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NATIVE HAWAIIAN FISHING RIGHTS ISSUE PAPER

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NATIVE HAWAIIAN FISHING RIGHTS ISSUE PAPER

PART I: HISTORICAL LAWS RELATING TO FISHING

I. Laws Governing Fishing (1839-1900)

On June 7, 1839, almost nine years before the Māhele, King Kamehameha III signed into law a bill that redistributed the fishing grounds from Hawai'i to Kaua'i among himself, the ali'i or konohiki who were in possession of those fisheries, and the common people. In his 1839 decree, Kamehameha took from "those who now possess them" the fishing grounds from Hawaii to Kauai, and redistributed them in equal shares, giving one-third to the common people, one-third to the konohiki (landlords), and reserving one-third to himself.[1]

The one-third portion of the fishing grounds given to the common people was defined in the 1839 law as encompassing all of the fishing grounds which have no coral reef, that is to say, the grounds where fishermen hunt for he'e[2] using the kilohe'e and lūhe'e method,[3] the grounds where fishermen fish for mālolo,[4] and

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[1]The law of June 7, 1839 is found in Chapter III, section 8, subsections 1 and 2 of Translation of the Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III, (Lahainaluna 1842)(Reprint 1994). The laws printed in Translation comprise the first compilation of laws enacted by the Kingdom between 1839-1842. The language used in section 8 is believed to be the original language used in 1839. According to Translation, amendments were made to Chapter III on November 9, 1840, however, it is unclear if the 1840 amendments substantially altered section 8.

[2]The term "he'e" would include the he'e mauli (day octopus, Octopus cyanea, formerly known as Polypus marmoratus), as well as the he'e pūloa (night octopus, Octopus ornatus).

[3]According to Titcomb, Margaret J. Native Use of Fish In Hawaii, 15 (1983), as explained to her by Mary Kawena Pukui, the kilohe'e grounds is an area shallow enough for wading, or examining the bottom from a canoe, perhaps with the aid of the oiliness of pounded kukui nut to smooth the surface of the water. The lūhe'e grounds is an area where the water was too deep for the bottom to be in sight and the he'e had to be caught by line and cowrie shell lure. These were deep places, but were not considered the open ocean.

the open ocean beyond those grounds.[5]

The one-third portion of the fishing grounds given to the konohiki consisted of the grounds extending from the beach to the outer edge of the coral reef. This area was set aside for the common use of the konohiki and their tenants.

The King reserved as his one-third share the right to designate for his exclusive use, "at the proper season for fishing", all marine life within certain fishing grounds on the Islands of Moloka'i and O'ahu,[6] as well as certain species of fish found within the waters of each island.[7] In addition, the King

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[4]Flying fish, Cypselurus simus. According to Pukui (see Note 3, supra), the mālolo grounds were certain rough and choppy areas, crossed by currents, where the mālolo habitually ran. Like the kilohe'e and lūhe'e grounds, the mālolo grounds were deep places, but were not considered the open ocean.

[5]See, Note 1, supra. The marine jurisdiction of the Hawaiian Kingdom was identified in the laws of 1845 as extending no further than one marine league (3.45 statute miles) seaward from low water mark around all of the major Hawaiian Islands, including Kaho'olawe. See, Statute Laws of His Majesty Kamehameha III, ch.VI, art. I and IV, §§I and I (1846). Thus, the phrase "open ocean grounds" as stated in the 1839 laws was limited by the law of 1845 to a distance of one marine league.

[6]The fisheries on O'ahu and Moloka'i were identified as:

On O'ahu: Kalia, Ke'ehi, Kapapa, Malaeakuli, and Pahihi.
On Moloka'i: Punalau, O'oia, Kawai, Koholanui, Kaonini, Aiko'olua, Waiokama, and Heleiki.

[7]The species or variety of fish set aside were identified as follows:

On Lāna'i: the aku (ocean bonito, Katsuwonus pelamys) and the uhu (parrot-fish, Scarus spp.).
On Maui: the kule [akule] kū (goggle eyed scad, Selar crumenophthalmus) of Honua'ula and other places of Maui.
On Hawai'i: the 'ahi (albacore, Thynnus thynnus).
On Kaua'i: the 'anae (mullet, Mugil cephalus) of Huleia, Anahola, Kahili, and Hanalei; the he'e (octopus, Polypus marmoratus) and freshwater fish [o'opu?] of Mana.
On Ni'ihau: all of the permanent shoal fish.

imposed a kapu on all "transient shoal fish from Hawaii to Niihau"[8], and imposed a duty on such fish taken.

This information was obtained in Translation, supra, at Note 1. The author compared the English version found in Translation with the Hawaiian version printed in Ke Kumu Kanawai A Me Nā Kanawai O Ko Hawaii Pae Aina (Honolulu 1841) in the Hawai'i State Archives, and found them essentially to be the same. The author did find an earlier printing of the Hawaiian version, printed in 1840 (He Kumu Kanawai A Me Ke Kanawai Ho'oponopono Waiwai No Ko Hawaii Pae Aina (Honolulu 1840), and compared that with the 1841 version. There are differences between the 1840 and 1841 Hawaiian versions. For instance, the 1840 version refers only to the aku of Kaunolū, and the uhu of Kaohai, as being reserved for the King. In addition, the 1840 version only refers to the fishing grounds of Kaua'i, and makes no mention of Ni'ihau. It appears that the law was amended sometime between 1840 and 1841.

According to Pukui, (see, Note 2, supra), the adjective suffix kū (as in akule kū)is added to any fish name to indicate a stand, or pause of the school in its journey.

In 1845, the law was further amended to: 1) delete the uhu (parrot-fish, Scarus spp.) as a fish reserved for the King on Lāna'i, 2) delete Kahili as an area where the 'anae (mullet, Mugil cephalus) was reserved for the King, and 3) delete all references to the "permanent shoal fish" on the Island of Ni'ihau as fish reserved for the King.

] [8]The phrase "transient shoal fish" were later identified in an 1841 amendment as: 1) akule (goggle eyed scad, Selar crumenophthalmus), 2) 'anae holo (mullet, Mugil cephalus), 3) alalauwā (juvenile bigeye, Priacanthus spp.), 4) uhu ka'i (parrot-fish, Scarus spp.), 5) kaweleā (Heller's barracuda, Sphyraena helleri), 6) kawakawa (little tunny, Euthynnus alletteratus), and 7) kalakū (surgeonfish, Acanthuridae spp.). In addition, the 1841 amendment declared that these fish were to be "divided equally [with the King], whenever they [the fish] arrive at these [aforementioned] islands, or whenever they drift along." Act of April 1, 1841, §5.

The term uhu ka'i is probably not a description of a species of uhu, but a contraction of uhu māka'ika'i. As explained by Titcomb, supra, Note 2:

> Uhu are found along all shores of Hawaii, and travel in schools. There is always a leader in a school, and then they move along, sometimes in a single file, sometimes in double file, after the leader. The term for this formation is uhu holo, or uhu māka'ika'i.

In 1845, the boundaries of the fisheries were delineated by statute, and the rights and responsibilities of the konohiki and tenant were further defined.[9] The law of 1845 provided that the jurisdiction of the Hawaiian Kingdom extended for a distance of one marine league[10] (approx. three statute miles), beginning at the low water mark on each of the major Hawaiian islands, including Kaho'olawe.[11] Accordingly, the fishing grounds for the common people were defined as extending from the edge of the coral reefs to the limit of the Kingdom's marine jurisdiction.[12]

In addition, the konohiki fishery was defined in the 1845 law as beginning at the low water mark and extending to the outer edge of the coral reef.[13] In areas where there was no reef, the boundaries of the fishery would extend from low water mark seaward for one geographical mile.[14] Within the boundaries of the fishery, the konohiki could regulate the taking of fish and other marine life for the equal use of himself and his tenants. Although the konohiki's authority to regulate the fishery was based on "ancient

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[9]Statute Laws of His Majesty King Kamehameha III, 1845-1846 (Vol. I), Ch. VI, art. V, §§ I-XIV (1846).

[10]A league is a measure of distance, varying in different countries, but equal to about three statute miles. Black's Law Dictionary, 800 (5th Ed. 1979). One marine league is equal to three nautical miles (3.45 statute miles) or 5.56 kilometers. Webster's New World Dictionary 1688 (2d Ed. 1980).

[11]Ch. VI, art. I, §I. Section one provides that:

> The jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the islands of ...Kahoolawe...commencing at low water mark on each of the respective coasts of said islands.

[12] Id.

[13]art. V,§2.

[14] Id.

regulation"[15], the konohiki was not authorized to lay any additional tax, or subject the tenant to further restrictions, unless it was expressly stated in the 1845 statute.[16]

Each year, the konohiki was allowed under the 1845 law to set aside one species or variety of fish for his or her exclusive use and consumption by giving public notice to the tenants and others residing in the ahupua'a by viva voce proclamation[17], as well as notifying the Minister of the Interior in writing of the kind and description of the fish to be set aside.[18] The konohiki had the right to recover any reserved fish caught by the tenant, or seek reimbursement for the value of the fish taken.[19]

If the konohiki elected not to reserve one species or variety of fish, the konohiki could prohibit "in consultation with the tenants", fishing within the fishery during certain months of the year.[20] In addition, the konohiki could, during the fishing season, exact a duty of one-third (1/3) of all fish caught by each tenant.[21]

In addition, the 1845 law sought to clarify the relationship between the locally-controlled konohiki fishery and the fish and

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[15]art. V, § II.

[16]art. V, §VI.

[17]The term "viva voce proclamation" means to proclaim an act by word of mouth (orally). Black's Law Dictionary 1410 (5th ed. 1979).

[18]The Minister, in turn, was required to publish yearly in the government-run newspaper "The Polynesian" a list of the konohiki, their place of residence, and the variety of species set aside. art. V, §IV.

[19]The 1845 provided that if the tenant shall take one fish, he shall pay five, in proportion to the amount taken. art. V, §5. If the tenant fails to pay, he would be fined $50.00 for each offense. Id.

[20]art. V, §VII.

