

Michael Kumukauoha Lee
Pro Se
91-1200 Keaunui Drive, Unit 614
'Ewa Beach, HI 96706

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DEPARTMENT OF LAND & NATURAL RESOURCES

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BOARD OF LAND AND NATURAL RESOURCES

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

State of Hawaii

In the matter of Limited Contested Case)	DLNR File No. 0A-2670
Petition Regarding a Request to Amend)	
Conservation District Use Permit (CDUP))	MICHAEL KUMUKAUOHA LEE'S
OA-2670 to Construct a Marina Entrance)	PROPOSED FINDINGS OF FACT,
Channel Located at Honouliuli, 'Ewa, O'ahu)	CONCLUSIONS OF LAW, DECISION
Plat (1) 9-1-012 by Haseko to Reduce the)	AND ORDER; CERTIFICATE OF
Size of the Marina.)	SERVICE
_____)	

MICHAEL KUMUKAUOHA LEE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

PROPOSED FINDINGS OF FACT

Any conclusions of law herein improperly designated as a finding of fact should be deemed as a conclusion of law; any findings of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

Procedural Background

1. Haseko (Ewa) Inc. (Haseko) originally filed its request for conservation district use permit (CDUP) OA-2670 in 1993. (Exhibit 218)
2. A contested case was held on the CDUP in 1994. (Exhibit 218)
3. 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)
4. 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)

6. 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)

7. 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)

8. 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)

9. 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)

10. 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)

11. 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.

11. 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).

12. On October 29, 2007, the BLNR notified Haseko of the violations and ordered fines and penalties for the violations. (Exhibit 297)

13. 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)

14. 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)

15. 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)

16. 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.

17. 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)

18. 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)

19. 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)

20. On February 11, 2011 granted Michael Lee's request for a contested case hearing and authorized the selection and appointment of a hearings officer.

21. Prehearing conferences were held with counsel for Haseko, the hearing officer, and the deputy attorney general in 2011.

22. 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.

23. The hearing was held on July 26, 2011.

Haseko's Proposed Project

24. The proposed design of the 'Ewa Marina includes a large channel through the existing beach into the ocean. Exhibits 4 and 8.

25. Haseko's Ocean Pointe project is the new name of the 'Ewa Marina project which was approved by the Board in April 2000 (DLNR File No.: OA-2670). Exhibits A-10 at 1.

26. Haseko requested to reduce the size of the proposed 'Ewa Marina from 70 acres down to 53.76 acres. (Exhibit 272)

Historic Sites

27. In 1990, Haseko's archaeological work for the Ewa Marina project looked at all of its property – the entire project area (including that portion of the area now proposed to be traversed by the drainage infrastructure) – comprehensively as one parcel. Haseko has consistently viewed the subject parcel (where the reduced Marina acreage is located) as part of the entire Ewa Marina (or Ocean Pointe) project. (Exhibit 31)

28. The 'Ewa Marina underwent archaeological inventory level survey in 1990. Many sites were found which no longer exist due to surface clearing. The importance and mo'olelo of the area was also documented at that time as the plains of wandering souls. Kaupe'a. Exhibit 31

29. In 1991, the Wai'anae Historical and Archaeological Preservation Council placed One'ula on their agenda to discuss the project. (Exhibit 144)

30. In 1992, Haseko entered into a Memorandum of Agreement with the State of Hawai'i State Historic Preservation Officer, the Office of Hawaiian Affairs, the Army Corps of Engineers and the Advisory Council on Historic Preservation that required the long-term preservation of selected historic sites in 'Ewa. This MOA pertained to the Department of Army Corps of Engineers permit application No. PODCO 2117. This MOA required the delineation of buffer zones around these archaeological sites. Exhibit 92.

31. There were extensive meetings, site visits and other discussions in 1998 regarding issues surrounding the adequacy of the archaeological survey work at One'ula and the reported existence of unmarked burial sites in the area of Haseko, 'Ewa, Inc., proposed 'Ewa Marina and development. Markell Declaration at 61.

