



# Feasibility of a Non-Commercial Marine Fishing Registry, Permit, or License System in Hawai'i

Study Group Final Report  
December 2016





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# I. EXECUTIVE SUMMARY

**Hawai'i's fisheries are indispensable** to the State's environment, economy, food security, and culture. Hawai'i's fisheries require well-informed management with an adequate capacity to ensure that the resources exist for future generations. The Hawai'i State Legislature has periodically examined what a non-commercial marine fishing license may be able to offer to address these needs. Hawai'i remains, however, the only coastal U.S. state without a mandatory non-commercial marine fishing registry, permit, or license ("RPL") system, because these previous attempts to enact an RPL system have been unsuccessful.

To better understand the issues relevant to an RPL system, Conservation International Hawai'i (CI Hawai'i) and the Western Pacific Regional Fishery Management Council ("Council") invited individuals from different fishing organizations and interest groups to serve as members of a Study Group to undertake a fresh examination of the RPL system issues. These individuals have diverse knowledge and experience and worked together over much of 2016 to gather and analyze information to better understand the implications of any prospective RPL system.

The Study Group focused on evaluating any potential RPL system based on its ability to meet three primary objectives: (1) provide additional and more robust data to support fishery management; (2) foster two-way dialogue between fishers and managers by identifying the universe of non-



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commercial fishers in Hawai'i and developing approved communication pathways; and (3) create a source of independent, continuous funding to support effective fisheries management. The Study Group examined several RPL system options, including those enacted by other states, that might meet the above-stated objectives and sought to analyze the respective advantages and disadvantages of each. The group also reviewed the results of legal and financial analyses of some or all of these RPL system options, interviewed fisheries managers in other coastal states, and focused outreach efforts on certain unique stakeholders and rights-holders.

The Study Group did not identify a preferred alternative, however, the Study Group concluded that there are no legal or constitutional barriers in Hawai'i that would prohibit the implementation of a new RPL system, and that it is possible, subject to further consultation regarding implementation, to design a system that does not violate the Native Hawaiian traditional and customary rights protected under Hawai'i law. The Study Group further concluded that only some form of fee-based license or permit system would address all three primary objectives, and that it would be possible for such a system to be designed in a way that would generate additional net revenue for fisheries management using a fee structure not unlike Hawai'i's existing freshwater fishing and game mammal hunting licenses fees.

There are a number of RPL system design and implementation options available to allow different categories of fishers, fishing activities, and other factors to be handled in distinct ways, if necessary. For example, it is common in other states to grant RPL system fee waivers for children, seniors, and in some cases, very low-income individuals. Additionally, there may be special design and implementation considerations to address Native Hawaiian traditional and customary rights. This report identifies and discusses these options.

The Study Group takes no collective position on whether an RPL system should be implemented at this time, or if a specific RPL system option is preferred over others. However, if the State chooses to develop an RPL system, the group recommends that the following issues be carefully considered. (Further elaboration of these are included in Section XII of this report).

## A. OUTREACH

- Undertake extensive outreach, consultation, and discussions with affected stakeholders statewide prior to and as part of the decision-making process.
- As part of any outreach effort, ensure that this study is available to the public in general and to fishing stakeholders in particular.

## B. ADDITIONAL RESEARCH AND INFORMATION GATHERING

- Clarify the definition of the term ‘non-commercial fishing’, and better understand the demographics of the population segments that are active in non-commercial fishing.
- Consult non-commercial Native Hawaiian fishing practitioners to identify practices that are a part of traditional subsistence, cultural, ceremonial, or religious activities.
- Consult with charter fishing industry representatives to identify RPL elements that would work easily for charter patrons and businesses, and consider ways to use RPL fees collected through charter operations to improve State infrastructure used by this industry.
- Continue to collect additional information from other states on their lessons learned.
- Carefully consider and conduct further analysis on the financial implications of prospective fee-waivers or exemptions from any new RPL system.
- Consider ways to align any RPL system with complementary data collection efforts that improve management of near-shore waters.
- Ensure that the State has specific plans for how data will be collected, used, and shared before data collection efforts begin. Conduct further research into any confidentiality and data protection issues that may apply.



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## C. FUNDS

- Ensure that any and all funds collected from any form of RPL system are protected and dedicated to managing marine fisheries.
- Ensure that any funds derived from a fee-based RPL system are additive to the Division of Aquatic Resources’ (DAR’s) budget and do not replace General Funds and/or other funds.

## D. ADVISORY BOARD

- Establish a formal advisory board to help DAR improve communication and information exchange with non-commercial fishers.
- Ensure adequate representation from different segments of the fishing communities, both geographically and by type of fishing.
- Define and publicize lists of any special gear, restricted areas, or individual species if considering charging permit fees for using special gear, fishing in restricted areas, or fishing for specific species.
- If any RPL system is enacted, require that DAR provide annual reports. The annual reports should be provided to any advisory board prior to being released to the public. The annual reports should address the data collected and how it was used to support fisheries management. The report should also include the amount collected from fees (if applicable), and how they were spent to support fisheries management. If a portion of the fees are provided to DOCARE for aquatics enforcement, the report should also describe how those enforcement funds were spent. If data is collected, the report should summarize the preliminary data and include the refined findings when they are analyzed. At minimum, the report should summarize how fishermen benefit from the RPL program.



## **E. NATIVE HAWAIIAN RIGHTS**

- Undertake focused outreach and consultation with the Native Hawaiian community to determine how best to reach Native Hawaiian fishers and fisher groups, particularly in communities where fishing is important to subsistence and cultural practice. Address concerns that traditional and customary fishing practices could be adversely affected by an RPL system or that exercising them could be construed as criminalized by a new RPL system. Solicit Native Hawaiian views and opinions or analyses from recognized experts on acceptable approaches for avoiding these perceptions.
- Develop systems, trainings and policies to avoid criminalization of native Hawaiian practitioners.
- If a permit system is implemented, provide a mechanism for Native Hawaiian non-commercial fishing practitioners to identify their traditional fishing area(s), types of gear, restricted areas or seasons, and specific species that are part of their traditional subsistence, cultural, ceremonial, or religious practices.

## **F. ENFORCEMENT**

- Provide information and training for DOCARE and other law enforcement personnel about changes to the law under any new RPL system. Enlist their assistance with specific outreach and community education, including for Native Hawaiian-related issues and concerns.
- Increase the presence of community-based DOCARE officers simultaneous with implementing any new RPL system. Ensure that they know and understand the communities of non-commercial fishers in the areas to which they are assigned.
- Recognize that any RPL system provisions regarding DOCARE's right to inspect personal coolers may be particularly sensitive to certain fishers. Clarify under what terms and conditions such inspections may be warranted.

## **G. OTHER**

- Research other possible mechanisms for producing additional information and data to support informed decision-making in non-commercial fishing management.
- Consider ways to combine any new RPL system with other existing DAR fishing license programs, such as a combined non-commercial saltwater and freshwater system. Strive for simplicity for the users.
- If a fee-based license or permit is pursued, look into the advantages and disadvantages of creating different tiers of licenses (e.g., levels or categories, such as a single boat license that can cover several non-commercial fishers on the same boat).



## II. GLOSSARY OF KEY TERMS AND ABBREVIATIONS

The Study Group identified working definitions for the following key terms to clarify their meanings as used in the context of this report, but recognizes that alternative definitions may exist.

**Ahupua'a tenants:** Tenants of an area of traditional land division under Hawaiian law (ahupua'a). Ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 possess customary and traditional rights that the State of Hawai'i has an affirmative duty to protect under state law.

**Extractive use:** An activity that intends to remove terrestrial or aquatic life or other natural resource from lands or waters under the State of Hawai'i's management authority.

**Fishery:** The unit defined in terms of people involved in some or all of the following: species or type of fish, area of water or seabed, method of fishing, class of boats, and purposes of the activities.

**License:** A document that gives the holder the right to operate in a fishery according to the terms established by the state regulating that fishery.

**Native Hawaiian:** For the purpose of this report, the term Native Hawaiian means a person who is a descendant of the native Hawaiians who inhabited the Hawaiian Islands prior to 1778 regardless of their blood quantum.

**Nearshore:** Waters at a small distance from the shore that is reasonably accessible for most people without the means of a powered craft.

**Non-commercial fishing:** Fishing that does not involve or intend to involve the sale of fish for profit. Non-commercial fishing includes sport fishing, recreational fishing, subsistence fishing, and traditional fishing to perpetuate culture and customs. This definition pertains to an activity, and not necessarily to individual fishers who may engage in both commercial and non-commercial fishing.

**Probable Cause:** A requirement generally required before a law enforcement officer can search or arrest someone for a suspected criminal violation. As described by statute, a law enforcement officer has probable cause "when the facts and circumstances within the officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that a crime has been or is being committed."

**Permit:** Unless otherwise specified in this report, a permit is a document that gives the holder the right to engage in activity in a fishery that would otherwise be prohibited by the State of Hawai'i.

**RPL:** A Registry, Permit, or License system.

**Registry:** A database of fishers managed by a state to collect relevant information about each fisher and contact them for specific fishing-related purposes. Submitting information

to a registry may or may not give a fisher specific rights or permissions related to fishing.

**Stamp:** An authorization purchased in addition to a general fishing license to allow a fisher to fish for a particular species. The number of stamps available for purchase during a given year is generally unlimited. For example, the Hawai'i Game Mammal Hunting license system provides an option for hunters to purchase Game Bird stamps, allowing them to hunt for specific birds.

**State waters:** Marine waters under the State of Hawai'i's police power and management authority, generally considered to extend 3 nautical miles from the shore.

**Subsistence fishing:** A non-commercial fishing activity that involves the taking of, fishing for, or possession of aquatic life or other fisheries resources under the State of Hawai'i's management authority by a resident of Hawai'i for the purpose of direct personal or family consumption as food or for customary trade, barter, or sharing for personal or family consumption.

**Tag:** A document purchased in addition to a general fishing license to allow a fisher to fish with certain types of gear or to possess certain species of marine life. The total number of tags available for purchase for a particular species during a given year is usually limited.

### ABBREVIATIONS

**CFEU:** Community Fisheries Enforcement Unit

**CI Hawai'i:** Conservation International Hawai'i

**Council:** Western Pacific Regional Fishery Management Council

**DAR:** DLNR's Division of Aquatic Resources

**DLNR:** Department of Land and Natural Resources

**DOBOR:** DLNR's Division of Boating and Ocean Recreation

**DOCARE:** DLNR's Division of Conservation and Resources Enforcement

**HB:** House Bill (within Hawai'i State Legislature)

**HFACT:** Hawai'i Fishermen's Alliance for Conservation and Tradition

**HMRFS:** DAR's Hawai'i Marine Recreational Fishing Survey

**JFF:** Joint Fact Finding

**MRIP:** NOAA's Marine Recreational Information Program

**NMFS:** NOAA's National Marine Fisheries Service

**NOAA:** National Oceanic and Atmospheric Administration

**NSAR:** National Saltwater Angler Registry

**OHA:** Office of Hawaiian Affairs

**PIFSC:** NOAA's Pacific Islands Fisheries Science Center

**USFWS:** U.S. Fish and Wildlife Service



### III. INTRODUCTION AND BACKGROUND

**Hawai‘i’s fisheries are indispensable to the State’s environment, economy, food security, and culture.** They are especially important to people who fish for sustenance, go to the ocean for recreation, or practice their culture. Ocean waters beyond the three-nautical-mile limit are primarily governed by federal and/or international laws, but Hawai‘i’s nearshore ocean waters are the responsibility of the State.

Hawai‘i’s fisheries require well-informed management with an adequate capacity to ensure that the resources exist for future generations. As one, but by no means the only, way to help accomplish this, the Hawai‘i State Legislature has periodically examined the pros and cons of a fishing license for better managing non-commercial fishing in local waters. However, Hawai‘i remains the only coastal state in the U.S. without a mandatory non-commercial marine fishing registry, permit, or license system (RPL). (Appendix B).

There have been previous attempts by the Legislature to authorize the Department of Land and Natural Resources (DLNR) to create a non-commercial marine fishing license system. The last effort was in 2014 when two bills were introduced: HB 1911 (to establish a nonresident permit for marine and freshwater fishing) and HB 1912 (to create a saltwater non-commercial fishing license that applies to residents and nonresidents). Neither bill survived committee hearings. While there was very little testimony regarding HB 1911, there was some opposition to HB 1912. The primary concern was that key provisions of the proposed license had not been defined and sufficiently analyzed, such as how much it would cost, how the fee revenues would be used, to whom it would apply, and how often it would need to be renewed. Other concerns were raised about its potential impacts on Native Hawaiian traditional and customary rights, subsistence practices, and whether a license would improve enforcement. These and other concerns became the foundation for this Study Group effort.



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In addition, there have been several attempts in the Legislature since 2007 to provide DLNR’s Division of Conservation and Resources Enforcement (DOCARE) with the authority to inspect fishing bags and coolers without the need to establish probable cause. DOCARE’s lack of ability to do so is seen by some as limiting the State’s ability to effectively enforce the rules and regulations that are currently in place to protect Hawai‘i’s nearshore fisheries. However, there also was strong feeling among some in the fishing community that such a rule would be overly invasive and could cause strong opposition and negative response to a license with such a provision. None of these prior legislative bills passed.

With Conservation International Hawai‘i (CI Hawai‘i) and the Western Pacific Regional Fishery Management Council (the Council) as conveners, several experts and individuals from various marine fishing agencies and organizations were invited to be members of a Study Group that would examine the issues described above and explore various options that might address them. The Study Group met six times in Honolulu between May and December 2016. Some members of the Study Group, along with CI staff and the Group facilitators, participated in separate web meetings and conference calls. These included a limited number of “listening sessions” to gather additional perspectives from Native Hawaiian fishers and charter boat industry representatives (Appendix C lists dates for these sessions, the Study Group members that participated, and the groups that were contacted). The Study Group acknowledges that this is not the universe of perspectives that should be considered, and has made recommendations for more outreach and consultation.

### IV. FORMATION, SPONSORSHIP, AND FUNDING

Funding for this project was provided by the Harold K.L. Castle Foundation and the National Oceanic and Atmospheric Administration’s (NOAA’s) Coral Reef Conservation Program and Saltonstall-Kennedy Grant Program. Peter S. Adler, Ph. D. and Keith Mattson of The Accord 3.0 Network of mediators, planners, and facilitators were retained as neutral conveners and facilitators. Invitations to serve on the Study Group were made to different members of marine fishing organizations, interest groups and fishery experts with experience in local, small scale fisheries. In addition, representatives from DLNR’s Division of Aquatic Resources (DAR) and the Office of Hawaiian Affairs (OHA) were invited to serve as ex officio members of the Study Group. Each Study Group member agreed to a Charter of Commitments that defined the purpose and the process used (Appendix A).



## V. STUDY GROUP COMPOSITION

The following individuals agreed to participate in the Study Group in their individual capacities rather than as official organizational representatives (listed alphabetically):



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Kua'aina Ulu Auamo (KUA), Executive Director



**Aarin Gross**  
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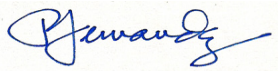
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**Phil Fernandez**  
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**Ed Watamura**  
Waialua Boat Club

### EX OFFICIO MEMBERS:

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Division of Aquatic Resources, Acting Commercial Fisheries  
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## VI. OBJECTIVES

The Study Group came to consensus on three major objectives that any new registry, permit, or license (RPL) system for Hawai'i's non-commercial marine fisheries would be evaluated against. In effect, they became criteria for comparing possible RPL systems against each other. These objectives include the system's ability to:

**1) Provide additional and more robust data to support fishery management.** The State, stakeholders, and rights-holders all need better information about who fishes, how they fish, when and where fish are taken, and how much is caught.

**2) Foster more two-way dialogue between fishers and managers.** Improved mechanisms are needed for non-commercial marine fishers to be identified and contactable so they may effectively engage in regulatory and policy decisions and to create better information exchanges between fishers and managers, so fishers can exercise a greater voice in decision-making and managers can stay educated and informed on issues of importance to the non-commercial fishing community.

**3) Create a source of independent, continuous funding to support effective management.** Funding for nearshore fisheries management is perceived by fishers and managers to be inadequate, and there is a desire for dedicated monies that would benefit fisheries conservation, management, and enforcement and to improve stock assessments, restore habitats, and enhance fish populations.

The Study Group also sought to answer the following questions:

- What RPL system options meet the above-stated objectives? (Other options were not analyzed.)
- What are the relative advantages and disadvantages for each option?
- How would each of the options benefit or negatively impact different stakeholder interests in Hawai'i?
- Which option maximizes potential benefits and minimizes negative impacts to Hawai'i's stakeholders in relation to the three objectives identified by the Study Group?
- If there is an option that maximizes benefits and minimizes impacts, what should be done to enact it.

The Study Group ultimately did not identify a 'preferred option' that maximizes potential benefits and minimizes negative impacts or make specific recommendations for the enactment of a preferred option. However, the Study Group's conclusions and recommendations will be useful to support any future efforts to define, enact, and implement an RPL system option.

## VII. METHODOLOGY

The Study Group engaged in a facilitated Joint Fact Finding (JFF) process led by Adler and Mattson. JFF is an analytic deliberation process designed to gather facts pertinent to a specific problem. It does this in a focused manner based on courteous, evidence-based debate. The process uses a carefully selected working group of experts and knowledgeable stakeholders who typically have diverse opinions but are willing to engage in rigorous, open-minded, and candid, factual discussions. The overall goals of any JFF are to illuminate the factual assumptions behind an issue, identify areas of factual agreement, put those areas in a proper context, and help inform policy making. This particular JFF was designed to inform future decision making by DLNR and/or the Legislature.

The Study Group then gathered, analyzed, and discussed data and information on:

- Pertinent legal, regulatory, and financial issues;
- Native Hawaiian traditional and customary practices and the legal protections in place for those practices;<sup>1</sup>
- Existing data on Hawai'i's fisheries and surveys of non-commercial marine fishing activities;
- Information from DLNR on current fisheries management, regulation and enforcement, and the administration of other current license systems for freshwater and commercial marine fishing and hunting; and
- Non-commercial marine fishing license, registry, and permit systems from other states and US territories.

At the conclusion of the process, each of the Study Group members was invited to write a Personal Statement regarding the process, report, or related issues. These statements are included in Appendix I.

## VIII. THE ISSUES

### A. NON-COMMERCIAL MARINE FISHER DATA

Unlike commercial fishing in Hawai'i, for which the State has a license requirement and a great deal of detailed data dating back to the early 1900s, the State does not have a license requirement for the non-commercial marine fishing sector. The most consistent estimates of the 'universe' of Hawai'i's non-commercial marine fishers come from a broader nationwide effort to estimate fishing and hunting activity. Since 1955, the U.S. Fish and Wildlife Service (USFWS) has partnered with the U.S. Census Bureau to collect phone survey information on fishing and hunting from each State every five years. The most recent USFWS survey in 2011 estimated there are 155,000 non-commercial marine fishers in Hawai'i, including residents and visitors. In contrast, there were only 3,715 commercial marine fishing license holders in 2015.

A somewhat similar effort has been conducted by NOAA's National Marine Fisheries Service (NMFS), Pacific Islands Fisheries Science Center (PIFSC), Fisheries Research and Monitoring Division in partnership with DAR. NOAA's Marine Recreational Information Program (MRIP) and DAR's Hawai'i

1 The Study Group was assisted in this by Assistant Professor Malia Akutagawa, Esq., of the William S. Richardson School of Law, University of Hawai'i at Mānoa.



Marine Recreational Fishing Survey (HMRFS) were designed to develop statewide, annual estimates of the non-commercial fishing catch by species. The HMRFS program started in 1979, was halted after 1981, then was restarted in 2001. This effort has utilized a household telephone survey, a field intercept survey, and at one time, a charter boat survey to produce estimates of fishing effort, catch, and participation. The program is in the process of replacing the telephone survey with a mail survey with a more direct intercept survey methodology.

While both of these efforts fill some data gaps associated with the non-commercial marine fishing sector, they are still only estimates that are often incomplete and conflicting. Some have questioned the usefulness of the data and its accuracy for management purposes.

A survey conducted by the USFWS occurs every five years which makes it useful for long term trends, but less useful for understanding shorter and more specific periods. Its sample size is also limited. For example, the 2006 data was extrapolated from eligible households throughout the State. Of those approximately 1,600 eligible households, 1,401 phone interviews were obtained. Detailed interviews were then conducted with 299 individuals of the designated “sportsperson” category.

The HMRFS program faces similar challenges with sample size, but is also challenged by the physical and financial difficulties faced by its costly field intercept approach and the evolution of its methodology over time. (Field intercept surveys are on-site interviews with fishers engaged in some form of fishing.) There are very few surveyors compared to shoreline areas fished, and the terrain is often difficult, making it challenging to reach fishers. Some fishing also occurs at night when surveys cannot be done due to safety and liability issues. There are also no concentrated points of entry into the water for activities like spear fishing.

Importantly, estimates of Hawai'i's non-commercial marine fishing population from the programs described above vary widely and are considered highly uncertain. The 2006 USFWS survey estimated approximately 154,000 fishers in Hawai'i, while the MRIP estimated 396,000 anglers for the same year. There are also significant differences in estimates of long term trends. NOAA Fisheries estimated a decreasing trend in recreational angler participation in Hawai'i between 2003 (260,745 anglers) and 2006 (172,696 anglers), while the USFWS survey estimated an increase in participation during a similar time period from 2001 (113,000 anglers) to 2006 (157,000 anglers). Due to changes in sampling methodology, NOAA Fisheries participation estimates are not available after 2006, so it is difficult to compare these datasets beyond 2006.

Because so much is unknown about the population characteristics of the non-commercial marine fishing sector, it has been a challenge to accurately estimate catch (how many fish are being removed) and fishing effort. Without having good estimates of these factors, it is difficult for managers and scientists to accurately answer even the most basic management questions about the impact of this sector on the fisheries resources, the economy, and the overall ecosystem.

## B. NON-COMMERCIAL MARINE FISHING OUTREACH AND EDUCATION CHALLENGES

Outreach and education occur at different levels in Hawai'i. DAR is the primary State agency that performs public outreach for nearshore marine resources. DAR has four Education Specialists (one each for O'ahu, Maui County, Kaua'i, and Hawai'i island) and one Program Manager who are specifically tasked with these activities. On the Federal level, NOAA Fisheries and the Council collaborate with DLNR to conduct outreach and education regarding fisheries matters in State waters that overlap with federal jurisdictions such as for bottomfish, major pelagic fisheries, and interactions with protected species. Fisheries outreach and education also occurs on a non-governmental and community level.

One difficulty in developing and assessing outreach efforts is defining fisher representation within the State. Without knowing the universe of fishers and certain characteristics about that population, it is difficult to determine the level of effort necessary for targeted outreach and education on a particular topic. It is also challenging to assess the effectiveness of such an effort after the fact. For example, if there was a proposed regulation that would impact spear or line fishers, currently it would be difficult to determine an effective method to engage those specific user groups because there is no easy way to efficiently contact these groups in their entirety.



People fishing sunset at Ala Moana Beach Park, O'ahu © RobertCravens

This is likely reflected in the low turnout and participation rate of fishers in many fisheries-related management actions, such as public hearings. Fishers often say, “I didn't know about it or I would have come.” This has also led to discontent among some within the fishing community and a feeling they are not being adequately notified or given the opportunity to become more involved.

In addition to the challenge of being able to contact fishers, it is equally challenging to determine who are the most “representative” fishers to contact. Fishing practices and activities may be significantly different on different islands and in different local areas, which indicates the need to better understand locale-based fisher communities. For both area-based and species-based management, there is a multitude of different fishing modes for catching a species or fishing in an area. An additional challenge with outreach and education are the cultural and language barriers that exist due to Hawai'i's diverse resident, transient, and visitor populations.

The extent of these challenges is evidenced by the fact that citizens have felt the need to take it upon themselves to establish non-governmental groups for purposes such as “[helping] to organize and keep Pacific Island fishermen engaged and informed” (the Pacific Island Fisheries Group, or PIFG) and to “provide and promote the interests of fishermen through education, information, advocacy, improved economic efficiencies, and representation with a unified voice” (Hawai‘i Fishermen’s Alliance for Conservation and Tradition, or HFACT). A governmental program with a similar goal of “increasing communication and collaboration” between fishers, managers, and scientists is the Fisheries Extension Program co-managed by DLNR and NOAA Fisheries.

Many of the non-governmental groups and government agencies work together to conduct outreach and education efforts, promote representation of fishers, and encourage participation of fishers in management decisions. However, as alluded to earlier, we do not know how effective these efforts are, since it’s not clear there is sufficient representation of Hawai‘i’s diverse fishing communities. Boat, shoreline, and dive clubs are used as a point of contact for outreach efforts, but members of these groups constitute only a small percentage of the larger communities to which they belong. Fisher forums, social media, “talk story” sessions, and websites are often used as tools to engage or educate fishers, but the effectiveness of these efforts for reaching target audiences will remain unknown until sufficient information on the target audiences is known.

### C. NON-COMMERCIAL MARINE FISHING ENFORCEMENT CHALLENGES

DOCARE is responsible for enforcing the State of Hawai‘i’s fisheries rules and regulations, but it has a broad mandate that goes beyond aquatic resources. Essentially, DOCARE has full police powers to enforce all State laws and rules involving State lands, State Parks, historic sites, forest reserves, aquatic life and wildlife areas, coastal zones, conservation districts, State shores, as well as County ordinances involving County parks. The division also enforces laws relating to firearms, ammunition, and dangerous weapons.

DOCARE’s budget for fiscal year (FY) 2016-17 is approximately \$12.3 million, which is roughly 10% of DLNR’s overall budget. In October 2016, DOCARE had 100 fulltime and 10 volunteer officers statewide to provide natural resources enforcement to a population of approximately 1.4 million residents across Hawai‘i’s diverse archipelago and to an additional 8.1 million estimated annual visitors. DOCARE expected to spend 36% of its time and resources on aquatic resources enforcement during FY 2016-17, and is currently issuing approximately 10-20 citations per month statewide for both commercial and non-commercial fishing rule violations. Many fishers argue that DOCARE’s enforcement and monitoring efforts are seriously under-resourced.

DOCARE officers are assigned to specific islands, with a range of 15 officers on Kaua‘i and up to 35 officers on O‘ahu. Shift assignments, weekends, vacations, and sick leave means that the actual number of officers on duty at a given time is relatively small. For example, on a ‘peak day’ on O‘ahu (e.g., major holidays), approximately 10 to 20 officers will be on duty to cover the entire island, which is where just under one million people or approximately 70% of the state’s entire population is located. Officer activities vary statewide, but

the greatest differences are between O‘ahu and the Neighbor Islands. On the Neighbor Islands, officers collectively spend about 45% of their time on aquatic resources and another 45% of their time on boating activities. The remaining 10% is spent on other duties, including hunting, forest, and various other natural resource issues. O‘ahu’s officers are forced to spend significantly more time on park- and harbor-related enforcement due to the island’s relatively large population and greater incidence of non-resource-related crimes, such as vandalism, theft, and other property crimes.

The most common fishing citations issued by DOCARE are for illegally taking regulated marine life. This includes using illegal gear such as small-eyed gill nets, fishing in marine reserves, taking undersized or out of season species, and taking too many of a certain type of marine life. Other common violations include illegally fishing in restricted areas and using illegal or inappropriate equipment such as lay nets or gill nets. The most common commercial fishing violation is for failing to file monthly catch reports, as required by the State’s commercial marine fishing license.

While most DOCARE officers must divide their time between aquatic and other resource activities, a pilot program on Maui has allowed three officers to dedicate their time solely to aquatic resources enforcement. The North Maui Community Fisheries Enforcement Unit (CFEU) has a team of three DOCARE officers who since 2013 have patrolled 17-miles of state-controlled ocean water on Maui’s north shore. The CFEU received initial funding for a vessel and supporting equipment from CI Hawai‘i and the Harold K.L. Castle Foundation to concentrate on fishing and recreation within a heavily-used area. The program emphasizes outreach and education, as well as surveillance and enforcement, and has successfully curbed the number of fishing violations in the area over the more than two-year period of operations. CFEU officers indicate that a dedicated jet-boat capable of navigating shallow waters and improved surveillance equipment have been



Manini (Convict Tang) © G Ward Fahey

instrumental for identifying illegal fishing activities and enabling enforcement to be more effective. The CFEU is a potential model for other marine areas in the state that are heavily used for both fishing and recreation. In addition, the CFEU program benefited from additional support staff who helped with reporting, financial management, and other administrative requirements thus allowing DOCARE officers to spend more time in the field.



## D. DLNR FUNDING CHALLENGES

DLNR's mission is to conserve, protect, and manage Hawai'i's natural and cultural resources for the benefit of present and future generations. This mission translates into the department being responsible for stewarding approximately 30% of Hawai'i's land and water resources with an allocation of approximately 1.1% of the State's operating budget. For nearly two decades, Hawai'i has ranked between 45th and 48th out of the 50 U.S. states in terms of the percentage of state funds that are spent on natural resource management. The portion of state funds dedicated to fisheries in particular is minuscule, with approximately 0.014% of the State operating budget dedicated to fisheries management and approximately 0.035% dedicated to aquatics resources enforcement. Although it is difficult to confirm without knowing the full cost to provide DLNR with the staff and resources necessary to effectively fulfill its substantial mandate under the law, there is a perception among many in the fishing community and the broader public that DLNR – particularly fisheries management and aquatics resources enforcement – lacks the funding levels required to effectively maintain the sustainability of fishing in Hawai'i's nearshore waters.

## IX. FINDINGS

### A. LICENSE AND REGISTRY SYSTEMS FOR OTHER NATURAL RESOURCES IN HAWAII

The Study Group reviewed some of the regulatory systems that are currently used by the State of Hawai'i for other natural resources, and focused on three license systems in place in Hawai'i for the extractive use of natural resources:

1. Freshwater Game Fishing License (Hawai'i Administrative Rules (HAR) § 13-74-10, established in 1949);
2. Commercial Marine Fishing License (HAR § 13-74-20, established in 1925); and
3. Game Mammal Hunting License (HAR title 13 chapter 123, established in 1907).

Hawai'i also has an existing registry which applies to non-commercial fishers who take bottomfish from a vessel in Hawai'i's marine waters (HAR § 13-94-9, established in 1998).

These license and vessel registry systems are administered by DLNR, must be renewed on an annual basis, and are enforceable through DOCARE. Basic details on each license's fee structure, requirements, use of revenues, and other aspects are included in Table 1. Generally speaking, each of these license systems was created to help the State better manage specific natural resources, and the license fee revenues are dedicated to management and enforcement needs and programs of those specific natural resources. As a regulated activity, game mammal hunting in Hawai'i is very different from fishing, in part because hunting targets animal

populations that are destructive to the native environment, such as feral pigs, feral goats, and Mouflon sheep. Additionally, the use of firearms for hunting raises public safety concerns that the hunting license rules and regulations must address. Nevertheless, the game mammal hunting license provides an example of an existing regulatory tool currently used for natural resource management in Hawai'i.

Applicants for a hunting license must first take a hunter education course and have a valid hunter education certificate, proof of completion, or written exemption when applying for a hunting license.<sup>2</sup> Once the education course certificate or proof of completion is obtained, the hunting license can be purchased online with payment by credit card. Only individuals 10 years of age or older are eligible to participate in the hunter education program.<sup>3</sup> The license must be shown to enforcement officers upon demand, and the officer must be allowed to inspect a hunter's game bag, container, or any other carrier that might be used to conceal game.<sup>4</sup> Hunting without a license or failing to cooperate with inspections can result in criminal fines of \$100 and up to 30 days imprisonment for the first offense.<sup>5</sup> A hunting license can also be revoked for violating Hawai'i's game laws.<sup>6</sup> All fees collected from hunting licenses, stamps, tags, hunter education training programs, and the use of public target ranges must be deposited into the Wildlife Revolving Fund.<sup>7</sup> This fund can only be used for programs and activities related to wildlife and game management, preservation, propagation, and protection, including providing match for federal grants to support specific wildlife and game programs.

Hawai'i's commercial marine fishing license was originally established to prevent foreign fishers from fishing in Hawai'i's waters. The license system dates back to Hawai'i's territorial days. Currently, anyone who catches fish to be sold, or intends to, must have a valid commercial marine fishing license. This requirement means that even fishers who derive only a very small amount of money from fishing must be licensed in order to occasionally sell the fish they catch. Charter fishing vessel operators and crew must also have commercial marine fishing licenses, whether or not they intend to sell their catch.

Commercial marine fishing license holders are required to submit monthly reports on all their fishing activities, including their non-commercial fishing activities. License holders must also allow DOCARE to inspect their catch, and acknowledge that the State may suspend or revoke their license for cause. The monthly reporting requirement enables the State to maintain reasonably accurate information on the rates of fish extraction relative to fishing effort. In some cases, this has helped DLNR determine if or when restrictions are needed to prevent significant population declines among specific fish species. However, commercial fishing catch data does not always provide an accurate picture of fishing resources and/or activities, since business and economic factors might determine whether certain species are targeted, and caught, at any given time. Likewise, environmental factors such as invasive species or pollution may impact certain species and influence catch data in ways that don't necessarily relate to fishing activities.

2 HRS § 183D-22(a)(3).  
3 HAR § 13-122-12(a)(5).  
4 HRS § 183D-25.  
5 HRS § 183D-5.  
6 HRS § 183D-5(f).  
7 HRS § 183D-10.5.

**Table 1. Existing DLNR License and Registry Systems**

	COMMERCIAL MARINE FISHING LICENSE	RECREATIONAL FRESHWATER FISHING LICENSE	HUNTING LICENSE	BOTTOMFISH VESSEL REGISTRY
<b>YEAR ESTABLISHED</b>	1925	1949	1907	1998
<b>CURRENT HOLDERS (FY 2015)</b>	3,715	5,189	About 13,000	1,326
<b>CURRENT ANNUAL REVENUE GENERATED</b>	About \$300,000*	About \$25,000	About \$400,000 to \$500,000	\$0
<b>FEE STRUCTURE</b>	\$50 for residents and nonresidents	\$5 for residents and nonresident military personnel between 15 – 64 years; \$3 for residents 9 -15 years; \$25 for nonresidents not in military. Short-term non-resident licenses for \$10 - \$20	\$20 for residents under 65 years; \$105 for nonresidents. Also sell game tags and have special hunts.	Free, but required for anyone (not just the vessel owner) to legally fish for bottomfish from a vessel.
<b>FUND FOR REVENUES</b>	Commercial Fisheries Special Fund (HRS § 189-2.4)	Sport Fish Special Fund (HRS § 187A-9.5)	Wildlife Revolving Fund (HRS §183D-10.5)	No revenue generated
<b>FEE WAIVERS</b>		65 years and older	Over 65 years; Hansen's disease residents of Kalaupapa, Moloka'i	
<b>DURATION</b>	One Year	One Year	One Year	One Year
<b>STAMPS OR TAGS FOR EXTRA FEES</b>	Baitfish license	Not applicable	Game Birds; Special Lottery Hunts	Not applicable
<b>RESTRICTIONS ON USE OF REVENUES</b>	Can be used only for programs, activities, research, and personnel involved in conservation and management of aquatic life for commercial purposes	Federal Sport Fish Restoration laws and HRS § 187A-9.5 pertain	Funds can only be used for hunting related activities	No revenue generated
<b>PROVISIONS FOR NATIVE HAWAIIAN RIGHTS</b>	No	No	No	No

\* The Commercial Marine Fishing fee for nonresidents was reduced from \$250 to \$50 per year in 2015. That change is not yet reflected in annual revenue generated.



Hawai'i's freshwater game fishing license program regulates recreational fishing for seven species of introduced freshwater game fish in the State's fairly limited inland water bodies and streams. These include public fishing areas at the Kōke'e and Wailua reservoirs on Kaua'i, Lake Wilson on O'ahu, and the Waiākea fish pond on Hawai'i Island. Other smaller freshwater reservoirs can also be fished, although many of them are on privately owned shores with access requiring special permission. No education course is needed to obtain this license. Licenses must be shown to enforcement officers upon demand, and enforcement officers are allowed to inspect bags or containers. Consent to such inspections is also required as a condition of fishing within the Kōke'e and Wailua Reservoir Public Fishing Areas.<sup>8</sup>

Freshwater fishing without a license, or failing to allow inspections when required, can result in criminal fines up to \$250 or administrative fines up to \$1,000 for the first offense or violation.<sup>9</sup> Fees collected from the freshwater game fishing licenses, permits, or the use of public fishing areas or other fishing grounds must be deposited into the Sport Fish Special Fund, which can only be used to implement DLNR's programs and activities related to the management and administration of the aquatic life and aquatic resources of Hawai'i. Although freshwater license fee revenues are small, they do provide a match for federal funds to support sport fish projects, development and maintenance of trails and access ways into public fishing areas, and research programs and activities that concern sport fish conservation and management.<sup>10</sup>

Hawai'i's bottomfish vessel registry requires all vessels used to fish for bottomfish in Hawai'i waters to be registered with DLNR's Division of Boating and Ocean Recreation (DOBOR).<sup>11</sup> Bottomfish include: (1) 'Ula'ula koa'e, ruby or longtail snapper, or onaga (*Etelis coruscans*); (2) 'Ula'ula or ehu (*Etelis carbunculus*); (3) Kalekale (*Pristipomoides sieboldii*); (4) 'Opakapaka (*Pristipomoides filamentosus*); (5) 'Ukikiki or gindai (*Pristipomoides zonatus*); (6) Hapu'u, hapu'upu'u, or Hawaiian grouper (*Epinephelus quernus*); and (7) Lehi or rusty jobfish (*Aphareus rutilanus*).<sup>12</sup> These fisheries occur in both State and federal waters, and the State cooperates with federal agencies to create uniform and comprehensive management measures for them.<sup>13</sup>

The bottomfish vessel registry system enables the State to send surveys and other information to bottomfishers for fisheries management use.<sup>14</sup> The bottomfish vessel registry is free and as such does not generate any revenues for DLNR. It is only valid for one year, and is required for anyone (not just the vessel owner) to legally fish for bottomfish from a vessel.<sup>15</sup> Violators are subject to criminal fines up to \$250 or administrative fines up to \$1,000 for the first offense.<sup>16</sup> Vessels can be registered online through the same third-party vendor that administers the online purchases of hunting and freshwater fishing licenses or in person at one of DAR's administrative offices.<sup>17</sup>

## B. REGISTRY, PERMIT AND LICENSE (RPL) SYSTEMS IN OTHER STATES

All other coastal states in the U.S., as well as the territory of Puerto Rico, have some form of mandatory, non-commercial marine fishing RPL system in place. Some of these are longstanding systems. Others were created more recently, in response to the federal government's requirement that recreational marine fishers without a state-issued license, permit, or registration must register annually with the National Saltwater Angler Registry (NSAR) for a fee (currently \$29). Of these other coastal systems, the Study Group selected nine states and the territory of Puerto Rico for further analysis, based on similar attributes to Hawai'i and the types of non-commercial fishing license systems they created that cover a range of RPL system options. (The basic details of some of these other systems are included in Appendix D).

Study Group members contacted officials responsible for some of these other non-commercial marine fishing regulatory systems to seek further insight into how their systems were developed and how well their systems addressed the Study Group's objectives for improving marine resource management. The jurisdictions contacted include:

- Florida (license with stamps for different species);
- Massachusetts (flat fee permit);
- Connecticut (license with stamps for different species);
- Maryland (license);
- New Jersey (free registry);
- North Carolina (license); and
- Puerto Rico (license).

Representatives from these other jurisdictions were helpful and offered the following advice and observations, if Hawai'i decides to create a registry, permit, or license system for its non-commercial marine fishing.

1. Keep licensing systems as simple as possible, and avoid needless complications such as multiple categories of fishers, multiple types of tags and permits, and other variables.
2. Avoid systems that allow fishers to wait several years before they have to renew (to ensure that fisher data remains current).
3. Be very cautious about the age definitions used for fee waivers, since these can have significant impacts on a system's potential revenues. (For example, the definition of 'senior' is of particular concern, since fishing activity is often higher among older residents.)
4. Consider how license requirements would be met by tourists. Make the license simple, easily understood, and easy to acquire.

8 HAR § 13-64-3(b)(4); § 13-65-4(b)(4).

9 HRS §§ 187A-12.5; 187A-13.

10 HRS § 187A-9.5(c); HRS § 187A-2.

11 HAR § 13-94-9.

12 HAR § 13-94-5.

13 HRS § 187A-5.5.

14 Moffitt, Robert B. et al. May 2006. Status of the Hawaiian Bottomfish Stocks, 2004. Pacific Islands Fish. Sci. Cent., Natl. Mar. Fish. Serv., NOAA, Honolulu, HI 96822-2396. Pacific Islands Fish. Sci. Cent. Admin. Rep. H-06-01, 2-3 pp.

15 HAR § 13-94-9.

16 HRS §§ 187A-5, 187A-13; HAR § 13-94-3.

17 <http://dlnr.hawaii.gov/dar/contact-us/>; <https://dlnr.hawaii.gov/cms-public/app/new-vessel-registration;jsessionid=91DA6BB006CCB7193BC3252450F10E98.prodapp1?execution=e1s1>

5. Having a private sector vendor develop and administer the online applications can ease State financial and administrative burdens. Consider using an ‘administration fee’ on top of any license fee that can go directly to the vendor for that service.
6. Facilitate obtaining a license through various means, including online, at fishing supply stores, via charter boat operations, or in person.
7. Consider including active military members as state residents for the purpose of license requirements and fees.
8. Obtain email addresses, as they are an effective way to maintain communication with fishers.
9. New Jersey is one of three states with a free registry, and its registered numbers have decreased over time, due primarily to a perceived lack of necessity to fishers and a lack of compliance enforcement.
10. It is very important to emphasize to the public the additional benefits for fishing resources that will be realized from any fishing license revenues.
11. None of the states that the Study Group talked to had special license provisions for indigenous persons in their general fishing license; however, some licenses explicitly acknowledged that indigenous fishers were not required to have state fishing licenses when fishing on sovereign tribal reservations. (Tribal governments may have their own license requirements.)
12. Consider allowing ‘open fishing days’ when no licenses would be required.
13. Florida does not require licenses for people fishing with ‘cane poles’ in their county of residence. This is a possible analogy for traditional gear & methods that may be associated with traditional and customary rights in certain areas of Hawai‘i.
14. Some states formed fisheries advisory groups to help set priorities for use of the fishing license or permit revenues, or conducted surveys of license holders to ask how they thought funds should be spent.
15. The license application form/process is a good opportunity to collect data on the types of fishing people engage in (e.g., frequency, gear used, species sought, etc.). This data can be compared with other survey data obtained through other means.
16. Some states issue annual reports on RPL system revenues and how they are spent.
17. North Carolina has a ‘blanket license’ for certain public piers and for charter boats, which covers anyone fishing from within these confines.
18. North Carolina has a fishing license fee waiver for low-income persons, who must demonstrate their eligibility for other government assistance, such as participation in the Supplemental Nutrition Aid Program (SNAP).

19. Consider ways for fishers exempted from a fee-based RPL system requirement to be enumerated and captured in the universe of non-commercial fishers. A special free license or certificate that must be carried while fishing is one option.

## C. HAWAI‘I LAW CONSIDERATIONS

Hawai‘i is the only coastal state in the nation without a mandatory registration or license requirement for non-commercial marine fishing. Enacting one requires addressing specific legal questions, which are briefly listed and discussed below. A more complete summary of these legal issues is included in Appendix E.

### 1. Hawai‘i law protects the public’s right to fish. Doesn’t this provision therefore prohibit the creation of a mandatory registration or license requirement for non-commercial marine fishing in Hawai‘i?

**Short Answer: Not likely.**

Hawai‘i law grants to the people of Hawai‘i access to and use of the public fisheries in State waters, but that grant of access and use is subject to the State’s right and responsibility to regulate and manage the taking of fish and other aquatic life in order to protect the long-term use of the fisheries. Specifically, Article XI, section 6 of Hawai‘i’s Constitution reads “The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State ... All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same[.]” This is reinforced in HRS § 187A-21.

The legal meaning of the word “free” in the above quote is the primary issue in this question. Basically, can “free to the public” and “free and equal use by all persons” be interpreted as prohibiting the State from charging a fee for a license, registry, or permit? Or is it based on the Organic Act which sought to do away with “private” or “exclusive” fisheries rights that would otherwise prevent equal access to the fisheries? Many believe the State’s right to “manage and regulate the taking of aquatic life” allows the State to create a fee-based fishing license to protect the sustainability of fisheries under its control. Hawai‘i courts have not yet addressed this issue, but many other states with mandatory, fee-based fishing licenses have similar provisions in their constitutions and statutes that also protect the public’s right to fish subject to the state’s right to regulate fishing.<sup>18</sup>

### 2. If a fee-based, non-commercial, marine fishing license were created, could the Legislature use the license fees for something other than programs that benefit fishers?

