

***“Ua koe ke kuleana o na kanaka”* (reserving the rights of native tenants):
Integrating *Kuleana* Rights and Land Trust Priorities in Hawai’i**

Jocelyn Garovoy¹

¹ J.D., University of California at Berkeley School of Law (Boalt Hall), 2004; M.A., Conservation Biology, University of Pennsylvania, 1999; B.A., Biology, University of Pennsylvania, 1999. The author may be reached at jgarovoy@cales.com. Many individuals helped inform the research and thought that formed this article. Their names and organizational affiliations appear in Appendix A. I extend sincere thanks to all for sharing their time and wisdom. Special thanks to Professor Andrea Peterson of Boalt Hall for her tireless editorial assistance. This project was made possible by the vision of Dale Bonar and Tom Pierce of the Maui Coastal Land Trust. It was funded in part by a grant from the Boalt Hall School of Law of the University of California at Berkeley, and the U.S Fish & Wildlife Service. Mahalo to Josh Stanbro at the Trust for Public Land in Honolulu for helping to bring me to this task. Personal thanks to Michael T. Herbert for listening to ideas and offering support throughout the development of this project. All errors and omissions are my own.

Contents

Introduction..... 3

I. Historic Background: *Kuleana* and Land Title in Hawai'i..... 5

II. Kuleana Rights..... 9

 A. Right of Reasonable Access..... 14

 B. Right to Agricultural Uses..... 18

 C. Gathering rights in ahupua'a..... 20

 D. Right to Single Family Dwelling..... 22

 E. Sufficient water for drinking, irrigation..... 24

 F. Fishing Rights in the *Kunahu*..... 26

III. Integrating *Kuleana* Rights and Land Trust Priorities..... 27

 A. Approaches for Fee Simple Acquisitions..... 29

 1. Fee Simple Ownership..... 29

 2. Status of Title..... 30

 3. If the kuleana is occupied..... 30

 4. If the kuleana has not been occupied in recent memory..... 31

 i. Status Quo..... 31

 ii. Locate the *kuleana* holders..... 32

 iii. Addressing Land Trust Funders' Requirements..... 32

 iv. Quieting Title..... 33

 a. Adverse Possession..... 35

 b. Partition Actions..... 36

 B. Approaches for Conservation Easements..... 38

 1. Consent of all landowners is required to validate conservation easements..... 39

 2. Include the Kuleana in the Easement or Exchange it for Another Parcel..... 40

IV. Proposals: Moving Forward..... 40

 A. Addressing uncertainty: Subsidized title research..... 40

 B. Water Distribution & Land trusts' kuleana water rights..... 42

 C. Strategic rezoning..... 43

Conclusion..... 45

Appendix A Individuals Interviewed..... 46

Appendix B The *Kuleana* Act of 1850..... 47

Appendix C Contemporary Legislative Sources of *Kuleana* Rights..... 49

Introduction

Conservation land trusts (hereinafter, “land trusts”) are non-profit organizations that work to conserve land through direct transactions, such as the purchase or acceptance of donations of fee simple title to land or conservation easements.² Land trusts serve broad public interests in open space and working landscape preservation, habitat conservation, archaeological or historic site preservation, and environmental education. In Hawai'i, land trusts are responsible to an even broader spectrum of constituents than their Mainland counterparts. They answer to dues-paying land trust members (both full-time and part-time residents of Hawaii from many cultural backgrounds), easement grantors (large ranches, resort corporations, domestic and foreign private landowners), and the diverse communities that surround or access protected landscapes, including native Hawaiians with and without ancestral ties to specific lands, local residents of non-native descent, tourists, and visitors. Addressing the interests of these myriad constituents can create legal and political complications for land trusts evaluating how best to proceed with inherently complex land transactions. When *kuleana* lands, which are parcels awarded in fee simple to native tenants under the Kuleana Act of 1850,³ enter the picture, the complexity increases, as land trusts struggle to determine their own legal rights in the land and the “right” political course of action.

When *kuleanas* exist within the boundaries of a land trust's acquisition, the potential exists for either productive collaboration or destructive conflict between land trusts and native Hawaiians. One likely scenario occurs where the land trust acquires the land surrounding *kuleanas* in fee simple absolute by a grant deed from the prior landowner, and simultaneously acquires title to *kuleanas* by a quit-claim deed. The land trust may have already learned, through a preliminary title report or other sources, that the title to the *kuleanas* is unclear because of conveyance of fractional interest to successive landowners over time. Often, somewhere in the chain of title, the title insurance company finds a break in the paper trail. The *kuleana* may have been co-owned by siblings who inherited it from their parent to who the original *kuleana* award was given. Sometimes, just one sibling later granted his/her fractional interest in the *kuleana* to a later buyer. That buyer acted as if he owned the land entirely, and the *kuleana* became superficially indistinguishable from the surrounding land. Over time, the other sibling's interest in the land was forgotten or lost. Subsequent purchase and

2 Konrad Liegel, Gene Duvernoy, Land Trusts: Shaping the Landscape of Our Nation, 17 Fall Nat. Resources & Env't 95 (2002).

3 An Act Confirming Certain Resolutions of the King and Privy Council, Passed on the 21st Day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands, and House Lots, and Certain Other Privileges. See Appendix B, *infra*.

sale agreements pass along the *kuleana* via a quitclaim deed, acknowledging that they do not have full title to sell, but will sell the subsequent buyer whatever interest they do have in the land. Fearing expensive litigation defending their insured, title insurance companies will decline to insure these portions of the property, leaving the land trust vulnerable to later claims made by descendants of the sibling whose claim to the land had been long dormant. Sometimes, *kuleana* are described as “floating” in the midst of a parcel. These “floating” *kuleana* have unsurveyed boundaries and a Land Commission Award number generally placing them generally within the boundaries of some larger property, but without a recorded precise location. Floating *kuleana* create additional uncertainty for a land trust approaching a potential conservation acquisition.

Where the land trust acquires a conservation easement as a donation, if that easement includes a *kuleana*, the land trust may learn that a similar fact situation exists, where the landowner has a valid fractional interest in the land, but may not have clear title to the *kuleana*. What should a land trust do? The answer will depend on several factors: the conservation value of the land in question, i.e. what sort of habitat does it contain, how rare are its flora and fauna, does the land trust have similar acquisitions already, or would this easement add a new kind of land to its “portfolio”? What is the land trust’s relationship to the easement donor? To the surrounding community? Would its presence be welcomed there or would acquiring the easement strain local political relationships with the neighbors? Is the easement located such that it might promote creation of a wildlife corridor or have other beneficial effects on neighboring parcels of land? In its consideration of these questions, it will serve the land trust to know the law of *kuleanas*, how this law may limit and expand land trusts’ rights with respect to the *kuleana* parcel, and how the *kuleana* may affect the surrounding land. The land trust tends to give special consideration to native Hawaiian rights, as these rights relate intimately to *kuleana* lands. In determining the best way to proceed in an acquisition situation involving *kuleanas*, each land trust may come to its own conclusions, based on mission statements, board members’ ideology, short term acquisition goals, and longer term strategies.

The purpose of this article is to identify the legal rights of *kuleana* holders, especially native Hawaiian *kuleana* owners, and consider how they interact with the general priorities of Hawai'i-based land trusts. The article advocates collaboration between these groups by suggesting ways that Hawai'i land trusts might integrate *kuleana* rights with their missions of acquiring title to or easements over lands of high conservation value. This article does not suggest that any one approach will fit every acquisition. Rather, Hawai'i land trusts will have to determine their approach

to *kuleana*-encumbered properties on a case-by-case basis. Native Hawaiians and entities organized around promoting native Hawaiian rights may find the article useful as a key to understanding the priorities of land trusts in Hawaii and the challenges they face in their efforts to *malama ka'aina* (care for the land) in their own way.

Part I of the article introduces the concept of *kuleana* land title through a discussion of the legal background and history of land division in Hawai'i. Part II describes the rights associated with *kuleana* lands, including those rights inherent in the land itself, and those rights enjoyed specifically by people with ancestral connections to *kuleana*. Part III describes the broad objectives and tools employed by Hawai'i-based land trusts to conserve land. Part IV addresses the complexity of the intersection of these two unique land claims, and offers suggestions as to how land trusts might integrate *kuleana* rights into their conservation goals without compromising their own missions of conserving habitat and natural resources. Part IV offers three proposals for non-traditional ways that land trusts might further engage the *kuleana* lands issue: OHA-subsidized title research; cooperative efforts with native Hawaiians challenging the current distribution of water rights; and strategic rezoning proposals.

I. Historic Background: *Kuleana* and Land Title in Hawai'i

The ancient Hawaiian land tenure system encouraged sufficiency within an *abupua'a*, the land division most commonly understood as a division of land running from the mountains, *mauka* to the sea, *makai*.⁴ The *abupua'a* supplied food and materials to the *maka'ainana* (commoner residents/tenants) who tended the land, as well as to the *konobiki* who administered the *abupua'a*, and the *ali'i nui* (chief), who was responsible for several *abupua'a*.⁵ This responsibility to provide for himself and the *ali'i* on a long-term basis generally compelled the *konobiki* toward sustainable management of both human and natural resources.⁶

The native Hawaiian land tenure system underwent rapid and dramatic changes between 1820 and 1850. Americans and Europeans seeking stable land title pressured the Hawaiian government toward a westernized system of private property to ensure their ability to hold long

4 A Dictionary of Hawaiian Legal Land-Terms, Paul F. Nahoa Lucas (Native Hawaiian Legal Corporation, 1995) at 61 (citing *Territory v. Bishop Trust Co., Ltd*, 41 Haw. 358,362 (1956)).

5 For a more complete history describing the native Hawaiian land tenure system before the Mahele, see, e.g. Mavian Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 Wash. L. Rev. 233, 237-244 (1989).

6 Id.

term leases and fee simple title to facilitate large scale agricultural ventures.⁷ Yielding to these pressures, between 1845 and 1848 King Kamehameha III divided up land among the Kingdom, high-ranking chiefs, and the territorial government, in what is known as *Ka Mabele* (literally, “The Division”).⁸

This process of dividing up lands to convey them in fee simple absolute began in 1845 with the establishment of the Board of Commissioners to Quiet Land Titles, referred to as the “Land Commission”.⁹ The statute establishing the Land Commission provided that five commissioners would be appointed by King Kamehameha III “for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this Act.”¹⁰ As its first task, the Land Commission defined seven principles to guide its decisions: the first five addressed the type of inquiries the Land Commission should make to examine land claims; the sixth addressed the matter of commutation to be paid to receive a Royal Patent that would verify the Land Commission award, and the seventh principle “emphatically declared that anyone not filing a claim with the Land Commission on or before February 14, 1848 forfeited his interest in the land to the government.”¹¹ By 1848, title to all the lands in Hawaii had been resolved: The 240 Konohiki were granted 1,619,000 acres (Konohiki Lands);¹² King Kamehameha was granted 984,000 acres (Crown Lands); and the Hawaiian government was granted 1,523,000 acres (Government Lands).¹³

7 From Mauka to Makai: The River of Justice Must Flow Freely – Report on the Reconciliation Process Between the Federal Government and Native Hawaiians 23, Department of Interior & Department of Justice, October 23, 2000, available at <http://www.doi.gov/nativeHawaiians> .

8 King Kamehameha I unified the Hawaiian Islands into one Hawaiian Kingdom in 1810. Under his reign, the choicest lands were held by him for his personal use, and the remainder of lands were distributed to his principal warrior chiefs who distributed their shares. Unlike prior leaders, Kamehameha I allowed these chiefs to retain their land and pass it to their heirs. Kamehameha II made no major changes, and allowed those chiefs who had inherited land under his father's rule to retain their land, reinforcing the expectation of hereditary land ownership. It was during the reign of Kamehameha III that the landholding chiefs and foreigners compelled the King to enact a series of laws creating a westernized system of land tenure. First came the 1839 Declaration of Rights, which limited the King's power. It stated: “Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by the express provision of the laws.” Lam, *supra* note 5, at 252-54. Then followed the 1840 Constitution, which stated that the land of the kingdom of Hawaii belonged to Kamehameha I, “but was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.” Id. at 254. The Land Commission began its work for the Kingdom between 1840 and 1846. Id.

9 The Great Mahele Hawaii's Land Division of 1848 8, Jon J. Chinen, (University of Hawai'i Press, 1958)

10 Id.[9] The first five members of the Land Commission were William Richards, John Ricord, (then Attorney General of the Kingdom), Zorobabela Kaauwai, James Young Kaneohoa, and John Ii. Id. at 9.

11 Id [9]. at 12. The Principles were later codified at 2 Revised Laws of Hawai'i 2121 (1925).

12 Konohiki means land agent appointed by the ali'i (chief). Later in the statutes, konohiki came to mean landlord or chief. A Dictionary of Hawaiian Legal Land Terms, *supra* note 4, at 57.

13 Chinen, *supra* note 9, at 29.

All of these lands were granted subject to the rights of native tenants. Deeds executed to the *konohiki* conveying land contained the phrase “*na koe ke kuleana o na kanaka*,” or “reserving the rights of all native tenants,” in continuation of the reserved tenancies which characterized the traditional Hawaiian land tenure system.¹⁴ The *Kuleana Act* of 1850 authorized the Land Commission to award fee simple titles to all native tenants who had occupied and improved any portions of Crown, Government, or *Konohiki* Lands.¹⁵ To receive their *kuleana* award, the Land Commission required native tenants to prove that they had occupied, improved or cultivated the claimed lands. The Commission also required claimed lands to be surveyed before they would issue an award for the land. The *kuleana* award could include land actually cultivated and a house lot of not more than a quarter acre.¹⁶ Upon receipt of a Land Commission award, the *maka 'ainana* could receive Royal Patents verifying their title.¹⁷

Most *maka'ainana* never claimed their *kuleanas*. Of the 29,211 adult males in Hawai'i in 1850 eligible to make land claims, only 7,500¹⁸ *maka'ainana* actually received *kuleana* awards. Their awards account for a combined 28,600 acres as *kuleana* lands – less than one percent of the Kingdom's lands.¹⁹ These numbers are commonly attributed to several factors. Land ownership was not a part of Hawaiian tradition, so Hawaiian people had no social context for it, and associated privileges and responsibilities of land ownership were unknown and misunderstood. For generations the Hawaiian people had lived and worked in a system of communal rights to upland and forest produce, coastal fishing rights, and shared rights in land.²⁰ Moreover, claims could only be advanced for lands that were being, and had been, actively cultivated. Tenants cultivating parcels in remote rural areas may not have received adequate notice of the existence of the *Kuleana Act* and the rights and responsibilities it conferred. Moreover, if they heard about the opportunity to claim *kuleana* title too late, the four-year time window allotted by the Land Commission was inflexible. The requirement to pay for a survey may have discouraged many tenants from claiming their cultivated lands, and the surveys that were done at the time of the *Mahele* to identify *kuleana* lands were notoriously

14 Access Rights 213, Paul Lucas in *Native Hawaiian Rights Handbook*, Melody Kapilialoha MacKenzie, ed. (Native Hawaiian Legal Corporation & Office of Hawaiian Affairs 1991)

15 Chinen, *supra* note 9, at 29.

16 MacKenzie *supra* note 14.

17 In the Districts of Honolulu, Lahaina, and Hilo, native tenants claiming house lots were required to pay a commutation fee to receive their Land Commission Awards. No other areas required payment of this commutation by the *maka'ainana* applicants. See Chinen, *supra* note 9 at 29.