[21]Id.

fisheries reserved by the King in the 1839 law. Under the new law, the konohiki maintained control over the O'ahu and Moloka'i fisheries reserved by the King, and was nonetheless entitled to kapu one variety or species of fish.[22] In addition, in those fisheries that included walled fishponds, the konohiki was entitled to take young species of fish reserved for the King for the purpose of restocking the konohiki's ponds.[23] Finally, if any fish reserved by the King were caught with the fish reserved by the konohiki, the konohiki would nonetheless be entitled to take one third of the total catch.[24]

The 1845 law also sought to clarify the procedures used by the King in reserving his fish. Under the law, the King, through the Minister of Interior, was required to notify the public annually of the season(s) that the kapu would be imposed on his fish and fisheries. After the season ended, the public was entitled to fish for those fish, accounting to government fishing agents for the King's portion so taken.[25] Failure to comply with the laws resulted in forefeiture of fish taken, paying five times the amount of fish taken, or imprisonment.[26]

The ownership of fishing grounds was not determined between the King and the ali'i or chiefs during the Māhele of 1848, presumably because the law of June 7, 1839 had previously decided and determined title to the fisheries. Similarly, the Board of Commissioners to Quiet Land Titles did not determine title or use rights to fishing grounds, unless specifically requested by the

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[22]art. V, §VIII.

[23]art. V,§VIII

[24]This rule was limited to the fisheries on Moloka'i and O'ahu, and the rivers of Kaua'i. art. V, §VIII.

[25]The 1845 law also gave the King the right to set apart a portion of the fish reserved for use of the royal palace. art. V., §XII.

[26]§XIV.

claimant.[27] After the Māhele of 1848, title to the inshore coastal fisheries continued to remain with the owner of the ahupua'a, however, the Māhele created three classes of "konohiki": the King, the ali'i and the government.

On July 11, 1851, the government declared that, because all "fish belonging to the government are productive of little revenue", and that management of the fishing rights by the government agents "are a source of trouble and oppression to the people", all fishing grounds attached to any government land "shall be, and are hereby, forever granted to the people, for the free and equal use of all persons", subject to the right of the Minister of the Interior to restrict the taking of fish at certain seasons of the year "for the protection of such fishing grounds".[28] By this Act, the Hawaiian government disclaimed its right to regulate each individual fishery. Nonetheless, the government did maintain its perogative as the corporate body politic to manage the ocean waters for the good of its citizens.

The King and the various ali'i who received land in the Māhele, however, remained in possession of their fisheries and continued to regulate the fisheries adjoining their ahupua'a. Private fisheries were sold or leased during the late 18th and mid 19th centuries.[29] These private fisheries are now commonly

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[27]For example, the Board, in its award to the Chiefess Keohokālole for the ahupua'a of Kahana, O'ahu, expressly determined that the award included the right to fish for akule in the fishery attached to the ahupua'a of Kahana. See, Land Awards Book 10, page 442.

[28]Act of July 11, 1851, §2. This law has remained on the books since its enactment and is currently found in Hawai'i Revised Statutes § 187A-21.

[29]For a detailed discussion of the number of private fisheries required to register under sec. 96 of the Hawaii Organic Act, see, R.H. Kosaki, Konohiki Fishing Rights 10 (Legislative Report No. 1, 1954).

referred to as "konohiki fisheries".[30]

After the Māhele of 1848, the government began selling its lands for various public purposes. Individuals who had purchased government lands adjoining the sea, however, began treating the government fishery as privately-owned. In addition, members of the public who were given the right to fish in areas beyond the edge of the coral reefs, namely the kilohe'e, lūhe'e, and mālolo grounds, were being denied access to these areas by individuals who had purchased lands from the government. On May 24, 1851, the same year that the government opened their fisheries to the public, the Legislature declared that any person who obtains government land "by lease or other title" adjoining a government fishery, cannot claim any greater rights to the fishery unless expressly stated in the government's grant.[31] In addition, the Act of May 24, 1851 further defined the rights of an owner of a private fishery to regulate his fishery when it adjoins a government fishery, and further provided for penalties for konohiki or other individuals who prevented members of the public from using the government fisheries adjoining private fisheries[32].

II. KAHO'OLAWE FISHERY

A. Boundaries of Fishery (1839-1851)

The boundaries of the fishery surrounding Kaho'olawe prior to

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[30]For an in-depth discussion of the historical development of the laws as they apply to private fisheries, see Native Hawaiian Rights Handbook, Chapter 8, "Konohiki Fishing Rights and Marine Resources". The laws governing private fisheries are found in Hawaii Revised Statutes §§187A-21 through 23 (supp. 1996).

[31]Act of May 24, 1851, §1, printed in 1851 Sess. Laws of Haw.

[32]Both the Acts of July 11, 1851 and May 24, 1851 were consolidated in the Civil Code of 1859 and renumbered at §§384-386 and §§393-396, respectively.

1839 are unknown.[33] Indeed, the size and shape of the fisheries under Hawai'i's traditional land tenure varied considerably.[34] Nonetheless, the 1839 and 1845 laws served to formally delineate the boundaries of the Kaho'olawe fishery. As set forth in those laws, supra, the konohiki of Kaho'olawe would have the sole power to regulate the taking of marine life within the Kaho'olawe

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[33]The 1839 law assumes that the ownership of the fishery attaches to the konohiki in possession of the unit of land adjoining the fishery, usually an ahupua'a. In the case of Kaho'olawe, however, it is unclear whether Kaho'olawe was viewed as an ahupua'a or a separate island.

According to an 1895 map found in the Office of the State Surveyor, Department of Accounting and General Services, the entire island of Kaho'olawe was designated as a single ahupua'a. The 1895 map identifies twelve 'ili on Kaho'olawe: Kealaikahiki, Honokoa, Ahupu, Kuheia, Papaka, Kaulana, Wa'aiki, Hakioawa nui, Hakioawa iki, Kanapou, Na'alapa, and Kunaka. There is no indication in the literature that these 'ili were ever 'ili kūpono, or parcels of land independent politically of the ahupua'a. Thus, it is probably safe to assume that these 'ili were the 'ili of the ahupua'a, further subdivisions within the ahupua'a made by and for the convenience of the local ruling chief.

On the other hand, Kaho'olawe is listed in the Act of June 7, 1848,(which transferred a portion of the King's land to the government) not as an ahupua'a, but as a "Mokupuni Oko'a", which means a distinct and separate island from the other islands. It is unclear whether separate rules or customs were attached to this designation.

[34] For example, Curtis Lyons writes:

> These same [ahupua'a] lands generally had the more extended sea priviledges. While the smaller ahupuaas had to contend themselves with the immediate shore fishery extending out not further than a man could touch bottom with his toes, the larger ones swept around outside of these, taking to themselves the main fisheries much in the same way as that in which the forests were appropriated.

Lyons, C.J. A History of Hawaiian Government Survey With Notes On Land Matters In Hawaii,(Appendices 3 and 4 of Surveyor's Report for 1902), Hawaiian Gazette Co. Honolulu (1903), p.25.

fishery, which was now defined in law to begin at low water mark extending to the outer edge of the reef.[35] Similarly, the people would be entitled to fish in the mālolo, kilohe'e and lūhe'e grounds, including the public fishery of the Kingdom, now defined by law as extending from the edge of the reef to the limit of one marine league seaward (beginning at low water mark).[36]

During the period that the 1839 and 1845 laws were passed, Kaho'olawe was listed in government records as land belonging to the King.[37] Thus, the King enjoyed the rights of the Kaho'olawe fishery as the konohiki in possession of Kaho'olawe. In addition, as set forth in the 1839 law, the King had exclusive use rights to those fishes identified in the 1839 law which frequented the waters in and around Kaho'olawe.

II. Ownership of Kaho'olawe fishery (1848-1851)

The Māhele of 1848 transferred ownership of the Kaho'olawe fishery from the King to the Hawaiian government. On March 8, 1848, one day after Kamehameha III and his chiefs completed the Māhele, the King signed and executed a document which transferred approximately 1.5 million acres of land to "his chiefs and people" (the Hawaiian government) in perpetuity.[38] Among the lands conveyed to the Hawaiian government was the island of Kaho'olawe.[39]

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[35]In many cases, this control would extend no farther than 50 feet from the low water mark (see topographic ocean map of Kaho'olawe) .

[36]See, art. V, §I, supra, at Note 11.

[37] See, e.g., Letter in the files of the Department of the Interior, Hawaii State Archives, dated 16 December 1847, from Namau'u to Gerritt P. Judd. In his letter, Namau'u lists the Island of Kaho'olawe as one of the "lands of the King, in accordance with your instructions to me...[t]his is what I know and heard, and very well known as belonging to Kamehameha I, K.II, [and] K. III."

[38]Māhele Book, pages 224-225.

[39]Kaho'olawe is actually listed in the Māhele book at page 200 under the column "Ko Kamehameha III" or "King Kamehameha III's [private] lands". However, a handwritten entry, made by Gerritt P.

The legislature confirmed the King's tranfer of lands by the Act of June 7, 1848.[40] The Act of June 7 specifically lists Kaho'olawe as among the inventory of lands held by the government.[41] Thus, as of 1848, and pursuant to the Law of 1839, the government assumed the role of konohiki for the fishery. Moreover, as previously stated, the government relinquished its role as konohiki over the Kaho'olawe fishery in 1851. Thus, as early as 1851, the waters surrounding Kaho'olawe were for the free and unrestricted use of all the people, subject to regulation by the government.[42]

III. Lessees Attempts To Assert Rights In Kaho'olawe Fishery (1851-1941)

As government land, the government leased Kaho'olawe from 1858 through 1941, primarily for use as a ranch. None of the government leases issued to the various lessees during this period authorized the lessees to regulate the waters surrounding Kaho'olawe.[43] Despite this fact, and the 1851 law which prohibited lessees of government land from asserting rights to the adjoining fishery, lessees of Kaho'olawe continued to unlawfully assert control of the waters surrounding Kaho'olawe. For instance, Cobb writing in 1905, noted that:

Judd immediately to the right of the ahupua'a of Ukumehame, states "Kahoolawe no aupuni" which means "Kaho'olawe for the government".

[40]Act of June 7, 1848

[41]Ibid.

[42]A review of documents on file at the Hawai'i State Archives show that neither the King nor the government chose to publicly assert their rights in the Kaho'olawe fishery between 1847 and 1851. This may have been due to the fact that Kaho'olawe was used as a penal colony by the Kingdom during the period 1832-1853. See, Kaho'olawe Island: Restoring A Cultural Treasure, Final Report of the Kaho'olawe Island Conveyance Commission to the United States Congress, 21 (March 1993).