**Short Answer: No.**

Hawai‘i law requires any license fees collected by the State government to be used for purposes that specifically benefit the individuals who paid the fees. If they aren’t, license holders can challenge the license fee as an improper tax and ask a court to invalidate the fee requirement.<sup>19</sup> Also, federal and

<sup>18</sup> See Appendix F for a matrix comparing the language that appears in the following state authorities: Ala. Const. § 39.02, Amendment 5; Alaska Const. VIII, § 15; Cal. Const. Art. 1, § 25; Fla. Stat. § 379.104; Ga. Code Ann. § 27-1-3(a); La. Const. Art. I, § 27; R.I. Const. Art. I, § 17; S.C. Art. 1, § 25; Va. Const. Art. XI, § 4.  
<sup>19</sup> *Hawai‘i Insurers Council v. Lingle*, 201 P.3d 564, 120 Haw. 51 (2008).

state law requires all sport fishing license fees to be deposited into the Sport Fish Special Fund.<sup>20</sup> This fund was created in 1993 “to establish a Sport Fish Special Fund to be administered by the Department of Land and Natural Resources and into which sport fishing license and permit fees, and other associated moneys are to be deposited[.]”<sup>21</sup>

The exact definition of “sport fishing” is not provided under Hawai‘i law. Based on definitions provide under federal law, however, “sport fishing” activities include recreational fishing and likely overlap with most but possibly not all of the activities described by the term “non-commercial fishing” (such as subsistence, bartering, or traditional fishing to perpetuate culture or customs). This means that if Hawai‘i chose to create a “non-commercial” marine fishing license (rather than one called “sport fish” or “recreational”), the majority but possibly not all of the license fees would be required by law to be deposited into the Sport Fish Special Fund. To resolve any doubt, the State would need to amend the language of the Sport Fish Special Fund statute to add the phrase “non-commercial” to guarantee that all non-commercial marine fishing license fees would be required by law to be deposited into the fund. That being said, nothing in the statute prevents



Spearfisherman with his catch, photo by Jhana Young

the State from choosing to deposit all “non-commercial” license fees into the Sport Fish Special Fund without amending the statute.

Once any license fees are deposited into the Sport Fish Special Fund, those moneys can only be used for:

- Programs and activities to implement the laws related to aquatic resources and wildlife, including providing state funds to match federal grants under the Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop Breaux Act) for sport fish projects;
- Acquiring the use, development, or maintenance of trails or access ways into public fishing areas, fishery management areas, marine life conservation districts, or private lands where public sport fishing is authorized;

- Research programs and activities concerning sport fish conservation and management; and
- Importation into, and the management, preservation, propagation, enforcement, and protection of sport fishes in the State.<sup>22</sup>

Any deviation from these allowable uses of the Sport Fish Special Fund would jeopardize the federal Sport Fish Restoration Act (Dingell-Johnson/Wallop Breaux Act) funding that Hawai‘i receives annually (known as “DJ funds”). Currently, Hawai‘i receives a 1% allocation of available DJ funds, which has been approximately \$3.5M per year.<sup>23</sup> These DJ funds provide approximately 40% of the annual budget for DAR.<sup>24</sup>

It is important to note that these requirements would prevent the Legislature from diverting fees from a fee-based RPL system, but they would not prevent the Legislature from reducing other funding (including General Funds) that must be allocated to DLNR for fisheries management and enforcement.

### 3. If a fee-based license were created, could the license fees be used to improve enforcement?

**Short Answer: Yes.**

Federal DJ funds generally will not be granted to state fish and wildlife agencies to support projects that involve law enforcement activities to enforce fish regulations.<sup>25</sup> But this does not prevent a state from using the fees that it collects on its own from a recreational or non-commercial fishing license (i.e. state funds) for enforcement activities. The USFWS has confirmed that law enforcement activities specific to fish conservation are very much a part of the administration of state fish and game agencies and can be funded by state recreational or non-commercial fishing license fees without negatively affecting its ability to continue receiving federal DJ funds. However use of such fees would require that DOCARE officers separately track and account for time spent responding to fisheries enforcement versus other responsibilities. Funding could also be used for supplies and equipment dedicated to enforcement of fisheries, such as vessels and surveillance devices.

### 4. If a fee-based license were created, would the nonresident fee amount have to be the same as the resident fee amount?

**Short Answer: No.**

The State of Hawai‘i charges different fees for residents and nonresidents in its Freshwater Game Fish and Game Mammal Hunting license programs. Different resident and nonresident fee rates are also consistent with the trend seen in a majority of other coastal states and do not appear to have been challenged in court.<sup>26</sup>

There have been legal challenges to commercial fishing licenses based on a legal principle that protects a U.S. citizen’s

20 HRS § 187A-9.5.

21 S. Stand. Comm. Rep. No. 1647, in 1993 Senate Journal, at 1348.

22 HRS § 187A-9.5(c)-(e).

23 Specifically, Hawai‘i’s final apportionment of DJ funds for the last three available fiscal years were: \$3.6M (FY2016); \$3.4M (FY2015); \$3.2M (FY2014). See [https://wsrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR\\_Funding.htm](https://wsrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR_Funding.htm).

24 DJ funds are provided in the form of reimbursement for up to 75% of eligible project costs. This means that a state must cover the other 25% of a project’s costs from its own funds or in-kind contributions. 50 C.F.R. § 80.12.

25 50 C.F.R. § 80.6. Exceptions to this general rule can be made when these activities are necessary for the accomplishment of project purposes that have been approved by the USFWS regional director.

26 See Appendix B for a detailed comparison of marine fishing regulatory systems in U.S. coastal states and territories.



right to conduct business on equal footing with other U.S. citizens in all of the U.S. states.<sup>27</sup> There are circumstances where different resident and non-resident fees are allowed in the commercial context, but states must be able to make a factual showing to support the basis for this difference.<sup>28</sup> Hawai'i had a different fee for resident and nonresident commercial fishing licenses, which was challenged and subsequently revised in 2015 to remove the differential. Since these challenges were based on a legal principle that specifically protects business interests, they do not appear to apply to recreational/non-commercial fishing license fees.

**5. If the State creates a fee-based license, would everyone have to get one?**

**Short Answer: It will depend upon the details of any RPL system enacted.**

The State has the power to create a fee-based license system that applies to all fishers or one that creates exemptions and/or fee-waivers for certain categories of fishers. Fee waivers or license exemptions are frequently granted in other states to senior citizens, children, disabled persons, and active military personnel. In some cases, other categories like low income persons, veterans, and members of federally recognized tribes are eligible for fee waivers or exemptions.

For example, Hawai'i's freshwater game fish license exempts fishers under 9 years old, waives license fees for seniors 65 years and older, and provides a reduced-fee license to members of the U.S. armed forces on active duty in Hawai'i and their families. Hawai'i's game mammal hunting license has fee waivers for seniors over 65 and residents of Kalaupapa, Moloka'i with Hansen's disease.

Providing complete exemptions from license requirements would reduce data that many fishers say is lacking. Reduced-fee licenses or fee waivers may be better approaches to providing special treatment for certain categories of fishers.

## D. NATIVE HAWAIIAN RIGHTS

The Hawai'i Constitution provides unique protections for Native Hawaiian culture and for traditional and customary practices that exist in addition to any protections provided by the United States Constitution. Protected Native Hawaiian traditional and customary rights are determined under the law on a case by case basis and are difficult to generalize, even in the fishing context. Fishing practices or customs and their associated rights may differ at the island-level (mokupuni), island district-level (moku), or district division-level (ahupua'a). An analysis of how a new State non-commercial marine fishing RPL system might affect these rights and protections was prepared by Malia Akutagawa, Esq. to support this Study Group process, and her full analysis is included in Appendix G.

Below is a summary of the key questions Ms. Akutagawa analyzed for the Study Group, as well as her conclusions and recommendations. The Study Group took Ms. Akutagawa's analysis and all of her recommendations under consideration, but did not adopt them all. The recommendations that were adopted by the entire Study Group are outlined in Section XII of this report.

## KEY QUESTIONS ANALYZED

**1. Would any kind of statewide non-commercial marine fishing RPL system automatically threaten Native Hawaiian rights and practices?**

**Short Answer: No.** If the intent of a non-commercial marine fishing RPL system would be to provide adequate data on the fishery health as well as potentially fund additional monitoring and enforcement efforts, this is a form of mālama (conservation and stewardship) that is aligned with Hawaiian cultural beliefs and practices.

**2. May the State exercise its regulatory authority to create a non-commercial marine fishing RPL system even if it may cause harm to Native Hawaiian rights?**

**Short Answer: Yes and No.** Article XII, Section 7 of the Hawai'i State Constitution describes the State's legal obligation to Native Hawaiians. "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."<sup>29</sup>

The language is clear. While the Hawai'i Constitution requires State agencies like DLNR to protect Native Hawaiian rights, agencies may also regulate these rights. The Hawai'i Supreme Court rationalized that ancient Hawaiian usage was self-regulating and on this basis the State may also impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits it issues.<sup>30</sup> However, the State, in exercising its regulatory authority over Hawaiian rights, must weigh and reconcile competing interests.<sup>31</sup> Even when certain types of permits may interfere with Native rights the State and/or its political subdivisions may still issue these permits in instances where preserving and protecting Native rights would result in actual harm to the recognized interests of others.<sup>32</sup> While the State and counties may regulate Hawaiian rights, they are still obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.<sup>33</sup> Moreover, government has an affirmative duty<sup>34</sup> to preserve native rights and does not have unfettered discretion to regulate such rights out of existence.<sup>35</sup>

27 See *Marilley v. Bonham*, 802 F.3d 958 (9th Cir. 2015) (a class of non-resident fishers who purchased commercial fishing licenses and gear and species specific permits in California and paid higher fees than California residents successfully sued the State of California for violation of the Privileges and Immunities Clause of the United States Constitution).

28 Courts use a two-part test to determine whether different treatment of non-residents violates the Privileges and Immunities Clause:  
1) Does the challenged restriction deprive nonresidents of a privilege that falls within the protection of the Privileges and Immunities Clause? If yes, then:  
2) Is the restriction closely related to the advancement of a substantial state interest? If no, then the court will invalidate the restriction.

29 HAW. CONST. art. XII, § 7 (1978).

30 *Public Access Shoreline Hawaii v. Hawaii County Planning Commission (PASH)*, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995).

31 *Id.* at 447, 903 P.2d at 1268.

32 *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43 (citing *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 12, 656 P.2d 745, 752 (1982)).

33 *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43.

34 *Ka Pa'akai O Ka 'Aina v. Land Use Commission (Ka Pa'akai)*, 94 Haw. 31, 45, P.3d 1068, 1082 (2000) (citing *Stand. Comm. Rep. No. 57*, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 639 (1980)).

35 *PASH*, supra note 2, 79 Haw. at 451, 903 P.2d at 1272.

### 3. What are the sensitive areas and issues to be aware of when contemplating RPL system scenarios?

**Short Answers:** Primarily hoā‘āina (ahupua‘a tenant) practices, and konohiki fisheries that survived condemnation proceedings in the aftermath of the 1900 Organic Act and were deemed “vested.”

In addition, the following issues should be considered:

- Relative geographic isolation of rural subsistence communities, who are most dependent on nearshore resources, and their limited ability to access and participate in an RPL system;
- Resistance of many Native Hawaiians to participate in what they perceive as illegitimate state authority especially in regards to cultural customs and practices;
- Historically high resistance and negative reaction to any form of licensing or “registration” requirement for cultural practitioners;
- Exacerbating the disproportionate impacts of the criminal justice system on Native Hawaiians, through criminal penalties associated with a potential RPL system, especially as there may be higher numbers of Native Hawaiians who fish in general; and
- Disagreement and misunderstanding about what are “rights” and how they are protected by the law.

### 4. How can an RPL system respect and protect Native Hawaiian rights and also avoid criminalizing Native Hawaiians who are exercising their traditional and customary rights?

**Short Answer:** Some form of identification could potentially be provided that would alert DOCARE officers patrolling State marine waters that these individuals are exercising their protected rights within an area where their rights attach.

These rights holders could also be exempted from fees associated with a non-commercial marine fishing RPL system when exercising their rights within the geographic areas where their rights attach, including conducting traditional subsistence fishing and native mālama practices. When fishing in any other area, however, these individuals should be required to follow the RPL system requirements, including fees, that are applicable to the general public.

### 5. How would a mandatory free registry for non-commercial marine fishing impact Native Hawaiian rights?

**Short Answer:** There is likely no impact to Native Hawaiian Rights, since the State Constitution acknowledges the State’s authority to regulate those rights.

### 6. How would a fee-based fishing license for non-commercial marine fishing impact Native Hawaiian rights?

**Short Answer:** On its face, this is a reasonable regulation provided that it doesn’t allow the State to prevent a Native Hawaiian from exercising his or her customary rights within the ahupua‘a fishery where the fisher physically resides, and/or other fishing areas where that fisher’s customary rights attach.

### 7. How would including additional fees for particular activities impact Native Hawaiian rights?

**Short Answer:** Fees may be problematic if they completely infringe upon or cause extreme hardship to subsistence fishers. A fee waiver or exemption for subsistence fishers who are indigent/low-income may mitigate this issue.

Additional considerations:

**Fishing Gear Types:** Regulatory provisions for gear designed to take large harvests or resembling commercial fishing gear is likely no infringement on Hawaiian rights. If the gear is for subsistence fishing (modern gear included) or is crafted traditionally (e.g., leho he‘e – octopus lure with cowry shell) this might unreasonably infringe on cultural practices and should probably be exempted.

**Fishing Area Restrictions:** If the restricted area includes a Native Hawaiian fisher’s ahupua‘a fishery or other traditional fishing grounds, any cost or restriction may infringe on the indigenous user’s rights. However, it is noted that the State already restricts fishing in specific areas, at specific times, and for specific species.

**Permits for Different Species:** Requiring a special permit and/or additional fees for specific species may infringe upon Hawaiian cultural practitioners and “summarily extinguish” that person’s practice in violation of constitutional protections if that species is critical to a Native Hawaiian fisher’s subsistence diet or other traditional practice.

## ADDITIONAL RECOMMENDATIONS FROM MS. AKUTAGAWA

Ms. Akutagawa also recommended the following, if an RPL system is pursued for Hawai‘i:

- Train DAR personnel and DOCARE officers in the rights guaranteed to Native Hawaiian fishers and ocean stewards;
- Always reference the [Ka Pa‘akai](#) case framework in decision-making (i.e. [Ka Pa‘akai O Ka ‘Aina v. Land Use Commission](#)); and
- Utilize the ‘Aha Moku system as a unifying entity for broader education and outreach.

## ADDITIONAL RECOMMENDATIONS FROM LISTENING SESSION PARTICIPANTS

At the Listening Session held with Native Hawaiian Fishers, participants made the following additional recommendations:

- Consider the feasibility of organizing and implementing a place-based pilot project for any new RPL system prior to considering it statewide; and
- Consider other possible mechanisms for generating additional funding to support fisheries management and conservation in Hawai‘i, such as imposing a small surcharge on incoming non-resident airline passengers.

The Study Group did not adopt all of these recommendations, but it did recognize that before any potential non-commercial marine fishing RPL system is operationalized, further research and consultation should be done to:

- Identify who or what entity will determine the existence of Native Hawaiian traditional and customary rights in any given instance;
- Clarify how these rights would be determined; and
- Decide if exceptions would be granted for broader categories of fishers to ensure that all or most potentially protected traditional and customary practices would be not be infringed on.

## E. FINANCIAL CONSIDERATIONS

The Study Group looked at some of the general dynamics of potential costs and revenues associated with a new non-commercial marine fishing RPL system as described in a Financial Impact Analysis prepared by CI Hawai'i (Appendix H). The Analysis utilized information from DLNR, other Hawai'i agencies, and licensing agencies in other states to examine the potential financial impacts of a range of RPL system design scenarios, including both non-revenue and revenue-generating programs.

DLNR staff indicate that, in absence of revenue generating mechanisms or external financial support, establishing a free (no-fee) fishing RPL system will create an additional financial burden on an already resource-limited DLNR. If increasing State financial burdens is a concern to be avoided, any new RPL system contemplated by the State of Hawai'i would need some mechanism for recovering program operating costs over time.

To understand the potential net financial contributions of a revenue-generating licensing program, CI Hawai'i conducted a discounted cash flow (DCF) analysis to explore three different fee scenarios. Each scenario assumed a total of 158,123 non-commercial saltwater anglers in 2015, based on an estimate from the USFWS. However, in each scenario different assumptions were made for other key factors such as the expected annual volume of licensing transactions (i.e. purchases and renewals), program cost structure, and license fee rates. (A more detailed description of these factors is included in Appendix H).

### Scenario A: Minimum Universal License Fee (Break-Even Fee Rate).

Scenario A attempted to identify the minimum license fee rate that would still enable the licensing program to 'break-even'. In other words, the scenario that would cover all of the up-front and recurring costs generated by the licensing program over a 15-year time horizon, but without generating any new net revenue. Assuming a fixed, universal rate (applied to all license purchases irrespective of residency status, or waiver eligibility), the minimum license fee to break-even is \$1.13. (See Appendix H for further detail).

### Scenario B: Residency-Based Price Differentials and Demographic-Based Subsidies.

Scenario B evaluated the potential financial returns generated by a licensing program with a residency-differentiated rate structure of \$15.00/year for permanent Hawai'i residents and \$35.00/year non-permanent residents) and waiving license fees for: (a) Hawai'i residents ages 65 years and older; (b) individuals ages 16 years and younger, irrespective of residency status; and (c) Hawai'i residents eligible for Supplemental

Nutrition Assistance Program (SNAP) benefits. Under this scenario, the Analysis projected that the licensing program will generate a Net Present Value (NPV) \$18,027,240 over 15 years and an Internal Rate of Return (IRR) of 284.73%. In other words, based on the assumptions stated in the Financial Impact Analysis and an estimated initial program investment of \$296,250, the net cash flows generated by the licensing program over a 15-year period would be valued at an estimated \$18,027,240 in present dollars. Very preliminary estimates of net annual revenues under Scenario B are \$686,140 in Year One and \$2,089,807 in Year Five.

### Scenario C: Alternative Residency-Based Price Differentials and Demographic-Based Subsidies.

Scenario C evaluated the potential financial returns of a licensing program under assumptions identical to those of Scenario B, with reduced license fee rates. In this Scenario, the analysis assumed a fee rate of US \$5.00/year for permanent Hawai'i residents and US \$25.00/year for non-residents. The same license fee waivers in Scenario B applied to Scenario C. Under this scenario, it is projected that the licensing program will generate an NPV of US \$9,818,565 and an IRR of 170.35% over a 15-year time horizon. Very preliminary estimates of net annual revenues under Scenario C are \$360,504 in Year One and \$1,159,654 in Year Five.

While additional evaluation on the reasonableness of revenue, cost and other assumptions is strongly recommended, the preliminary analysis indicates potential for a licensing program to generate financial benefits for the State of Hawai'i, provided however, the program involves some revenue-generating mechanism.

## X. OPTIONS

The Study Group examined four different non-commercial marine fishing RPL system options, as well as considering a 'do nothing' or status quo option in which nothing new is implemented. Three of the four RPL system options were based on existing systems used in other coastal states. Table 2 includes basic details about each option and lists examples of states that use them, if applicable.



**TABLE 2: RPL SYSTEM OPTIONS CONSIDERED**

RPL OPTION	SYSTEM ELEMENTS	EXAMPLE STATES
EXISTING SYSTEM	Non-commercial marine fishing from the shoreline to three nautical miles out is legal for residents and nonresidents of all ages without a license or registration and without paying any fees (except for bottomfish)	N.A. (Hawai'i only)
FREE MANDATORY REGISTRY	Mandatory annual registration for all fishers over a certain age (often 16 yrs). No fee required.	New York, New Jersey, Maine
FEE-BASED LICENSE W/ FEE WAIVERS OR REDUCTIONS FOR CERTAIN CATEGORIES OF FISHERS	Mandatory fee-based, annual license with fee waivers for certain categories of fishers (e.g., residents vs nonresidents, seniors, disabled, military, low income).	Rhode Island
LOW-FEE LICENSE W/PERMITS, STAMPS, OR TAGS AT ADDITIONAL CHARGE	Mandatory low-fee, basic, annual license with the option to purchase special permits, tags, or stamps for special activities (e.g. different species or gear). Fees could be waived or reduced for certain categories of people.	Alaska, California
FREE LICENSE W/PERMITS, STAMPS, OR TAGS AT ADDITIONAL CHARGE	Mandatory free, basic, annual license with the option to purchase special permits, tags, or stamps for special activities for additional fees. Fees could be waived or reduced for certain categories of people.	N.A.

**TABLE 3: EXISTING SYSTEM, REGISTRY, PERMIT, AND LICENSE OPTIONS EXAMINED COMPARED TO OBJECTIVES**

RPL OPTION	SYSTEM ELEMENTS	NEW DATA	BETTER COMMUNICATIONS		MORE FUNDS	
		PROVIDE ADDITIONAL INFORMATION ON FISHERS	ENHANCE COMMUNICATION WITH FISHERS	STRENGTHEN 'VOICE' FOR FISHERS	INCREASE REVENUES FOR FISHERIES	IMPROVE ENFORCEMENT
EXISTING SYSTEM	Non-commercial marine fishing from the shoreline to three nautical miles out is legal for residents and nonresidents of all ages without a license or registration and without paying any fees (except for bottomfish)					
<b>NEW OPTIONS COMPARED AGAINST EXISTING SYSTEM</b>						
FREE MANDATORY REGISTRY	Mandatory annual registration for all fishers over a certain age (often 16 yrs). No fee required.	✓	✓	✓		
FEE-BASED LICENSE W/ FEE WAIVERS OR REDUCTIONS FOR CERTAIN CATEGORIES OF FISHERS	Mandatory fee-based, annual license with fee waivers for certain categories of fishers (e.g., residents vs nonresidents, seniors, disabled, military, low income).	✓	✓	✓	✓	✓
LOW-FEE LICENSE W/PERMITS, STAMPS, OR TAGS AT ADDITIONAL CHARGE	Mandatory low-fee, basic, annual license with the option to purchase special permits, tags, or stamps for special activities (e.g. different species or gear). Fees could be waived or reduced for certain categories of people.	✓	✓	✓	✓	✓
FREE LICENSE W/PERMITS, STAMPS, OR TAGS AT ADDITIONAL CHARGE	Mandatory free, basic, annual license with the option to purchase special permits, tags, or stamps for special activities for additional fees. Fees could be waived or reduced for certain categories of people.	✓	✓	✓	✓	✓

✓ = the RPL system option addresses the objective.

# XI. CONCLUSIONS

Hawai'i's marine resources are affected by a number of factors besides non-commercial fishing including pollution, invasive species, erosion, coastal development, climate change, and impacts from other marine recreational or industrial activities. However, this Study Group focused solely on issues associated with creating a non-commercial marine fishing RPL system and evaluated whether an RPL system had the potential to accomplish three objectives:

1. Provide additional and more robust data to support fishery management;
2. Foster two-way dialogue between fishers and managers; and
3. Create a source of independent, continuous funding to support effective management.

This section includes three parts:

1. A 'threshold analysis' indicating each RPL system's ability to address each objective;
2. Specific conclusions for each objective and for overarching legal matters;
3. Relative advantages (pros) and disadvantages (cons) of different RPL system options.

## A. THRESHOLD ANALYSIS

The Study Group evaluated four broadly-defined RPL system options, in addition to Hawai'i's existing system, to determine the ability of respective options to address the Study Group's three objectives. Two of the objectives were divided into 'sub-objectives' to allow further definition. The evaluation results are summarized in Table 3. This table illustrates a simple 'threshold' analysis that depicts whether or not each RPL system option meets the stated sub-objective, as compared to the existing system. The table does not reflect whether one option meets a sub-objective better or worse than another option; it simply indicates whether the option does or doesn't address the sub-objective.

Based on this threshold analysis, the only options that would address all five of the sub-objectives are the fee-based license options and the free-license with fee-based permits, stamps, or tags option. The free registry would address only three of the sub-objectives.

## B. SPECIFIC CONCLUSIONS

The Study Group also reached the following conclusions relative to the three objectives, and overarching legal matters:

### Objective 1: Provide additional and more robust data to support fishery management

- a. The 'status quo' or existing system will not provide additional or more robust data on non-commercial marine fishing activity in Hawai'i unless different approaches are used for surveys and fisher censuses.
- b. It is likely that a statewide RPL system would provide more useful and complete data than is currently gathered. A statewide RPL system could potentially provide DAR with

a count of non-commercial fishers who participate in non-commercial marine fishing activities and comply with that particular RPL system. A simple RPL system could result in a "phonebook" of fishers for further survey efforts. A more intensive RPL system could gather additional user demographic information such as where they reside, their age, and information about their typical fishing activities. But these options would likely provide only the total number of non-commercial fishers, subtotals of fisher types, and information on how to contact them for surveys or other data collection efforts.

- c. To avoid creating gaps in data on fishers, it is better to grant fee waivers for specific categories of fishers rather than exempting them from participating in the RPL system. For example, if a fee-based license program was implemented, a fee waiver for low income fishers would generate data on them without imposing financial burdens. In contrast, if those fishers are exempt, there would be no data generated for that user group.

- d. For data gathering purposes, an RPL system will be more effective if lifetime application options are not offered (as opposed to annual renewals). Many states noted that lifetime or multi-year RPL holders limited their data gathering capabilities.

- e. Similar to existing DAR and DOBOR RPL systems, confidentiality requirements will exist for any new non-commercial fishing RPL system. Specific confidentiality concerns regarding fisher data collected by any RPL system is a subject that should be investigated further. Confidentiality requirements may affect how any RPL system option needs to be designed and put into operation, and how personal information from it is collected and used.

### Objective 2: Foster more two-way dialogue between fishers and managers

- a. The status quo or existing system is not likely to foster more two-way dialogue unless an alternative means is used to identify more members of the non-commercial fishing community.

- b. Many fishers are interested in having a greater voice and influence on the laws, rules, and regulations that affect them. Knowing the number of non-commercial marine fishers who are active in Hawai'i and having current contact information available to engage them on relevant issues could give fishers a stronger voice in decision-making processes.

- c. Depending on how it is designed, any form of RPL system could provide a means for more two-way communication between fishers and the State. A fee-based permit or license may also be seen as an implied two-way contract or understanding between fishers and the State that would bring with it expectations for better communication of rights, responsibilities and fisheries management.

- d. Depending on how it is designed, an RPL system could provide opportunities for more focused outreach and education on fishing issues and more organized and effective interactions between State agencies and Hawai'i's various fishing communities than is currently the case. Other states, for example, use formal advisory groups to inform their state fisheries management agency on management priorities.

- e. An RPL system could make it easier and more cost-effective to get information out to license holders about updated or new spatial, temporal, gear, or species related rules and restrictions.
- f. Requiring fishers to annually renew their participation in any of the RPL system options would prevent fisher contact information from becoming out-of-date or obsolete.
- g. All RPL system options would need to address cultural and linguistic differences among fishers, and the geographic isolation of certain rural fishing communities in order to be most effective.
- h. All of the RPL system options could be designed to allow fishers to selectively determine how they should be contacted (via email, phone text, or mail), and how they should be engaged (e.g. surveys, additional information options, etc.).

**Objective 3: Create a source of independent, continuous funding to support effective management**

- a. Neither the status quo/existing situation or free registry would create new sources of funding.
- b. A fee-based license system has the potential to generate additional revenue for the State. However, the amount of revenue and net income derived from a fee-based permit or license will depend upon specific design and implementation factors. Revenues can be modeled using assumptions about the fee amounts to be charged for a permit or license, the numbers of participating fishers (i.e. total number of fishers minus the number of fishers who would receive waivers or qualify for exemptions), expected compliance rates (i.e. the percentage fishers who actually purchase licenses compared to the number of fishers that should), and the costs to start-up and maintain the permit or license system over time.
- c. The Study Group’s preliminary financial analysis of potential licensing revenues and net income assumed two different fee structures: a \$15 resident/\$35 nonresident annual license and a \$5 resident/\$25 nonresident annual license. Using available estimates of the number of participating fishers, and projected compliance rates and program costs, this analysis indicated that a fee-based license with similar features would likely generate positive annual net income in a relatively short amount of time. While the results of these preliminary analyses appear promising, further research and analysis should be conducted to validate the revenue, cost, and other assumptions associated with any fee-based permit or license system that may be selected. Additionally, any fee waiver categories should be studied further for projected increases or decreases over time and the related impact those changes may have on expected net revenues.
- d. The Study Group reviewed the non-commercial marine fishing license systems of twelve coastal states. Among those states, annual license fees ranged from \$7 to \$35 for residents and \$10 to \$145 for nonresidents.
- e. DAR currently charges residents \$5 for an annual freshwater fishing license and charges nonresidents \$25 for the same license. The Division of Forestry and Wildlife (DOFAW) charges \$20 and nonresidents \$105 for annual game mammal hunting licenses. DAR charges \$50 annually

for commercial marine fishing licenses for residents and nonresidents alike.

- f. State law requires that fees collected from a “recreational” marine fishing permit or license be deposited into the Sport Fish Special Fund. It is less clear if all fees from a “non-commercial” marine fishing permit or license would be treated the same way. Once deposited into the Sport Fish Special Fund, both federal and state law requires that the funds be used only for specific fisheries-related purposes. These uses are defined by statute, but all fishers may not agree that these uses are the only activities that support ‘effective fisheries management.’
- g. The Sport Fish Special Fund cannot be diverted by the legislature for other purposes without risking Hawai‘i’s eligibility to continue receiving federal funds that make up 40% of DAR’s annual budget. However, this provision would not prevent the legislature from possibly reducing the State General Funds allocated for fisheries management to compensate for anticipated income from permits or licenses. Having a stronger enumerated fisher ‘voice’ could help fishers advocate for preserving the existing funds allocated for fisheries management by the legislature and preventing such reductions in General Funds from occurring.
- h. RPL system fees could potentially be used to support DOCARE’s fisheries enforcement activities, but would need to be carefully defined and accounted for in order to maintain the State of Hawai‘i’s eligibility to continue receiving the federal funds that support fisheries management. Even without additional revenues to DOCARE, a license or permit system could also enhance their capabilities and effectiveness for aquatics enforcement efforts, (i.e. through improved data collection or the requirement for license holders to consent to inspections).

**LEGAL MATTERS**

- a. There is no indication that a fee-based fishing permit or license is prohibited by Art. XI, § 6 of the Hawai‘i Constitution (which addresses people’s rights to fish in Hawai‘i’s sea waters. (See Section IX (C) 1 for discussion)
- b. If a fee-based, non-commercial, marine fishing permit or license were created and all the fees were deposited into the existing Sport Fish Special Fund, the Legislature could not use the license fees for something other than programs relating to fisheries management. (See Section IX (C) 3 for discussion)
- c. If a fee-based permit or license were created, fees could be used to increase the capacity and tools available for enforcement of Hawai‘i’s fishing rules and regulations (See Section IX (C) 3 for discussion)
- d. If a fee-based license were created, nonresident license fee amounts do not have to be the same as resident license fee amounts. (See Section IX (C) 4 for discussion)
- e. The State can exempt certain categories of people from the requirements of any new RPL system or provide those categories of people with fee waivers. (See Section IX (C) 5 for discussion)



f. Requiring a new non-commercial fishing RPL system will not automatically threaten Native Hawaiian rights and practices. (See Section IX (D) 1 for discussion). Any new RPL system must not prevent Native Hawaiians that hold traditional and customary rights from exercising those rights within fishing areas where those rights attach. (See Section IX (D) 6 for discussion). The most important areas to be aware of when considering a new RPL system are Hoa'āina (ahupua'a tenant) practices and any existing konohiki fisheries that survived condemnation proceedings following the 1900 Organic Act and were deemed "vested". (See Section IX (D) 3 for discussion) Additionally, any RPL system should avoid placing additional burdens or liability on cultural practitioners engaging in bona fide traditional and customary or subsistence practices.

g. A subsistence-based fee waiver could address financial or cultural impacts to indigent, low-income, Native Hawaiian, and other fishers. (See Section IX (D) 7 for discussion)

### **C. RELATIVE ADVANTAGES (PROS) AND DISADVANTAGES (CONS) OF DIFFERENT OPTIONS**

The Study Group identified various advantages and disadvantages to each of the RPL system options evaluated. These are a reflection of the Study Group's informed opinions and observations based on the collective knowledge and experience of its members.

**Table 4: Advantages and Disadvantages of Different Registry, Permit, and License System Options**

RPL SYSTEM	PROS (POTENTIAL ADVANTAGES)	CONS (POTENTIAL DISADVANTAGES)
<p><b>1. EXISTING SYSTEM</b></p>	<p>No additional administrative burden                      All non-commercial marine fishing is free                      No push back from public who don't support change to status quo</p>	<p>Don't know how many people are fishing                      Difficult to contact, talk to or hear from fishers on important issues                      Effective enforcement is difficult                      No additional revenue for fisheries management                      Risk of mismanaging the fisheries based on limited data</p>
<p><b>2. FREE REGISTRY</b></p>	<p>Allows you to know who is fishing non-commercially                      May not cost as much to create &amp; maintain as other options                      Opportunity to enhance outreach and education                      All non-commercial marine fishing is free</p>	<p>Difficult to get compliance                      Limited in types of data collected                      No additional revenue for administering the system                      Limited usefulness for enforcement (registration cannot be revoked for not complying with rules and regulations)                      Low incentive for fishers to register</p>
<p><b>3. FEE-BASED LICENSE W/ FEE WAIVERS OR REDUCTIONS FOR CERTAIN CATEGORIES OF FISHERS</b></p>	<p>Would produce more data on the universe of fishers                      Would generate new revenue source                      Could help with enforcement by providing greater authority to inspect                      Could be relatively easy to implement and comprehend</p>	<p>A system with fee waivers or reduced fee licenses would be more complicated and could create enforcement challenges                      Most fishers would have to pay to fish legally                      Requires more funds to institute &amp; maintain                      Waivers could result in less overall support and buy in</p>
<p><b>4. LOW-FEE LICENSE W/ PERMITS, STAMPS, OR TAGS AT ADDITIONAL CHARGE</b></p>	<p>Similar to hunting license structure                      Would identify a more complete universe of fishers                      Would improve data on specific categories of fishing activity                      Would provide a cheaper and relatively easier option for fishers not engaged in stamp/permit/tag activities                      Would generate new revenue source through basic license and additional stamp/permit/tag fees</p>	<p>May not generate enough funds - implementing a stamp &amp; tag system would be costly, but the most common fee collected would be low                      May be complicated &amp; confusing                      Could infringe on cultural rights</p>
<p><b>5. FREE LICENSE W/ PERMITS, STAMPS, OR TAGS AT ADDITIONAL CHARGE</b></p>	<p>Free for most fishers                      May have a better compliance rate                      Capture basic info on all fishers while adding additional information about specific activities</p>	<p>Revenues may not cover implementation costs                      Could be seen as unfair targeting certain activities</p>

## XII. RECOMMENDATIONS

The Study Group takes no collective position on a preferred option or whether an RPL system should be implemented at this time.

However, if any of these options are to be pursued at a later date, the Study Group recommends that the following be considered:

### A. OUTREACH

- Undertake extensive outreach, consultation, and discussions with affected stakeholders statewide prior to and as part of the decision-making process.
- As part of any outreach effort, ensure that this study is available to the public in general and to fishing stakeholders in particular.

### B. ADDITIONAL RESEARCH AND INFORMATION GATHERING

- Improve the definition of non-commercial fishing and an understanding of the demographics of affected population segments, for example, the delineation between boat and shore-based fishers, their age, and their geographic distribution and how issues of sustenance and subsistence fishing apply.
- Consult non-commercial Native Hawaiian fishing practitioners to identify practices that are a part of traditional subsistence, cultural, ceremonial, or religious activities. These may include types of gear, restricted areas or seasons, and high value species.
- Consult with charter fishing industry representatives to identify RPL elements that would work easily for charter patrons and businesses, and consider ways to use RPL fees collected through charter operations to improve State infrastructure used by this industry.
- Continue to collect additional information from other states on their lessons learned, special issues, the social challenges that have arisen, and financial costs and benefits of how generated funds can and have been used. However, be conscious of demographic, geographic, historic, and cultural differences between Hawai'i and the other states in considering the adoption of any approaches.
- Carefully consider and conduct further analysis on the financial implications of prospective fee-waivers or exemptions from any potential RPL system. Develop a more thorough understanding of the full range of costs the State may incur if it seeks to implement any of the RPL systems examined.
- Consider ways to align any RPL system with complementary data collection efforts that improve management of near-shore waters.
- Ensure that the State has specific plans for how data will be collected, used, and shared before data collection efforts

begin. Conduct further research into any confidentiality and data protection issues that may apply.

### C. FUNDS

- Ensure that any and all funds collected from any form of RPL system are deposited in the Sport Fish Special Fund and protected and dedicated to managing marine fisheries.
- Ensure that any funds derived from a fee-based RPL system are additive. The addition of funds from any fee-based RPL system should not replace or reduce General Funds and/or other funds currently supporting DAR or other DLNR divisions for fisheries management and conservation.
- Recognize that DLNR is already systematically underfunded and a new RPL system may not fully alleviate that situation for fisheries management.
- If an RPL system is pursued that would generate additional net revenue, the use of that revenue should strive to meet the needs identified in Objective 1 (better data) and Objective 2 (enhanced information and dialogue) of this study.

### D. ADVISORY BOARD

- Establish a formal advisory board to consult with DAR to improve communication and information exchange on matters pertaining to non-commercial fishing in local waters.
- Ensure adequate representation from different segments of the fishing communities, both geographically and by type of fishing.
- Define and publicize lists of any special gear, restricted areas, or individual species, if a potential RPL system considers charging permit fees for using special gear, fishing in restricted areas, or fishing for specific species.
- If any RPL system is enacted, require that DAR provide annual reports. The annual reports should be provided to an advisory board prior to being released to the public. The annual reports should address the data collected and how it was used to support fisheries management. The report should also include the amount collected from fees (if applicable) and how they were spent to support fisheries management. If a portion of the fees are provided to DOCARE for aquatics enforcement, the report should also describe how those enforcement funds were spent. If data is collected, the report should summarize the preliminary data and include the refined findings when they are analyzed. At minimum, the report should summarize how fishermen benefit from the RPL program.

### E. NATIVE HAWAIIAN RIGHTS

- Undertake focused outreach and consultation with the Native Hawaiian community to determine how best to reach Native Hawaiian fishers and fisher groups, particularly in communities where fishing is important to subsistence and cultural practice. Address concerns that traditional and customary fishing practices could be



adversely affected by an RPL system or that exercising them could be construed as criminalized by a new RPL system. Solicit Native Hawaiian views and opinions or analyses from recognized experts on acceptable approaches for avoiding these perceptions.

- Develop systems, trainings and policies to avoid criminalization of native Hawaiian practitioners.
- If a permit system is implemented, provide a mechanism for Native Hawaiian non-commercial fishing practitioners to identify their traditional fishing area(s), types of gear, restricted areas or seasons, and specific species that are a part of their traditional subsistence, cultural, ceremonial, or religious practices.

non-commercial saltwater and freshwater system. Strive for simplicity for the users.

- If a fee-based license or permit is pursued, look into the advantages and disadvantages of creating different tiers of licenses (e.g., levels or categories, such as a single boat license that can cover several non-commercial fishers on the same boat).



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## F. ENFORCEMENT

- Provide information and training for DOCARE and other law enforcement personnel about changes to the law under any new RPL system, particularly about how to validate any proposed RLP system exemptions. Enlist their assistance with specific outreach and community education, including for Native Hawaiian related issues and concerns.
- Increase the presence of community-based DOCARE officers simultaneous with implementing any new RPL system. Ensure that they know and understand the communities of non-commercial fishers in the areas to which they are assigned.
- Recognize that any RPL system provisions regarding DOCARE's right to inspect personal coolers may be particularly sensitive to certain fishers. Clarify under what terms and conditions such inspections may be warranted. Other state laws may be sources of guidance on the types of language that can be used to specify and limit the consent to inspection.

## G. OTHER

- Research other possible mechanisms for producing additional information and data to support informed decision-making in non-commercial fishing management.
- Consider ways to combine any new RPL system with other existing DAR fishing license programs, such as a combined

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## PROJECT SPONSORS

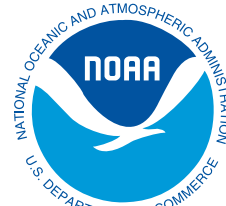
This report was prepared by The Study Group on the Feasibility of a Non-Commercial Marine Registry, Permit, or License System for Hawai'i using funds from the Harold K.L. Castle Foundation and Federal funds under award NA16NMF4270267 from NOAA Fisheries, U.S. Department of Commerce, and award NA15NOS48220099 from NOAA Coral Reef Conservation Program, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of the Harold K.L. Castle Foundation, NOAA Fisheries, NOAA Coral Reef Conservation Program, or the U.S. Department of Commerce.



HAROLD K.L. CASTLE  
FOUNDATION



NOAA  
CORAL REEF  
CONSERVATION PROGRAM



**Harold K.L. Castle Foundation:** Founded in 1962, the Harold K.L. Castle Foundation works to build resources for Hawai'i's future. It does so by investing in promising initiatives and organizations through grantmaking, using its convening power, and introducing and spreading new ideas and approaches to help solve some of Hawai'i's most pressing problems.

**NOAA Coral Reef Conservation Program of the U.S. Department of Commerce:** The NOAA Coral Reef Conservation Program was established in 2000 by the Coral Reef Conservation Act to protect, conserve, and restore the nation's coral reefs by maintaining healthy ecosystem function. The program brings together expertise from across NOAA for a multidisciplinary approach to studying these complex ecosystems to inform more effective management.

**NOAA Saltonstall-Kennedy Grant Program of the U.S. Department of Commerce:** The goal of the Saltonstall-Kennedy program is to fund projects that address the needs of fishing communities, optimize economic benefits by building and maintaining sustainable fisheries, and increase other opportunities to keep working waterfronts viable.

# APPENDICES

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Charter of Commitments

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## **APPENDIX H**

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## **APPENDIX I**

Personal Statements from Study Group Members

Study Group

*Feasibility of a Noncommercial Marine Fishing License in Hawai'i*

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**Charter of Commitments**

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**I. Purpose of the Charter.**

This document describes the purpose and procedures of the Study Group for determining the feasibility of a noncommercial marine fishing license in Hawai'i being conducted during 2016. The Charter serves as a "terms of reference" document and is intended to help us meet our aspirations and schedules and engage in disciplined and productive discussions. It is flexible and can be amended or changed by a majority of Study Group members.

**II. Mission.**

The project, funded by grants from federal and local funders but conducted independently, brings together knowledgeable scientific, technical, policy, and stakeholder group perspectives to try to answer the following questions:

1. What purposes and goals are to be served by creating a State of Hawai'i noncommercial marine fishing license, registration, or permitting system?
2. What are the different options and models to consider for Hawai'i and what are the respective pros and cons for each?
3. How would each of options benefit and impact different stakeholder interests in Hawai'i?
4. Is there one option that maximizes potential benefits and minimizes impacts to Hawai'i's of all or most stakeholders?
5. If there is a possible "yes" to one or more options, what should be done to enact one of them?



These questions are subject to further refinement during the deliberations.

### **III. Membership.**

Members of the JFF Study Group are:

1. Joshua DeMello - Western Pacific Regional Fishery Management Council
2. Christopher Hawkins, Ph.D. - Western Pacific Regional Fishery Management Council, Social Scientist
3. Jack Kittinger, Ph.D. – Conservation International, Hawai'i Program Director
4. Aarin Gross, J.D. – Conservation International, Hawai'i Program Manager
5. Eric Co – Harold K.L. Castle Foundation, Senior Program Officer for Marine Conservation
6. Phil Fernandez – Hawai'i Fishermen's Alliance for Conservation and Tradition, President
7. Ed Watamura – Waialua Boat Club
8. Frank Farm – Ali'i Holo Kai Dive Club
9. McGrew F. Rice – Ihu Nui Kona Sportfishing
10. Kevin Chang – Kua'aina Ulu Auamo (KUA)
11. Dave Itano – Fisheries Consultant (OHA)?

Ex Officio members who bring specialized knowledge and expertise to the table are:

12. Wayne Tanaka - Office of Hawaiian Affairs
13. Bruce Anderson – Division of Aquatic Resources, Administrator
14. Alton Miyasaka – Division of Aquatic Resources, Fisheries Program Manager
15. Michael Fujimoto – Division of Aquatic Resources, District Program Manager
16. David Sakoda, J.D. – Department of Land and Natural Resources, Marine Law Fellow

Additional Study Group members, including ex officio ones, may be added. Others may be asked to provide information and perspectives or serve as liaisons to the JFF effort.

### **IV. Organization and Coordination.**

The project will be facilitated by Peter S. Adler, PhD and Keith Mattson of *ACCORD3.0*. Matt Ramsey, NOAA Hawai'i Fisheries Extension Agent will assist with facilitation and technical support. Jhana Young and Aarin Gross from Conservation International will assist with research, project administration, and logistics.

The job of the Project Team is to help the Study Group to address key issues and come to the highest possible consensus. As part of the effort, the Project Team will facilitate a Joint Fact Finding (JFF) process on specific issues identified by the Study Group with the goal of

aiding the development of consensus findings and recommendations. Adler, Mattson and the team will help the Study Group prepare for and manage meetings, help identify and prioritize critical issues, organize study materials, and chair the deliberations so that the JFF's purposes are accomplished and summarized in a final report. More specifically, the team can be expected to:

- Ensure that a reasonably diverse range of knowledgeable perspectives is brought to bear on discussions.
- Ensure that no one group or person is allowed to hijack or dominate discussions or to disadvantage the expression of other perspectives.
- Encourage all members of the Study Group to articulate their questions, concerns, and suggestions to produce a comprehensive group effort
- Remain impartial on the substance of the issues being discussed while proactively ensuring that all Study Group members collectively prioritize which issues are most important to study and discuss.
- Ensure that members of the Study Group understand that they cannot use Adler and his team to advance any pro- or con- advocacy agendas.
- Encourage members of the Study Group to work together, build and maintain cohesion, and work towards the highest levels of congruent, fact-informed conclusions that can be achieved.
- Encourage the fullest disclosure and exchange of information vital to accomplishing the Study Group's three goals.