18 MacKenzie *supra* note 14, at 8.

19 From Mauka to Makai, *supra* note 7, at 24.

20 John H. Wise, “The History of Land Ownership in Hawaii,” in *Ancient Hawaiian Civilization: A Series of Lectures Delivered at the Kamehameha Schools*, (Mutual Publishing, 1933, 1999) pp. 83-84.

inconsistent, with crude surveying methods, and boundaries often defined in terms of old landmarks that have worn away over time.²¹ Many tenants may have feared of the *ali'i*s (chiefs') reactions for asserting a personal claim to land in the *ahupua'a*, and so avoided claiming their *kuleana* even though they wished to remain on the land.²² Not understanding the change to come, many newly designated *kuleana* owners who overcame all of these obstacles and successfully claimed *kuleana* quickly leased their land to corporations that were developing plantations in the area. After a period of years, the *kuleana* owner might return, seeking to occupy the *kuleana* again, and find formerly static and reliable landmarks gone. In this way, many *kuleanas* were lost.²³

The fact that most tenants never claimed their share of the available land, combined with an 1850 Act enabling aliens to acquire Hawaiian land in fee simple²⁴ and the auctioning off of Government Lands between 1850 and 1860,²⁵ resulted in a net movement of land from native Hawaiian to foreign control.²⁶ The passage of the Adverse Possession Law in 1870 furthered this transfer of land from Hawaiian to foreign control.²⁷ The new law enabled individuals occupying land continuously for at least twenty years to take title to the land if a court determined that their occupancy had been visible, notorious, continuous, exclusive, and hostile, and that they had paid property taxes on the land.²⁸ The statutory period required to successfully advance an adverse possession claim was reduced from twenty to ten years in 1898, making it even easier to assert such a claim.²⁹ Native Hawaiians did not use this new law to remain on the land and assert their own adverse possession claims. By 1890, the census showed that the transfer of land out of Hawaiian

21 Wise, *supra* note 20, at 85.

22 From Mauka to Makai, *supra* note 7, at 24.

23 "Ditches had been filled in, dikes had been leveled off, hedges had been cut down...He might go to the plantation office to see what could be done. Here he might find his name and a record of a lease on 'a kuleana in the ili of Wai Momona, Hanalei.' That was all. Where was the ili(an 'ili is a subdivision of land within an ahupua'a)...? In the early days every man, woman, and child for a dozen miles about could have told just where it was but now no one knew....The owner might have gone to law to recover his holding. It would have been a long, expensive process to prove ownership of a kuleana originally so poorly defined and now lost in the great fields of the plantation. And if the owner could have afforded this, if he had gone to law and won his case, he would have found himself in possession of separate pieces of land surrounded by [sugar] cane or rice, cut off from the life of his people. Faced with this, many kuleana owners lost their property." Wise, *supra* note 20, at 86.

24 An Act to abolish the disabilities of aliens to acquire and convey lands in fee simple, passed July 10, 1850, Penal Code of the Hawaiian Kingdom, 1850.

25 From Mauka to Makai, *supra* note 7, at 25.

26 *Id.* [25]

27 *Id.* [25].

28 *Id.* [25]

29 The adverse possession statute remained at ten years until 1973, when it reverted to twenty years. *Id.* *See also* MacKenzie, *supra* note 14 at 116.

hands was nearly complete: native Hawaiian lands represented just 257,457 acres, where non-Hawaiians controlled 1,052,492 acres.³⁰

Given these large-scale land transfers, many native Hawaiians, as well as some non-native supporters of native Hawaiians feel that the current distribution of land is an unjust result of early commercial land-grabs and U.S. federal imperialism.³¹ Adding another dimension to this perception of injury are native Hawaiian spiritual beliefs in the inherent sacredness of the natural world, and in a human obligation to care for the land.³² Hawaii land trusts should keep this context in mind when deciding whether and how to acquire properties containing *kuleanas*.

II. Kuleana Rights

Contemporary sources of law, including the Hawai'i Revised Statutes, the Hawai'i State Constitution, and case law interpreting these laws protect six (6) distinct rights attached to the *kuleana*, and/or native Hawaiians with ancestral connections to the *kuleana*.

These rights are:

- (1) reasonable access to the land-locked *kuleana* from major thoroughfares;
- (2) agricultural uses, such as taro cultivation;
- (3) traditional gathering rights in and around the *abupua'a*;
- (4) a house lot not larger than 1/4 acre;
- (5) sufficient water for drinking and irrigation from nearby streams, including traditionally established waterways such as *'auwai*; and

30 From Mauka to Makai, supra note 7, at 25.

31 In 1892, European and American residents of Hawaii, many of whom were involved in the sugar industry, formed a "Committee on Public Safety" in response to the McKinley Tariff Act of 1891, which provided a subsidy to American sugar growers and put Hawaiian growers at an economic disadvantage. The Committee sought to gain control over the Hawaiian government to ultimately overthrow it and have Hawaii annexed to the United States. Then President Harrison favored the idea of annexation of Hawaii, and in January of 1893 U.S. Minister John Stevens ordered the U.S. Marine Corps to Honolulu to position themselves near Kingdom of Hawaii government buildings. The Committee took control of the government building the following day, declared a Provisional government, and declared an end to the Hawaiian Monarchy. Queen Liliuokalani did not recognize the Provisional Government, and maintained that she was the constitutional leader of the Islands. The Provisional government forwarded an annexation treaty to Washington within 1 month of seizing control. Although incoming President Grover Cleveland expressed public disapproval for the methods used to "annex" Hawaii and attempted to restore the Queen to power, he ultimately did not garner support for his proposition in Congress, and did not wish to declare war on the American citizens running the Provisional government. From Mauka to Makai, supra note 7, at 28-29.

32 In Hawaiian tradition, all beings – both living and non-living possess a sentient spirit or akua, which may take many forms. Hawaiian religion calls for people to ask permission of the spirit and say a prayer before taking any such natural resource for personal use. "Because of their belief that sentience permeated the natural world, the Hawaiians responded to nature with a loving disposition seeking to care for the land, as seen in the often heard phrases of malama 'aina (care for the land)...and aloha 'aina (love for the land)... Aloha 'aina then has become a rallying call for the Hawaiian people to preserve one of the most sacred resources any people can lay claim to, their land." Scott G. Fisher, Ke Ala A Kiki I Noa: The Path to Liberation, Final M.A. Thesis, Earlham School of Religion, December 1998 (on file with author).

(6) fishing rights in the *kunalu* (beach to reef).³³

Hawaii courts have interpreted some *kuleana* rights as associated with native Hawaiian ancestral connection to specific lands, other rights as running with the *kuleana* land itself, and others as ambiguous. These distinctions will be important to land trusts deciding how to plan for properties that contain *kuleanas* within their boundaries.³⁴

There are five sources of *Kuleana* rights:

- Article XII, section 7 of the Hawai'i Constitution;
- *Hawai'i Revised Statutes section 1-1*³⁵;
- *Hawai'i Revised Statutes section 7-1*;
- Precedent-setting case law that has applied these primary sources to actual scenarios that have tested and refined specific elements of these laws; and
- The *Kuleana Act*.³⁶

Each of these sources of law provides distinct protections of *kuleana* rights, ranging from specific enumerated lists of those activities which should be conducted customarily on a *kuleana*, to broad statements protecting rights of native Hawaiians, who may or may not be the present owners of a given *kuleana*. Each source of law is discussed in turn, below.

Article XII, section 7 of the Hawai'i State Constitution reads:

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.

This section of the State Constitution was added in 1978, after "serious conflict among the drafters regarding the broad scope of rights granted."³⁷ The debate surrounding the amendment indicated that legislators were not confident that they knew fully what rights they were protecting, and so failed to include any language in the amendment or elsewhere that would clarify the scope or

³³ See *Haalea v. Montgomery*, 2 Haw. 62 (1858).

³⁴ In making determinations about prospective acquisitions, Hawaii Land trusts may be inclined to favor those rights that are native Hawaiian rights over those that extend to any person holding title to a *kuleana* lot.

³⁵ *Id.* at 221.

³⁶ The *Kuleana Act* was repealed except for the portion which remains as Hawai'i Revised Statutes section 7-1. Gina M. Watumull, *Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights*, 16 Hawai'i L. Rev. 207, 218 (1994).

³⁷ *Id.* at 224.

meaning of the enumerated rights.³⁸ This uncertainty is characteristic of *kuleana* rights. Whatever the protected rights may be, this particular section of the Hawaii Constitution limits their applicability to *ahupua'a* tenants of native Hawaiian ancestry.

Hawai'i Revised Statutes section 1-1 is another broad protection of specifically Hawaiian rights. It states:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i, in all cases, except as...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 the State.³⁹

While this section has rarely been cited as a source of native tenant rights, it does create an important exception from English common law rules adopted by the State for "Hawaiian usage".⁴⁰ English common law is the source of the contemporary Western concept of private property right to exclude, and the language of this section implies that these rules may be subject to modifications based on traditional Hawaiian usage. The Hawaii Supreme Court has held that "the precise nature and scope of the rights retained by §1-1 would, of course, depend on the particular circumstances of each case."⁴¹ This implies that §1-1 may offer broad or scant protection of native Hawaiian rights, as the courts see fit in any given case.

More specific to *kuleana* lands than to native Hawaiians, Hawai'i Revised Statutes section 7-1, enumerates the rights attached to the land that are outlined in the *Kuleana Act* of 1850:

Where the landlords have obtained, or may hereafter obtain, allodial⁴² 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 ki leaf from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.⁴³

The language in Section 7-1 derives from the *Kuleana Act*, originally applicable at the time of its drafting to native tenants who claimed their cultivated parcels. However, the term "people" in the statute has been understood to mean the owners of the *kuleana* within the *ahupua'a*, regardless of

³⁸ Id. at 227.

³⁹ Hawai'i Revised Statutes §1-1 (1985).

⁴⁰ See Watamull, *supra* note 36, at 222-23.

⁴¹ Kalipi v. Hawaiian Trust Co., et al, 66 Haw. 1, 12, 656 P. 2d 745, 752 (1982).

⁴² "Allodial" means freehold, as opposed to feudal title.

ancestry, (but not applicable to the public at large).⁴⁴ One issue of debate has been whether the list of rights in the statute is exhaustive. The current interpretation is that the list is not an enumeration of all surviving rights, but rather an exposition of some of the rights associated with *kuleana* ownership.⁴⁵ In *Kalipi v. Hawaiian Trust Co.*, the Hawaii Supreme Court decided which rights apply where native Hawaiians have continued to practice cultural rites not enumerated in §7-1: “Where these practices have, without harm to anyone, been continued...the reference to Hawaiian usage in §1-1 insures their continuance for so long as no actual harm is done thereby.”⁴⁶ This indicates that customary rights listed in the *Kuleana* Act, but not enumerated in §7-1, or even traditional practices nowhere listed but still practiced, may be protected by Hawaiian courts. Another issue posed by §7-1 is how broadly applicable it is to non-native Hawaiians. Section 7-1 has been understood as providing rights that are appurtenant to the *kuleana* parcel itself, are not severable, and cannot be abandoned or forfeited.⁴⁷

King Kamehameha III may have intended to reserve the rights of native tenants when he divided the Kingdom lands through the *Mabele*, but the courts have assigned much more weight to the work of the Land Commission than to any intent of the King when determining who retains *kuleana* rights in land. Where native tenants failed to claim their *kuleanas* at the Land Commission and yet continued to occupy the land, the Court has held that their continuing occupancy does not establish the basis for a successful adverse possession claim.⁴⁸ In *Dowsett v. Maukeala*, native tenants argued that by continuing their occupancy of their old tenancy in the *abupua'a* after the Mahele, and after title to the *abupua'a* and other *kuleanas* claimed therein had been awarded by the Land Commission, they had adversely possessed their parcel. The Hawaii Supreme Court rejected this theory, and ruled that such occupancy of land not properly claimed or awarded even after the

43 Hawai'i Revised Statutes, § 7-1 (1985).

44 Robert Bruce Graham, Jr. “Traditional Hawaiian Land Law,” in *Hawaii Real Estate Law Manual*, vol. I, (Hawaii Institute for Continuing Legal Education, 1997) pp. 6-12 – 6-14.

45 *Id.* [44], citing *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

46 66 Haw. 1, 9, 656 P.2d 745, 751 (1982).

47 Graham, *supra* note 44, at 6-13, citing *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982). A recent federal district court decision suggests that §7-1 may not be so broadly applicable to non-natives outside the kuleana rights context: “[d]ue to the fact that by the clear language of the statute and Hawaii caselaw interpreting it...non-residents of the State of Hawaii, are not entitled to the rights afforded by Section 7-1...given the historical context in which the statute came into existence, the Court finds that the rights secured by H.R.S. Section 7-1 were not intended to inure to those who, at the time access is sought, reside thousands of miles outside the State of Hawaii.” *Daly v. Harris*, 215 F. Supp. 2d 1098, 1119-1121 (2002).

48 *Dowsett v. Maukeala*, 10 Haw. 166 (1895).

passage of the “extremely liberal” Kuleana Act, must be considered unlawful.⁴⁹ The court held that the tenancy under the Hawaiian land tenure system had been permissive, and that only by failing to pay rent did their possession become adverse. The lawsuit was filed ten years after the tenants ceased paying rent, and it interrupted the statutory period for adverse possession. More recently, in *Pai ‘Ohana v. United States*, native Hawaiians occupying 5 acres inside the boundaries of a National Historic Park brought an action to quiet title to the parcel and establish their exclusive right of occupancy therein, though their ancestors had not claimed a *kuleana*.⁵⁰ Plaintiffs advanced an argument to expand the existing doctrine of native Hawaiian tenant’s rights to include those tenants who had not claimed and received *kuleana* awards. They attempted to distinguish their situation from *Dowsett*, arguing that *Dowsett* “was decided during an era when the Hawaii courts were bent upon conforming Hawaiian law to western property concepts...it should therefore be reviewed in a different light today.”⁵¹ The federal district court noted that even though the plaintiffs stated they were not claiming a right of fee simple ownership, that their claim of a right of perpetual use and occupancy was the functional equivalent of fee simple title.⁵² The court held that the Kuleana Act had provided the plaintiffs’ ancestors their opportunity to lay claim to the land. That they had not done so foreclosed plaintiffs’ claims to adverse possessory rights to the parcel under Hawaii state law.⁵³ These cases demonstrate that the courts have not expanded the concept of title beyond those provisions made explicit by the Kuleana Act in 1850.⁵⁴

49 Id. [48] The court in explained its reasoning as follows: " If the hoaina (tenant), so-called, without paper title by kuleana, remains on the land after his permissive occupancy has ceased either by notice to quit or by his own act of refusing to attorn, he cannot be considered as being a 'lawful occupier' and entitled to the specific rights of the people above set forth. It seems to us that these specific rights on an ahupua'a must be confined to those who have lawful right to reside there, whether upon kuleanas or by the will of the owner. To say that the old tenancy by will of the chief or konohiki became an adverse holding as soon as the chief or konohiki received his title to the land [in the Mahele], and this without notice on the tenant's part that he held henceforth adversely, would give such person folding thereafter for twenty years, to all intents and purposes, as perfect a title to the land as if he had applied for and received a fee simple title therefor, and thus be saved the expense of procuring such title. The law did not intend thus to favor those who slept upon their rights." Id. at 170-71.