[43]See, G.L.47A issued to Elisha H. Allen and Robert C. Wyllie (1858-1863), G.L. 115 originally issued to Elisha H. Allen and C.G. Hopkins (1864-1910), G.L. 1049 originally to Angus MacPhee (1918-1933), and G.L. 2341 issued to Angus MacPhee and Harry Baldwin (1933-1952).

> The refusal of the former lessee to permit outside fishermen on the island, or even to fish in the adjacent waters previous to the abrogation of the fishery rights in the islands, had prevented its development into an excellent fishing station.[44]

There are also reports that Angus MacPhee, who leased Kaho'olawe from the government between 1918-1941, prohibited fishing in the waters surrounding Kaho'olawe.[45]

When the United States assumed control of Kaho'olawe in 1941, access in and around the waters of Kaho'olawe for a three mile radius were restricted to military personnel.[46] In the 1980's, due to pressure from congressional representative Patsy Mink, the Navy allowed the public to fish in the waters surrounding Kaho'olawe,

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[44]Cobb further notes that:

> There are said to be plenty of fish around the island, but the owner of it claims the fishery right and refuses to allow the fishermen from the other islands to fish there unless they pay him for the priviledge.

Cobb, Scott Commercial Fisheries of the Hawaiian Islands, U.S. Fish Commission Report for 1901. Government Printing Office, Washington, D.C. (1902). At the time that Cobb prepared his report, he was probably referring either to Benjamin F. Dillingham, who leased Kaho'olawe from 1899-1903, or Randall Von Tempsky, C.S. Kynnersly and J.R.S. Kynnersley, who leased Kaho'olawe from 1887-1899.

[45]See, Interview with Rudolph "Boogie" Lu'uwai, conducted by Akoni Akana (9/9/93).

[46]The first regulations establishing a three mile danger zone around Kaho'olawe was actually promulgated on June 11, 1955, and is presently found at 33 C.F.R. §334.1340(a)(4), (b), and (c) (1995). These rules were enacted pursuant to 33 U.S.C. §3 (1988), which allow the Corps of Engineers to establish danger zones and restrict access in any portion or area of the navigable waters of the United States in the interest of public safety.

Although Kaho'olawe was returned to the state in 1993, the Navy still controls access to the island, pursuant to § 10001(d)(2) of the Department of Defense Appropriations Act of 1994, Pub. L. No. 103-139, 107 Stat. 1418 (1993), until the year 2004. Any rules enacted by the Navy that regulate ocean activities in the waters surrounding Kaho'olawe, however, must have a nexus to the threat of danger caused by unexploded ordinance.

but only for two weekends out of each month.[47]

IV. Traditional/Customary Fishing Practices on Kaho'olawe

Save and except several interviews with Hawaiian informants previously published for the KIR Commission, very little has been written on Hawaiian fishing practices on and around the waters surrounding Kaho'olawe.[48] A review of these interviews, as well as interviews recently conducted by this author, reveal that there was no customs or practices unique to Kaho'olawe.[49] Rather, the fishing techniques as well as the values practiced by native Hawaiians those commonly practiced by Hawaiians elsewhere. Much of the discussions contained in these interviews concerning fishing spots and techniques used by fishermen are given in broad terms. Indeed, fishing methods as well as the location of fishing grounds were not openly shared among Hawaiians.[50]

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[47]The federal administrative rules governing limited access to Kaho'olawe, first promulgated on June 25, 1982 and found in 32 C.F.R. §763.1 et seq.(1994), was the direct result of the Consent Decree and Order filed on December 1, 1980 in Aluli v. Brown, Civ. No. 76-0380.

Although 32 C.F.R. §763.1 allows limited access to the waters surrounding Kaho'olawe, the Navy never provided fishermen with access, thus prompting intervention by Congresswoman Mink.

[48] Reichel, K. Traditional Fishing Practices and Uses of Waters Surrounding Kaho'olawe, October 1993 (draft); Tau'a, Keli'i "Born on Kaho'olawe," Hawai'i Fishing News, (Vol. 9, #7), August 1984.

[49]The author must emphasize that this report is not, and should not be construed, as an attempt to document every traditional and customary fishing practices used by native Hawaiian families on Kaho'olawe. Rather, this section of the report is merely intended to provide the KIRC and its staff with a sampling of the extent to which Kaho'olawe was used for fishing by native Hawaiians, primarily during the later years of the monarchy, extending through the territorial period and statehood.

[50]As Kamakau, supra, notes regarding deep-sea ko'a fishing grounds:

> Those who wished to fish in the deep ocean sought out these [deep-sea] fishing grounds and kept them secret. Ka

The earliest account of traditional Hawaiian fishing practices in and around the waters of Kahoʻolawe are contained in a series of articles written in 1902,[51] by A.D. Kahaulelio[52] and published in

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> po'e kahiko regarded their secret fishing grounds, ko'a hūnā, as 'calabashes and meat dishes' (he 'umeke a he ipu kai) and as 'grandparents' (kupunakane a he kupunawahine) [sources of provisions], and could be robbed and beaten before they would reveal their locations. They pointed out their secret fishing grounds only to their own children. The locations of most of the deep-sea ko'a have been lost; only a few remain known, as the knowledge of their whereabouts has lessened, and the youth of today have not been taught their locations.
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> * * * * * * * * * * * *
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> For fishing in secret fishing grounds, ko'a hūnā, the hooks were prepared and baited on shore; the short lines that were the snoods of the hooks were put in one gourd, and the fishlines in another. Early in the morning, before there was light enough for him to be recognized, the fisherman went out to his ko'a. At daylight he let down the pohakialoa sinker, and as many fish took the line as there were hooks on it. When he knew that the hooks had all been taken by the fish, he pulled the line part way up, enough so that the stone was clear of the bottom, and tied the line to the starboard end (muku) of the 'iako and sailed out of sight of the ko'a before hauling the fish into the canoe. Then he returned to shore. In this way those who had secret fishing grounds kept their locations from becoming common knowledge. That is why most of the fishing grounds of ka po'e kahiko are unknown to their descendants and their locations have been lost.

Kamakau, S.M., The Works of the People Of Old, (B.P. Bishop Museum Press 1976) 75-76,78-79.

[51] A.D. Kahaulelio's "He mau Kuhiuhi No Ka Lawaia Ana"(Fishing Lore) was published in the Ka Nūpepa Kūʻōkoʻa from February 28, 1902 to July 4, 1902. A typescript of the original text, as well as a translation into English by the renowned Hawaiian scholar Mary Kawena Pukui, are preserved in the Hawaiian Ethnographic Notes Collection, Library, Bishop Museum (hereinafter "HEN Notes").

[52] A.D. Kahaulelio was born around 1837, probably in Lāhaina, Maui. According to Kahaulelio, his grandparents, "left Keoneoio, Honuaula, Maui, their birthplace five years afer the Word of God

the Hawaiian language newspaper Ka Nūpepa Kūoko'a. According to Kahaulelio, he and his father fished in waters off the western shoreline of Maui in an area ranging from Hāwea point (Ka'anapali) to Hema point (Lāna'i), to Paki aka Kealaikahiki (Kaho'olawe) to Kukui point (Kaho'olawe) and Papawai.[53] In his articles, Kahaulelio makes reference to specific place names on Kaho'olawe, the type of fish and other marine life that are found in that area, and the method generally used by his family to catch them.

On the beaches of Kaho'olawe, Kahaulelio would fish for uhu[54] using the paeaea pole fishing method.[55] Along the hilly and rocky coasts, Kahaulelio would fish for ulua[56] using the kuikui pole fishing method[57]. At Kanapou bay, near the large stream facing Honua'ula, Kahaulelio picked opihi.[58]

On the windward side of Kaho'olawe facing Lāhaina, in waters of ten fathoms or less, Kahaulelio would fish for weke 'ula[59] and

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had come to Hawaii and they made their home on this land of Lahaina, on the ahupua'a of Makila." HEN Notes ,4/14/02 at 150. Kahaulelio further notes that "I have fished for sixteen years with my father and grandfather until all passed out of this life and for twenty five years I have fished by myself. Now [1902] I have retired from the deep sea and inshore fishing taught me by my father." HEN Notes, 2/28/02 at 1.

[53] HEN Notes, 3/7/02 at 17.

[54] Scarus spp.

[55] The pole would be the same type of pole as that used to catch aku (ocean bonito, Katsuwonus pelamys). Hā'uke'uke (sea urchin, Colobocentrotus atrata), wana (sea urchin, Diadema Paucispinum), and 'ina (juvenile sea urchin, Echinometra spp.) would be crushed and used as chum to attract the fish. The teeth of the Hā'uke'uke, wana, or 'ina would then be attached to the hook to catch the fish.

[56] Caranx spp.

[57] A stout wooden pole was used together with three ply olona cord. The hook would be baited with the puhi paka (moray eel, Lycodontis flavimarginatus).

[58] Limpets, or Cellana spp.

[59] goatfish, Mulloidichthys vanicolensis

weke a'a[60] using the papa and paloa net fishing method.[61]

Kahaulelio names several ko'a, or deep-sea fishing grounds: Laeokukui, Ahupunui, Honokoa, Kealaikahiki, and Laipaki.[62] Laepaki is the shallowest of these grounds, a distance of five miles, and in waters 15-20 feet deep. Kahaulelio states that in an area three miles out from Laepaki, and in waters fifteen fathoms, the most productive fishing grounds exist around Kaho'olawe.[63] All of the deep sea ko'a, with the exception of Kealaikahiki, Kahaulelio would catch aholehole[64], hahanui (?), 'opakapaka,[65] ukikiki,[66] 'ula'ula,[67] and he'e[68] using the kukaula (short line) fishing method. All of the deep waters surrounding Kaho'olawe were excellent for lūhe'e. The deep waters of Kaho'olawe were also areas for catching mālolo using the hano net fishing method, with a special chum.

On the leeward side of Kaho'olawe, from the canoe landing at Kanapou Bay facing Makena to an area at Kealaikahiki point where it dips into the sea, beyond the reefs or in areas where there was no reef, Kahaulelio would fish for kole pala[69], maiii[70], omalemale[71]

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[60]goatfish, Mulloidichthys flavolineatus

[61]5/16/02, p.69.

[62]HEN Notes, 3/28/02 at 23. Kahaulelio also mentions Ka'ule and Hau, both place names which may pertain to Kaho'olawe.

[63]HEN Notes, 4/4/02 at 30.