32. There were meetings of the O'ahu Island Burial Council in 1998 whereby the issue of "underground burial complexes" were raised. OIBC minutes 1998 show the concern

regarding missed burials and informants providing information regarding “sinkhole complexes” to the Burial Sites Program staff of the SHPD. (Exhibit 87)

33. Native Hawaiians interred their dead in a multitude of ways including in caves and voids. Exhibit 30

34. Around 1999-2000, the State Historic Preservation Division Burial Sites Program was informed by a Native Hawaiian that there were underground cave complexes at One`ula which contained running water and that ‘ohana could visit their ancestors who were placed on shelves within the cave system.

35. That in January of 2001, the State Historic Preservation Division responded to the discovery of human skeletal remains at One`ula in the area of the proposed ‘Ewa Marina entrance channel. Markell Declaration at 65.

36. That this was the same general area in which another set of human skeletal remains had washed out in 1992 during Hurricane Iniki. Markell Declaration at 66.

37. The ‘Ewa Marina development project has undergone over two decades of controversy and PHRI’s own chronology acknowledges two burial finds in general area of proposed Marina entrance. One in 1992 and one in 2001. Exhibit 102

38. That SHPD staff, Sara Collins, Elaine Jordane, Kala`au Wahilani, and Kai Markell viewed the site of the original interment and spoke with the man who discovered the iwi and who notified the SHPD and the Honolulu Police Department. Markell Declaration at 67.

39. That the set of remains were uncovered and recovered a few days later during archaeological investigation by Sara Collins and Elaine Jordane and that a full report was produced which was maintained in the files of the SHPD. Markell Declaration at 68.

40. A burial find was reported on January 5, 2001 and 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

41. That 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.

42. That neither Sara Collins or Elaine Jourdane possessed the authority pursuant to Chapter 13-300, Hawaii Administrative Rules, to authorize permanent relocation of the inadvertent discovery of the Ali'i wahine burial. Markell Declaration at 70.

43. That the excavation was based upon "imminent danger" and fell under temporary recovery pursuant to Section 13-300-40(k) which authorized temporary protective custody until a final decision could be rendered in accordance with Chapter 6E, HRS and Chapter 13-300, HAR. Markell Declaration at 71.

44. 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)

45. The exact location and nature of the ali'i burial site found in January of 2001 was transmitted formally by the State Historic Preservation Division to Paul Rosendahl, Inc., the archaeological consultant for Haseko, 'Ewa, Inc. on February 12, 2004. Exhibit 16

46. Perry White, Haseko's Planner received information from Sara Collins of SHPD showing Perry and Haseko the burial find was located in the Marina Entrance Channel back in January 11, 2001 Exhibit 17.

47. The ali'i burial site found in January of 2001 is situated via Global Positioning in the entrance way to the proposed 'Ewa Marina Channel entrance. (Exhibit 55)

48. One'ula is known to contain human burial sites. (Exhibit 57)

49. The ali'i burial site found in January of 2001 has not had a formal decision of either preservation in place or relocation by the SHPD. Markell Declaration at 72.

50. That on June 28, 2007, a set of human skeletal remains eroded out of the beach at One'ula and Kai Markell responded to a site visit while working for OHA. Markell Declaration at 73.

51. This discovery was about 100 yards East of the marina entrance channel discoveries. Markell Declaration at 74.

52. In April of 2008, Kai Markell, along with OHA Native Rights Advocate Jerome Yasuhara, visited the SHPD iwi room located at 33 South King Street in the Mezzanine level with SHPD Burial Sites Program staffer Linda Kaleo Paik, for the sole purpose of checking on the welfare of the as of yet unidentified One'ula Ali'i wahine burial. Markell Declaration at 75.

53. That Kai Markell was shocked at that time to see and hold her two lei niho palaoa which were “tongue” shaped in the style of Moku o Keawe, and not “opu‘u” or “bud shaped” as in the style of the O‘ahu chiefs. Markell Declaration at 76.

54. Since 2001, Markell was under the belief that the two lei niho palaoa were of the “opu‘u” variety having seen and held two opu‘u palaoa when the remains of the Ali‘i wahine and her burial artifacts were transferred from the SHPD office in Kapolei to the iwi curation room at 33 South King Street in early 2001. Markell Declaration at 77.