50 *Pai ‘Ohana v. United States*, 875 F. Supp. 680 (1995).

51 Id. [50] at 691.

52 *Id.* at 692-693.

53 Id. [50] at 689, 695. The court remarked further that plaintiffs’ “interpretation of the law would create chaos in land ownership and occupancy throughout the State of Hawaii by reversing almost 150 years of settled Hawaii land law and jeopardizing over a century of conveyances and titles. Ironically, those who would be most in jeopardy are the individual native Hawaiians whose ancestors perfected their titles under the Kuleana Act. Anyone could claim their ancestors were ‘tenants’ upon virtually any property within the State of Hawaii...it would be virtually impossible to verify or disprove these ‘tenant’ interests since by their nature they are ‘unrecorded’ and unperfected...this type of chaos was precisely the type of problem that the Kingdom of Hawaii sought to avoid by enacting the Kuleana Act of 1850.” Id. at 694, fn 32. The court seems to overlook the fact that although not all ancient tenancies were recorded in land registries, and false claims to ancestral land could surface, native Hawaiians have detailed oral histories and genealogical chants that could help prevent the “chaos” the court seems to fear. Perhaps if more attorneys and judges were proficient in the Hawaiian

A. Right of Reasonable Access

Taken together, the cases and statutes addressing the right of access to *kuleana* lands show that *kuleana* lands generally have a right of reasonable access to and from major thoroughfares where it can be shown that the access route has been used customarily, or where it can be demonstrated that the road or footpath is a necessary means of accessing the land. *Kuleana* are often land-locked, surrounded by land owned entirely by other parties and may be without direct access to thoroughfares. Under western property law, landlocked parcels might have implied access easements under two distinct theories of implied easement. Both theories, necessity and prior existing use, require that the landlocked parcel be created by some prior division of the estate that resulted in the dominant estate becoming cut off from the road.⁵⁵ Presumably, to apply these easement rules to *kuleana* parcels, one must consider the *Mabele* itself, which drew boundary lines around properties and set the stage for the Kuleana Act, to be the equivalent of the severance of an estate under western property law.

Early Hawai'i Supreme Court cases held that *kuleana* holders were entitled to access their lots on the basis of necessity or prior existing use. In *Kalaukoa v. Keawe*⁵⁶, the Court upheld the width of an access easement to a landlocked parcel (not specified as a *kuleana*). The court ordered that the easement be maintained for use by a carriage rather than, as the plaintiff would have preferred, a smaller footpath or horse path. The path had been made wide enough to accommodate a carriage

language, this oral tradition could be helpful as evidence, creating a record useful for distinguishing lawful from unlawful occupancies.

⁵⁴ While the Court has not granted title or exclusive possessory rights to native Hawaiians in these cases, in the last decade it has expanded gathering rights for native Hawaiians who have demonstrated established traditional religious uses of undeveloped property whose title may be held by non-native landowners. See PASH discussion, *infra* note 87 and surrounding text.

⁵⁵ At common law, easements can be implied on the basis of necessity. To prove such an easement, a party must show an unity of ownership in the dominant and servient estates; that the roadway is a necessity, not just a convenience, and that the necessity existed at the time of the severance of the two parcels. 17 Am. Jur. Easements §43,49, p.953,963. Usually an implied easement on the basis of necessity exists only so long as the necessity exists. An easement implied on the basis of a prior existing use must show that the use was effective at the time the parcels were separated and the one became landlocked, and that the easement is reasonably necessary. Easements may be granted by prescription, as well. Here, the requirements echo the elements required to prove adverse possession, use of the easement must be open, notorious, continuous, adverse, and under claim of right. The location of the easement was considered fixed at common law, but the 3rd Restatement of Property §4.8 comment f may change this rule, as it grants the servient estate owner (the property across which the easement runs) the right to change the location of the easement if the change does not significantly lessen the utility of the easement, increase the burden on the owner of the easement, or frustrate the purpose for which the easement was created. This new formulation of the rule has been applied in *Levis v. Young*, 92 NY 2d 443 705 N.E.2d 649 (1998), *Soderberg v. Weisel*, 455 Pa. Super. 158, 687 A.2d 839 (1997), *Note: The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 Harv. L. Rev. 1693 (1996). 56 9 Haw. 191 (1893).

nearly twenty years prior to the litigation.⁵⁷ In holding for the landlocked defendant, the Court cited western property law precedent from the common law jurisdictions of Massachusetts, New York, New Hampshire, Illinois, and Connecticut.⁵⁸

One year later, in *Henry v. Ablo*⁵⁹, the Court applied this common law right of access to a *kuleana* owner. In *Henry*, the defendant had erected a fence to prevent the plaintiff from using the usual access route to his *kuleana*. Although the case related to *kuleana* access, the Court did not invoke the unique rights established by the Kuleana Act. The Supreme Court held for the plaintiff on a necessity theory: “this road is a matter of necessity to the plaintiff. He must have a way to and from his own land. It is a right which he acquired with the land...we do not regard it necessary to consider the question of prescriptive right, as this is a case of a way of necessity.”⁶⁰ It was not until many years later, after the Kuleana Act had been substantially codified as HRS §7-1, that the Court relied on the separate rights appurtenant to *kuleana* lands to enforce access rights.

In *Santos v. Perreird*⁶¹, plaintiffs owned land that was not a *kuleana* and sought an access easement to their land across neighboring property. They argued that they were entitled to a right-of-way based on reasonable necessity under HRS §7-1.⁶² The court rejected this argument, holding that HRS §7-1 is only applicable to ancient tenancies and *kuleanas*, not generally to any landlocked property in Hawaii: “[I]n our view, HRS §7-1(1976) provides the key to unlock some, but not all landlocked property.”⁶³ In *Rogers v. Pedro*⁶⁴, the Hawaii Intermediate Court of Appeals held that *kuleana* owners had a right of access on the basis of necessity and “based also on the reservation of the right to a right-of-way to native tenants...”⁶⁵ The court stated that to prove an easement by

57 The Court failed to distinguish whether it was granting the access easement on the basis of necessity alone, or also on the basis of prior existing use, citing several reasons why the easement should be maintained in its current location: “[T]he existence of the way is a matter of necessity and the way in question had been used for many years prior to the conveyance of the lands and was apparent and of a continuous nature, and has been used for nearly twenty years after the severance of the lands and has ever since about 1860 been of the present width and most of the time traveled over with carriages, and is a continuation of another private way of about the same width which leads from the public highway to the boundary of the plaintiff’s land, and the opening through that boundary which is a stone wall is and ever since the wall was built many years ago has been of the same width as the way, and a carriage way. If not absolutely necessary, is at least appropriate and natural for the use of the dominant tenement as a foot or horse way would be, the conclusion is almost irresistible that the intention was to grant or reserve a way of the width which has so long been in actual use.” Id. [56]

58 Id. [56].

59 9 Haw. 490 (1894).

60 Id. [59]

61 2 Haw. App. 387, 633 P.2d 1118 (1981)

62 Id.[61] at 390, 1122.

63 Id.[61] at FN7.

64 3 Haw. App. 136; 642 P.2d 549 (1982)

65 Id. [64] at 551.

necessity under HRS §7-1, “it must be clearly established that the landlocked parcel is an ancient tenancy or kuleana whose origin is traceable to the Great Mahele.”⁶⁶ These cases establish an important distinction between *kuleanas* and other landlocked parcels. While many landlocked parcels in Hawaii may have a right of access based on common law rights of easements implied on the basis of necessity or on the basis of a prior existing use, *kuleana* parcels may also rely on the unique access right provided specifically to *kuleana* lands by HRS §7-1⁶⁷.

In *Palama v Sheehan*,⁶⁸ landowners brought a quiet title action and *kuleana* owners responded by claiming a right of way across the land based on ancient Hawaiian rights of necessity. They offered testimony from parents, grandparents, and great-grandparents that they had used the path across the adjoining property to access their taro patches. The court held that, based on this evidence, *kuleana* holders had a right to pass through the adjoining property. The right of way included vehicular traffic, but only because the landowners had purchased their land from someone who had widened the trail and built a road which was in existence for 28 years prior to the landowners’ quiet title action. The court determined this meant that the vehicular use did not impose an unreasonable burden on the land, and found no grounds to restrict the road to an equestrian or pedestrian path.⁶⁹

In *Hai'ku Planters Ass'n v Lono*⁷⁰, the court held that *kuleana* holders with an easement across adjacent property could park cars only where it could be shown that historically parking had occurred along the ingress/egress route. Finding no evidence that vehicles had been parked there historically, the court held that the easement included the right to drive in and out, but did not include a right to park vehicles along the access easement road.⁷¹ By an agreement between the parties, alternate parking was made available on an adjoining lot.

The Hawai'i Supreme Court recently revisited the issue of *kuleana* access in *Bremer v. Weeks*.⁷² In that case, plaintiff *kuleana* owner claimed a right of way over the *makai* (seaward) portion of a trail parcel owned by the defendant based on ancient or historical use under HRS §7-1 and an easement based on necessity. The *kuleana* also had access by a *mauka* (toward the mountain) trail granted by

66 642 P. 2d 549, 551-52.

67 “In Hawaii, there is a special right-of-way unique to ancient tenancies and kuleanas (citing *Rogers v. Pedro*). In order to establish such an easement by necessity, the origin of the ancient tenancy must be traceable to the Great Mahele. Such an easement by necessity confers a right of way to the native tenants’ allodial lands.” 28A Corpus Juris Secundum Easements §103, Easements by Necessity Unique to Ancient Tenancies and Kuleanas.

68 440 P. 2d 95 (1968)

69 Id. [68]. at 99.

70 56 Haw. 96, 529 P.2d 1 (1974)

71 Id.

contractual agreement to prior owners of the *kuleana*. In its §7-1 analysis, the Court noted that “[no] Hawaii cases specifically set out the parameters for defining what is sufficient to constitute ‘ancient’ or ‘historic’ use for purposes of establishing a claim to a right of way under HRS §7-1.”⁷³ With respect to the issue of necessity, the Court noted that the alternate *mauka* access route (which the plaintiff did not prefer to use) was terminable, as it was established by a 1985 agreement that created a license, not an easement. A license is an interest in land that entitles its owner to use of land possessed by another, but subject to the will of the possessor, and thus are not incident to the land.⁷⁴ The Court held that “a claim of easement by necessity will not be defeated on the basis that an alternate route to the claimant’s land exists where the claimant does not have a legally enforceable right to use the alternate route.”⁷⁵ The Court vacated the circuit court’s order granting the defendant partial summary judgement and remanded the case for a determination of the merits of plaintiff’s claims of easement by reason of ancient or historic use under §7-1 and easement by reason of necessity under §7-1. The court’s findings on the merits on these issues of *kuleana* access will be important for Hawaii land trusts (as well as other Hawaii landowners) with *kuleanas* within the boundaries of acquired lands.

Vehicular access by landlocked *kuleana* owners across a land trust’s conservation easements or fully owned land is likely to be problematic, considering common land trust priorities of preserving fast disappearing wild and scenic areas, and providing habitat for threatened and endangered species. Maintaining roadless areas on properties of high conservation value may be a matter of public policy, and Hawai’i land trusts are likely to champion this argument in the face of road construction or continued vehicle use across an established route to access a *kuleana*. Growing development pressures and habitat loss, particularly in coastal areas, along with escalating numbers of endangered native species highlight the problems associated with vehicular traffic across otherwise undeveloped land.

On the other hand, a common notion in western property law is that “all property should and must have access, as a matter of public policy. An owner of property should be able to use his or her property to the full extent for which it is zoned, and he or she can do that only if the property has access.”⁷⁶ There is, however, one case that supports what is likely to be the land trusts’ preferred

⁷² 85 P.3d 150; 2004 Haw. LEXIS 101 (2004).

⁷³ *Id.* [72] at 171, 67.

⁷⁴ 43 Restatement of Property §512 (1944); *Bremer*, 85 P. 3d at 175, 2004 Haw. LEXIS 101, 81.

⁷⁵ *Bremer*, *supra* note [72], at 174, 75.

⁷⁶ Hawaii Real Estate Manual at 9-24.

approach to the issue. In *Collins v. Goetsch*⁷⁷, the Hawai'i Supreme Court cited an Oregon case, *Swaggerty v. Peterson*⁷⁸, noting that “free and unrestricted use of property is favored only to the extent of applicable State land use and County zoning requirements.”⁷⁹ The *Swaggerty* opinion noted that traditional land use rules favored “untrammelled land use”⁸⁰ and that “[p]ublic policy...no longer favors untrammelled land use, but requires careful public regulation of all of the land within the state.”⁸¹ Native Hawaiian attorneys and non-native real estate attorneys interviewed for this article both acknowledged the incongruity between a land trust’s habitat protection and restoration goals and construction of roads or houses on *kuleana* lands in sensitive habitat areas. In *Haiku v. Lono*, where vehicular access to a *kuleana* was allowed, the court noted that the burden posed by the vehicle was not unreasonable.⁸² A Hawaii conservation land trust might be able to distinguish the *Haiku v. Lono* decision based on the fact that vehicular access could create an unreasonable burden on the land trust where land is being restored to bring back wildlife habitat and reestablish native species. These access and ownership conflicts could create tension between land trusts and native Hawaiians, but need not be an insurmountable obstacle, as recovering native species populations is often a shared interest of native Hawaiians and land trusts. Considering the uncertainty of outcome and costs, both economic and political, of engaging in litigation over *kuleana* access, where access issues emerge in sensitive habitat areas, land trusts should negotiate with the *kuleana* holders to limit vehicular traffic or find alternate access routes.

