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**BOARD OF LAND AND NATURAL RESOURCES**

**State of Hawai‘i**

In The Matter Of A Limited Contested	)	
Case Regarding A Request To Amend	)	
Conservation District Use Permit OA-2670	)	DLNR CC OA 11-02
To Construct A Marina Entrance Channel	)	
Located At Honouliuli, Ewa, Oahu,	)	MICHAEL KUMUKAUOHA LEE’S
Plat (1) 9-1-012 By Haseko To Reduce The	)	OPENING BRIEF
Size Of The Marina.	)	

**MICHAEL KUMUKAUOHA LEE’S OPENING BRIEF**

Michael Kumukauoha Lee, by and through himself, Pro Se, submits this Opening Brief to highlight some of the legal and factual issues that demonstrate why Haseko is not entitled to received an Amendment to their Conservation District Use Permit prior to the Board of Land and Natural Resources identifying, assessing and mitigating harmful or adverse impacts to Native Hawaiian resources and cultural practices in the area of One’ula, the area on O’ahu where the most sacred and highest ranking Ali’i were interred and where numerous burial sites still exist. One’ula means the “sacred royal sands.” (Exhibit)

This case is about a twenty-year history of poor regulatory oversight by numerous State and County agencies allowing one of the most significant cultural landscapes not only on O`ahu, but throughout the Hawaiian Islands to be obliterated causing great harm to not only Michael Kumukauoha Lee, but to thousands of descendants of the iwi kupuna buried at One`ula as Ali`i. This harm extends to the spiritual well-being of the entire Native Hawaiian lahui as well. This brief does not represent a complete presentation of Michael Kumukauoha Lee`s case. New arguments will be raised after all the exhibits and testimony have been entered in this contested case. Some of Michael Kumukauoha Lee`s arguments will be based upon testimony elicited from Haseko`s witnesses as well as hostile witnesses.

## **I. LEGAL CONTEXT FOR DECISIONMAKING**

### **A. The Standing and Interests of Michael Kumukauoha Lee (LEE)**

LEE is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawai`i. Certain members of LEE`s `ohana are buried on the grounds of both the State of Hawaii parcels and Haseko parcels located at One`ula as recognized by the O`ahu Island Burial Council at their April 14, 2010 meeting. (Exhibit) LEE has religious and spiritual beliefs and engages in traditional and cultural practices that originate in, and are interpreted from, the traditional Native Hawaiian culture and community. (Exhibit) One of the critical tenets of Native Hawaiian traditional customary practices is the obligation to ensure that iwi (Native Hawaiian human remains) receive proper treatment, care, protection and respect. This is one of most documented traditional and customary native Hawaiian practice known. (Exhibit) Protection of iwi is a traditional and customary practice of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778. LEE is obligated by his cultural beliefs and

practices to ensure that iwi are not unnecessarily disturbed or moved. This obligation, a cultural kuleana, is very serious, especially when it involves high ranking or high status individuals, or Ali'i burial sites. (Exhibit)

LEE has been injured by the removal and destruction of iwi kupuna located at One'ula and will continued to be injured by the continued removal and destruction of burial sites at One'ula, including family burial sites, by the lack of proper regulatory oversight by governmental agencies. The harm caused by removal can never be completely remedied. Native Hawaiians believe that the disturbance of some burial sites, especially those of high ranking individuals or those of the kahuna class, or those with sacred objects buried with them, can, and does result sometimes in the death of various individuals with varied levels of culpability or personal responsibility. This is one of the most serious cultural beliefs of the Native Hawaiian community. (Exhibit) There is clear subject matter jurisdiction here on burial matters. *Kaleikini vs. Thielen*, No. 28491, Supreme Court, August 18, 2010.

### **B. Haseko's Heavy Burden**

“The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria [in HAR Section 13-5-30(c)]” HAR 13-5-30(c). This burden is compounded by the duties imposed by the public trust doctrine, pre-existing native Hawaiian rights and the State Constitution.