[64]Hawaiian flagtail, Kuhlia sandvicensis

[65]Snapper, Pristipomoides spp.

[66]juvenile stage of Pristipomoides spp. and Etelis spp.)

[67]Etelis spp.

[68]Octopus cyanea

[69]Ctenochaetus strigosus

[70]Acanthurus nigrofuscus

, opule[72], panuhonuha [73], "and others" using the lau apoapo net fishing method[74].

Attempts have been made to record other fishing practices by living native Hawaiians. Interviews with Rudolph "Boogie" Lu'uwai, long-time resident fisherman of Makena whose family has a strong connection to Kaho'olawe[75], Paulo Kamakakehauualiiilii Fujishiro, a resident of Ukumehame whose family fished in the waters of Kaho'olawe, and David and Steven Pedro, the last family to officially reside on Kaho'olawe, offer further insight into the use by native Hawaiians.

Boogie Lu'uwai is 61 years old, and is a member of the Kūkahiko family, which comes from Makena. When Boogie was eleven years old, he went with his father, John Lu'uwai[76] fishing in the waters off Kaho'olawe. Boogie and his father would troll from Lae o ka Ule, to Halona, to Kaka[77], then to Kaho'olawe Li'ili'i. At

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[71]juvenile Scarus spp.

[72]Anampses cuvier

[73](panuhunuhu (?) (juvenile Scarus spp.)

[74]HEN Notes, 2/28/02 at 6.

[75]Taken from an Interview conducted on Sunday, September 9, 1993, by Akoni Akana at Makena Landing, Maui, printed in K. Reichel's 1994 draft of traditional fishing practices and uses of waters surrounding Kaho'olawe.

[76] John Lu'uwai's birth name was John Kauhane Lu'uwai Kukahiko. He legally changed his name in 1944. John was the captain of the Pua Lele, a boat which shipped cattle to and from Kaho'olawe during Angus McPhee's tenure on the island. The boat was destroyed when it washed onshore in a large Kona storm in 1938 or 39.

[77] According to Boogie's father, the area was named Kaka because of the type of fishing done in that area, kaka or ka'ili. In the ka'ili method of fishing, the fisherman would load the middle of the canoe with small sized stones. At the desired location, he would tie his baited hook and line around a rock and drop it overboard. When the rock reached the bottom, he would give it a jerk, loosening the rock and allowing the hook to float freely on the bottom. After the fish took the bait the line was pulled

Honokanaea, in an area called Black Rock, Boogie and his dad would bottomfish for opakapaka[78], kalamoa [79], and 'ula'ula[80], until the Navy destroyed most of the rocks there. They would be joined by other fishermen such as Sonny Ho'opi'i, James Kana'ele, JB Kimokea, Moke Ka'ana'ana, who would throw net along the shoreline for moi[81], and dive in that area for ulua[82]. They would also go to Kanapou Bay to a beach called Maluaka(?) for moi[83] using surround net. John's father and aunties would pick opihi [84], and hā'uke'uke[85]. John Lu'uwai would catch fish using homemade lures, and would prepare different colors of lures, depending on the type of fish he wanted to catch.[86] He also knew where certain species of fish lived. The Lu'uwai family would catch lobster at Molokini, and spearfish for ulua.[87]

According to Boogie, his father told him that as a small kid, his family would tell him stories of the Kukahiko family travelling back and forth from Makena to Kaho'olawe in canoes to fish. According to his father, the people of Makena had a connection with Kaho'olawe. The Lu'uwai family observed several rituals: 1) no

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back to the surface.

[78]Pristipomoides spp.

[79]ala'ihi kalaloa? Sargocentron spiniferum

[80]Etelis spp.

[81]threadfin, Polydactylus sexfilis

[82]Carandigae spp.

[83]threadfin, Polydactylus sexfilis

[84]Limpets, Cellana spp..

[85]sea urchin, Colobocentrotus atrata

[86]The Father would bottom fish using aho cord with piano wire and hooks. He would also make his own lures for catching ahi, ono, and aku.

[87]Carangidae spp.

lights on in the house when night netfishing, 2) don't eat anything (e.g., shell fish, limu) until after you've finished fishing, 3) never take bananas when fishing.

Paulo Fujishiro is a -- year old Hawaiian fisherman, who resides in Ukumehame, Maui. Paulo's family has resided in Ukumehame for generations, and can trace their family to Kamakakehau, who moved from Kohala to Ukumehame in 1818 or 1819 to serve as konohiki of Ukumehame to care for Kamehameha's cattle. Kamakakehau's granddaughter, Ha'eha'e Kealo'i, married Ioane Kekahuna, who moved from Lāna'i in the early 1800's and settled in Maui.[88]

Kekahuna served as a policemen in the Olowalu-Ukumehame area. Kekahuna and his friend Charles Lindsey, a sheriff of Lāhaina, would travel to Kaho'olawe by canoe rigged with a sail to fish and camp for three to four days. Lindsey and Kekahuna would fish at Kaulana and Hakioawa; they would not fish at Honukanaenae because of the rough and unpredictable ocean conditions. Most of the fish that was caught was dried because of the lack of refrigeration, and fresh fish were caught on the return voyage to Maui. Fujishiro started fishing when he was about seven or eight years old, and was trained by his uncle, Samuel Kamuela Fujishiro.

Several practices were observed by Fujishiro and his family while at Kaho'olawe; 1) Boats landing at Hakioawa would approach from the left side in order to land- the right side of the bay is kapu for bathing by hapai women, 2) Hawaiians took only what they needed, nothing more; some of the catch was used as offerings to the fish dieties Kū'ula and 'Ai'ai, and 3) Because of the rough and oftentimes unpredicable weather conditions, Kaho'olawe is an area reserved only for the experienced fisherman. Because of the sudden changes in weather conditions, fishermen must always be alert to the first sign of danger.

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[88]Ha'eha'e was previously married to Ka'aea, the brother of Kekahuna. After Ka'aea died (sometime between 1870-1875), Ha'eha'e married Kekahuna.

David and Stephen Pedro's father, Manuel Pedro, was the ranch foreman on Kaho'olawe from 1919 until 1941. The Pedro's are familiar with those fishing areas at or near Kuheia Bay, also known as "Pedro's Bay", where their father's house was located. Manuel Pedro would catch 'ama'ama[89] and moi[90] in the sandy areas, and aholehole[91] and uouoa[92] in the south area of Kuheia Bay using a throw net. A second spot was Kaulana Bay, where moi[93] was plentiful. A third spot was Haupu Bay, where the brothers would catch po'opa'a[94] , hinalea[95] and papio[96] with a bamboo pole, using opihi as bait. A man named Yamaichi occasionally used the area for hukilau net fishing.

V. Attempts to Regulate Customary and Traditional Practices

Except for the laws regulating private fisheries, there were few laws enacted by the Hawaiian government between 1839 and 1900 which regulated the taking of marine life in Hawaii's waters.[97]

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[89]mullet, Mugil cephalus

[90]threadfin, Polydactylus sexfilis

[91]Hawaiian flagtail, Kuhlia sandvicensis

[92]false mullet, Neomyxus leuciscus

[93]threadfin, Polydactylus sexfilis

[94]Cirrhitus pinnulatus

[95]Thalassoma spp., Coris spp., Gomphosus spp.

[96]Carangidae spp.

[97]Some of the early laws enacted included:
1) prohibiting fishing on Sunday, "unless of necessity or works of mercy"(Statute Laws of His Majesty King Kamehameha III, ch.XI, §1 (1840),
2) payment of government tax in fish (if no money, kukui nuts, arrow root, tumeric, etc.) proportion to what the tax would be in money (Statute Laws, supra, at ch.---, §11),
3) Payment of tax allowed in fishing line (80 fathoms) and fishing nets (800 meshes in length). Act of May 16, 1842 at 133-135.

One early law made it a crime to use the plant auhuhu to catch fish in any lake, pond, stream, or reservoir.[98] In 1872, the government banned the use of explosive powder in catching fish in all waters of the Hawaiian Islands.[99]

The first major attempt to regulate the size, manner, and quantity of fish taken began in earnest in 1900, when Hawai'i became a territory of the United States. At that time, a Commission was formed to recommend legislative measures which were designed to regulate Hawai'i's now dwindling marine resources. In recommending that the government establish minimum size catch requirements for fish, a task force formed by the U.S. Commissioner of Fish and Fisheries in 1900 to investigate fishing conditions in Hawaii found that:

> The chief argument used against protective laws is the desire of the Hawaiian people to eat little fishes raw. Of these little fishes thus eaten, one or two, called 'nehu,' never grow large. On the other hand, it may be urged that the nehu is an important food of larger fishes; that the market value of all which are taken is insignificant, and that the young of the mullet and other fishes of real value are taken and eaten with the nehu.[100]

Based on this report, Hawai'i's territorial legislature enacted a series of laws between 1900 and 1959 prohibiting the taking of fish during certain seasons,[101] in certain areas,[102] and

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[98]Laws of 1850, ch.25, §§7,9.

[99]Act of June 3, 1872 (current version at §188-23(a), H.R.S.).

[100]David Starr Jordan and Barton Warren Evermann, Preliminary Report On The Investigation Of The Fishes And Fisheries Of The Hawaiian Islands, H.R. Doc. No. 249, 57th Cong., 1st Sess. 21 (1902).

[101]See, e.g., Act of April 20, 1911, ch.110, 1911 Haw.Sess. Laws 148-50 (closed season for ama ama from December through March, except private ponds with licenses), Act of April 26, 1913, 1913 Haw. Sess. Laws 176-178 (closed season for bass from January through June);Act of March 19, 1917, ch.13, 1917 Haw. Sess. Laws 13-14 (prohibiting taking of lobster, crab, and other crustaceans

by certain methods.[103] The current laws regulating the taking of fish, now found in Chapter 188 of the Hawai'i Revised Statues, actually incorporate many traditional and customary practices.[104]

PART II. FORMULATING POLICY TO GUIDE KIRC IN RULE-MAKING

I. Law Establishing Kaho'olawe Island Reserve (KIR)

The boundaries of the Kaho'olawe Island Reserve (hereinafter "Reserve") are defined as "the island of Kaho'olawe and the submerged lands and waters extending seaward two miles from its shoreline".[105]

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while with egg)..