B. Right to Agricultural Uses

Kuleana lots have cultivation rights associated with them, by definition. They are lands that the *maka 'ainana* were cultivating at the time of the *Mabele* – known to be fertile, and therefore valuable under the Hawaiian land tenure system⁸³. Section 6 of the *Kuleana* Act states: “In granting to the people their cultivated grounds, or *kalo* lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands,” indicating that taro cultivation was explicitly contemplated by the Act. Considering this plain statement of a cultivation right in the statute and the broad protections offered by HRS §1-1 and Hawai'i State Constitution Article XII

77 59 Haw. 481, 485 (1978).

78 572 P. 2d 1309 (Or. 1977).

79 59. Haw. 481, 485, n. 2.

80 572 P. 2d 1309.

81 *Id.*

82 1 Haw. App. 263; 618 P. 2d 312 (1980).

83 See Chinen, *supra* note 9, at 31.

Section 7, a *kuleana* holder asserting a right to cultivate his/her *kuleana* would have a compelling argument.

For land trusts considering how taro, sweet potato, or other crop cultivation on a *kuleana* fits within a conservation plan for the surrounding property, the answer depends on the type of land in question and the surrounding conservation priorities. In many instances, taro or other crop cultivation, if done in an environmentally sensitive manner, may complement the land trust's goals and intended uses of the land. Considerations for land trusts include: water usage, pesticide use, pests attracted to the site, impacts associated with increased access to the area by the farmers, such as potential for runoff and soil erosion, impacts on endangered species or habitat restoration, and trampling restored or re-vegetated areas. Land trusts should also consider the ecosystem benefits of taro cultivation, as it can provide habitat for native or endangered species and can return water to the aquifer beneath where it grows. If no one claims the *kuleana*, and a title search reveals that the land trust or private landowner through whom the land trust holds a conservation easement over the *kuleana* has good, insurable title to *kuleana* parcels, it may consider inviting interested people to work the land in accordance with existing conservation plans.⁸⁴

A *kuleana* holder might argue for a right to pasture animals on the plot. While in theory the *kuleana* holder could use his/her property for ranching, *kuleana* parcels tend to be an acre or less in size, too small an area for ranching purposes. It would be unlawful for any grazing animals to wander out from the *kuleana* to enter the surrounding land trust property. The Hawai'i Supreme Court has addressed the question of animal grazing in the *ahupua'a* beyond the boundaries of the *kuleana*. In *Oni vs. Meeke*⁸⁵, a *kuleana* holder sued to recover the value of two horses taken by the owner of the surrounding land. Oni claimed that it was his customary right as a tenant of the *ahupua'a* to graze his horses on the surrounding *konohiki* lands. "The court found that the *Mabele* and Kuleana Act had separated out interests in land such that horses and other animals could no longer graze, with statutory blessing, on *konohiki* lands, any more than 'cultivation on unoccupied parts' could continue."⁸⁶ If the land trust has an agreement with a landowner who runs a ranch and owns land surrounding and including *kuleana* parcels, for instance, and the conservation easement includes grazing in its terms, then the specified grazing in and around the *kuleana* would be allowed. The *Oni* rule is only applicable where the *kuleana* and surrounding land are owned by different parties, and it

⁸⁴ See section III (B), *infra*.

⁸⁵ 2 Haw. 87 (1858).

⁸⁶ Maivan Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 Wash. L. Rev. 233, 270 (1989).

is meant to prevent grazing animals from wandering onto land surrounding the *kuleana*. This rule reinforces the fact that the *ahupua'a* surrounding the *kuleana* is in many cases, no longer communally owned.⁸⁷

C. Gathering rights in the ahupua'a

Lands held by Hawai'i land trusts, whether they are *kuleanas* or other types of lands, held in fee simple absolute or through a conservation easement, may be open to reasonable gathering by native Hawaiians for religious or cultural purposes that are established as traditional and customary and where the lands are not characterized as "fully developed".⁸⁸ In *State v. Hanapi*, the Hawai'i Supreme Court clarified its earlier holdings on native Hawaiian gathering rights (i.e. PASH⁸⁹) noting that "fully developed" residential property is not open to the exercise of traditional and customary native Hawaiian gathering rights or religious practices.⁹⁰ In that opinion, the Court also noted that: "property used for residential purposes [is] an example of 'fully developed' property. There may be other examples of 'fully developed' property as well where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights."⁹¹ Land trusts tend not to hold lands that are 'fully developed' in the residential sense expressed by the Court in *Hanapi*. This being the case, many land trust holdings are likely to be attractive settings for traditional Hawaiian gathering and religious practices. Land trusts and Hawaiians seeking to exercise gathering rights may negotiate agreements where sensitive habitat and endangered species are present in an area sought to be used for gathering purposes.

The law governing gathering rights has evolved over the past three decades. In *Kalipi v. Hawaiian Trust Co.*,⁹² Kalipi sought to exercise traditional gathering rights in two *ahupua'a* on Moloka'i, one in which he owned a taro patch, and the other a houselot. He resided in the houselot

⁸⁷ Parts of the decision in *Oni v. Meek* have since been overruled. The court in *Oni* inferred the loss of customary rights where the *kuleana* had been acquired in fee simple, and also held that Section 7 of the *Kuleana Act*, now HRS §7-1, listed the only traditional rights still available to *kuleana* awardees. These two propositions are incorrect. In *Kalipi v. Hawaiian Trust Co.* 66 Haw. 1; 656 P.2d 745(1982), and again in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, (a.k.a. the PASH decision), 79 Haw.425; 903 P.2d 1246 (1995), the Court has held that traditional Hawaiian gathering rights still exist, and that rights beyond those enumerated in HRS §7-1 are protected for native Hawaiians. The amended State Constitution Article XII section 7 also offers protection beyond HRS §7-1.

⁸⁸ *State of Hawai'i v. Alapai Hanapi*, 89 Haw. 177, 187 (1998). The Hawai'i Supreme Court held in *Hanapi* that "if property is deemed 'fully developed' i.e. lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property. In accordance with PASH however, we reserve the question as to the status of native Hawaiian rights on property that is 'less than fully developed.'" *Id.*

⁸⁹ See *infra* note 98 and surrounding text.

⁹⁰ *Id.*

⁹¹ *Id.* at FN 10.

periodically, but not at the time of the case. Defendant landowners had denied Kalipi access to gather with his family on the privately owned property in one of the *ahupua'a* where he was not residing at the time of the case. The Hawai'i Supreme Court determined that HRS §7-1 was intended to protect gathering rights of actual occupants of the *ahupua'a*, and that because he was not living there, he could not exercise those gathering rights.⁹³ The court applied a balancing test “whereby the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area, and second, by balancing the respective interests of the practitioner and the harm to the landowner.”⁹⁴

Ten years later, in *Pele Defense Fund v. Paty*⁹⁵, plaintiffs Pele Defense Fund (PDF), a non-profit corporation formed to perpetuate the Hawaiian religion, claimed that as a result of a state transfer of 27,800 acres of ceded lands in exchange for 25,800 acres of Campbell Estate land (to facilitate the development of geothermal energy on the ceded lands), they had been denied access for gathering and religious purposes. PDF members claimed they had used the area for customary gathering and religious purposes. The court extended a right of access to the property even though the PDF members were not residents of the *ahupua'a*, because unlike in *Kalipi*, where the plaintiff based his claim on land ownership, PDF based their claim on the exercise of traditional practice of Hawaiian customs.⁹⁶ The court held that “native Hawaiian rights protected by article XII, §7 may extend beyond the *ahupua'a* in which a native Hawaiian resides *where such rights have been customarily and traditionally exercised in this manner.*”⁹⁷ For Hawai'i Land trusts, this holding implies that gathering rights can be exercised only where they have been customarily exercised.

In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*⁹⁸, plaintiff organization Public Access Shoreline Hawai'i (PASH) and native Hawaiian Angel Pilago opposed the application of a Japanese-owned development corporation, Nansay, for a county Special Management Area (SMA) Use Permit to develop a resort on the Big Island in Kohanaiki. The Hawai'i County Planning Commission held a public hearing, but refused to hold a contested case hearing for PASH and Pilago, because it perceived their interests as no different from those of the general public, and a public hearing had already taken place. The county issued the building permit, and PASH

92 Kalipi, *supra* note 87.

93 *Id.* at 9; 656 P.2d at 750.

94 D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*. 20 Haw. L. Rev. 321, 338 (1998).

95 73 Haw. 578; 837 P.2d 1247 (1992).

96 David Forman & Steven M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 Hawai'i Bar Journal 13 1,7.

97 *Pele Defense Fund v. Paty*, 73 Haw. 578, 620; 837 P.2d 1247, 1272 (1992) (emphasis added).

challenged the county's ruling. Ultimately, the Hawai'i Supreme Court held that (1) PASH had standing (2) a contested case hearing should be held (3) that native Hawaiians retain rights to pursue traditional and customary activities, as land patents in Hawai'i confirm only a limited property interest. In examining HRS §1-1, the court defined "traditional practices" as those established by November 25, 1892, and applied a vague three-part test for establishing what is meant by "custom": (1) custom must be consistent when measured against other customs; (2) a practice must be certain in an objective sense; (3) a traditional use must be exercised in a reasonable manner, meaning that there is no legal reason against the custom. The court also reaffirmed *Pele's* holding that customary rights could be exercised beyond the ahupua'a of tenancy.⁹⁹

Taken together, these cases indicate that native Hawaiians may exercise traditional and customary gathering rights on land trust lands that are not "fully developed," and that a court would base its decision on whether the proposed gathering activities impose a reasonable impact on the landowner.¹⁰⁰ Opinions may differ as to what level of gathering is reasonable, and land trusts should be aware that they may not have full control over gathering practices on their properties or on land affected by conservation easements they have acquired. Private agreements between Hawaiians with established traditional practices and the incoming land trust may be the best solution to increase certainty and reduce potential tensions between land trusts and Hawaiians seeking to use open lands for customary religious purposes.

D. Right to Single Family Dwelling

The right to a house is explicit in the *Kuleana Act*:

"In granting to the people, their house lots in fee-simple, such as are separate and distinct from their cultivated lands, the amount of land in each of said house lots shall not exceed one quarter of an acre."

While the right to build a house on one's *kuleana* is not specifically enumerated anywhere in the extant HRS sections nor in the State Constitution, it remains a right generally associated with *kuleana* lots. House construction would, in most cases, be regulated by applicable zoning laws.¹⁰¹ One exception appears in the Maui County code, where *kuleana* are considered to be nonconforming uses

⁹⁸ [PASH Sup Ct citation]

⁹⁹ Sproat, *supra* note 94, 340-342.

¹⁰⁰ Interview with David Forman, attorney, Allston Hunt Floyd & Ing, Honolulu July 2, 2003. Notes on file with the author.

¹⁰¹ All of Hawaii's lands are zoned either Urban, Rural, Agricultural, or Conservation, with additional restrictions on shoreline development Special Management Areas. Open Space districts exist at the county level. For a more complete discussion of zoning laws in Hawaii, see David L. Callies, *Preserving Paradise: Why Regulation Won't Work*, 11-28 (University of Hawai'i Press, Honolulu 1994).

in the Agricultural district and may be exempt from the density restrictions. Maui County Code §19.30A.100 (A) states:

“If provided by Hawai'i Revised Statutes, for lands legally defined and recognized as *kuleana* or similar type of land ownership, such as land commission awards or royal patents, the district standards of section 19.30A.030, and the density restriction of subsection 19.30A.050.B.1, shall not apply”.¹⁰²

In the Conservation District, *kuleana* come under the jurisdiction of the state Department of Land and Natural Resources. The *kuleana* lots in areas zoned for Conservation have an associated right to build a house if it can be shown that the parcel was customarily used as a house lot. Hawai'i Revised Statutes §183C-5 states:

“Any land identified as a *kuleana* may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, the construction of a single family residence. Any structures may be subject to conditions to ensure they are consistent with the surrounding environment.”

Land trusts can determine whether a *kuleana* was customarily used as a house lot by engaging in title searches and obtaining relevant land records from the Bureau of Conveyances in Honolulu. As described, the test for what constitutes custom is vague, and likely to be determined on a case-by-case basis.¹⁰³ Land trusts might look to sources such as native testimony, archaeological records, and oral history as retold by the descendants of those who lived prior to 1892 to determine the likelihood that a particular *kuleana* lot was customarily used as a house site. DLNR has jurisdiction and administers permits for *kuleana* in the Conservation district, and the statute delegating this control contemplates the use of the *kuleana* in the context of the use of surrounding land.¹⁰⁴ If land trusts and *kuleana* owners seeking to build houses cannot negotiate some agreement, land trusts may submit comments to DLNR regarding a house plan and access route as to their consistency with conservation management plans.

Unless and until anyone comes forward claiming ownership of the *kuleana*, land trusts may prefer not to seek out these potential builders. Instead, they might communicate conservation goals and objectives to the surrounding community and thereby encourage community support and

¹⁰² The “district standards” in 1930A.030 provide the following standards for facilities, and structures in the Agricultural District: a minimum lot size of 2 acres; minimum lot width 200 feet; minimum yard setbacks, front yards 25 feet, side and rear yards, 15 feet; maximum developable area, 10% of total lot area; maximum height limit of 30 feet except for chimneys, antennae, etc; maximum wall height not to exceed 4 feet; maximum number of lots to be based on gross area of the subject lot. The “density restrictions” in 19.30A.050.B.1 provide for accessory uses on agricultural lots including 2 farm dwellings per lot, one of which is not to exceed 1000 square feet. According to this section of the County code, these standards and restrictions do not apply to *kuleana* lots in the Agricultural District.

¹⁰³ Robert Bruce Graham, Jr. Traditional Hawaiian Land Law, in Hawai'i Real Estate Law Manual, supra note 136, at 6-11.

involvement in stewardship plans. With community-wide cooperation, individuals might choose not to engage in construction projects that would be inconsistent with the conservation plans. By involving local school groups in environmental education projects, such as oral history projects about historical uses of the area, land trusts can engage the community and garner support for conservation visions of the property in question.¹⁰⁵ This kind of community engagement may have a deterrent effect on anyone asserting a right to build a structure within the boundaries of a land trust holding. On the other hand, land and affordable housing are scarce commodities in Hawai'i and an agreement may be out of reach. To avoid an impasse, before acquiring land surrounding or including a *kuleana*, land trusts can thoroughly research the likelihood of construction on existing undeveloped houselots, and decide accordingly if the property is a proper acquisition.

E. Sufficient water for drinking, irrigation

As is stated in HRS §7-1 and the *Kuleana* Act of 1850, *kuleana* lands have specific water rights associated with them for irrigation and domestic uses:

“[T]he people shall also have a right to drinking water, and running water...The springs of water, running water...shall be free to all, on lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.”

HRS §174C-101(c) provides that *kuleana* lands have water rights even without water permits:

“The appurtenant water rights of *kuleana* and taro lands...shall not be diminished or extinguished by failure to apply for or to receive a permit under this chapter.”