The public trust doctrine effectively prescribes a higher level of scrutiny for private commercial uses, and that burden ultimately lies with those seeking such uses to justify them in light of the purposes protected by the trust. *In Re Wai'ola O Moloka'i Inc.*, 103 Hawaii 401, 429, 83 P.3d 664,692 (2004). The public trust doctrine applies to all natural resources in the state, including marine life such as limu, but also to cultural

sites such as ancestral native Hawaiian burial sites afforded protection by the State of Hawai'i Legislature as expressed in Chapter 6E, Hawaii Revised Statutes. *Morgan v. Planning Dept., County of Kau'ai*, 104 Hawai'i 173, 184n. 12, 86 P.3d 982, 993 n. 12 (2004). A developer has "no right to make any use of its property that would substantially impair the public rights of navigation and fishing, as well as incidental purposes..." *Orion Corp. v. State*, 747 P. 2<sup>nd</sup> 1062, 1073 (Wash. 1987). And a developer certainly has no right to use public land to impair public trust resources. A key component of the sacred Ali'i burial site complex identified at One'ula and recommended for protection by the O'ahu Island Burial Council on April 14, 2010, is located on State owned lands from which Haseko must pass through to open the ocean channel to the 'Ewa Marina. Other components of the ali'i burial complex exist underground traversing the State beachfront parcel and passing through Haseko's property line where the 'Ewa Marina is being constructed. Some components of the burial complex have already been adversely impacted or destroyed by a breach into the Karst system where sacred artifacts associated with high ranking Ali'i burials in the Karst system have been destroyed or plundered, possibly in violation of both State of Hawai'i Chapter 6E, HRS and Chapter 13-300, HAR as well as Federal law. See *Native American Graves Protection and Repatriation Act of 1990* and *Archaeological Resources Protection Act*. (16 U.S.Code 470aa-470mm), statute text. Protection of Archaeological Resources (43 CFR 7), regulation text.

Furthermore, an applicant for a permit is obligated to demonstrate affirmatively that the proposed use will not affect native Hawaiian rights. *Waiola* at 442; 83 P.3d at 705, see also, *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui*, 116 Hawaii 481, 509, 174 P.3d. 320, 348 (2007). "[T]he western concept of exclusivity is not universally applicable in Hawai'i." *PASH v. Cty. Planning Comm*, 79

Hawaii 425, 447 (1995). “[T]he ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights established through the Land Commission.” Id. At 449. “[T]he right of each ahupua’a tenant to exercise traditional and customary practices remains intact...” Id. at 450.

The applicant has a heavy burden to show that its proposal (1) meets the criteria in the conservation district rules; (2) does not adversely affect public trust resources; and (3) does not adversely affect native Hawaiian rights. Such that the matter before the Board of Land and Natural Resources is an amendment to a previously granted Conservation District Use Application and Permit, the applicant can not merely assert that this is a reduction in the size of the proposed ‘Ewa Marina and therefore a lessening of impacts or worse yet, no impact to public trust resources or native Hawaiian rights.

Haseko maintains that the ‘Ewa Marina in Phase I will act as a large detention basin, buffering the impact of stormwater flowing into the ocean, providing flood control and reducing offshore siltation. (Exhibit) Shrinking the size of the proposed Marina without predictive modeling of the potential impacts to the limu, fish and other cultural resources or a Supplemental Environmental Impact Statement (See Hawaii Supreme Court, Turtle Bay Kuilima SEIS ruling). (Exhibit) Reduction in the size of the ‘Ewa Marina can reduce the efficacy of the Marina as a retention basin to handle the water “from all Mauka development” and also create anoxic conditions, or areas without oxygen which can cause an explosion in toxic bacteria. (Exhibit) Reduction in the size of the Marina can also accelerate the development process whereby the breaching of the One’ula Beach over State owned and controlled lands to create a Marina entrance channel will adversely impact and destroy the Ali’i burial sites. (Exhibit) The State

Historic Preservation Division (SHPD) has failed for over a year to act on the recommendation of the O'ahu Island Burial Council to recognize the existence of seven Ali'i burial sites, including the burial sites of Ka'eokulani, Kalanikupule, and Kaomileika'ahumanu, the true biological mother of Kamehameha III (Kauikeaouli), discovered in the State owned lands in 2001 where the 'Ewa Marina entrance channel is located. (Exhibit) Another burial from this same entrance channel location on the beach was washed out in 1992 according to SHPD records and staff statements. (Exhibit)

### **C. The BLNR's Heavy Burden**

Not only does the applicant have a heavy burden, but so too does the BLNR if it chooses to amend the conservation district use permit for this project. The BLNR has a duty to analyze traditional and customary native Hawaiian practices and the public trust obligations emanating from the Hawai'i Constitution and case decisions construing it, *Maui Tomorrow v. State*, 110 Hawaii 234, 243, 131 P. 3d 517, 526 (2006). In this case, the Chairperson of the BLNR, stated in an open public meeting, that this matter ('Ewa Marina shrinkage issue) was between LEE and Haseko. The BLNR had "*no dog in this fight.*" Nothing could be further from the truth.