[102]See, e.g., Act of March 23, 1911, ch.38, 1911 Haw. Sess. Laws 148-50 (prohibiting the use of nets to take fish in Honolulu Harbor); Act of April 20, 1909, ch.88, 1909 Haw. Sess. Laws 116-117 (prohibiting the use of nets to take fish in Hilo Harbor).

[103]See, e.g., Act of April 30, 1913, ch.156, 1913 Haw. Sess. Laws 282 (prohibiting the use of nets greater than 12 feet to take nehu and iao); Act of April 15, 1915, ch.87, 1915 Haw. Sess. Laws 96-97 (prohibiting the use of nets with mesh opening smaller than 2 inches to take fish, except for certain enumerated species, repealed by Act of March 19, 1917, ch.14, 1917 Haw. Sess. Laws 14-15 (prohibiting the use of nets with mesh opening smaller than 1-1/2 inches to take fish, amended by Act of April 15, 1919, ch.84, 1919 Haw. Sess. Laws 107-108 (reinstating prohibition on the use of nets with mesh opening smaller than 2 inches to take fish).

[104]See, e.g., §188-29(a)(4), H.R.S. (allowing fishermen net mesh smaller than two inches to fish for opelu); §188-46, H.R.S. (prohibiting use of fish or animal bait to fish for opelu in waters off of Miloli'i, South Kona, Hawai'i); §188-40, H.R.S. (law establishing minimum sizes for taking fish only applies to commercial use).

[105]§6K-2, H.R.S. The boundaries of the KIR is a creature of state, not federal law. See, Pub. L. No. 103-139, §10001(b), 107 Stat. 1418, 1480-84 (1993)(which simply states that the federal transfer of land consists of "approximately 28,776 acres of land known as Kaho'olawe Island, Hawaii and its surrounding waters.")

The boundaries of the Reserve, as originally proposed in House Bill 2015, included a three mile radius around the island of Kaho'olawe. However, the boundaries of the Reserve was reduced

Commercial use of the island is "strictly prohibited".[106] As set forth in Chapter 6K, the Reserve is "reserved in perpetuity" to be used "solely and exclusively" for the following purposes: 1) "[p]reservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual, and subsistence purposes", 2) "[p]reservation and protection of its archaeological, historical, and environmental resources", 3) [r]ehabilitation, revegetation, habitat restoration, and preservation", and 4) "education".[107]

"Notwithstanding section 6K-3", however, section 6K-7 provides that the Kahoʻolawe Island Reserve Commission (hereinafter "Commission") "shall adopt rules pursuant to chapter 91 to permit fishing in the waters around Kahoʻolawe that are consistent with the purpose of this chapter and that take into consideration the health and safety of the general public."[108]

II. Existing KIRC Administrative Rules Governing Fishing

Pursuant to Chapter 6K, the KIR Commission has adopted rules as an emergency measure to comply with section 6K-7, pending receipt and final approval of an ocean management plan for Kahoʻolawe.[109]

The existing KIR rules prohibit fishing, as well as other recreational water activities within the KIR, except in certain enumerated instances. Section 13-260-3(a) prohibits any person from entering the KIR "for any purpose", which includes "operat[ing]..beach[ing], park[ing], anchor[ing],...moor[ing]

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from three to two miles during negotiations between House and Senate conferees; no reason was given for the change. See, S. Rep. No. 1188, 17th Sess. 1202 (1993).

[106]§6K-3(b), H.R.S.

[107]§6K-3(a),(b), H.R.S.

[108]§6K-7, H.R.S. In addition, the KIR Commission is required to "[a]dopt rules in accordance with chapter 91 that are necessary for the purposes of this chapter...". §6K-6(8), H.R.S. (1994 Supp.).

[109]Title 13, Subtitle 12, Chapter 260, H.A.R.

vessels or other water craft", or otherwise using the waters of the KIR, unless it is an emergency, or expressly provided by the KIR commission rules. Prohibited uses specifically include "fishing from shore, fishing by trolling or drifting, bottom fishing, spearfishing, net or trap fishing, [and] diving," unless permitted under §13-260-4 of the KIRC rules.

Section 13-260-4 authorizes fishing within the waters of the KIR in only two instances. First, trolling is allowed in the KIR two weekends per month, provided that the vessel "remains underway at all times."[110] Second, fishing is allowed if it is conducted during an "escorted access" to the KIR for the four purposes listed in section 6K-3, provided, however, that the applicant secure prior written approval from the KIR commission, and, if necessary, the U.S. Navy.[111] Finally, fishing for "customary and traditional native hawaiian cultural, spiritual and subsistence use, in areas deemed safe" is a permitted use under the KIRC administrative rules. However, all fishing must be conducted while staying on the island.[112]

III. Implementation of Section 6K-7, H.R.S.

A. KIRC's Authority To Regulate the Waters of Kaho'olawe

Although the Kaho'olawe fishery was set aside by the Hawaiian government as early as 1851 for public use, the government reserved the right to regulate the fishery as needed, in order to maintain the health of the resource.[113]

As a general rule, a state has the inherent authority to control public fisheries, and regulate the taking of fish necessary

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[110]§13-260-4(a), H.A.R.

[111]§13-260-4(b), H.A.R.

[112]"[S]ubsistence use" has been defined in the KIR rules as "the customary and traditional native Hawaiian uses of renewable ocean resources for direct personal consumption while staying on the island, and not for sale." §13-260-2, H.A.R.

[113]See, Act of July 11, 1851, § 2.

to conserve the marine resources within its jurisdiction from extermination or undue depletion.[114] This authority stems from the state's inherent police powers as a sovereign entity to regulate health, safety, and welfare in the best interests of its citizens.[115]

In Hawai'i, the agency responsible for adopting regulations to conserve and protect the State's marine resources is the Department of Land and Natural Resources.[116] In the case of Kaho'olawe, however, the authority to regulate has been expressly delegated to the KIR Commission through Chapter 6K.

B. KIRC's Authority is Not Limited to Fishing

Although the KIR Commission is required under §6K-7 to promulgate rules relating to fishing, the KIR Commission's regulatory powers is not limited under Chapter 6K to "fishing". Under § 6K-6(1) and (6), the Commission has the exclusive authority within the KIR to: 1)"establish criteria, policies, and controls for permissible uses within the island reserve", and 2) "carry out those powers and duties otherwise conferred upon the board of land and natural resources...with regard to dispositions and approvals pertaining to the island reserve." This broad language gives the KIR Commission the authority to regulate other types of ocean-related activities such as swimming, surfing, snorkeling, diving, etc.[117]

C. Commercial Use of the Waters Surrounding Kaho'olawe

An additional issue that has been raised is whether commercial

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[114]Territory v. Hoy Chong, 21 Haw. 39, 41 (1912); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 11, 49 S.Ct. 1, 73 L.Ed 147 (1928).

[115]Territory v. Hoy Chong, 21 Haw. at 41.

[116]See, Chapter 188, H.R.S.

[117]See, §13-260-3(a), H.A.R. It may even be argued that because the express language of §6K-7 only requires the Commission to permit "fishing", other types of ocean recreation activities, such as swimming, surfing (wind and board), snorkeling, diving, etc, may be excluded by implication.

activities are permitted uses within the Reserve. The language of section 6K-3(b) states that: "the island shall be reserved in perpetuity for the uses enumerated in subsection (a). Commercial uses shall be strictly prohibited." Subsection (b) implies that all uses in the Reserve other than those specifically set forth in subsection (a), including commercial uses, are prohibited.

However, an argument can be made that subsection (b) states that the enumerated uses set forth in subsection (a), which restrict commercial use, apply only to to the island of Kaho'olawe, and do not extend to the entire Reserve. Indeed, §6K-3(b) appears to be susceptible of two interpretations. As a general rule of statutory construction, in the case of an ambiguous statute, a court may turn to the legislative history of the statute in order to discern legislative intent.[118]

A review of Chapter 6K's legislative history shows that the legislature did not intend to limit the four enumerated purposes set forth in subsection (a) to the island, but intended to apply the prohibition on commercial use to the entire Reserve. For example, the House Standing Committee Report states that:

> this island reserve is to be held in perpetuity and solely for the purposes of preserving traditional native Hawaiian culture and religion; for education, and for the rehabilitation, restoration, preservation, and protection of the environmental, archaeological, and historical resources of the island.[119]

In addition, it can be argued that commercial use of the waters surrounding Kaho'olawe is inconsistent with the overall intent and purpose of Chapter 6K, as defined in §6K-3(a), which is to have the entire Reserve set aside to be used as an ecological preserve. A final opinion, however, should be rendered by the Commission's attorney. Any prohibition on commercial use must be rationally tied to the purposes of the Reserve, such as preservation of the

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[118]Housing Finance and Development Corp. v. Castle, 79 Haw. 64, 898 P.2d 576 (1995); Allstate Insurance Co. v. Hirose, 77 Haw. 362, 884 P.2d 1138 (1994).

[119]H.R.No. 453, 17th Sess. 1153 (1993)

fishery resource.

D. Problems Associated with Implementing § 6K-7, H.R.S.

As set forth in §6K-7, the KIR Commission must permit fishing activities in the KIR. The nature and extent of those fishing activities, however, is unclear from the language of the statute. As previously discussed, section 6K-7 states that the KIR Commission shall adopt rules to permit fishing in the KIR, "[n]otwithstanding section 6K-3", that are "consistent with the purpose of [Chapter 6K] and that take into consideration the health and safety of the general public."

Section 6K-7 requires that the KIR Commission disregard § 6K-3, which explicitly sets forth the purpose of the KIR, when promulgating fishing regulations, but then states that these rules must be "consistent with the purposes of [Chapter 6K]".[120] The legislature cannot direct the KIR Commission to promulgate rules that may conflict with the purposes set forth in the enabling legislation. As a general rule of statutory construction, an agency should not construe a statute in such a manner as to produce an absurd result.[121] Properly construed, § 6K-7 requires the KIR Commission to promulgate rules that allow fishing activities in the KIR that are consistent with the purposes of Chapter 6K. Thus, commercial fishing cannot be authorized by regulation, since it is prohibited by statute.

E. Factors KIRC Must Consider Under Chapter 6K

The following language, taken from sections 6K-3 and 6K-7 are

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[120]A review of Chapter 6K's legislative history shows only that § 6K-7 was added during conference committee "to permit fishing in the waters around Kaho'olawe". Conf. Rep. No. 215, 17th Sess. 952 (1993). For a complete legislative history of Chapter 6K, see: H. Rep. No. 712, 17th Sess. 1267 (1993); H. Rep. No. 452, 17th Sess. 1153-1154 (1993); S. Rep. No. 1011, 17th Sess. 1142 (1993); S. Rep. No. 1188, 17th Sess. 1202 (1993).

