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DEPT OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

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DEPT OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

**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	)	CLOSING BRIEF
Size Of The Marina.	)	

**MICHAEL KUMUKAUOHA LEE'S CLOSING BRIEF**

Michael Kumukauoha Lee, by and through himself, Pro Se, submits this Closing 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."

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 closing brief does not represent a complete summary of Michael Kumukauoha Lee's case but highlights of key pieces of evidence including exhibits and witness testimonies.

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

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

Haseko (Ewa) Inc. (Haseko) originally filed its request for conservation district use permit (CDUP) OA-2670 in 1993. (Exhibit 218) A contested case was held on the CDUP in 1994. (Exhibit 218) BLNR issued the CDUP OA-2670 in 1995 and it was appealed to First Circuit Court and then to the Hawaii Supreme Court. (Exhibit 218) The Hawaii Supreme Court issued a Memorandum Opinion in 1998 remanding the case back to the BLNR for specific findings. (Exhibit 218)

5. Haseko received CDUP OA-2670 from the board of land and natural resources (BLNR) on April 26, 2000. (Exhibit 272) CDUP OA-2670 permitted Haseko to dredge and entrance channel to connect a man-made marina, excavated out of privately owned fast lands, with the ocean, through State of Hawaii owned property. (Exhibit 299) The proposed marina entrance channel will be constructed over 30 acres of beachfront and require removal of 300,000 cubic yards of sand and coral substrate from the ocean floor. (Exhibit 218) The BLNR, on April 26, 2000, approved amended Findings of Fact, Conclusions of Law, Decision and Order, conditionally granting Haseko, the CDUP OA-2670 to construct a marina entrance channel. (Exhibit 297)

On July 13, 2001, the BLNR approved a request by Haseko to amend CDUP OA-2670 to recognize a reduction in the size of the marina from 120 acres to approximately 70 acres. This amendment to the permit did not change the size of the entrance channel that is located within the Conservation District. (Exhibit 297) In October of 2006, Haseko requested amendments to CDUP OA-2670 to reduce the size of the marina from 70 acres to 53.76 acres (Exhibit 294)

On August 24, 2007, proposed amendments to CDUP OA-2670 were to be heard before the BLNR, however it was brought to the BLNR's attention that an archaeological site was damaged and a breach of the CDUP's conditions may have occurred. The agenda item was deferred and Staff was instructed to investigate a possible breach of the Memorandum of Agreement pursuant to conditions #10 and #26 of CDUP OA-2670 in regards to the treatment of

historic sites on the project site. On October 26, 2007, the BLNR found Haseko in violation of Section 183C-7, Hawaii Revised Statutes and Section 13-5-6 of the Hawaii Administrative Rules regarding non-compliance with the permit. (Exhibit 297). On October 29, 2007, the BLNR notified Haseko of the violations and ordered fines and penalties for the violations. (Exhibit 297) On February 22, 2008, the BLNR approved the reduction in size of the marina from 70 acres down to 53.76 acres along with amendments to three conditions of CDUP-OA-2670. (Exhibit 294)

On February 22, 2008, Michael Lee, orally requested a contested case hearing on the CDUP amendment and then perfected his request by filing a written request within the time period proscribed. (Exhibit 294) On December 12, 2008, the Office of Conservation and Coastal Lands (OCCL) recommended Michael Lee's request for a contested case be denied for lack of standing. Lee was given additional time to amend his petition which was refilled on December 18, 2008. (Exhibit 294) On January 15, 2009, Haseko, via letter to Chair Laura Thielen, withdrew their request to downsize the 'Ewa Marina and amend the CDUP OA-2670 rendering Lee's requested contested case Moot. Exhibit 294.