## **V. The Spirit of the Process.**

For the Study Group and the project team, this will be a collaborative and non-adversarial process. It will not pit one orientation or faction against others. Instead, it will involve mutual inquiry and collective dialogue where each member is guided by the following principles: (1) be tough on the problems; (2) be easy and collegial with each other; (3) focus on the best data and evidence available while understanding that much data remains incomplete; and (4) be willing to modify personal and collective views when the cumulative evidence points in a different direction than you thought.

## **VI. Rules of the Road.**

1. **KNOWLEDGE.** Study Group members are chosen for their (a) diverse types of knowledge, experience, and expertise in areas related to noncommercial fishing

activities or marine resource management, policy, or research; and (b) their commitment to work collaboratively with others.

2. **VOLUNTEERS.** Members of the group serve as volunteers and commit to serve for an expected six or more meetings in 2016. Homework between meetings will also be needed.
3. **COLLABORATION.** The JFF is a cooperative and non-adversarial evidence-based inquiry. This means the group works together towards the common goal of answering the questions it was formed to address. It requires substantive, procedural, and social introspection and a willingness to assume good intentions when disagreement arises. Candor is prized but courtesies and etiquette conducive to high quality deliberation are essential, i.e. sharing airtime; not monopolizing discussions; focusing on factual information; listening to others; staying on topic.
4. **WILLINGNESS TO ASSUME RESPONSIBILITIES.** JFF Study Group members may be asked to present materials, recruit speakers, research issues, draft sections of reports, or perform other tasks for the project. While every effort will be made to distribute workloads and respect individual members' availabilities, the success of the effort depends on all members having their oars in the water.
5. **NO ALTERNATES.** While every effort will be made to schedule briefings and meetings at a time convenient to most members, continuity of learning will be important. It is understood that Study Group members may have to miss a meeting or two but may not send alternates.
6. **BETWEEN MEETINGS.** As needed, the Study Group and/or the Project Team will hold teleconferences, webinars or briefings with other experts between meetings.
7. **LOCALE.** All Study Group meetings will be held on Oahu.
8. **MEETINGS.** Most of the Study Group's meetings will be held as executive session deliberations. Unless invited for a specific reason by the group, these meetings will not be open to observers. However, invitational listening sessions and, budget allowing, public sessions on all islands are anticipated.
9. **DOCUMENTATION.** Jhana Young will serve as the project's official documentarian. She will keep an official set of meeting notes. These notes are for the Study Group's use only. Jhana may audio-record some discussions for purposes of creating accurate notes but audio recordings will be erased once the meeting records have been circulated. No individual or organizational attributions of comments will appear in the notes.
10. **CONFIDENTIALITY.** With minor modifications, the Study Group will utilize the Chatham House Rule (see <https://www.chathamhouse.org/about/chatham-house-rule>). To encourage open and risk-free give-and-take conversations, Study Group

discussions will be confidential unless otherwise agreed to. As a matter of good faith and to avoid distraction, Study Group members and the Project Team will withhold public comments and personal evaluations about Study Group composition, and the content and process of the Study Group's deliberations until the project is completed. This also means not blogging or writing about what is progressing. It is understood that Study Group members may want to brief groups they represent from time to time, and the Project Team will draft period Project Updates for that purpose.

11. **PUBLIC STATEMENTS.** No member of the Study Group will speak for the Study Group except Adler or Mattson. Wherever possible, requests by the media or political leaders for comments will be vetted with the Study Group. Adler and Mattson will not characterize the substance of the deliberations other than to describe progress with the process.
12. **SECURE INTERNET.** The Project Team will create a secure and proprietary internet site specifically for the JFF group members and project staff to exchange or read documents and engage in information exchange.
13. **MUTABILITY.** These rules of the road may be expanded or changed by the group.

## **VII. Decision Making.**

There will be numerous small and large decisions to be made. Procedural decisions may range from the locations, dates and times of meetings to matters of research. Substantive decisions will range from the priority of issues to be studied, the specific studies to be discussed, and recommendations as to future studies and methodologies that should be provided to relevant decision makers following this study.

Wherever possible, the Study Group will operate by the highest consensus possible. Consensus decisions are those everyone in the Study Group can support, or at a minimum, for which there is "no objection." If, after discussion, consensus proves impossible, the Study Group will take votes of those voting members who are present, which will be recorded. Organizations with more than one member (such as Conservation International and Western Pacific Regional Fishery Management Council) will get only one vote per organization. *Ex officio* members, such as Department of Land and Natural Resources and Division of Aquatic Resources, will not vote. Major concluding decisions will be deferred until all members of the Study Group are present, or a vote can be done by teleconference, or by e-mail.

Each member of the Study Group who wishes will also be invited to write a personal concluding statement regarding the process and the decisions and recommendations made. The personal statements will be limited to a maximum 1,500-word count, and will be made available as part of the Final Report.

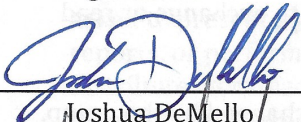
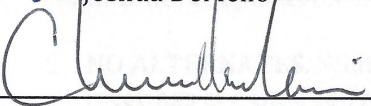


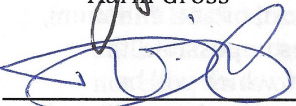
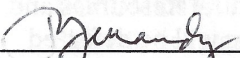
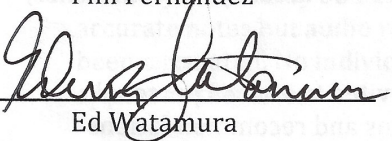


### VIII. Schedule.

With flexibility, and subject to revisions, the Study Group will meet for at least six anticipated meetings at dates and times to be established beginning May 20, 2016 and ending by December 31<sup>st</sup>.

### IX. Inquiries

Inquiries about the project and the process may be directed to: Peter S. Adler, PhD at [padleraccord@gmail.com](mailto:padleraccord@gmail.com). Adler can also be reached at 808-888-0215.

<i>Signatures</i>	<i>Date</i>
 _____ Joshua DeMello	<u>06-28-16</u>
 _____ Christopher Hawkins	<u>6/28/16</u>
 _____ Jack Kittinger	<u>28 June 2016</u>
 _____ Aarin Gross	<u>6/28/16</u>
 _____ Eric Co	<u>6/28/16</u>
 _____ Phil Fernandez	<u>6/28/16</u>
 _____ Ed Watanura	<u>6/28/16</u>

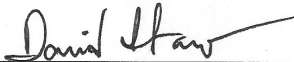
Frank Farm

McGrew Rice



Kevin Chang

6/28/16



Dave Itano

6/28/16

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Coastal States & Territories Compared to Hawai'i					4 parameters similar to Hawai'i =		3 parameters similar to Hawai'i = Connecticut, Rhode Island	
State/Territory	Miles of coast	Land area (sq mi)	DJ funds (FY'15)	Population	Climate Zone	# of Marine/Tidal Species Managed	Noncommercial System Type	Exemptions (
*Hawai'i	750	6,422	\$3M	1,431,603	Tropical	~35 fish, ~15 invertebrates, 3 corals, 2 limu, monk seal & green sea turtle	Freshwater-only License, Aquarium Permits, Bottomfish Vessel Registration	
Alabama	53	50,645	\$6M	4,858,979	Subtropical	~60 fish; 3 invertebrates	License (resident/non-resident fee schedule); registration in Alabama Saltwater Angler Registry required for fishers exempt from license, except those under 16 yrs	<16 yrs; 65+ yrs; residents on public fishing piers;
Alaska	6,640	570,640	\$17M	738,432	Temperate to Subarctic	~30 finfish, 4 shellfish	License (resident/non-resident fee schedule) + stamps (king salmon)	<16 yrs; 60+ yr residents; disabled veteran (SF Harvest Record Report required)
American Samoa	72	76	\$1M	54,343	Tropical	3 finfish, 5 shellfish, sea turtles, marin mammals, sharks, coral, live rock	Nothing in place, but license authority exists in statute/regulation	
California	840	155,779	\$17M	39,144,818	Subtropical to Temperate	~80 fish, ~20 invertebrates, ~5 shellfish, ~5 kelp	License (resident/non-resident fee schedule)	Fishing on public piers or at aquaculture facilities

**Coastal States & Territories Compared to Hawai'i**

**4 parameters similar to Hawai'i = 3 parameters similar to Hawai'i = Connecticut, Rhode Island**

State/Territory	Miles of coast	Land area (sq mi)	DJ funds (FY'15)	Population	Climate Zone	# of Marine/Tidal Species Managed	Noncommercial System Type	Exemptions (
<b>Connecticut</b>	96	4,842	\$3M	3,590,886	Temperate	~30 fish, ~7 invertebrates	License (resident/non-resident fee schedule) + validations or stamps for specific species &/or gear	<16yrs
<b>Delaware</b>	28	1,948	\$3M	945,934	Subtropical to Temperate	~20 tidal finfish, ~6 tidal invertebrates	License (fee-based with fresh and tidal combined)	<16 yrs & Senior Residents 65 yrs+
<b>Florida</b>	1,350	53,624	\$11M	20,271,272	Tropical to Subtropical	~100 marine fish (reef, pelagic, & aquarium), ~10 invertebrates	License (separate fresh and saltwater licenses, including a saltwater shoreline, broken into resident and nonresident rates with several time based options) + additional permits for specific species: spinney lobster, snook	<16 yrs & senior residents (65 yrs+), resident Armed Forces member home on leave for 30 days or less
<b>Georgia</b>	100	57,513	\$6M	10,214,860	Subtropical	~60 fish; ~6 invertebrates	License (inclusive of fresh and saltwater recreational fishing)	<16 yrs; residents fishing on their land
<b>Guam</b>	78	209	\$1M	161,785	Tropical	~10 finfish, ~15 invertebrates	None (in the process of creating legislation that requires licenses)	
<b>Louisiana</b>	397	43,203	\$6M	4,670,724	Subtropical	~70 fish, ~6 invertebrates	License (a special saltwater license that requires additional basic fishing license)	<16 yrs; basic licens exemption for residents born before June 1, 1940 who have lived in Louisiana for one year prior to fishing



**Coastal States & Territories Compared to Hawai'i**

**4 parameters** similar to Hawai'i =

**3 parameters** similar to Hawai'i = **Connecticut, Rhode Island**

State/Territory	Miles of coast	Land area (sq mi)	DJ funds (FY'15)	Population	Climate Zone	# of Marine/Tidal Species Managed	Noncommercial System Type	Exemptions (
<b>Maine</b>	228	30,842	\$3M	1,329,328	Temperate	~65 fish, ~15 invertebrates	Free marine registry or freshwater fishing license; Saltwater fishing covered by any other state's valid license, a ME freshwater fishing license, and other operator permits; most fishers required to sign up for an online marine fishers registry free of charge	<16 yrs; passengers on party/charter or head boat operated by an individual who holds a valid Recreational Operator's license; when fishing for smelt from a smelt camp rented from an individual who holds a valid Recreational Operator's license; when fishing from a dock, pier, or wharf that is owned by an individual who possesses a valid Recreational Operator's license
<b>Maryland</b>	31	9,707	\$3M	6,006,401	Subtropical	~55 fish, 1 invertebrate	License (nontidal and Chesapeake Bay versions, required for anglers over 16 years of age) + Saltwater Angler Registry for fishers exempt from license	<16 yrs; fishing from licensed charter boat or licensed commercial fishing pier; fishing on free fishing day; holder of valid commercial tidal fish license; holder of Potomac River Fisheries Commission recreational fishing license; holder of Chesapeake Bay & Coastal Sport Fishing License; resident on active duty with Armed Forces on leave with official orders
<b>Massachusetts</b>	192	7,800	\$3M	6,794,422	Temperate	~75 fish, ~15 invertebrates, marine mammals, sea turtles, terrapin	Permit (flat \$10 fee)	<16 yrs; disabled anglers (as defined by Massachusetts statute); anglers fishing on permitted for-hire vessels (charter/head boat); permitted anglers from neighboring coastal states (i.e. NH, RI, CT)
<b>Mississippi</b>	44	46,923	\$4M	2,992,333	Subtropical	~10 fish	Must have both Saltwater and Freshwater licenses	<16 yrs; residents who are blind, paraplegic, a multiple-amputee, adjudged totally disabled by the Social Security Administration or totally service connected disabled by the Veterans Administration

**Coastal States & Territories Compared to Hawai'i**

**4 parameters** similar to Hawai'i = **3 parameters** similar to Hawai'i = **Connecticut, Rhode Island**

State/Territory	Miles of coast	Land area (sq mi)	DJ funds (FY'15)	Population	Climate Zone	# of Marine/Tidal Species Managed	Noncommercial System Type	Exemptions (
<b>New Hampshire</b>	13	8,952	\$3M	1,330,608	Temperate	~30 fish, ~10 invertebrates	License (for saltwater, \$11 flat fee)	<16 yrs; anglers fishing from a licensed charter or party boat
<b>New Jersey</b>	130	7,354	\$3M	8,958,013	Subtropical to Temperate	~20 fish, ~5 invertebrates	Non-fee based registry (assortment of freshwater licenses)	None
<b>New York</b>	127	47,126	\$8M	19,795,791	Temperate	~40 fish, ~10 invertebrates	Non-fee based registry for anglers over 16	None
<b>North Carolina</b>	301	48,617	\$10M	10,042,802	Subtropical	~80 fish, ~10 invertebrates	License (Coastal Recreational License System for saltwater)	<16 yrs & holders of other specified hunting or combination licenses
<b>Northern Mariana Islands</b>	296	182	\$1M		Tropical	~10 invertebrates and corals	Permits for specific species and activities	
<b>Oregon</b>	296	95,988	\$7M	4,028,977	Temperate	~40 fish, ~30 invertebrates	Single License for Fresh and Saltwater	<12 yrs; fishing during free fishing weekends; resident fishing on their lands (except for salmon, steelhead, sturgeon, or halibut)
<b>Puerto Rico</b>	311	3,423	\$3M	3,474,182	Tropical		License (separate for saltwater and inland water fishing, same price)	<13 yrs

**Coastal States & Territories Compared to Hawai'i**

**4 parameters** similar to Hawai'i = **3 parameters** similar to Hawai'i = **Connecticut, Rhode Island**

State/Territory	Miles of coast	Land area (sq mi)	DJ funds (FY'15)	Population	Climate Zone	# of Marine/Tidal Species Managed	Noncommercial System Type	Exemptions (
<b>Rhode Island</b>	40	1,033	\$3M	1,056,298	Temperate	~20 fish, ~10 invertebrates	License (resident/non-resident fee schedule)	<16 yrs; anglers fishing on licensed party or charter boats; anglers who hold a license from a reciprocal state (i.e. NY, CT, MA, ME); anglers who hold a NOAA Fisheries registration; Anglers who hold Highly Migratory Species Angling Permits; anglers who are on leave from active military duty; anglers who are blind or permanently disabled
<b>South Carolina</b>	187	30,060	\$4M	4,896,146	Subtropical	100+ fish, ~10 invertebrates	Licenses (Fresh and Saltwater, with various time limits)	<16 yrs
<b>Texas</b>	367	261,231	\$17M	27,469,114	Subtropical	~50 fish, ~15 invertebrates	License (saltwater fishing stamp endorsement plus fishing license)	<17 yrs; born before January 1, 1931; mentally disabled persons engaging in recreational fishing as part of medically approved therapy and under formal supervision or under the supervision of a licensed angler family member; free fishing day
<b>U.S. Virgin Islands</b>	117	134	\$1M	104,737	Tropical		Permits for specific area and restricted gear.	

**Coastal States & Territories Compared to Hawai'i**

**4 parameters** similar to Hawai'i = **3 parameters** similar to Hawai'i = **Connecticut, Rhode Island**

State/Territory	Miles of coast	Land area (sq mi)	DJ funds (FY'15)	Population	Climate Zone	# of Marine/Tidal Species Managed	Noncommercial System Type	Exemptions (
Virginia	112	39,490	\$4M	8,382,993	Subtropical	~45 fish, ~5 invertebrates	License (fresh and saltwater separate) + registry (Virginia Fisherman Identification Program)	<16 yrs; The following are exempt from license but must register: 65 yrs+; fishing on a VA or PRFC licensed chart or head boat; fishing from a public fishing pier with a VMRC issued license; fishing from a private boat with a VA or PRFC saltwater boat license; fishing from the angler's private property/pier; fishing with a reciprocal MD saltwater license; fishing with gear licensed by the Commission
Washington	157	66,455	\$6M	7,170,351	Temperate	~45 fish, ~35 invertebrates, & seaweeds	License (saltwater and freshwater recreational)	<15 yrs; free fishing weekend



**Coastal States & Territ 2 parameters similar to Hawaii = Delaware, Maine, Maryland,**

State/Territory	Special Licenses	Subsistence	Indigenous	Licenses issued/Yr	Data Collection	Advisory Group Used	Website
*Hawai'i							<a href="http://dlnr.hawaii.gov/dar/licenses-permits/">http://dlnr.hawaii.gov/dar/licenses-permits/</a>
Alabama	Pier; Spear Fishing; Disabled	No	No		Mandatory for red snapper		<a href="http://www.outdooralabama.com/saltwater-fishing-alabama;">http://www.outdooralabama.com/saltwater-fishing-alabama;</a> <a href="http://www.outdooralabama.com/saltwater-angler-registration">http://www.outdooralabama.com/saltwater-angler-registration</a>
Alaska	Resident senior; Resident disabled; Low income; Military; Blind	Yes (residents only)	Yes (residents only)	Licenses: 190,366 (resident); 288,915 (nonresident); King Salmon stamps: 74,775 (resident); 104,086 (nonresident); 18,039 (low-income resident)			<a href="http://www.adfg.alaska.gov/index.cfm?adfg=fishing.main">http://www.adfg.alaska.gov/index.cfm?adfg=fishing.main</a>
American Samoa		Authority exists in regulation					<a href="http://www.asbar.org/index.php?option=com_content&amp;view=category&amp;id=886&amp;Itemid=294">http://www.asbar.org/index.php?option=com_content&amp;view=category&amp;id=886&amp;Itemid=294</a>
California	Disabled veteran; recovering military member; 65+ low income resident; Native American low income resident; developmentally disabled individuals; permanently physically disabled residents;	Yes (only registered members of the Yurok Indian tribe by annual permit)	Yes (only registered members of the Yurok Indian tribe by annual permit)		Mandatory for North Coast Salmon, Steelhead, Abalone, Sturgeon, & Spiny Lobster		<a href="https://www.wildlife.ca.gov/Licensing/Fishing">https://www.wildlife.ca.gov/Licensing/Fishing</a>

**Coastal States & Territ 2 parameters similar to Hawaii = Delaware, Maine, Maryland,**

State/Territory	Special Licenses	Subsistence	Indigenous	Licenses issued/Yr	Data Collection	Advisory Group Used	Website
<b>Connecticut</b>	Senior residents (65 yrs+); Armed Forces members; blind; physically or intellectually disabled	No		41,000 (Y1); 119,000 (Y2)	Voluntary	Yes, to develop legislation	<a href="http://www.ct.gov/deep/cwp/view.asp?a=2696&amp;q=322708&amp;depNav_GID=1630%20">http://www.ct.gov/deep/cwp/view.asp?a=2696&amp;q=322708&amp;depNav_GID=1630%20</a>
<b>Delaware</b>	Annual Resident, Annual Non-Resident, 7-day tourist				Annual Resident, Annual Non-Resident, 7-day tourist		<a href="http://www.dnrec.delaware.gov/fw/fisheries/pages/newfishinglicense.aspx">http://www.dnrec.delaware.gov/fw/fisheries/pages/newfishinglicense.aspx</a>
<b>Florida</b>	Resident disabled; military/disabled veteran event exemption; Time: 1 yr, 5 yr, Lifetime combined freshwater/saltwater for FL residents; Non-Residents: 3-day, 7-day, 1-yr licenses;	No					<a href="http://myfwc.com/fishing/saltwater/recreational/">http://myfwc.com/fishing/saltwater/recreational/</a>
<b>Georgia</b>	1-day saltwater shore fishing; resident seniors (65 yrs+); permanently and totally disabled residents; blind fishers; wildlife Management Areas, and species for residents, and non-residents, lifetimes, prices vary by age	No					<a href="http://www.georgiawildlife.com/fishing">http://www.georgiawildlife.com/fishing</a>
<b>Guam</b>		Specific regulations for personal use of certain species					<a href="http://www.guamcourts.org/compileroflaws/GAR/09GAR/09GAR002-12.pdf">http://www.guamcourts.org/compileroflaws/GAR/09GAR/09GAR002-12.pdf</a>
<b>Louisiana</b>	Military, resident senior (60 yrs+), charter passenger, charter skiff, non-resident student, resident disabled, hook & line, basic fishing, saltwater, senior, charter passenger, non resident basic fishing season freshwater or saltwater, non-resident 1-day freshwater or saltwater, non-resident charter skiff, lifetime, additional licenses for gear	No					<a href="http://www.wf.louisiana.gov/sites/default/files/pdf/publication/31743-2016-recreational-fishing/2016_fishing_regulations_may_10_2016-2.pdf">http://www.wf.louisiana.gov/sites/default/files/pdf/publication/31743-2016-recreational-fishing/2016_fishing_regulations_may_10_2016-2.pdf</a>

**Coastal States & Territ 2 parameters similar to Hawaii = Delaware, Maine, Maryland,**

State/Territory	Special Licenses	Subsistence	Indigenous	Licenses issued/Yr	Data Collection	Advisory Group Used	Website
<b>Maine</b>	Holiday specific (Labor Day, Memorial Day, and July 4th) free days						<a href="http://www.maine.gov/ifw/licenses_permits/fishing.htm#saltwater">http://www.maine.gov/ifw/licenses_permits/fishing.htm#saltwater</a>
<b>Maryland</b>	Resident veteran who is 100% service-connected disabled; resident veteran who is former POW; Annual Resident and Non-Resident, 7 -day	No				Yes, specific to rate increase bill & a more general advisory council	<a href="http://www.eregulations.com/maryland/fishing/fishing-licenses-stamps-saltwater-angler-registration/">http://www.eregulations.com/maryland/fishing/fishing-licenses-stamps-saltwater-angler-registration/</a>
<b>Massachusetts</b>	Free annual permit to resident seniors (60 yrs+)			150,000	Voluntary	Yes, prior to legislation & in budgeting process	<a href="http://www.eregulations.com/massachusetts/fishing/saltwater/2016-saltwater-fishing-permit/">http://www.eregulations.com/massachusetts/fishing/saltwater/2016-saltwater-fishing-permit/</a>
<b>Mississippi</b>	Resident seniors (65 yrs+) 3-day freshwater, 1-day, 3-day freshwater, 3-day saltwater for non-residents, 14-day fishing armed-forces license, additional for specific species						<a href="https://www.mdwfp.com/law-enforcement/fishing-rules-regs.aspx">https://www.mdwfp.com/law-enforcement/fishing-rules-regs.aspx</a>

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State/Territory	Special Licenses	Subsistence	Indigenous	Licenses issued/Yr	Data Collection	Advisory Group Used	Website
<b>New Hampshire</b>	Charter and party boats	No					<a href="http://www.eregulations.com/newhampshire/fishing/saltwater/">http://www.eregulations.com/newhampshire/fishing/saltwater/</a>
<b>New Jersey</b>		No					<a href="http://www.nj.gov/dep/saltwaterregistry/">http://www.nj.gov/dep/saltwaterregistry/</a>
<b>New York</b>		No	Yes, for Native Americans living and working on reservation land				<a href="http://www.dec.ny.gov/outdoor/7755.html">http://www.dec.ny.gov/outdoor/7755.html</a>
<b>North Carolina</b>	Residents, non-residents: 10-days, 1-yr. lifetime is for residents only. Additional gear license for gillnets, pots, trawls, seines.	Individuals can qualify for subsistence waiver if receive Medicaid, foodstamps, Work First Family Assistance					<a href="http://portal.ncdenr.org/web/mf/recreational-fishing-licenses-and-permits">http://portal.ncdenr.org/web/mf/recreational-fishing-licenses-and-permits</a>
<b>Northern Mariana Islands</b>							<a href="http://www.cnmidfw.com/fishing-rules.php">http://www.cnmidfw.com/fishing-rules.php</a>
<b>Oregon</b>	Youth (12-17 yrs); resident senior (70 yrs+ & Oregon resident for 5 yrs); disabled veteran and uniformed service member; daily/multiday; shellfish	No					<a href="http://www.dfw.state.or.us/resources/fishing/index.asp#rules">http://www.dfw.state.or.us/resources/fishing/index.asp#rules</a>
<b>Puerto Rico</b>	Divides classes of fishermen into: F-T commercial, P-T commercial, beginning commercial, recreational, provisional recreational (less than 1 year); free until age 15. : categories by age: 15-21, 22-60, visiting US citizens, non-resident foreign citizens. Older than 60 yrs & disabled required license but free. Additional permits for particular species.	No					<a href="http://sero.nmfs.noaa.gov/sustainable_fisheries/caribbean/documents/pdfs/regs_booklet.pdf">http://sero.nmfs.noaa.gov/sustainable_fisheries/caribbean/documents/pdfs/regs_booklet.pdf</a>

**Coastal States & Territ 2 parameters similar to Hawaii = Delaware, Maine, Maryland,**

State/Territory	Special Licenses	Subsistence	Indigenous	Licenses issued/Yr	Data Collection	Advisory Group Used	Website
<b>Rhode Island</b>	Resident senior (65 yrs+); active military personnel stationed in RI; temporary 7-day license	No		42,000	Voluntary	Yes, prior to legislation & in budgeting process	<a href="http://www.dem.ri.gov/programs/managementservices/licenses/saltwater-fishing-licenses.php">http://www.dem.ri.gov/programs/managementservices/licenses/saltwater-fishing-licenses.php</a>
<b>South Carolina</b>	14-day, 1-yr, lifetime; shrimp baiting; public fishing pier; charter fishing vessel; active duty or military personnel who are residents of SC stationed outside of the state and home on leave	No					<a href="http://www.dnr.sc.gov/regs/saltwaterregs.html">http://www.dnr.sc.gov/regs/saltwaterregs.html</a>
<b>Texas</b>	Resident, non-resident, one-day, annual, senior, lifetime; resident or non-resident qualifying as a disabled veteran; resident on active duty in the Armed Forces	No					<a href="http://tpwd.texas.gov/regulations/outdoor-annual/fishing/saltwater-fishing/">http://tpwd.texas.gov/regulations/outdoor-annual/fishing/saltwater-fishing/</a>
<b>U.S. Virgin Islands</b>		Yes					<a href="http://sero.nmfs.noaa.gov/sustainable_fisheries/caribbean/documents/pdfs/regs_booklet.pdf">http://sero.nmfs.noaa.gov/sustainable_fisheries/caribbean/documents/pdfs/regs_booklet.pdf</a>



**Coastal States & Territ 2 parameters similar to Hawaii = Delaware, Maine, Maryland,**

State/Territory	Special Licenses	Subsistence	Indigenous	Licenses issued/Yr	Data Collection	Advisory Group Used	Website
<b>Virginia</b>	Annual resident and non-resident combined freshwater/saltwater, resident and non-resident 5-day, 10-day, lifetime; recreational boat; tidal boat sport fishing; disabled; Additional licenses for specific gear	No					<a href="https://webapps.mrc.virginia.gov/public/reports/swrecfishingrules.php">https://webapps.mrc.virginia.gov/public/reports/swrecfishingrules.php</a>
<b>Washington</b>	1-5 day combination license, residents, non-residents, resident seniors (70 yrs+), veteran with a service-connected disability of 30%+; veteran 65 yrs+ with a service-connected disability; resident who permanently uses a wheelchair; resident who is blind or visually impaired; resident with a developmental disability; shellfish/seaweed; razor clam						<a href="http://wdfw.wa.gov/fishing/saltwater.html">http://wdfw.wa.gov/fishing/saltwater.html</a>

**Full Study Group Meetings in Honolulu**

1. May 20, 2016
2. June 28, 2016
3. July 26, 2016
4. August 25, 2016
5. October 3, 2016
6. November 10, 2016

**Q&A Panel Discussions (via video-call) with Other States**

1. August 17, 2016 8:00 am HST with:
  - a. Mark Alexander, Supervising Fisheries Biologist, Connecticut's Marine Fisheries Division and
  - b. Erin Rainey, Director of Licensing for Florida Fish and Wildlife Conservation Commission
2. August 23, 2016 8:00 am HST with:
  - a. Craig Lilyestrom, Puerto Rico Department of Natural and Environmental Resources, Marine Resources Division
3. August 24, 2016 7am HST with:
  - a. Story Reed, Fisheries Policy Analyst with Massachusetts' Department of Fish & Game, Division of Marine Fisheries
  - b. Michael Armstrong, Assistant Director of Fisheries Biology Section of Massachusetts' Department of Fish & Game, Division of Marine Fisheries
  - c. Doug Mumford, North Carolina's Division of Marine Fisheries, Recreational Statistics
  - d. Katy West, North Carolina's Division of Marine Fisheries, Pamlico District Manager
4. September 1, 2016 8am HST with:
  - a. Gina Hunt, Deputy Director, Maryland Department of Natural Resources, Fisheries Service
  - b. Maryellen Gordon, New Jersey Division of Fish & Wildlife, Bureau of Marine Fisheries

**Small Group Listening Sessions**

1. October 20, 2016 (in person and via video call) with DOCARE supervisors and officers convened by the facilitation team and attended by Study Group members Aarin Gross of Conservation International Hawai'i and Matt Ramsey of NOAA NMFS.
2. October 21, 2016 (via conference call) with Native Hawaiian Fishers convened by Study Group member Kevin Chang of KUA and attended by the facilitation team and Study Group member Aarin Gross of Conservation International Hawai'i.
3. October 21, 2016 (in person in Kona) with a representative of charter boat operators convened by Chris Hawkins formerly of the Western Pacific Regional Fishery Management Council and attended by Study Group member Jack Kittinger of Conservation International Hawai'i.

# Appendix D

State/Territory	Does your new system help you understand patterns of noncommercial fishing that are taking place? If so, how?	Does it help you understand the volume of fish being caught (better than before)? If so, how?	Has it improved your ability to educate noncommercial fishers? If so, how? What is different for you now?	Are there any other ways that the noncommercial fishing license/registry information is being used by your agency?	Has it provided any efficiencies for your agency that were not possible prior to having the license/registry in place?	General Recommendations
<b>1. New Hampshire</b>	Somewhat. We only have a single license, so no species-specific data is obtained through the recreational license, but it does allow us to track the changes in the number and timing of saltwater license sales within and between years.	The primary purpose of implementing the federal registry, followed by its replacement with the state saltwater license, was to use the directory of known-saltwater anglers for use in the National Marine Fisheries Service's Recreational Saltwater Fishing Effort Survey. Prior to the license the effort was generated through a highly inefficient random-digit-dial survey. Since that time the survey has piloted mail surveys with more success than the phone survey with the shift to cell phones instead of land-lines. Currently they have selected to move the effort survey to a hybrid mail and phone survey, of which the phone portion will use the directory of saltwater anglers that is created by the saltwater license (or the federal registry for states that do not have a saltwater license). The directory should mean that the rate of contact with an angler compared to the random-digit-dial should be exponentially higher and therefore produce a greater sample size in the final effort estimation. The greater sample size should lead to results that have better precision and can be used with more certainty than the current and past estimates. The effort portion of the survey is what is used to calculate the catch and harvest estimate (numbers and weight) and because of that, our understanding of the volume of fish being caught should be better (more precise) than before.	Minimally. We obtain contact information for saltwater recreational anglers through the licensing system and it can and has been used to send out information (email) to license holders about regulatory changes, most notably those that change mid-season after the production of our printed rule books.	No.	No.	
<b>2. Connecticut</b>	As there is no mandatory catch reporting associated with our saltwater angler licenses, the license system itself provides no direct information on fishing activity or catch, other than geographic distribution of anglers. For effort and harvest data, Connecticut (as does all other Atlantic Coastal states) relies on NOAA Fisheries' Marine Recreational Information Program. Our office supplies MRIP with angler-level monthly uploads of saltwater fishing license information (including phone number(s), email address, mailing address) that forms a basis for their survey sampling frame. Our license system does provide us with some demographic information (gender, age, race, town, etc.) about recreational angling participants.	See response to bullet 1.	By virtue of non-mandatory collection of email addresses, it has enhanced the scope of our listserv in informing the fishing public on regulation changes, public hearings/informational meetings, and others matters of interest.	Analysis of the demographic data has informed efforts to make some legislative changes to the portfolio of licenses offered for sale. For example, to encourage and enhance fishing and hunting participation among young adults, we got legislation passed that established reduced fees for 16-17 year olds. Demographic data was also used to inform an unsuccessful attempt in establishing a nominal fee for presently free 65+ hunting and fishing licenses.	It provides us a means of identifying and geographically/demographically analyzing and characterizing our saltwater angling population that would not otherwise be possible. Having email addresses (see bullet 3) provides an efficient and economical means of contacting at least that portion of our licensed anglers that provide an email address (~30%). Contacting licensed saltwater anglers by mail (n~150,000) would be prohibitively expensive. It also provides contact information (phone number) for our anglers in case we need to contact specific individuals for any reason, and our licensing system has a contact log in which we can maintain a history of interactions (staff person, date, time, type of contact, reason, resolution, etc.) with our license holders.	
<b>3. Rhode Island</b>	It breaks down license sales into resident, non resident, over 65, active military, and temporary (10 day). Other data includes DOB, address, phone number.	Not really that is accomplished via MRIP sampling. Volume of anglers more appropriately.	Yes we provide an annual budget report to a stakeholder group (required by statute) gives opportunity to give program info to rec folks who are generally heads of various fishing organizations in turn they can pass along the info to their members. Also we attend and issue licenses at our annual fishing trade show which allows for ample public discourse.	We use the info to update our annual saltwater verses freshwater participation breakdown for USFWS funding.	It was a new license program so it didn't update an older system. We have it set up with our internet portal contractor such that they do all of the remittance and tech support to vendors and the public, this is better than our current Freshwater/ Hunting license program which is still paper based and billing is handled by RIDEM staff, not as cost effective as our SW license program.	

State/Territory	Does your new system help you understand patterns of noncommercial fishing that are taking place? If so, how?	Does it help you understand the volume of fish being caught (better than before)? If so, how?	Has it improved your ability to educate noncommercial fishers? If so, how? What is different for you now?	Are there any other ways that the noncommercial fishing license/registry information is being used by your agency?	Has it provided any efficiencies for your agency that were not possible prior to having the license/registry in place?	General Recommendations
4. Delaware	Yes, but only in a rather limited regard - resident versus non-resident; trout anglers (stamp); 7-day tourist; boat license. Note that the boat license is an option that covers all folks fishing on a vessel.	It does not. Estimates of recreational fishing effort and landings are coastwide initiatives generated through phone surveys (transitioning to mail-based) and access point angler intercept surveys. NOAA/NMFS administers the program in partnership with the Atlantic States Marine Fisheries Commission and its member states.	Only in the sense that we use a small portion of the funds to produce plastic fishing rulers that are distributed free at license sales agents. We recently received the authority from our legislature to use license information for recruiting and retaining angler and for sustaining and increasing license sales. We have yet to do so, but this will allow us to work cooperatively with the Recreational Boating and Fishing Foundation (RBFF) to retain anglers through the numerous promotions and incentives they offer to anglers. The difference is that it generates a tremendous amount of money that can be used to match (25%) our federal Sport Fish Restoration dollars. Over the years general fund monies and positions were cut and converting our freshwater fishing license to a general fishing license was the only long-term solution to obtaining match. Sport Fish Restoration monies fund a lion's share of our fishery projects (research, boat ramps, fishing piers, aquatic ed, monitoring, etc.).	We use license information in conjunction with our Fisherman Information Network (FIN) number information to establish our saltwater/freshwater splits for federal aid purposes. The 5 question for the FIN inform us on whether they will fish non-tidal waters, tidal waters, federal waters, or fish for blue crab or clams.	I would not say that the licenses provided any efficiencies per se.	
5. Maryland	Maryland has actually had a recreational saltwater license since the late 80s, but it provided certain exemptions that did not comply with NSAR. Created a free registry to capture the fishers exempt from the existing license (fishers on registered boats, in free fishing areas, waterfront property, etc.). The system provides individuals with a unique identifying number that allows the department to see what products an individual purchases from the department (e.g. fishing license, hunting license, camping permit). That allows them to see who renews their licenses and how that might relate to fee increases.	The fisher estimates with the license + registry are better than before when it was based on surveys alone. Maryland has few shoreline access points so intercept survey data is weaker and data from telephone surveys was weaker because it didn't necessarily capture fishers. At least now they have a mechanism for targeting fishers with surveys for data.	Fishers can opt in for email contact from the department. Provides a direct mechanism for communication to fishers and updates on rules.	The online system now provides individuals with a unique identifying number that allows the department to see what products an individual purchases from the department (e.g. fishing license, hunting license, camping permit).	The free registry increased department's costs. And even though it is free, fishers still complain about the inconvenience of having to register in both the boat and saltwater registry. The registry also operates at a loss.	Maryland was not in a position to build a system from scratch, just modified an existing system to comply with NSAR. If they started from scratch, they would not have created license exemptions (especially for those on registered boats) which put them in a place of having to create a shadow registry system to capture the necessary data. If possible, have any fee increase legislation submitted by a fisher group or advisory board, rather than the department. Fee-increase bill successfully adopted that way. Look into possible grant from the Recreational Boating & Fishing Foundation ( <a href="https://www.takemefishing.org/corporate/">https://www.takemefishing.org/corporate/</a> ) to support your efforts to create a license system. If anglers on charter boats will not need to purchase license, but charter boat captain will have to report catch, start with electronic reporting. Paper reporting requires a lot more staff time. Be prepared for the creation of any system to take years. Modifications to Maryland's existing fee rates take at least a year. Unrelated to the registry/license creation, a fisher stakeholder group initiated a bill that increased the recreational fees and created a task force group that made recommendations to the department about how the increased fee revenue should be spent. Although there were problems with the bill that had to be worked out later, the report that was generated by the task force provided something that the fishers and department could use to pressure legislators not to cut the department's budget to account for the increased fees. Since fee-increase was initiated by the fishers, the legislators would be very unpopular, if they cut the support to those same fee-payers.
6. Puerto Rico	Puerto Rico's recreational saltwater (and freshwater) license system will also include stamps for hunting doves, pigeons and ducks. I say "will" because it is still not implemented. We came within a few days of starting sales last year, but circumstances intervened. We're working with Active Network to redo some parts of the web-based system (which we call "FLIPR", for Fishing Licenses in Puerto Rico), adding a shoreline fishing license at low cost, and a few other tweaks.		One of my goals for the system is to clarify the dividing line between recreational anglers and commercial fishermen. We also expect that it will provide us with an avenue to get the regulations out to a broader audience. Internal surveys have shown us that only around 10% of the non-commercial fishermen have ever seen our regulations.			Some things I've learned in this experience, are that it is critical to have complete buy-in from the top of the agency. And it's not enough to think you have it. And you have to realize they may be under pressures you don't realize. Also, setting up a system like this is very, very, very complicated. There are so many details, and we're short on people that can handle them. Ours may be particularly complicated since we're trying to do it fully bilingual, working with a company that isn't completely comfortable in Spanish. The training of all the sales personnel, law enforcement, finances people in the Department, alerting the Treasury people to what's coming, preparing informational/educational materials, User Acceptance Testing of the main system, the streamlined system for use by our Regional Offices, and the Administrative System, with financial reports and special access by administrators, hiring of a coordinator and getting her trained fully. We'll have 3 phone help lines also: one for general users, one for Regional Office sales people (the Regional offices will sell in cash to people who don't have credit cards or who have special needs, and we've had to upgrade their internet speed and buy new computers also), and one for law enforcement to call to check validity of licenses or with other questions. Each phone line has "wait" text, in Spanish and English that has to be approved.

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## Overview of Hawai'i Legal Issues Related to a Non-commercial Marine Fishing License

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Prepared by  
Aarin Gross, J.D.  
Conservation International Hawai'i<sup>1</sup>

### “Is a non-commercial marine fishing license legally possible for Hawai'i?”

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When this question has been raised at various points in the past, it has created confusion and triggered very strong emotions. Many people believe, often for different reasons, that it is not legally possible to create a non-commercial marine fishing license in Hawai'i. The purpose of this overview is to explore in detail some of the legal issues that are often raised about this topic, determine whether any of these issues prevent the creation of a non-commercial marine fishing license in Hawai'i, and provide recommendations about what should be considered, if such a license is pursued.

This overview and analysis was prepared to support a co-discovery process and analysis conducted by the Study Group on the Feasibility of a Non-Commercial Marine Fishing Registry, Permit, or License System for Hawai'i, which was convened from May through December 2016.

### Issues Raised During Prior Attempts at Legislation

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Just in the last 15 years, there have been multiple attempts to pass legislation related to a non-commercial marine fishing license. These legislative efforts have included attempts to:

- create a non-commercial marine fishing license;
- protect funds related to non-commercial fishing from improper transfers for other purposes;
- clarify that federal funds for non-commercial fishing activities could be used for enforcement activities; and
- provide the State of Hawai'i's Department of Land and Natural Resources (DLNR) with the authority to inspect bags and containers that contain aquatic life to strengthen fisheries regulation enforcement efforts.

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<sup>1</sup> Conservation International (CI) is a non-profit organization that works to empower societies to responsibly and sustainably care for nature for the well-being of humanity by building on a strong foundation of science, partnership, and field demonstration. The Hawai'i program focuses on ho'i i ke kai momona (return to an abundant ocean) by merging traditional knowledge with Western science, conservation tools, and strategies for changing how people and business value local, sustainable seafood.

Aarin Gross is a Senior Program Manager for Policy and Operations at CI Hawai'i. She received her Juris Doctor degree from the University of Hawai'i at Mānoa – William S. Richardson School of Law, clerked for the Hawai'i Supreme Court, and practiced as a commercial and civil litigator in Honolulu prior to joining CI Hawai'i. This overview and analysis benefited greatly from research contributed to CI Hawai'i by Cora Sorenson while she pursued her joint Master of Business Administration and Master in Public Policy at Mills College.



Some of these legislative efforts were successful. Others were not.<sup>2</sup> Those that were unsuccessful, often became very divisive.

Written testimony submitted in response to two unsuccessful 2014 bills related to the creation of a non-commercial marine fishing license highlight the concerns that often lead to division around this topic.<sup>3</sup> These concerns outline some of the issues that need to be explored and understood by the public and by decision makers before any non-commercial fishing license could progress to policy change in Hawai'i.

In summary, these concerns include:

1. ***Do we know enough to create a new license requirement?*** (Do we have adequate science-based data on fish stock assessments to make an informed decision about a non-commercial fishing license? Why will fishers have to pay for something that other ocean users will benefit from and get for free? Why are fishers the target for the fee?)
2. ***Who would have to get a license?*** (Tourists on vacation? Children fishing with bamboo poles? Native Hawaiians? Fishers on charter boats? How will this affect the right of Native Hawaiians to sustain themselves from the land? Won't this just turn Native Hawaiians into criminals?)
3. ***How will the fee schedule be structured?*** (Will nonresidents pay more than residents? Will Native Hawaiians be exempt? How will subsistence and low-income fishers be accommodated? How will "recreation," and "subsistence" be defined? Would you provide a rate for a family or long-term residents? Would there be different rates based on age?)
4. ***What will the fees be spent on?*** (Will they be used to improve enforcement? How can fishers be confident that license fees won't be swept into the General Fund for other purposes? How do we know that the legislature won't cut DOCARE's budget by the same amount that the new license fees bring in to DLNR? How do we avoid a zero-sum game? The problem is not a lack of funding but a lack of will by the Legislature to properly fund DLNR. Can we require the Legislature and the Governor to match funds generated by a license fee?)
5. ***Where will the fees be held?*** (Will a new fund need to be created? How likely is that to be successful? Could that new fund be raided for other purposes?)

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<sup>2</sup> For example, in 2013, a House resolution was introduced that would have directed DLNR to create what was to be called a Marine Game Fishing Task Force. H. Con. Res. 91, H.D. 1, 27th Leg. Reg. Sess. (2013). Ultimately, this resolution was not enacted into law. If it had become law, however, DLNR would have been required to convene a task force that would have specifically considered:

1. Establishing a regulatory framework for marine game fishing similar to that used by the State to regulate hunting;
2. Requiring annual renewal of marine game fishing licenses;
3. The licensing fee amounts, including establishing different fees for residents and nonresidents;
4. The disposition of the licensing fees collected;
5. The feasibility of establishing joint licensure for hunting and marine game fishing; and
6. Potential issues or concerns that marine game fishing licensure might present, such as specifying which activities constitute marine game fishing and addressing concerns regarding native Hawaiian traditional and customary rights.

