

“UA KOE KE KULEANA O NA KANAKA”
(RESERVING THE RIGHTS OF NATIVE TENANTS):
INTEGRATING KULEANA RIGHTS AND
LAND TRUST PRIORITIES IN HAWAII

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For Hawaii-based conservation land trusts, kuleana lands present both unique opportunities and complex challenges to land conservation efforts. Kuleana lands are those parcels granted to native Hawaiian tenant farmers between 1850 and 1855. Rights attaching to these special lands include: reasonable access, agricultural uses, gathering rights, rights to a single-family dwelling, water rights, and fishing rights. In consideration of these rights, the political and cultural context surrounding conservation acquisitions, and outside agencies' funding requirements, Hawaii conservation land trusts are advised to take a balanced approach to land acquisitions. Such an approach involves conducting thorough title research, investigating opportunities for collaboration with native Hawaiian community leaders, and negotiating agreements with respect to access rights and land and water use on kuleana lands located within or bordering on land trust-managed parcels. Both land trusts and native Hawaiian community members stand to benefit from strategic collaborations that integrate kuleana rights and land trust priorities.

INTRODUCTION

Conservation land trusts are nonprofit organizations that conserve land by working in cooperation with private landowners and local governments using tools such as conservation easements and fee-simple acquisition of land with inherent or potential conservation value. Effective conservation land trusts can serve broad public interests in open space and working landscape preservation, habitat conservation, archaeological or historic site preservation, and environmental education. In Hawaii, 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 (i.e., large ranches, resort corporations, and 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 de-

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scent, tourists, and visitors. Addressing the interests of these myriad constituent groups can create legal and political complications for land trusts evaluating how best to proceed with already complex land transactions. When native Hawaiian land issues enter the picture, the complexity increases, as conservation land trusts struggle to determine their own legal rights in the land as well as the correct political course of action.

Kuleana lands create a particularly complex problem for conservation land trusts in Hawaii. *Kuleana* lands emerge out of a critical moment in Hawaiian history. As will be explained in more detail in Part I, in 1848, King Kamehameha III responded to increasing economic pressure from foreigners who sought to control land by fundamentally changing the land tenure system to a westernized paper title system.¹ The lands were formally divided among the king and the chiefs, and the fee titles were recorded in the *Mahele* book.² Lands granted in the *Mahele* were granted "subject to the rights of native tenants," usually tenant farmers who already worked and resided on portions of those lands.³ In 1850, a law was passed allowing these "native tenants" to claim fee simple title to the lands they worked.⁴ Those who claimed their parcel(s) successfully acquired what is known as a *kuleana*.⁵ In the years that have passed since the *Mahele*, many of the large parcels initially granted to chiefs have changed hands through formal legal transfers of title.⁶ It is not at all uncommon, though, for a *kuleana* parcel to appear on a map, or in a deed, as a so-called "cloud" on the title to that parcel. Some private landowners choose to quiet the title through legal action,⁷ while others let the *kuleana* parcel remain as it is, often uninhabited or untended by the descendants of its original claimant, taking their chances that a descendant of the original grantee will not eventually lay claim to the use of their parcel. For conservation land trusts in Hawaii, deciding how best to approach *kuleana* lands, this choice is not an easy one.

Hawaii is poised to benefit directly from the growth of the land trust movement. Without the cooperation of *kuleana* owners, and related native Hawaiian interests that define so much of property law in Hawaii, 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 Hawaii with a proper emphasis on protecting its natural cultural and ecological beauty.

¹ Melody MacKenzie, *Historical Background*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, 5–6 (Melody Kapilialoha MacKenzie ed., 1991).

² *Id.* at 7. *Mahele* means "division."

³ *Id.* (citing The Kuleana Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141–42 (1925)).

⁴ *Id.*

⁵ *Id.*

⁶ MacKenzie, *supra* note 1, at 9–10. See generally Haunani Kay Trask, *Introduction*, in FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII 1–25 (1993).

⁷ See, e.g., *Hana Ranch v. Kanakaole*, 623 P.2d 885 (Haw. Ct. App. 1981).

The purpose of this Article is to identify the legal rights of *kuleana* holders, particularly those of native Hawaiian *kuleana* descent, and consider how these rights interact with the general priorities of Hawaii-based land trusts. This Article advocates collaboration between these groups by suggesting ways that Hawaiian conservation land trusts might integrate *kuleana* rights with their mission 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, Hawaii conservation 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 this Article useful as an aid 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 this Article introduces the concept of *kuleana* land title through a discussion of the legal background and history of land division in Hawaii. 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 Hawaii-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 mission of conserving habitat and natural resources. Part IV also offers three proposals for non-traditional ways in which land trusts might address the *kuleana* lands issue: title research subsidized by the Office of Hawaiian Affairs ("OHA"), cooperative efforts with native Hawaiian groups to challenge the current distribution of water rights, and strategic rezoning proposals. As Hawaii land conservation enters a new era of increased development pressure and increased recognition of funds and programs available to support land trust activity, it is intended that these proposals will foster collaboration and invite new ideas and approaches to land conservation in Hawaii.

I. HISTORICAL BACKGROUND: *KULEANA* AND LAND TITLE IN HAWAII

The ancient Hawaiian land tenure system encouraged sufficiency within an *ahupua'a*.⁸ The *ahupua'a* is most commonly understood as a division of land running from the mountains (*mauka*) to the sea (*makai*).⁹ The *ahupua'a* supplied food and materials to the *maka'ainana* (commoner residents/tenants) who tended the land, as well as to the *konohiki* (overseers),

⁸ See Glossary in Appendix C for definitions of Hawaiian terms.

⁹ PAUL F. NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 4 (1995) (citing *Territory v. Bishop Trust Co.*, 41 Haw. 358, 361 (1956)).

who administered the *ahupua'a*, and the *ali'i nui* (chief), who was responsible for several *ahupua'a*.¹⁰ This responsibility to provide for himself and the *ali'i* on a long-term basis generally compelled the *konohiki* toward sustainable management of both human and natural resources.¹¹

The native Hawaiian land tenure system changed dramatically with the Great *Mahele*.¹² Americans and Europeans seeking stable land title had been pressuring the Hawaiian government toward a westernized system of private property for years, hoping to ensure long term leases and fee simple title that would facilitate large-scale agriculture.¹³ 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 Mahele* (literally, "The Division").¹⁴

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."¹⁵ The statute establishing the Land Commission provided for five commissioners appointed by the king "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."¹⁶ 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 a fee to be paid to receive a Royal Patent that would verify the Land Commission award.¹⁷ 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."¹⁸ By 1855, the lands in Hawaii had been distributed: the *Konohiki* were granted

¹⁰ See E. S. C. Handy, *Government and Society*, in ANCIENT HAWAIIAN CIVILIZATION: A SERIES OF LECTURES DELIVERED AT THE KAMEHAMEHA SCHOOLS 31, 31–42 (1999). For a more complete history describing the native Hawaiian land tenure system before the *Mahele*, see Mavian Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 237–44 (1989).

¹¹ Lam, *supra* note 10, at 243.

¹² See John H. Wise, *The History of Land Ownership in Hawaii*, in ANCIENT HAWAIIAN CIVILIZATION: A SERIES OF LECTURES DELIVERED AT THE KAMEHAMEHA SCHOOLS 82–87 (1999).

¹³ DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY—REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 23 (2000), at <http://www.worldcatlibraries.org/wcpa/ow/86453bb378dafbcfa19afeb4da09e526.html> (on file with the Harvard Environmental Law Review).

¹⁴ Lam, *supra* note 10, at 259–61.

¹⁵ JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 8 (1958).

¹⁶ *Id.* The first five members of the Land Commission were William Richards, John Ricord (then Attorney General of the Kingdom), Zorobabela Kaauwai, James Young Kaneo-hoa, and John Ii. *Id.* at 9.

¹⁷ *Id.* at 12.

¹⁸ *Id.*

1.5 million acres (*Konohiki* Lands);¹⁹ King Kamehameha was granted approximately 1 million acres (Crown Lands); and the Hawaiian government was granted 1.5 million acres (Government Lands).²⁰

All of these lands were granted “subject to the rights of native tenants.”²¹ Deeds executed during the *Mahele* conveying land contained the phrase “*ua koe ke kuleana o na k̄naka*,” or “reserving the rights of all native tenants,” in continuation of the reserved tenancies which characterized the traditional Hawaiian land tenure system.²² The *Kuleana* Act of 1850 authorized the Land Commission to award fee simple titles to all native tenants who lived and worked on parcels of Crown, Government, or *Konohiki* Lands.²³ To receive their *kuleana* award, the Land Commission required native tenants to prove that they had occupied, improved, or cultivated the claimed lands.²⁴ The Commission also required claimed lands to be surveyed before they would issue an award for the land.²⁵ The *kuleana* award could include land actually cultivated and a house lot of not more than a quarter acre.²⁶

Most *maka‘ainana* never claimed their *kuleanas*. Of the 29,221 adult males in Hawaii in 1850 eligible to make land claims, only 8205 *maka‘ainana* actually received *kuleana* awards.²⁷ Their awards account for a combined 28,600 acres of *kuleana* lands—less than one percent of the Kingdom’s lands.²⁸ These numbers are commonly attributed to several factors. Private land ownership was not a part of Hawaiian tradition, so Hawaiian people had no social context for it, and associated privileges and responsibilities of private land ownership were unknown and misunderstood.²⁹ 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.³⁰ Moreover, *kuleana* 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. If they heard about the opportunity to claim

¹⁹ *Konohiki* means land agent appointed by the *ali‘i* (chief). Later in the statutes, *konohiki* came to mean landlord or chief. LUCAS, *supra* note 9, at 57 (citing *Territory v. Bishop Trust Co.*, 41 Haw. 358, 361–62 (1956)).