In 2010, Haseko renewed its request to reduce the size of the marina from 70 acres to 53.76 acres which was approved at the September 9, 2010 meeting of the BLNR. (Exhibit 272) At the September 9, 2010 meeting of the BLNR, Michael Lee made an oral request for a contested case on Haseko's renewed request to amend the CDUP and reduce the size of the marina. (Exhibit 272)

On February 11, 2011, the BLNR held a public hearing on Michael Lee's Request that the Board Grant a Petition for Contested Case Hearing with Respect to an Amendment to Conservation District Use Permit (CDUP) OA-2670 to Construct a Marina Entrance Channel Located at Honouliuli, Ewa, O'ahu, Plat (1) 9010012 and for Authorization to Select and Appoint a Hearing Officer. (Exhibit 272)

On February 11, 2011 granted Michael Lee's request for a contested case hearing and authorized the selection and appointment of a hearings officer. Prehearing conferences were held with counsel for Haseko, the hearing officer, and the deputy attorney general in 2011. The parties submitted witness statements, declarations and exhibits which have all been received into evidence with the exception of Darren Panoke on the Petitioner's witness list and Exhibits 298,

311 and 312 which were stricken from Lee's Exhibit List. The hearing was held on July 26, 2011.

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. (Exhibits 107 and 108, Markell Declaration at 91, Lee Declaration at 31) 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. (Lee Declaration at 39) 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. (Markell Declaration at 47) 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. (Exhibits 150 and 151, Markell Declaration 40-49)

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. (Markell Declaration at 51) 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 164) There is clear subject matter jurisdiction here on burial matters as Lee is an O'ahu Island Burial Council Recognized Cultural Descendant for the burials at One'ula (Exhibits 22, 106, 107, 108, Markell Declaration at 91, Lee Declaration at 31) and Lee's legal interests stem from his cultural and religious beliefs regarding the protection of the iwi. *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 Comn*, 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**

Michael Lee submitted a Burial Registration Form for State of Hawaii lands and Haseko Lands identifying for protection seven burial sites, signed October 22, 2010, with detailed information about all the ali'i which were buried at One'ula, including Kualii'i, Kalanikupule, Ka'eokulani, and other famous chiefs, and discussing the karst system. Mr. Lee also submitted a descendancy claim for Kualii'i, Ka'eokulani, and one for Kalanikupule. (Exhibit 183)

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 March 12, 1998, (Exhibit 93) 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. Now we all know differently. (Exhibit 65)

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 114) 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. (Exhibits 2 and 82, Markell Declaration at 69).

The burial find reported on January 5, 2001 was excavated and recovered on January 8, 2001 by Sara Collins and Muffet Jourdane, O'ahu Island archaeologists for the State Historic Preservation Division. The burial was described as an "adult female (mid-20's). Head at West, feet at East. Cache of traditional and historic artifacts found: (1) 2 palaoa w/glass beads, etc. found on right side of pelvis. (2) Glass beads and long beads, with whale teeth ornaments also found in chest neck region." Exhibit 99 The individual discovered was a high status female as evidenced by her extensive burial goods and artifacts. Markell Declaration at 69. Exhibits 82 and 2.

Haseko's archaeological consultant, Dr. Paul Rosendahl, was made aware of the significant ali'i burial site reported on January 5, 2001 in a Facsimile Transmittal Sheet sent to him on February 12, 2004 by Muffet Jourdane, archaeologist for the island of O'ahu at the State Historic Preservation Division. (Exhibit 99)

On November 28, 2005, Perry White of Planning Solutions, who was assisting Haseko, 'Ewa, Inc. with their Papiapi Road Drainage Improvements, wrote a letter to Melanie Chinen, then Administrator of the State Historic Preservation Division requesting copies of "all records related to the find" of the January 5, 2001 ali'i burial site located at the proposed entrance

channel to the proposed 'Ewa Marina. Raymond Kanna of Haseko, 'Ewa, Inc. was copied on Mr. White's letter. (Exhibit 100)