55. Markell now interprets this occurrence as a hō‘ailona and akaka kū, or standing vision. Markell Declaration at 78.

56. Following this visit to the iwi room, on Wednesday, April 16, 2008, the very next week, an OHA staffer had a hō‘ailona and aka kū on the 5th floor of OHA offices whereby Kuhina Nui Ka‘ahumanu appeared, along with her retainers, and issued a command, or kauoha, to “protect” One‘ula and the remains of the Ali‘i wahine. Markell Declaration at 79.

57. That OHA took possession of the remains of the Ali‘i wahine in June of 2009 for protective custody. Markell Declaration at 80. Exhibit 96.

58. In April of 2010, two OHA beneficiaries, both kāula, or seers, were present in my office, including the Petitioner, Michael Kumukaouha Lee, when one kāula, was able to communicate with the remains of the Ali‘i wahine. Markell Declaration at 81; Lee Declaration at 14 and 15.

59. She eventually identified herself as well as parts of her story. Markell Declaration at 82; Lee Declaration at 16.

60. Her name is Kaomileika‘ahumanu and she died from blood loss giving birth to twins. Markell Declaration at 83; Lee Declaration at 17; 07/26/11 TR at 47/48

61. She was the Chiefess of Kalanikūpule, King of O‘ahu. Markell Declaration at 84; Lee Declaration at 18, 07/26/11 TR at 48.

62. She gave birth to twins, the female twin being La‘amea and the male twin being Kauikeaouli, commonly known as Kamehameha the III. Markell Declaration at 85; Lee Declaration at 19, 07/26/11 TR at 48.

63. Kaomileika‘ahumanu is the true mother of Kauikeaouli, not Keopuolani, as commonly thought by historians. Markell Declaration at 86; Lee Declaration at 20; 07/26/11 TR at 48.

64. That Kamehameha is the father of Kauikeaouli (Kamehameha III). Markell Declaration at 87, Lee Declaration at 21.

65. A Chant for Kauikeaouli obtained from the Bernice Pauahi Bishop Museum cites his birth in 'Ewa. Exhibit 166

66. In the Mele Inoa for Kauikeaouli, Line 27, reads "E 'aina nei e ke 'Ewa" dated 1902. Exhibit 181

67. 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.

68. 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.

69. When asked if other iwi kūpuna were present in the area of her discovery, the proposed 'Ewa Marina entrance channel, Kaomileika'ahumanu responded in the affirmative. Markell Declaration at 90. Lee Declaration at 30.

70. Michael Kumukauoha Lee was recommended for Cultural Descendancy by the State Historic Preservation Division on April 7, 2010 to ali'i iwi kupuna at One'ula, in 'Ewa. (Exhibit 22)

71. The O'ahu Island Burial Council agendized the matter of cultural descendancy recognition and recognition of the ali'i burial sites complex for April 14, 2010(Exhibit 106)

72. Michael Kumukauoha Lee presented compelling evidence to the OIBC and the veracity of the oral and documentary evidence presented led the recommendation of the OIBC to recognize and protect the ali'i burial site complex at One'ula. Exhibits 107 and 108

73. 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. 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.

74. That as of June 20, 2011, the SHPD had not affirmatively acted upon this recommendation of the OIBC. Lee Declaration at 32; Markell Declaration at 92.