²⁰ MacKenzie, *supra* note 1, at 9.

²¹ Paul Lucas, *Access Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 1, at 213.

²² *Id.* See *Rogers v. Pedro*, 642 P.2d 549, 551 n.3 (Haw. 1982) (citing *Palama v. Sheehan*, 440 P.2d 95 (Haw. 1968)).

²³ CHINEN, *supra* note 15, at 29.

²⁴ Lam, *supra* note 10, at 234.

²⁵ MacKenzie, *supra* note 1, at 8.

²⁶ *Id.*

²⁷ DEP’T OF THE INTERIOR & DEP’T OF JUSTICE, *supra* note 13, at 24.

²⁸ *Id.*

²⁹ Wise, *supra* note 12, at 83–84.

³⁰ *Id.* at 81, 83–84.

kuleana title too late, the four-year time window allotted by the Land Commission was inflexible.³¹ 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 inconsistent, with crude surveying methods and boundaries often defined in terms of old landmarks that became obsolete or were destroyed over time.³² Tenants may have feared the reaction of the *ali'i* to any assertion of personal claims to land in the *ahupua'a* and so avoided claiming their *kuleana* even though they wished to remain on the land.³³ 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.³⁴ In this way, many *kuleanas* were lost.³⁵

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 simple³⁶ and the auctioning off of Government Lands between 1850 and 1860,³⁷ resulted in a net movement of land from native Hawaiian to foreign control.³⁸ The passage of the Adverse Possession Law in 1870 furthered this transfer of land from Hawaiian to foreign control.³⁹ The new law enabled individuals occupying land 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.⁴⁰ The statutory period required to successfully

³¹ MacKenzie, *supra* note 1, at 8.

³² Wise, *supra* note 12, at 84–86.

³³ *Id.* at 84.

³⁴ *Id.* at 86.

³⁵ *Id.*:

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 Mōmona, 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.

³⁶ DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, *supra* note 13, at 24.

³⁷ *Id.* at 25.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

advance an adverse possession claim was reduced from twenty to just ten years in 1898, making it even easier to assert such a claim.⁴¹ It is apparent from a review of the adverse possession cases that 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 hands was nearly complete: tax records show native Hawaiians controlled just 257,457 acres, where non-Hawaiians controlled 1,052,492 acres.⁴²

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. imperialism. The story of the overthrow of the Hawaiian monarchy adds fuel to this perception that Hawaiian land has been stolen from the native people.⁴³ Adding another dimension to this perception of political injury is the notion of spiritual harm. Native Hawaiian spiritual beliefs recognize the inherent sacredness of the natural world and a human obligation to care for the land.⁴⁴ Hawaii conservation land trusts should keep these

⁴¹ See DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, *supra* note 13, at 25 (noting also that the adverse possession statute remained at ten years until 1973, when it reverted to twenty years); see also Cynthia Lee, *The Doctrine of Adverse Possession*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 1, at 127.

⁴² DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, *supra* note 13, at 25.

⁴³ 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 Lilliuokalani 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 one 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. *Id.* at 27–29.

⁴⁴ 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. Scott G. Fisher, *Ke Ala A Kiki I Noa: The Path to Liberation* 56, 61 (1998) (unpublished M.A. thesis, Earlham School of Religion) (on file with the Harvard Environmental Law Review):

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*," or 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.

political and spiritual contexts in mind when deciding whether and how to acquire properties containing *kuleana*.

II. KULEANA RIGHTS

Contemporary sources of law, including the Hawaii Revised Statutes, the Hawaii State Constitution, and case law interpreting these laws protect six 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;⁴⁵
- (2) agricultural uses, such as taro cultivation;⁴⁶
- (3) traditional gathering rights in and around the *ahupua'a*;⁴⁷
- (4) a house lot not larger than 1/4 acre;⁴⁸
- (5) sufficient water for drinking and irrigation from nearby streams, including traditionally established waterways such as *'auwai*;⁴⁹ and
- (6) fishing rights in the *kunahu* (the coastal region extending from beach to reef).⁵⁰

Kuleana rights are often associated with a native Hawaiian ancestral connection to specific lands, but in fact these rights can run with the *kuleana* land itself, where the courts and legislature have not explicitly stated otherwise. Land trusts deciding how to plan for properties that contain *kuleanas* within their boundaries should consider developing policies of their own regarding how to approach *kuleana* lands held by Hawaiians with ancestral connections to the land, versus *kuleanas* owned by non-native Hawaiians.

There are five sources of *Kuleana* rights:

- (1) Article XII, section 7 of the Hawaii Constitution;⁵¹
- (2) Hawaii Revised Statutes section 1-1;⁵²
- (3) Hawaii Revised Statutes section 7-1;⁵³

Id. at 65.

⁴⁵ See *infra* Part II.A.

⁴⁶ See *infra* Part II.B.

⁴⁷ See *infra* Part II.C.

⁴⁸ See *infra* Part II.D.

⁴⁹ See *infra* Part II.E.

⁵⁰ See *infra* Part II.F; see also *Haalea v. Montgomery*, 2 Haw. 62 (1858).

⁵¹ HAW. CONST. art. XII, § 7.

⁵² HAW. REV. STAT. § 1-1 (1993). Attached in appendix B.

⁵³ HAW. REV. STAT. § 7-1 (1993).

- (4) Precedent-setting case law that has applied these primary sources to actual scenarios that have tested and refined specific elements of these laws;⁵⁴ and
- (5) The *Kuleana Act*.⁵⁵

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 Hawaii 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.⁵⁶

This section of the State Constitution was added in 1978, after much controversy among legislators about the scope of rights granted by this section.⁵⁷ The debate surrounding the amendment indicated that the drafters 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 meaning of the enumerated rights.⁵⁸ This uncertainty is characteristic of *kuleana* rights. Whatever the protected rights may be, this section of the Hawaii Constitution is limited to the descendants of *ahupua'a* tenants living in Hawaii before 1778—particularly native Hawaiians.⁵⁹

Hawaii Revised Statutes section 1-1 offers similarly 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 pro-

⁵⁴ See *infra* Parts II.A–F.

⁵⁵ 2 REV. LAWS HAW. 2141–42 (1925). The Kuleana Act was repealed except for the portion that was codified as HAW. REV. STAT. § 7-1 (1993). 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 U. HAW. L. REV. 207, 218 (1994).

⁵⁶ HAW. CONST. art. XII, § 7.

⁵⁷ Watumull, *supra* note 55 at 224.

⁵⁸ *Id.* at 227.

⁵⁹ HAW. CONST. art. XII, § 7.

ceedings except as provided by the written laws of the United States or the State.⁶⁰

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.”⁶¹ English common law is the source of the contemporary Western concept of a 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 section 1-1 would, of course, depend on the particular circumstances of each case.”⁶² This analysis implies that section 1-1 may offer broad or scant protection of native Hawaiian rights, as the courts see fit in any given case.

Hawaii Revised Statutes section 7-1 enumerates the rights attached to the *kuleana* land itself:

Where the landlords have obtained, or may hereafter obtain, allodial⁶³ 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.⁶⁴

The language in section 7-1 derives from the *Kuleana* Act, which, as we have seen, was intended at the time of its drafting to apply to native tenants who claimed their cultivated parcels and house lots.⁶⁵ However, the term “people” in the statute has been understood to mean the owners of the *kuleana* within the *ahupua‘a*, regardless of ancestry (but not applicable to the public at large).⁶⁶ One issue of debate has been whether the list of rights in section 7-1 is exhaustive. The current interpretation is that

⁶⁰ HAW. REV. STAT. § 1-1 (1993) (emphasis added).

⁶¹ See Watamull, *supra* note 55, at 222–23.

⁶² Kalipi v. Hawaiian Trust Co., 656 P.2d 745, 752 (Haw. 1982).

⁶³ “Allodial” means freehold, as opposed to feudal title.

⁶⁴ HAW. REV. STAT. § 7-1 (1993).

⁶⁵ See *supra* notes 21–26 and accompanying text. See also The Kuleana Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141–42 (1925).