<sup>3</sup> See H.B. 1911, H.D. 1, S.D. 1, 27th Leg., Reg. Sess. (2014); H.B. 1912, 27<sup>th</sup> Leg., Reg. Sess. (2014).

6. *How would the new license fit in with existing federal requirements?* (Would fishermen that are already federally registered be required to hold a license as well?)
7. *How would this benefit fishers?* (DLNR is not effectively managing or enforcing the existing rules; how will this change? Exactly what would DLNR use these fees for that would benefit fishers?)
8. *How can we trust DLNR?* (How do we know that the license isn't just the first step needed to impose stricter rules and limit more areas to fishing later? How will this stop overharvesting? How do we know that DLNR will enforce the rules to protect the resource after they get the money from the fees?)

The extent to which these questions raise legal issues under Hawai'i law will be analyzed in the following overview.

## Exploring the Issues

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### A. Do we know enough to create a new license requirement?

This is primarily a policy question. From discussions with federal and state fisheries managers who are familiar with the data used for stock assessments, many managers believe that the currently available data about the number of non-commercial fishers fishing in Hawai'i is inconsistent and not comprehensive. Reportedly, this weakness in the available data affects fisheries managers' ability to make reliable, science-based decisions about Hawai'i's nearshore fisheries. Many of these managers have said that they view a state non-commercial marine fishing license as a way to better identify the number of active non-commercial fishers in Hawai'i waters and improve the reliability of the data used to make management decisions.

Hawai'i's nearshore fisheries are under a myriad of pressures that are likely to increase as the human population adjacent to them continues to grow. Fishing is unique from other recreational ocean activities, in part, because when it is successful, it will remove fish from the water. As the resident and visitor populations continue to grow, lacking an ability to know how many people are removing fish from Hawai'i's waters will become increasingly problematic for fisheries managers. They will continue to be unable to fully assess this particular pressure on Hawai'i's fisheries and marine resources. These managers acknowledge, however, that there are other, equally significant, pressures on nearshore fisheries that would not be reduced or even affected by the creation of a non-commercial marine fishing license. These pressures include pollution (land-based and off-shore), habitat loss and destruction, and climate change. These pressures must also be addressed through appropriate and effective tools before comprehensive improvement in the health of Hawai'i's nearshore fisheries can be realized.

Although the question above is primarily one of policy, there are legal issues that may be relevant to it, too, including:

1. Does Hawai'i law prohibit the creation of a non-commercial marine fishing license because it protects the public's right to fish?
2. If it is not prohibited, can the State of Hawai'i require a non-commercial marine fishing license right now?

These issues are explored in more detail below.

## 1. The Public's Right to Fish

Hawai'i law grants to the people of Hawai'i access to and use of the public fisheries in state waters, but that grant of access and use is subject to the State's right and responsibility to regulate and manage the taking of fish and other aquatic life in order to protect the long-term use of the fisheries.

Article XI, section 6 of Hawai'i's Constitution provides, in part:

*The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State.... All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same[.]*

Similarly, section 187A-21 of the Hawai'i Revised Statutes (HRS) states:

*Except as otherwise provided by law, all fishing grounds appertaining to any government land or otherwise belonging to the government, except ponds, shall be and are forever granted to the people, for the free and equal use by all persons; provided that for the protection of these fishing grounds, the department may manage and regulate the taking of aquatic life.*

Based on the plain language of these provisions, the public's right to access and use public fisheries and fishing grounds is subject to the state government's higher right to regulate and manage that access and use for the protection of the fishing grounds. In conversations about this issue, some people have focused on the phrases "free to the public" and "free and equal use by all persons" to interpret these provisions as prohibiting the State of Hawai'i from creating a fishing license or registration system that charges a fee. Other people have focused on the qualifying phrases that follow (i.e. "subject to vested rights and the right of the State to regulate the same" and "provided that for the protection of these fishing grounds, the department may manage and regulate the taking of aquatic life") as allowing DLNR to create a fee-based, non-commercial marine fishing license in order to protect the sustainability of the fishing grounds.

Unfortunately, Hawai'i courts have not yet addressed this exact issue, so these conflicting interpretations cannot be definitely resolved right now. It is instructive, however, that many other states with mandatory, fee-based marine fishing licenses have similar constitutional and statutory provisions that protect the public's right to fish subject to the state's right to regulate fishing.<sup>4</sup>

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<sup>4</sup> See Ala. Const. §39.02, Amendment 5; Alaska Const. VIII, §15; Cal. Const. Art. 1, §25; Fla. Stat. §379.104; Ga. Code Ann. § 27-1-3(a); La. Const. Art. I, §27; R.I. Const. Art. I, §17; S.C. Art. 1, §25; Va. Const. Art. XI, §4.

## 2. DLNR's Existing Authority

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Under the Hawai'i Constitution, the State of Hawai'i has "the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources."<sup>5</sup> As stated above, the State also has the power to "manage and control the marine, seabed and other resources located within the boundaries of the State[.]"<sup>6</sup> the State of Hawai'i's authority over aquatic life has been transferred to DLNR, which is directed to manage and administer the coastal areas of the State (except the commercial harbor areas) including aquatic life and all activities on or in those coastal areas.<sup>7</sup> Specifically, DLNR's powers and responsibilities include:

- managing and administering the aquatic life and aquatic resources of the State;
- gathering and compiling information and statistics concerning the habitat and increase and decrease in aquatic resources in the State; and
- enforcing all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the State waters.<sup>8</sup>

Subject to the rulemaking process defined by HRS chapter 91, DLNR is required to adopt rules for and concerning the conservation and allocation of the natural supply of aquatic life in any area, including rules on:

- Size limits;
- Bag limits;
- Open and closed fishing seasons;
- Specifications and numbers of fishing or taking gear which may be used or possessed; and
- Prescribing and limiting the kind and amount of bait that may be used and conditions for entry into areas for taking aquatic life.<sup>9</sup>

Under separate statutes, DLNR has also been given the authority to issue licenses for certain activities related to aquatic life. These include the:

- Aquaculturist license: Allows a qualified aquaculturist to fish, possess, rear, and sell any aquatic life whose fishing, possession or sale is prohibited by closed season, minimum size, or bag limit;<sup>10</sup>
- Special activity permit: Good for a year or less and allows the permit holder to engage in an otherwise prohibited activity related to aquatic resources for scientific, education, management, or propagation purposes;<sup>11</sup>
- Aquarium fish permit: Good for a year or less and allows the permit holder to use fine meshed traps or nets (other than throw nets) to take marine or freshwater nongame fish and other aquatic life for aquarium purposes or to sell them live for aquarium purposes;<sup>12</sup>

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<sup>5</sup> Haw. Const. Art. IX, §8.

<sup>6</sup> Haw. Const. Art. XI, §6.

<sup>7</sup> HRS §26-15(b)-(c).

<sup>8</sup> HRS §187A-2.

<sup>9</sup> HRS §187A-5.

<sup>10</sup> HRS §187A-3.5.

<sup>11</sup> HRS §187A-6.

<sup>12</sup> HRS §188-31.

- Mullet license: Allows the owner or operator of a fishpond to lawfully catch young mullet (pua) during the closed season for the purpose of stocking the owner’s or operator’s pond and to lawfully sell pond-raised mullet during the closed season;<sup>13</sup>
- Baitfish license: Allows holders of a commercial marine license to take nehu, iao, or any other species for use as bait only;<sup>14</sup>
- Freshwater game fish license: Required for any person nine years old or older to fish, take, or catch any introduced freshwater game fish;<sup>15</sup>
- Out-of-season crab or lobster license: Allows a commercial marine dealer, hotel, restaurant, or other public eating house to sell or serve, during closed season, Kona crabs or lobsters lawfully caught during the open season;<sup>16</sup>
- Live coral collection permit: Allows the collection of live stony corals or marine life visibly attached to rocks placed in the water for a commercial purpose;<sup>17</sup>
- Commercial marine license: Required for any person taking marine life for commercial purposes whether the marine life is caught or taken within or outside of the State and for any person providing vessel charter services in the State for the taking of marine life in or outside of the State;<sup>18</sup>
- Commercial marine dealer license: Allows any commercial marine dealer to sell or offer for sale, to purchase or attempt to purchase, to exchange, or to act as an agent in the transfer of, any marine life taken within the State for commercial purposes;<sup>19</sup>
- Commercial marine export license: Allows the license holder to export any marine life taken within the jurisdiction of the State for commercial purpose;<sup>20</sup> and
- Conservation district permits: Allows the taking of marine life or engaging in activities otherwise prohibited in the conservation district for scientific, education, or other public purposes;<sup>21</sup>

Importantly, these statutes give DLNR the authority to require a license for anyone taking or catching introduced freshwater game fish (i.e. through the freshwater game fish license) and for anyone taking marine life for commercial purposes (i.e. through the commercial marine license). But none of them provide DLNR with authority to require a license for anyone taking or catching marine life for non-commercial purposes. To allow DLNR to issue and require such a license, the Hawai’i Legislature must amend one of the existing license statutes or create a new statute that provides DLNR with the necessary authority. Such a statute would also need to provide DLNR with the authority to set license fees by administrative rule, if the statute does not identify the fees itself.

Creating or amending a statute can happen only during the legislative session, which in Hawai’i starts every year in the third week of January and generally concludes in May.<sup>22</sup> If a new or amended statute were successful in becoming law and giving DLNR the necessary authority, DLNR

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<sup>13</sup> HRS §188-44.

<sup>14</sup> HRS §188-45.

<sup>15</sup> HRS §188-50.

<sup>16</sup> HRS §188-57.

<sup>17</sup> HRS §188-68.

<sup>18</sup> HRS §189-2.

<sup>19</sup> HRS §189-10(a).

<sup>20</sup> HRS §189-10(b).

<sup>21</sup> HRS §190-4.

<sup>22</sup> Haw. Const. Art. III, sec. 10.



would still need to adopt administrative rules that define the specifics of a non-commercial marine fishing license, such as how much it would cost and whether any groups of fishers might be eligible for a free license.

This rulemaking process is subject to the requirements of HRS Chapter 91, which requires, among other things, that a proposed rulemaking action by DLNR and the full text of the proposed rules or changes to existing rules be posted on the lieutenant governor's website.<sup>23</sup> Prior to the adoption of any new or amended rules, DLNR must give at least 30 day's notice of a public hearing that will be held on the proposed rules, including the date, time, and place and where interested persons may be heard on the proposed rules.<sup>24</sup> DLNR must afford all interested persons the opportunity to submit data, views, or arguments, orally or in writing, on the proposed rules, and DLNR must fully consider these submissions prior to adopting the proposed rules.<sup>25</sup> After doing so, DLNR would have the discretion to make a decision on the proposed rules at the public hearing or to announce a date when it intends to make a decision.<sup>26</sup>

DLNR's decision to adopt or amend any rules would then be subject to approval by the governor.<sup>27</sup> After approval by the governor, the new or amended rules must be filed with the lieutenant governor.<sup>28</sup> Once filed, the new or amended rules become effective 10 days after filing, unless a later effective date is specified in the rule.<sup>29</sup> This rulemaking process can be initiated by DLNR at any time during the calendar year and does not have a specific deadline or timeframe for completion. Informal discussions with DLNR staff indicate, however, that this process generally takes approximately eight months to a year to complete.

In summary, Hawai'i law does not prohibit the State of Hawai'i from establishing a non-commercial marine fishing license. However, DLNR does not currently have the statutory authority required to issue non-commercial marine fishing licenses right now. Since obtaining authority and specifying the required details of a license will require, at minimum, a statutory amendment (which can only happen between January and May of any given year) and a subsequent rulemaking process (which can take an additional eight months to one year), it is likely that even if these processes were initiated tomorrow, a non-commercial marine fishing license would not become a legal requirement for at least another 18 months to two years. If the legislative process must be attempted more than once, the entire process would take much longer to complete.

## B. Who would have to get a license?

Through the legislative and rulemaking processes described in the previous section, the State of Hawai'i can create a fee-based license system that applies to all non-commercial marine fishers or one that creates exemptions or fee-waivers for certain categories of fishers. In other states, young fishers (commonly under 16 years) are often exempt from the non-commercial or recreational fishing license requirement. Some states also exempt seniors, disabled individuals, veterans, or active duty military individuals on leave. Other jurisdictions have also chosen to

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<sup>23</sup> HRS §91-2.6.

<sup>24</sup> HRS §91-3(a)(1).

<sup>25</sup> HRS §91-3(a)(2).

<sup>26</sup> HRS §91-3(a)(2).

<sup>27</sup> HRS §91-3(c).

<sup>28</sup> HRS §91-4(a).

<sup>29</sup> HRS §91-4(b).

exempt fishers on charter boats (e.g. Massachusetts, Maryland, Puerto Rico, Florida, and South Carolina) and individuals who receive government assistance or are under the care of a government institution (e.g. Florida, North Carolina).<sup>30</sup>

License exemptions will create categories of fishers that are not required to apply for or obtain a license to fish legally. Providing exemptions, however, can present two main challenges. The first challenge is that license exemptions can create gaps in the data that fisheries managers would rely on to make management decisions. Exemptions can also affect the level of funding that a license may generate in fees for fisheries conservation and management. The greater the number of people qualifying for an exemption category, the more an exemption will reduce the data and funds generated by a license.

The second challenge presented by license exemptions is a practical one. If a state requires fishers to carry a license to prove that they are fishing legally, the state must also identify what kind of documentation a fisher must carry to prove that he or she doesn't need a fishing license. Rhode Island has reported struggling with this issue when trying to properly document an individual's eligibility for a blind or disabled fisher exemption. Rhode Island's state agency found it difficult to determine what proof these fishers needed to carry with them in lieu of a license.

To minimize the data gaps and practical difficulties presented by license exemptions, some states have opted to provide free or reduced-fee special licenses rather than exempting certain categories of fishers from the license requirement altogether. Fee waivers or fee reductions have been provided to resident seniors (often 60 or 65 years and older), disabled individuals, veterans, anglers fishing from public fishing piers or charter boats, low income individuals, or members of federally recognized tribes within the state.

Hawai'i will face a unique practical challenge if it wants to provide free or reduced-fee special licenses to holders of Native Hawaiian traditional and customary rights. In states that offer Native American or indigenous special fishing licenses, the state government usually issues these free special licenses to a tribal authority.<sup>31</sup> The tribal authority then determines how to appropriately distribute the special licenses to members of the tribe. California, for example, provides a free sport fishing license to low income Native Americans. Fishers must present evidence of income eligibility and a certification by the Bureau of Indian Affairs or proof of being on a tribal registry when applying for the California free sport fishing license. In Hawai'i, there is currently no equivalent tribal registry or tribal authority, so determining how a similar free special license would be issued, and how eligibility for it would be determined, would be more complicated. Because of Hawai'i's unique political history, the models used in other states will not be directly translatable to Hawai'i.

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<sup>30</sup> Massachusetts (<http://www.mass.gov/eea/agencies/dfg/licensing/who-needs-a-license.html>); Maryland ([http://dnr.maryland.gov/service/fishing\\_license.asp](http://dnr.maryland.gov/service/fishing_license.asp)); Puerto Rico (Puerto Rico Fishing Regulations, Ch. III, Art. 16.2 (2004)); Florida (<http://myfwc.com/license/recreational/do-i-need-a-license/>); South Carolina (<http://www.dnr.sc.gov/licenses/genlicense.html>); North Carolina (<http://www.ncwildlife.org/Licensing/HuntingFishingTrappingLicenses/ExceptionsforObtainingaLicense.aspx>).

<sup>31</sup> Maine ([http://www.maine.gov/ifw/licenses\\_permits/complimentary.htm](http://www.maine.gov/ifw/licenses_permits/complimentary.htm)); Oklahoma ([http://www.wildlifedepartment.com/laws\\_regs/fish1516.pdf](http://www.wildlifedepartment.com/laws_regs/fish1516.pdf)).

Ultimately, DLNR has the discretion to determine who would have to get a license, how much it would cost, and who would qualify for exemptions, fee waivers, or free special licenses, as long as DLNR's decisions do not conflict with state and federal law. For example, Hawai'i's existing freshwater game fish license, provides an exemption for fishers under 9 years old, provides free licenses to seniors (65 years or older), and provides a reduced-fee license to members of the U.S. armed forces on active duty in Hawai'i and their families.<sup>32</sup> If a non-commercial marine fishing license is created, the main challenge in defining any fee-waivers or special license categories will be protecting the rights of Native Hawaiian traditional and customary practitioners (as required by state law)<sup>33</sup> without defining the fee-waiver or special license by race or ethnicity (which would violate federal law).<sup>34</sup>

The Native Hawaiian traditional and customary rights that are relevant to this issue are explored in detail in a separate analysis with accompanying recommendations.<sup>35</sup> As described in that analysis, the State of Hawai'i has an affirmative duty to protect certain traditional and customary rights related to fishing. Although a non-commercial marine fishing license would not automatically violate these rights, the license cannot regulate these rights out of existence. This means that a fee-based license, at minimum, would need to provide an opportunity for traditional and customary rights holders who cannot afford a license fee to obtain a license for free. If not, the State would likely be vulnerable to a legal challenge based on the rights protected under Hawai'i's Constitution.

### C. How will the license fee schedule be structured?

Noting the state law requirements that may require a free or reduced-fee license option based on traditional and customary rights, the State of Hawai'i has discretion in determining how much to charge for a non-commercial marine fishing license. Currently the annual freshwater sport fish license for most residents is \$5, while the license for most nonresidents is \$25. Similarly, a Hawai'i hunting license is \$20 for most residents and \$105 for most nonresidents. Reviewing the fee schedules of fishing licenses in other states, a non-commercial marine fishing license that charges different fees to residents and nonresidents is consistent with the trend seen in a majority of other coastal states.

Non-commercial marine fishing licenses with different fees for residents and nonresidents do not appear to have been challenged in court. There have been legal challenges to commercial fishing licenses that require nonresidents to pay higher fees than residents. This has been the subject of at least one successful federal lawsuit challenging California's non-resident commercial fishing license fees.<sup>36</sup> In that case (Marilley v. Bonham), the higher fees charged to non-resident

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<sup>32</sup> HRS § 187A-9.5; HAR §13-74-10.

<sup>33</sup> See Haw. Const. Art. XII, § 7; Ka Pa'akai O Ka 'Aina v. Land Use Commission (Ka Pa'akai), 94 Haw. 31, P.3d 1068 (2000); Public Access Shoreline Hawaii. v. Hawaii County Planning Commission (PASH), 79 Hawai'i 425, 903 P.2d 1246 (1995).

<sup>34</sup> See U.S. Const. Amend. XIV ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."); Rice v. Cayetano, 528 U.S. 495 (2000); Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007); Corboy v. Louie, 128 Hawai'i 89, 283 P.3d 695 (2011).

<sup>35</sup> See "Evaluation of Proposed Hawai'i Noncommercial Marine Fishing Registry, Permit, and License Design Scenarios & Policy Recommendations for Resolving Potential Conflicts with Native Hawaiian Rights," prepared for Conservation International Hawai'i by Malia Akutagawa, Esq.

<sup>36</sup> See Marilley v. Bonham, 802 F.3d 958 (9th Cir., 2015) (a class of non-resident fishers who purchased commercial fishing licenses and gear and species specific permits in California and paid higher fees than

fishers for commercial fishing licenses and permits were successfully challenged and found to be unconstitutional based on the Privileges and Immunities Clause of the United States Constitution.

The Privileges and Immunities Clause provides that the citizens of each state are entitled to the same privileges and immunities of other states.<sup>37</sup> This was designed to put the citizens of each state on the same “footing” with citizens of other states when it comes to the advantages of state citizenship. The clause creates a national economic union among all the states.

There are circumstances, however, where different treatment between residents and non-residents is allowed. The courts use a two-part test to determine whether different treatment of non-residents violates the Privileges and Immunities Clause:

- (1) Does the challenged restriction deprive nonresidents of a privilege that falls within the protection of the Privileges and Immunities Clause? If yes, then:
- (2) Is the restriction closely related to the advancement of a substantial state interest? If no, then the court will invalidate the restriction.

In Marilley, it was undisputed that the right to pursue commercial fishing was a “common calling” that fell within the scope of the Privileges and Immunities Clause. So the answer to the first question was “yes.” To answer the second question, the State of California had to demonstrate that “substantial reasons” exist for the discrimination against non-residents and that the degree of discrimination bears a close relationship to those “substantial reasons.”

Courts have allowed a state to charge non-residents a different fee to compensate the state for conservation expenses that only residents pay. The Marilley court acknowledged that a state can be compensated for conservation and enforcement expenses, but it concluded that the State of California failed to demonstrate that the additional fees charged to non-residents had a close relationship to taxes that only residents paid. California could have justified the higher fee for non-residents by showing that the higher fee was closely related to the costs of addressing a burden created uniquely by non-residents, or that it was close to the amount in taxes that only residents pay toward relevant state expenses that non-residents also benefit from. California did not make that showing in the Marilley case and lost. Because the Marilley case was decided by a federal appellate court with jurisdiction that includes Hawai‘i, a similar challenge brought against the State of Hawai‘i would likely be decided the same way.

In 2014, a federal lawsuit was filed against the State of Hawai‘i by a commercial fisherman from Oregon.<sup>38</sup> The lawsuit challenged the State’s ability to charge higher commercial fishing licenses fees to nonresidents than it charges to residents. A commercial fisherman from California also joined the lawsuit. The argument in this case appears to have mirrored the one made in the Marilley case. To defeat this challenge, the State of Hawai‘i would have needed to demonstrate

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California residents successfully sued the State of California for violation of the Privileges and Immunities Clause of the United States Constitution). In the Marilley case, the plaintiffs specifically challenged: (1) a commercial fishing license (\$130.03 for residents, \$385.75 for non-residents); (2) commercial fishing vessel registration (\$338.75 for residents, \$1,002.25 for non-residents); (3) Herring Gill net permit (\$359 for residents, \$1,334.25 for non-residents); and (4) Dungeness Crab vessel permit (\$273 for residents, \$538 for non-residents).

<sup>37</sup> U.S. Const. art. IV, § 2, cl. 1.

<sup>38</sup> Daranciang, Nelson, “Settlement erases higher fee for fishers from outside state,” Honolulu Star-Advertiser, Jan. 9, 2016.

that the higher nonresident commercial fishing license fees were (1) closely related to costs of addressing a burden created uniquely by non-residents, or (2) close to the amount in taxes that only residents pay toward the State of Hawai'i's expenses relevant to commercial fishing. Ultimately, the lawsuit was settled and the State of Hawai'i agreed not to charge nonresidents higher fees than residents for commercial fishing licenses. At the time of the settlement, resident annual commercial license fees were \$50 and nonresident fees were \$200.

There are fundamental differences between the legal arguments that apply to commercial license fees and those that apply to non-commercial license fees. The commercial license court cases were based on a legal principle that specifically protects business interests. For non-commercial licenses, there is no business interest at issue. For this reason, the commercial license cases do not appear to apply to non-commercial licenses that may charge a higher fee to nonresidents.

#### D. What will the fees be spent on? Where will the fees be held?

##### 1. State and Federal Protections

There are state and federal law restrictions on how sport fishing license fees could be spent and where they must be held. First, Hawai'i law imposes restrictions on how any license fees collected by the state government can be spent. License fees collected by the state government must be used for purposes that specifically benefit the people who pay the fees (i.e. the license holders). If not, license holders can challenge the license fees as an improper tax and seek to have them invalidated in court.<sup>39</sup> Essentially, the argument is that all tax payers must be taxed equally for public benefits that all tax payers receive.<sup>40</sup> If license holders pay more to the state government than other tax payers, they must receive an extra benefit from the government that other tax payers do not receive.

Second, under state law, all sport fishing license fees must be deposited into an existing special fund, called the Sport Fish Special Fund.<sup>41</sup> This fund was created in 1993 "to establish a sport fish special fund to be administered by the department of land and natural resources and into which sport fishing license and permit fees, and other associated moneys are to be deposited[.]"<sup>42</sup>

Specifically, the State of Hawai'i must deposit the following into the Sport Fish Special Fund:

1. Money collected as fees for sport fishing licenses and permits, attendance of aquatic resources education programs, use of public fishing areas or other fishing grounds for sport fishing purposes, and use of sport fisheries-related facilities;
2. Money collected in relation to the importation, taking, catching, or killing of any sport fish;

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<sup>39</sup> Hawai'i Insurers Council v. Lingle, 201 P.3d 564, 120 Haw. 51 (2008).

<sup>40</sup> Generally, a fee is exchanged for a service rendered or a benefit conferred, and the amount of the fee normally bears a relationship to the value of the service or benefit. Hawai'i Insurers Council v. Lingle, 201 P.3d 564, 120 Haw. 51 (2008). Fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of a society. Id. (quoting National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974)).

<sup>41</sup> HRS §187A-9.5.

<sup>42</sup> S. Stand. Comm. Rep. No. 1647, in 1993 Senate Journal, at 1348.

3. Most of the money collected as fines or bail forfeitures for sport fishing violations (with the exception of informers' fees);
4. Money collected from DLNR's sale of any items related to sport fish or sport fishing;
5. Monetary contributions or money collected from the sale of gifts made to DLNR to benefit sport fish or sport fishing; and
6. The interest, dividend, or other income generated from the above sources.<sup>43</sup>

Once deposited, any funds in the Sport Fish Special Fund can only be used for the following:

1. Programs and activities to implement the laws related to aquatic resources and wildlife, including providing state funds to match federal grants under the Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop Breaux Act) for sport fish projects;
2. For acquiring the use, development, or maintenance of trails or accessways into public fishing areas, fishery management areas, marine life conservation districts, or private lands where public sport fishing is authorized;
3. For research programs and activities concerning sport fish conservation and management; and
4. For the importation into, and the management, preservation, propagation, enforcement, and protection of sport fishes in the State.<sup>44</sup>

Limiting Sport Fish Special Fund money to only these uses is required not only by Hawai'i law, but also by federal law. The State of Hawai'i receives funding from the Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop Breaux Act).<sup>45</sup> Under this Act, the U.S. Fish and Wildlife Service (USFWS) must cooperate with eligible state, commonwealth, and territory fish and wildlife departments to fund fish restoration and management projects.<sup>46</sup> For eligible states, the USFWS provides funding (often referred to as "DJ funds") to the state fish and wildlife departments for projects that have the purpose of restoring, conserving, managing, and enhancing sport fish.<sup>47</sup> These federal funds are provided as reimbursement for up to 75 percent of eligible project costs.<sup>48</sup> This means that a state has to cover the other 25 percent of a project's costs from its own funds or in-kind contributions. To the extent practicable, coastal states (which include Hawai'i) are also required to split DJ funds equally between marine and freshwater projects.<sup>49</sup>

DJ funds are apportioned among the different eligible states and territories based on two ratios: 1) the area of a state's land and coastal waters compared to the total area of all the states combined; and 2) the number of sport or recreational license holders in a state compared to the number of such license holders in all of the states combined. The first ratio determines how 40% of the available DJ funds will be distributed to eligible states, and the second ratio determines how

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<sup>43</sup> 64 Stat. 430, 16 U.S.C. §§ 777-777n; HRS §187A-9.5(b).

<sup>44</sup> HRS §187A-9.5(c)-(e).

<sup>45</sup> 64 Stat. 430, 16 U.S.C. §§ 777-777n.

<sup>46</sup> Federal Aid in Sport Fish Restoration Act (Dingell-Johnson/Wallop-Breaux Act) (64 Stat. 430, 16. U.S.C. §§ 777-777n); see 16 U.S.C. 777 (2015); 50 C.F.R. 80.1.

<sup>47</sup> The term "sport fish" here means "aquatic, gill-breathing, vertebrate animals, bearing paired fins, and having material value for sport or recreation." 50 C.F.R. 80.5(b).

<sup>48</sup> See 50 C.F.R. 80.12.

<sup>49</sup> See 50 C.F.R. 80.23.



the remaining 60% will be distributed.<sup>50</sup> Regardless of these ratios, however, each eligible state is guaranteed to receive at least 1% of available DJ funds, and no state will receive more than 5%.<sup>51</sup>

Hawai'i is a state that receives only 1% of the available DJ funds, which has been approximately \$3.5M per year.<sup>52</sup> These DJ funds provide approximately 40% of the annual budget for DLNR's Division of Aquatic Resources (DAR).<sup>53</sup> To remain eligible for DJ funds, a state cannot divert revenues from sport fishing license fees for purposes other than the administration of the state's fish and wildlife agency.<sup>54</sup> With DJ funds making up nearly half of DAR's annual budget, it is in the best interest of the State of Hawai'i to remain eligible to receive DJ funds.

One of the requirements of eligibility for DJ funds is that a state must pass legislation that specifically assents to the restrictions and requirements of the Dingell-Johnson/Wallop-Breaux Act.<sup>55</sup> In particular, this state legislation must prohibit the diversion of any license fees (and revenue from license fees) paid by hunters and sport fishermen to purposes other than the administration of the fish and wildlife agency.<sup>56</sup> In Hawai'i, the Sport Fish Special Fund was created to satisfy this requirement.<sup>57</sup> In 2002, the legislature passed amendments to the Sport Fish Special Fund statute to further clarify that the Sport Fish Special Fund is exempt from transfers to the

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<sup>50</sup> See 16 U.S.C. 777c (2015).

<sup>51</sup> Range of DJ funds received by states/territories in FY 2013:

- Territories (1/3 of 1%): ~\$1.2M (American Samoa, D.C., Guam, Virgin Islands)
- Min. State (1%): ~\$3.5M (Hawai'i, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Puerto Rico, Rhode Island, Vermont, West Virginia)
- Middle (≥1% to 4%): ~\$4M-14M (Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, Wyoming)
- Max State (5%): ~17M (Alaska, California, Texas)

<sup>52</sup> Specifically, Hawai'i's final apportionment of DJ funds for the last three available fiscal years were: \$3.6M (FY2016); \$3.4M (FY2015); \$3.2M (FY2014). See [https://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR\\_Funding.htm](https://wsfrprograms.fws.gov/Subpages/GrantPrograms/SFR/SFR_Funding.htm).

<sup>53</sup> DJ funds are provided in the form of reimbursement for up to 75% of eligible project costs. This means that a state must cover the other 25% of a project's costs from its own funds or in-kind contributions. 50 C.F.R. 80.12.

<sup>54</sup> 50 C.F.R. 80.4.

<sup>55</sup> 50 C.F.R. § 80.3.

<sup>56</sup> 50 C.F.R. §§ 80.3-80.4. Revenues from license fees include income from: 1) general or special licenses, permits, stamps, tags, access and recreation fees or other charges imposed by the State to hunt or fish for sport or recreation; 2) real or personal property acquired or produced with license revenues; 3) interest earned on license revenues; and 4) project reimbursements to the State that were originally funded by license revenues (50 C.F.R. § 80.4(a)).

<sup>57</sup> S. Stand. Comm. Rep. No. 1647, in 1993 Senate Journal, at 1348 ("The purpose of this bill is to establish a sport fish special fund to be administered by the department of land and natural resources and into which sport fishing license and permit fees, and other associated moneys are to be deposited. ... In 1992, the United States Fish and Wildlife Service requested the department to provide documentation regarding its compliance with the program requirements pertaining to the nondiversion of sport fishing license fees for purposes other than administration of the state fish and game agency. The department explained that although the State was already in compliance, a special fund would resolve any doubt that the State is in compliance.").

General Fund to cover central service and departmental administrative expenses, which were not allowed under federal law.<sup>58</sup>

Although it is possible for the Hawai'i Legislature to transfer funds from the Sport Fish Special Fund into the General Fund by mistake, such a transfer would likely be recognized as a mistake and the funds returned to preserve Hawai'i's eligibility to continue receiving DJ funds.<sup>59</sup>

## 2. "Sport fishing" vs. "Non-commercial fishing"

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The Sport Fish Special Fund statute does not define the term "sport fishing" or "sport fish." Neither do any other Hawai'i statutes. The USFWS regulations, however, define the term "sport fish" as "aquatic, gill-breathing, vertebrate animals with paired fins, having material value for recreation in the marine and fresh waters of the United States."<sup>60</sup> Additionally, the term "angler" is defined as "a person who fishes for sport fish for recreational purposes as permitted by State law."<sup>61</sup> Assuming these definitions apply to the interpretation of the Sport Fish Special Fund statute, a person who is fishing for paired-fin fish in marine or fresh water for recreational purposes would likely be considered someone who is "sport fishing." Therefore, fees from licenses issued for that activity would clearly be required to be deposited in the Sport Fish Special Fund.

Many managers and fishers view the term "sport fishing" and even the term "recreational fishing" as being too narrow to capture all the kinds of non-commercial fishing activities that take place in Hawai'i waters, such as subsistence fishing, fishing as a regular supplement to a family's diet, bartering, or traditional fishing to perpetuate culture and customs. For this reason, there is often a strong preference to use the term "non-commercial" rather than "sport" or "recreational" to describe a potential fishing license for these activities in Hawai'i.

As currently written, the Sport Fish Special Fund statute would clearly require all fees from a "sport fishing" or "recreational fishing" license to be deposited into the Sport Fish Special Fund, and once deposited, receive state and federal protection from transfers to non-fish conservation or management purposes. Additionally, nothing in the current statutory language would prevent license fees from a "non-commercial fishing license" to be deposited into the Sport Fish Special Fund. However, the current statutory language may not guarantee that all "non-commercial fishing" license fees would be deposited into the Sport Fish Special Fund. Therefore, if a "non-commercial fishing" marine license were created in Hawai'i, to ensure that all license fees must be deposited into the Sport Fish Special Fund, the language of HRS §187A-9.5 should be amended to add "non-commercial" to the description of fishing license fees that must be deposited into the Sport Fish Special Fund.

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<sup>58</sup> S. Stand. Comm. Rep. No. 3550, in 2002 Senate Journal, at 1676; S. Stand. Comm. Rep. No. 2859, in 2002 Senate Journal, at 1381; H. Stand. Comm. Rep. No. 117, in 2002 House Journal, at 1279; H. Stand. Comm. Rep. No. 2538, in 2002 House Journal, at 1449.

<sup>59</sup> Courts that have addressed the issue of funds transferred from special funds so that they could be used for more general purposes have held that the transferred funds should be returned to the special funds. Hawai'i Insurers Council v. Lingle, 201 P.3d 564, 120 Haw. 51 (2008).

<sup>60</sup> 50 CFR 80.2.

<sup>61</sup> 50 CFR 80.2.

## E. How would a new state license fit in with existing federal requirements?

In 2010, the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) established the National Saltwater Angler Registry (NSAR) program as part of its Marine Recreational Information Program (MRIP).<sup>62</sup> MRIP is the way NMFS counts and reports marine recreational catch and effort, which provides the basis for fisheries management decisions in federal waters. Prior to NSAR, MRIP relied on a data collection method that involved randomly dialing coastal households to determine the number of people fishing and the number of fishing trips they take in a given year.<sup>63</sup> The participants in the random household surveys may or may not have been fishers. With NSAR in place, recreational fishers that fish in federal waters (and some state waters) are now required to register each year with NOAA or through an approved alternative method.<sup>64</sup> In this way, NSAR provides a "phone book" or registry of people who are actually recreationally fishing.

The registry was created to account for recreational anglers and for-hire fishing vessels that engage in angling and spearfishing for marine and anadromous fish (i.e. species that migrate from marine waters to fresh water to spawn).<sup>65</sup> NSAR registration requires a fisher to provide his or her name, address, date of birth, current home or cell phone number, and region of the country that he or she plans to fish in. Currently, a \$29 annual fee is required for NSAR registration, which covers the cost of administering the program.<sup>66</sup> These registration fees go to the Federal treasury and are not designated to support non-commercial fishing activities or any other specific purpose.<sup>67</sup>

There are exemptions from the NSAR registration requirement, however. For example, fishers that obtain a state-issued recreational fishing license are automatically registered with NSAR when they buy the state license. Unlike NSAR registration fees, however, the money paid for a recreational fishing license stays with the state.<sup>68</sup> As described in a previous section, if the state is a recipient of DJ funds, the recreational fishing license fees it receives must be restricted to fish conservation or management purposes, in order to maintain DJ fund eligibility.<sup>69</sup> Fishers who are exempt from a state's recreational license or registration requirements and who fish for non-anadromous marine fish in state waters would not be required to register under NSAR.<sup>70</sup>

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<sup>62</sup> NSAR was created through a National Marine Fisheries Service regulation that implements Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 et seq.).

<sup>63</sup> NOAA Fisheries website, "National Saltwater Angler Registry - Frequently Asked Questions:" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

<sup>64</sup> NOAA Fisheries website, "Frequently Asked Questions:" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

<sup>65</sup> According to NMFS, generally speaking "angling" and "spear fishing" mean using a hook and line, or a spear, to try to catch fish. Technically, angling and spear fishing include fishing for, attempting to fish for, catching or attempting to catch fish using a hook that is attached to a line that is hand held or by rod and reel (angling) or by a spear or powerhead (spear fishing).

<sup>66</sup> NOAA Fisheries website, "National Saltwater Angler Registry" <https://www.countmyfish.noaa.gov/register/>

<sup>67</sup> NOAA Fisheries website, "National Saltwater Angler Registry - Frequently Asked Questions" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

<sup>68</sup> NOAA Fisheries website, "National Saltwater Angler Registry - Frequently Asked Questions" <https://www.countmyfish.noaa.gov/register/frequentlyQuestions.jsp>

<sup>69</sup> 50 C.F.R. 80.4.

<sup>70</sup> NOAA Fisheries website, "National Saltwater Angler Registry – Do I Need to Register?" [https://www.countmyfish.noaa.gov/register/q\\_2011\\_intro.jsp](https://www.countmyfish.noaa.gov/register/q_2011_intro.jsp)

Therefore, if a non-commercial marine fishing license were established in Hawai'i, fishers who obtain that license would no longer need to register with NSAR. Similarly, marine fishers that are exempt from the Hawai'i license and who only fish for non-anadromous marine fish in state waters would not be required to register with NSAR. However, marine fishers that are 16-years or older that are exempt from the state license requirement, but who fish in federal waters (i.e. beyond 3 nautical miles from shore) or who fish in state waters for anadromous fish would still be required to register with NSAR. It is very unlikely, however, that many fishers would fall into the last category.

## F. How would this benefit fishers?

### 1. Funding for Beneficial Programs, Management Activities, and Research

As briefly described in a previous section, Hawai'i law imposes restrictions on how license fees must be spent. Hawai'i law requires that license fees must be used for purposes that benefit the individuals who pay the the fees (i.e. the license holders). This requirement was stated by the Hawai'i Supreme Court in a 2008 case called, Hawai'i Insurers Council v. Lingle.<sup>71</sup>

Based on this case, Hawai'i courts use a three-step test to determine whether a charge imposed by the government will be considered a permissible regulatory fee or an improper tax.<sup>72</sup> Under that test, the charge in question will be considered a permissible regulatory fee if: (1) a regulatory agency assessed the fee; (2) the agency placed the money in a special fund; and (3) the money is not used for a general public purpose, but rather for the regulation or benefit of the parties upon whom the assessment is imposed.<sup>73</sup> This is likely the test that would be used to evaluate the fees charged by any new non-commercial marine fishing license.

In the case of a non-commercial marine fishing license, DLNR (a regulatory agency) would assess the fee. As discussed in a previous section, any fees from such a license would be required by state law to be deposited into the Sport Fish Special Fund.<sup>74</sup> Therefore, the first two steps of the Hawai'i Insurers Council test would be satisfied. The third step of the test would be satisfied if DLNR actually uses the license fees for the regulation or benefit of the non-commercial fishers who paid the fees.

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<sup>71</sup> 201 P.3d 564, 120 Haw. 51 (2008).

<sup>72</sup> Hawai'i courts have recognized two common types of fees: (1) user fees; and (2) regulatory fees. User fees are "based on the rights of the entity as a proprietor of the instrumentalities used. Id. Examples of user fees include bridge tolls, sewer hookups, and charges for managing wastewater. Regulatory fees (including licensing and inspection fees) are "founded on the police power to regulate particular businesses or activities" and to promote public safety, health, and welfare. Examples of regulatory fees include state fund assessments imposed on insurance companies to protect insurance policy holder, transaction fees for each pawn shop transaction report filed with the police department, and permit, registration, application, license, and franchise fees assessed against telecommunication service providers. Regulatory fees may deliberately discourage particular conduct by making it more expensive or raise money placed in a special fund to help defray an agency's regulation-related expenses.

<sup>73</sup> This test is based on the test stated by the U.S. First Circuit Court in San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, 967 F.2d 683 (1st Cir. 1992).

<sup>74</sup> The Sport Fish Special Fund's explicit prohibition against transfers to the General Fund further strengthens an argument that the license fees are not a tax.

As reported to the Hawai'i Legislature in 2015, the money in Hawai'i's Sport Fish Special Fund and administratively related special funds were used:

- To monitor recreational fishing success and harvest levels with creel censuses, maintain the statewide system of open-water fish aggregating devices, and maintain and improve existing artificial reefs; and
- For salary and operating costs for various projects previously approved by the Legislature, including:
  - to perform education and outreach: conducting fishing education classes, teacher's workshops, educational presentations, public service announcements, displays at appropriate events, presentations to fishing clubs, civic groups, distributing printed materials related to marine and freshwater resources and watershed-based approaches to fisheries management;
  - for the coordination of the Statewide Sport Fish Restoration Program;
  - to review environmental impact statements, permit applications, legislation, investigate fish kills, provide environmental guidance to State, County and private agencies to mitigate freshwater environmental disturbances;
  - for the development and maintenance of man-made shelters and structures (artificial reefs) for attracting and sustaining marine life to new fishing areas, thus improving recreational fishing opportunities;
  - for the management and improvement of the statewide fish aggregation device system;
  - to manage and evaluate the effectiveness of the freshwater public fishing areas and fishery management areas; stock, monitor and assess trout fishing at Koke'e, Kauai, Public Fishing Area;
  - to monitor recreational fishing success and harvest levels with creel censuses, conduct ulua movement patterns study and life histories of marine fishes, and evaluate the effectiveness of bottomfish restricted fishing areas; and
  - to conduct marine research and surveys to improve recreational fishing, e.g. investigations of estuarine habitats, bottomfish movements, and development and improvement of an aquatic resources database.

The use of fishing license fees for the activities above would likely satisfy the third step of the Hawai'i Insurers Council test. If a non-commercial marine fishing license were created, fishers would likely have to benefit from additional investment of funds in activities such as these in order for the license fees to be considered legally valid under state law.

## 2. Improved Enforcement Efforts

### a) Additional Funding for Aquatics Enforcement

In addition to providing additional funding for programs, management activities, and research that benefit fishers, a non-commercial marine fishing license could provide additional funds for aquatics enforcement activities. In conversations with fishers, increased funds for enforcement of fisheries regulations is often cited as a condition of their support for a non-commercial marine fishing license. There has been some confusion in the past about whether it is possible to fund enforcement activities with fishing license fees.

Federal DJ funds generally will not be granted to state fish and wildlife agencies to support projects that involve law enforcement activities to enforce fish regulations.<sup>75</sup> This does not prevent, however, a state from using the fees it collects from a recreational or non-commercial fishing license (i.e. state funds) to support such law enforcement activities. The USFWS has confirmed to Hawai'i fisheries managers that law enforcement activities specific to fish conservation are very much a part of the administration of state fish and game agencies. As such, a state can fund those activities with state recreational or non-commercial fishing license fees without negatively affecting the state's ability to continue receiving federal DJ funds.

If a non-commercial marine fishing license were created in Hawai'i, the fees collected from that license could be used to support enforcement activities specific to fish conservation. In Hawai'i, such enforcement activities are carried out by DLNR's Division of Conservation and Resources Enforcement (DOCARE).<sup>76</sup> Unlike states with enforcement officers that exclusively enforce natural resource violations (such as fish and game wardens), DOCARE officers have broad police powers, in addition to their duties to enforce natural resource laws. Their duties apply to the land as well to the marine waters within the State's jurisdiction.<sup>77</sup> These broader duties mean that if a DOCARE officer observes a non-natural resource violation while on patrol (such as a parking or firearm violation), the DOCARE officer would be required to respond to such violations under Hawai'i law. Any time that DOCARE officer spends responding to a non-resource violation cannot be funded with recreational or non-commercial fishing license fees. If such time was funded by fishing license fees, Hawai'i's eligibility to continue receiving DJ funds would be jeopardized.<sup>78</sup>

What this means is that, to use non-commercial marine fishing license fees to fund permissible enforcement efforts, DOCARE must be able to separately track the time that officers spend on enforcement activities related to fish conservation. DOCARE appears to have this ability in place, as it already receives various sources of restricted funding that require similar documentation and tracking practices. If these practices are followed for any hours funded by non-commercial fishing license fees, Hawai'i could support enforcement activities related to fish conservation with license fees without jeopardizing its eligibility to continue receiving DJ funds.

#### *b) Consent to Inspections*

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In addition to providing a new source of funding for aquatics enforcement activities, a non-commercial marine fishing license could improve the effectiveness of aquatics enforcement activities that already take place. Currently, by statute, enforcement officers must have probable cause before they can conduct examinations and searches of: (1) the contents of any bag or container of any kind used to carry aquatic life; or (2) any vehicle or conveyance used to transport aquatic life.<sup>79</sup>

Determining whether "probable cause, as provided by law to believe that such bag, container, vehicle, or conveyance contains evidence of a violation of DLNR law or rule" exists in any given

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<sup>75</sup> 50 C.F.R. §80.6. Exceptions to this general rule can be made when these activities are necessary for the accomplishment of project purposes that have been approved by the USFWS regional director.