The Hawai'i State Water Code contains provisions that call for a balancing of priorities between traditional uses, instream flow, and development. The purpose of the code is simultaneously to conserve the resource and to obtain maximum beneficial uses of the State's waters. Adequate provision is to be made for a variety of beneficial instream uses, including native Hawaiian traditions and practices.¹⁰⁶

It is worthwhile for land trusts to consider the larger context of water laws in Hawaii before making a decision to acquire land or conservation easements. There are three main types of water rights at common law in Hawai'i: (1) appurtenant, referring to water rights associated with the land parcel at the time of the *Mabele*; (2) riparian, water flowing to lands adjacent to streams; and (3)

104 HRS §183C-5.

105 Interview with Paulo Fujishiro, July 29, 2003. Notes on File with author

106 Douglas MacDougal, Private Hopes and Public Values in the “Reasonable Beneficial Use” of Hawai'i's Water: Is Balance Possible?, 18 U. Haw. L. Rev. 1, 36 (1996).

correlative or groundwater rights. *Kuleana* parcels have both appurtenant and riparian rights associated with them, and where a Land trust holds title to *kuleana* lands, it may exercise these rights.

Appurtenant water rights are defined as “rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land” and are “incidents of land ownership”.¹⁰⁷ These rights may only be used in connection with the particular parcel of land to which the right appertains, but not for diversion or transport out of the watershed.¹⁰⁸ Most water rights established under this system apply to existing or former areas of wetland taro cultivation. Appurtenant rights are a concept borrowed from English common law and have been applied in Hawai'i in the *McBryde*¹⁰⁹ and *Reppun*¹¹⁰ cases, both landmark water law cases describing the extent to which water in Hawai'i is legally attached to the watershed where it originates. The *McBryde* case stands for the proposition that water may not be diverted out of the watershed.¹¹¹ In *McBryde*, the court held that (1) HRS §7-1 imposed the riparian or natural flow doctrine on Hawai'i, (2) that riparian water rights pertain only to lands adjoining a natural watercourse, and (3) that appurtenant rights may only be used in connection to the particular parcel with which they are associated. In *Reppun*, the court went a step further by holding that (1) a deed that purported to sever water rights from lands was ineffective as to the parties whose rights had been severed, and (2) a deed that attempted to reserve appurtenant water rights had the effect of extinguishing them for both parties.¹¹²

Most recently, in *In re Water Use Permit Applications*, (the *Waiahole* decision)¹¹³, the Hawai'i Supreme Court held that “the Public Trust Doctrine creates a dual mandate for the State, requiring it to balance resource protection against maximum reasonable and beneficial use of water.”¹¹⁴ The court maintained that while the public trust may have to accommodate off-stream diversions to accommodate private development, “any balancing of public and private uses [must] begin with a

107 *Reppun v. Board of Water Supply*, 65 Haw. 531; 656 P.2d 57 (1982).

108 Elizabeth Ann Ho-oipo Kala'ena'auao Pa Martin, David Lynn Martin, David Campbell Penn, Joyce E. McCarty, *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U.Haw. L. Rev. 71, 168 (1996).

109 *McBryde Sugar Co. v. Robinson*, 54 Haw. 174; 504 P. 2d 1330, appealed upon rehearing,, 55 Haw. 260; 517 P. 2d 26 1973.

110 *Reppun v. Board of Water Supply*, 65 Haw. 531; 656 P. 2d 57 1982.

111 Keala C. Ede, *He Kanawai Pono No Ka Wai, A Just Law for Water; The Application and Implications of the Public Trust Doctrine in In Re Water Use Permit Applications*, 29 Ecology L. Q. 283, 290 2002.

112 The court stated that “the rule posited in *McBryde* prevents the effective severance or transfer of appurtenant water rights...consistent with the general rule that appurtenant easements attach to the land to be benefited and cannot exist or be utilized apart from the dominant estate. ALI Restat. Property §487, comment b.” *Reppun*, 65 Haw. 531, 656 P.2d 57, 71 (1982).

113 9 P. 3d 409, Haw. 2000

presumption in favor of public use, access, and enjoyment.”¹¹⁵ This holding implies that a court might favor land trust uses over other private water uses when applying its balancing test, as generally, conservation land trusts aim to protect natural resources for the good of all.

As private landowners working in the public interest, land trusts occupy a unique position with respect to water law in Hawai'i. Judging from the cases described here, and the general purpose and intent of the State Water Code, land trusts may be ideal recipients of scarce water in the eyes of the law. They are private landowners or hold conservation easements through private landowners who can assert certain water rights; they may allow public access to their land holdings¹¹⁶; they serve broad public trust goals; as owners/easement holders of lands adjacent to streams, they may have riparian rights, and if they have acquired title to *kuleana* parcels, they may have established appurtenant water rights as well. As discussed in Section IV below, Hawai'i land trusts could benefit from strategic partnerships designed to assert these water rights to improve instream flow and restore aquifers.

F. Fishing Rights in the *Kunalu*

Kuleana lands and surrounding *Konohiki* lands have associated fishing rights in the *kunalu* (beach to reef) area of the *abupua'a* where they are located. Section 388 of the Civil Code of the Hawaiian Kingdom, provided:

"The Konohikis shall be considered in law to hold said private fisheries for the equal use of themselves, and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their Konohikis subject to the restriction imposed by law."¹¹⁷

The Hawai'i Supreme Court has held that tenants of an *abupua'a* have “a right to fish in the sea appurtenant to the land as an incident of his tenancy.”¹¹⁸ Tenants also have a right to sell fish caught by them in the exercise of these fishing rights, so long as their fishing does not reduce the *konohiki's* share of fish.¹¹⁹ While a tenant may have formed agreements relinquishing his personal fishing rights, the tenant's descendants living in the *abupua'a* still retain those fishing rights, as they are an incident of occupancy in the *abupua'a*.¹²⁰ For land trusts, this *kuleana* right to fish in the area from

114 Ede, supra note 111 at 296.

115 Waiahole, 9 P. 3d 409, 454 as cited in Ede, supra note 74 at 297.

¹¹⁶ Conservation easements are not required to allow public access to meet the requirements of the IRS conservation purposes test, I.R.C. §170 (h)(4)(A)(i)-(iv).

117 Hatton v. Piopio, 6 Haw. 334 (1882); see also Haalea v. Montgomery, 2 Haw. 62 (1858).

118 Hatton v. Piopio, 6 Haw. 334 (1882)

119 Id.

120 Damon v. Tsutsui, 31 Haw 678 (1932).

the beach to the reef is tempered by the right of the surrounding landowner not to have his “share of fish” interfered with. Where land trusts are the surrounding landowner akin to the *konobiki*, they may assert a right not to have their “share of fish” interfered with and may accordingly monitor fishing activity, and encourage voluntary compliance with State fishing rules and guidelines in order to improve the condition of marine fish populations.

III. Integrating *Kuleana* Rights and Land Trust Priorities

This section explores the tools available to Hawai'i Land trusts working to integrate *kuleana* rights with their own conservation priorities. Land trusts' objectives are distinct from those of the average private landowner in Hawai'i. Land trusts are not generally interested in selling land once they acquire it. The easements they hold are designed to carry on “in perpetuity.” However, like other private landowners, Hawai'i land trusts do exercise their right to exclude people from their property, especially where intended uses of the land conflict with conservation goals or restoration plans for the property. The land trust will have different options available to it for addressing *kuleana* rights depending on whether it holds the land in fee simple¹²¹ or owns a conservation easement on the land.¹²²

To purchase land, land trusts generally rely on funding from foundations, county and state governments, private individual donations, charitable corporate grants, membership fees, federal matching grants. Land trusts may also receive land as a gift through planned giving bequests or donations from land-rich individuals or corporations. Individuals give gifts of land for a variety of reasons, ranging from concern for the environment, to relief from stewardship responsibilities, and to reduce income and estate taxes.

Land trusts have enjoyed increasing popularity in recent years. According to data collected by the Land Trust Alliance, the umbrella organization for the nation's local, state, and regional land trusts, in 1980 there were 431 local, state, and regional land trusts. By the end of 2000, that number had grown to 1,263.¹²³ The growth of this manner of land conservation is apparent not only in the number of land trusts, but also in the number of acres of land protected through their work. In 1980, there were 128,001 acres protected by conservation easements held by local, state, and regional land trusts. By 2000, that number had grown to almost 2.6 million acres.¹²⁴ The current political

¹²¹ Discussion in Section III.B.

¹²² Discussed in Section III.C.

¹²³ Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach, 31 Ecology Law Quarterly ____ (2004) in press, citing www.lta.org.

¹²⁴ Id. [123].

climate in many states as well as at the national level is adverse to increases in government regulation of private land. Conservation easements, the most frequently used tool by local, state, and regional land trusts, provide a solution by offering a financial incentive, tax benefits, in exchange for the donation of a conservation easement requiring the landowner to relinquish certain development and use rights on the donated portion, in perpetuity. The conservation easement has enjoyed increasing bipartisan support as a conservation alternative that respects the rights of landowners.¹²⁵ Private land trusts, like those emerging in Hawai'i, have been heralded as “the most promising candidate for a truly voluntary, compensated, and private approach to land conservation.”¹²⁶ Hawai'i is poised to benefit directly from the growth of the land trust movement. Without the cooperation of *kuleana* owners, and, in particular, native Hawaiian interests that define so much of property law in Hawai'i, land trusts face a grim future. With cooperative efforts, though, these groups, with their varied constituents and spheres of influence throughout the Islands, could affect sweeping change and help balance the economic development of Hawai'i with a proper emphasis on protecting its natural cultural and ecological beauty.

In many instances, *kuleanas* may be used by the owner in ways consistent with conservation management plans. The potential for trouble arises when *kuleana* owners with or without ancestral ties to the *kuleana* may wish to use the land in ways perceived by the land trust as inconsistent with its preservation goals. In the following sections, I address specific techniques available to land trusts to limit controversy when *kuleana* owners or claimants assert the rights described above. Before explicating the legal remedies available to land trusts, it is essential to point out that out of respect for native Hawaiian culture, land trusts may seek to avoid approaching any perceived land conflict in an adversarial manner that could lead the parties into litigation.

Traditionally, Hawaiian families sought to resolve conflict through a ritualized process called *ho'oponopono*, or setting things right. The process rests on the idea that negative relationships are destructive for both the party who harbors ill feelings and the party who receives them.¹²⁷ The party who harbors the ill feelings is thought to suffer retributive comeback or *ho'i ho'i*, beginning a

¹²⁵ Though the land trust movement is gaining in popularity, it is not without critics. Some cite to the lack of public input into which lands, and what types of lands are conserved. The lands may not be the same large tracts preserved in National Parks, for instance, and many of the lands protected by land trusts are not open to public recreation. Leigh Raymond, Sally K. Fairfax, The “Shift to Privatization” in Land Conservation: A Cautionary Essay, 42 Nat. Resources J. 599, 621 (S2002).

¹²⁶ Leigh Raymond, Sally K. Fairfax, The “Shift to Privatization” in Land Conservation: A Cautionary Essay, 42 Nat. Resources J. 599, 621 (S2002).

¹²⁷ Fisher, *supra* note 32, at 86.

destructive web that can ensnare a large group of people if not properly addressed.¹²⁸ This family dispute resolution process may not be transferable outside the family unit, but its principles of honesty and resolution and a willingness to heal the conflict are instructive. In the PASH decision, which allowed for continued traditional Hawaiian gathering rights on “less than fully developed” land, the Hawaii Supreme Court nodded to the *aloha* spirit:

“Although this premise [of fee ownership limited by cultural rights] clearly conflicts with common understandings of property and could theoretically lead to disruption, the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances”¹²⁹

In making such a statement, the Court justifies its ruling by drawing from native Hawaiian culture as well as law.¹³⁰ Hawai'i based land trusts may follow the Court's lead in considering how to deal with *kuleana* lands that appear to interfere with land trust acquisition processes. I advocate a balanced approach, where land trusts maintain awareness of the legal remedies available (discussed below), and simultaneously work to arrive at agreements that, to the extent possible, do not violate native Hawaiian cultural norms.

A. Approaches for Fee Simple Acquisitions

1. Fee Simple Ownership

Land trusts hold fee simple title to lands which they purchase or receive as gifts. Fee simple ownership confers the right to possess and use the property, the right to sell it or give it away, and the right to devise it by will or leave it to heirs. Fee simple absolute ownership indicates that no other party has any presently identifiable legal right to obtain ownership of the property.¹³¹ In Hawai'i, no title is entirely free of encumbrances owing to the nature of the land division and

128 Id. [127]. In the process, the group selects an elder to arbitrate, and a date for the ho'oponopono to occur. The process begins with an opening prayer to the guiding ancestors to help resolve the dispute. It then requires a complete statement of the nature of the problem from both perspectives; it includes a discussion phase that uncovers the various levels of hostility, and offers an opportunity for anyone aggrieved by the problem to come forward and speak. If discussion gets too heated, the arbiter may call for a period of silence. Each party must submit to scrutiny and questions requiring absolute honesty. The final phase is the mihi process, or forgiveness, which includes a sincere confession of wrongdoing and seeking of forgiveness. Any restitution required is then dealt with. In the closing phase, the arbiter describes and assesses what has taken place, sums up the strength of group bonds, and requires the parties never to raise the issue again. The ho'oponopono will not be declared complete until it is clear that no further issues remain. Once it is done, the parties close with a prayer and share a meal to which both have contributed, providing physical sustenance, as well as an opportunity for psychological and spiritual recovery. Id. at 87-91.

129 903 P.2d 1246, 1250 (1995) as cited in M. Casey Jarman, Robert R.M. Vernick, *Beyond the Courts of the Conqueror: Balancing Private and Cultural Property Rights Under Hawai'i Law* 5 Scholar 201, 209-10 (2003).

130 Jarman, *supra* note 129 at 210.

131 Joseph W. Singer, *Property Law: Rules, Policies, and Practices*, 2nd Ed., 538 (Aspen Law & Business 1997).

historic claims to land that are still in effect, as well as State rights to subsurface minerals. Even so, ownership of the majority interest in a given property is often colloquially referred to as fee simple ownership to distinguish ownership from a lease agreement, conservation easement, or other more limited interest in the property.

2. Status of Title

As with any major real estate transaction, Hawaii land trusts obtain full title reports prior to acquiring land, as this is the most efficient way to determine which portions of the property have clear title, which have clouded title or breaks in the chain of title, and which are insurable by a title insurance policy. Title insurance companies in Hawaii can refuse to insure a parcel because the chain of title is broken. Many *kuleana* lands have broken title, where the record of conveyance from one owner to the next over time is incomplete. This can happen in several ways. For example, an owner may die without leaving a will or without clearly devising the parcel to his/her devisees, who later convey it to another party, assuming it was theirs to convey. Breaks in the chain of title also appear where someone who inherits a fractional interest, i.e. one of several siblings, conveys a full interest in the title to a purchaser (e.g. a plantation) at a later date without any record indicating that the other siblings had relinquished their interest(s). Such titles are considered clouded because those siblings and their heirs may still have a demonstrable valid interest in the land. While in many cases these lost heirs to the *kuleana* have not paid property taxes for decades, they may still have valid claims to their fractional interests in the property.