[121]Keaulii v. Simpson, 74 Haw. 417, 847 P.2d 663, recon. denied, 74 Haw. 650, 853 P.2d 542, cert. denied, 114 S.Ct. 61 (1993).

factors that the Commission must consider and apply in promulgating its rules concerning fishing: 1) the "health and safety of the general public", 2) "preservation and protection of ...environmental resources", 3) "rehabilitation...habitat restoration, and preservation", 4) "education", and 5) "preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual, and subsistence purposes".

Although each purpose has been set forth in a separate section, these purposes overlap to a considerable extent with each other. For example, habitat restoration of the marine life in the waters surrounding Kaho'olawe also promotes traditional and customary native Hawaiian practices, such as aloha 'āina and mālama 'aina. In addition, the KIR Commission should not favor one purpose over the other, but give equal weight to each purpose in formulating its rules.[122]

The KIRC's rules will be based on, and guided primarily by, the fisheries management plan developed in connection with this ocean management plan. The criteria used to develop the fisheries management plan should be consistent and conform with the overall use plan developed by PBR Hawai'i for Kaho'olawe.[123]

1. Protection of the Health and Safety of Users of KIR

One important factor required by the language of § 6K-7 is the health and safety of the public. Protection from ordinance is a paramount health and safety factor, given the fact that Kaho'olawe

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[122]For example, by placing a preference for conserving and protecting Kaho'olawe's marine resources, the Commission may necessarily exclude traditional and customary practices. See, e.g., Chapter 195, H.R.S. (traditional and customary Hawaiian practices not permitted within the Natural Area Reserve System).

[123]As stated in the Kaho'olawe Use Plan (Dec. 1995), the vision statement for Kaho'olawe includes the belief that "[p]ristine ocean waters and healthy reef ecosystems are the foundation that supports and surrounds the island." This statement has been interpreted to mean that "Kaho'olawe presents the people of Hawai'i with a unique and historic opportunity to...create a marine sanctuary that can also help regenerate marine life for Maui and Lāna'i". Id. at 2-1.

was used for many years as a military bombing range. Accordingly, rules regulating activities within the KIR should focus on the very real threat of injury caused by unexploded ordinance.

2. Conservation of the Marine Resources in the KIR

The language in 6K-3 which identifies the "preservation and protection of environmental resources", and "rehabilitation...habitat restoration, and preservation" underscores the Commission's duty under Chapter 6K to give priority to the protection of all marine resources within the KIR. Accordingly, fishing must be regulated in such a manner that it does not overburden the KIR's marine ecosystem.

3. Education

The third purpose identified in §6K-3 is that the island shall be used for "education". Consistent with the other purposes identified in §6K-3, the KIR Commission's rules should include participation in educational programs for all user groups, such as fishermen, that relate to conservation of the KIR[124], including those values relating to conservation as practiced by native Hawaiians.[125]

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[124]Educating the public by teaching them about traditional Hawaiian fishing methods used on Kaho'olawe is one means of educating the public concerning the customary fishing practices of native Hawaiians.

However, the KIR Commission should not exclude native Hawaiians from using modern techniques to catch fish. It is clear that native Hawaiians are not limited to methods of fishing at the time of western discovery, but may employ modern boats, nets, and other techniques in the exercise of their fishing rights. See, United States v. Washington, 384 F.Supp. 312, 402 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)("The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource.").

[125]The conservation and protection of the resource is consistent with basic Hawaiian values such as mālama 'āina and aloha 'āina; it is an essential element to maintaining a healthy fishery. In early Hawaiian society, fish and other marine life were cultivated and cared for in the same manner as plants and

4. Protection of Traditional and Customary Uses

The language of §6K-3 which sets aside the KIR for "preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual, and subsistence purposes", underscores the Commission's duty to promulgate rules that will not interfere with the exercise of these rights. In addition, because the KIR is to be held, under § 6K-9, by the state in trust for the eventual return to a sovereign native Hawaiian entity, the KIR Commission has a fiduciary duty to ensure that the Kaho'olawe fishery, which is a

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animals were to supplement the Hawaiians' subsistence lifestyle. As one well respected author noted:

> To conserve the supply of all resources was constantly in the Hawaiian mind. When plants were taken from the forest, some were always left to replenish the supply. Replanting was done without fail at the proper time as beds of taro and sweet potatoes were used. 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 that the gods would have been displeased by greediness or waste.

Titcomb, Margaret Native Use of Fish in Hawaii (UH Press 1983), p.12-13.

One well-known kapu was that governing aku and 'opelu. Fishing for 'opelu was permitted during the summer while fishing for aku was permitted during the winter. On the other hand, no kapu were imposed on young fry, such as the manini, kole, uhu, kumu, palani, kala, and others, that matured in sheltered sea pools. (p.14)

part of the trust corpus, remains viable for the new nation.[126]

F. Preference for Native Hawaiians

1. Race-based Legislation violates Equal Protection

The equal protection amendment to the U.S. Constitution prevents Congress or States from enacting laws that discriminate based on race.[127] In Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (U.S. June 12, 1995), the United States Supreme Court held that a federal law that gives a preference to minority owned businesses violates equal protection, unless the government can show a compelling interest for such preference. Although the Court held that Congress would be given greater deference than state or local governments when it enacts remedial legislation aimed at improving the conditions of minorities, it must nonetheless show, with a high degree of specificity the discrimination complained of, and the steps taken to remedy such discrimination.

Six years earlier, the Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) held that affirmative action programs enacted by a State or local government are presumed unconstitutional, unless the government can show a compelling interest for such preferential treatment.

2. Preference for Native Americans

In the case of native Americans, however, Congress may enact special legislation that treats Native Americans differently from other citizens because such preference is not based on race, but on their unique political status as semi-autonomous, dependent

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[126]Arguably, the KIRC is only required to turn over the KIR in a condition as good as it existed at the time Chapter 6K was created (1993). Given that Kaho'olawe fishery has been substantially degraded through long periods of public use, KIRC's only duty, under trust law, may be to ensure that the fishery does not become further degraded.

[127]U.S. Const., amend. V. The equal protection amendment is made applicable to the State or county governments through the 14th amendment.U.S. Const., amend. XIV, § 1. Hawai'i has enacted an amendment similar to its federal counterpart. Haw. Const., art. I, § 5.

nations.[128] Special treatment stems from the government to government relationship that Indian tribes enjoy with the federal government, and which is provided for in the United States Constitution.[129]

The issue that has not been resolved is whether Native Hawaiians enjoy the same political status as other aboriginal groups within the United States. Indeed, Congress has included Native Hawaiians in various federal entitlement programs that benefit Native Americans.[130] While many believe that legislation enacted for the benefit of Native Hawaiians is constitutional because it is analogous to that which benefits Indian tribes,[131] the issue has not been fully resolved.[132] However, the issue is whether the courts will uphold the constitutionality of such legislation, viewing it as race-based legislation or legislation

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[128]Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L.Ed 2d 290 (1974).

[129]U.S. Const., art. I, § 8. This special treatment is made applicable to the state's through the 14th amendment.

[130]Examples include: Native American Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (1975)(codified at 42 U.S.C. § 2991 (1976) (providing assistance to public and nonprofit agencies serving "American Indians, Hawaiian Natives, and Alaskan Natives"); American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996) (1978) (designed to protect the religious expression "of the American Indian, Eskimo, Aleut, and Native Hawaiians"); Native American Employment and Training Programs, as amended in 1978, Pub. L. No. 95-524, § 302, 92 Stat. 1909 (1962) (codified at 29 U.S.C. § 872 (1978) (to promote "programs to meet the employment and training needs of Hawaiian natives")); The Native American Graves Protection and Repatriation Act, Pub. L. No. 101-60, 104 Stat. 3048 (1991) (codified at 25 U.S.C. sec. 3001)(which includes native Hawaiians among the beneficiaries).

[131]Jon Van Dyke, The Constitutionality of the Office of Hawaiian Affairs, 7 Haw. L. Rev. 63 (1985); Atty. Gen. Op. No. 80-8 (1980).

[132]Recently, a lawsuit was filed in federal district court challenging the constitutionality of the Office of Hawaiian Affairs. Rice v. Cayetano, Civ. No. 96-00390.

similar to those that benefit Indian tribes.

When Hawai'i was admitted into the Union in 1959, Congress transfered to the state two tracts of lands which were to be held in trust for the benefit of native Hawaiians: 1) the Hawaiian Homes Commission Act of 1920, and 2) lands conveyed under §5(f) of the Admission Act, commonly referred to as the "ceded lands trust."[133] It is well settled that a native Hawaiian individual or organization has standing, as a beneficiary of these land trusts, to file an action, in either federal or state court, against the State and its officers to enjoin a breach of trust by disposal of trust assets in violation of constitutional and statutory provisions.[134]

At least one federal district court has held that the Hawaiian

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[133]In 1959 Congress transferred lands that were "ceded" or obtained from the Provisional Government following the overthrow of the Hawaiian monarchy in 1893, to the State of Hawai'i, to be held in trust, the lands or the income derived from those lands to be used for five specific purposes: 1) support of public schools and other public educational institutions, 2) betterment of conditions of native Hawaiians, 3) development of farm and home ownership, 4)public improvements, and 5) any other public use. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4,6 (1959).

Hawaii has recognized two classes of beneficiaries of the §5(f) land trust: native Hawaiians and the general public. Haw. Const. art. XII, §4. The Department of Land and Natural Resources, headed by the Board of Land and Natural Resources, is the agency charged with the administration of public lands, including those subject to the §5(f) trust. H.R.S. §171-3 (Supp. 1991).

[134]Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327 (1982); The Aged Hawaiians v. Hawaiian Homes Commission, 78 Haw. 192 (1995); Price v. Akaka, 3 F.3d 1220, 1224-1225 (9th Cir. 1993); Pele Defense Fund v. Paty, 73 Haw. 578, 591-595, 601-606 (1992).