<sup>76</sup> HRS § 199-3.

<sup>77</sup> HRS §§ 199-3; 199-4.

<sup>78</sup> 50 C.F.R. § 80.5.

<sup>79</sup> HRS §187A-15.



situation, however, can be difficult and is very dependent on the facts of the situation.<sup>80</sup> Enforcement officers must establish sufficient probable cause prior to inspecting any bags and containers for every suspected fishing violation or they risk having the enforcement action thrown out of court. This means that even if fishers are caught violating fishing regulations they may not be held accountable for those violations because enforcement officers cannot provide a court with the evidence necessary to prove the fishing violations. This can result in DOCARE officers spending many days in court, rather than on patrol, and the fishing violation cases taken to court may still be thrown out for lack of evidence. This creates a cycle of demoralizing inefficiency for aquatics enforcement efforts.

Since 2007, there have been legislative attempts almost every year to give DOCARE the authority to inspect bags or containers containing aquatic life without the need for probable cause.<sup>81</sup> This legal issue has been identified as a hurdle to effectively enforcing fishing violations.<sup>82</sup> For comparison, this particular enforcement challenge does not exist for hunting violations, because game mammal and bird hunting licenses require a hunter to consent to these kind of searches as a condition of receiving the hunting license.<sup>83</sup> Since no similar license exists for non-commercial marine fishing, legislative efforts have attempted to address the consent to

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<sup>80</sup> State v. Delmondo, 54 Haw. 552 (Haw. 1973) (“Probable cause has been established when it can be said that a reasonable person viewing the evidence would have a strong suspicion that a crime had been committed.”); HRS § 803-5(b) (A law enforcement officer has probable cause to make an arrest when the facts and circumstances within the officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that a crime has been or is being committed.)

<sup>81</sup> See S.B. 663, S.D. 1, 24th Leg., Reg. Sess. (2007);

<sup>82</sup> See S. Stand. Comm. Rep. No. 265 (2007) (“Hawaiian commercial and recreational marine life stocks are depleted, over-utilized, and in danger of irretrievable exhaustion. Although management tools have been enacted, fishery assessment depends on the voluntary cooperation of those who harvest these resources. While most fishers are willingly cooperative, increasing stock scarcity has led to conspicuous instances of obstruction of the efforts by Division of Conservation and Resources Enforcement officers to inspect catch. Your Committee finds that the current probable cause provision under section 187A-15, Hawai‘i Revised Statutes, does provide a degree of constitutional protection while at the same instance, may unduly hinder enforcement officers by preventing them from inspecting containers that may be used to transport fish and other aquatic life. Thus, this greatly weakens the effect of fisheries management measures, such as bag and size limits. While your Committee recognizes the seriousness of repealing the probable cause requirement from section 187A-15, Hawai‘i Revised Statutes, establishing an administrative inspection scheme will enable Division of Conservation and Resources Enforcement officers to better inspect and enforce the State’s fishing laws.”).

<sup>83</sup> For example, consent to inspections is a condition of applying for game mammal hunting in public hunting areas. See HAR § 13-123-22(1)(D) (“By signing a hunting license, stamp, tag, or permit, the person agrees to comply with all the terms and conditions of the applicable license, stamp, tag, or permit, as well as applicable laws and regulations; and consents to be subject to inspection for appropriate license, permit, stamp, and/or tag, hunting equipment, and type and amount of game, by a duly authorized representative of the department[.]”); see also HAR § 13-122-12(a)(4) (providing a similar condition for game bird hunting); S.B. 663, S.D. 1, 24th Leg., Reg. Sess. (2007) (“No probable cause is required because the consent to a search occurs when a hunting license is issued.”).

search issue for all aquatics violations by statute.<sup>84</sup> Those legislative attempts have been unsuccessful.

Many fishers have stated that they are unsatisfied with the current level of fisheries enforcement. Many of them have also stated that they would support a non-commercial marine fishing license, if the license fees would be used for better enforcement. Although it is not likely to be universally supported, many fishers may support increasing DOCARE's enforcement effectiveness (by allowing officers to spend less time in court and more time in the field), even if funding to DOCARE is not increased. If some portion of the money from non-commercial marine license fees was also used to support DOCARE's aquatics enforcement activities, these fishers may consider a non-commercial marine fishing license to be capable of providing noticeable and meaningful benefits to them.

#### G. How can we trust DLNR?

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As with the first question addressed in this overview, this one is really a policy question. Although there are no legal issues that would likely inform this question, some recommendations about process can be made. If the public, particularly fishers of various interest groups, do not trust DLNR, they are unlikely to provide DLNR with more regulatory authority than it already has. As discussed in a previous section, DLNR needs additional statutory authority to issue non-commercial marine fishing licenses. Such statutory authority requires action by the Legislature and support (or at least lack of opposition) from the public, particularly fishers. As previously discussed, even after DLNR is granted authority, however, a lengthy rulemaking process will be required before any new license could be legally mandated. DLNR may rightfully view that the rulemaking process will allow concerned members of the public to influence what a new license would eventually look like. Members of the public who are already distrustful of DLNR, however, may not be willing to allow the necessary statutory authority to be secured, until they know more about the likely details of a new license. Unfortunately, these details are often not available until the later rulemaking stage.

There are two possible ways to bridge the divide that may currently exist between DLNR and a mistrusting public on this issue:

1. Consultation Prior to Legislation: DLNR could engage in a consultation process or create an advisory committee comprised of key fisher group representatives (including traditional and customary rights holders) to advise DLNR prior to seeking the necessary statutory authority. Connecticut, Massachusetts, and Rhode Island utilized a fisher advisory group prior to seeking legislation, and these states currently have in place a fee-based license or permit for recreational marine fishing.
2. Accountability After Legislation: DLNR could also commit to keeping such an advisory committee engaged after statutory authority has been granted and after a non-commercial marine fishing license is in place. This is an approach that has been used in Maryland, Massachusetts, and Rhode Island. In Massachusetts and Rhode Island, the fisher advisory group is also involved in the fisheries department's budgeting process. The fisher group is invited to make recommendations for uses of the license fees during the department's budgeting process and it receives reports at the close of the

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<sup>84</sup> H.B. 1499, H.D. 2, S.D. 1, 24th Leg. Reg. Sess. (2007) (seeking to use an administrative exception to the probable cause requirement and obtain authority to create a valid administrative search scheme to enforce aquatic regulations).

year on how the license fees were actually spent. This approach could provide a way for DLNR to be directly accountable to the fishers and begin to rebuild trust between them.

If DLNR commits to a specific fisher engagement process both prior to and after seeking statutory authority, fishers may be willing to support an effort to provide DLNR with the authority it currently needs to issue non-commercial marine fishing licenses.

## Conclusions

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To summarize the main conclusions from the legal issues explored in this overview:

1. A non-commercial marine fishing license is not prohibited under Hawai'i law;
2. DLNR does not currently have the legal authority necessary to make such a license mandatory;
3. DLNR requires additional legal authority from the Legislature to issue non-commercial marine fishing licenses and to adopt rules to specify how such a license would work;
4. Securing the necessary legal authority will require support from the general public, particularly from the fishers who would be most impacted by the new license;
5. Whether or not the necessary support can be found will likely depend on whether fishers believe they will gain something meaningful to them after the license is implemented;
6. If a "recreational" marine fishing license were created, the license fees would be required to be deposited into the existing Sport Fish Special Fund. It is less clear if all the fees from a "non-commercial" marine fishing license would be required to be deposited into the Sport Fish Special Fund;
7. Any fees deposited into the Sport Fish Special Fund would be protected by state and federal law from transfers for any purpose other than fish conservation and management;
8. There are traditional and customary rights related to fishing that the State of Hawai'i has an affirmative duty to protect. A non-commercial marine fishing license will not automatically violate these rights, but a fee-based license, at minimum, needs to provide an opportunity for traditional and customary rights holders who cannot afford a license fee to obtain a license for free;
9. License fees could provide additional funding for programs, management activities, and research that benefit fishers;
10. License fees could provide additional funding for aquatic enforcement activities; and
11. A non-commercial marine fishing license could provide a consent to inspection by DOCARE officers for coolers and other containers that might contain evidence of fishing regulation violations, allowing officers to spend more time in the field on patrol and less time in court.

Identifying which of the potential benefits from a non-commercial marine fishing license will be meaningful to fishers will be very important to securing the authority that DLNR needs to issue licenses. For some fishers, it may be meaningful that a license may improve the effectiveness of aquatics enforcement efforts (through the ability to legally inspect coolers of suspected regulation violators more often) and increase the presence of enforcement officers in the field (through

additional funding for aquatics enforcement activities). For other fishers, it may be meaningful that the data that drives fisheries management decisions could be improved and become more reflective of what is actually happening in the water. For other fishers, it may be meaningful to them that the ability to take fish out of Hawai'i's waters will come with a responsibility to give back to the fisheries and to make a tangible investment in their long-term care and sustainability.

## Recommendations

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### H. Based on This Analysis

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The conclusions of the legal analysis provided in this overview, suggest the following recommendations:

1. If a non-commercial marine fishing license is pursued, conduct further research into the benefits and drawbacks created by using the term “non-commercial” rather than “recreational” to describe the license. If the term “non-commercial” is used, seek amendment of the Sport Fish Special Fund statute (HRS § 187A-9.5) to add the language “non-commercial” to the description of fees that must be deposited into the fund (i.e. “Moneys collected as fees for non-commercial and sport fishing licenses...”);
2. If a fee-based non-commercial marine fishing license is pursued, provide, at minimum, an opportunity for traditional and customary rights holders who cannot afford the license fee to obtain a license for free;
3. Conduct public engagement and consultation with key fisher groups (including traditional and customary rights holders) prior to seeking the necessary statutory authority for DLNR. At minimum, create a non-commercial marine fishing advisory group comprised of key fisher group representatives to advise DLNR on proposed legislation; and
4. Provide a mechanism for DLNR to be held accountable to fishers after statutory authority to issue a license has been secured. At minimum, DLNR should be required to provide annual reports to the fisher advisory group (and make available to the public) the amount collected in fees from the new license and how those fees were spent. If a portion of the fees is provided to DOCARE for aquatics enforcement, the report should also describe how those enforcement funds were spent.

### I. From Other States

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During the course of researching these issues, fish agency representatives from states that have created recreational marine fishing license programs within the last seven years offered recommendations to decision makers in Hawai'i, as they consider creating a new non-commercial marine fishing license. Their recommendations include:

- Make sure there is clear communication with the public from the beginning of the engagement process, including clearly articulating the goals of the proposed system, where collected fees go, and who they support.
- Get the head of the fish and game department and higher level officials to convene stakeholders and fisher focus groups to increase fisher buy-in for a new license;

- Get major angler groups to sign off on any proposed system even before going public to get their input early on.
- Once a supportable path forward has been identified, assure individuals who express opposition that “we’ll do the best we can” rather than “no, we can’t do that.”
- Craft a license fee structure with foresight that anticipates future needs. For example, it is difficult to change the age range of license requirements after regulations have been established.
- Involve top levels of resource management in any bill design to encourage their ownership and investment in its success. Maintain clear communication while the bill progresses during the legislative session.
- Present a unified voice of commercial and non-commercial fishers to demonstrate wide public support of the bill.
- Establish a solid partnership with a member of the legislature who can defend any proposed bill during session.
- Prepare the fisher community for the need to protect license revenues at the legislature, if necessary. Provide them with the information they will need to be effective in doing so.
- If possible, a financial argument for self-sufficiency can be persuasive to the legislature. But any limitations on the use of the license revenue needs to be clear.
- Co-mingling of recreational and commercial license funds can be problematic.
- Changes to a proposed bill during the legislative session (without fisher input) can result in significant backlash and subsequent repeal of any law that is finally passed.

## Appendix F

State	Authority	Right to Fish Language	Marine Fishing
<b>*Hawai'i</b>	Haw. Const. Art. XI, §6	"All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same[.]"	No license required
<b>Alabama</b>	Ala. Const. §39.02, Amendment 5	"The people have a right to hunt, fish, and harvest wildlife, including by the use of traditional methods, subject to reasonable regulations, to promote wildlife conservation and management, and to preserve the future of hunting and fishing."	Fee-based license required
<b>Alaska</b>	Alaska Const. VIII, §15	"No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State."	Fee-based license required
<b>California</b>	Cal. Const. Art. 1, §25	"The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; ... provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken."	Fee-based license required
<b>Florida</b>	Fla. Stat. §379.104	"([T]he Legislature intends that the citizens of Florida have a right to hunt, fish, and take game, subject to the regulations and restrictions prescribed by general law and by s. 9, Art. IV of the State Constitution."	Fee-based license required
<b>Georgia</b>	Ga. Code Ann. § 27-1- 3(a)	"[T]he General Assembly declares that Georgia citizens have the right to take fish and wildlife, subject to the laws and regulations adopted by the board for the public good and general welfare, which laws and regulations should be vigorously enforced."	Fee-based license required



State	Authority	Right to Fish Language	Marine Fishing
<b>Louisiana</b>	La. Const. Art. I, §27	“The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. Hunting, fishing and trapping shall be managed by law and regulation consistent with Article IX, Section 1 of the Constitution of Louisiana to protect, conserve and replenish the natural resources of the state.”	Fee-based license required
<b>Rhode Island</b>	R.I. Const. Art. I, §17	“The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.”	Fee-based license required
<b>South Carolina</b>	S.C. Art. 1, §25	“The citizens of this State have the right to hunt, fish, and harvest wildlife traditionally pursued, subject to laws and regulations promoting sound wildlife conservation and management as prescribed by the General Assembly.”	Fee-based license required
<b>Virginia</b>	Va. Const. Art. XI, §4	“The people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law.”	Fee-based license required

# **Evaluation of Proposed Hawai‘i Noncommercial Marine Fishing Registry, Permit, and License Design Scenarios & Policy Recommendations for Resolving Potential Conflicts with Native Hawaiian Rights**

prepared for Conservation International Foundation - Hawai‘i

by Malia Akutagawa, Esq.

November 9, 2016

## **I. Introduction**

### **A. Scope of Work**

Conservation International Foundation – Hawai‘i (CI) commissioned a series of reports to aid in determining the feasibility of a statewide adoption of a comprehensive fisheries licensing program that would ultimately contribute to protection, regulatory enforcement, enhancement and restoration of Hawai‘i’s precious marine resources.

This work builds upon an initial report submitted to CI that surveyed traditional and customary Hawaiian rights applicable to access, use, and regulation of marine resources in Hawai‘i. This submittal consists of an evaluation of several fisheries registry, permit, and license (RPL) system design scenarios provided by CI that are co-developed with various stakeholders serving as members of a project Study Group and in consultation with the State Department of Land and Natural Resources (DLNR). The evaluation of each design scenario will entail an identification of any conflicts with traditional and customary Hawaiian rights and the options available for resolving each conflict. Following this analysis are recommended policy actions based upon feedback provided by the Study Group.

### **B. Summary of the Study Group’s Work**

On June 28, 2016, I met with the Study Group to conduct a two-part presentation on (1) my analysis on traditional and customary Hawaiian rights applicable to access, use, and regulation of marine resources in Hawai‘i and (2) a broad evaluation of elements identified in the several RPL design scenarios presented by CI. In preparation for the meeting, I submitted several handouts and delivered a powerpoint presentation for the Study Group. Those handouts are attached here as an incorporation of the report and for any future outreach work provided by Conservation International.

Since that time, the Study Group has met monthly and is about to conclude its work. As discussions ensued and the Study Group contemplated each RPL scenario, it became evident to its members that more outreach work might be needed. One of the Study Group members hosted a conversation among several Native Hawaiian lawai‘a (fishers) who engage in traditional, subsistence fishing and do community-based resource management work. Input from this sampling of lawai‘a confirmed that more mana‘o (input) needs to be considered and that there may be additional models from which to draw inspiration from.

Based on these new developments, I have provided some additional recommendations and suggested policy actions below that reflect a more long-term vision and entails broader outreach work among stakeholders, community, policy- and decision-makers.

### **C. Framework for Legal Analysis, Evaluation, and Policy Recommendations**

This report is divided into several parts. The first part provides an overview of non-commercial fishing RPL scenarios provided by CI for evaluation. The second part addresses the overarching legal issues relevant to each or several RPL scenarios. The third part is an evaluation of the impact of each RPL design scenario on Native Hawaiian rights and practices, and specific recommendations to minimize those impacts. The fourth part provides policy recommendations that would best address Native Hawaiian concerns as well as the concerns of other stakeholders, policy- and decision-makers. It suggests strategies that will likely bring about a positive outcome for all interests and especially for the sustainability of Hawai‘i’s precious fisheries.

## **II. Overview of Non-Commercial Fishing Licensing Scenarios**

As a starting point for discussion amongst a Study Group of various stakeholders representing different fishing interests as well as those in key agency positions responsible for the management of Hawai‘i’s fishery resources, four (4) fisheries RPL scenarios were presented for assessment and evaluation. They are as follows:

### **Design #1: Registry (No Fee)**

Rather than a license system, a free registry for all fishers above a certain age.

### **Design #2: Simple Flat-Fee License with Multiple Exemptions**

A fee-based annual license for most fishers. Fees would differ between those with resident and non-resident status and also differ depending on time length for nonresidents. Fee exemptions may be granted to certain categories of fishers that would likely require specific accommodations. For example, other states exempt fishers with disabilities; military personnel on leave from active military duty; veterans; anglers on charter boats; anglers fishing from public fishing piers; senior citizens; low income individuals or those eligible for food stamps; persons under government care or residents of institutions; and/or federally recognized Native American tribes.

### **Design #3: Low-Fee Base License with Permit & Tag Fees**

A general low-cost, fee-based license; with optional purchase of additional special permits, tags, or stamps for special activities. The permits, tags, or stamps would allow a fisher to use certain gear types, fish in more restricted areas, or target higher value species. Fishers under a certain age may be entitled to an exemption. Certain categories of eligible fishers may also obtain a free license. All other fishers would pay, at minimum, for a low-fee base license.

#### **Design #4: Free License with Permit & Tag Fees**

A free basic annual license offered to all fishers. Fishers who opt to acquire additional fishing permits, tags, or stamps for special activities will be charged. The permits, tags, or stamps will entitle fishers to use certain gear types, fish in more restricted areas, or target higher value species. Fishers under a certain age would be exempt from obtaining a license. All other fishers would be required to have at least the basic free license to fish legally.

Preliminary strengths and weaknesses for each design scenario were provided, as well as examples of other States utilizing these various licensing systems. CI provided an initial general legal analysis as a starting point to support discussion among the Study Group members.

The Study Group then explored the potential for a noncommercial fishing license that fulfills three (3) main objectives:

1. To fill data gaps on resource impacts from noncommercial fishing within State waters (3 miles from shore).
2. To improve compliance with fishing regulations.
3. To increase funds marine resource management and enforcement.

In addition to maintaining these three objectives, the Study Group is also tasked with determining if there is a workable RPL system, that supports or, at minimum, avoids infringing upon Native Hawaiian rights and practices associated with the fisheries. To best prepare the Study Group to deal with the complexities and nuances found in Native Hawaiian law, it makes best sense to approach this analysis and evaluation more broadly. Firstly, this approach entails addressing some general, over-arching legal issues relevant to consideration of any fisheries license design scenario. Whether the Study Group gravitates to one or several of these scenarios or brainstorms and considers other models, it will at least be armed with the right legal tools from which to evaluate impacts to Native Hawaiian rights and make the necessary adjustments to avoid potential conflict.

### **III. Over-Arching Legal Issues Relevant to Fisheries RPL Design Scenarios**

Before considering each RPL scenario individually, it makes sense to first consider several overarching issues that arise when evaluating the efficacy of any statewide non-commercial fishing licensing program and potential impacts to native Hawaiian rights. These overarching questions are:

- Would any kind of statewide non-commercial fishing RPL program automatically threaten Native Hawaiian rights and practices?
- May the State exercise its regulatory authority to create a non-commercial fishing RPL program even if it may cause harm to Native Hawaiian rights?
- What are the sensitive areas to be aware of when contemplating a RPL scenario?

- How can the RPL system respect and protect Native Hawaiian rights and also avoid criminalizing Native Hawaiians who are exercising their rights?

The following discussion attempts to answer each of these questions.

**A. Would any kind of statewide non-commercial fishing RPL program automatically threaten Native Hawaiian rights and practices?**

**Short Answer: No.**

**Discussion:** The intent of a non-commercial RPL program is to provide adequate data on the fishery health as well as possibly fund additional monitoring and enforcement efforts. This is a form of mālama (conservation and stewardship) that is aligned with Hawaiian cultural beliefs and practices.

Furthermore, in ancient times, the Hawaiian people followed the kapu system. Under the kapu system, conservation measures were imposed by konohiki, those who were appointed in ancient times to oversee the agricultural and maricultural activities, and governed natural resource uses within the ahupua‘a (traditional land division). Conservation decisions and kapu (restrictions) were imposed based on the konohiki’s expert knowledge of ecological processes, and the life cycles and reproductive periods of key plant and animal species along the phases and cycles of the moon. The konohiki’s role was to inspire and motivate maka‘āinana (the common people) to be mahi‘ai (farmers) of land and sea, to cultivate ‘āina momona (abundance) as evidenced in contoured taro terraces that helped to direct water flow and aid in maximum absorption, feeding taro patches and creating spring lines below and along the coastline, which in turn fed more crops and created the important estuarine conditions and microhabitat for fish farming in loko i‘a (fishponds). Beyond specific kapu, the people lived an ethic of mālama, caring for land and sea by exercising self-restraint, to take only what they needed to feed their families and to ensure abundance for future generations.

The former konohiki system in ancient Hawai‘i and as codified under Hawaiian Kingdom law assured abundance. The nearshore fishing areas served particularly as critical nursery and feeding grounds for fish and other marine species; harbored important estuarine habitats that fed limu (seaweed) beds, attracted herbivores, and facilitated life cycles of diadromous species. These rich nearshore fisheries also served as the “ice-box” for hoa‘āina (ahupua‘a tenants) who maintained priority rights over their ahupua‘a resources and were assured through wise konohiki management and their own ethic of mālama, a fishery capable of sustaining successive generations.

The illegal overthrow, U.S. annexation, and statehood brought a seismic shift to Hawai‘i’s marine tenure system. The 1900 Organic Act condemned and deprivatized nearshore ahupua‘a fisheries under the konohiki system and threw them into the public domain as a matter of right under a western framework with none of the associated responsibilities to mālama, as understood from a Kanaka (Native Hawaiian) perspective. These events brought about a tragedy of the commons.

Today, the State of Hawai‘i has taken on the role of trustee and konohiki of depleted fishery resources. DLNR is the State agency with primary authority to manage Hawai‘i’s natural environment as well as cultural heritage. DLNR’s Division of Conservation and Resources Enforcement (DOCARE) is charged with enforcing State laws and regulations on natural resource protection. DLNR is chronically underfunded and understaffed, leaving Hawai‘i’s natural and cultural resources under constant threat.

The Study Group has taken on this issue proactively by exploring the potential of implementing a non-commercial fishing RPL system in Hawai‘i that could simultaneously fill data gaps in monitoring fishery health, while bringing in additional revenue to assist DLNR/DOCARE in better marine management, enforcement, and compliance. A RPL system that could achieve these goals is also in alignment with Native Hawaiian mālama values that stress resource health over unlimited resource extraction.

**B. May the State exercise its regulatory authority to create a non-commercial fishing RPL program even if it may cause harm to Native Hawaiian rights?**

**Short Answer:** Yes and No.

**Discussion:** Article XII, Section 7 of the Hawai‘i State Constitution describes the State’s legal obligation to Native Hawaiians. It reads as follows:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.<sup>1</sup>

The language is clear. While the constitution requires State agencies like DLNR to protect Native Hawaiian rights, agencies may also regulate these rights. The Hawai‘i Supreme Court rationalized that “ancient Hawaiian usage was self-regulating” and on this basis the State may also “impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits” it issues.<sup>2</sup>

However, the State, in exercising its regulatory authority over Hawaiian rights, must weigh and “reconcile competing interests.”<sup>3</sup> Even when certain types of permits may “interfere[ ] with [Native] rights” the State and/or its political subdivisions may still issue these permits in instances where preserving and protecting Native rights would result in “‘actual harm’ to the ‘recognized interests of others.’”<sup>4</sup>

While the State and counties may regulate Hawaiian rights, they are still “obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.”<sup>5</sup> Moreover, government has an “affirmative duty”<sup>6</sup> to preserve native rights and “does not have unfettered discretion to regulate [such] rights . . . out of existence.”<sup>7</sup>

The State has jurisdiction over waters extending out to three miles from shore. Within this section of ocean, the State has created various marine designations for management, which



includes prohibitions on access and certain uses.

**Marine Life Conservation Districts (“MLCDs”)** are established for the purpose of conserving marine resources and provide a prolonged rest period from fishing in order to facilitate resource replenishment. The controlling statute for MLCDs is H.R.S., Chapter 190 which prohibits the taking of living material (fish, eggs, shells, corals, algae, etc.) and non-living habitat material (sand, rocks, coral skeletons, etc.). Non-consumptive uses such as swimming, snorkeling, and diving are generally allowable in MLCDs. DLNR may impose certain gear restrictions if some fishing is allowed. Examples of MLCDs: Hanauma Bay, Pūpūkea, Waikīkī on O‘ahu.

**Fishery Management Areas (“FMAs”)** are managed with the intent of conserving both marine and estuarine species located near harbors and in bays and have been compromised by recreational fishing pressure. FMAs are used as a tool to diffuse user conflicts and competition over finite resources. H.R.S. §§ 187A-5, 188-53, 188F-2 provide the legal basis for DLNR to impose regulations in FMAs, primarily restrictions on fishing gear, seasons, time of day, bag limit, species, etc.

**Bottomfish Restricted Fishing Areas (“BRFAs”)** address the alarming decline in commercial fish landings and increased harvests of sexually immature bottomfish. H.R.S. § 13-94 restricts taking of bottomfish species (‘ula‘ula koa‘e or onaga; ‘ula‘ula or ehū; kalekale; ‘ōpakapaka; ‘ūkīkiki or gindai; hāpu‘u; and lehi) in designated BRFAs during closed season, except by permit. Also includes minimum size for onaga and ‘ōpakapaka (one pound); non-commercial bag limits; and gear restrictions (trap, trawl, bottomfish longline, or net other than scoop net or Kona crab net).

**Natural Area Reserve System (“NARS”)** under H.R.S. Chapter 195 are unique environments designated for protection due their important geologic and volcanic features, as well as rare aquatic and terrestrial species. An example of a NARS site is ‘Ahihi-Kina‘u on the island of Maui. Access is prohibited in this 1,238 acre property comprised of lava fields fed from Mt. Haleakalā, sensitive anchialine ponds, wetlands, native plants, and pristine coral reef habitat.

**Kaho‘olawe Island** enjoys special protections today in the aftermath of naval bombing exercises that greatly damaged the landscape, destroyed the aquifer, and impacted the surrounding ocean waters. As the U.S. Navy returned management to the State, certain legal protections were imposed on the island. H.R.S. § 6K-4 and H.A.R. § 13-260 bans all marine uses out to two nautical miles around Kaho‘olawe for the purpose of protecting its cultural, educational, scientific, and environmental assets. The State is holding Kaho‘olawe in trust for the future recognized, Native Hawaiian nation.

**Community Based Subsistence Fishing Areas (“CBSFAs”)** are sites either designated legislatively or through the petitioning of DLNR by communities interested in co-managing nearshore fishery resources with the State. The law governing CBSFAs arose out of an important subsistence study<sup>8</sup> on the island of Moloka‘i. The study revealed the importance of maintaining the health of natural resources and ecosystems to supporting Native families and contributing to the island’s unique subsistence economy. One of the main initiatives proposed by

the Hawaiian Homestead community was to protect its nearshore fishery from overfishing and returning to traditional values and management methods. For this reason, the legislature passed Act 271, codified as H.R.S. § 188-22.6 which imposes special protections on fisheries statewide that “reaffirm[ ] and protect[ ] fishing practices customarily and traditionally exercised for purposes of Hawaiian subsistence, culture, and religion.”<sup>9</sup> Other communities like Miloli‘i<sup>10</sup> on the Big Island and Hā‘ena<sup>11</sup> on Kaua‘i were legislatively designated as CBSFAs. After 20 years since the passage of the CBSFA law in 1994, Hā‘ena was the first community to have their customized rules for traditional management passed. There are 19 other communities statewide vying for designation and rules approval.

**Ocean Recreation Management Area (“ORMA”)** is a type of designation initiated by the DLNR Division of Boating and Ocean Recreation (DOBOR) to manage recreational use and avoid user conflicts in high activity areas. Under H.R.S. § 13-256, DOBOR issues permits for commercial vessel, water craft, and water sports equipment operators.

DLNR engages communities directly in ocean stewardship and regulatory compliance efforts. For example, the **Makai Watch** program enlists community volunteers to conduct resource monitoring work, education and outreach. Community members trained by DLNR report regulatory violations to DOCARE for better compliance and improved resource health.

Communities may also partner with DOBOR to **Adopt-A-Harbor**. This work entails having volunteers care for and upkeep their local harbor or pier, boat ramp, and facilities area.

The highly effective **Community Fisheries Enforcement Unit (CFEU)** program was launched in 2013 as a pilot project in north Maui. A dedicated vessel and team of DOCARE officers works with the Makai Watch Coordinator and patrols 13-miles of shoreline to issue citations, enforce rules, and educate people about fishing regulations. The Harold K.L. Castle Foundation and Conservation International provided funding for this program. DLNR hopes to expand this successful program statewide.

While there haven’t been any legal challenges as yet by Native Hawaiian cultural practitioners against marine designations and permitting processes, especially those that appear to be most restrictive in terms of access and use (e.g., MLCDs and NARS), informal communications with DLNR personnel reveal that there are instances in the field where Native Hawaiians have challenged DOCARE officers attempting to enforce regulations within these designated areas. One common type of scenario that DOCARE officers experience are blanket challenges made by Native Hawaiian commercial fishers who state by virtue of being Native Hawaiian by blood they have a right to fish whenever they want, wherever they want, and for however many fish they want. These types of blanket statements do not reflect Hawaiian practice.

There are however certain practices that would trigger legal protections for Native Hawaiian rights. A series of questions would need to be asked of fishers claiming to be Native Hawaiian who are conducting prohibited activities within marine designated areas. This leads to the next issue regarding what sensitive Hawaiian rights issues need to be addressed when contemplating a non-commercial fishing RPL program.

Why is this important? It may just be a matter of time that Native Hawaiians file a formal lawsuit challenging a number of these kinds of marine designations. For those legitimately exercising customary fishing and mālama practices, especially within their own ahupua‘a or otherwise traditional fishing grounds, a deeper legal analysis is warranted.

### **C. What are the sensitive areas to be aware of when contemplating a licensing scenario?**

#### **Short Answers:**

(1) Hoa‘āina (ahupua‘a tenant) practices, particularly within their ahupua‘a fisheries, are the most important and most sensitive issue to consider when reviewing whether a non-commercial fishing RPL scenario would be unduly harmful to Native Hawaiian rights.

(2) Any attempt to further regulate konohiki fisheries that survived condemnation proceedings in the aftermath of the 1900 Organic Act and were deemed “vested” through successful registration with and acknowledgement by the circuit court, should not be further regulated under a non-commercial fishing RPL system. These vested konohiki fisheries are deemed private and subject to management and customized rules imposed by konohiki (whether they are “landlords” within a western property construct or a landlord who also possesses comprehensive traditional knowledge of marine resources, their life cycles, habitat and ecosystem dynamics necessary for wise management decisions).

#### **Discussion:**

##### **➤ Protecting Hoa‘āina Practices and Rights**

Hoa‘āina rights date back to the unwritten customary laws around ancient land tenure prior to the establishment of the Hawaiian monarchy and kingdom. A more generalized term for the common people of the land is maka‘āinana. Hoa‘āina is a more specific term for those maka‘āinana who were specifically connected to a certain ahupua‘a. This term is more commonly understood today in the field of Native Hawaiian law given that hoa‘āina continue to maintain priority rights within their ahupua‘a.

In early Hawai‘i, ‘ohana (extended families) within the ranks of the maka‘āinana worked the land under the chiefs and konohiki (resource managers). If fairly treated by the ali‘i, ‘ohana maintained their tenancy on the land from generation to generation, thrived, and expanded in numbers within their ahupua‘a and moku.<sup>12</sup> The extended ‘ohana lived inland (‘ohana ko kula uka) and along the shore (‘ohana ko kula kai).<sup>13</sup> Some ‘ohana maintained rights in ‘ili which consisted of either contiguous or non-contiguous (‘ile lele) land segments within an ahupua‘a or several ahupua‘a. The more general, contiguous ‘ili were typically narrow land strips running vertically from mountain to sea.<sup>14</sup> For families, ‘ili served a functional purpose to best meet their needs. Families maintained rights to use, cultivate, and mālama their ‘ili.<sup>15</sup> Ideally, ‘ili comprised a mauka (mountain, inland) piece noted as the ‘umeke ‘ai (“that which filled the poi bowl”) and a makai (shoreline, nearshore) section called the ipukai (“meat bowl”) where a rich source of fish was provided.<sup>16</sup>

Hoā'āina were most intimately connected to their place and held extensive knowledge of palena (natural and human-made features that served as cognitive boundary markers) of both land and sea.<sup>17</sup> The people had names for varied features of shoreline to open sea:

- *Pu'eone* for the sandy seashore, sand dunes, and sandbar.
- *Kai pualena*, where rivers and streams transporting minerals from the land collide with the sea, mix and churn the water with a golden hue.
- *Kai koholai* for the shallow lagoons located close to shore within the reef's protection.
- *Po'ina nalu* and *kai po'i* where the waves break along the reef.
- *Kai ele*, the deep, dark blue ocean
- *Kai-popolohua-mea-a-Kāne*, the sea associated with the god Kāne with its vibrant purple-blue and red-brown tones.<sup>18</sup>

For ahupua'a geographically located along the coastline, their boundaries extended into the ocean to include a fishery by which hoā'āina had priority access and use rights.<sup>19</sup>

While hoā'āina had the right or privilege (described as one part of the equation of the Hawaiian word "kuleana") to engage in subsistence fishing and gathering, they also had the kuleana (responsibility) to mālama (care for) the resources that sustained them. According to Hawaiian Studies professor Carlos Andrade, ahupua'a fisheries were tended to in a similar way as the maka'āinana cultivated the "gardens filling coastal plains, stream-lined valleys, and forest clearings in the uplands."<sup>20</sup> Limu (seaweed) were plucked carefully, with at least an inch of growth left above the holdfast or "roots" that connected to stones and other substrate in the water. Initial cleaning of limu took place onsite which encouraged the release of spores and new growth.<sup>21</sup> Certain reef patches and blue holes are identified by traditional names, especially ko'a, rich fishing grounds. Their names are passed from generation to generation among fishing families. On Moloka'i, some reef patches are named after ancient women who originally tended them as ocean gardens.<sup>22</sup> Even evidence of coral plantings extending outward from the mākāhā (sluice gates) of loko kuapā (walled fishponds made of stone) has been discovered on Moloka'i. Fish houses made of stacked stone are also constructed to attract manini (*Acanthurus triostegus*, convict tang). The top stone of the hale manini (manini house) is lifted during low tide to allow for hand harvesting of the fish.<sup>23</sup> "Pruning" coral to increase niche areas and attract more fish is a traditional practice in Kahalu'u Bay on Hawai'i Island that continues on to this day.<sup>24</sup>

The people not only possessed a thorough knowledge of the nearshore fisheries, but also were very familiar with deep sea fisheries. Ka Nupepa Kuokoa articles written in the 1800s by expert lawai'a (fisherman) Daniel Kahā'ulelio of Lahaina, Maui recount his knowledge passed down to him by his father of a hundred deep ocean fishing grounds.<sup>25</sup> Even today, there are Native fishing families who continue to maintain knowledge and a relationship with deep sea fishing ko'a (rich fishing grounds).

Some ko'a are fed palu (chum). For example, native communities who fish 'ōpelu (*Decaperus spp.*, Mackerel Scad) hānai (adopt) or mālama (care for) ko'a for 'ōpelu and prepare vegetable-based palu for herbivorous fish. Titcomb described the common practices that lawai'a (fishers) observed in feeding ko'a and harvesting responsibly:

Fishing grounds were never depleted, for the fishermen knew that should all the fish be taken from a special feeding spot (*ko‘a*) other fish would not move in to replenish the area. When such a spot was discovered it was as good luck as finding a mine, and fish were fed sweet potatoes and pumpkins (after their introduction) and other vegetables so that the fish would remain and increase. When the fish became accustomed to the good spot, frequented it constantly, and had waxed fat, then the supply was drawn upon carefully. Not only draining it completely was avoided, but also taking so many that the rest of the fish would be alarmed. At the base of this action to conserve was the belief the gods would have been displeased by greediness or waste.<sup>26</sup>

This understanding was later codified into written laws under the Kingdom of Hawai‘i. King Kamehameha III officially recognized konohiki fishing rights and traditional Hawaiian fishing customs and practices in the Constitution and Laws of June 7, 1839.<sup>27</sup> This law was reaffirmed in 1840. The law recognized that the king, the konohiki (a word altered to generically describe chiefs and landlords regardless of expert knowledge on natural resource management),<sup>28</sup> and *hoa‘āina* possessed fishing rights.<sup>29</sup> The Kingdom crafted several versions of the fishery law, but they did not reflect any major substantive changes from earlier iterations.<sup>30</sup>

Kingdom law standardized aspects of ancient custom in the fisheries, preserving exclusive rights of piscary (fishing rights) to konohiki and *hoa‘āina* within their *ahupua‘a* from the shoreline to the outer edge of the reef. If the *ahupua‘a* fishery possessed no reef, then the law designated the boundary of the fishery to extend one mile from shore. Konohiki had a right to *kapu* one fish for his/her exclusive use, receive from *hoa‘āina* one-third of their catch, and temporarily rest areas during certain periods of the year to allow for replenishment. The waters beyond the reefs and the open ocean were granted to all the people.<sup>31</sup> These were the *kilohe‘e* grounds (described as the waters shallow enough to wade or see the bottom by canoe with the aid of *kukui* oil to harvest *he‘e* or octopus), the *luhe‘e* grounds (the deeper waters where octopus was caught by line and with a cowrie lure), the *mālolo* grounds (characterized by rough currents and choppy seas where the *mālolo* or flying fish frequent), and beyond into deeper waters.<sup>32</sup>

Subsequent case law during the Kingdom period confirmed *hoa‘āina* fishing rights:

Every resident on the land, whether he be an old *hoaa*, a holder of a *Kuleana* title, or a resident by leasehold or any other lawful tenure has a right to fish in the sea appurtenant to the land as an incident of his tenancy.<sup>33</sup>

In 1893, the Hawaiian monarchy was illegally overthrown by a group of missionary born sugar barons backed by the U.S. military. The American government followed with the annexation of Hawai‘i in 1898 by Joint Resolution of the House and Senate. This was followed by U.S. Congress’ passage of the Organic Act in 1900. The Organic Act had the effect, among other things, of deprivatizing the konohiki fisheries (with the exception of fishponds) and placing them into the public commons. Section 95 of the Organic Act repealed konohiki “exclusive fishing rights” and made these private fisheries “free to all citizens of the United States subject, however to vested rights.”<sup>34</sup> Section 96 of the Act clarified that these rights were “vested” only if the owner of the konohiki fishery successfully petitioned the circuit court within a two-year period.<sup>35</sup>

Even if vested, the Territory of Hawai‘i could exercise the option to condemn a konohiki fishery in favor of public use, provided it justly compensate the owner.<sup>36</sup>

How did the Organic Act affect *hoa‘āina* piscary rights? Jurisprudence in this area is cloudy with conflicting judicial decisions. A 1927 decision, *Smith v. Laamea*,<sup>37</sup> issued by the Supreme Court of the Territory of Hawai‘i acknowledged the rationale set forth in *Haalelea v. Montgomery*, an 1858 case issued by the Supreme Court of the Kingdom of Hawai‘i:

Those persons who formerly lived as tenants under the konohikis but who have acquired fee simple title to their kuleanas, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as *hoainas* under the old system.<sup>38</sup>

However, in 1930, just three years after the *Smith v. Laamea* decision, the Territory of Hawaii Supreme Court altered its perspective on *hoa‘āina*, particularly those who assumed *ahupua‘a* tenancy after 1900. In *Damon v. Tsutsui* (1930) the Court ruled that vested rights statutorily created under Kingdom law was the equivalent to a contractual transaction whereby an “offer” to convey piscary rights was made, but no longer available for acceptance given the passage of the Organic Act.<sup>39</sup>

A further eroding of the understanding of Hawaiian custom and the unique body of jurisprudence in Hawai‘i continued with *Bishop v. Mahiko* (1940),<sup>40</sup> a case heard during the Territorial period which involved the Makalawena *ahupua‘a* fishery. The fishery was not timely registered within the two-year period under the Organic Act and the Estate of Bernice Pauahi Bishop lost the private fishery of the *ahupua‘a* of Makalawena. The Bishop Estate as konohiki and the *hoa‘āina* of Makalawena *ahupua‘a* filed suit<sup>41</sup> challenging the constitutionality of Sections 95 and 96 of the Organic Act as an unlawful taking of the private fishery without due process of law and just compensation in violation of the 5<sup>th</sup> amendment of the U.S. Constitution.<sup>42</sup> While the court acknowledged that the konohiki fishery statutes established during the Kingdom period created vested konohiki and *hoa‘āina* rights of piscary, it justified the taking of the Makalawena fishery for public use because there was no record of the metes and bounds for the *ahupua‘a* and fishery.

This ruling controverted the common practice in Hawai‘i’s courts from the Kingdom period, through the Territory days and up to the present day under Statehood to “allow reputation evidence by *kama‘āina* witnesses in land disputes.”<sup>43</sup>

It was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon ... With the Great Mahele in 1848, these *kamaainas*, who knew and lived in the area, went on the land with the government surveyors and pointed out the boundaries to the various divisions of land. In land disputes following the Great Mahele, the early opinions of this court show that the testimony of *kamaaina* witnesses were permitted into evidence. In some cases, the outcome of decisions turned on such testimony.<sup>44</sup>

Absent in the konohiki fisheries’ decisions made by the Supreme Court of the Territory of Hawai‘i is a regard for Native Hawaiian custom and usage which was made part of Kingdom law and survived as a statute in both the Territory period and today as a State. In *Bishop v. Mahiko*

the Supreme Court for the Territory of Hawai‘i saw no reason to concern itself with reviewing “the respective rights of piscary enjoyed by konohikis and common people in ancient times,” rather it confined its analysis to the “written laws” or statutes promulgated under Kingdom law and held over by the Republic of Hawaii.<sup>45</sup>

This ruling was in direct opposition to the Federal District Court opinion in *United States v. Robinson* issued in 1934, just six years prior to *Bishop v. Mahiko*. The Federal District Court in *Robinson* opined:

[I]f a fee-simple title to a portion of the ahupua‘a originated even as late as approximately 1924 (certainly long years after the repeal of the fishing laws of 1900) the owner of such parcel of land would become entitled, upon acquiring title, to an appurtenant right of fishery.<sup>46</sup>

When a judiciary was founded in 1847 under Kamehameha III, it was granted the authority to “cite and adopt ‘[t]he reasonings and analysis of the common law, and of the civil law [of other countries] ... so far as they are deemed to be founded in justice, and *not in conflict with the laws and usages of this kingdom.*’”<sup>47</sup> On November 25, 1892, the Kingdom passed the Judiciary Act which states:

Section 5. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, *or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage*, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.<sup>48</sup>

When Hawai‘i was annexed to the United States, the statute was adopted by the Territorial government.<sup>49</sup> This provision also survived into Statehood as H.R.S. § 1-1.<sup>50</sup>

The Hawaiian custom and usage clause of H.R.S. § 1-1; the Kuleana Act (1851) now codified as H.R.S. § 7-1 which protects hoā‘āina rights to gather certain enumerated items in the ahupua‘a for home use; and the protections of traditional and customary rights of ahupua‘a tenants afforded under Article XII, § 7 of the Hawai‘i State Constitution have contributed to a unique body of jurisprudence that continues to develop and evolve in ways that favor the protection of traditional hoā‘āina rights on both public and private “undeveloped”<sup>51</sup> and “less than fully developed”<sup>52</sup> lands. In this sense, the term “lands” encompasses a broader definition that accounts for the unique manner in which coastal ahupua‘a were known to include the adjacent fishery as an appurtenance. Thus, the Native rights of hoā‘āina and their practices associated with access, use, and mālama within their respective ahupua‘a fishery<sup>53</sup> and/or other fisheries they may have customarily utilized beyond their ahupua‘a of residence<sup>54</sup> must be reasonably protected. Any non-commercial fishing RPL system would need to take those rights into account.