⁶⁶ Robert Bruce Graham, Jr., *Traditional Hawaiian Land Law*, in HAWAII REAL ESTATE LAW MANUAL, 6-12 to 6-13 (Deborah Macer Chin ed., 1997).

the list is not an enumeration of all surviving rights but rather an exposition of *some* of the rights associated with *kuleana* ownership.⁶⁷

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 section 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.”⁶⁸ This holding indicates that customary rights listed in the *Kuleana Act*, but not specifically enumerated in section 7-1, or even traditional practices nowhere listed but still practiced, may be protected by Hawaiian courts. Another issue posed by section 7-1 is how broadly it applies to non-native Hawaiians. Section 7-1 has been understood as providing rights that are appurtenant to the *kuleana* parcel itself and are not severable.⁶⁹

King Kamehameha III may have intended to reserve the rights of native tenants when he divided the Kingdom lands through the *Mahele*, but state 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.⁷⁰ In *Dowsett v. Maukeala*, native tenants argued that by continuing their occupancy of their old tenancy in the *ahupua‘a* after the *Mahele* and after title to the *ahupua‘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 passage of the “extremely liberal” *Kuleana Act*, must be considered unlawful.⁷¹ The court held that the tenancy

⁶⁷ *Id.* at 6-12.

⁶⁸ 656 P.2d 745, 751 (Haw. 1982).

⁶⁹ *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 71 (Haw. 1982). However, a recent federal district court decision suggests that section 7-1 may not be so broadly applicable to non-natives outside the *kuleana* rights context: *See Daly v. Harris*, 215 F. Supp. 2d 1098, 1119-21 (Haw. 2002):

[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.

⁷⁰ *Dowsett v. Maukeala*, 10 Haw. 166, 169 (1895).

⁷¹ *Id.* The court explained its reasoning as follows:

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*],

under the Hawaiian land tenure system had been permissive and that only by failing to pay rent did possession become adverse.⁷² The lawsuit was filed ten years after the tenants ceased paying rent, interrupting the statutory period for adverse possession.⁷³

More recently, in *Pai 'Ohana v. United States*, native Hawaiians occupying five 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, although their ancestors had not claimed a *kuleana*.⁷⁴ Plaintiffs advanced an argument to expand the existing doctrine of native Hawaiian tenants' rights to include those tenants who had not claimed and received *kuleana* awards. They attempted to distinguish their situation from *Dowsett*, arguing that since *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."⁷⁵ The federal district court noted that even though the plaintiffs stated they were not claiming a right of fee simple ownership, their claim of a right of perpetual use and occupancy was the functional equivalent of fee simple title.⁷⁶ The court held that the *Kuleana* Act had provided the plaintiffs' ancestors their opportunity to lay claim to the land. Their ancestors' failure to claim the *kuleana* foreclosed plaintiffs' claims to adverse possessory rights to the parcel under Hawaii state law.⁷⁷ These

and this without notice on the tenant's part that he held henceforth adversely, would give such person holding thereafter for twenty years, to all intents and purposes, as perfect a title to the land he held as if he had applied for and received a fee simple title therefor, and he 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.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Pai 'Ohana v. United States*, 875 F. Supp. 680, 682, 697 (D. Haw. 1995).

⁷⁵ *Id.* at 692.

⁷⁶ *Id.* at 692–93.

⁷⁷ *Id.* 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 Hawai'i by reversing almost 150 years of settled Hawai'i 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 Hawai'i 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 Hawai'i sought to avoid by enacting the Kuleana Act of 1850.

Id. at 695 n.32. The court did not address the fact that native Hawaiians have detailed oral histories and genealogical chants that could help prevent the "chaos" the court alludes to. If admissible, this oral tradition could be helpful as evidence, creating a record useful for distinguishing lawful from unlawful occupancies.

cases demonstrate that the courts have not expanded the concept of title beyond those provisions made explicit by the *Kuleana* Act in 1850.⁷⁸

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.

This right is of particular importance to Hawaii conservation land trusts whose acquisitions may contain *kuleana* lands and who may be concerned about vehicular access across conservation land. *Kuleanas* raise this problem because they are often surrounded by land owned entirely by other parties and may be without direct access to thoroughfares. This Section responds to the importance of this issue by explaining the relevant cases in some detail.

Under Western property law, landlocked parcels might have implied access easements under two distinct theories. 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.⁷⁹ Presumably, to apply these easement rules to *kuleana* parcels, one can consider the *Mahele* itself, which drew boundary

⁷⁸ While the courts have not granted title or exclusive possessory rights to native Hawaiians in these cases, in the last decade they have 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 *infra* note 115 and accompanying text.

⁷⁹ At common law, easements can be implied on the basis of necessity. To prove such an easement, a party must show a 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. See, e.g., *Kalaukoa v. Keawe*, 9 Haw. 191, 191 (1893). 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 dominant one became landlocked, and that the easement is reasonably necessary. See, e.g., *Granite Properties Ltd. P'ship v. Manns*, 512 N.E.2d 1230, 1236 (Ill. 1987). Easements may be granted by prescription, as well. See, e.g., *Lalakea v. Hawaiian Irrigation Co.*, 36 Haw. 692, 693 (1994). 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. *Id.* The location of the easement was considered fixed at common law, but one of the comments accompanying the Third Restatement of Property may change this rule. It grants the owner of the servient estate—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. See RESTATEMENT (THIRD) OF PROPERTY § 4.8 cmt. F (2000). Several courts have applied this new formulation of the rule. See *Lewis v. Young*, 705 N.E.2d 649, 650 (N.Y. 1998); *Soderberg v. Weisel*, 687 A.2d 839 (Pa. Super. Ct. 1997); see also Note, *The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 HARV. L. REV. 1693 (1996).

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.

1. *Early Access Cases*

Early Hawaii 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*,⁸⁰ 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.⁸¹ The path had been made wide enough to accommodate a carriage nearly twenty years prior to the litigation.⁸² 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.⁸³

One year later, in *Henry v. Ahlo*,⁸⁴ 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 Hawaii 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 land. It is a right which he acquired with the land . . . [W]e do not regard it necessary to consider the question of prescriptive right, as this is a case of a way of necessity.⁸⁵

⁸⁰ 9 Haw. 191, 192 (1893).

⁸¹ *Id.*

⁸² 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. *See id.* at 194:

[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.

⁸³ *Id.*

⁸⁴ 9 Haw. 490 (1894).

⁸⁵ *Id.*

It was not until many years later, after the *Kuleana* Act had been substantially codified,⁸⁶ that the court relied on the separate rights appurtenant to *kuleana* lands to enforce access rights.

2. *Cases After the Enactment of Hawaii Revised Statutes Section 7-1*

In *Santos v. Perreira*,⁸⁷ 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 section 7-1.⁸⁸ The Hawaii Intermediate Court of Appeals rejected this argument, holding that the statute 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.”⁸⁹

In *Rogers v. Pedro*, the same court held that *kuleana* owners had a right of access based on necessity and also on the right of way granted by section 7-1.⁹⁰ The court stated that to prove an easement by necessity under section 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.”⁹¹ 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, these cases demonstrate that *kuleana* parcels may also rely on the unique access right provided specifically to *kuleana* lands by section 7-1.

Regarding vehicular access, in *Palama v. Sheehan*, 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.⁹² The defendants offered testimony that their parents, grandparents, and great-grandparents had used the path across the adjoining property to access their taro patches.⁹³ The court held that, based on this evidence, *kuleana* holders had a right to pass through the adjoining property.⁹⁴ 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 that was in existence for twenty-eight years prior to the landowners’ quiet title action. The court accordingly determined that the vehicular use did

⁸⁶ See HAW. REV. STAT. § 7-1 (1993).

⁸⁷ 633 P.2d 1118 (Haw. Ct. App. 1981).

⁸⁸ *Id.* at 1122.

⁸⁹ *Id.* at 1122 n.7.

⁹⁰ 642 P.2d 549, 551–52 (Haw. 1982).

⁹¹ *Id.*

⁹² 440 P.2d 95, 96 (Haw. 1968).

⁹³ *Id.* at 97–98.

⁹⁴ *Id.* at 98.

not impose an unreasonable burden on the land, and found no grounds to restrict the road to an equestrian or pedestrian path.⁹⁵

In *Haiku Planters Ass'n v. Lono*, the court noted that *kuleana* holders with an easement across adjacent property could not park cars along the easement if they could not demonstrate that, historically, parking had occurred along the ingress/egress route.⁹⁶ 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.⁹⁷ By an agreement between the parties, alternate parking was made available on an adjoining lot.⁹⁸

The Hawaii Supreme Court recently revisited the issue of *kuleana* access in *Bremer v. Weeks*.⁹⁹ In that case, plaintiff *kuleana* owner claimed a right of way over the *makai* portion of a trail parcel owned by the defendant based on ancient or historical use under section 7-1 of the Hawaii code and an easement based on necessity.¹⁰⁰ The *kuleana* also had access by a *mauka* trail granted by contractual agreement to prior owners of the *kuleana*.¹⁰¹ In its analysis of section 7-1, 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.”¹⁰² 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.¹⁰³ 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.”¹⁰⁴ The court vacated the circuit court’s order granting the defendant partial summary judgment and remanded the case for a determination of the merits of plaintiff’s claims of easement by reason of ancient or historic use under section 7-1 and easement by reason of necessity under section 7-1.¹⁰⁵ 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.