The State, as trustee, is required to hold to the same standards as a private trustee for the management and operation of the Hawaiian Home Lands trust, Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 339-340 (1982), as well as the ceded lands trust.See, Pele Defense Fund v. Paty, 73 Haw. 578, 604-605 n.18 (1992); but, see, Price v. Hawaii, 921 F.2d 950, 955-956 (9th Cir. 1990).

Homes Commission Act (HHCA), which creates a homesteading program that gives preference to native Hawaiians, is not unconstitutional. In Naliielua v. State of Hawaii, 795 F. Supp. 1009 (D. Haw. 1990), Judge David Ezra held that the Hawaiian Homes Commission Act (HHCA) did not create a suspect classification based on race, analogizing the HHCA to congressional legislation giving preference for Indians. Naliielua v. State of Hawaii, 795 F. Supp. at 1012-1013.

The waters surrounding Kaho'olawe became part of the ceded lands trust when Hawai'i was admitted into the Union in 1959.[135] Although no cases have been brought that challenge the constitutionality of the 5(f) trust, an argument can be made that giving preference to native Hawaiians[136] who wish to exercise

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[135]The Submerged Lands Act of 1953 (43 U.S.C. §1301-1343), made applicable to Hawai'i through section 5(i) of the Hawai'i Admission Act, conveyed all tidal and submerged lands extending from high water mark to a distance of three geographic miles seaward to the State of Hawai'i. 43 U.S.C. §1311(a); Civil Aeronautics Board v. Island Airlines, 235 F. Supp. 990 (D. Haw. 1964), aff'd, 352 F.2d 735 (9th Cir. 1965).

The State has acknowledged that the lands conveyed under §5(i) are not independent, but impressed with the §5(f) trust. See, paragraph 28, page 23 in Findings of Fact, Conclusions of Law Decision and Order Dated December 1994 in In re Conservation District Use Application for Haseko (Ewa), Inc., No. OA-2670.

Kaho'olawe was never ceded lands subject to the 5(f) trust, having been reserved by the United States under section 5(c) of the Admission Act for use as a military target range and training facility. Section 5(c) of the Admission Act states that any lands set aside by Executive Order prior to 1959 shall remain the property of the United States. Pub. L. No. 86-3, 73 Stat. 4. Under sections 5(e) and (f), if the President determines that the lands are no longer needed by the United States, those lands are to be conveyed to Hawai'i. 73 Stat. at --, When Kaho'olawe was finally returned to Hawai'i in 1993, it became impressed with the 5(f) trust.

[136]For purposes of this discussion, section 5(f) states that the lands subject to the 5(f) trust shall be used, among other things, for the betterment and conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920, as amended".

traditional and customary activities in the waters off Kaho'olawe, is constitutional because it is consistent with the trust purposes set forth in § 5(f). Enacting rules that provide a preference for native Hawaiian fisherman can be viewed as consistent with the State (and the KIRC)'s duty to fulfill the mandates of the §5(f) trust to native Hawaiians.[137] In addition, it could arguably be consistent with the KIRC's fiduciary duty to hold the KIR for the eventual transfer to a sovereign Hawaiian nation. See, §6K-9, H.R.S. [138] In any event, the Commission must determine such preferences, consistent with §5(f) and Chapter 6K, as well as the

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As defined in the Hawaiian Homes Commission Act, the term "native Hawaiian" means "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778". §201(a)(7), H.H.C.A.

[137]The federal courts have given considerable leeway to the State in managing and disposing of the trust assets under §5(f). As stated in Price v. Hawaii, 921 F.2d 950, 956 (9th Cir. 1990):

> ....the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes.
>
> * * * * * * * * * * * *
>
> Our reading [of section 5(f)] also helps assure that the federal courts will not become involved in the micro management of the government of the State. While we must stand ready to correct diversions of funds from the listed purposes, we need not and should not immerse ourselves in the day-to-day activities of state officials as they struggle with the immense task of managing the resources of the State for public purposes.

[138]At least one federal court case, Han v. Department of Justice, 824 F. Supp. 1480, 1486 (D. Haw. 1993) has concluded that the federal government has no trust duty to native Hawaiians concerning disputes arising out of the State's management and disposition of Hawaiian home lands, the precedent is questionable, given that the Ninth Circuit affirmed the Han opinion without deciding the issue. See, Han v. Department of Justice, 45 F.3d 333 (9th Cir. 1995). A recent Hawaii Supreme opinion disagrees with the district court's analysis in Han. See, Aged Hawaiians v. Hawaiian Homes Commission, 78 Haw. 192, 206 (1995).

procedure for determining which users are "native Hawaiian".

3. Other Federal Models

At least two federal laws purport to give preference to native Hawaiian fishing practices; however, these laws, in fact, do not create enforceable fishing rights for native Hawaiians.

On June 20, 1938, federal legislation was enacted which authorized the Secretary of the Interior to acquire lands located in the Kalapana area for the expansion of the Hawaii Volcanoes National Park. This legislation, commonly referred to as the "Kalapana Extension Act", authorized the Secretary to issue residential leases to native Hawaiians who resided in the area being acquired for the Park. The Act also provided "[t]hat fishing shall be permitted in said area only by native Hawaiian residents of said area or of adjacent villages and by visitors under their guidance."[139] The language of the Act does not create a right to fish in the fishery per se, but rather creates an exclusive shoreline fishing priviledge for native Hawaiians residing in Kalapana and their guests. Indeed, the federal government has no jurisdiction over the ocean that adjoins the Park because the Park boundaries, as defined by the 1938 statute, do not include the fisheries appurtenant to the lands that were acquired as part of the extension.[140] Moreover, the Secretary of the Interior, in implementing the language of the statute, enacted regulations which allow:

Native Hawaiian residents of the villages adjacent to the

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[139]An Act to Add Certain Lands on the Island of Hawaii to the Hawaii National Park, And For Other Purposes, Pub. L. No. 680, §3(a), 52 Stat. 781, 784 (1938)(now codified at 16 U.S.C. 396(a) 1988).

[140]Many of these ahupua'a conveyed by the Territory of Hawaii to the United States were originally granted to the Hawaiian government after the Māhele of 1848. As discussed, supra, the government declared these fisheries to be open to the public. Nonetheless, the Park's boundaries do not include these fisheries. See, e.g., 16 U.S.C. §391b which states, among other things, that the Park's makai boundaries run "[a]long the seacoast at high water mark...". See, also, 16 U.S.C. §391a.

> Kalapana extension area added to the park by the above act [Act of June 20, 1938] and visitors under their guidance are granted the exclusive privileges of fishing or gathering seafood from parklands (above the high waterline) along the coastline of such extension area.

36 C.F.R. §7.25(a)(3)(i)(1988)(emphasis supplied).

A second model that purports to give fishing rights to native Hawaiians is the "native Hawaiian fishing rights" provision set forth in the rules drafted by the Western Pacific Regional Fishery Management Council (the Council).[141] However, the proposed draft of the rules do not contain a provision for native fishing rights, the Council leaving this issue for another day.[142]

G. Laws Based on Custom

As previously discussed, laws enacted by the State which give a preference based on race are subject to strict scrutiny and in most cases, will be deemed unconstitutional. In Hawai'i, however, the common law doctrine of custom entitles native Hawaiians to certain rights that is not based on race.

1. Custom

Article XII, § 7 of the Hawaii State Constitution provides that:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence,

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[141]The Western Pacific Regional Fishery Management Council was created by the Fishery Conservation and Management Act of 1976(P.L. 94-265).

[142]In its latest amendment to the Fishery Management Plan for the Bottomfish and Seamount Groundfish Fisheries of the Western Pacific Region (March 1988), the Council stated that:

> In developing this [limited entry] program [for fishing in the Northwestern Hawaiian Islands], the Council considered the question of whether to make special provision for native Hawaiian fishing rights. No recommendations or proposals are made at this time. The Council is continuing to research this issue with the Native Hawaiian Legal Corporation and the Office of Hawaiian Affairs.

Amendment at p. 11-7.

> 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.[143]

As set forth in the plain language, Article XII, § 7 protects "all rights" customarily and traditionally exercised by native Hawaiians who are descendants of ahupua'a tenants, subject to state regulation. These rights would include fishing and gathering of marine resources within the KIR, as well as other ocean recreational activities that are "traditional and customary".[144]

2. Customary practices must be considered by the KIRC

It is clear that agencies such as the KIRC must consider the impacts of their decisions on traditional and customary practices. In Public Access Shoreline Hawaii v. Hawaii Planning Commission, 79 Haw. 425, 903 P.2d 1246 (1995), cert. denied, 64 U.S.L.W. 3511 (1996), the Hawaii Supreme Court held that the Hawaii County Planning Commission was required, under Article XII, § 7, to consider the impacts of granting a county shoreline permit for development at Kohanaiki, Kona, Hawai'i, on the traditional and customary practices of native Hawaiians residing near the permit area who use the shoreline area for the harvesting of shrimp.[145]

As set forth in the PASH decision, all government agencies must balance the competing interests of the landowner (or, in this case,

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[143]Adopted by the 1978 Constitutional Convention and ratified by the voters, section 7 protects all pre-existing rights of native Hawaiians, without specifying what those rights are. It is important to point out that section 7 does not create any new rights.

[144]Cite other examples under §1-1, H.R.S.

[145]Public Access Shoreline Hawaii (PASH), a community organization which included native Hawaiian members, asked the Hawaii County Planning Commission for an administrative hearing before it issued a shoreline management area permit to a developer to construct a master planned resort at Kohanaiki, Kailua-Kona. PASH claimed that construction of the resort would harm native Hawaiian PASH members use of the anchaline ponds near the resort's shoreline, to gather shrimp for fishing.

the purposes of Chapter 6K) against the rights of native Hawaiians seeking to exercise those practices.[146] Neither of these interests are absolute, as the PASH court noted, but the state is required to balance any competing interests. This "balancing" role is not different in kind from that inherent in land use regulation. Nonetheless, the PASH court made it clear that "unreasonable" and "non-traditional" uses are not protected.

3. Nature and Scope of Customary Fishing Rights

a. Based on Tenancy

Under Hawai'i's early case law as it developed in connection with private fisheries, a tenant had the right to fish in the fishery as an incident of his tenancy in the ahupua'a.[147] As defined in early case law, the word "tenant" is synonymous with the word "occupant", that is, any person who lawfully occupies the ahupua'a is a tenant within the meaning of the law.[148] In the case of Kaho'olawe (assuming that the entire island of Kaho'olawe comprises a single ahupua'a), any person who resides on Kaho'olawe would be entitled to fish in the Kaho'olawe fishery. Practically speaking, however, this "right" is of little import, as Kaho'olawe, other than the modern-day kahu who plan to reside on the island,

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[146]As stated in PASH, while the state is obligated to protect the reasonable exercise of traditional practices "to the extent feasible", the state can permit development that interferes with such rights, if the exercise of those rights would result in "actual harm" to the "recognized interests of others". at 450, n.43.