- **Recognizing Vested Konohiki Fisheries Where Konohiki Practices are Still Exercised and Kapu Prescribed.**



An exact accounting of konohiki fisheries prior to the Organic Act is unknown.<sup>55</sup> The best estimate is somewhere between 1,200 – 1,500 konohiki fisheries based on the number of coastal ahupua‘a and ‘ili throughout the islands.<sup>56</sup> After annexation and the passage of the Organic Act in 1900, there were between 360-720 fisheries classified as private.<sup>57</sup> In the decade just preceding statehood in 1959, an estimated 300-400 konohiki fisheries were registered, 248 were unregistered and considered having “waived”<sup>58</sup> their rights, and 37 were condemned for government use.<sup>59</sup> In a practical sense, the vast majority of konohiki fisheries were deprivatized, lost, and/or condemned.

In a legal sense, the body of jurisprudence on konohiki fisheries in the aftermath of annexation is laden with discrepancies and conflicting outcomes. Generally, the Hawai‘i Supreme Court of the Territory of Hawai‘i consistently ruled that the irrefutable intent of the Organic Act was “to destroy, so far as it is in [the U.S. Congress’] power to do so, all private rights of fishery and to throw open the fisheries to the people”<sup>60</sup> as a public commons. Any konohiki who failed to timely petition a private fishery before the circuit court was deemed to have “waived” his or her rights to that fishery.<sup>61</sup> According to the Territorial Court, the only way for a konohiki to have a “vested” right in the private fishery was to timely and successfully petition his/her rights before the circuit court.<sup>62</sup> Failing to do so would relinquish the private fishery to the public for “the free use and enjoyment of all citizens of the United States.”<sup>63</sup>

In contrast, the United States Supreme Court was less willing to dismiss vested rights in the konohiki fisheries despite the passage of the Organic Act:

A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however, anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.<sup>64</sup>

The U.S. Supreme Court similarly ruled in *Carter v. Hawaii* that a claim for vested rights based on ancient prescription and statutes succeeds if the “effect” of the statutes involved “created vested rights.”<sup>65</sup> The Court reasoned that if the intent was clear to grant a konohiki fishing right as appurtenant to the land, then it is vested.<sup>66</sup>

Despite the U.S. Supreme Court decisions which clearly continued to recognize the vested rights of konohiki through ancient prescription and then by Kingdom statute, regardless of the passage of the Organic Act and its registration requirements, the State of Hawai‘i appears to lend greater import to the Territorial Supreme Court rulings. Only konohiki fisheries that successfully registered within the two-year window required under the Organic Act, and which were not subsequently condemned by the government are considered “vested.” Today, the State of Hawai‘i constitutionally protects “vested rights” within that limited understanding:

All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, *subject to vested rights* and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use.<sup>67</sup>

In addition to constitutional protections of vested fishing rights, the State has reaffirmed Hawaiian Kingdom laws governing konohiki fisheries that were successfully registered, pursuant to the requirements of the Organic Act.<sup>68</sup> The boundaries of the konohiki fisheries are set similarly to the Kingdom laws. They encompass the coastal waters from the beach at low watermark to the reefs, or up to one mile seaward where no reefs are present.<sup>69</sup> The konohiki fishery is held "for the equal use by the konohiki and the tenants" of the ahupua'a.<sup>70</sup> Ahupua'a tenants may only take from the konohiki fishery what they need for subsistence, and not for commercial use.<sup>71</sup> Konohiki may, through posting notice, exercise a right to kapu one fish or other aquatic species for a specified period of time,<sup>72</sup> or in the alternative kapu the taking of one or a variety of species for several months each year.<sup>73</sup> During open fishing season, the konohiki may claim one-third of the catch by ahupua'a tenants, so long as notice is given.<sup>74</sup>

DLNR responded to inquiries of whether any successfully registered konohiki fishery are being actively managed today through placing of kapu and restricting harvests of certain fish during their spawning periods. One DOCARE officer recalled the La'ie, O'ahu fishery as the last known konohiki fishery that used to post notices of kapu in the past, but it hasn't done so for a long time now.<sup>75</sup> When asked if DLNR has an inventory of registered konohiki fisheries that have not been condemned by the State, the response was they were unaware of a definitive list and needed to do more research on that.<sup>76</sup>

The 1954 Kosaki report expressed this difficulty as well as a 1978 report to the legislature from James Shon:

At present, all of the major konohiki rights have been condemned and acquired by the state. The remaining [vested] fisheries are assumed to be abandoned, since owners have not attempted to bar the public from fishing in their areas.<sup>77</sup>

The Kosaki report also references legislative committee recommendations in 1939 to delay condemnation of registered fisheries due to lack of Territorial government funds and also in the hope that the remaining konohiki fisheries would lose their value over time such that compensation would be nominal or unnecessary:

Experts have told us that, within the next eight or ten years, the value of these fisheries will be reduced to a comparatively low figure as, at the present rate, most of the fish which are still found in large numbers in these fisheries, will have disappeared by reason of depletion.<sup>78</sup>

Indeed, the breakdown of the konohiki system of managing resources, as it was practiced anciently has caused an erosion of Native Hawaiian cultural values of mālama and subjected Hawai‘i’s fishery to a tragedy of the commons.

While it is still unclear whether vested konohiki fisheries still exist today, the law is clear in their protection. Thus, any non-commercial fishing RPL system should be configured in such a way that it expressly acknowledges the presence of certain vested konohiki fisheries and avoids infringement on their customized management and utilization by present-day konohiki and ahupua‘a tenants.

**D. How can the RPL system respect and protect Native Hawaiian rights and also avoid criminalizing Native Hawaiians who are exercising their rights?**

**Short Answer:** In order for a non-commercial fishing RPL system to avoid criminalizing Native Hawaiians, particularly hoā‘āina engaging in traditional subsistence and/or religious or ceremonial rites within their ahupua‘a fishery, some form of identification should be provided that would alert DOCARE officers patrolling State marine waters that these individuals are exercising their rights. These rightholders should also be exempt from purchasing a non-commercial fishing RPL, particularly for conducting traditional subsistence fishing and native mālama practices within their own ahupua‘a fishery.

**Discussion:** A recent opinion issued by the Hawai‘i Intermediate Court of Appeals (ICA) dismissing criminal charges against a Native Hawaiian defendant who was arrested for pig hunting on private lands within his ahupua‘a and without benefit of a State hunting license would be comparable to and problematic in a situation requiring Native Hawaiians to acquire a non-commercial fishing license even for continuing to exercise traditional, subsistence and religious practices within their own ahupua‘a fishery.

In *State v. Palama* the ICA affirmed the trial court’s dismissal of criminal charges against a Native Hawaiian defendant who was arrested for pig hunting on private property located within his ahupua‘a of Hanapepe, Kaua‘i.<sup>79</sup> Palama maintains a taro patch in Hanapepe on kuleana ancestral lands. He often walks throughout Hanapepe ahupua‘a, including across privately owned sections, to inspect the river flow and water quality for his kalo. He often hunts in Hanapepe for subsistence. At trial Dr. Jon Osorio, a cultural expert and Hawaiian Studies professor, testified that pig hunting has been a traditional practice well before 1892 and is also is a customary form of mālama in the protection of taro a potato gardens from foraging animals.<sup>80</sup> Palama learned how to hunt as a child and this knowledge was passed down through the family. A Native Hawaiian hunter from Hanapepe also offered kama‘āina expert testimony at trial and confirmed Palama and his ‘ohana’s long tenancy in Hanapepe and as subsistence hunters for successive generations. One day, Palama went pig hunting with a mule and his dogs. He successfully killed a wild pig with his knife and was subsequently arrested for trespass and for hunting on private lands.

The court applied a three-part *Hanapi*<sup>81</sup> test that a criminal defendant must meet to assert a constitutionally protected native Hawaiian right. Namely, the defendant must prove that he is a descendant of “native Hawaiians who inhabited the islands prior to 1778”;<sup>82</sup> second, that his

“claimed right is constitutionally protected as a customary or traditional native Hawaiian practice”;<sup>83</sup> and third, “that the exercise of the right occurred on undeveloped or ‘less than fully developed property.’”<sup>84</sup> Based on the testimony provided, the court found Palama had satisfied this three-part test.

The appeals court affirmed pig hunting as a traditional and customary Hawaiian right. The court also agreed that the Defendant’s constitutionally protected hunting privilege was reasonably exercised. The court found substantial evidence in the record that Palama hunted in a reasonable manner, in alignment with cultural subsistence values and with a mindset for traditional conservation in that he protected his taro patch by hunting pig in the surrounding area.

Under Article XII, Section 7 of the Hawai‘i State Constitution, government must protect Native Hawaiian rights, but may reasonably regulate them to the extent feasible.<sup>85</sup> However, this provision does not give the State “the unfettered discretion to regulate the rights of ahupua‘a tenants out of existence.”<sup>86</sup> Additionally Article XII, Section 7 of the Constitution “places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies ‘the power to protect these rights and to prevent any interference with the exercise of these rights.’”<sup>87</sup>

In criminal cases where the constitutional privilege of exercising a valid Native Hawaiian right succeeds under the three-prong *Hanapi* test, an additional requirement is a “balancing test” that requires the court to “look to the totality of the circumstances and balance the State’s interest in regulating the activity against the defendant’s interests in conducting the traditional or customary practice.”<sup>88</sup>

In *Palama*, the State successfully requested judicial notice be taken of the DLNR Game Mammal Hunting Regulations, Hawaii Administrative Rules (HAR), Title 13, Chapter 123 specifically for the island of Kaua‘i which informs hunters of public hunting grounds where pig hunting is allowed. In doing so, it challenged the trial court’s finding that this regulation served as a “blanket prohibition or extinguishment of [Palama’s] protected [Hawaiian] practice.”<sup>89</sup> The State reasoned that Palama could easily have acquired permission from the landowner or obtained a hunting license to hunt on public lands as provided for by State regulations.

Palama argued that the State’s implementation of H.R.S., § 183D-26 would impermissibly delegate to private landowners “the absolute power to grant or deny Native Hawaiians their constitutional privileges.”<sup>90</sup> The trial court also found the State’s rationale to be flawed. Focusing specifically on whether the State’s enforcement of the regulation infringed on Palama’s right to hunt on the subject private property in Hanapepe ahupua‘a (where he is a hoā‘āina), the appeals court ruled that this action would “operate[ ] as a summary extinguishment of Palama’s constitutionally protected right to hunt pig on the subject property.”<sup>91</sup>

The *Palama* case was decided within a criminal trespass context and places the burden on the Native Hawaiian defendant to prove s/he was practicing a constitutionally protected traditional and customary Hawaiian right. Rather than leave Hawaiians vulnerable to criminal prosecution during DOCARE ocean patrols, the more appropriate approach is to ensure that a non-

commercial fishing RPL program is structured in a manner that affirmatively protects Native rights and practices that are inextricably tied to healthy marine resources and ecosystems.

#### IV. Evaluation of Fisheries RPL Design Scenarios, Their Impact on Native Hawaiian Rights, and Recommendations

For ease of review, the following table is provided describing four non-commercial RPL scenarios, their potential impacts to Native Hawaiian practices and rights, and comments and recommendations to ameliorate unintended negative consequences for indigenous cultural practitioners.

##### A. Overview Table

RPL Design Scenarios	Comments and Recommendations <b>Re: Impacts to Native Hawaiian Rights</b>
<p><b>Design #1: Registry (No Fee)</b>  <b>A registry rather than a license.</b>            Registration is <b>free</b> and <b>mandatory for all fishers</b> over a certain age.</p>	<p>Likely no impact to Native Hawaiian Rights. Article XII, § 7 of the Hawai‘i State Constitution protects Native Hawaiian traditional and customary rights. However, it also acknowledges the State’s authority to regulate those rights. The regulation must be reasonable to the extent feasible, but must not extinguish Native Hawaiian traditional and customary rights.</p> <p>An across the board registry for all fishers over a certain age, required at no-cost to fishers, is a reasonable regulation of Native Hawaiian traditional and customary rights and would likely pass constitutional review.</p>
<p><b>Design #2: Simple Flat-Fee License with Multiple Exemptions</b>  <b>A fee-based annual license with exemptions</b> for certain categories of fishers and different fee structure among different groups.</p> <p><b>Fee Structure Differences</b></p> <ul style="list-style-type: none"> <li>▪ residents</li> <li>▪ nonresidents (and possibly licenses for different lengths of time for nonresidents).</li> </ul> <p><b>Exempt categories</b> (no license required, no data to be provided by these users)</p> <ul style="list-style-type: none"> <li>▪ blind or disabled anglers</li> <li>▪ military personnel on leave from active duty</li> <li>▪ anglers on charter boats</li> <li>▪ anglers fishing from public fishing piers</li> </ul>	<p>On its face, this is a reasonable regulation as to Native Hawaiian rights and the State has a right to regulate Native Hawaiian traditional and customary rights under Article XII, § 7 of the Hawai‘i State Constitution.</p> <p>However, if a Native Hawaiian fisher is cited, arrested, and/or prosecuted for</p> <ul style="list-style-type: none"> <li>▪ subsistence fishing without a license within the nearshore fishery of his/her ahupua‘a where he/she physically resides (from shoreline to edge of reef, or up to one mile from the shoreline out to sea where there is no reef)</li> <li>▪ subsistence fishing without a license within another nearshore ahupua‘a fishery where he/she may not physically reside, but has genealogical ties, historical and multi-generational connections to that place, and/or is accompanying a Native Hawaiian ahupua‘a tenant as a guest fisher</li> <li>▪ conducting cultural, ceremonial, or religious practices in either the nearshore fishery or the open ocean (e.g., feeding ko‘a with palu, tending to reef patches and other fishing grounds that are part of his/her family’s cultural tradition and kuleana, visiting underwater heiau, making ho‘okupu or offerings, etc.).</li> </ul> <p>a court will likely hold in favor of the Native Hawaiian defendant as having successfully raised a constitutional privilege.</p>

Licensing Design Scenarios	Comments and Recommendations Re: Impacts to Native Hawaiian Rights
<p><b>Exempt categories</b> (no license required, no data to be provided by these users) (continued)</p> <ul style="list-style-type: none"> <li>▪ resident seniors</li> <li>▪ low income or food stamp eligible</li> <li>▪ individuals under government care or residents of institutions</li> <li>▪ members of federally recognized tribes</li> </ul>	<p><b>Recommendations:</b></p> <ul style="list-style-type: none"> <li>▪ Provide a free license, but with some kind of notation that fisher may freely fish in certain areas where his/her rights attach: ahupua‘a fishery where fisher physically resides and/or other fishing areas where he/she and ‘ohana have traditionally fished and/or conducted cultural, ceremonial, or religious practices.</li> <li>▪ If Native Hawaiian fisher wants to fish in other areas outside of his/her ahupua‘a and traditional fishing grounds, and/or fish on neighbor islands as the rest of the general public may freely access, then he/she should pay the regular license fee.</li> </ul>
<p><b>Design #3: Low-Fee Base License with Permit &amp; Tag Fees</b></p> <ul style="list-style-type: none"> <li>▪ <b>Low-cost, fee-based license</b></li> <li>▪ For <b>additional fees</b> - option of purchasing special permits, tags, or stamps <b>for special activities</b></li> <li>▪ Special activities to include: <ul style="list-style-type: none"> <li>○ use certain gear types</li> <li>○ fish in more restricted areas</li> <li>○ target higher value species.</li> </ul> </li> <li>▪ <b>Fishers under certain age exempt</b> from license requirement</li> <li>▪ <b>All other fishers</b> required to have at least the <b>low-fee base license</b>.</li> </ul> <p><b>Free license available for certain categories of eligible fishers.</b></p>	<p>Same assessment and recommendations as provided for Design #2</p> <p>Additional comments and recommendations:</p> <ul style="list-style-type: none"> <li>▪ <b>Fees</b> of any kind and especially increased fees for special activities may also be problematic if it completely infringes upon or causes extreme hardship on Native Hawaiians to engage in subsistence fishing activities. <ul style="list-style-type: none"> <li>○ <b>Recommendation:</b> if Native Hawaiian subsistence fisher is indigent/low-income; consider exempting him/her from paying for both the low-cost license and special activities licenses that require additional fees.</li> </ul> </li> <li>▪ <b>Special activities:</b> <ul style="list-style-type: none"> <li>○ <b>Gear types:</b> it depends on what kind of gear. If the gear is designed for taking large harvests or more closely resembles commercial gear, then there is likely no infringement on Hawaiian rights. If the gear is for subsistence fishing (modern gear included) or is crafted traditionally (e.g., leho he‘e – octopus lure with cowry shell) this might unreasonably infringe on cultural practices and should probably be exempted.</li> <li>○ <b>Fishing in more restricted areas:</b> it depends on what areas are being considered. If the restricted area may include a Native Hawaiian fisher’s ahupua‘a fishery or other traditional fishing grounds, any cost may infringe on the indigenous user’s rights.</li> <li>○ <b>Target higher value species:</b> it depends on what higher value species are being considered and whether that particular species is critical to a Native Hawaiian fisher’s subsistence diet or other traditional practice (e.g., a Hawaiian kapa cloth maker traditionally gathers ‘opihi and hā‘uke‘uke for imprinting designs on kapa, yet these species are listed as high value requiring a special license and additional fees, that may infringe upon the Hawaiian cultural practitioner and “summarily extinguish” that person’s practice in violation of constitutional protections).</li> </ul> </li> </ul> <p><b>Recommendations:</b></p> <ol style="list-style-type: none"> <li>1) Provide a list of special gear, special restricted areas, and high value species that will be subject to additional fees.</li> <li>2) Provide an option for a Native Hawaiian practitioner to identify any listed gear, restricted area, and high value species on the list that may impact his/her traditional subsistence, other cultural, and/or ceremonial/religious practices.</li> </ol>

Licensing Design Scenarios	Comments and Recommendations Re: Impacts to Native Hawaiian Rights
<b>Design #3: Low-Fee Base License with Permit &amp; Tag Fees</b> (continued)	3) Issue for free special permit, tag, and/or stamp for applicable special activities. 4) Train DOCARE officers to not cite, arrest, or recommend prosecution of any Native Hawaiian individuals who may not have registered for a license, special permit, tag, and/or stamp if that person explains to the DOCARE officer s/he is exercising his/her traditional subsistence, other cultural, and or ceremonial/religious practices.
<b>Design #4: Free License with Permit &amp; Tag Fees</b> <ul style="list-style-type: none"> <li>▪ <b>Basic annual license free to all fishers</b></li> <li>▪ For <b>additional fees</b> - option of purchasing special permits, tags, or stamps <b>for special activities</b></li> <li>▪ Special activities to include:               <ul style="list-style-type: none"> <li>○ use certain gear types</li> <li>○ fish in more restricted areas</li> <li>○ target higher value species.</li> </ul> </li> <li>▪ <b>Fishers under certain age exempt</b> from license requirement</li> <li>▪ <b>All other fishers</b> required to <b>have at least the basic free license</b> to fish legally.</li> </ul>	Same assessment as provided for Design Scenarios # 2 and # 3

## B. Discussion

### 1. Evaluation of Impacts & Recommendations for Specific RPL Design Scenarios

**Design Scenario 1: Registry (No Fee).** The first design scenario would require that all fishers over a certain age enter their names into some kind of registry. No fees would be attached and rather than serve as a license, it would merely be a mandatory register for tracking purposes.

Native Hawaiian traditional and customary rights are statutorily and constitutionally protected. Government, however, may exercise regulatory authority to ensure the “reasonable exercise” of cultural practices.<sup>92</sup> While the efficacy of a free registry in actually protecting fishery resources is questionable, its free, no-cost and general application to all fishers over a certain age, is a reasonable regulation of Native Hawaiian traditional and customary rights and would likely pass constitutional review.

**Design Scenario 2: Simple Flat-Fee License with Multiple Exemptions.** The second design scenario would charge annual license fees to fishers with a varied fee structure based on residency status and possible exemptions based on other categories such as: disability, military status, low income/food stamp eligible, elderly/senior age and those receiving government care,



anglers on charter boats and using public fishing piers, and federally-recognized tribal Indian status.

This design scenario for the most part appears harmless on its face and within the State's authority to regulate Native Hawaiian rights. However, it is foreseeable that in certain circumstances Native Hawaiians legitimately and reasonably exercising traditional, subsistence fishing rights and practices may be vulnerable to criminal prosecution under this licensing scenario.

As described in greater detail in Section III. C. there are certain *hoāina* and *konohiki* fishing and *mālama* practices that the law protects, especially within their respective *ahupua'a* of residence or other fishing grounds for which they have customarily accessed and utilized for subsistence and to engage in active stewardship. If a Native Hawaiian fisher is cited, arrested, and/or prosecuted for

- subsistence fishing without a license within the nearshore fishery of his/her *ahupua'a* where he/she physically resides (from shoreline to edge of reef, or up to one mile from the shoreline out to sea where there is no reef)
- subsistence fishing without a license within another nearshore *ahupua'a* fishery where he/she may not physically reside, but has genealogical ties, historical and multi-generational connections to that place, and/or is accompanying a Native Hawaiian *ahupua'a* tenant as a guest fisher
- conducting cultural, ceremonial, or religious practices in either the nearshore fishery or the open ocean (e.g., feeding *ko'a* with *palu*, tending to reef patches and other fishing grounds that are part of his/her family's cultural tradition and *kuleana*, visiting underwater *heiau*, making *ho'okupu* or offerings, etc.).

a court will likely hold in favor of the Native Hawaiian defendant as having successfully raised a constitutional privilege.

To avoid the potential risk of criminalizing Native Hawaiians with this type of licensing scenario, consider providing a free license, with a notation that the Native Hawaiian fisher may freely fish in certain areas where his/her rights attach. The exercise of such rights are paramount in the fisher's own *ahupua'a* fishery where s/he physically resides and/or other fishing areas where s/he and *'ohana* have traditionally fished and/or conducted cultural, ceremonial, or religious practices.

In the instance that a Native Hawaiian fisher wants to fish in other areas outside of his/her *ahupua'a* and traditional fishing grounds, and/or wants to fish on neighbor islands as the rest of the general public may freely access, then he/she should pay the regular license fee. The reason for this is that Native Hawaiian rights are place-based, and relationship-based. These rights are not applicable to all places. When a Native Hawaiian identifies his/her *'āina*, s/he is literally referring the specific land that feeds him/her. The association to one's *'āina* can be likened to one's own mother. Thus, the rights attach to the *'āina* for which one has been nurtured by and has cultivated a long and reciprocal relationship with.

**Design Scenario 3: Low-Fee Base License with Permit & Tag Fees.** This scenario provides the same low-cost, fee-based license structure as Scenario 2. All fishers would be required to have, at minimum, a low-fee base license except for fishers of a certain age who would be exempt. A free license would likely be available for certain categories of eligible fishers as described in Scenario 2. However the difference here would be an offering of optional, additional fees for special permits, tags, or stamps for special activities. Special activities include the use of certain gear types; fishing in more restricted areas; and fishing for higher value species.

The same assessment and recommendations provided for Scenario 2 are applicable here. Namely, to avoid situations that would criminalize Native Hawaiians reasonably and legitimately exercising their customary fishing and mālama practices. Further, fees of any kind and especially increased fees for special activities may also be problematic if it completely infringes upon or causes extreme hardship on Native Hawaiians to engage in subsistence fishing and mālama activities. For low-income or indigent Native Hawaiians extracting resources from their ahupua‘a or other ahupua‘a that they lack genealogical and customary connections in order to supplement a subsistence livelihood should be considered for an exemption both for the low-cost license and special activities licenses that require additional fees.

Hawaiian rights may or may not be affected by certain special activities. With respect to gear types, it depends on what kind of gear. If the gear is commercial in nature or designed in a manner that extracts huge harvests and/or harvests indiscriminately, then it stands to reason that those types of gear are not aligned with Hawaiian practice. Native Hawaiian cultural practices and fundamental beliefs are grounded in kuleana which means right, privilege, and responsibility in one. For Hawaiians, one cannot separate responsibility from right and privilege. They are intertwined and engender an expectation of reciprocity and respect for all things, both inanimate and animate, and including the natural and cultural resources that sustain the people physically and spiritually.

If the gear is for subsistence fishing (modern gear included such as a spear, throw net, etc.) or is crafted traditionally (such as a leho he‘e, an octopus lure with cowry shell) then restrictions on their use or the imposition of added fees for a hoā‘āina might unreasonably infringe on his/her cultural practices and should probably be exempted.

Another special activity for which added fees are contemplated in this license scenario is fishing in more restricted areas. Again, it depends on what areas would be considered as more restricted. If the restricted area may include a Native Hawaiian fisher’s ahupua‘a fishery or other traditional fishing grounds, any cost may infringe on hoā‘āina rights.

Finally, this license scenario identifies targeting higher value species as a special activity warranting additional fee costs. Once more, it depends on what higher value species are being considered and whether that particular species is critical to a Native Hawaiian fisher’s subsistence diet or other traditional practice. Kahuna lā‘au lapa‘au (experts in Hawaiian medicinal healing) sometimes prescribe certain fish to their patients to assist in their healing. If it so happens that the prescribed fish is a high value target species, this may impact a traditional practice. Another example may be if ‘opihi and hā‘uke‘uke are deemed high value species, other

cultrual practitioners such as kapa cloth makers utilize these species in their cloth designs. The law cautions against regulating Native rights out of existence as a violation of the constitution.<sup>93</sup>

The attractive part of this licensing scenario is that it provides a fee structure commensurate with the degree of use and impact on fishery resources. Base license fees and additional fees for special activities could greatly build DLNR's capacity to manage natural resources and ensure effective enforcement.

There are ways to both support a robust licensing system and protect Native Hawaiian rights. With respect to special activities, the State could provide a list of special gear types, special restricted areas, and high value species that will be subject to additional fees. The State could then provide an option for a Native Hawaiian practitioner to identify any listed gear, restricted area, and high value species on the list that may impact his/her traditional subsistence, other cultural, and/or ceremonial/religious practices. The specific gear, restricted area(s), and high value species that the Native cultural practitioner identifies and provides a clear foundation for authenticating the customary practice may be issued an exemption or free special permit, tag, and/or stamp for the applicable special activities.

Another safeguard for the continued exercise of Native Hawaiian rights and practices in the fisheries would entail training DOCARE officers to not cite, arrest, or recommend prosecution of any Native Hawaiian individuals who may not have registered for a license, special permit, tag, and/or stamp if that person explains to the DOCARE officer that s/he is exercising his/her traditional subsistence, other cultural, and or ceremonial/religious practices. Since this issue is prevalent for any type of license scenario. Further discussion on how DOCARE officers should be trained is provided below in Section IV. B. 2.

**Design Scenario 4: Free License with Permit & Tag Fees.** This design scenario is very similar to scenarios 2 and 3, except that the basic annual license is free to all fishers and only special activities are subject to additional fees.

Due to the similarities, my analysis of the potential impacts to Native Hawaiian rights for scenario 4 is the same as I described for scenarios 2 and 3. Thus my recommendations are also the same.

## **2. General Recommendations**

**Train DAR personnel and DOCARE officers in the rights guaranteed to Native Hawaiian fishers and ocean stewards.** It may not always be the case that a Native Hawaiian registers as a fisher or acquires a non-commercial fishing license. Does that mean s/he should be cited for fishing without registration or for failure to acquire a license?

No.

The history behind the original Kuleana Act of 1850 and its subsequent amendment in 1851 is instructive here. During the time of the Māhele when the Kingdom of Hawai'i were crafting the law that allowed for hoā'āina to make claims to small kuleana parcels that provided a house lot for their family and some arable land for subsistence cultivation, a provision within the act also

recognized basic *hoāāina* access and gathering rights. The act expressly identified *hoāāina* rights of access to water from springs and streams; to freely traverse upon the trails and roads; and to gather *ti* leaf, *aho* cord, firewood, and house timber for subsistence. This provision was critically important to King Kamehameha III who expressed to his privy council, “A little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value.”

The King’s words bore truth the following year, when *hoāāina* expressed distress over a part of the Kuleana Act which required that they first acquire permission from the chiefs or landlords of their respective *ahupua‘a* before gathering the articles they needed for their daily living. One such petition in 1851 from 54 *hoāāina* from Kane‘ohe, O‘ahu captures the crisis the people were suffering by chiefs who barred access:

We who live on lands which have no forests, we are in trouble. The children are eating raw potato because of no firewood, the mouths of the children are swollen from having eaten raw taro. We have been in trouble for three months; the *konohikis* with wooded lands here in Kaneohe have absolutely withheld the firewood and *la‘i* [*ti* leaves] and the timber for houses ... We urge you to let the nobles know immediately, and to let us have firewood and *la‘i* and timber ... You make haste these days, or the children will be dead from starvation because of no firewood with which to cook food.<sup>94</sup>

This incident was not an isolated one, but all too common.<sup>95</sup> It led to an amendment of the Kuleana Act a year after its passage, which essentially removed the requirement to ask permission of the landlords and chiefs to access and gather the resources. It is this version that was adopted by the State as H.R.S., § 7-1.

Just as King Kamehameha was mindful of the basic needs of the *hoāāina* and amended the Kuleana Act to remove the real hardships the people faced when dealing with greedy chiefs and landlords who no longer honored custom and their trust responsibilities, it is important here to protect *hoāāina* from laws that may unjustly persecute them because they failed to seek official “permission” through registration and/or licensure. Further, the *Palama* case reflects the court’s reluctance to prosecute *hoāāina* exercising traditional subsistence hunting in their *ahupua‘a* for lack of a hunting license.

It may be difficult for DOCARE officers seeking to enforce fishing laws to determine whether they may be infringing on Native Hawaiian fishing and *mālama* rights if some individuals possessing the right do not have a form of identification that a registration card or license would more easily convey. It may be a simple formality at low- or no-cost to the *hoāāina* to register and/or acquire a noncommercial fishing license, but the lack of registration or license should not be a basis for prosecution. The best way, then, is to provide both DAR personnel who promulgate administrative rules for the care of natural resources and DOCARE officers who enforce these regulations with appropriate training on Native Hawaiian rights and practices with respect to the fisheries. The training could entail a series of questions or inquiries that DOCARE officers can make when encountering a Native Hawaiian claiming to be exercising a valid customary fishing and/or *mālama* practice in the ocean.

In *State v. Pratt*,<sup>96</sup> a case in which the defendant raised a constitutional privilege as a Native Hawaiian exercising traditional and customary practices of mālama on ancestral lands in Kalalau Valley in the Nā Pali Coast State Wilderness Park. Mr. Pratt cared for heiau (temples) on the land and removed invasive plants and rubbish from the area. He replanted native vegetation, vegetables, and fruit trees in Kalalau Valley. The State cited him for illegally living in a closed area within the wilderness park. While the court eventually upheld Pratt's conviction based on the reasonableness of park regulations to require acquisition of a camping permit for which Pratt failed to apply for; the case is useful for our purposes because it cites Dr. Davianna McGregor's expert testimony describing "six elements essential to traditional and customary native Hawaiian practice." Based on Dr. McGregor's testimony and other facts on the record, the court acknowledged that Pratt's practices were valid Native Hawaiian cultural practices. The six elements described by Dr. McGregor to validate the cultural authenticity of the practices were:

- (1) the purpose is to fulfill a responsibility related to subsistence, religious, or cultural needs of the practitioner's family;
- (2) the practitioner learned the practice from an elder;
- (3) the practitioner is connected to the location of practice, either through a family tradition or because that was the location of the practitioner's education;
- (4) the practitioner has taken responsibility for the care of the location;
- (5) the practice is not for a commercial purpose; and
- (6) the practice is consistent with custom.<sup>97</sup>

Dr. McGregor further identifies foundational 'ohana cultural values and customs for subsistence and mālama. They include but are not limited to the following:

- 1) Only take what is needed.
- 2) Don't waste natural resources.
- 3) Gather according to the life cycle of the resources. Allow the native resources to reproduce. Don't fish during their spawning seasons.
- 4) Alternate areas to gather, fish and hunt. Don't keep going back to the same place. Allow the resource to replenish itself.
- 5) If an area has a declining resource, observe a kapu on harvesting until it comes back. Weed, replant and water if appropriate.
- 6) Resources are always abundant and accessible to those who possess the knowledge about their location and have the skill to obtain them. There is no need to overuse a more accessible area.
- 7) Respect and protect the knowledge which has been passed down inter-generationally, from one generation to the next. Do not carelessly give it away to outsiders.
- 8) Respect each other's areas. Families usually fish, hunt, and gather in the areas traditionally used by their ancestors. If they go into an area outside their own for some specific purpose, they usually go with people from that area.
- 9) Throughout the expedition keep focused on the purpose and goal for which you set out to fish, hunt, or gather.
- 10) Be aware of the natural elements and stay alert to natural signs, e.g. falling boulders as a sign of flash flooding.
- 11) Share what is gathered with family and neighbors.
- 12) Take care of the kūpuna who passed on the knowledge and experience of what to do and are now too old to go out on their own.
- 13) Don't talk openly about plans for going out to subsistence hunt, gather, or fish.

- 14) Respect the resources. Respect the spirits of the land, forest, ocean. Don't get loud and boisterous.
- 15) Respect family 'aumakua. Don't gather the resources sacred to them.<sup>98</sup>

DAR personnel could draft administrative regulations that align to these 'ohana cultural values and customs as well as the six elements to authenticate Native Hawaiian cultural practice. DOCARE officers could approach individuals claiming Native ho'a'aina rights with a series of similar questions to determine the authenticity of their practice and to avoid issuing citations inappropriately.

**Always reference the *Ka Pa'akai* framework in decision-making.** The Hawai'i Supreme Court in *Ka Pa'akai O Ka 'Aina v. Land Use Commission* ("*Ka Pa'akai*")<sup>99</sup> provided a legal framework that would "maintain a careful balance between native Hawaiian rights and private interests" and also fulfill the State's constitutional mandate to "reasonably" and "feasibly" protect Native Hawaiian rights.<sup>100</sup> This framework applies to all State and County agencies reviewing permit, licensing, zoning applications, and other types of land use approvals. In order to affirmatively protect Native Hawaiian rights, State and County agencies must make an independent assessment of the following:

- (A) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (B) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (C) the feasible action, if any, to be taken ... by the [State and/or its political subdivisions] to reasonably protect native Hawaiian rights if they are found to exist.<sup>101</sup>

Within the context of reviewing each non-commercial fishing license scenario, the State must independently:

- assess the traditional and customary Hawaiian practices taking place in State waters;
- evaluate the impacts each proposed non-commercial fishing licensing scenario may have on the resources for which Native Hawaiians depend on; and
- determine the feasible action to reasonably protect existing native Hawaiian rights

The table above utilizes this legal framework to determine the potential negative impacts to Native Hawaiian rights under each non-commercial fishing RPL scenario and recommends approaches to ameliorate those threats.

### **3. Recommended Long-Term Strategy and Policy Actions**

The important work of the Study Group is coming to a close. Its members have created a good momentum and have made significant headway in its analysis of various RPL scenarios. They have concluded that more outreach work is needed to create a successful outcome that achieves several ends: fills data gaps on resource impacts from noncommercial fishing; improves

compliance with fishing regulations; and increases revenues for marine resource management and enforcement.

My initial scope of work for CI in support of the Study Group process consisted of several deliverables: (1) an analysis of traditional and customary Hawaiian rights applicable to access, use, and regulation of marine resources in Hawai‘i; (2) a broad evaluation of elements identified in several non-commercial fishing license scenarios; (3) a policy brief; and (4) an updated integration of the three reports into a cohesive whole. The first deliverable is complete and deliverable 2, this evaluative piece, is provided here.

The third deliverable was ultimately envisioned as a synthesis of the Study Group’s findings and final recommendations to support a policy brief that would ultimately guide the preparation of any subsequent legislative package. Given that more community outreach work is needed, the third deliverable, a policy brief, warrants greater thought and some restructuring. At this juncture, it is premature to provide guidance for a bill intended for the next legislative session in January 2017. Without further community and stakeholder outreach, as recommended by the Study Group, an RPL effort may face a greater risk of public backlash and undo the good progress and momentum already achieved.

The Study Group has, therefore, refined its scope of work to providing an objective analysis of all RPL scenarios, rather than undergoing an intense vetting process to select a single model. The Study Group’s final report is envisioned, then, as a resource for broader community outreach and education efforts in the future that can inform possible stakeholder, community, and political consensus on a viable program. Keeping in line with the Study Group’s objectives, I believe the broader community engagement work will be better served by a policy analysis that provides long-term strategic recommendations.

**Utilize the ‘Aha Moku system as a unifying entity for broader education and outreach.** An ideal tool and vehicle for education, outreach, and decision-making on the local level is the island ‘aha moku system. Some islands are more developed than others, but the statutory and administrative infrastructure is fully in place now for all islands to build a strong foundation for local leadership at the moku (regional) level and communicate their concerns and recommendations to the Statewide ‘Aha Moku Advisory Committee (AMAC) for resolution within the DLNR and its various divisions.

In 2007, the State legislature passed Act 212 which “initiat[ed] a process to create a system of best practices that is based upon the indigenous resource management practices of moku (regional boundaries), which acknowledges the natural contours of land, the specific resources located within those areas, and the methodology necessary to sustain resources and the community.”<sup>102</sup> In 2012, the legislature followed with the passage of Act 288 to establish the ‘Aha Moku Advisory Committee (AMAC) within the State Department of Land and Natural Resources (DLNR) for the purpose of integrating traditional Hawaiian resource conservation practices on all islands.



Specifically, these Acts charge AMAC with:

- 1) Integrating indigenous resource management practices with western management practices in each moku;
- 2) Identifying a comprehensive set of indigenous practices for natural resource management;
- 3) Fostering the understanding and practical use of native Hawaiian resource knowledge, methodology, and expertise;
- 4) Sustaining the State's marine, land, cultural, agricultural, and natural resources;
- 5) Providing community education and fostering cultural awareness on the benefits of the 'Aha Moku system;
- 6) Fostering protection and conservation of the State's natural resources; and
- 7) Developing an administrative structure that oversees the 'Aha Moku system.<sup>103</sup>

Just last month, on October 20, 2016, the AMAC passed its Final Rules of Practice and Procedure. My law students and I were responsible for making substantive revisions to the original draft that included four months of gathering input from the local island 'aha councils, respected kupuna, and cultural practitioners with comprehensive knowledge of the 'āina, natural, and cultural resources.

The rules inform DLNR of Hawaiian Indigenous methodologies and provide the procedural pathway to communicating and resolving concerns from island 'aha moku councils, to AMAC, and the respective DLNR divisions and other state, county, and federal agencies that have kuleana for managing natural and cultural resources in Hawai'i. The rules reflect the 'ike (traditional knowledge) shared by Hawaiian cultural practitioners and kūpuna throughout Ka Pae 'Āina (the Hawaiian Islands). The rules also reaffirm statutory and constitutional protections of Native Hawaiian traditional and customary rights and practices and the public trust. The rules uphold international law, namely, the United Nations Declaration on the Rights of Indigenous Peoples with the 'Aha Moku system serving as a customary decision-making process and vehicle for respecting free, prior, and informed consent.

Last month, one of the Study Group members hosted a conversation among several Native Hawaiian lawai'a (fishers) who engage in traditional, subsistence fishing and do community-based resource management work. Some of the initial comments from this small group of lawai'a and traditional resource managers was that a non-commercial fishing RPL system may not be the only model, nor the best model, to achieve the overarching goal of restoring resource abundance and healthy fishery ecosystems. This group suggested that rather than uphold an ineffective, centralized, top-down governance structure for regulating the fisheries, a decentralized, community-based, bottom-up process utilizing Hawaiian traditional knowledge systems might be more effective. Some members of this group were integral to the leadership that achieved the promulgation of customized regulations for Hā'ena as a Community Based Subsistence Fishing Area (CBSFA). They had to work with many stakeholders, charter boats and tourism interests, recreational users, and commercial fishermen to compromise and come up with rules that everyone could live by.

The level of community engagement at the grassroots level with multiple stakeholders that Hā'ena achieved for CBSFA designation and rules approval is a great model to follow. The

‘Aha Moku system can be initiated to achieve similar ends. Local leadership within the island ‘aha moku councils can be utilized to facilitate meetings with Native Hawaiian communities and multiple stakeholders, policy- and decision-makers. Findings and recommendations coming out of the island ‘aha councils could then be advanced to the statewide AMAC and review by DLNR and its appropriate divisions. From there, a strong legislative package endorsed by Native communities and other stakeholder groups could be submitted for approval and passage into law. In this manner, the kind of backlash that was experienced in the past when similar legislative proposals were introduced could be avoided through comprehensive education and coordinated outreach efforts beforehand.

## V. Conclusion

In summary, the proposed RPL scenarios provide a good starting point for discussion and impact analysis on Native Hawaiian traditional and customary rights. This legal rights analysis combined with data gathered by CI and the preliminary findings and recommendations of the Study Group comprise an important resource for communities on each island who utilize their own local networks and make best use of the ‘aha moku system as a self-empowered and self-governing vehicle for promoting systemic change from the bottom-up.

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<sup>1</sup> HAW. CONST. art. XII, § 7 (1978).

<sup>2</sup> *Public Access Shoreline Hawaii. v. Hawaii County Planning Commission (PASH)*, 79 Hawai‘i 425, 451, 903 P.2d 1246, 1272 (1995).

<sup>3</sup> *Id.* at 447, 903 P.2d at 1268.

<sup>4</sup> *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43 (citing *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 12, 656 P.2d 745, 752 (1982)).

<sup>5</sup> *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43.

<sup>6</sup> *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission (Ka Pa‘akai)*, 94 Haw. 31, 45, P.3d 1068, 1082 (2000) (citing Stand. Comm. Rep. No. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 639 (1980)).

<sup>7</sup> *PASH*, *supra* note 2, 79 Haw. at 451, 903 P.2d at 1272.

<sup>8</sup> Jon Matsuoka, Davianna McGregor, Luciano Minerbi, & Malia Akutagawa, *Governor’s Molokai Subsistence Task Force Report* 20 (1994).

<sup>9</sup> Haw. Rev. Stat. § 188-22.6(a).

<sup>10</sup> Haw. Rev. Stat. § 188-22.7 (2005).

<sup>11</sup> Haw. Rev. Stat. § 188-22.9 (2006).

<sup>12</sup> E.S. CRAIGHILL HANDY & MARY KAWENA PUKUI, *THE POLYNESIAN FAMILY SYSTEM IN KA‘U, HAWAI‘I* 5 (1998).

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.*

<sup>15</sup> KAMANAMAICALANI BEAMER, *NO MĀKOU KA MANA: LIBERATING THE NATION*, 43 (2014).

<sup>16</sup> HANDY & PUKUI, *supra* note 66, at 4.

<sup>17</sup> BEAMER, *supra* note 15, at 32-33 (the palena created “spaces of attachment and access . . . [they] delineated the resource access of maka‘āinana and ali‘i on the ground, literally connecting people to the material and spiritual resources of these places.” The knowledge of these palena known “visually and cognitively” by hoa‘āina was shared orally from one generation to the next).

<sup>18</sup> E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT* 56-57 (rev. ed. 1991) [hereinafter HANDY, HANDY & PUKUI].

<sup>19</sup> *Application of Kamakana*, 58 Haw. 632, 638-39, 574 P.2d 1346, 1350 (1978). (citing *In re the Boundaries of Pulehunui*, 4 Haw. 239, 241 (1879) and *Harris v. Carter*, 6 Haw. 195, 197 (1877) and describing ahupua‘a as land running “from the mountain to the sea” and providing for the chief and his people “a fishery residence at the warm

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seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land.” Also describing “both inland and shore fishponds” as “part of the ahupua‘a and within its boundaries.”).

<sup>20</sup> CARLOS ANDRADE, *HĀ‘ENA THROUGH THE EYES OF THE ANCESTORS*, 30 (2008).

<sup>21</sup> These limu traditions and practices are known to author through personal experience via direct knowledge transmission from her grandmother Katharine “Kitty” Akutagawa of Moloka‘i who learned this art from her Hawaiian kūpuna (elders).

<sup>22</sup> Malia Akutagawa, Shaelene Kamaka‘ala, Harmonie Williams, & the Native Hawaiian Rights Clinic, *Traditional & Customary Practices Report for Mana‘e, Moloka‘i* 54-55, 83-84 (2016).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citing Interview with Dr. Kaipo Perez, Recreation Specialist I, City & Cty. of Honolulu, in Honolulu, Haw. (Jul. 1, 2015).

<sup>25</sup> DANIEL KAHĀ‘ULELIO, *KA ‘OIHANA LAWAI‘A: HAWAIIAN FISHING TRADITIONS* 55 (M. Puakea Nogelmeier ed., Mary Kawena Pukui trans., 2006).

<sup>26</sup> MARGARET TITCOMB, *NATIVE USE OF FISH IN HAWAII* 12-13 (2d. ed. 1972).

<sup>27</sup> 1 KEPĀ MALY & ONAONA MALY, *KA HANA LAWAI‘A A ME NĀ KO‘A O NĀ KAI ‘ĒWALU: SUMMARY OF DETAILED FINDINGS FROM RESEARCH ON THE HISTORY OF FISHING PRACTICES AND MARINE FISHERS OF THE HAWAIIAN ISLANDS* 243 (2003) [hereinafter 1 MALY & MALY, *KA HANA LAWAI‘A*].

<sup>28</sup> *Territory of Hawaii v. Bishop Trust Co., Ltd.*, *supra* note 53 at 361-62 (describing that konohiki were traditionally considered agents of the chief responsible for ili, land subdivisions within an ahupua‘a, but later written laws referenced konohiki as chiefs or landlords. Hoa‘āina who traditionally labored on the land to provide for their families and for the chiefs were later referenced under the law as tenants of an ahupua‘a.).