⁹⁵ *Id.* at 99.

⁹⁶ 618 P.2d 312, 314 (Haw. Ct. App. 1980).

⁹⁷ *Id.*

⁹⁸ *Id.* at 314 n.2.

⁹⁹ 85 P.3d 150 (Haw. 2004).

¹⁰⁰ *Id.* at 152.

¹⁰¹ *Id.* at 156.

¹⁰² *Id.* at 171.

¹⁰³ *Id.* at 176. 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 is not incident to the land. *Id.* at 175 (citing RESTATEMENT OF PROPERTY § 512 (1944)).

¹⁰⁴ *Bremer*, 85 P.3d at 174.

¹⁰⁵ *Id.* at 177.

3. Vehicular Access Rights

Given the desire of land trusts to preserve wild and scenic areas and to provide habitat for threatened and endangered species, vehicular access by landlocked *kuleana* owners across a land trust's conservation easement or fully owned land is likely to be problematic. Maintaining roadless areas on properties of high conservation value may be a matter of public policy, and Hawaii 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 pressure and habitat loss, along with escalating numbers of endangered native species in Hawaii, highlight the problems associated with vehicular traffic across otherwise undeveloped land.

Although western property law favors access to landlocked parcels, there is one Hawaiian case that supports what is likely to be the land trusts' preferred approach to the issue. In *Collins v. Goetsch*, the Hawaii Supreme Court noted that "'free and unrestricted use of property' is favored only to the extent of applicable State land use and County zoning requirements."¹⁰⁶ The court, in drawing this conclusion, cited an Oregon case, *Swaggerty v. Petersen*, which explained that while traditional land use rules favored unlimited access rights to private property, "[p]ublic policy . . . no longer favors untrammelled land use, but requires careful public regulation of all of the land within the state."¹⁰⁷

In *Rogers v. Pedro*, where vehicular access was allowed, the court held that the location of the road access to the *kuleana* did not pose an unreasonable burden on the servient estate.¹⁰⁸ A Hawaii conservation land trust could argue that a vehicular access easement granted by necessity, by implication, and/or by Hawaii Revised Statutes section 7-1 poses an unreasonable burden on the land trust, and that therefore, under the court's reasoning in *Pedro*, the access easement should be modified or denied based on its impact to conservation activities such as habitat restoration. These access and ownership issues could create tension between land trusts and native Hawaiian rights activists but need not be an insurmountable obstacle, as recovering native species populations is often a shared interest of native Hawaiians and conservation 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 consider their course carefully and try to negotiate with the *kuleana* holders and community leaders to limit vehicular traffic or find alternate access routes.¹⁰⁹

¹⁰⁶ 583 P.2d 353, 357 n.2 (Haw. 1978).

¹⁰⁷ 578 P.2d 1309, 1313 (Or. 1977).

¹⁰⁸ 642 P.2d 549, 552 (Haw. Ct. App. 1982) (citing *Henry v. Ahlo*, 9 Haw. 490 (1894) and *Haiku Plantations v. Lono*, 618 P.2d 312 (Haw. Ct. App. 1980)).

¹⁰⁹ See *infra* Part III.A.4.b for discussion of strategic collaboration with Hawaiian groups.

B. Right to Agricultural Uses

1. Cultivation of Crops

Kuleana lots have cultivation rights associated with them, by definition. They are lands that the *maka'ainana* were cultivating at the time of the *Mahele*—known to be fertile, and therefore valuable under the Hawaiian land tenure system.¹¹⁰ Section 6 of the *Kuleana* Act states: “In granting to the people their cultivated grounds, or kalo [taro] lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands.”¹¹¹ This indicates 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 Hawaii Revised Statutes section 1-1 and Hawaii State Constitution Article XII section 7, a *kuleana* holder asserting a right to cultivate his or her *kuleana* would have a compelling argument.

For land trusts considering how taro or other crop cultivation on a *kuleana* fits within a conservation plan for the surrounding property, the answer will depend 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 farmers, potential for runoff and soil erosion, impacts on endangered species or habitat restoration, and trampling of 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 help return water to the aquifer beneath it. 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, the land trust may consider inviting interested people to work the land in accordance with existing conservation plans.¹¹²

2. Grazing

A *kuleana* holder might argue for a right to pasture animals on the plot. While in theory the *kuleana* holder could use his or her property for ranching, *kuleana* parcels tend to be an acre or less in size, an area too small for ranching purposes. It would be unlawful for any grazing animals to

¹¹⁰ See CHINEN, *supra* note 15, at 31.

¹¹¹ The *Kuleana* Act of Aug. 6, 1850, 2 REV. LAWS HAW. 2141–42 (1925).

¹¹² See *infra* Part III.B for further discussion of land trust rights associated with conservation easements.

wander out from the *kuleana* to enter the surrounding land trust property. The Hawaii Supreme Court has addressed the question of animal grazing in the *ahupua'a* beyond the boundaries of the *kuleana*. In *Oni v. Meek*, a *kuleana* holder sued to recover the value of two horses taken by the owner of the surrounding land, claiming that it was his customary right as a tenant of the *ahupua'a* to graze his horses on the surrounding *konohiki* lands.¹¹³ The court determined that the *Mahele* and *Kuleana* Act had separated interests in land such that animals could no longer graze on lands surrounding *kuleana*.¹¹⁴ This rule reinforces the fact that the *ahupua'a* surrounding the *kuleana* is in certain cases no longer communally owned.¹¹⁵

C. *Gathering Rights in the Ahupua'a*

Lands held by Hawaii land trusts, irrespective of whether they contain *kuleana* or not, whether they are held in fee simple absolute or by a conservation easement, may be open to reasonable gathering by native Hawaiians for traditional and customary religious or cultural purposes where the lands are not characterized as “fully developed.”¹¹⁶

The law governing gathering rights has evolved over the past three decades. In *Kalipi v. Hawaiian Trust Co.*, 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 periodically, but not at the time of the case.¹¹⁷ 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.

¹¹³ 2 Haw. 87, 90 (1858).

¹¹⁴ *Id.* at 91.

¹¹⁵ The scope of the decision in *Oni v. Meek* has since been refined. The court in *Oni* inferred the loss of customary rights where the *kuleana* had been acquired in fee simple, and also suggested that section 7 of the *Kuleana* Act, now codified at Hawaii Revised Statutes section 7-1, listed the only traditional rights still available to *kuleana* awardees. *Id.* In *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 751–52 (Haw. 1982), and again in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 903 P.2d 1246, 1260 (Haw. 1995), the court has held that traditional Hawaiian gathering rights still exist and that rights beyond those enumerated in Hawaii Revised Statutes section 7-1 are protected for native Hawaiians. The amended State Constitution Article XII, section 7 also offers protection beyond Hawaii Revised Statutes section 7-1.

¹¹⁶ *State v. Hanapi*, 970 P.2d 485, 494–95 (Haw. 1998). The Hawaii 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. (citations omitted).

¹¹⁷ 656 P.2d at 747.

The Hawaii Supreme Court determined that Hawaii Revised Statutes section 7-1 was intended to protect gathering rights of actual occupants of the *ahupua'a* and that because Kalipi was not living there, he could not exercise those gathering rights.¹¹⁸ 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.”¹¹⁹

Ten years later, in *Pele Defense Fund v. Paty*, plaintiffs Pele Defense Fund (“PDF”), a nonprofit corporation formed to perpetuate the Hawaiian religion, claimed that they had been denied access to land for gathering and religious purposes.¹²⁰ PDF members claimed they had used the area for customary gathering and religious purposes.¹²¹ 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 its claim on the exercise of traditional practice of Hawaiian customs.¹²² 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.*”¹²³ For Hawaii conservation land trusts, this holding implies that gathering rights can be exerted only where they have customarily been so exercised.

In *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, plaintiff organization Public Access Shoreline Hawaii (“PASH”) and Angel Pilago opposed the application of a Japanese-owned development corporation, Nansay, for a county Special Management Area Use Permit to develop a resort on the Big Island at Kohanaiki.¹²⁴ The Hawaii 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.¹²⁵ The county issued the building permit, and PASH challenged the county’s ruling.¹²⁶ Ultimately, the Hawaii Supreme Court held that native Hawaiians retain rights to pursue traditional and customary activities, recognizing that land title in Hawaii confirms only a limited property interest.¹²⁷ The court also reaffirmed *Pele’s*

¹¹⁸ *Id.* at 749–50.

¹¹⁹ D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 HAW. L. REV. 321, 338 (1998).