An archaeological Scope of Work by Haseko's archaeological consultant Paul H. Rosendahl (PHRI) (Exhibit 95) clearly notes a September 1992 burial discovery in the general "area of the proposed marina channel" as well as a January 5, 2001 discovery of human skeletal remains in general "area of proposed marina channel." The report goes on to further note "remains currently curated at SHPD Office in Honolulu; final disposition to be determined." Note, the BLNR made findings of fact that there were "*no burial sites in the area of the proposed marina entrance*" in 1993 despite the 1992 finding in their own agency, SHPD's records. This is troubling given the findings twice that "no burial sites or spiritual sites" existed in the proposed marina channel was found by the BLNR when their own sub-agency, the SHPD clearly had documentation that a burial washed out in the channel entrance area in 1992. This never came out in either the 1994 or 2000 contested case hearings. The emergence of Kaomileika'ahumanu set the record straight for everyone.

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. Despite the existence of this map, Haseko's own expert, Steve Dollar, who admitted to having never seen the map before, still admitted that he is sure the "whole area" has caves and fissures. Transcript 7/26/11 at 37. 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 associated 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. (Lee Declaration)

On April 14, 2010, the O'ahu Island Burial Council (OIBC) voted unanimously to recognize Michael Kumukauoha Lee as a Cultural Descendant to burials at One'ula and to recognize an ali'i burial complex at One'ula including the burial sites of Kaomileika'ahumanu.

This was a formal recommendation to the SHPD that this area be identified as such and protected. Markell Declaration at 91. Lee Declaration at 31.

Other well known ali'i buried at One'ula, include, but are not limited to, Ka'eokūlani, Kalanikūpule, Kualī'i, Pele'ioholani, Keali'iahonui, and others associated with the O'ahu line of ruling chiefs as well as Maui and Kaua'i. Markell Declaration at 89; Lee Declaration at 23. One'ula is a Royal burial area and a Leina a ka 'uhane where souls ascend into the next world. Markell Declaration at 88; Lee Declaration at 22.

These sites are associated with Kalanikūpule and his wives. Lee Declaration at 24. These sites are associated with Kaumuali'i and Kahekili. Lee Declaration at 25. These sites are associated with Captain Henry Barber and the ship Arthur. Lee Declaration at 26. These sites are associated with the Battle of Kuki'iahu and Kaeokūlani. Lee Declaration at 27. These sites are associated with the aftermath of the Battle of Nu'uanu Pali in 1795. Lee Declaration at 28. The historical events of Kalanikūpule, Kamehameha and Ka'eokūlani are well documented in Hawaiian mo'olelo, or story. The battles at 'Ewa and the famous battle of Nu'uanu are also well documented. (Exhibit 39) Kalanikūpule, Henry Barber and Kamehameha are associated with 'Ewa as documented. Exhibit 206

Native Hawaiian cultural practices regarding ali'i burial treatment are documented. The association of the Chiefess Kalola-a-kumu-ko'a, the mother of Kaomileika'ahumanu, and the association with Kamehameha is also documented. Exhibit 12. Kamehameha III, was po'olua, or had two fathers, Kalanikūpule and Kamehameha, as Princess Ruth Keli'ikolani was po'olua, and had two fathers. Exhibit 13

The iwi of Chiefess Kaomileika'ahumanu Kamahanakapu was found at Waipouli, a karst system underground at One'ula in January of 2001. Lee Declaration at 34. Waipouli is mentioned in Sites of O'ahu in the Legend of Namakaokapo'o on page 36, regarding how Namakaokapo'o's mother was made Mo'i of O'ahu. Lee Declaration at 35. (Exhibit 113) This Waipouli burial cave is referenced in "Burial of the Last Prince of Kaua'i" taken from the Annual Report of the Hawaiian Historic Society, Volumes 1-21, by the Hawaiian Historical Society in 1893. Lee Declaration at 36. Exhibit 136. Royal Patent Kekauohohi 42, 000 acres of 'Ewa, Honouliuli (Exhibit 145) Kahu of last prince of Kaua'i buried at Waipouli

Sinkholes are known to exist throughout the 'Ewa region with burials. Exhibit 130 and 137, 7/26/11 TR at 37. Mikahale Kekauonohi a granddaughter of Kamehameha the Great, and his 5<sup>th</sup> wife of her Uncle Kamehameha II, buries her second husband, the Prince of Kaua'i, Keali'iahonui, the son of Kualii'i, in the caves at Pu'uloa, 'Ewa. Lee Declaration at 37. A vision Lee received in October of 2004 at One'ula showed him one of the two Waipouli burial caves being broken into and breached by Haseko, 'Ewa, Inc. construction activities and a ki'i of Pelewahine and othe funerary objects being taken and removed from his families' burial site. Lee Declaration at 38.