<sup>29</sup> *Id.* at 244 (citing Act Regulating Taxes (June 7, 1839) (amended Nov. 9, 1840), ch. III, § 8(1)).

<sup>30</sup> Alan T. Murakami & Wayne Chung Tanaka, *Chapter 10: Konohiki Fishing Rights*, 618, n. 34 in *NATIVE HAWAIIAN LAW: A TREATISE* (Melody Kapilialoha MacKenzie, Susan K. Serrano, D. Kapua‘ala Sproat, Ashley Kaiāo Obrey, & Avis Ku‘uipoleialoha Poai, eds., 2015) (noting minor changes to the fishing laws that reflected “transient shoal fish reserved for the king and also the fish reserved by each konohiki, and the areas in which the restrictions applied” but that there were no substantive changes in terms of fishing rights.).

<sup>31</sup> *Id.*

<sup>32</sup> TITCOMB, *supra* note 26 at 15 (describing the meanings of the different fishing grounds named in the fishing law.).

<sup>33</sup> *Hatton v. Piopio*, 6 Haw. 334, 336 (1882).

<sup>34</sup> Section 95 of the Organic Act reads in full:

**§ 95. Repeal of laws conferring exclusive fishing rights.** That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established hereinafter provided.

<sup>35</sup> Section 96 of the Organic Act reads in full:

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

<sup>36</sup> *Id.*

<sup>37</sup> *Smith v. Laamea*, 29 Haw. 750 (1927).

<sup>38</sup> *Id.* at 755 (citing *Haalelea v. Montgomery*, 2 Haw. 62, 71 (1858).).

<sup>39</sup> *Damon v. Tsutsui*, 31 Haw. 678, 693 (1930).

<sup>40</sup> *Bishop v. Mahiko*, 35 Haw. 608 (1940).

<sup>41</sup> *Id.* at 614.

<sup>42</sup> *Id.* at 617-18.

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<sup>43</sup> *In re Ashford*, 50 Haw. 314, 316, 440 P.2d 76, 77 (1968) (citing *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879) and *Kanaina v. Long*, 3 Haw. 332 (1872).)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 615.

<sup>46</sup> RICHARD H. KOSAKI, HAW. LEGIS. REFERENCE BUREAU, REP. NO. 1, KONOHIKI FISHING RIGHTS 27(1954) (citing *United States v. Robinson*, Civ. No. 292 (D. Haw. 1934)).

<sup>47</sup> *PASH*, *supra* note 2 at 437, n. 21, 903 P.2d at 1258, n. 21 (citing Act of September 7, 1847, ch. I, § IV; 2 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* (1847) (emphasis added)).

<sup>48</sup> L.1892, ch. 57, § 5, approved on November 25, 1892 states, “Section 5. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, *or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage*, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.” (emphasis added).

<sup>49</sup> Section 1-1, R.L.H.1955, provides as follows:

Common law of Territory; exceptions. The common law of England as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory.

<sup>50</sup> Haw. Rev. Stat. § 1-1 (2013) reads as follows:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage*; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

<sup>51</sup> *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 8, 656 P.2d 745, 749 (1982) (stating that ahupua‘a tenants may exercise Native gathering rights on undeveloped lands within their ahupua‘a).

<sup>52</sup> *PASH*, *supra* note 2, 79 Haw. at 450, 903 P.2d at 1271 (finding that Native Hawaiian customary gathering practices may also be exercised on “less than fully developed” lands.)

<sup>53</sup> *See Kalipi*, *supra* note 50.

<sup>54</sup> *Pele Defense Fund v. Paty*, 73 Haw. 578, 620, 837 P.2d 1242, 1272 (1992) (holding “that native Hawaiian rights protected by article XII, § 7 [of the Hawai‘i State Constitution] may extend beyond the ahupua‘a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.”)

<sup>55</sup> Murakami & Tanaka, *supra* note 30, at 621, n. 78 (citing NORMAN MELLER, INDIGENOUS OCEAN RIGHTS IN HAWAII: SEA GRANT MARINE POLICY AND LAW REPORT 9-10 (1985).

<sup>56</sup> *Id.*, n. 79 (citing MELLER at 10).

<sup>57</sup> *Id.*

<sup>58</sup> *Bishop v. Mahiko*, *supra* note 40 at 678 (holding that “the failure to establish a private fishing right [within the two year window provided under the Organic Act] operated as an abandonment and waiver of all claims to and just compensation for such fishing right.”)

<sup>59</sup> Murakami & Tanaka, *supra* note 30 at 622, note 81 (referencing table titled “KONOHIKI FISHERIES ACQUIRED, 1900-1953” in RICHARD H. KOSAKI, HAW. LEGIS. REFERENCE BUREAU, REP. NO. 1, KONOHIKI FISHING RIGHTS 13-14 (1954).

<sup>60</sup> *In re Fukunaga*, 16 Haw. 306, 308 (1904).

<sup>61</sup> *Bishop v. Mahiko*, *supra* note 57.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904).

<sup>65</sup> *Carter v. Territory of Hawaii*, 200 U.S. 255, 256 (1906).

<sup>66</sup> *Id.*

<sup>67</sup> HAW. CONST. art. XI, § 6 (emphasis added).

<sup>68</sup> HAW. REV. STAT. § 187A-23 (2013).

<sup>69</sup> *Id.* § 187A-23(a).

<sup>70</sup> *Id.* § 187A-23(b).

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- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.* § 187A-23(c).
- <sup>73</sup> *Id.* § 187A-23(d).
- <sup>74</sup> *Id.*
- <sup>75</sup> Personal communication with Guy Chang, DOCARE Officer (Dec. 11, 2014).
- <sup>76</sup> Personal communication with David Sakoda, Law Fellow, DLNR Division of Aquatic Resources (Dec. 11, 2014).
- <sup>77</sup> MELLER, *supra* note 60 (citing JAMES SHON, HAW. LEGIS. REFERENCE BUREAU, REP., HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE X, ARTICLE XI 117 (1978)).
- <sup>78</sup> KOSAKI, *supra* note 112 at 19 (citing Judiciary Committee of the 1939 Legislature for the Territory of Hawaii recommendation to table House Concurrent Resolution No. 10 “directing the attorney general to condemn all privately owned sea fisheries in the territory.”).
- <sup>79</sup> *State v. Palama (Palama)*, No. CAAP—12—0000434, 2015 WL 8566696 (Haw. Ct. App. Dec. 11, 2015).
- <sup>80</sup> *Palama*, *supra* note 79 at 6.
- <sup>81</sup> *State v. Hanapi (Hanapi)*, 89 Haw. 177, 970 P.2d 845 (1998).
- <sup>82</sup> *Palama*, *supra* note 79 at 4 (citing *State v. Hanapi*, 89 Haw. 177, 186, 970 P.2d 845, 894 (1998) (quoting *PASH*, 79 Haw. at 449, 903 P.2d at 1270)).
- <sup>83</sup> *Id.* (citing *Hanapi*, 89 Haw. at 186, 970 P.2d at 494).
- <sup>84</sup> *Id.* (citing *Hanapi*, 89 Haw. at 186, 970 P.2d at 494).
- <sup>85</sup> *PASH*, *supra* note 2 at 437, 903 P.2d at 1258.
- <sup>86</sup> *Id.* at 451, 903 P.2d at 1272.
- <sup>87</sup> *Ka Pa‘akai*, *supra* note 6 at 45, 7 P.3d at 1082 (citing Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 639 (1980)).
- <sup>88</sup> *Palama*, *supra* note 79 at 4 (citing *State v. Pratt (Pratt II)*, 127 Haw. 206, 216-18, 277 P.3d 300, 310-312 (2012)).
- <sup>89</sup> *Id.* at 8.
- <sup>90</sup> *Id.*
- <sup>91</sup> *Id.* at 8-9.
- <sup>92</sup> *PASH*, *supra* note 2 at 442, 903 P.2d at 1263 (citing *Pele*, 73 Haw. at 618-21, 837 P.2d at 1269-72).
- <sup>93</sup> *Id.* at 451, 903 P.2d at 1272.
- <sup>94</sup> LINDA K. MENTON & EILEEN TAMURA, A HISTORY OF HAWAI‘I 114 (1989) (citing Marion Kelly, Hawaiian Land Tenure Change (1982) unpublished).  
Kelly, 1982).
- <sup>95</sup> *PASH*, *supra* note 2 at 446, 903 P.2d 1267 (citing L. 1851, § 7, at 98 regarding the “many difficulties and complaints [that] have arisen from the bad feeling existing on account of the Konohiki’s [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them.”).
- <sup>96</sup> *State v. Pratt*, 127 Haw. 206, 277 P.3d 300 (2012).
- <sup>97</sup> *Id.* at 209, 277 P.3d at 303.
- <sup>98</sup> DAVIANNA MCGREGOR, THE NATURE CONSERVANCY, CULTURAL ASSESSMENT FOR THE KAMAKOU PRESERVE, MAKAKUPA‘IA AND KAWELA, ISLAND OF MOLOKA‘I 16-17 (2006).
- <sup>99</sup> *Ka Pa‘akai*, *supra* note 6.
- <sup>100</sup> *Id.* at 35, 7 P.3d at 1072.
- <sup>101</sup> DAVID M. FORMAN & SUSAN K. SERRANO, HO‘OHANA AKU, A HO‘OLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAI‘I 17 (2012) [hereinafter FORMAN & SERRANO, HO‘OHANA AKU, A HO‘OLA AKU] (citing *Ka Pa‘akai*).
- <sup>102</sup> Report to the Twenty-Fifth Legislature 2009 Regular Session: Final Report Aha Kiole Advisory Comm. at 7 (2008), available at <http://www.ahamoku.org/wp-content/uploads/2011/09/Final-Report-12-18-081.pdf> [hereinafter Aha Kiole Legislative Report 2009] (quoting Act 212, 2007 Leg., 24th Sess. (Haw. 2007)).
- <sup>103</sup> HAW. REV. STAT. §171-4.5(d) (2013).



## Traditional Sea Tenure in Ancient Hawai'i, the Evolution of Fishery Laws from the Kingdom of Hawai'i Period to Statehood, and Remaining Native Hawaiian Rights in the Fisheries

### The Kumulipo

The night gave birth  
 Born was Kumulipo in the night, a male  
 Born was Po'ele in the night, a female  
 Born was the coral polyp, born was the coral, came forth  
 Born was the grub that digs and heaps up the earth, came forth  
 Born was his [child] an earthworm, came forth  
 Born was the starfish, his child the small starfish came forth  
 Born was the sea cucumber, his child the small sea cucumber came forth  
 Born was his [child] an earthworm, came forth  
 Born was the starfish, his child the small sea cucumber came forth  
 Born was the sea urchin, the sea urchin [tribe]  
 Born was the short-spiked sea urchin, came forth



Born was the smooth sea urchin, his child the long-spiked came forth  
 Born was the ring-shaped sea urchin, his child the thin-spiked came forth

Born was the barnacle, his child the pearl oyster came forth  
 Born was the mother-of-pearl, his child the oyster came forth  
 Born was the mussel, his child the hermit crab came forth  
 Born was the naka shellfish, the rock oyster his child came forth  
 Born was the drupa shellfish, his child the bitter white shellfish came forth  
 Born was the conch shell, his child the small conch shell came forth

### Hawaiian Cosmological & Genealogical Connections to the Sea

#### The Kumulipo - Hawaiian Creation Chant

The Kumulipo, a mele ko'ihonua, is a genealogy chant honoring the birth of a chief, traced to the first ali'i Hāloa, progenitor of the Hawaiian people, and younger brother to Hāloalaukapalili (taro plant). The Kumulipo links the human family to all of creation, from the beginning when there was only Pō (darkness) that gave birth to night and day, fashioned the hot Earth into a living planet, and brought forth corresponding plants and animals of land and sea over successive wā (eras). The Kumulipo describes the sea and the birth of coral as the "first stone in the foundation of the earth." Following the birth of coral, other ocean species came into being such as shellfish, sea cucumber, sea urchin, mussels, barnacles, sea snails, and cowry.

#### Deification of the Sea, Kinolau (God Forms), Fishing Deities, and Aumakua (Family Deities) and Lessons of Mālama (Stewardship)

Kanaloa is the god of the ocean, currents, and navigation. His kinolau (physical manifestations) are present in the form of the he'e (octopus), koholā (whale), nai'a (dolphins), and coral. Other lesser gods are also known for having kinolau, such as the pig god Kamapua'a who travels in the ocean in his fish form, the trigger fish called humuhumu-nukunuku-pua'a.

Hawaiian families respect their 'aumakua (ancestral deities) that assume the form of specific animals, plants, and natural phenomena. Common 'aumakua from the sea are the honu (turtle), puihi (eel), and manō (shark). To avoid illness or even death, 'ohana honor special kapu that forbids the killing and consuming of species in the same group of their 'aumakua.

Hawaiian fishing lore is filled with the prowess of great lawai'a (fishers) and their possession of mana kupua (supernatural powers) to haul in large harvests of fish and to cause them to multiply.





## Ahupua'a and the Fisheries

Ahupua'a are defined by recent scholars as "culturally appropriate, ecologically aligned, and place specific unit[s] [of land] with access to diverse resources." (Gonschor & Beamer, 2014) Ahupua'a have also been defined as "community-level land-division component[s] that ha[ve] been implemented in various ways, as part of a larger social-ecological system, with the aim of maximizing resource availability and abundance." (Winter, 2015). Hawai'i's courts have understood ahupua'a to mean land divisions running from mountain to sea, providing for the chiefs and people "a fishery residence at the warm seaside, together with the products of the highlands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land" and including "both inland and shore fishponds ... within its boundaries." *Application of Kamakana*, 58 Haw. 632, 638-39 (1978). Ahupua'a fisheries were well "cared for as if they were extensions of gardens." (Andrade, 2008)

## Foundations of Mālama

The islands were governed separately by several mō'i (supreme chiefs), lesser chiefs at the moku (regional) level called ali'i 'ai moku, and at the ahupua'a level the ali'i 'ai ahupua'a. Konohiki, those who possessed special expertise in natural resource management, were designated by the ali'i 'ai ahupua'a to oversee agricultural activities; to fairly allocate water among the maka'āinana (common people of the land); to monitor fishery health; and enforce kapu. The kapu were strictures and regulations governing human behavior in a manner that preserved resource abundance and allowed for continued renewal.

The source of reciprocity and interdependence between ali'i (chiefs) and maka'āinana (the common people) is embedded within the obligation to mālama 'āina. Ali'i were charged with providing the leadership and organization to make the land bountiful and, in turn, capable of sustaining a growing population. The maka'āinana through their labor fed and clothed the ali'i. If a commoner failed in his kuleana to mālama the portion of 'āina allotted to him, he was dismissed. A konohiki was also discharged of his duties if he failed to properly direct the people in their labor. If the land suffered and the people starved, it was perceived as the fault of the ali'i for displeasing the gods and not following religious protocols. Negligence in mālama 'āina signaled also a breakdown in the relationship between ali'i and maka'āinana. (Kame'eleihiwa 1992)



Famous fishers Kū'ula-kai (red Kū of the sea), his wife Hina-puku-i'a (Hina gathering seafood), and their son 'Ai'ai (Eat food) have been memorialized and deified. Whenever 'Ai'ai invoked his parents' names to bless a people and place, the fish would come and multiply. If 'Ai'ai found the people behaving in a greedy manner, he called upon his parents to remove the fish as punishment. 'Ai'ai inherited the kuleana (responsibility) of erecting all the Kū'ula (stone altars to attract and congregate fish) and creating ko'a lawai'a (fishing grounds) throughout the islands. 'Ai'ai taught various individuals who were pono (righteous and good) the effective methods of catching seafood, the locations of special fishing grounds, how to care for them and the religious protocols associated with this knowledge. He admonished them to share generously of their catch and sometimes gifted them with special stones and other objects that contained mana to call and capture large schools of fish.



Kū'ula stone altar at Kahalu'u, Hawai'i Island.

This rich history of Maoli origins and the mo'olelo passed down through the centuries are very much alive today in the practices of Hawaiian fishing families throughout Hawai'i.



Lawai'a (fishermen) made ho'okupu (offering) before the altar of fishing god Kū'ula after each fishing expedition. This practice still occurs today in culturally intact native communities. In ancient times, prized catch were also set aside for the ali'i and his household; then apportionment to the kahuna and konohiki; and finally among the fishermen and those who were in need.



## Mālama Practices of Hoā'āina

- **Limu (seaweed):**

pluck limu above the holdfast to allow for regrowth. Clean and “scrub” limu in the ocean which stimulates spores to release, settle on new substrate, and expand limu growing areas.



- **Coral:** coral lanes planted at mākāhā (sluice gates) to attract fish into fishponds and reef patches with the names of ancient women who tended them as found on old Māhele maps of 'Aha'ino ahupua'a, Moloka'i. Coral pruning in Kahalu'u Bay, Hawai'i Island to open new habitat and niches for fish and other marine life.

- **Fish House Construction:** a wahine practice on Moloka'i to stack stone shelters in the shallows for manini fish. The fish are harvested by hand at low tide by lifting the top stones.

- **Feeding ko'a:** a practice that is continued in Miloli'i, Hawai'i Island for 'ōpelu, whereby families prepare palu (chum) into a porridge-like substance and place it in a handkerchief for hand-feeding the fish. The fish are trained to feed on the palu, become tame, and congregate in large numbers at the ko'a over time. After consistent feedings the ko'a is open for sustainable harvesting. When harvesting season begins, families who cared for the ko'a have first priority to the catch.

As Titcomb describes,

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

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

### The Kapu System and Role of Konohiki

Kapu were integrated into fisheries management and conservation. Konohiki oversaw the fishing activities within each ahupua'a. They ordered the people to alternate fishing areas to avoid depletion and allow for replenishment. They also issued species-specific kapu to correspond with fish spawning periods.

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

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

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



## The Konohiki Fisheries

Through 1897, the law governing konohiki fisheries generally encompassed the following:

1) Private konohiki fisheries spanned the ahupua'a shoreline at low tide to the reef's outer edge. In areas where there were no reef, the konohiki fishery extended from the beach at low water mark to one geographical mile seaward.

2) The konohiki and hoa'aina within the ahupua'a had exclusive and joint rights to the private fishery.

3) The konohiki had the authority to regulate the fishery in the following ways:

- a) Placing a kapu on one species of fish for his/her exclusive use
- b) Receive from all tenants one-third of their catch within the fishery
- c) Place temporary fishing prohibitions during certain periods of the year

### Haalelea v. Montgomery (1858)

Recognized status of Ha'alelea as konohiki, having inherited ahupua'a from deceased wife. His authority included the ability to institute a kapu or tax to tenants utilizing the fishery. Court further held Montgomery to be a tenant, having received a deed conveying a portion of land within the ahupua'a. As such Montgomery possessed a hoa'aina right of piscary (fishing).

### Hatton v. Piopio (1882)

Court held Piopio, a person lawfully living on his employer's property in Pu'uloa within the ahupua'a of Honouliuli, to be a tenant with fishing rights within the ahupua'a: "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."

### Codifying Customary Fishing Laws During the Kingdom Period

Through conquest, Kamehameha I brought all the islands under one rule and established the Hawaiian Kingdom in 1810. The kingdom was governed primarily under oral, customary laws until Kamehameha III drafted the first constitution in 1839. In the Constitution and Laws of June 7, 1839, the king formally recognized konohiki fishing rights and traditional Hawaiian fishing customs and practices. In 1840, a law reaffirming this proclamation was enacted. The law divided fishery rights



among three classes of people: the king, the konohiki (landlords), and the common people. It acknowledged the resource rights and practices within traditional ahupua'a fisheries that give priority to hoa'aina as ahupua'a tenants and acknowledges special privileges to chiefs and konohiki as "landlords" in managing the resources.

The kingdom standardized these practices by preserving ahupua'a fisheries (from the shoreline to the outer edge of the coral reef) to the exclusive use of the landlord and ahupua'a tenants. The landlord had the right to kapu for himself a specific species of fish and was entitled to one-third of the

tenants' catch. The waters beyond the reefs and the open ocean was granted to all the people. These were the kilohe'e grounds (described as the waters shallow enough to wade or see the bottom by canoe with the aid of kukui oil to harvest he'e or octopus), the luhe'e grounds (the deeper waters where octopus was caught by line and with a cowrie lure), the mālolo grounds (characterized by rough currents and choppy seas where the mālolo or flying fish frequent), and beyond into deeper waters.

### Fisheries Jurisprudence During the Kingdom Period

All cases interpreting the konohiki fisheries laws placed greater emphasis on western

constructs that characterize konohiki as property owners rather than those selected for their 'ike (knowledge, expertise) and an ethic for conservation. Similarly, hoa'aina were perceived as mere tenants with piscatory rights, regardless of whether they fulfilled kuleana (responsibility) to mālama (care for) the resources.



## The Impact of the Organic Act on the Konohiki Fisheries

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

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



## Dismantling the Konohiki Fisheries Under American Rule

### The Organic Act (1900)

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

### Summary of Konohiki Fishery Jurisprudence in the Territorial Period.

The Hawai'i Supreme Court during the Territory period was very keen on extinguishing vested fishing rights, placing all fisheries in the commons, and upholding the constitutionality of sections 95 and 96 of the Organic Act against konohiki and hoa'aina alike who failed to timely register their rights.

In contrast, the federal district court and U.S. district court took a more cautionary approach in protecting konohiki and hoa'aina vested rights, even if they did not timely register their fishery. U.S. Supreme Court rulings in *Damon v. Hawaii* and *Carter v. Hawaii* indicate that whether by statute, grant, or Hawaiian custom vested fishery rights are recognized. The Organic Act cannot extinguish vested rights. This is controlling law despite contradictory rulings from the Territory Supreme Court.

Despite these discrepancies, the result on the ground was wholesale loss of konohiki fisheries throughout the islands as the Territorial government treated unregistered rights as waived and abandoned.

The U.S. Supreme Court has never ruled on prior “takings” challenges under the fifth amendment of the U.S. constitution with respect to konohiki fisheries as private property. The 1954 Kosaki legislative report, however, cites *United States v. Robinson* (1934), a case adjudicating the rights of Dowsett Co., Ltd., a tenant possessing a hoa'aina right of piscary in Hoaeae fishery that was subject to condemnation proceedings. The court held Dowsett Co. was entitled to compensation in a share of the sum to be paid for the Hoaeae fishery in an amount commensurate with “the value of its hoaina right of piscary.”



## **Hawai'i Admission into Statehood (1959) and the Reaffirmation of Vested Fishing Rights**

Hawai'i became the 50<sup>th</sup> State of America in 1959 with the passing of the Admission Act. **Section 2 of the Act cedes to the State “all the islands, together with their appurtenant reefs and territorial waters.”** The Act transferred all public lands, including fisheries and marine waters to the new State of Hawai'i, to be held in trust. Section 5(f) of the Act, typically called the “ceded lands trust” identifies certain trust purposes for which revenue generation and any other disposition of public lands are to benefit. **One of the named public trust purposes is “for the betterment of the conditions of native Hawaiians,** as defined in the Hawaiian Homes Commission Act, 1920, as amended.” Section 5(i) incorporates by reference certain federal laws including the Submerged Lands Act of 1953 which grants coastal states title to the submerged lands (marine waters) out to three miles.

Today, the State of Hawai'i constitutionally protects vested rights:

***All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the reefs. The State may condemn such vested rights for public use.***

In addition to constitutional protections of vested fishing rights, the State has reaffirmed Hawaiian Kingdom laws governing konohiki fisheries that were successfully registered, pursuant to the requirements of the Organic Act. The boundaries of the konohiki fisheries are set similarly to the Kingdom laws. They encompass the coastal waters from the beach at low watermark to the reefs, or up to one mile seaward where no reefs are present. The konohiki fishery is held “for the equal use by the konohiki and the tenants” of the ahupua'a. Ahupua'a tenants may only take from the konohiki fishery what they need for subsistence, and not for commercial use. Konohiki may, through posting notice, exercise a right to kapu one fish or other aquatic species for a specified period of time, or in the alternative kapu the taking of one or a variety of species for several months each year. During open fishing season, the konohiki may claim one-third of the catch by ahupua'a tenants, so long as notice is given. Haw. Rev. Stat. §187A-23.



# Overview of Native Hawaiian Traditional and Customary Hawaiian Rights and the Public Trust

## Key Points of Law

### Article XII, Section 7 of the Hawai'i State Constitution

**“The state reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”**

## Case Law:

### In re Application of Ashford (1968)



**“In this jurisdiction, it has long been the rule, based on necessity, to allow reputation evidence by kamaaina witnesses in land disputes.”**

*A shoreline boundary dispute. The court considers the location of the makai (seaward) boundaries of a beachfront parcel in Kainalu, East Moloka'i with a royal patent issued that describes the property as running “ma ke kai” (along the sea). Ashford, the landowner, utilizes a licensed land surveyor employing U.S. geodetic survey techniques to provide expert evidence that in the long-run would characterize the beach as his own private beach. The court certifies a kama'aina (native born person) of Kainalu as an expert to interpret the meaning of “ma ke kai” according to the traditionally known location of the shoreline boundary founded on indigenous place-based knowledge of palena (geographical boundaries known to kama'aina with knowledge passed down inter-generationally).*

The court finds:

“Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. . . . It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof.”

Kama'aina witnesses may testify to the location of seashore boundaries dividing private land and public beaches according to reputation and ancient Hawaiian tradition, custom and usage.



## HRS § 7-1

“Where landlords have obtained, or may hereafter obtain allodial titles to their lands, **the people on each of their lands shall not be deprived of the right to take firewood, house timber, ‘aho cord, thatch, or kī leaf, from the land upon which they live, for their own private use, but they shall not have a right to take such articles to sell for profit.** The people shall also have a right to drinking water, and running water, and the right of way. **The springs of water, running water, and roads shall be free to all,** on lands granted in fee simple; provided that this shall not be applicable wells and watercourses which individuals have made for their own use.

### Kalipi (1982)

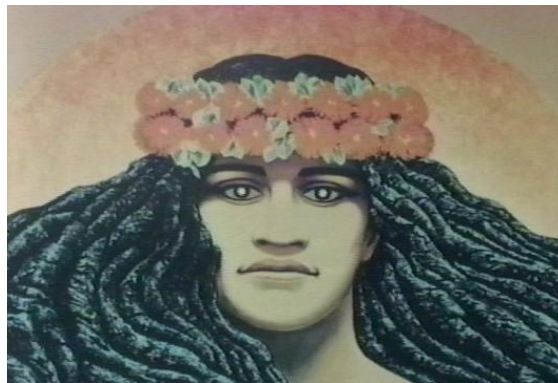
*William Kalipi owned a kalo field in the ahupua‘a of Manawai and an adjoining house lot located in the ahupua‘a of ‘Ōhi‘a on the island of Moloka‘i. He filed suit against the owners of the ahupua‘a of Manawai and ‘Ōhi‘a after he was denied kuleana gathering rights in both ahupua‘a. Kalipi sought to gather certain items under HRS 7-1 for subsistence and medicinal purposes.*



The Supreme Court determined that in order to assert a right to gather under HRS 7-1, three conditions must be satisfied:

(1) The tenant must physically reside within the ahupua‘a from which the item is gathered; (2) the right to gather can only be exercised upon undeveloped lands within the ahupua‘a; and (3) the right must be exercised for the purpose of practicing Native Hawaiian customs and traditions.

### Pele Defense Fund (1992)



*Native Hawaiian residents living in the Puna region of the Big island asserted gathering rights claims to certain ahupua‘a outside of their physical residence.*

The court held that Native Hawaiian rights protected by section 1-1 of the HRS and article XII, section 7 of the Hawaii State Constitution may extend beyond the ahupua‘a in which a Native practitioner resides if those rights have been traditionally and customarily exercised in that manner.

The date by which Hawaiian usage must have been established is fixed at November 25, 1892.

## Key Points of Law

### Hawai'i Revised Statute, Section 1-1:

#### Common Law of the State; exceptions:

**Hawaiian Usage:** The Hawai'i Supreme Court determined that for the purposes of establishing custom and usage, the Hawaiian custom must have been established in practice by November 25<sup>th</sup>, 1892. **In plain terms, if the custom existed prior to this date it is considered customary, protected, and an exception to the common law of the State.**



### Public Access Shoreline Hawaii (PASH) (1995)

A public interest group with Native Hawaiian cultural practitioners appeals the Hawai'i County Planning Commission's denial of standing in a contested case hearing involving a special management area (SMA) permit application to develop a condominium in a shoreline area.

Hawaiians have unique and distinguishable rights from the general public that qualify them for standing in administrative hearings.

Protecting Hawaiian rights is not a taking of private property in Hawai'i because not all the "bundles of sticks are included" (namely, the right to alienate and exclude others from one's property.)

The State cannot regulate Native Hawaiian rights out of existence.

Expanded Kalipi to include protection of Hawaiian Rights on less than fully developed lands.

### Ka Pa'akai O Ka 'Āina (2000)

*A Hawaiian coalition challenges the Ka'ūpulehu resort development on Hawai'i island, the reclassification of 1,000 acres of land from conservation to urban by the State LUC, and the agency's failure to protect customary and traditional practices there.*

In order to affirmatively protect Native Hawaiian rights, State and County agencies reviewing permit, licensing, zoning applications, and other types of land use approvals must make an independent assessment of the following:

- (1) The identity and scope of valued cultural and historical or natural resources in the petition area including the extent to which traditional and customary Native Hawaiian rights are exercised in the petition area.
- (2) The extent to which those resources including traditional and customary Native rights will be affected or impaired by the proposed action; and
- (3) The feasible action if any taken by the State to reasonably protect Native Hawaiian rights if they are found to exist.





## Key Points of Law

### Article XI, Section 1 of the Hawai'i State Constitution:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

### Article XI, Section 7 of the Hawai'i State Constitution:

"The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."

## Protecting the Public Trust in Water, Ocean Resources, and Native Hawaiian Rights and Practices

McBryde (1973)



*The Hawai'i Supreme Court re-examines water law in Hawai'i that had developed in the aftermath of the illegal overthrow and annexation by the U.S. of the Hawaiian Kingdom. Water jurisprudence during the U.S. Territory days characterized water as a commodity and the personal property of wealthy sugar barons. Water could be*

*acquired "prescriptively" as a kind of adverse possession and diverted out of their original watersheds. Sugar plantation interests often severed reserved water rights associated with traditional taro cultivation (appurtenant water) to apply water originating from agriculturally productive windward valleys, to dry leeward plains where sugar crops flourished.*

*By 1959, Hawai'i becomes the 50th State of the U.S. and the make-up of the State Supreme Court changes to reflect Native Hawaiian and local justices, as compared to U.S. mainland judges that dominated the bench during the Territorial period.*

*This case involved a water dispute between two sugar plantations on the island of Kaua'i. Rather than look to the body of water law developed during the Territorial period of Hawai'i, the Court turns to Hawaiian custom and usage and the King's sovereign prerogatives over the lands and waters of the Hawaiian Kingdom to arrive at its decision in this landmark case. The Court makes the following findings:*

The Hawaiian Kingdom and the Principles Adopted by the Board of Commissioners to Quiet Land Titles, 1846 (hereinafter, the "Land Commission")

In the years that led up to the Mahele, the Land Commission was authorized to convey the king's private or feudal rights in the land, but not his **sovereign prerogatives** as head of the Hawaiian Kingdom.

One of these sovereign prerogatives included the power **"to encourage and even to enforce the usufruct of lands for the common good."**

All subsequent conveyances are subject to these sovereign prerogatives; namely here, the **right to use water [as] one of the most important usufructs of the land.**

Therefore, all of the waters flowing in natural water courses belong to the State in trusteeship for the people.

## Key Points of Law

### Precautionary Principle - A Standard for Managing Public Trust Resources (Waiāhole):

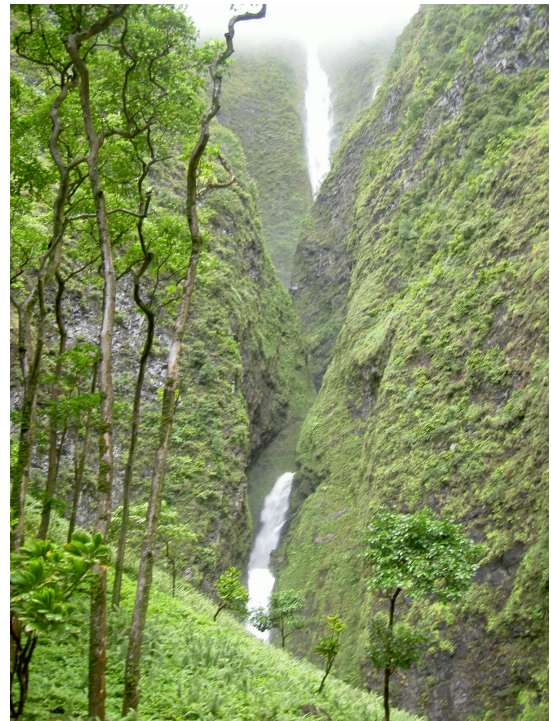
Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt “precautionary principles” in protecting the resource. That is, **where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation ... In addition, where uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.**

#### Waiāhole (2000)

*Waiāhole Ditch captures surface waters from Kahana to Kahalu’u, Windward O’ahu and diverts 27 million gallons per day (mgd) of water to central and leeward plains for sugar. Taro farmers petitioned return of waters to windward valleys to sustain traditional agriculture, restore streams and estuaries. Nearly 20 other parties (County, State, Feds, private interests in large-scale agriculture and urban development) filed water use permit (WUP) applications and sought continued diversions. Parties entered into contested case hearing before State Commission on Water Resource Management (CWRM).*

CWRM decision: over half of 27 mgd is allocated to leeward users and for a “proposed agricultural reserve” and “non-permitted ground water buffer.” Windward streams are allocated the leftover amount.

Hawai’i Supreme Court overrules CWRM decision, remands to the agency to re-evaluate allocations in accordance with constitutionally mandated public trust obligations. Court orders CWRM to determine how much water must return to Windward streams to support native stream life, estuaries, and community uses.



The Court also makes the following findings:

- The State is obligated to protect, control and regulate the use of Hawai’i’s water resources for the benefit of its people as a public trust.
- Private commercial use is not a public trust purpose.
- Retention of waters in their natural state does not constitute waste. Rather, a public trust interest exists in maintaining a free-flowing stream for its own sake.
- CWRM “inevitably must weigh competing public and private water uses on a case-by-case basis” but any balancing must “begin with a presumption in favor of public use, access, and enjoyment.”
- Domestic uses and the exercise of Native Hawaiian and traditional and customary rights are public trust purposes.





### **Wai'ola o Moloka'i (2004)**

*Molokai Ranch - Wai'ola requested to construct a well and obtain a Water Use Permit for an additional 1.25 mgd from the Kamiloloa aquifer for current and future domestic, commercial, industrial, and municipal water needs. Department of Hawaiian Home Lands (DHHL) intervenes to protect its current uses and reservation for future uses in the adjacent Kualapu'u aquifer. Other intervenors: Hawaiian cultural practitioners claiming the proposed withdrawal would interfere with their traditional and customary rights of subsistence gathering of marine resources such as fish and limu (seaweed) along the Kamiloloa shoreline.*

Water reservations for Native Hawaiian Homesteaders constitutes a public trust purpose. CWRM must not “divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers.”

Recognized Moloka'i's ground and surface water resources are interconnected. Ground water pumpage and use in one area has the potential to reduce water quality of wells and the discharge of freshwater into nearshore marine fisheries that support Native Hawaiian traditional and customary subsistence practices (e.g., gathering fish, limu, and other marine life).

State has an affirmative duty to protect Native Hawaiian traditional and customary rights.

Burden of proof rests on the permit applicant to demonstrate its use will not interfere with native Hawaiian rights and practices.

### **Kelly v. 1250 Oceanside Partners (2006)**

*Soil runoff caused by a developer's grading and grubbing activities on the land pollutes the pristine coastal waters of Kealakekua Bay on Hawai'i Island.*

“[T]he plain language of Article XI, Section 1 [of the Hawai'i State Constitution] mandates that the County does have an obligation to conserve and protect the state's natural resources[,]” which includes protecting coastal waters from polluted runoff.

“The duties imposed upon the State are the duties of a trustee and not simply duties of a good business manager[;]”

[T]herefore, the agency was required “to not only issue permits after prescribed measures appear to be in compliance with [the appropriate] regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources.”

## Burden Shifting

### **Criminal Defendants Asserting a Constitutional Privilege for the Protection of a Traditional and Customary Hawaiian Right have the Burden of Proof**



#### State v. Hanapi (1998)

Hanapi was arrested for criminal trespass when he walked onto to private property to express to his neighbor his concern that the neighbor's land clearing activities was causing harm to an ancient fishpond and constituted a desecration of this cultural site. Hanapi stated he was present on his neighbor's property to conduct cultural and religious ceremonies to heal the land. The Hawai'i Supreme Court affirmed Hanapi's conviction for criminal trespass.

In a criminal trespass context, "it is the obligation of the person claiming the exercise of a Native Hawaiian right to demonstrate the right is protected."

In order for a criminal defendant to establish that his or her conduct is constitutionally protected as a Native Hawaiian right, the defendant must:

- (1) Prove that s/he is a Native Hawaiian (a descendant of the island inhabitants of Hawai'i prior to 1778)
- (2) Provide an adequate foundation through expert or kama'āina witness testimony connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice.
- (3) Show that the exercise of the claimed right occurred on undeveloped or less than fully developed land.

#### State v. Pratt (2012)

*Native Hawaiian defendant Pratt camped in Kalalau valley, Kaua'i for prolonged periods without obtaining a camping permit. He spent time cleaning heiau (traditional temples), growing taro and native plants, clearing brush, and taking out garbage. He was convicted for illegally camping without a permit. The State asserted its interests in keeping Kalalau valley a wilderness area (through limiting traffic and length of stay), preserving park resources, public safety, and welfare.*

The Hawai'i Supreme Court upheld the conviction despite Pratt having satisfied the 3-Part Hanapi test because the exercise of the State's regulatory authority in this instance was reasonable.

Article XII, Section 7 of the Hawai'i State Constitution grants the State the right to reasonably regulate Native Hawaiian rights.

Pratt's right to perform traditional and customary practices in Kalalau State Park were outweighed by the State's compelling interest to maintain public health and safety. These are reasonable State concerns. The state's requirement for users to obtain a camping permit to utilize state park lands is a reasonable regulation.

The court conducts a balancing test between the constitutionally protected Native Hawaiian traditional and customary right and the State's authority to reasonably regulate such rights. It will consider the facts on a **case-by-case** basis and will take into consideration the **totality of the circumstances**.



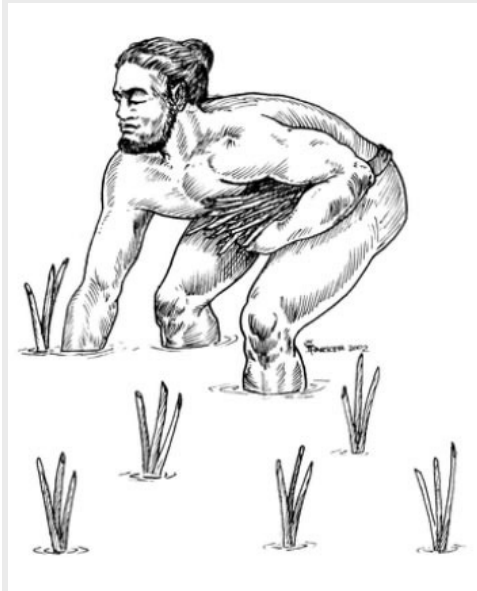


### **State v. Armitage (2014)**

*The petitioners asserted a Native Hawaiian privilege to access Kaho'olawe Reserve for the purpose of reestablishing the Reinstated Hawaiian Government, but failed to apply for authorization to enter the Reserve from the Kaho'olawe Island Reserve Commission (KIRC).*

Haw. Admin. R. § 13-261-11 details the process for obtaining approval from KIRC for entrance into and activities within the reserve, by applicants seeking to exercise traditional and customary rights and practices.

The court held that “the balance weighs in favor of the State’s interest in protecting the health and safety of those individuals who travel to Kaho’olawe.”



### **State v. Palama (2015)**

*A Native Hawaiian pig hunter and taro farmer from Hanapēpē ahupua’a on the island of Kaua’i was cited for criminal trespass on private lands in Hanapēpē Valley when he went to hunt for pig with his dogs and a knife. The trial court dismissed the trespass charges against Palama and the Intermediate Court of Appeals (ICA) affirmed the decision. On appeal the State argued that its DLNR Game Mammal Hunting Regulations, HAR, Title 13, Ch. 123 for the island of Kaua’i informs hunters of public hunting grounds where pig hunting is allowed. Palama could have obtained a hunting license and hunted on public lands or acquired permission from the landowner to hunt on private lands in Hanapepe.*

Palama satisfied the 3-Part Hanapi test. The ICA agreed with the trial court that the expert evidence and kama’āina testimony presented demonstrated that pig hunting is a Native Hawaiian traditional and customary right and practice. Pig hunting was determined to be cultural practice of mālama ‘āina (caring for the land and resources) because it helped to keep the pig population down and deter pigs from destroying cultivated sweet potato and taro. The court also found that Palama exercised his hunting right in a reasonable manner.



The ICA agreed with Palama’s argument that the State was impermissibly delegating to private property owners an “absolute power to grant or deny Native Hawaiians their constitutional privileges.”

The court found that the State’s action would “operate as a summary extinguishment of Palama’s constitutionally protected right to hunt pig on the subject property — the ahupua’a of Hanapēpē for which Palama cared for his family’s kuleana land, grew taro, and hunted. Palama and his ‘ohana were clearly hoā’āina (ahupua’a tenants) of Hanapēpē. The court recognized these priority hoā’āina rights and found that the State’s regulatory authority to foreclose Palama from hunting in his ahupua’a and delegating its authority to a private landowner would effectively extinguish Palama’s rights or essentially “regulate” Palama’s “right out of existence” — a consequence the PASH court cautioned against.

Our past, our present, and whatever remains of our future, absolutely depend on what we do now.

- Sylvia Earle, Oceanographer

## Marine Management in Hawai‘i

### Marine Life Conservation Districts (“MLCDs”), H.R.S. Ch. 190

To conserve marine resources and allow for replenishment. Taking living material (fish, eggs, shells, corals, algae, etc.) and non-living habitat material (sand, rocks, coral skeletons, etc.) is prohibited. Non-consumptive uses are generally okay (e.g., swimming, snorkeling, and diving). The State Department of Land and Natural Resources (DLNR) may impose certain gear restrictions if some fishing is allowed. Examples of MLCDs: Hanauma Bay, Pūpūkea, Waikiki on O‘ahu.

### Fishery Management Areas (“FMAs”), H.R.S. §§ 187A-5, 188-53, 188F-2

To manage and conserve freshwater and marine life in impacted shoreline recreational fishing spots near harbors, in bays, and estuaries. Usually instituted to resolve user conflicts and competition. DLNR imposes regulations on fishing gear, seasons, time of day, bag limit, species, etc. Examples of FMAs:

- Manele Harbor, Lāna‘i – net ban in favor of local pole fishing for halalu.
- Kiholo Bay, Hawai‘i to protect sea turtles. DLNR allows aquarium fish permits and hand-fishing methods (e.g., spearfishing) since these activities are not harmful to turtles.
- West Hawai‘i Regional FMA – to resolve conflicts among aquarium fish collectors, commercial dive and snorkel tour operators, and recreational users. DLNR and community council designated 9 fishery replenishment areas (30% of West Hawai‘i Coastline) where aquarium collection and fish feeding is banned.



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Mac Poepoe, Konohiki of Mo‘omomi Fishery on Moloka‘i

### Bottomfish Restricted Fishing Areas (“BRFAs”), H.R.S. § 13-94

Law establishing BRFAs was passed due to alarming decline in commercial fish landings and increased harvests of sexually immature bottomfish. The law restricts taking of bottomfish species (‘ula‘ula koa‘e or onaga; ‘ula‘ula or ehu; kalekale; ‘ōpakapaka; ‘ūkikiki or gīndai; hāpu‘u; and lehi) in designated BRFAs during closed season, except by permit. Also includes minimum size for onaga and ‘ōpakapaka (one pound); non-commercial bag limits; and gear restrictions (trap, trawl, bottomfish longline, or net other than scoop net or Kona crab net).

### Community Based Subsistence Fishing Areas (“CBSFAs”)

- Act 271/HRS § 188-22.6. (1994) authorized DLNR to designate CBSFAs for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion. Also established a 2 year pilot project on NW coastline of Moloka‘i, Kawa‘aloa and Mo‘omomi Bays (HAR § 13-59, June 1995 – July 1997)
- Act 232 (2005)/HRS § 188-22.7 (2005) – Legislatively designated Miloli‘i as a CBSFA. DLNR shall adopt management strategies and rules consistent with CBSFA statute and that: (1) Ensure long-term sustainable populations of fish and other marine species; and (2) Encourage the scientific study and understanding of subsistence fishing management.
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- Around 19 other communities statewide are vying for designation and rules approval.

We know that when we protect our oceans we’re protecting our future.

- President Bill Clinton

### Natural Area Reserve System (“NARs”), H.R.S. Ch. 195

To protect important geologic and volcanic features and aquatic and terrestrial species associated with these unique environments. Example: ‘Ahihi-Kina‘u reserve, Maui – access is prohibited in order to protect 1,238 acres of lava fields from Haleakalā eruption, sensitive anchialine ponds, wetlands, native plants, and pristine coral reef habitat.

