Id.* at 628.

<sup>146</sup> *Id.* at 614.

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<sup>147</sup> *Id.* at 617-18.

<sup>148</sup> *Id.* at 615.

<sup>149</sup> *Id.* at 676-77.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 677.

<sup>152</sup> *Id.* at 678.

<sup>153</sup> *Id.* at 680.

<sup>154</sup> RICHARD H. KOSAKI, HAW. LEGIS. REFERENCE BUREAU, REP. NO. 1, KONOHIKI FISHING RIGHTS 27-28 (1954) (citing *United States v. Robinson*, Civ. No. 292 (D. Haw. 1934)).

<sup>155</sup> *Id.* at 28.

<sup>156</sup> *Id.* at 28 (citing *United States v. Robinson*, Civ. No. 292 (D. Haw. 1934)).

<sup>157</sup> *Id.* (citing *United States v. Robinson*, Civ. No. 292 (D. Haw. 1934)).

<sup>158</sup> *Id.* at 27 (citing *United States v. Robinson*, Civ. No. 292 (D. Haw. 1934)).