Over time, the landowner who has title to the land surrounding the *kuleana* often sells the whole parcel by a grant deed to the portion with clear title, and a quitclaim deed to the *kuleanas*. Title insurance companies, who otherwise defend against competing claims to property they insure, consider this cloud of uncertainty to be too risky and therefore may not insure *kuleanas*. The *kuleanas* will appear as Schedule C exceptions in the preliminary title report, identified by their Land Commission Award number – the same number assigned to the *kuleana* when it was awarded after the *Mabele*.

3. If the kuleana is occupied

Land trusts may acquire property that surrounds occupied *kuleana* parcels. The optimal scenario in this fact pattern is for the land trust to communicate its plans for the surrounding property to the occupants of the *kuleana*, specifically explaining the nature of the organization, and negotiating any access issues or other *kuleana* rights that may conflict with the land trust's

management plan. Land trusts may elect to discuss with the occupants the advantages of establishing a conservation easement across their *kuleana* to limit future development to the property in exchange for a tax deduction. This is most likely to work well where the *kuleana* is being used for agricultural purposes. Land trusts may also offer to buy the underlying land and lease it to the occupants, but depending on the occupant's ties to the land, such an arrangement may be infeasible.

C. If the kuleana has not been occupied in recent memory

i. Status Quo

One common scenario occurs when *kuleana* parcels are unoccupied and have been effectively incorporated into the surrounding land for many years, as sometimes evidenced by quitclaim deeds assigning uncertain interests in the *kuleana* to subsequent owners. In this scenario, land trusts have several options. Most common, and perhaps the most practical approach for many landowners in Hawai'i, including land trusts, is to maintain the status quo: proceed with the purchase or gift acceptance and perform requisite due diligence to close the deal, but pursue no legal action. Optimally, land trusts would learn the title history of the parcel, obtain a full title report and copies of all associated documentation to anticipate any claims to *kuleana* that may arise later.

Documentation includes anything related to the transfer of title to the property and all parcels contained therein since the *Mabele*, such as deeds written in Hawaiian or in English and related documents from the Bureau of Conveyances in Honolulu. It may include property tax records, birth, death, and marriage certificates of individuals who held title to the property over time, notes on genealogies of families who owned the property, available surveys on the metes and bounds of *kuleanas*, and the main parcel, and native testimony on the historic uses of the property.

Land trusts may also seek strategic partnerships with community organizations and individuals who would be interested in carrying out environmental or cultural restoration projects on the property. Making good use of the land with the support of community and educational programs may help insure against claimants emerging later asserting a right to build on a *kuleana* lot in a manner inconsistent with the stewardship plans for the property. Developing the land trust's projects and interests in the property in this way does not legally diminish the existing *kuleana* rights. Rather, it sets up a situation where claimants might be less likely to assert rights to build houses in the midst of, or drive vehicles over land managed for conservation. Agricultural uses and select other uses may still be complementary, and land trusts and *kuleana* owners may agree to alternative management plans.

ii. Locate the *kuleana* holders

Another option where the *kuleana* has been unoccupied for many years is for the land trust to undertake its own title research, to make efforts to find and contact the people named by the title documents as potential owners, or their heirs. Often, there are many descendants to find, depending on how long ago the break in the chain of title occurred, and the effort to contact people may be costly, including travel to Honolulu to search Land Conveyance records, running ads in Honolulu and Neighbor Island newspapers, searching multiple sources for contact information, and delivering notices. By contacting these individuals, the land trust risks alerting a potential claimant whose idea of how to use and enjoy his/her newly discovered property does not complement the land trust's stewardship plans. Also, there is the related risk of inciting disagreements among heirs that could require the land trust to buy the contested lot from the family members, or to pay for attorneys to represent the land trust's interests in negotiations or litigation. Finally, the land trust risks becoming a defendant to quiet title or partition actions should the newly alerted *kuleana* holder decide to make such a legal claim to the parcel. Any of these outcomes could be damaging to the land trust.

The benefits of doing this extra work to track down potential owners are that the land trust could just as well emerge with new allies in its stewardship plans, and could fulfill a sense of moral obligation by offering Hawaiians, displaced from their *kuleana* by the course of events surrounding the *Mabele*, the opportunity to reconnect with ancestral family lands. Such reconnaissance and explicit promotion of native Hawaiian land rights is not currently a part of most land trusts' missions. Discussions among board and staff of land trusts to determine the mission of the land trust with respect to native Hawaiian land rights are likely to be difficult; even so, land trust board and staff could benefit from clarifying these policies. Any examination of this Hawaiian land rights issue is likely to prompt an examination of the makeup of the board of directors and staff of Hawaii land trusts. As in other areas of conservation, inclusiveness and awareness of environmental justice issues are worthy goals befitting land trusts, as they occupy a unique position regarding land control in Hawaii.

iii. Addressing Land Trust Funders' Requirements

When deciding how best to approach *kuleana* land purchases or gift acceptances, Hawai'i Land trusts must consider the requirements of government agencies or programs cooperating to finance the transaction or restoration of the property. Basic funding requirements concerning demonstration of land ownership are not so simple for Hawaii-based land trusts. For example, the Wetlands Reserve Program (WRP) within the U.S. Department of Agriculture (USDA) offers

funding for wetland restoration on agricultural lands throughout the United States. The program requires that USDA be granted a conservation easement across the portion of the property on which it is funding wetland restoration.¹³² As a condition of the WRP easement, the property owner must demonstrate clear or insurable title to the portion of the land to which restoration funds are directed.¹³³ If there are *kuleana* located precisely or “floating”¹³⁴ in the wetland area, WRP perceives a problem. It may be possible to exclude the *kuleana* from the WRP easement, but this approach risks excluding portions of the property ideally targeted by the restoration project.¹³⁵ The determination as to whether the *kuleana* are located where they will affect wetland restoration is made by Department field biologists. For Hawai'i, the biologist working with USDA's Natural Resource Conservation Service (NRCS) at the time of this writing is familiar with land ownership issues in Hawai'i. Although some of the terms of the WRP funding requirement are inflexible, the NRCS biologist may be able to work cooperatively with land trusts to design appropriate easements.

iv. Quieting Title

Another way for land trusts to approach *kuleana* that have been unoccupied and where surrounding landowners have essentially incorporated the *kuleana* parcel into their land in spite of their status as fractional owners, is to attempt to quiet title to the *kuleana*, or require the previous landowner to quiet title as a precondition of sale. This approach is feasible where the *kuleanas* have been unclaimed for the statutory period to allow for an adverse possession claim (20 years), or where multiple owners of the *kuleana* have not agreed how to use or divide the property among themselves. Given these fact scenarios, title can be quieted in two ways: an action to quiet title on the basis of adverse possession or a an action to quiet title by partition.¹³⁶ These claims may be

132 The regulations state that land is eligible for enrollment in the WRP if the USDA determines that: (1) the land maximizes wildlife benefits and wetland values and functions and (2) the likelihood of successful restoration merits inclusion in the Program. Lands that may be included are: (1) formerly farmed wetlands, (2) degraded wetlands, (3) riparian areas along streams that will link to wetlands, and (4) lands adjacent to the wetland which contribute significantly to wetland functions such as buffer areas. See 7 C.F.R. §1467.4(d) (2003). Terrell Erickson at NRCS has also indicated that educational components may be included in the easement. Telephone interview, July 22, 2003. Notes on file with the author.

133 7 C.F.R. §1467.10 (4)(c) states: “the landowner shall convey title to the easement which is acceptable to the Department. The landowner shall warrant that the easement granted to the United States is superior to the rights of all others, except for the exceptions to the title which are deemed acceptable by the Department.” The exceptions allowed are easements for utilities such as overhead power lines along boundaries that will not affect restoration. Email correspondence and telephone interview with Alison Pena, USDA, July 30, 2003. On file with the author.

134 “Floating” *kuleana* are essentially *kuleana* with unsurveyed boundaries but with a Land Commission Award number generally placing them within the boundaries of some larger property. See Introduction, *infra*.

135 WRP is currently funding a project on Kauai where the *kuleana* have been excluded from the easement.

136 Actions to quiet title in Hawaii are governed by HRS §669. See Tom Leuteneker, Quiet Title and Easements, in *Hawai'i Real Estate Law Manual*, (Hawai'i Institute for Continuing Legal Education, 1997) at 9-1.

accompanied by a partition action where two or more parties are determined to own the *kuleana*.¹³⁷ Each of these approaches to quieting title has distinct costs and benefits that may influence a land trust's decision about how best to deal with *kuleana* with broken title within land trust properties. For some landowners, quieting title to *kuleana* parcels, in which they have a fractional interest and that lie within the boundaries of their surrounding property, is important so that the whole parcel can be insured and traded at its highest market value. The market value of the land is less likely to be of primary concern to land trusts, given their prevailing conservation missions, and the fact that they are highly unlikely to sell a parcel once they have acquired it. Even so, the quiet title option is available to a land trust worried about the potential for inconsistent uses on the *kuleana*, though not necessarily advisable. In particular, many native Hawaiians disapprove of the moral implications of quieting title by adverse possession, as it was historically used against native Hawaiians by large corporate agricultural landholders to take land from *kuleana* farmers who may have entered into legal agreements without full knowledge of the implications.¹³⁸

A land trust would be using the established legal tool of adverse possession¹³⁹ for very different ends than early plantation owners did, but even so, the costs to the land trust should be adequately considered before proceeding with quiet title actions. In order to quiet title in Hawai'i, the owner of the land must follow a series of steps.¹⁴⁰ First, the owner must obtain a title report, in which the title insurance company advises the owner of the title's status. The landowner must then obtain a survey of the land to firmly establish the modern boundaries of the land, and to have admissible survey evidence for a reviewing court.¹⁴¹ The third step is to give all possible claimants to the property adequate notice, as required by Hawai'i state law.¹⁴² Pursuant to the due process clause of the Fifth Amendment of the United States Constitution, private property may not be taken by

¹³⁷ Tom Leuteneker, Quiet Title and Easements, in *Hawai'i Real Estate Law Manual*, (Hawai'i Institute for Continuing Legal Education, 1997) 9-1, 9-28.

¹³⁸ Hawaiian hostility to adverse possession claims is documented. See *Kahalepauole v. Associates Four*, 8 Haw.App. 7, 15 791 P.2d 720, 724 (1990) citing *Hirayasu*, *Adverse Possession and Quiet Title Actions—Recent Constitutional Developments*, 19 Haw. B.J. 59 (1985).

¹³⁹ Traditional policy justifications for adverse possession are that it provides some certainty of ownership to possessors of land by eliminating the possibility of outdated claims to title, and that it encourages maximum utilization of land. 7 Powell on Real Property ¶ 1012[3]. (For additional, economics based justifications for the adverse possession doctrine, see Joseph Singer, *Justifications for Adverse Possession: "Roots Which We Should Not Disturb" or "Land Piracy"?*, in, Singer, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES*, 2nd Ed. 162-168 (Aspen Law & Business, 1997). When the adverse possession doctrine came into being in England, the notion of maximum utilization of land was widely shared. In the present day world with land use challenges ranging from overpopulation to sprawl, the ideal of maximum utilization of land may not be so widely shared.

¹⁴⁰ Leuteneker, *supra* note [136], at 9-7 – 9-12.

¹⁴¹ The survey requirement poses an additional challenge for floating *kuleanas*, whose boundaries and landmarks originally describing their boundaries, have been lost.

state action without due process of law. A court entering judgment determining owners of property constitutes state action. Therefore, in order to uphold the due process requirements of both state and federal law, parties attempting to quiet title must make diligent efforts to locate all the possible owners of the land in question.¹⁴³

a. Adverse Possession

Adverse possession claims are a way to quiet title when the party desiring to quiet title has been using the land in an actual, open, hostile, notorious, continuous, and exclusive manner for the statutory period of 20 years.¹⁴⁴ If the party claiming the land is able to show that it meets all of these elements, it may acquire fee simple title to the property in question. Title by adverse possession extinguishes the title of the prior owner, and is equivalent to a title by deed.¹⁴⁵ Claiming title by adverse possession against co-tenants is a difficult case to win; the presumption is that each co-tenant has the right to occupy the whole property. In the case of a jointly owned *kuleana*, this would mean that the land trust and others with fractional interests in the *kuleana* all share in the right to occupy the *kuleana*. To achieve adverse possession against a co-tenant, the claimant must demonstrate a clear intent to claim adversely against the co-tenants, adverse possession in fact, and knowledge or notice made clear to the co-tenants.¹⁴⁶ Moreover, a co-tenant must act in good faith

142 H.R.S. §669(c)(1)

143 In *Hustace v Kapuni* (6 Haw. App. 241; 718 P.2d 1009 (1986)) the plaintiffs filed an action to quiet title naming several possible defendants and serving some with notice only by publication in a newspaper. The court articulated that notice by publication, rather than in person, is constructive notice, not actual notice, and constructive notice is authorized only if the complainant “reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant.” The court suggested that claimants or their attorneys search at state libraries, the Bishop Museum, churches, circuit and supreme courts, the Mission House, Hawai'i Sugar Planter's Association, the Department of Health, Department of Immigration and Naturalization, and the state archives to determine all possible claimants. When this due diligence is complete, affidavits can then be submitted to the court for an order allowing service by publication in a Honolulu newspaper and the local outer island newspaper if applicable. This diligent inquiry is expensive --one reason to avoid quiet title as an approach to kuleana lands.

144 A claimant must have claim of title, but need not have color of title, meaning that the claimant need not have the paper title as evidence of his/her claim, but without a deed or probate document, the possessory claim is weakened. *Thomas v. State*, 55 Haw. 30,32 (1973). The use of the property need not be by one party during the twenty year period; successive users in privity (successive or mutual relationship to the same property) may tack their uses together, such as a buyer and seller, or deceased person and his/her heir or devisee. *Kainea v. Kreuger*, 31 Haw. 100, 108 and 114-115 (1929), *Territory v. Pai-a*, 34 Haw. 722, 725 (1938), *Bishop of Zeugma v. Paabo*, 16 Haw. 345, 346-347 (1904). Adverse possession claims in Hawai'i require good faith, meaning that the person asserting the claim must have a genuine interest in the land in question based on inheritance, a written instrument of conveyance, or a judgment of a court. HRS §669-1(b). An invalid or defective title, if believed to be good, is considered as good as a valid deed under this requirement. *George v. Holt*, 9 Haw. 135,140 (1893). See *Leutenecker supra* note 137, at 9-13- 9-18.