### Ocean Recreation Management Area (“ORMA”), Act 272, H.R.S. § 13-256

To reduce conflicts among multiple ocean users especially in high activity areas. 10 ORMA sites were selected by the Division of Boating and Ocean Recreation (DOBOR) to manage recreational use. DOBOR provides a permitting process for operators of commercial vessels, water craft or water sports equipment.

### Other marine areas protected under state and federal laws:

- **Kalapana Extension Act, 52 Stat. 781 et seq. (1938)** – U.S. Congressional act allows for lease of lands within the Kalapana extension to Native Hawaiians and recognizes their traditional subsistence fishing rights. The act reserves exclusive fishing rights of “native Hawaiian residents of said area or of adjacent villages and by visitors under their guidance.”
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### DLNR & Community Partnerships for Ocean Stewardship and Enforcement:

- **Makai Watch** – Community volunteers conduct resource monitoring work, education and outreach, and reports regulatory violations to the Division of Conservation & Resources Enforcement (DOCARE) for better compliance and resource health.
- **Community Fisheries Enforcement Unit (CFEU)** – Launched in 2013 as a pilot project in north Maui. A dedicated vessel and team of DOCARE officers works with Makai Watch Coordinator and patrols 13-miles of shoreline to issue citations, enforce and educate people about fishing regulations. The Castle Foundation and Conservation International provided funding for this program. DLNR hopes to expand program statewide.
- **Adopt-A-Harbor Program** – Communities partnering with DOBOR to care for and upkeep harbor/pier, boat ramp, and facilities area.
  - Kahana Kilo Kai, O‘ahu
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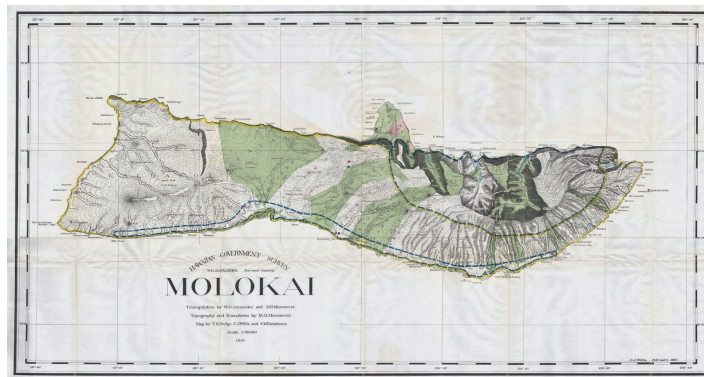
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## A FRAMEWORK FOR THE AHA MOKU SYSTEM AND COLLABORATIVE GOVERNANCE

### HISTORY OF THE 'AHA COUNCILS

"There is no man familiar with fishing least he fishes and becomes an expert. There is no man familiar with the soil least he plants and becomes an expert. There is no man familiar with hō`ola least he be trained as a kahuna and becomes expert at it."<sup>1</sup>

- Following this principle, leaders who govern people manage the resources should be those who are actual practitioners; i.e those who have gained a comprehensive and masterful understanding of the biological, physical, and spiritual aspects of the 'āina. In traditional Hawaiian resource management, those with relevant knowledge comprised what were called the 'Aka Kiole,<sup>2</sup> the people's council.
  - **'Aha** – The kūpuna metaphorically ascribed these councils and the weaving of various 'ike, or knowledge streams, as an 'aha. The individual aho or threads made from the bark of the olonā shrub were woven together to make strong cordage, called 'aha. Thus the early Hawaiians referred to their councils as 'aha to represent the strong leadership created when acknowledged 'ike holders came together to weave their varied expertise for collective decision-making that benefitted the people, land, and natural resources.<sup>3</sup>
  - **Kiole** – The term kiole described the abundant human population, likened to the 'iole or large schools of pua (fish fingerlings) that shrouded the coastline en masse. Thus, Molokai's councils were called 'Aha Kiole, the people's council.<sup>4</sup>
- 'Aha council leadership was determined by the people who collectively understood who the experts were in their community. These were experts in fisheries management, hydrology and water distribution, astronomy and navigation, architecture, farming, healing arts, etc.
- According to Kumu John Ka'imikaua the purpose of the 'aha councils was to utilize the expertise of those with 'ike (knowledge) to mālama 'āina, to care for the natural resources, and to produce food in abundance not just for the people, but for successive generations.



<sup>1</sup> *A Mau A Mau (To Continue Forever): Cultural and Spiritual Traditions of Moloka'i* (Nālani Minton and Nā Maka O Ka 'Āina 2000) [hereinafter *A Mau A Mau*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## HOLISTIC PROBLEM SOLVING OF THE ANCIENT 'AHA COUNCILS

1. Identify problem or issue
2. Critically examine potential solutions including potential effects upon the *āina* using eight resource realms. These realms provided the ethical foundation for the decision making process:<sup>5</sup>
  - a. **Moana-Nui-Ākea** – the farthest out to sea or along the ocean’s horizon one could perceive from atop the highest vantage point in one’s area.
  - b. **Kahakai Pepeiao** – where the high tide is to where the lepo (soil) starts. This is typically the splash zone where crab, limu, and ‘opihi may be located; sea cliffs; or a gentle shoreline dotted with a coastal strand of vegetation; sands where turtles and seabirds nest; or extensive sand dune environs.
  - c. **Ma Uka** – from the point where the lepo (soil) starts to the top of the mountain.
  - d. **Nā Muliwai** – all the sources of fresh water, ground/artesian water, rivers, streams, springs, including springs along the coastline that mix with seawater.
  - e. **Ka Lewalani** – everything above the land, the air, the sky, the clouds, the birds, the rainbows.
  - f. **Kanaka Hōnua** – the natural resources important to sustain people. However, management is based on providing for the benefit of the resources themselves rather than from the standpoint of how they serve people.
  - g. **Papahelōlona** – knowledge and intellect that is a valuable resource to be respected, maintained, and managed properly. This is the knowledge of the kahuna, the astronomers, the healers, and other carriers of ‘ike.
  - h. **Ke ‘Ihi‘ihi** – elements that maintain the sanctity or sacredness of certain places.
3. Implement solution with 3 considerations
  - a. Honor ancestral past
  - b. Address the needs of the present
  - c. Set up future generations to have more abundance

Kumu John Ka‘imikaua expressed that this procedural management resulted in lōkahi, “the balance between the land, the people that lived upon the land and the akua (gods).” In turn, lōkahi manifested “pono, the spiritual balance in all things.”<sup>6</sup>

## AHA MOKU SYSTEM UNDER STATE LAW

- **What is it?** - The aha moku system is a land, water, and ocean system of best practices that is based upon indigenous resource management practices of ahupua‘a and moku (regional) boundaries. Its goal is to find methods of sustaining, protecting and keeping the natural balance among the different ecosystems existing within the eight main Hawaiian Islands. It serves in an advisory capacity to the chairperson of the Board of Land and Natural Resources (BLNR). An important focus of the aha moku system is to bring regional concerns from island communities forward to the Department of Land and Natural Resources (DLNR) so issues can be addressed and if needed, mitigated.

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<sup>5</sup> Presentation by Dr. Kawika Winter, ethnobotanist and director of Limahuli Garden and Preserve on the island of Kaua‘i. Dr. Winter is a former hālau member of Hālau Hula o Kukunaokalā, led by the late Kumu John Ka‘imikaua, who re-introduced the history of the ancient ‘aha councils in his film *A Mau A Mau* and in educational workshops on Moloka‘i. It was Kumu John’s wish to revitalize the ‘aha councils to restore pono to the land and people.

<sup>6</sup> *A Mau A Mau*, supra note 1.

The ‘aha were created under Act 288, which recognized that over the past 200 years, Hawaii has suffered through extensive changes to the Native Hawaiian culture, language, values, and land tenure system, resulting in the following:

- Over-development of coastlines;
- Alterations of fresh water streams;
- Destruction of watersheds;
- Decimation of coral reefs;
- The decline of endemic marine and terrestrial species<sup>7</sup>

In addition to these consequences, Act 288 recognized the value of cultural practitioners and their use of knowledge that has been passed down through kupuna, experienced farmers, and fishers to engage and enhance sustainability, subsistence, and self-sufficiency.<sup>8</sup>

Puwalu ‘Ekahi – From August 15-17, 2006, representatives from 43 moku (regions) across the state and over one hundred Hawaiian cultural practitioners, including kupuna and acknowledged traditional experts, joined together to share their mana‘o and call on Native Hawaiians to begin a process to uphold and continue Hawaiian traditional land and ocean practices.<sup>9</sup>

Puwalu ‘Elua – On November 8 and 9, 2006, educators, administrators, cultural practitioners, and kupuna discussed how to incorporate traditional Hawaiian cultural knowledge into an educational framework that could be integrated into a curricula for all public, private, charter, and Hawaiian immersion schools in Hawaii.<sup>10</sup>

Puwalu ‘Ekolu – On December 19 and 20, 2006, policymakers and stakeholders engaged in protecting Hawai‘i’s ecosystems; Native Hawaiian practitioners with expertise in traditional sustainability methods; Native Hawaiian organizations, agency and legislative representatives in state government; and experts in education and environmental advocacy discussed existing programs and their successes and failures in community-building. Participants in Puwalu ‘Ekolu, agreed that statutes, ordinances, and a framework for consultation with Hawaiian communities using the Hawaiian perspective and traditional methods such as the ahupua‘a management system are needed, and that the ‘aha moku system should be established.<sup>11</sup>

From 2006 to 2010, three more puwalu were convened to gather additional community input on best practices in the area of native Hawaiian resource management. Integrating the mana‘o of farmers, fishers, environmentalists, educators, organizations and agencies, and governmental representatives, consensus was reached on the necessity of integrating the ‘aha moku system into government policy.<sup>12</sup>

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<sup>7</sup> 2012 Haw. Sess. Laws Act 288, § 1 at 1:1-8.

<sup>8</sup> 2012 Haw. Sess. Laws Act 288, § 1 at 1-8.

<sup>9</sup> 2012 Haw. Sess. Laws Act 288, § 1 at 2:8-3:7.

<sup>10</sup> 2012 Haw. Sess. Laws Act 288, § 1 at 3:8-19.

<sup>11</sup> 2012 Haw. Sess. Laws Act 288, § 1 at 3:20-4:10.

<sup>12</sup> 2012 Haw. Sess. Laws Act 288, § 1 at 4:11-22.

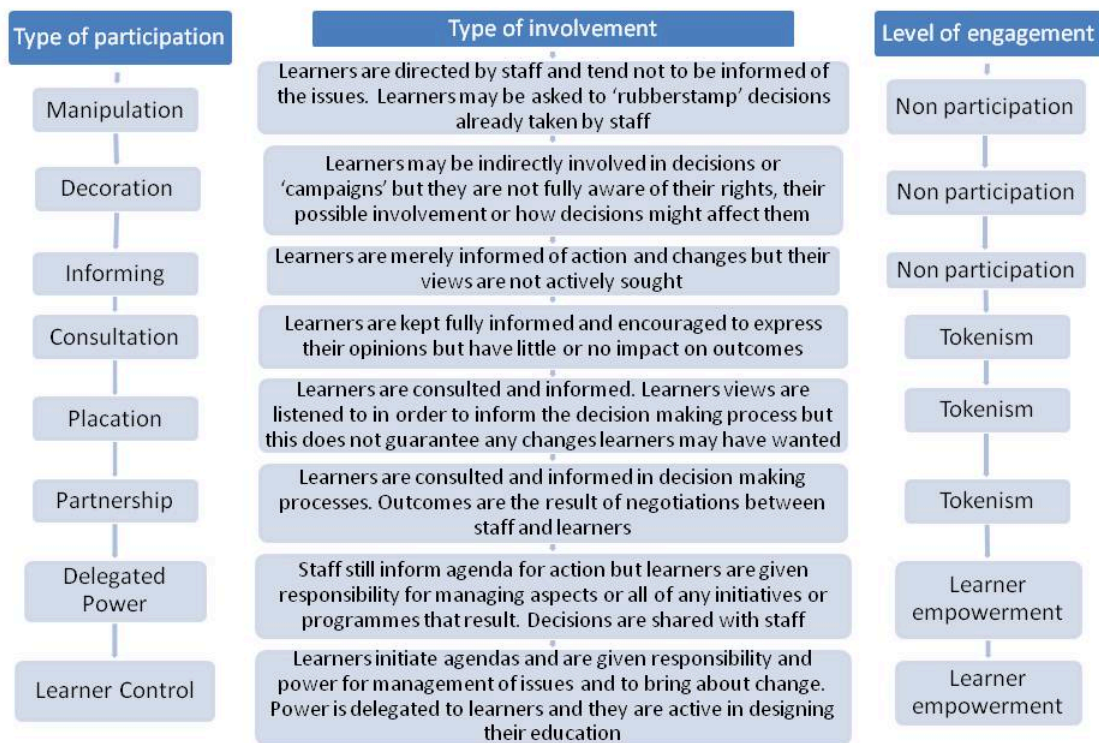
## COLLABORATIVE GOVERNANCE

**Collaborative governance**, brings public and private stakeholders together in collective forums with public agencies to engage in consensus-oriented decision making.

Collaborative Governance stresses six important criteria:

- (1) a forum initiated by public agencies or institutions,
- (2) participants in the forum include nonstate actors,
- (3) participants engage directly in decision making and are not merely “consulted” by public agencies,
- (4) the forum is formally organized and meets collectively,
- (5) the forum aims to make decisions by consensus (even if consensus is not achieved in practice), and
- (6) the focus of collaboration is on public policy or public management. This is a more restrictive definition than is sometimes found in the literature.

## ‘LADDER’ OF PARTICIPATION



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Collaborative governance allows those affected by decisions and those with relevant knowledge to have an influential say in the decision making process. Act 288 and creation of the ‘aha

<sup>13</sup> Arnstein’s Ladder of Participation - [https://talintuoh.files.wordpress.com/2013/03/ladder\\_of-participation.jpg](https://talintuoh.files.wordpress.com/2013/03/ladder_of-participation.jpg)



councils are attempts to integrate collaborative governance processes through communication lines to DLNR and through annual reports.

PROS/CONS OF COLLABORATIVE GOVERNANCE	
PROS	CONS
May be cheaper/quicker than litigation	Power imbalances between stakeholders
Greater fulfillment for community from public discussion	Commitment needed by both public/private stakeholders
Educated decisions made by those who are most affected	Decisions may still be made contrary to suggestions of stakeholders
Decisions/deliberations made public	History of antagonism may impede process

**WHAT AREAS OF EXPERTISE MAY THE ‘AHA COUNCILS ADVISE ON?**

The aha councils are allowed to provide advice on the following:

1. Integrating indigenous resource management practices with western management practices in each moku;
2. Identifying a comprehensive set of indigenous practices for natural resource management;
3. Fostering the understanding and practical use of native Hawaiian resource knowledge, methodology, and expertise;
4. Sustaining the State’s marine, land, cultural, agricultural, and natural resources;
5. Providing community education and fostering cultural awareness on the benefits of the aha moku system;
6. Fostering protection and conservation of the State’s natural resources; and,
7. Developing an administrative structure that oversees the aha moku system.

**Within the DLNR, several divisions are related to these areas:**

<p><b>AQUATIC RESOURCES (DAR)</b></p> <p>Manages the State’s marine and freshwater resources through programs in commercial fisheries and aquaculture; aquatic resources protection, enhancement and education; and recreational fisheries. <b>Issues fishing licenses</b></p>
<p><b>BOATING AND OCEAN RECREATION (DBOR)</b></p> <p>Responsible for the management and administration of statewide ocean recreation and coastal areas programs pertaining to the ocean waters and navigable streams of the State which include 21 small boat harbors, 54 launching ramps, 13 offshore mooring areas, 10 designated ocean water areas, 108 designated ocean recreation management areas, and beaches encumbered with easements in favor of the public. Registers small vessels.</p>
<p><b>CONSERVATION AND COASTAL LANDS (OCCL)</b></p> <p>The Office of Conservation and Coastal Lands is responsible for overseeing private and public lands that lie within the State Land Use Conservation District. In addition, to privately and publicly zoned Conservation District lands, OCCL is responsible for overseeing beach and marine lands out to the seaward extend of the State’s jurisdiction.</p>

CONSERVATION AND RESOURCES ENFORCEMENT (DOCARE)

Responsible for enforcement activities of the Department. The division, with full police powers, enforces all State laws and rules involving State lands, State Parks, historic sites, forest reserves, aquatic life and wildlife areas, coastal zones, Conservation districts, State shores, as well as county ordinances involving county parks. The division also enforces laws relating to firearms, ammunition, and dangerous weapons.

FORESTRY AND WILDLIFE (DOFAW)

Responsible for the management of State-owned forests, natural areas, public hunting areas, and plant and wildlife sanctuaries. Program areas cover watershed protection; native resources protection, including unique ecosystems and endangered species of plants and wildlife; outdoor recreation; and commercial forestry. **Issues hunting permits.**

HISTORIC PRESERVATION DIVISION (SHPD)

SHPD's three branches, History and Culture, Archaeology, and Architecture, strive to accomplish this goal through a number of different activities.

**IS THERE A LEGAL BASIS TO REQUIRE COLLABORATIVE GOVERNANCE?**

- Agencies responsible for protecting traditional and customary Native Hawaiian rights must conduct detailed inquiries into the impacts on those rights to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way.
  - This is the responsibility of the agency, not the developer!<sup>14</sup>
  - The failure of a state agency to take appropriate measures may be a breach of constitutional obligations to protect Native Hawaiian interests and possibly an infringement upon due process rights.
- Ka Pa'akai O Ka 'Aina v. Land Use Commission (Ka Pa'akai),<sup>15</sup>
  - Supreme Court of Hawaii rules that "the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible."<sup>16</sup>
  - In a dispute brought by Native Hawaiian cultural practitioners opposed to a developer's request before the State Land Use Commission (LUC) to reclassify certain lands to urban zoning on Hawai'i Island in order to build a resort, the Hawai'i Supreme Court noted "[a]rticle XII, section 7 of the Hawai'i Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible when granting a petition for reclassification of district boundaries."<sup>17</sup> In order to satisfy these obligations the LUC needed to evaluate:
    - (A) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional

<sup>14</sup> David M. Forman & Susan K Serrano, Ho'ohana Aku, a Ho'ōla Aku: A Legal Primer for Traditional and Customary Rights in Hawai'i 15 (2012).

<sup>15</sup> 94 Hawai'i 31, 35, 7 P.3d 1068, 1071 (2000).

<sup>16</sup> See also Pub. Access Shoreline Hawai'i v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 450 n.43, 903 P.2d 1246, 1271 (1995).

<sup>17</sup> Ka Pa'akai, 94 Hawai'i at 46, 7 P.3d at 1083.

- and customary native Hawaiian rights are exercised in the petition area;
- (B) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (C) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.<sup>18</sup>
  - The Ka Pa‘akai ruling now mandates this legal framework be followed by all State and County agencies for the protection of traditional and customary Hawaiian rights.
  - The Statewide AMAC, with direction from local ‘aha councils on each island, could utilize their traditional knowledge and cultural expertise to provide advisories or guidance documents to the DLNR and its multiple divisions on protocol for engagement with Native Hawaiian communities and how to protect traditional and customary rights and practices on the ground.
- DLNR has consulted with ‘Aha Kiole o Moloka‘i (along with other Native Hawaiian groups, such as the Hawaiian Civic Clubs and OHA) on a variety of resource management issues<sup>19</sup> including in November 2012 when ‘Aha Kiole o Moloka‘i reached an understanding with the state about limiting cruise ship visits to the island following protests the previous year (and earlier, in 2007) that blocked landings at the Kaunakakai pier.<sup>20</sup>

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<sup>18</sup> Id. at 47, 7 P.3d at 1084.

<sup>19</sup> Forman & Serrano, supra note 14, at 53.

<sup>20</sup> Id.

### MEMORANDUM

Date: October 25, 2016

To: **Aarin Gross**  
Senior Manager, Hawaii Program  
Conservation International

From: **Jan Yoshioka**  
Senior Manager, Conservation Finance  
Conservation International

Re: **Summary Financial Impact Analysis of Hawaii Non-Commercial Marine Licensing Program**

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#### Introduction

This Financial Impact Analysis examines the financial implications of various non-commercial marine licensing program (“Licensing Program”) design scenarios being considered by the DAR and other stakeholders. In general, these scenarios can be delineated into two primary categories: non-revenue generating and revenue-generating programs. Non-revenue generating programs include systems such as a universal free (no-fee) fishing registry. Revenue-generating programs include systems that involve the issuance of fee-based licenses to all or some subset of marine resource users. While non-revenue generating programs are discussed in brief, this Financial Impact Analysis is largely focused on revenue-generating programs. This Memorandum describes the results of preliminary analyses conducted into the relationship between certain design, operating and financial assumptions.

#### Approach

Irrespective of the system design, the creation of a new Licensing Program will require a commitment of certain financial resources either by the State of Hawaii or external investors. Evaluating the attractiveness of such an investment from a financial perspective requires an analysis of the future benefits and costs that may be generated by a Licensing Program, and a comparison of these costs and benefits with the value of the initial Program investment(s). In order to facilitate this analysis, we conducted a *discounted cash flow (DCF) analysis*, a valuation method commonly used to evaluate the attractiveness of project investments—in this case, the proposed License Program. DCF analysis is used to calculate a project’s Net Present Value (NPV)—that is, the present (discounted) value of future cash flows generated by or used in a project relative to the value of initial capital investments made. The general premise of the DCF analysis is that, all else equal, if the present value of net cash flows (benefits) exceeds the current capital investment required (costs) by a project the project should be considered.

#### Methods

In connection with the DCF analysis, we constructed a DCF model which details the revenue and cost structure of a project on a cash basis. The DCF model was used both to evaluate the expected financial returns of the Licensing Program over a 15-year time horizon and to conduct a series of sensitivity analyses examining the sensitivity of returns and other model

parameters (e.g. break-even license transaction volume, break-even license per-unit fee rates) to changes in key underlying assumptions. A copy of the DCF model developed in connection with this Financial Impact Analysis is attached to this Report as **Appendix X-2**.

Underlying assumptions and key model inputs were derived from a combination of primary and secondary sources including government datasets and personal interviews with Department of Land and Natural Resources, Division of Aquatic Resources (DAR), and other relevant State and Federal agency staff. Where feasible, assumptions and inputs were discussed with subject matter experts in order to establish the appropriateness and reasonableness of each. A more detailed description of the methods applied to this Financial Impact Analysis are presented in **Appendix X** attached hereto.

## Information Objectives

The Study Group identified a series of information objectives which this Financial Impact Analysis is intended to address:

- A. Estimated Net Cash Flows. The estimated net cash flow contribution (or burden) generated by a new Licensing Program, given certain assumptions;
- B. Returns on Investment. The potential financial returns that may be generated by a Licensing Program expressed in terms of the program's Net Present Value (NPV), Internal Rate of Return (IRR) and other select financial metrics;

Additionally, for revenue-generating programs, we conducted analyses of:

- C. Target License Fee Rate(s). The per-unit license fee that would enable the proposed Licensing Program to 'break-even' – that is, to cover all of the initial start-up and recurring direct and indirect costs of operating the Licensing Program given certain population estimate, compliance, subsidy and/or waiver, cost structure, and other assumptions; and
- D. Target License Transaction Volume. Determine the annual volume of non-commercial license transactions (i.e. purchases and renewals) required to achieve 'break-even' given certain license fee, cost structure, and other assumptions.

In each case, we explored the sensitivity of these values to changes to underlying assumptions.

## Preliminary Findings

### *Non-Revenue Generating Programs*

A free registry can be expected to generate a combination of one-time and recurring costs. We assume a free registry will utilize the same transactional system or platform as a fee-based licensing system and will require certain additional resources including, at minimum, DAR personnel to assist with processing and entry of manual (paper-based) applications, and to conduct statistical or other analysis of registry data.<sup>1</sup> The estimated initial capital investment required is US \$224,000<sup>2</sup> for the design and development of a web-based platform similar to an existing system being used to process and store commercial marine licenses and other State of

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<sup>1</sup> Details regarding specific assumptions used in this analysis are included in **Appendix X**.

<sup>2</sup> \$175,000 in 2004 dollars, CPI-U inflation adjusted-value

Hawaii marine resource licenses and permits administered by the DAR. Annual operating costs are estimated at \$72,253, inclusive of system hosting maintenance costs, personnel salaries, payroll taxes and fringe benefits for 1 FTE 1.0 research statistician and a 1 FTE 0.50 office assistant, and anticipated periodic system upgrade change orders. The model assumes a year-on-year increase in labor costs at an average 2.64% per annum, the average rate of growth over the past three fiscal years.

Without a mechanism to capture or recover funds, the analysis of this design scenario suggests that a free registry would result in an estimated initial cost burden of \$296,253 (Year 0), and annual cash flow deficits ranging from \$74,005 in Year 1 to \$104,000 in Year 15 in nominal terms. Over the same time horizon, this design scenario is expected to produce a negative project NPV of \$1.13M, suggesting that the investment should not be considered from a purely financial perspective unless long-term external funding commitments can be secured.

### *Revenue-Generating Programs*

In connection with this Financial Impact Analysis, we considered a range of potential design configurations including the application of a universal fixed license fee (a single fee rate for all non-commercial marine fishing licenses issued), license fee differentials based on residency status, and license fee subsidies and/or waivers applied to select demographic groups. In each case, we explored the sensitivity of Licensing Program revenues and expected overall financial returns to these design scenarios, given a set of underlying population, compliance, program cost and other assumptions.

For purposes of this Summary Report, we present the findings of our analysis on a select group of revenue-generating program design scenarios. A more comprehensive discussion of our analysis, including the results of the various sensitivity analyses conducted in connection with this Financial Impact Analysis is presented in **Appendix X**.

## **1. Model Assumptions**

**1.1 Cost Structure.** For each scenario presented herein, we assume: (a) a required initial investment of US \$224,000 for the design and development of an online license processing system occurring in the period Year 0; and (b) annual fixed or semi-fixed costs of operation which includes software maintenance and hosting costs, personnel salaries, payroll taxes, and fringe benefits for the above-mentioned DAR positions, and anticipated periodic system upgrade costs presented on an amortized basis. Based on information provided by the DAR regarding existing licensing systems, variable costs are not anticipated as part of the Licensing Program cost structure. This analysis assumes unit-level transaction and other direct processing costs are assessed by the licensing system vendor and paid by license purchasers.

**1.2 License Transaction Volume.** The expected volume of license transactions is influenced by certain underlying assumptions regarding the current size and potential growth rate of the non-commercial marine angler population, and the expected rates of compliance with new licensing regulations.

1.2.1 Population Size. In order to establish a baseline estimate of the Hawaii non-commercial marine angler population we examined available Hawaii-specific data derived from the National Oceanographic and Atmospheric Administration (NOAA) Marine Recreational Fisheries Statistics Survey (MRFSS) and the National Survey of Fishing, Hunting, and Wildlife-Associated Recreation Report prepared by the U.S. Fish and Wildlife Service (USFWS). Based on these survey data, we estimate



that the population of non-commercial marine anglers in Hawaii (inclusive of permanent resident and non-permanent resident anglers ages 15 years and older) is roughly between 154,600 and 472,430.

For purposes of this Financial Impact Analysis, we used Hawaii saltwater angler population estimates presented in the 2011 USFWS report, which dataset provides the more conservative (lower) estimate of non-commercial marine anglers in Hawaii and includes relevant demographic data including age and residency status. The reported 2011 population estimate was adjusted to 2015 values using an estimated average annual growth rate of 0.50%, the simple average annual growth rate derived from the ten-year growth rate (5.00%) presented in the report.

1.2.2 Expected Compliance Rates. Due to a range of factors, we assume that only a portion of the total non-commercial marine angler population will purchase and continue to renew non-commercial marine licenses on an annual basis. Based on data compiled on license purchasing trends from other U.S. states, we estimate that a maximum 70 percent of the angler population will purchase and/or renew non-commercial marine licenses in a given year, conservatively. Further, we estimate that the rate of compliance with new licensing regulations (and thus the rate of license transactions) will increase at an average annual growth rate of XX% over the first five years before reaching the 70 percent compliance target.

**1.3 Fee Differentials.** Consistent with practices in other U.S. states, the Study Group has considered the possibility of a residency-based license fee differential between permanent and non-permanent Hawaii residents. For design scenarios that consider residency-based fee differentials, we used placeholder fee rates suggested by the DAR.<sup>3</sup>

**1.4 Subsidies and Waivers.** For design scenarios that consider license fee waivers for certain demographic groups, we assume that waiver-eligible individuals will receive a 100% waiver of license fees<sup>4</sup> and that waiver eligible population segments will include: (a) permanent resident individuals ages 16 years and younger; (b) permanent resident individuals ages 65 years and older; and (c) permanent resident individuals between the ages of 17 and 64 years qualifying for Supplemental Nutritional Assistance Program (SNAP) benefits in any calendar year.

**1.5 Discount Rate.** [IN PROGRESS]

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<sup>3</sup> While fee setting is, to a large degree, at the discretion of the DAR, the author strongly recommends additional analysis including “willingness-to-pay” and other studies be conducted to understand the effects, if any, of pricing decisions on purchasing and compliance trends.

<sup>4</sup> Waiver applied to license fees assessed by the DAR, but may not apply to convenience or transaction fees assessed by license portal vendors.

## 2. Analysis of Licensing Program Design Scenarios

**2.1 Scenario A: Universal License Fee Break-Even.** Scenario A examines the minimum license fee required for the Licensing Program to “break-even” assuming: (a) a 15-year time horizon; (b) a fixed, universal (applied to all license purchasers, irrespective of residency status, age, or other demographic classification); (c) no subsidies or waivers are considered; (d) all of the cost structure assumptions stated in Section 1.1 herein are applied; and (e) all other relevant assumptions as presented in **Table 1. Scenario Analysis – Model Drivers** below.

Our analysis indicates that, given the assumptions described above, the minimum (break-even) license fee rate is US \$1.13. Additional findings of our analysis are summarized in **Table 2. Scenario Analysis – Model Outputs** below. In interpreting the break-even analysis presented here, it is important to note the *relevant range*—that is, the activity level range within which certain revenue or cost levels can be expected to occur. Increases or decreases to the population size, compliance rates, or other data underlying model drivers such as the expected volume of license transactions, or changes in the Licensing Program cost structure all influence the break-even license fee rate.

Additionally, as indicated in Table 2. below, following year-on-year increases in Years 1 through 5, annual net cash flows (the difference between annual cash inflows (revenues) and outflows (expenses)) are expected to decrease year-on-year due as a result of projected annual operating expense increases in excess of projected revenue growth.

**2.2 Scenario B: Residency-Based Price Differentials and Demographic-Based Subsidies.** Scenario B examines the financial impacts of both a residency-based license fee differential and license fee subsidies and/or waivers applied to eligible population segments<sup>5</sup> assuming: (a) a 15-year time horizon; (b) all of the cost structure assumptions stated in Section 1.1 herein are applied; and (c) all other relevant assumptions as presented in **Table 1. Scenario Analysis – Model Drivers** below.

Our analysis indicates that given the assumptions described above, the Licensing Program is expected to generate a Net Present Value (NPV) of \$18,027,240 and a project Internal Rate of Return (IRR) of 284.73%. Annual net cash flows are presented in Table 2. below.

**2.3 Scenario C: Alternative Residency-Based Price Differentials and Demographic-Based Subsidies.** Scenario C examines the financial impacts of alternative residency-based license fee rates assuming: (a) a 15-year time horizon; (b) license fee subsidies and/or waivers are applied to eligible population segments; (c) all of the cost structure assumptions stated in Section 1.1 herein are applied; and (d) all other relevant assumptions as presented in **Table 1. Scenario Analysis – Model Drivers** below.

Our analysis indicates that given the assumptions described above, the Licensing Program is expected to generate a Net Present Value (NPV) of \$9,818,565 and a project Internal Rate of Return (IRR) of 170.35%. Annual net cash flows are presented in Table 2. below.

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<sup>5</sup> Subsidy and/or waiver-eligible population segments are described in Section 1.4 of this Memorandum.

**Table 1. Scenario Analysis – Model Drivers**

Scenario A		Scenario B		Scenario C	
<b>Hawaii Angler Population Estimates</b>		<b>Hawaii Angler Population Estimates</b>		<b>Hawaii Angler Population Estimates</b>	
Hawaii Resident, Total	...	Hawaii Resident, Total	104,055	Hawaii Resident, Total	104,055
Ages less than 16	*	Ages less than 16	*	Ages less than 16	*
Ages 65+	...	Ages 65+	17,221	Ages 65+	17,221
SNAP eligible, ages 18 to 64	...	SNAP eligible, ages 18 to 64	11,300	SNAP eligible, ages 18 to 64	11,300
SNAP eligible, ages 65+	...	SNAP eligible, ages 65+	7,586	SNAP eligible, ages 65+	7,586
Non-Resident	...	Non-Resident	54,068	Non-Resident	54,068
<b>Total</b>	<b>158,123</b>	<b>Total</b>	<b>158,123</b>	<b>Total</b>	<b>158,123</b>
Annual Population Growth	0.50%	Annual Population Growth	0.50%	Annual Population Growth	0.50%
<b>Expected Compliance</b>		<b>Expected Compliance</b>		<b>Expected Compliance</b>	
Year 1	25.00%	Year 1	25.00%	Year 1	25.00%
Year 2	40.00%	Year 2	40.00%	Year 2	40.00%
Year 3	55.00%	Year 3	55.00%	Year 3	55.00%
Year 4	65.00%	Year 4	65.00%	Year 4	65.00%
Year 5	70.00%	Year 5	70.00%	Year 5	70.00%
Year 6...15	70.00%	Year 6...15	70.00%	Year 6...15	70.00%
<b>License Fee Rates</b>		<b>License Fee Rates</b>		<b>License Fee Rates</b>	
Hawaii Resident	...	Hawaii Resident	\$ 15.00	Hawaii Resident	\$ 5.00
Non-Resident	...	Non-Resident	\$ 35.00	Non-Resident	\$ 25.00
<b>License Fee Rate Subsidies</b>		<b>License Fee Rate Subsidies</b>		<b>License Fee Rate Subsidies</b>	
Ages 65+, Hawaii Resident	...	Ages 65+, Hawaii Resident	100.00%	Ages 65+, Hawaii Resident	100.00%
Ages <16, All Anglers	...	Ages <16, All Anglers	100.00%	Ages <16, All Anglers	100.00%
SNAP eligible, Hawaii Resident	...	SNAP eligible, Hawaii Resident	100.00%	SNAP eligible, Hawaii Resident	100.00%

\* The USFWS National Survey of Fishing, Hunting, and Wildlife-Associated Recreation Report Hawaii saltwater angler population estimates exclude individuals ages 16 years and younger

... Data element not applicable to scenario

**Table 2. Scenario Analysis – Model Outputs**

<b>Scenario A</b>		<b>Scenario B</b>		<b>Scenario C</b>	
<b>Summary of Financial Returns</b>		<b>Summary of Financial Returns</b>		<b>Summary of Financial Returns</b>	
Net Present Value <sup>1</sup>	\$ 0.00	Net Present Value	\$ 18,027,240	Net Present Value <sup>1</sup>	\$ 9,818,565
Internal Rate of Return <sup>2</sup>	% 5.00	Internal Rate of Return	% 284.73	Internal Rate of Return	% 170.35
<b>Projected Annual Net Cash Flows</b>		<b>Projected Annual Net Cash Flows</b>		<b>Projected Annual Net Cash Flows</b>	
Year 0	(\$ 296,253)	Year 0	(\$ 296,253)	Year 0	(\$ 296,253)
Year 1	(\$ 28,995)	Year 1	\$ 686,140	Year 1	\$ 360,504
Year 2	(\$ 3,428)	Year 2	\$ 1,146,510	Year 2	\$ 622,888
Year 3	\$ 22,365	Year 3	\$ 1,611,436	Year 3	\$ 887,855
Year 4	\$ 39,246	Year 4	\$ 1,926,629	Year 4	\$ 1,067,212
Year 5	\$ 47,078	Year 5	\$ 2,089,807	Year 5	\$ 1,159,654
Year 6	\$ 45,725	Year 6	\$ 2,098,668	Year 6	\$ 1,163,863
Year 7	\$ 44,322	Year 7	\$ 2,107,529	Year 7	\$ 1,168,051
Year 8	\$ 42,868	Year 8	\$ 2,116,392	Year 8	\$ 1,172,216
Year 9	\$ 41,362	Year 9	\$ 2,125,253	Year 9	\$ 1,176,357
Year 10	\$ 39,802	Year 10	\$ 2,134,113	Year 10	\$ 1,180,472
Year 11	\$ 38,187	Year 11	\$ 2,142,969	Year 11	\$ 1,184,560
Year 12	\$ 36,515	Year 12	\$ 2,151,821	Year 12	\$ 1,188,619
Year 13	\$ 34,784	Year 13	\$ 2,160,667	Year 13	\$ 1,192,649
Year 14	\$ 32,994	Year 14	\$ 2,169,505	Year 14	\$ 1,196,648
Year 15	\$ 31,141	Year 15	\$ 2,178,336	Year 15	\$ 1,200,614

<sup>1</sup> Scenario A examines the Net Present Value (NPV) break-even license fee rate--mathematically, the license fee rate that sets NPV to "0".

<sup>2</sup> Mathematically, the IRR is the rate that sets NPV to "0". Because Scenario A solves for the break-even license fee (NPV = "0"), the IRR is equivalent to the selected discount rate.

## Personal Statements

Study Group members were invited to submit brief 'personal statements' of their individual views on the process, issues, or outcomes related to this report. These personal statements were not edited or reviewed, nor do they necessarily reflect the beliefs or opinions of other Study Group members. They are attached here in their entirety.

Personal statement: David Itano

When I was invited to join this study group it took a while to make up my mind. I recognized it “made sense” to recruit me to the task since I know the local fisheries and formerly held the position of Recreational Fisheries Coordinator for NOAA’s Pacific Islands Regional Office. I hesitated to engage as I was not confident that my views would be fairly represented in the final product, whatever that might be. I finally agreed to take part in the group, going on the belief that it’s better to engage and have a voice in the process rather than let others speak for you.

I was beginning to regret my decision at the first meeting when draft materials, already well developed, were suggesting that the desired outcome from the “Group” would be to select and promote a single “Preferred Alternative” licensing system for Hawaii. The suggestion was to examine options and select the “best way forward” to be available to advise the legislature

Some of us argued that any suggestion of a “BEST” or “ONLY” way to proceed would doom the process from the start. This issue has been around a long time and that very TOP DOWN mentality was what had so alienated the fishing community that any possibility of rational discussion and debate was lost. I am pleased that our views were adopted and incorporated into this report.

Previous attempts to introduce a non-commercial saltwater accounting system failed due in part to a lack of information that was made available to the public, the fishing community and our legislators. Significantly, the State failed to conduct outreach, meetings and discussion with the public as part of a collective dialogue. The critical conversation with affective stakeholders never occurred. How rude and short sighted. Consider this as an information resource and the “homework” that wasn’t previously done.

This document is an attempt to address these information gaps and provide the community with the information and tools necessary to have an informed discussion on the pros and cons of a registry, permit or licensing system to account for non-commercial saltwater fishing activity in Hawaii. I hope you find it useful and informative.

Mahalo, David





November 25, 2016

**SUBJECT: STATEMENT REGARDING: A NON-COMMERCIAL FISHING REGISTRY.  
PERMIT AND LICENSE STUDY FOR THE STATE OF HAWAI'I: FINDINGS  
REPORT DECEMBER 2016**

Kua'āina Ulu 'Auamo (KUA) submits this statement on its representative's participation in "A Non-Commercial Fishing Registry. Permit and License Study for the State of Hawai'i: Findings Report, December 2016."

KUA works to empower communities to improve their quality of life through caring for their environmental heritage together; an activity commonly referred to as community-based natural resource management. We employ a community-driven approach that currently supports a network of more than 31 mālama 'āina community groups collectively referred to as E Alu Pū (move forward together), almost 40 fishpond projects and practitioners called the Hui Mālama Loko I'a, and a new and growing network of Limu practitioners (Limu Hui) all from across our state.

A primary function of KUA includes development of the 'auwai, a stream of resources, tools, bridges and networks that help to cultivate and take our communities' work to greater levels of collective impact. Research that helps to inform and improve community co-management efforts are one of the tools. The concept of non-commercial registry/permit/license (RPL) program is at its heart a centralized governance mechanism for managing fisheries. Though the bulk of our work is to encourage reasonable and responsible decentralization, especially in rural and Native Hawaiian communities-we also understand that an extreme view of either approach to governance can lead to dysfunction, abuse and the monopolization of power.

KUA was engaged in part to help provide feedback on the sentiments of and effects on rural and Native Hawaiian fishing communities and more importantly connect the facilitators to those in our networks from rural and Native Hawaiian communities who have an informed view on the subject matter.

As the study states this fact finding committee takes no opinion on the necessity or effectiveness of RPL programs. The study also acknowledges that deeper dialogue, broader outreach and input is necessary, a finding which KUA strongly agrees with.

Centralized and de-centralized approaches to governance can go hand in hand especially when the resources to do so are available. We also hope that beyond thinking about a program the need for our state to consider more resources for the mālama of Hawai'i beyond regulating fishing is not lost in the dialogue. This includes funding, people and the political will and capacity to care for and restore that which feeds us in mind, body and soul.

Pūpūkahi i holomua e ho'okanaka  
(Let's unite to better the human condition)

Kevin K.J. Chang  
Executive Director

Re: Study Group on the Feasibility of a Non-Commercial Marine Registry, Permit, or License System for Hawai'i

Hawai'i is the only coastal state in the US without a recreational or noncommercial marine fishing license or registry system. In my view, this places Hawai'i at a significant disadvantage in several critical ways. First, it creates significant data gaps that limit management effectiveness. Managers have little or incomplete information about the catch and fishing effort in state waters, which limits the effectiveness of management decisions. Put another way, you can't manage what you don't understand. Second, it results in missed opportunities for engagement and dialogue among fishers and managers. Fishers and managers across the state are seeking effective channels through which to engage in meaningful dialogue to design, test, and implement solutions for better fisheries management. Third, lacking a fee-based license results in missed opportunities to produce significant financial resources for fisheries management. The state investment in DLNR is extremely low at 1% of state funds, which ranked Hawai'i as the 50th state in terms of funding for fish and wildlife management in 1994. This hasn't changed much – in 2013 DLNR received less than 1.5% of the state's budget, a per capita investment lower than most states, including Iowa.

This report represents a collective approach to build a strong foundation (ho'okahua) for a non-commercial fisheries licensing, permit, or registration system. As the leader of a conservation non-profit group, I am acutely aware of the earlier controversies surrounding previous initiatives to explore a non-commercial license. I feel that these previous failed initiatives had at least two characteristics in common. First, they were not developed with a diverse set of partners at the table. Second, they did not carry a level of investment commensurate with the challenge of understanding the complexity of a license system and the pros and cons of what that would bring to Hawai'i.

To address these deficiencies, the CI Hawai'i team reached out to see if there was sufficient interest in exploring this topic among some of the leading voices in the fishing community. CI Hawai'i was blessed to be one of the founding partners in this initiative, joined by leadership in the Western Pacific Regional Fishery Management Council and the Harold K.L. Castle Foundation and with support from the Department of Land and Natural Resources to undertake the study. This was – by design – an uncommon alliance. We recruited other brave souls to form a study team, comprised of an incredible set of thought leaders, change-makers, and community advocates from the diverse constituencies across the state. This diverse coalition agreed with a shared objective that we were coming together to learn from one another – to go on a journey of discovery together. We had able guides in Peter Adler and Keith Mattson, expert facilitators. Leadership and staff from DLNR and the Office of Hawaiian Affairs served

as ex officio members, allowing them to participate fully in the learning process and discussions without committing to any specific finding or position of the group. It was a safe space for this community of practitioners to explore the issues, to challenge each other and our own beliefs, and to think deeply about what problems this management approach might solve.

Second, we were supported at the outset by an incredible set of institutions who believed in the initiative. This includes the leadership of the Harold K.L. Castle Foundation. Eric Co with the foundation was a principal architect of the process in its early stages and was key to the entire initiative. Two programs of the National Oceanic and Atmospheric Administration - the Coral Reef Conservation Program, and the Saltonstall-Kennedy program, also came to the fore to support this work. The program officers for both were instrumental in helping provide the key support for this initiative.

The report is not prescriptive – it does not recommend a preferred approach. Instead, we evaluated a vast and complicated landscape of issues surrounding a potential non-commercial marine fisheries licensing, permit, or registration system. In keeping with the thinking from Silicon Valley “moonshot” innovators, we attacked the hardest parts of the problem first. Our CI Hawai‘i team is proud to be part of this group and to have contributed to the knowledge gathered in this report. Having helped build this strong foundation, we now turn to the important work of supporting the conversation about what next steps will help ensure that Hawai‘i’s oceans continue to benefit our communities – now and into the future.

A handwritten signature in black ink, appearing to read "Jack Kittinger". The signature is fluid and cursive, with the first name "Jack" being more prominent than the last name "Kittinger".

Jack Kittinger, November 2016