¹²⁰ 837 P.2d 1247 (Haw. 1992).

¹²¹ *Id.* at 1269.

¹²² *Id.* at 1271.

¹²³ *Id.* at 1272 (emphasis added).

¹²⁴ 903 P.2d at 1246, 1250 (Haw. 1995).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1251.

¹²⁷ *Id.* at 1255, 1268.

holding that customary rights could be exercised beyond the *ahupua'a* of tenancy.¹²⁸

In *State v. Hanapi*, the Hawaii Supreme Court noted that “fully developed” residential property is not open to the exercise of traditional and customary native Hawaiian gathering rights or religious practices.¹²⁹ 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.”¹³⁰

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. 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.

Since conservation land trusts tend not to hold lands that are “fully developed” in the residential sense expressed by the court in *Hanapi*, many land trust holdings are likely to be attractive settings for traditional Hawaiian gathering and religious practices. In lieu of litigation, land trusts and Hawaiians may negotiate agreements where sensitive habitat and endangered species are present in an area that Hawaiians wish to use for gathering purposes. 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 space 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.”¹³¹

While the right to build a house on one’s *kuleana* is not specifically enumerated anywhere in the extant state statutes 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.¹³²

¹²⁸ *Id.* at 1269.

¹²⁹ 970 P.2d 485, 494–95 (Haw. 1998).

¹³⁰ *Id.* at 495 n.10.

¹³¹ The *Kuleana* Act of August 6, 1850, 2 REV. LAWS HAW. 2141–42 (1925).

¹³² All of Hawaii’s lands are zoned by the state Land Use Commission either Urban, Rural, Agricultural, or Conservation, with additional restrictions on shoreline development

One exception appears in the Maui County Code, where *kuleana* are considered to be nonconforming uses in the Agricultural District and may be exempt from the density restrictions.¹³³

In the Conservation District,¹³⁴ *kuleana* come under the jurisdiction of the state Department of Land and Natural Resources (“DLNR”). 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. Hawaii law provides that:

[a]ny 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.¹³⁵

Land trusts can determine whether a *kuleana* was customarily used as a house lot by ordering title searches and obtaining relevant land records from the Bureau of Conveyances in Honolulu. As described in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, the test for what constitutes custom is vague and likely to be determined on a case-by-case basis.¹³⁶ Land trusts might look to sources such as native testi-

Special Management Areas. HAW. REV. STAT. § 205-2 (1993). For a more complete discussion of zoning laws in Hawaii, see DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 10–12 (1994). Open Space districts exist at the county level. *Id.* at 68.

¹³³ Maui County Code section 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.

The “district standards” in section 1930A.030 provide the following standards for facilities, and structures in the Agricultural District: a minimum lot size of two acres; minimum lot width 200 feet; minimum yard setbacks, front yards twenty-five feet, side and rear yards, fifteen feet; maximum developable area, ten percent of total lot area; maximum height limit of thirty feet except for chimneys, antennae, etc.; maximum wall height not to exceed four feet; maximum number of lots to be based on gross area of the subject lot. *Id.* The “density restrictions” in section 19.30A.050.B.1 provide for accessory uses on agricultural lots including two farm dwellings per lot, one of which is not to exceed 1000 square feet. MAUI, HAW. COUNTY CODE § 19.30A (2003), available at http://www.mauiboard.com/download_files/file_976491046.pdf (on file with the Harvard Environmental Law Review).

¹³⁴ As defined in Hawaii Revised Statutes section 183C-1, the Conservation District includes lands with important natural resources “essential to the preservation of the state’s fragile natural ecosystems and the sustainability of the state’s water supply.” HAW. REV. STAT. § 183C-1 (1999).

¹³⁵ HAW. REV. STAT. § 183C-5 (1999).

¹³⁶ 903 P.2d 1246, 1268 n.39 (Haw. 1995). The court 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

mony, archaeological records often held by the Bureau of Conveyances, 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.¹³⁷ Hawaii Revised Statutes section 183C-5 appears to contemplate the use of the *kuleana* in the context of the use of surrounding land, authorizing the agency to impose conditions to ensure any structure built is “consistent with the surrounding environment.”¹³⁸ If land trusts and *kuleana* owners seeking to build houses cannot come to some agreement on their own, land trusts may enlist the help of DLNR to impose adequate plans ensuring that Conservation District rules and/or land trust management of an area are not overly compromised.

Unless and until anyone comes forward claiming ownership of the *kuleana*, land trusts may prefer not to seek out these potential house builders. Instead, they might prefer to communicate conservation goals and objectives to the surrounding community and thereby encourage community support and involvement in stewardship plans. With community-wide cooperation, individuals might choose not to engage in house-construction projects that would be inconsistent with conservation plans for a particular piece of land. 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. 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 Hawaii and an agreement may be impossible. To avoid an impasse, before acquiring land surrounding or including a *kuleana*, land trusts can thoroughly research the likelihood of house construction on existing undeveloped houselots and decide accordingly if the property is a proper acquisition.¹³⁹

E. Right to Sufficient Water

As is stated in Hawaii Revised Statutes section 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, [and] running water . . .

the custom. *Id.*

¹³⁷ HAW. REV. STAT. § 183C-3 (1999).

¹³⁸ HAW. REV. STAT. § 183C-5.

¹³⁹ The likelihood that an individual or group of descendants with title to the *kuleana* would seek to construct a house might be inferred from thorough title research and conversations with community leaders.

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.¹⁴⁰

Hawaii state law also provides that *kuleana* lands have water rights even without water permits.¹⁴¹

The Hawaii State Water Code contains provisions that call for a balancing of priorities between traditional uses, instream flow, and development.¹⁴² The purpose of the code is simultaneously to conserve the resource and to obtain maximum beneficial uses of the State's waters.¹⁴³ The Water Commission is also charged with protecting beneficial instream uses, including native Hawaiian traditions and practices.¹⁴⁴

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 Hawaii: (1) appurtenant, referring to water rights associated with the land parcel at the time of the *Mahele*; (2) riparian, water flowing to lands adjacent to streams; and (3) 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 wish to contemplate appropriate ways to 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."¹⁴⁵ Appurtenant water rights may only be used in connection with the particular parcel of land to which the right attaches, but not for diversion to locations outside the watershed.¹⁴⁶ 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 Hawaii in the *McBryde Sugar Co. v. Robinson*¹⁴⁷ and *Reppun*¹⁴⁸ cases, both landmark water law cases describing the extent to which water in Hawaii 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 wa-

¹⁴⁰ HAW. REV. STAT. § 7-1 (1993).

¹⁴¹ HAW. REV. STAT. § 174C-101 (1993) ("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.").

¹⁴² 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, 2 (1996).

¹⁴³ *Id.* at 1.

¹⁴⁴ *Id.* at 36.

¹⁴⁵ *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 70-71 (Haw. 1982).

¹⁴⁶ Elizabeth Ann Ho-oipo Kala'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 168 (1996).

¹⁴⁷ 504 P.2d 1330, 1339 (Haw. 1973).

¹⁴⁸ 656 P.2d at 57.

tershed.¹⁴⁹ In *McBryde*, the court held that (1) Hawaii Revised Statutes section 7-1 imposed the riparian or natural flow doctrine on Hawaii, (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.¹⁵⁰ 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.¹⁵¹

Most recently, in *In re Water Use Permit Applications* (the *Waiahole* decision), the Hawaii Supreme Court held that the state must balance water conservation with maximum reasonable and beneficial use of water.¹⁵² The court maintained that while the public trust may have to permit off-stream diversions to accommodate private development, “any balancing between public and private uses [must] begin with a presumption in favor of public use, access, and enjoyment.”¹⁵³ Such a presumption in favor of public use might privilege land trust uses over other private water uses, 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 Hawaii. 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. In addition they may allow public access to their land holdings, and can serve broad public trust goals.¹⁵⁴ As owners/easement holders of lands adjacent to streams, land trusts may also have riparian rights. If they have acquired title to *kuleana* parcels, they may have established appurtenant water rights as well. As discussed in Part IV below, Hawaii land trusts could benefit from strategic partnerships designed to assert these water rights to improve instream flow and restore aquifers. In theory, *kuleana* holders present in the area of a land trust acquisition could have competing claims

¹⁴⁹ *McBryde Sugar Co.*, 504 P.2d at 1339–41; 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).

¹⁵⁰ 504 P.2d at 1341, 1344.

¹⁵¹ 656 P.2d at 71 (“[T]he 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.”).

¹⁵² 9 P.3d 409, 454 (Haw. 2000); see also Ede, *supra* note 149, at 296.

¹⁵³ *Waiahole*, 9 P.3d at 454.

¹⁵⁴ Conservation easements are not required to allow public access to meet the requirements of the IRS conservation purposes test. See I.R.C. § 170(h)(4)(A)(i)–(iv) (2005).

for water as well as complementary claims. However, the land trust would still likely be considered a public use with a presumption in its favor.