The BLNR is "required under the Hawaii Constitution to preserve and protect customary and traditional practices of native Hawaiians." *Ka Pa'akai O Ka'aina v. Land Use Commission*, 94 Hawaii 31, 45 (2000). The BLNR is under "an affirmative duty" to "protect these rights and to prevent any interference with the exercise of these rights." *Id.* In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the BLNR

must—at a minimum—make specific findings and conclusions as to the following: (1) the identity and scope of “valued cultural, historical, or natural resources” in the...area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights---will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken...to reasonably protect native Hawaiian rights if they are found to exist.

*Ka Pa’akai at 47 (2000), See also HRS Section 205A-4(a), Section 205A-5(b); Section 205A-2(b)(2).*

Similarly, the exercise of BLNR’s “discretionary authority is circumscribed by the public trust doctrine.” *Kelly v. 1250 Oceanside Ptnrs*, 111 Hawaii 205, 230, 140 P.3d 985, 1010 (2006). The Hawaii Supreme Court has recognized that the public trust doctrine protects resources for their own sake as well as for native Hawaiian traditional and customary rights. *In Re Water Use Permit Applications*, 94 Hawaii 97, 136-7, P.3d 409, 448-49 (2000) (“*Waiahole*”). “The state also bears an affirmative duty...to protect public trust uses whenever feasible.” *Waiahole*, 94 Hawaii at 141, 9 P.3d at 453, *State v. Central Vt. Ry.*, 571 A.2d 1128, 1132 (Vermont 1989) (“[T]he state’s power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.”) this duty requires that the state affirmatively act to ensure that public trust resources are not impaired. *Waiahole* at 139, 9 P.3d at 451; *Orion Corp. v. State*, 747, P.2d. 1062, 1073 (Wash. 1987). Under the public trust, the state has both the authority and the duty to

preserve the rights of present and future generations in the public trust resources of the state. *Waiahole* at 141, 9 P.3d at 453.

The public trust doctrine requires that the BLNR actively consider and protect the public trust natural resources that may be affected by its decisions. *Waiahole* at 141 and 143, 9 P.3d. at 453 and 455. The public trust doctrine requires that the BLNR “take the initiative in considering, protecting and advancing public rights in the resource at every stage of planning and decision-making process.” *Id.* at 143, 9 P. 3d. at 455. These duties are re-enforced by the mandates of HRS Chapter 205A: HRS Section 205A-4(a); 4(b), 5(b) and 6(a). See also HRS 205A-2(b)(1)(A), -2(b)(2)(A),-2(b)(3)(A),-2(b)(4)(A),-2(b)(6)(A), -2(b)(10)(A), -2(c)(1)(B)(i),-2(c)(1)(B)(v),-2(c)(3)(B),-2(C)(3)(C),-2(c)(4)(A),-2(c)(4)(C), -2(c)(4)(E).

“In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” *Waiahole* at 143.

What is even more egregious in the matter at hand is that the BLNR is not new to the concept of holding an elevated public trust responsibility and affirmative duty to properly identify, assess and mitigate “native Hawaiian valued cultural, historical, or natural resources” in the...area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area. *Ka Pa’akai at 47 (2000)*, See also HRS Section 205A-4(a), Section 205A-5(b); Section 205A-2(b)(2).