75. These sites are associated with Kalanikūpule and his wives. Lee Declaration at 24.

76. These sites are associated with Kaumuali'i and Kahekili. Lee Declaration at 25.
77. These sites are associated with Captain Henry Barber and the ship Arthur. Lee Declaration at 26.
78. These sites are associated with the Battle of Kuki'iahu and Kaeokūlani. Lee Declaration at 27.
79. These sites are associated with the aftermath of the Battle of Nu'uauu Pali in 1795. Lee Declaration at 28.
80. The historical events of Kalanikupule, Kamehameha and Ka'eokulani are well documented in Hawaiian mo'olelo, or story. The battles at 'Ewa and the famous battle of Nu'uauu are also well documented. (Exhibit 39)
81. Kalanikupule, Henry Barber and Kamehameha are associated with 'Ewa as documented. Exhibit 206
82. Many of these sites are depicted in Figure 1, Project Area and Site Locations, Phased II(a) Data Recovery, Field Work and Interim Report Archaeological Mitigation Program, 'Ewa Marina Communication Project, PHRI Project 93-1387, by PHRI, Paul H. Rosendahl, Ph.D., Inc. have been identified through traditional cultural practices by myself, my 'ohana and other cultural practitioners. Lee Declaration at 29.
83. Michael Lee's father, Randolph Martin Lee Jr. is the eldest son of Randolph Martin Lee, Sr. who is the eldest son of Mary Ann Newnes who is the eldest daughter of Annie Kaho'owaha Kekuewa who is the eldest daughter of John Meek (Kalawaia) who is the eldest son of Eliza Meek and Kauikeaouli (Kamehameha the III), who is the biological son of Kamehameha the Great and Kaomileika'ahumanu Kamahanakapu Leimakali'i, who is the daughter of Kalola II (Kumukoa) and Ke'eaumokupapa'iahiahi. Kalola is the daughter of po'olua fathers, Kahekilini'ahumanu (King of Maui) and Chief Kumukoa (Molokai). Lee Declaration at 33. Exhibit 171.
84. Genealogy of Kamehameha III and Haole wahine showing Kamehameha the III and Haole Ali'i which is Eliza Meek. Hawaii State Archives Nanaulu Genealogy and KSBE Genealogical chart. Exhibit 185.
85. Genealogy of Kaua'I Royal lineages (Exhibit 186) Princess Harriet Kawahinekipi marries Captain Meek's son, John Meek, Jr. II, who is Eliza's Meek's brother. After Princess

Harriet's death, John Meek, Jr. II marries Princess Kepo'okalani, the daughter of Ulualoha, the first cousin of Kamehameha the 1st.

86. Eliza Meek Probate 1888 (Exhibit 187) Jack Meek's youngest daughter, Eliza Meek, in which he bequeaths monies to her.

87. Parker family genealogy from Bernice Pauahi Bishop Museum showing issue from Kalanikupule (Exhibit 188)

88. Sworn testimony of Richard Meeks death whereby Richard Meek acknowledges, before death, John Meek Kalawaia (aka Jack Meek) as his cousin. May 6, 1891, Jack Meek dies six hours after Richard Meek's death. Exhibit 193

89. Meek family genealogy book The meles of Eliza Meek and the genealogies of the chiefs and the Meek family. 1862 book was written. Eliza's meles are for Kauikeaouli. Exhibit 194

90. Eliza Meek royal lovers The Merchant Prince of the Sandalwood Trade, Edited by Bob Dye. Lunalilo, retired to his chambers with his mistress, Eliza Meek, a hapa-haole beauty. Also, Emma, Hawaii's Remarkable Queen, by George S. Kanahale. 4. The family of Horace Crabbe, the king's chamberlain, including especially his wife, Elizabeth (Meek), sister of the king's mistress, Eliza Meek. This king is in reference to Kamehameha IV. Exhibit 196

90. 1843 Mo'I and Mo'I wahine This copy is Mo'i and Mo'iwahine, from the State of Hawaii archives showing that the King and Queen got married in 1843. This is Eliza Meek and Kamehameha III. This is a certified copy of Page 1 of M-11 Marriage Record Book of Rev. E.W. Clark, Wailuku from the Vital Statistics Collection. Exhibit 197

91. In 1860, John Meek sells a portion of Pele'ula, lands which belonged to Kamehameha III Exhibit 198

92. 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

93. Kamehameha III, was po'olua, or had two fathers, Kalanikupule and Kamehameha, as Princess Ruth Keli'ikolani was po'olua, and had two fathers. Exhibit 13

94. 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.

95. 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

96. 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.