145 *Leutenecker, supra* note 137, at 9-13.

¹⁴⁶ *Yin v. Midkiff*, 52 Haw. 537 (1971); *In Re Keamo*, 3 Haw.App. 360, 650 P.2d 1365(1982), *City and County of Honolulu v. Bennett*, 57 Haw. 195, 552 P.2d 1380 (1976).

toward co-tenants.¹⁴⁷ The doctrine of adverse possession is founded on public policy ideals that title to property should not remain uncertain or in dispute for long periods of time. Native Hawaiian advocates have tried to eliminate the adverse possession statute because the statute has been used primarily by large landholders to absorb the *kuleana* of native Hawaiians.¹⁴⁸ Native Hawaiian advocates have argued against the doctrine, noting that it is a legal concept foreign to native Hawaiians, and an obsolete anachronism not applicable in land-limited Hawai'i because its intended use was to encourage development of large tracts of land in states where such land was available. They have noted that its historical use has been as a weapon by the rich against the poor, to absorb *kuleana*.¹⁴⁹ Because of the challenge of meeting the requirements posed by the adverse possession laws and because “adverse possession in Hawai'i...has an unsavory reputation and is popularly perceived as a form of theft,”¹⁵⁰ Hawai'i land trusts should not pursue this as a course of action unless all other options have failed. Particularly in areas with rich Hawaiian cultural significance and many ancestral connections to the land, land trusts should avoid putting themselves in a position where they would be seen as hostile to native Hawaiian interests.

b. Partition Actions

Where land trusts do not have clear title to *kuleana* lots, they may be in situations of multiple ownership with the *kuleana* title-holders. By law all co-owners have an undivided interest in the entire property. Land trusts in Hawai'i may find themselves in co-ownership of a *kuleana* lot where the fractional interest in a *kuleana* is sold to a preceding landowner, or to the land trust itself. Often, it is desirable to divide the property among co-owners, especially where the other owners are likely to change meaning that the land trust could not rely on the continuing goodwill of the current co-owner, knowing that he/she might sell their fractional interest at any time. Where such uncertainty mars land management plans, where co-tenants cannot agree on a mutual land use plan, and where adverse possession claims have been ruled out by the land trust, a partition action may be appropriate. Hawai'i's partition statute authorizes a court “to cause the property to be equitably divided between the parties, according to their respective proportionate interests therein as the

¹⁴⁷Bennett, 57, Haw. 195 (1976). Proof of actual notice to co-tenants is excused in exceptional circumstances: where a tenant in possession has no reason to suspect a co-tenancy exists, where the tenant in possession makes a good faith effort to notify the co-tenants, or where the tenants out of possession already know that the tenant in possession is claiming adversely. *Id.*

¹⁴⁸ Cynthia Lee, The Doctrine of Adverse Possession in MacKenzie, *supra* note 14, at 121.

¹⁴⁹ *Id.* at 127.

¹⁵⁰ Graham, *supra* note 103, at 6-24.

parties agree.”¹⁵¹ Where the parties do not agree, the partition statute states that a partition in kind, whereby the competing claimants would each receive their share of the land, is the next step. However, where *kuleana* lots are concerned, because of their small size and the fact that there are often several claimants, the court orders a partition by sale, where the land goes to one party, and the fractional interests are bought for cash.

Often such a partition is the preferred approach where landowners are seeking to eliminate problems associated with having conflicting interests acting within the *kuleana* inside their property's boundaries. A partition by sale effectively eliminates the *kuleana* by allowing its multiple co-owners to be bought out. Hawai'i land trusts might consider bringing a partition action resulting in a sale of the *kuleana* in a scenario where they own a fractional share of the *kuleana*, and there are many heirs who have inherited fractional shares of the *kuleana*, and do not agree to how the property should be managed. Once a court determines that both the surrounding landowner and a *kuleana* heir own a fractional share of the property¹⁵², the court may order a partition. The court will then order the *kuleana*, often having a separate tax map key number, to be sold at a public auction, with sale proceeds divided proportionally among the parties according to their interest in the property.¹⁵³ If a court determines that a *kuleana* is owned entirely by heirs of the original owner, the surrounding landowner would have no right to a partition. If the court determines that the *kuleana* is owned by heirs, but has never been surveyed, it may order a partition sale, where often times the surrounding landowner is presupposed to be the buyer at auction.¹⁵⁴ Co-tenants may also agree to a partition sale by a private broker.¹⁵⁵

While partition actions may result in a monetary award to *kuleana* claimants, the pay-out to each claimant (often there are many) can be miniscule relative to the market value of the *kuleana* and

151 Hawai'i Revised Statutes §668-7(4). When partitioning the property in kind, the court will require an appraiser to provide evidence of the value of the various parcels, so each owner can receive a lot of proportional value to that owner's interest. Also, the court will count any improvements made in good faith on the property by any of the co-tenants toward their proportional interest. In some instances, a partition may be effectuated by sale at public auction or through a private broker, though the law favors partition in kind over partition by sale. See Leuteneker, *supra* note 136 at 9-29, 9-30.

152 The court verifies the claimant's stakes in the property by tracing the title of the parcel from the time of the Mahele. See, e.g. Haleakala Ranch Co. v. Heirs of Kamala Morton, Civ. No. 01-1-0202, Second Cir., Haw., (2002).

153 *Id.* at 6. The court assigns the parties' proportional interests in the property by determining how many acres of the original Land Commission Award have been deeded to each party over time, respectively. *Id.* (Note that Land Commission Award is a term that applies to land grants including but not limited to *kuleana* awards to tenant farmers, i.e. LCAs also include large land awards to higher ranking chiefs.).

154 *Id.*

155 Leuteneker, *supra* note 137, at 9-30.

to the intangible value, especially in Hawaiian culture, of having an interest in land itself.¹⁵⁶ A land trust offering a small payout to *kuleana* owners to settle the legal conflict may be taken as an insult by native Hawaiians displaced from their *kuleana*, an effect which can have repercussions for future community relations and may reflect poorly on the land trust. Recognizing this inequity, the Office of Hawaiian Affairs has testified in support of a bill currently before the Hawaii State Legislature that, if enacted, would prohibit the filing of partition actions where the property is *kuleana* land, the party that would be filing the action owns less than fifty-one percent of the *kuleana* land, and the court could order a sale of the *kuleana* land.¹⁵⁷ Such bills have appeared before the legislature before, and have been unsuccessful. The presence of a continuing lobby on this issue itself signals that pursuing partition actions on *kuleana* encumbered lands may be politically tenuous territory for the land trust.

B. Approaches for Conservation Easements

A conservation easement is a “voluntary, legally recorded deed restriction on a piece of property. Conditions of the conservation easements are mutually agreed upon by the landowner and the land trust and are in effect for perpetuity.”¹⁵⁸ Holding a conservation easement over property means that “the landowner limits the type or amount of development on their property while retaining private ownership of the land. Generally, the land trust accepts the easement with the understanding that it must enforce the terms of the easement in perpetuity. After the easement is signed, it is recorded with the County Registrar of Deeds and applies to all future owners of the land.”¹⁵⁹ Landowners most often agree to conservation easements to protect the land from future development and because donating the easement offers significant tax benefits to the landowner providing relief from federal income taxes, estate taxes, and inheritance taxes.¹⁶⁰ The Internal Revenue Service allows a

156 Interview with Tom Pierce, June 2, 2003. Notes on file with the author.

157 HB 1677, House of Representatives, Twenty-Second Legislature, 2003 State of Hawaii. Available at http://www.capitol.hawaii.gov/sessioncurrent/bills/HB1677_.htm

158 Maui Coastal Land trust, What is a Conservation Easement? at

<http://www.mauicoastallandtrust.org/htmls/QA.html> (visited August 30, 2003). Note that states vary in how strictly they interpret laws governing conservation easements. As conservation easements grow in popularity, so do legal challenges by subsequent landowners who do not wish to be bound by their terms. In general, where ambiguity is found in the terms of a conservation easement, the court must determine the intent of the parties at the time the instrument was drafted. *Thomas v. Campbell*, 690 P. 2d 333, 339 (Idaho, 1984). Often, ambiguously worded land restrictions are resolved “in favor of the free use of land.” *Thomas v. Campbell*, 690 P. 2d at 339; *Foundation for Historic Georgetown v. Arnold*, 651 A.2d 794, 797 (D.C. App. 1994). See eg Andrew Dana, attorney Bozeman MT, *Legal Conventions of Conservation Easement Interpretation*, document prepared for 2003 Land Trust Alliance Annual Rally (on file with author). 159 Id.

¹⁶⁰ “A landowner who donates a conservation easement during his lifetime may be eligible for three federal tax benefits: a charitable income tax deduction under [I.R.C.] §170(h), a charitable gift tax deduction under [I.R.C.] §2522(d), and an

deduction if the easement is perpetual and donated "exclusively for conservation purposes." At the state and local level, additional tax incentives may be available, though Hawaii has yet to offer such additional incentives.¹⁶¹ The easement does not guarantee public access to the land unless such access is agreed to in the terms of the easement. The landowner retains rights to sell the property, but any future buyer is bound by the terms of the easement. In order to qualify for a conservation easement under the terms set forth in the Internal Revenue Code, the land must be of significant conservation value, including but not limited to forests, wetlands, endangered species habitat, beaches, and scenic areas.¹⁶²

1. Consent of all landowners may be required to validate conservation easements

Hawai'i land trusts are likely to acquire a significant proportion of their lands through conservation easements, as this type of acquisition does not require the land trust to raise the significant capital otherwise required to purchase land in fee simple absolute. Land trusts have additional responsibilities to ensure the validity of easements where *kuleana* are present on the land, both to ensure the tax benefits promised to the landowner and to ensure clear and truthful reporting to the IRS. A land trust's easement across a property is only valid to the extent that the landowner can legally convey it, which, in the case of *kuleanas*, may pose some legal challenges. The Hawaii conservation easement statute offers some assurance to land trusts that their conservation easements are enforceable over the long term. The statute states that the conservation easements "shall be considered to run with the land," even where such a term may not be stipulated in the easement document itself.¹⁶³ Moreover, the statute provides that "no conservation easement shall be unenforceable on account of the lack of privity of estate or contract," offering some reassurance that if the conveyance of the land has an imperfect chain of title, the conservation easement will likely survive legal challenges.¹⁶⁴

In Hawaii, these laws of easements have not been tested on conservation easements over *kuleanas* where the land trust has an agreement with an owner who has a fractional interest in the *kuleana*. A conservative approach for the land trusts would be to obtain consent of the other fractional *kuleana* owner(s) to insure the conservation easement across the *kuleana*. If these

exclusion of up to 40 percent of the value of the land subject to the easement from the landowner's estate for estate tax purposes under [I.R.C.] §2031(c)." McLaughlin, *supra* note 123.

¹⁶¹ For example, both Colorado and Virginia currently offer tax incentives for conservation easement donors. See VA. CODE ANN. §58.1-510 – 513 (2000), COLO. REV. STAT. § 39-22-522 (2001) McLaughlin, *supra* note 123.

¹⁶² IRC §170 (h).

¹⁶³ Hawaii Revised Statutes §198-5(a) 2003.

individuals have never been located and neither the surrounding landowner, nor the land trust wishes to locate them, a land trust attorney might choose to draft the conservation easement to exclude the *kuleana*. Even if the *kuleana* is excluded from the conservation easement, land trusts will need to be alert to access issues that may emerge if the established access route crosses the conservation easement. So, even excluding the *kuleana* may be an imperfect solution. Land trusts often seek additional funding from easement donors to fund stewardship and related costs of maintaining the easement; where *kuleana* access issues are likely to arise, land trusts could consider asking for additional stewardship funds in case of foreseeable legal costs.

Another factor for land trusts to consider if excluding *kuleanas* from conservation easements is where the exclusion of the *kuleana* reduces the value of the donated land, and thereby the tax benefit to the private landowner. Economic incentives are not often the sole motivating factor for conservation easement donors, but may influence their decisions and planning.

2. Include the *Kuleana* in the Easement or Exchange it for Another Parcel

Land trusts, private landowners, and *kuleana* holders could contract to exchange *kuleana* parcels located in areas where conservation easements are to be designated with other plots of land outside the easement boundaries.¹⁶⁵ Alternatively, land trusts could propose that conservation easements be extended to include *kuleanas*, and a separate easement could be drafted to confer benefits on the *kuleana* owner. This option may be particularly feasible where the *kuleana* owner wishes to use the land in a manner consistent with the broad conservation purposes enumerated in the IRC.¹⁶⁶ If no *kuleana* holder is known, but the landowner donating the parcel wishes to donate the *kuleana* as well, it is advisable for the land trust to obtain the consent of the missing owners to promote insurability and enforceability of the conservation easement. Land trusts may determine that efforts to locate heirs to the *kuleana* are not worth the trouble that could arise if the parties are located but then seek to develop the land in a manner inconsistent with conservation goals.

IV. Proposals: Moving Forward

A. Addressing uncertainty: Subsidized title research

Given the interaction between *kuleana* rights and the values of Hawaii's conservation land trusts, it becomes clear that the real challenge for the land trusts is uncertainty. Land trusts cannot

¹⁶⁴ *Id.*

¹⁶⁵ Note that while relocating a *kuleana* may prove difficult, there is persuasive authority available for a land trusts to argue for a right to moving the access route to a landlocked *kuleana*. See *supra*, note 55, and surrounding text.

predict whether claimants to *kuleana* will appear and attempt to develop their land in the middle of a restoration or other conservation project. As Hawaiians enjoy a cultural revival and the Sovereignty movement¹⁶⁷ maintains steady support, Hawaiian people are actively seeking to reclaim ancestral lands, including by asserting genealogical connections to prove their status as heirs to *kuleana* lands. What they will elect to do with the land rights granted to their ancestors over 150 years ago if they rediscover them is unknowable without communication. While it may not be likely that such heirs to the *kuleana* would choose to develop their lots in ways entirely incongruous with a land trust's desired uses of the property, it is possible. To address this fundamental challenge of uncertainty, as part of due diligence for every property encumbered with *kuleana*, Hawai'i land trusts should pursue title research on *kuleana* lots to determine possible claimants, and make efforts to locate these potential claimants to create opportunities to negotiate land use agreements. While risky, this strategy of dealing with potential conflicts up-front could minimize uncertainty over land trust holdings.