F. Fishing Rights in the Kunalu

Kuleana lands and surrounding *Konohiki* lands have associated fishing rights in the *kunalu* area of the *ahupua'a* where they are located. Section 388 of the Civil Code of the Hawaiian Kingdom provided that “[t]he *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.”¹⁵⁵

The Hawaii Supreme Court has held a tenant of an *ahupua'a* has “a right to fish in the sea appurtenant to the land as an incident of his tenancy.”¹⁵⁶ 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.¹⁵⁷ While a tenant may have formed agreements relinquishing his personal fishing rights, the tenant's descendants living in the *ahupua'a* still retain those fishing rights, as they are an incident of occupancy in the *ahupua'a*.¹⁵⁸

For land trusts, this *kuleana* right to fish in the area from the beach to the reef is tempered by the right of the surrounding landowner not to have his “share of fish” interfered with.¹⁵⁹ Where land trusts are the surrounding landowner, somewhat parallel to the *konohiki*, 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 maintain and improve the condition of marine fish populations.

The rights associated with and attached to *kuleana* parcels are numerous and, in some areas, far-reaching. Understanding the ways that *kuleana* rights interfere with and benefit land trust priorities is important to the long-term success of conservation land trusts in Hawaii for conservation professionals, land use attorneys, government agencies, and native Hawaiians with an interest in specific land trust transactions.

¹⁵⁵ CIV. CODE OF THE HAWAIIAN KINGDOM ch. VII, art. V, § 388 (1880), available at http://www.hawaiiankingdom.org/civilcode/ARTICLE_V.shtml (on file with the Harvard Environmental Law Review).

¹⁵⁶ *Hatton v. Piopio*, 6 Haw. 334, 336 (1882).

¹⁵⁷ *Id.*

¹⁵⁸ *Damon v. Tsutsui*, 31 Haw. 678, 686–87 (Haw. 1932).

¹⁵⁹ *Hatton*, 6 Haw. at 336.

III. INTEGRATING *KULEANA* RIGHTS AND LAND TRUST PRIORITIES

This Part explores the tools available to Hawaii conservation 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 Hawaii. 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, Hawaii 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. Each land trust will have different options available to it for addressing *kuleana* rights depending on whether it holds the land in fee simple¹⁶⁰ or owns a conservation easement on the subject parcel.¹⁶¹

A. *Conservation Land Trusts*

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 just over 400 local, state, and regional land trusts.¹⁶² By the end of 2003, that number had grown to 1537.¹⁶³ 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. Between 1998 and 2003 alone, total acreage conserved by local, state, and regional land trusts doubled, increasing from 4.7 million acres to over 9.4 million acres.¹⁶⁴

To purchase land outright, land trusts generally rely on funding from foundations, county and state governments, private individual donations, charitable corporate grants, membership fees, and 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.

The current political climate in many states as well as at the national level is adverse to increases in government regulation of private land. Therefore, conservation easements have become the most frequently used tool by local, state, and regional land trusts. They provide a solution by offering a financial incentive—tax benefits—in exchange for the donation of a

¹⁶⁰ See *infra* Part III.A.

¹⁶¹ See *infra* Part III.B.

¹⁶² Land Trust Alliance, *National Land Trust Census* (2003), available at <http://www.lta.org/aboutlt/census.shtml> (on file with the Harvard Environmental Law Review).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

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.¹⁶⁵ Private land trusts, like those emerging in Hawaii, have been heralded because “in a political climate that is hostile to government regulation, the use of financial incentives to encourage private landowners to voluntarily engage in conservation practices has emerged as a favored approach to private land protection.”¹⁶⁶

B. *Kuleanas and Land Trust Acquisitions*

When *kuleanas* exist within the boundaries of a land trust’s acquisition, there is potential for either productive collaboration or destructive conflict between land trusts and native Hawaiians. One likely scenario occurs where a land trust acquires land surrounding *kuleanas* in fee simple absolute by a grant deed from the prior landowner and simultaneously acquires title to the *kuleanas* by a quitclaim 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 fractional interests in the land have been conveyed to successive landowners over time. Similarly, where a conservation land trust acquires a conservation easement as a donation and that easement includes a *kuleana*, the land trust may learn that the landowner has a valid fractional interest in the land but may not have clear title to the *kuleana*.

What should a conservation land trust do under such circumstances? 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 conservation land trust have similar acquisitions already, or would this easement add a new kind of land to its “portfolio”? What is the conservation land trust’s relationship to the easement donor and 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 so as to promote creation of a wild-life corridor or have other beneficial effects on neighboring parcels of land? In its consideration of these questions, a conservation land trust would be well served 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 conservation land trust may

¹⁶⁵ Though the land trust movement is gaining in popularity, it is not without critics. See, e.g., Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

¹⁶⁶ Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations: A Responsible Approach*, 31 ECOLOGY L.Q. 1, 4 (2004).

also give special consideration to other native Hawaiian rights, as these rights often 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 its mission statement, the ideology of its board members, short-term acquisition goals, and longer-term strategies.

In many instances, *kuleanas* may be used by their owner(s) in ways consistent with conservation management plans, such as low-impact agricultural or cultural uses. The potential for trouble arises when *kuleana* owners with or without ancestral ties to the *kuleana* wish to use the land in ways perceived by the land trust as inconsistent with its preservation goals. The following sections address specific techniques available to land trusts to limit controversy when *kuleana* owners or claimants assert the rights described above.

Before describing the legal remedies available to land trusts, it is important to keep in mind 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 to litigation. Traditionally, Hawaiian families sought to resolve conflict through a ritualized process called *ho'oponopono*, or setting things right.¹⁶⁷ 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.¹⁶⁸ The party who harbors the ill feelings is thought to suffer retributive comeback, or *ho'i ho'i*, beginning a destructive web that can ensnare a large group of people if not properly addressed.¹⁶⁹ The principles of honesty and resolution and a willingness to heal the conflict that characterize *ho'oponopono* are instructive. In the *PASH* decision, which allowed for continued traditional Hawaiian gathering rights on "less than fully developed" land, the Hawaii Supreme Court addressed the premise of fee ownership limited by cultural rights: "[a]lthough this premise clearly conflicts with common 'understandings of property' and could theoretically lead to disruption, the non-confrontational aspects of

¹⁶⁷ MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 341 (1986).

¹⁶⁸ Fisher, *supra* note 44, at 86.

¹⁶⁹ *Id.* 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 in dispute. 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.

traditional Hawaiian culture should minimize potential disturbances.”¹⁷⁰ In making such a statement, the court justifies its ruling by drawing from native Hawaiian culture as well as law.¹⁷¹ Hawaii-based land trusts may follow the court’s lead in considering how to deal with *kuleana* lands that may appear to interfere with land trust acquisition processes. Land trusts should consider a balanced approach, where they maintain awareness of the legal remedies available and simultaneously work to arrive at agreements that, to the extent possible, do not violate native Hawaiian cultural norms.

C. Approaches for Fee Simple Acquisitions

1. Fee Simple Ownership

Land trusts hold fee simple title to lands which they purchase or receive as gifts.¹⁷² 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.¹⁷³ Fee simple absolute ownership indicates that no other party has any presently identifiable legal right to obtain ownership of the property.¹⁷⁴ In Hawaii, no title is entirely free of encumbrances owing to the nature of the land division and historic claims to land that are still in effect, as well as State rights to subsurface minerals.¹⁷⁵ 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. This method 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

¹⁷⁰ Pub. Access Shoreline Hawaii v. Hawai‘i County Planning Comm’n, 903 P.2d 1246, 1268 (Haw. 1995).

¹⁷¹ 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).

¹⁷² JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 538 (2d ed. 1997).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Tom Leuteneker, *Quiet Title and Easements*, in HAWAI‘I REAL ESTATE LAW MANUAL, *supra* note 66, at 9-1.

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 or 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 sugar 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 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 *Mahele*.¹⁷⁶

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.

¹⁷⁶ A preliminary title report can be ordered through a recognized title research and insurance company such as Title Guaranty in Hawaii.

4. *If the Kuleana Has Not Been Occupied in Recent Memory*

a. *Status Quo*

One common scenario occurs when *kuleana* parcels are unoccupied and have been effectively incorporated into the surrounding parcel of 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 Hawaii, including land trusts, is to maintain the status quo: proceed with the purchase or gift 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 *Mahele*, 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.

b. *Strategic Collaboration*

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 and 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 drive over or build houses on 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.

c. *Locating Kuleana Owners*

Another option where the *kuleana* has been unoccupied for many years is for the land trust to undertake its own title research and 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, depend-

ing 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 or 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 party 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's public reputation and ability to work with other landowners in the future.