[147]Haalelea v. Montgomery, 2 Haw. 62,71 (1858); Hatton v. Piopio, 6 Haw. 334,336 (1882).

[148]As the Court held in Hatton, supra:

> Every resident on the land, whether he be an old hoaaina, 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.

has no "tenants" within the legal meaning of the word.[149] Moreover, the right of the tenant to fish in the fishery would be limited, under traditional law, to the edge of the coral reef, which is less than the present two mile boundary established under §6K.

b. Based on Custom

As set forth in Public Access Shoreline Hawaii, supra, rights based on custom are separate and distinct from those based on tenancy. In order to determine the legitimacy of claims based on tradition and custom, the PASH court set forth "some specific, although not necessarily exhaustive guidelines". First of all, the custom must have predated November 25, 1892, the date of enactment of §1-1. Second, the custom must be "consistent", i.e., the custom is properly measured against other customs, not the spirit of the present laws. Third, the custom must be "certain", i.e., it must be objectively defined and applied. Finally, the custom must be "reasonable" i.e., the custom is reasonable even though no acceptable rationale can be assigned, as long as there is no "good legal reason" against it.[150]

As previously discussed, the nature and scope of such traditional and customary fishing practices will ultimately be decided on a case-by-case basis by agencies, following the guidelines set forth in Public Access Shoreline Hawaii. Accordingly, the KIR Commission's rules should include provisions that allow native Hawaiians the opportunity to prove traditional and customary use.

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[149]The law is unclear whether in order to be protected under Article XII one must actually be a "tenant", or merely engage in traditional and customary activities that were possessed by tenants.

[150]In addition, PASH stated that claim based on custom are not limited to persons of 50% or more Hawaiian blood. Also, the particular custom must have continued to be practice. Also, the PASH court reaffirmed the limitation of the exercise of traditional and customary rights to undeveloped lands.

Assuming that native Hawaiian families can satisfy the guidelines set forth in PASH, the KIR Commission would be obligated to protect those rights. Indeed, the KIR Commission is already statutorily obligated under Chapter 6K to consider and protect those rights.[151] As stated in PASH, these rights are not based on race, but "flow from native Hawaiians' pre-existing sovereignty."

c. Sale of Fish As A Traditional and Customary Use

Under Hawai'i's traditional land tenure, no distinction was drawn between gathering practices that occured between the ocean and uplands. However, at least one case has held that a tenant of an ahupua'a has the right to sell fish from the fishery as an incidence of his tenancy. In Hatton v. Piopio, 6 Haw. 334 (1882), Hatton, the konohiki of Honouliuli, sued Piopio, a tenant of Pu'uloa for selling fish obtained from the Honouliuli fishery, claiming that since Piopio owned no kuleana, he had no right to fish nor to sell the fish.

The Supreme Court rejected Hatton's argument, holding that any bona fide resident of the ahupua'a has a right to fish in that ahupua'a as an incident of his tenancy. In addition, the Court held that Piopio had a right to sell his catch, since the law that regulates the fisheries did not expressly prohibit the sale of fish. In so deciding, the Court compared the statute relating to fisheries with §7-1's predecessor which reserves certain native gathering rights for tenants in the uplands:

> It is noticeable that in Section 1477 of the Civil Code [predecessor to §7-1, H.R.S.], where certain specific rights of the people are secured, the people on the lands are allowed to take firewood, house timber, aho cord, thatch and 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 for profit.' No such restrictions are made in the statute respecting the fisheries.

Hatton reaffirms the right of tenants lawfully occupying an ahupua'a to fish in the fishery attached to the ahupua'a, but expands the right to allow the tenant to actually sell his or her

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[151] §6K(a)(1), H.R.S.

catch, subject to the right of the konohiki to place a kapu or to tax the catch.

It is important to point out here that Hatton is a case that involves a private fishery, and is based on tenancy within an ahupua'a. There are no cases that have applied this rationale to public fisheries.

d. Model based on Konohiki (Private) Fisheries

In discussing the scope of customary practices, it should be pointed out that the KIR Commission should consider the konohiki (private) fisheries model, which is based on "tradition and custom". If adopted, the KIRC would resume the role of konohiki as set forth in section 187A-23, H.R.S.

There are problems with applying the laws governing private fisheries to any fishery management model proposed for Kaho'olawe. As discussed extensively in Part I, supra, the laws governing the konohiki (private) fisheries were based, in part, on a tax/tribute system owed to the landlord, and, in part, on the conservation of the resource, for the exclusive benefit of the konohiki and, to a lesser extent, the tenant. Thus, this model may not necessarily be compatible with the express purposes set forth in Chapter 6K because the primary benefits of conserving the resource under 187A was for the direct personal benefit of the konohiki, and his or her retainers.[152]

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[152]The konohiki placed many kapu, or restrictions on harvesting fish in certain areas as well as during the spawning seasons. The nature and extent of these kapu are not well known, and probably varied from one locale to the other, depending on the conditions of the area.

In Ka'u, for example, the kapu on fishing areas rotated. During the summer months, a kapu was placed on deep sea fishing, however, inshore fishing was permitted because the fish were abundant during the summer. Conversely, during the winter months, a kapu was placed on all inshore fishing, including seaweeds and shellfish. However, deep sea fishing was permitted. After the kahuna had examined an area and determined that the condition of the animals and plants were mature and had become established, he reported to the chief who then ended the kapu. Once the kapu was lifted, however, all persons did not have immediate use of the

More importantly, the basis for any asserted tenants rights under 187A stem from residency within the ahupua'a, an element that is not found at Kaho'olawe. In addition, the authority of the KIR under §187A would be considerably reduced because the KIR Commission's control would extend no farther than the edge of the

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area. For several days after the kapu was lifted, the chief had the perogative of reserving all of the seafood gathered, for himself and his household/retinue. After that the konohiki took his share, and finally, the area was open to all.

Samuel Kamakau, noted Hawaiian historian, writes of a similar experience during Kamehameha's rebuilding of the Islands after his conquest:

> He placed restrictions on sea fisheries for periods of five months, and on the six month when the restriction was removed and fishing was allowed all over the land, the king and the commoners were usually the only one's to share the first day's catch, and the landlords and the commoners the second day's catch. After this the restrictions were removed, allowing all to fish for six months. At the end of this period restrictions were again placed over certain fish in order that they might increase. These restrictions were also extended to the deep-sea fishing grounds where the kahala were caught and the fish that go in schools, such as the deep-sea squid, uhu, aku, and flying fish. Expert fishermen were appointed to catch the smaller fish such as 'a'ala'ihi, maikoiko, kole, 'upapalu, manini, 'opule, 'u'u, and other such fish as served for the morning meal.

According to Kamakau, a higher-ranking ali'i always had the perogative of divesting control of the fishery from the lower-ranking ali'i, or konohiki, presumably for the good of the resource (people). For example, Kamakau writes of the High Chiefess Ka'ahumanu, that:

> She was devoted to the people. In certain years she allowed the people to fish in the tabu waters of Oahu and forbade the landlords to prevent them from taking fish usually restricted for the chiefs, such as the uhu, opule, he'e, and kahala. For a time there were no tabu fishing grounds for Oahu.

Kamakau, S.M. Ruling Chiefs of Hawaii, (Kamehameha Schools Press 1992), p. 307.

coral reef, which is less than the present two mile boundary established under §6K. If anything, the KIRC should assume a "modified" role as konohiki specifically for the purpose of regulating and enforcing laws conserving the resource, consistent with the purpose for establishing the KIR, not as a personal benefit to the KIR Commission.

4. Regulations Cannot Conflict with State Law

In PASH, the Supreme Court held that while the State retains the right to "regulate" the exercise of Hawaiian traditional and customary practices, it "does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence."

As discussed previously in Part I, supra, the government has regulated the taking of fish since 1872. Many of the regulations pertain to the manner in which the fish is being taken. Size limits are established for commercial use; non-commercial use is largely not regulated, with a few exceptions.

In adopting rules governing fishing within the KIR, the KIRC may wish to consider amending the existing laws governing the size and type of fish, shell fish and other marine life caught that are inconsistent with Hawaiian tradition and customary practices. As the konohiki, however, the KIRC's primary concern should be the conservation of the resource.

IV. CONCLUSION

The proposed regulations governing fishing should be applied evenhandedly and have a rational basis in order to withstand judicial scrutiny. Rules to monitor and conserve the resource cannot be effectively implemented until the KIRC has conducted a comprehensive assessment of the marine biota in the KIR. Accordingly, monies should be expended by the KIRC to monitor and assess the water quality, fish populations, and general health of the marine ecosystem. This will give the KIRC an accurate database from which to gauge the impacts of pollution/overfishing on the marine life. When the levels drop below levels adopted by the KIRC in consultation with fisher/biologists, the KIRC will have a basis from which it can impose a kapu or restrictions until the

populations return to normal.

In addition to monitoring, the KIRC should expend monies for a comprehensive enforcement program to ensure that poaching does not occur. Under §6K-4, the DLNR has enforcement authority over laws and rules applicable to the KIR reserve. Any enforcement program should consist of officers within DOCARE specifically assigned to the KIR, or having DOCARE, via the BLNR, deputize volunteers to monitor and report violators[153]. In addition, the Commission should consider stiffer penalties for persons violating the Commission's rules[154].

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[153]Under section 199-4, H.R.S. the Board of Land and Natural Resources has "police powers" to appoint conservation officers. Under §199-1(2), the Board may "employ or appoint, and remove" enforcement officers in the Division of Conservation and Resource Enforcement, "including but not limited to enforcement officers on a voluntary basis and without pay." Such persons appointed and commissioned "shall have and may exercise all of the powers and authority of a police officer..".§199-4, H.R.S.

[154]Despite best efforts by the DOCARE staff, the courts are still reluctant to impose stiff fines for persons caught violating the rules. In one instance, an individual caught harvesting undersized opihi was fined $50.00. (pers. comm. with Keoni).