The BLNR cannot avoid its Public Trust Responsibilities with regards to safe-guarding 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 and a more recent National Park audit (Exhibit 270) 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 273) The mass exodus of staff from the SHPD over this time period is staggering. (Exhibit 24). 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 31) The rest were destroyed. (Exhibit 31). 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. (Exhibits 274 and 288) 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)

Desecration or injury to iwi perceived to be 'ohana or ancestral native Hawaiian kūpuna can create and manifest real harm in living descendants and Native Hawaiians in the form of 'eha

(hurt, pain, suffering), kaumaha (burdened, sorrowful), mānewanewa (grief, sorrow, mourning), uē (lamentation, crying), na`auauā (extreme visceral grief) and are injurious to the ‘uhane, the spirit, of the living person who has accepted the kuleana to care for and protect the iwi of the ancestors. Markell Declaration at 51. This harm is irreparable because there is no possibility of monetary compensation that could justify such disturbance. Markell Declaration at 52.

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 228) 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 228)

#### 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 102) 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. (Markell Declaration at 70) 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. (Markell Declaration 71) 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 or 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. In the Hawaiian culture, ancestral human skeletal remains are extremely sacred and precious and according to noted Hawaiian scholar and renown Hawaiian cultural expert, Mary Kawena Pukui, defined as our "*most cherished possession*" as a people. Markell Declaration at 41.

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.*" (Exhibits 150 and 151).

## CONCLUSION

Michael Kumukauoha Lee is submitting proposed Findings of Fact and Conclusions of Law that 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. Native Tenant rights are being purposefully diminished and are in increased danger of extinguishment as a strategy of land title companies. (Exhibit 91) 103. Native Hawaiians interests in documenting and preserving vastly disappearing historic and cultural sites is a long standing tradition as evidenced by Henry Kekahuna's Plea for Hawaiian Preservation dated March 31, 1951. Exhibit 14. Discoveries of caves and artifacts such as ki'i, are still occurring in modern times such as in Kohanaiki and are of great and profound interest to the Hawaiian community. (Exhibit 18 and 19, 20 and 21) Burial protection has been a long standing concern of the Native Hawaiian community. (Exhibit 26)

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. The duty of the BLNR is to perform the *Ka Pa'akai* three-tiered analysis and if the BLNR's action adversely impacts the public trust resources, then a mitigation needs to

occur. 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, who has been erased from history once already, it deeply impacts the well-being of the entire Hawaiian Nation, the lahui, and all who love and call Hawaii home. Her identity, existence and important contribution to Hawaiian history must not be denied again. She brings the pathway to healing, reconciliation, forgiveness, lokahi, mihi and huikala from the breath of Ke Akua. He has risen. She has risen. We can all rise to the occasion and most importantly, arrive together. Ke Akua pu...

Dated: Honolulu, Hawaii, \_\_\_\_\_ September<sup>13</sup>, 2011

A handwritten signature in black ink, reading "Michael Kumukauoha Lee", written over a horizontal line.

Michael Kumukauoha Lee

Plaintiff Pro Se



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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 ) CLOSING BRIEF  
Size Of The Marina. )

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the following document:

- 1) MICHAEL KUMUKAUOHA CLOSING BRIEF


Shall be duly served upon the following parties as indicated, by means of hand delivery, addressed as follows:

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Dated: Honolulu, Hawaii September 13, 2011

  
Michael Kumukauoha Lee  
Petitioner Pro Se