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, who may feel displaced from their *kuleana* by the course of events surrounding the *Mahele*, 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 with respect to land control in Hawaii.

d. Addressing Land Trust Funders' Requirements

When deciding how best to approach *kuleana* land purchases or gift acceptances, Hawaii land trusts must consider the requirements of government agencies or programs, especially federal 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.

e. Federal Funding Requirements: The Wetlands Reserve Program

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.¹⁷⁷ The WRP requires that USDA be granted a conservation easement across the portion of the property on which it is funding wetland restoration.¹⁷⁸ 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.¹⁷⁹ If there are *kuleana* located in the wetland area, WRP may perceive 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. The determination as to whether the *kuleana* are located where they will affect wetland restoration is made by Department field biologists. Although some of the terms of the WRP funding requirements are inflexible, the NRCS biologists may be able to work cooperatively with land trusts to design appropriate easements. This is just one example of how federal agency funding requirements can impact or even compromise land trusts’ ability to acquire *kuleana* parcels.

f. 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 (1) attempt to quiet title to the *kuleana*, or (2) to require the previous landowner to quiet title as a precondition of sale. This approach is feasible where the *kuleanas* have either been unclaimed for the twenty-year statutory period to allow for an adverse possession claim or where multiple owners of the *kuleana* have not agreed how to use or divide the property among themselves.¹⁸⁰ Given these fact scenarios, title can be quieted in two ways: an action to quiet title on the basis of adverse possession

¹⁷⁷ Natural Resources Conservation Service, *Wetlands Reserve Program*, at <http://www.nrcs.usda.gov/programs/wrp/> (last visited Mar. 18, 2005) (on file with the Harvard Environmental Law Review).

¹⁷⁸ 7 C.F.R. § 1467.4(d)(2) (2005). 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. 7 C.F.R. § 1467.4(d)(3) (2005).

¹⁷⁹ See 7 C.F.R. § 1467.10(4)(c) (2005) (“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 generally contemplated are easements for utilities such as overhead power lines along boundaries that will not affect restoration.

¹⁸⁰ Leuteneker, *supra* note 175, at 9-13, 9-29.

or action to quiet title by partition.¹⁸¹ These claims may be accompanied by a partition action where two or more parties are determined to own the *kuleana*.¹⁸² 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* within land trust property boundaries. For some landowners, quieting title to *kuleana* parcels that lie within the boundaries of their 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. While the quiet title option is nevertheless available to land trusts worried about the potential for inconsistent uses on the *kuleana*, the approach is not 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.¹⁸³

A land trust would be using the established legal tool of adverse possession 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 Hawaii, the owner of the land must follow a series of steps.¹⁸⁴ 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 to firmly establish the modern boundaries of the land and to have admissible survey evidence for a reviewing court.¹⁸⁵ The third step is to give all possible claimants to the property adequate notice, as required by Hawaii state law.¹⁸⁶ Essentially, in order to uphold 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.¹⁸⁷

¹⁸¹ Actions to quiet title in Hawaii are governed by section 669 of the Hawaiian code. See *id.* at 9-1.

¹⁸² *Id.* at 9-28.

¹⁸³ Hawaiian hostility to adverse possession claims is documented. Kahalepauole v. Assocs. Four, 791 P.2d 720, 724 (Haw. Ct. App. 1990) (citing Naomi Hirayasu, *Adverse Possession and Quiet Title Actions in Hawaii—Recent Constitutional Developments*, 19 HAW. B.J. 59 (1985)).

¹⁸⁴ Leuteneker, *supra* note 175, at 9-7 to 9-12.

¹⁸⁵ The survey requirement poses an additional challenge for some *kuleanas*, whose boundaries—and the landmarks originally describing their boundaries—may have been lost as land use patterns have changed over time.

¹⁸⁶ HAW. REV. STAT. § 669-2(c)(1) (1993).

¹⁸⁷ In *Hustace v. Kapuni*, 718 P.2d 1109 (Haw. Ct. App. 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 maintained that more deliberate research and notification is required. It held that notice by publication, as constructive notice, is authorized only if the complainant “reasonably employed knowledge at his command, made dili-

i. 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 twenty years.¹⁸⁸ 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.¹⁸⁹ 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-tenant, adverse possession in fact, and knowledge or notice made clear to the co-tenant.¹⁹⁰ Moreover, a co-tenant must act in good faith toward co-tenants.¹⁹¹ 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.

gent 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." *Id.* at 1114. The court suggested that claimants or their attorneys search at state libraries, the Bishop Museum, churches, circuit and supreme courts, the Mission House, Hawaii Sugar Planter's Association, the Department of Health, Department of Immigration and Naturalization, and the state archives to determine all possible defendants. *Id.* at 1115. Only after this due diligence is complete may affidavits be submitted to the court for an order allowing service by publication in a Honolulu newspaper and, if applicable, a local outer island newspaper. *Id.* This threshold level of inquiry is obviously expensive, and is one reason to avoid quieting title as an approach to *kuleana* lands.

¹⁸⁸ While a possessory claim is weakened by the lack of paper title, such as a deed or probate document, an adverse possessor need only make a claim of title. *Thomas v. State*, 514 P.2d 572, 574-75 (Haw. 1973). The use of the property need not be by one party during the twenty year period; successive users in privity, such as a buyer and seller or decedent and her inheritor, may tack their uses together. *See, e.g., Territory v. Pai-a*, 34 Haw. 722, 725 (1938); *Kainea v. Kreuger*, 31 Haw. 108, 114-15 (1929); *Bishop v. Paaho*, 16 Haw. 345, 346-47 (1904). Adverse possession claims in Hawaii 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. HAW. REV. STAT. § 669-1(b) (1993). 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 also Leutenecker, supra* note 175, at 9-13 to 9-18.

¹⁸⁹ *Leutenecker, supra* note 175, at 9-13.

¹⁹⁰ *City and County of Honolulu v. Bennett*, 552 P.2d 1380, 1389-90 (Haw. 1976); *Yin v. Midkiff*, 481 P.2d 109, 112 (Haw. 1971); *In re Keamo*, 650 P.2d 1365, 1371 (Haw. Ct. App. 1982).

¹⁹¹ *City and County of Honolulu v. Bennett*, 552 P.2d 1380, 1390 (Haw. 1976). Proof of actual notice to co-tenants is excused in exceptional circumstances, such as 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.*

Native Hawaiian advocates have tried to eliminate the adverse possession statute as a response to its use primarily by large landholders to absorb the *kuleana* of native Hawaiians. 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 Hawaii 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*.¹⁹² Because of the challenge of meeting the requirements posed by the adverse possession laws and because adverse possession in Hawaii “has an unsavory reputation and is popularly perceived as a form of theft,”¹⁹³ Hawaii 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.

ii. 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 Hawaii 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. This is especially true when the other owners are likely to change, meaning that the land trust could not rely on the continuing goodwill of the current co-owner. 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 an appropriate course of action. Hawaii’s partition statute authorizes a court “[t]o cause the property to be equitably divided between the parties according to their respective proportionate interests therein, as the parties agree, or by the drawing of lots.”¹⁹⁴ 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

¹⁹² Cynthia Lee, *The Doctrine of Adverse Possession*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 1, at 121.

¹⁹³ Graham, *supra* note 66, at 6–24.

¹⁹⁴ HAW. REV. STAT. § 668-7(4) (1993). Property can either be partitioned in kind or by sale. “The law requires that real property be partitioned in kind when possible. In a partition in kind, an appraiser . . . may provide evidence of the values of the various parcels, so that each owner receives land of a value equal to that owner’s individual interest.” Leuteneker, *supra* note 175, at 9-30.

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.¹⁹⁵

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. Hawaii 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 as 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 property,¹⁹⁶ 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.¹⁹⁷ 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 oftentimes the surrounding landowner is presupposed to be the buyer at auction.¹⁹⁸ Co-tenants may also agree to a partition sale by a private broker.¹⁹⁹

While partition actions may result in a monetary award to *kuleana* claimants, the payout to each claimant (often there are many) can be miniscule relative to the market value of the *kuleana* and to the intangible value, especially in Hawaiian culture, of having an interest in land itself.²⁰⁰ 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* and thereby endanger future community relations. Recognizing this inequity, the Office of Hawaiian Affairs testified in support of a bill recently before the Hawaii State Legislature that, if enacted, would have prohibited parties owning less than fifty-one percent of *kuleana* land from filing partition actions, a situation likely to result in the court order

¹⁹⁵ See *infra* notes 196–197 and accompanying text.

¹⁹⁶ 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*, No. 01-1-0202(2), slip op. at 2 (Haw. Cir. Ct. Dec. 23, 2002).

¹⁹⁷ See, e.g., *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. See, e.g., *id.* Note that "Land Commission Award" is a term that applies to land grants including but not limited to *kuleana* awards to tenant farmers; it also includes large land awards to higher ranking chiefs.

¹⁹⁸ *Id.*

¹⁹⁹ Leuteneker, *supra* note 175, at 9-30.

²⁰⁰ Interview with Tom Pierce, Attorney, in Wailuku, Maui (June 2, 2003) (notes on file with the author).

sale of the *kuleana* land.²⁰¹ Similar bills have appeared before the legislature in the past, and have been unsuccessful. Nevertheless, continuing lobbying on this issue itself signals that pursuing partition actions on *kuleana*-encumbered lands may be politically tenuous territory for the land trust.