In a Memorandum Opinion in 1998, (Exhibit) the Hawaii State Supreme Court ordered the BLNR to revisit the CDUP given to Haseko for the ‘Ewa Marina entrance channel to properly identify the valued cultural, historical, or natural resources in

the...area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area, using the same language which would re-surface in the landmark case *Ka Pa'akai* in 2000. This was after the original contested case in the early 1990's found "no burial sites, no spiritual sites and no fishing village" in the area of the proposed 'Ewa Marina channel entrance. (Exhibit)

In 2000, the BLNR held hearings on the limited focus of identifying the valued cultural, historical, and natural resources in the area and traditional and customary practices of native Hawaiians. Once again, the BLNR found "no burial sites, no spiritual sites and no fishing village" in the area of the proposed 'Ewa Marina entrance. (Exhibit) Both of these false findings occurred after a burial in 1992 was washed out in the area of the proposed channel entrance. In January of 2001, a second known burial was discovered in near the site of the 1992 burial. This time, however, the burial was discovered and known to have significant burial artifacts with the iwi kupuna. All signs of a high ranking female Ali'i. (Exhibit).

Two punawai, or water springs were noted in U.S. Geological Survey maps early last Century at One'ula. These fresh water underground rivers form cavities through the coral and limestone which formed the underground cave or karst system. (Exhibit) The two underground streams empty into the ocean and provide the limu and other cultural resources with nutrients and sustenance. They also provided a place for secreting iwi kupuna and associated artifacts as well as refuge in times of war. The beach terminus of one karst system is where the Ali'i burial site of Kaomileika'ahumanu was found and where another burial washed out in 1992 during a hurricane. The second karst system has been breached by the developer impacting the water flow, the secreted burial sites and

significant cultural artifacts associate with high ranking Hawaiian Ali'i. A four day effort to plug this breach has led to the request to shrink the size of the 'Ewa Marina and put that former developable land in the project into Conservation usage.

The BLNR cannot avoid its Public Trust Responsibilities with regards to safeguarding the important historical and cultural sites at this location. The State Historic Preservation Division (SHPD), plagued by staffing issues and efficacy issues for years now, after two State of Hawai'i Audits (Exhibit) and a more recent National Park audit (Exhibit) readily admitted that the period between 2004 and 2008, there was "no oversight" by SHPD over the ongoing construction at the 'Ewa Marina due to "staffing" issues and "loss of institutional knowledge." (Exhibit) The mass exodus of staff from the SHPD over this time period is staggering. (Exhibit). Even today, the SHPD admits to "delays" in processing descendant claims and in addressing the now one year old April 14, 2010 motion by the O'ahu Island Burial Council to recognize the Ali'i burial site complex at One'ula. (Exhibit). The SHPD is a Division within the DLNR/BLNR's own agency.

Of the hundred of archaeological features identified in the original 1990 survey work at One'ula, only a handful were slated for preservation. (Exhibit) The rest were destroyed. (Exhibit). Of those committed to preservation by Haseko, four were "accidentally" impacted when a buffer wasn't properly sited and two features impacted and two destroyed. Haseko had been warned in 1998 by the community about improper placement of buffers (Exhibit) but failed to rectify the shortcomings. Furthermore, one of only two known anchialine ponds containing '*Iohena Metabataeus*, opae'ula, or red shrimp, other than a sinkhole in Wai'anae, was "accidentally" filled in by Haseko.

(Exhibit) A shrimp which is close to being nominated for listing on the Endangered Species list. (Exhibit)

Despite overwhelming physical and documentary evidence establishing the rank of Kaomileika'ahumanu and her documented discovery and existence, Haseko, to date, still refers to her as an "alleged" discovery. (Exhibit) LEE was asked by the SHPD to amend his burial registration forms at an open public OIBC meeting to "take Haseko off of the form and limit it to the State parcel" in order for lineal descendancy to be granted to Kaomileika'ahumanu. After doing so, under duress, SHPD failed to follow through with their requirement. (Exhibit) Haseko maintains that they have no kuleana regarding the burial on State lands, despite their need to traverse and destroy this State portion to reach the ocean and open up their Marina entrance. (Exhibit)

#### D. BLNR Must Consider All Impacts Comprehensively

The duty to protect public trust resources requires that the BLNR thoroughly assess possible adverse impacts of development prior to issuing a permit. Kelly, 111 Hawaii at 227, 140 P.3d at 1008. An assessment is not thorough unless it considers cumulative impacts. Waiahole, 94 at 143, 9 P.3d at 455