As described, the level of title research required to complete such a task is time consuming and expensive, including travel to Honolulu to the Bureau of Conveyances and time researching, and it requires researchers who are competent to read and interpret old Hawaiian language documents. These expenses are simply beyond the capacity of many Hawai'i-based land trusts.¹⁶⁸ While land trusts might be able to budget for such additional expenses, receiving subsidies in the form of money or skilled research assistance would be preferable. The Office of Hawaiian Affairs (OHA) may be the proper entity to provide this support. OHA's statutory purposes include:

- promoting the betterment of conditions of native Hawaiians and Hawaiians;
- serving as the principle state agency for the performance, development, and coordination of programs and activities relating to Hawaiians;
- assessing the policies and practices of other agencies impacting on Hawaiians; conducting advocacy efforts;
- receiving and disbursing grants and donations from all sources for Hawaiians;

166 IRC § 170(h).

167 See., e.g. Haunani-Kay Trask, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I*, revised edition (University of Hawai'i Press, Honolulu 1999); see also <http://www.hawaii-nation.org/>

168 For example, Title Guaranty, a reputable Hawaii title insurance firm with a complete proprietary library of many land commission awards' title histories, would charge approximately \$500 and take 1 month to acquire all of the documentation for 2 uninsurable kuleana. (It is not clear whether this fee includes interpretation of the documents. Paying a competent translator to go through the Hawaiian language documents could be an additional cost to the land trust.)

- serving as a receptacle for reparations from the federal government.¹⁶⁹

Given OHA's mandate, it seems appropriate to involve the agency in title research on behalf of Hawai'i land trusts where the land trusts are willing to negotiate land management plans that include Native Hawaiian uses of the land.

Another aspect of OHA's work that makes it a logical partner in efforts to do diligent title research is its mandate with respect to *kuleana* escheat. Where there are no known heirs to the *kuleana*, it reverts or escheats, to the State Department of Land and Natural Resources, and then to OHA to be held in trust. HRS §669-2(e) requires that OHA be made a party to any quiet title action where *kuleana* escheat is alleged. It seems a logical extension of OHA's existing duties with respect to *kuleana* for it to help locate potential heirs and put land trusts in contact with those heirs to facilitate land use agreements that would include land trust goals as well as Native Hawaiian uses of the land not inconsistent with the land trust's policies or requirements for conservation easements under federal tax law.

Another possible source of support may be the Ceded Lands Study Group in the Center for Hawaiian Studies at the University of Hawai'i at Manoa. That group is involved in a project to inventory the ceded lands throughout Hawai'i, a task that involves extensive research into old land records from the time of the *Mabeh*, reading Hawaiian language documents, and analyzing their meaning. The Center was funded by an OHA grant to undertake this project.¹⁷⁰ Redirecting some of this group's efforts once the inventory is complete, or seeking ongoing assistance with title research for Hawai'i's land trusts, might be an efficient way to obtain information needed to locate potential claimants and reduce the risk involved with *kuleana*-encumbered land transactions.¹⁷¹

B. Water Distribution & Land trusts' *kuleana* water rights - Suggestions for a broader strategy

Where land trusts own property in fee simple that include *kuleana* parcels, they may assert the appurtenant water rights attached to those *kuleana* as a means of receiving sufficient water for habitat restoration and other water-dependent activities in the *kuleana*. For example, if a land trust wanted to claim its water rights, the *McBryde* and *Reppun* cases could be applied to establish the land trust's appurtenant water rights as owner of Land Commission Award lots and to establish riparian

¹⁶⁹ Melody MacKenzie, Historical Background, in MacKenzie, *supra* note 14, at 19-20.

¹⁷⁰ Pat Omandam, OHA award expands UH Hawaiian center staff: The \$1.5 million grant will also allow more study into native fields, Honolulu Star-Bulletin, November 9, 2002, available at <http://starbulletin.com/2002/11/09/news/story5.html>

rights for those LCAs adjacent to local streams.¹⁷² A reviewing court could find application of these cases persuasive, especially given the growing awareness throughout the state of over-pumping of aquifers by a few large commercial users.¹⁷³ If a land trust finds that as the stewardship and restoration plans take shape, it lacks sufficient water to carry out these plans, it might consider its options to bring a claim or join in other parties' claims against the county or state agency overseeing water distribution.¹⁷⁴

C. Strategic rezoning

Kuleana lands are treated as nonconforming use exceptions to some zoning requirements, meaning that even if they are located in an area that would otherwise require the landowner to obtain Special Management Area permits to build, the land's status as *kuleana* land may exempt it from this requirement. For example, on Maui, within the Agricultural district, this exception is written into the county code. Land trusts acquiring easements or fee property in Maui County and throughout the state should be aware of such zoning exceptions. Throughout the State, in the Conservation District, *kuleana* lands fall under state DLNR jurisdiction and claimants must show that the lot was customarily used as a house lot before special use permits will be issued. Building of any structures on lands re-zoned as open space under a proposed Maui County open space ordinance would be unequivocally prohibited, making this zoning attractive for land trust acquisitions.¹⁷⁵

171 contact: Lilikala Kame'eleihiwa, Director, Center for Hawaiian Studies, University of Hawai'i at Manoa lilikala@Hawai'i.edu phone: (808) 973-0977.

172 See Kuleana Water Rights discussion at Section II (E), *infra*.

173 For example, the Iao Aquifer on Maui has recently resulted in its designation as a State Groundwater Management Area. One commenter recently pointed out in Maui County: "Maui has enormous amounts of surface water that was developed starting in the 1850s and used for agriculture in both East and West Maui... This valuable water, however is tightly controlled by large corporations which are reluctant to relinquish control, although most of it originates on state (ceded) lands. They see the long-term control over this valuable resource as the prime factor in maintaining high development values for agricultural lands... While this [distribution of water] conflicts with the State Water Code, neither the Maui Board of Water Supply... nor the county administration... has had the political will to use eminent domain to separate the land and water barons from the people's water..." Jonathan Starr, Water Meter Moratorium Needed While More Sources are Developed, *The Maui News*, July 23, 2003 at A10.

174 For example, in 2001, the Maui Meadows Homeowners Association petitioned the State Commission on Water Resource Management to designate the 'Iao and Waihe'e aquifers as water management areas, to take management of the aquifers out of the County of Maui's control and bring water use under the control of the State Water Commission. In July, 2003, the 'Iao aquifer was designated as a state groundwater management area, which will restrict the amount of water that Maui County can withdraw and require that all uses in the aquifer receive a permit from the State Water Commission. Permit applicants must establish that their proposed use is consistent with the public interest. Local land trusts could join with groups such as the Maui Meadows Homeowners Association to put additional pressure on state and county authorities to enforce water conservation measures. See Earthjustice Legal Defense Fund, *'Iao, Waihe'e Aquifers on Maui Are Being Overpumped*, available at <http://www.earthjustice.org/urgent/print.html?ID=101>.

175 Interview, Michael Foley, Maui County Planning Director, July 23, 2003. Notes on file with the author.

By down-zoning their lands owned in fee to Conservation or Open Space designations, land trusts could achieve an additional safety net to discourage construction of houses and roads which may be inconsistent with a land trust's vision of conservation. As a public process, rezoning is time-consuming, and requires broad community participation. Preparation of exhibits for public hearings, staff involvement in the zoning proposal involving meetings with public officials and influential community members are some foreseeable expenses to a land trust seeking this type of policy solution to the uncertainties of *kuleana* rights on lands of high conservation priority. If a county commissioner, in lieu of the land trust, were to propose the amendment, some of these expenses might be eliminated. However, the process is involved, and there is no guarantee that the desired rezoning will be successful.

A risk associated with down-zoning is that it could expose land trusts to criticism from native Hawaiian land rights advocates that the land trust is seeking to limit native Hawaiian land rights in a manner that is similar to adverse possession suits, although without the same historical associations of adverse possession actions. Moreover, counties might be reluctant to proceed with down-zoning because they could expose themselves to expensive takings claims from disgruntled property owners who feel their private property rights have been violated by this changed regulation. Under both the Hawai'i and U.S. Constitutions, it is unlawful to take private property for public use without just compensation.¹⁷⁶ If a *kuleana* holder whose property was down-zoned could show that the down zoning was a taking, the county could be liable to the *kuleana* holder for the fair market value of the property taken.

Considering these shortcomings of a rezoning approach, it might only be practical where the land trust has a property interest in an area with multiple *kuleanas* on Agriculturally zoned lands where exemptions from density restrictions pose the risk of new development. Where this is the case, amending the community plan and rezoning the parcel may be an acceptable way to limit allowable construction of roads and structures, avoid the financial and political expense of quiet title actions, and still preserve the native Hawaiian ancestral *kuleana* title.

176 The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The Takings Clause applies to the states through the Fourteenth Amendment. *Hawai'i Housing Authority v. Midkiff*, 467 U.S. 229, 244 n. 7 (1984). Hawaii's Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Haw. Const. Art. I, § 20.

Conclusion

The success of Hawaii-based land trusts may hinge on their understanding land conservation in a way that includes land trust's rights and obligations as spelled out by courts and legislatures, and also respects the rights of native Hawaiians. Given the trend toward court-granted access to landlocked *kuleanas*, potential exemptions from building density restrictions, and the difficulty decision-making about how to proceed with legal remedies to quiet title to *kuleanas*, Hawai'i-based land trusts should spend the time to learn the title history of each property before completing land transactions. However, just as the presence of *kuleanas* on land trust acquisitions poses risks to a land trust's full control over land management on a given property, so too, the *kuleana* may provide unforeseen benefits. Additional water rights may be available to land trusts who own *kuleanas*; *kuleanas* may provide unique opportunities to engage Hawaiians with ancestral ties to the land in projects that revive the ecology of an area by combining conservation measures with traditional farming practices. Well-run and community supported land trusts have the ability to strategically acquire lands that may be important for habitat conservation, view-shed and open space preservation, and Hawaiian religious and cultural practices, making the case for collaborative efforts that much stronger. Working with the community to determine what lands are best suited to land trust protection, and employing negotiated agreements on *kuleana* –encumbered lands, land trusts can ensure the long-term protection of their acquisitions.

Appendix A Individuals Interviewed

- John & Maile Bay, Co-directors, Pacific Islands Lands Institute, O'ahu
- Dale Bonar, Executive Director, Maui Coastal Land trust
- Suzanne Case, Executive Director, The Nature Conservancy of Hawai'i
- Avery Chumbley, Wailuku Agribusiness, Maui
- Ann Southwick Datta, Executive Director, Kona Land Trust, Kona, Hawai'i
- Lucienne deNaie, The Sierra Club/Maui Tomorrow/Maui Coastal Land Trust Theresa Donham, Archaeologist, Maui
- Terrell Erickson, Natural Resources Conservation Service, US Department of Agriculture, O'ahu
- Michael Foley, Maui County Planning Director/Maui Coastal Land Trust
- David Forman, Attorney, Allston Hunt Floyd Ing, Honolulu
- Shelby Floyd, Partner, Allston Hunt Floyd & Ing, Waimea, Hawai'i
- Paul Fuijishiro, 'Ike 'Aina representative, Maui
- Dana Hall, Maui Burial Council
- Isaac Hall, Environmental and Cultural Attorney, Wailuku, Maui
- Isaac Harp, 'Ike 'Aina affiliate, Maui
- Lea Hong, Chair, Environmental and Cultural Resources Law Practice Group, Alston Hunt Floyd Ing, Honolulu
- Richard Keifer, Real Estate Attorney, Maui
- Jason Koga, Department of Land and Natural Resources
- Diane Lee, Program Associate, Maui Coastal Land trust
- Tom Leuteneker, Partner, Carlsmith Ball LLP, Maui
- Carrie Lindenbaum, Attorney, Kona, Hawai'i
- Arnold Lum, Adjunct Professor, University of Hawai'i at Manoa, Richardson School of Law
- Melody MacKenzie, Attorney, Native Hawaiian Legal Corporation, Honolulu
- Jim McMahon, Associate Attorney, Office of Hawaiian Affairs, Honolulu
- Alan Murikame, Attorney, Native Hawaiian Legal Corporation, Honolulu
- Alison Pena, Wetlands Reserve Program, US Department of Agriculture, Wisconsin
- Tom Pierce, Attorney, Paul Johnson Park & Niles, Wailuku/Maui Coastal Land Trust
- Josh Stanbro, Trust for Public Land, Hawai'i Field Office, Honolulu
- Hugh Starr & Amber Starr, Auku'u Land Consulting, Makawao, Maui
- Bill Tam, Of Counsel, Alston Hunt Floyd & Ing, Honolulu; Hawai'i State Attorney General's Office, counsel to the State Board of Land and Natural Resources (16 years) and counsel to the State Commission on Water Resources Management (1987 until 1997, including the Waiahole Contested Case Hearing), Honolulu
- Mililani Trask, Pacific representative to the United Nations Permanent Forum on Indigenous Issues, 1987-1998, Kia'aina (Governor/Prime Minister) of Ka Lahui Hawai'i, the Native Hawaiian Nation, Hilo, Hawai'i
- Colleen Uahinui, Senior Title Officer, Title Guaranty of Hawai'i, Inc., Honolulu

Appendix B
The *Kuleana* Act of 1850

BE IT ENACTED by the House of Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled:

That the following sections which were passed by the King in privy council on the 21st of December, A.D. 1849, when the legislature was not in session, be and are hereby confirmed; and that certain other provisions be inserted, as follows:

1. That fee--simple titles, free of commutation, be and are hereby granted to all native tenants, who occupy and improve any portion of any government land, for the lands they so occupy and improve, and whose claims to said lands shall be recognized as genuine by the land commission: Provided, however, that this resolution shall not extend to konohikis or other persons having the care of government lands, or to the house lots and other lands in which the government have an interest in the districts of Honolulu, Lahaina and Hilo.
2. By and with the consent of the King and chiefs in privy council assembled, it is hereby resolved, that fee-simple titles, free of commutation, be and are hereby granted to all native tenants who occupy and improve any lands other than those mentioned in the preceding resolution, held by the King or any chief or konohiki for the land they so occupy and improve: Provided, however, that this resolution shall not extend to house lots or other lands situated in the districts of Honolulu, Lahaina and Hilo.
3. That the board of commissioners to quiet land titles be, and is hereby empowered to award fee-simple titles in accordance with the foregoing resolutions; to define and separate the portions of lands belonging to different individuals; and to provide for an equitable exchange of such different portions, where it can be done, so that each man's land may be by itself.
4. That a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre.
5. In granting to the people, their house lots in fee--simple, such as are separate and distinct from their cultivated lands, the amount of land in each of said house lots shall not exceed one quarter of an acre.
6. In granting to the people their cultivated grounds, or kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people may have cultivated in different spots, with the seeming intention of enlarging their lots; nor shall they be entitled to the waste lands.
7. When the landlords have taken 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 ti leaf, from the land on which they live, for their own private use, should they need them, but they

shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee-simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.

Done and passed at the council house in Honolulu, this 6th day of August, A.D. 1850.

KAMEHAMEHA.

KEONI ANA.

Appendix C
Contemporary Legislative Sources of *Kuleana* Rights

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.”

Hawai'i Revised Statutes section 1-1:

“The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i, in all cases, except as...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 the State.”

Hawai'i Revised Statutes section 7-1:

“Where the 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 ki leaf from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.”