D. Approaches for Conservation Easements

A conservation easement is a “legal agreement a property owner makes to restrict the type and amount of development that may take place on his/her property.”²⁰² 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. 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.²⁰³

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.²⁰⁴ The Internal Revenue Service allows a deduction if the easement is perpetual and donated “ex-

²⁰¹ H.B. 1677, 22nd Leg. (Haw. 2003) (on file with the Harvard Environmental Law Review).

²⁰² Janet Diehl, *Managing a Responsible Easement Program*, in THE CONSERVATION EASEMENT HANDBOOK 5 (Janet Diehl & Thomas S. Barrett eds., 1988). 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.” *Found. for Historic Georgetown v. Arnold*, 651 A.2d 794, 797 (D.C. 1994); *Thomas*, 690 P.2d at 339; see also Andrew Dana, *Legal Conventions of Conservation Easement Interpretation: Document prepared for 2003 Land Trust Alliance Annual Rally* (on file with the Harvard Environmental Law Review).

²⁰³ MAUI COASTAL LAND TRUST, CONSERVATION EASEMENTS: WHAT ARE THEY?, at <http://www.mauicoastallandtrust.org/htmls/QA.html> (last visited Apr. 26, 2005) (on file with the Harvard Environmental Law Review).

²⁰⁴ McLaughlin, *supra* note 166, at 28–29:

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 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).

clusively for conservation purposes.”²⁰⁵ At the state and local level, additional tax incentives may be available, though Hawaii has yet to offer such additional incentives.²⁰⁶ 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.²⁰⁷

1. Consent of All Landowners May Be Required To Validate Conservation Easements

Hawaii 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.²⁰⁸ 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.²⁰⁹

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 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

²⁰⁵ I.R.C. § 170(h)(5) (2005).

²⁰⁶ For example, both Colorado and Virginia currently offer tax incentives for conservation easement donors. McLaughlin, *supra* note 166, at 39.

²⁰⁷ I.R.C. § 170(h)(4).

²⁰⁸ HAW. REV. STAT. § 198-5(a) (1993).

²⁰⁹ *Id.*

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. *Including the Kuleana in the Easement or Exchanging 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.²¹⁰ 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.²¹¹ 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 conservation land trusts is uncertainty. Land trusts cannot predict whether claimants to *kuleana* will appear and attempt to develop their land in the

²¹⁰ Note that while relocating a *kuleana* may prove difficult, there is persuasive authority available for a land trust to argue for a right to move the access route to a landlocked *kuleana*. See *supra* note 79 and accompanying text.

²¹¹ I.R.C. § 170(h)(4) (2005).

middle of a restoration or other conservation project. As Hawaiians enjoy a cultural revival and the Hawaiian Sovereignty movement 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.²¹² Land trusts cannot predict what such heirs might elect to do with the land rights granted to their ancestors over 150 years ago. 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, this outcome remains possible. To address this fundamental challenge of uncertainty, Hawaii 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 such an approach risks alerting potential claimants who might otherwise not have known about the *kuleana*, identifying 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. It requires travel to the Honolulu Bureau of Conveyances and researchers who are competent in translating and interpreting old Hawaiian language documents. These expenses are simply beyond the capacity of many Hawaii-based land trusts. 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;
- serving as a receptacle for reparations from the federal government.²¹³

²¹² See, e.g., HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (1993); see generally <http://www.hawaii-nation.org> (last visited Apr. 26, 2005) (providing information regarding native Hawaiian rights and sovereignty concerns).

²¹³ HAW. REV. STAT. § 10-3 (1993).

Given OHA's mandate, it seems appropriate to involve the agency in title research on behalf of Hawaii 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 DLNR, and then to OHA to be held in trust.²¹⁴ OHA must also be made a party to any quiet title action where *kuleana* escheat is alleged.²¹⁵ It seems a logical extension of OHA's existing duties for it to help locate potential *kuleana* heirs and put land trusts in contact with those heirs. This contact would facilitate land use agreements by including the land trust's goals, as well as incorporate native Hawaiian uses of the land that are 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 Center for Hawaiian Studies at the University of Hawaii at Manoa. That group has been involved in a project to make an inventory of the ceded lands throughout Hawaii, a task involving extensive research into old land records from the time of the *Mahele*, reading Hawaiian language documents, and analyzing their meaning. The Center was funded by an OHA grant enabling it to undertake this project.²¹⁶ Redirecting some of this group's efforts once the inventory is complete, or seeking ongoing assistance with title research for Hawaii'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.

*B. Water Distribution and Land Trusts' Kuleana Water Rights—
Suggestions for a Broader Strategy*

Where land trusts own property in fee simple that include *kuleana* parcels, they may attempt to assert the appurtenant water rights attached to those *kuleana* parcels 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 rights for those LCAs adjacent to local streams.²¹⁷ A reviewing court

²¹⁴ HAW. REV. STAT. § 560:2-105.5 (1999).

²¹⁶ HAW. REV. STAT. § 669-2(e) (1993).

²¹⁶ See Pat Omandam, *OHA Award Expands UH Hawaiian Center Staff: The \$1.5 million Grant Will Also Allow More Study into Native Fields*, HONOLULU STAR-BULL., NOV. 9, 2002, available at <http://starbulletin.com/2002/11/09/news/story5.html> (on file with the Harvard Environmental Law Review).

²¹⁷ See *supra* Part II.E.

could find the application of these cases persuasive, especially given the growing awareness throughout the state of the over-pumping of aquifers by a few large commercial users.²¹⁸ 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.²¹⁹

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.²²⁰ For example, on Maui, within the Agricultural District, this exception is written into the county code.²²¹ Land trusts acquiring easements or fee property in Maui County and throughout the state should be

²¹⁸ For example, over-pumping of 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 of this water 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*, MAUI NEWS, July 23, 2003, at A13 (on file with the Harvard Environmental Law Review).

²¹⁹ See Earthjustice, *'Iao, Waihe'e Aquifers Groundwater Management*, at <http://www.earthjustice.org/urgent/print.html?ID=101>:

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 to 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.

²²⁰ See, e.g., MAUI, HAW. COUNTY CODE § 19.30A.100 (1998), available at http://www.mauiboard.com/download_files/file_976491046.pdf (on file with the Harvard Environmental Law Review).

²²¹ *Id.*

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.²²² Building of single-family dwellings on lands rezoned as open space under a proposed Maui County open space ordinance would be unequivocally prohibited, making this zoning attractive for land trust acquisitions.²²³

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 and 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 Hawaii and U.S. Constitutions, it is unlawful to take private property for public use without just compensation.²²⁴ 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

²²² HAW. REV. STAT. § 183C (1999); HAW. ADMIN. RULES § 13-5-22 (1998).

²²³ MAUI COUNTY PLANNING AND LAND USE COMMITTEE REPORT NO. 03-64 (2003), available at http://www.co.maui.hi.us/files/PLU/Report/0319aa_03-64_isngkjgik.pdf (on file with the Harvard Environmental Law Review).

²²⁴ 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." U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. *Haw. Hous. Auth. 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.

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.

CONCLUSION

The success of Hawaii-based land trusts may hinge on their approaching land conservation in a way that balances the land trust's rights as spelled out by courts and legislatures with respect for the rights of native Hawaiians. Given the trend toward court-granted access to landlocked *kuleanas*, potential exemptions from building density restrictions, and the difficult decision making about how to proceed with legal remedies to quiet title to *kuleanas*, Hawaii-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 properties poses risks to a land trust's full control over land management, so too the *kuleana* may provide unforeseen benefits. For example, additional water rights may be available to land trusts who own *kuleanas*; *kuleanas* may also 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
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.
KEONIANA.

APPENDIX B

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."

APPENDIX C
GLOSSARY OF HAWAIIAN TERMS²²⁵

‘Aina—Land, earth

Ahupua‘a—Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by the image of a pig (pua‘a), or because a pig or other tribute was laid on the altar as tax to the chief. The landlord or owner of an ahupua‘a might be a konohiki.

Ali‘i Nui—high chief

Kanaka—Human being, man person, individual, party, mankind, population, subject, as of a chief; laborer, servant, helper

Konohiki—The headman of an ahupua‘a land division under the chief; land or fishing rights under control of the konohiki

Kuleana—Right, privilege, concern, responsibility, authority, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province; reason, cause, function, justification; small piece of property, as within an ahupua‘a.

Mahele—Portion, division, section, zone, lot, piece; land division of 1848 (the great mahele)

Maka‘ainana—commoner, populace, people in general, citizen, subject, people that attend the land

Malama—to take care of, tend, attend, care for, preserve, protect, beware, save, maintain

Makai—ocean, on the seaside, toward the sea, in the direction of the sea

Mauka—inland, upland, towards the mountain

²²⁵ All definitions are from PUKUI & ELBERT, *supra* note 167.