In *Sierra Club v. Department of Transportation* 115 Hawaii 299, 342, 167 P. 3d 292, 335 (2007), the Hawaii Supreme Court chided the Transportation Department for restricting its analysis to the harbor equipment that will be employed to facilitate the Superferry's operation instead of considering the Superferry's operation outside the harbor. Similarly, the BLNR cannot just have tunnel vision and only look at the shrinkage of the 'Ewa Marina without looking at the impacts to other portions of the project, even in a CDUP Amendment, especially given the physical proof of a high status Ali'i burial

site located right in the proposed entrance channel. The shrinkage of the marina size will severely limit the placement of the entrance channel should more high status Ali'i burial sites be discovered in the current entrance channel location and a determination to preserve in place occur by the SHPD or OIBC depending upon asserted jurisdiction and applicability of the rule and law. (Exhibit) Thus, the downsizing of the 'Ewa Marina will have direct impacts on known burial sites within the project area and proposed incursion across State land to construct the entrance channel. (Exhibit) This is particularly true since an official determination of "preservation in place" or "relocation" was never rendered by the SHPD on the iwi of Kaomileika'ahumanu in 2001. A certified shoreline survey was needed at the time to determine landownership and authority to make the decision within SHPD was being fought out in the 3<sup>rd</sup> Circuit Court in South Kona as the preliminary injunction for the Hokuli'a Project was in trial at the time Kaomileika'ahumanu was discovered. (Exhibit) The two attendant SHPD Archaeologists who recovered the remains and artifacts of Kaomileika'ahumanu did so under the authority of Section 13-300(40)(k), HAR, which allowed for remains to be removed for temporary protection but did not constitute an official decision to relocate remains. (Exhibit)

The State Environmental Council's rules defining cumulative impact are instructive. They provide that;

"Cumulative impact" means the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

HAR Section 11-200-2. Similarly,

A group of actions proposed by an agency or an applicant shall be treated as a single action when:

- A. The component actions are phases or increments of a larger total undertaking;
- B. An individual project is necessary precedent for a larger project;
- C. An individual project represents a commitment to a larger project; or
- D. The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group or actions as a whole.

The BLNR has a track record of rejecting CDUAs that harm cultural and natural resources. *In Mauna Kea Power Co. v. Board of Land & Natural Resources*, 76 Hawaii 259 (1994), the Hawaii Supreme Court upheld the BLNR's decision to deny a CDUA for a hydroelectric plant because of its impact on a surf shoal. In *In the Matter of the CDUA for HECO to construct a 138-kV Transmission Line at Wa'ahila Ridge*, DLNR File No. OA-2801, the BLNR denied a CDUA for a transmission line because of the detrimental visual impact.

In this case, the cultural resources at risk of obliteration are some of the most significant irreplaceable resources impacting the entire Native Hawaiian community. Hawaiian Cultural Expert and Icon, Mary Kawena Pukui, defines "iwi" as the "most cherished possession." The paramount importance of protecting the iwi of ancestors is critically important, and even higher expectation is protecting the iwi of Ali'i from desecration, those "gods who walked among men." (Exhibit).

## CONCLUSION

Michael Kumukauoha Lee will be submitting proposed Findings of Fact and Conclusions of Law that will demonstrate that this request to amend a conservation district use permit must be denied until the proper Constitutionally protected rights (Article 12, Section 7) regarding the

traditional cultural resources and practices, are afforded the proper identification, assessment and mitigation as required by both law and judicial precedent.

This case isn't just about a simple innocuous request to downsize a project and "lessen" impacts. This is a twenty-year disaster and failure of those agencies responsible for properly safeguarding precious sacred cultural resources unlike any others in the world, from irreparable loss and destruction. There is no tenet that development and the respectful sanctity of sacred Hawaiian cultural sites cannot co-exist but agencies and individuals cannot just deny their existence or shrug off responsibilities we all have to the next generation to leave a legacy for the children of tomorrow. How we treat our dead is the highest indicator for the recognition of a common humanity and an indicator of how we treat each other, the living. And for the Native Hawaiian, it goes beyond commonalities of respect. It transcends into the overall well-being of not only the individual, the descendant, the mo'opuna, but to the well-being of the entire 'ohana, and in the case of the beloved remains of so many Ali'i, including the Mother of Kamehameha III, Kauikeaouli, the beautiful tragic life of Kaomileika'ahumanu, it deeply impacts the well-being of the entire Hawaiian Nation, the lahui, and all who love and call Hawaii home.

Dated: Honolulu, Hawaii, \_\_\_\_\_, 2011

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