97. Royal Patent Kekauohohi 42, 000 acres of ‘Ewa, Honouliuli (Exhibit 145) Kahu of last prince of Kaua‘i buried at Waipouli

98. Sinkholes are known to exist throughout the ‘Ewa region with burials. Exhibit 130 and 137, 7/26/11 TR at 37.

99. Mikahale Kekauonohi a granddaughter of Kamehameha the Great, and his 5th wife of her Uncle Kamehameha II, buries her second husband, the Prince of Kaua‘i, Keali‘iahonui, the son of Kualī‘i, in the caves at Pu‘uloa, ‘Ewa. Lee Declaration at 37.

100. 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.

101. Lee submitted a Burial Registration Form for seven sites, recognized by the OIBC, on April 14, 2010 (Kalanikupule, Ka‘eokulani, Kualī‘i, Namahanakapu, and other chiefs.) Exhibit 156.

Native Hawaiian Traditional and Customary Practices

102. Native Tenant rights and Native Hawaiian Traditional and Customary Practices 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

104. 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)

105. Burial protection has been a long standing concern of the Native Hawaiian community. (Exhibit 26)

106. Decisions regarding the treatment of the remains of human beings are extremely sensitive and highly emotive. Markell Declaration at 40.

107. 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, our "*most cherished possession*" as a people. Markell Declaration at 41.

108. The significance of bones, or iwi, in the Hawaiian culture is well documented throughout Hawaiian oral history and written history. Exhibits 150 and 151; Markell Declaration at 42.

109. Iwi is a manifestation of the person once living and contains the spiritual power, or mana, of the individual. Markell Declaration at 43.

110. Hawaiians protected the iwi of loved ones and 'ohana to prevent them from being desecrated, mistreated or destroyed. Markell Declaration at 44.

111. Hawaiians on the verge of passing from this life, especially those of high rank, would often give a command, or kauoha, to care for, conceal, and inter their iwi, to entrusted family members or companions. Markell Declaration at 45.

112. There are a myriad of ways Hawaiians prepared the body of the deceased and how they provided final disposition of the body. Markell Declaration at 46.

113. One of the critical tenets of Native Hawaiian traditional and customary practices is the obligation to ensure that iwi remain undisturbed and protected; and that they receive proper care and respect as a vital an integral connection to the ancestors and ancestral guidance. Markell Declaration at 47.

114. Protection of iwi in place by 'ohana acting as kahu, and prevention of disinterment, relocation, disturbance, or desecration, is a traditional and customary practice of Native Hawaiians who inhabited the islands prior to 1778. Markell Declaration at 48.

115. Disturbing or moving iwi is not tolerated except in extraordinary circumstances and at the direction and discretion of the ‘ohana or kahu. Markell Declaration at 49.
116. It is an established traditional and customary Native Hawaiian practice to visit burial sites and engage in various religious and cultural practices such as offering ho`okupu and pule, and seeking advice from, and communicating with, deceased ancestors, through their iwi. Markell Declaration at 50.
117. 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.
118. This harm is irreparable because there is no possibility of monetary compensation that could justify such disturbance. Markell Declaration at 52.
119. Human skeletal remains impacted by machinery can be devastated, especially in trenching activities Exhibit 90
120. Moreover, the individual injury suffered by Hawaiians is also a collective one jointly felt and experienced amongst those who feel the call to protect iwi kūpuna and the mana they contain.
121. Nana I Ke Kumu shows that the reverence for the bones and iwi was extremely important, as well as the ability to communicate directly with spirits through a multitude of different means. Ancestors were also very important whether in the form of ‘aumakua or other spirits. (Exhibit 37 and 38)
122. The Native Hawaiian cultural practices of communicating with the deceased, especially ancestors, is well documented through the practices of ulaleo, hō‘ailona, akaka kū, ‘ike papa lua, moe ‘uhane, and other documented practices as outlined in the Nānā I Ke Kumu series by Mary Kawena Puku‘i. Markell Declaration at 94. Lee Declaration at 41.
123. Being a kahu, or keeper of my families’ iwi kūpuna Ali‘i ‘Aimoku, it is Lee’s responsibility as keeper to ensure the safety and proper return of all objects of his families’ burial complex. The iwi of Lee’s 5th great grandmother, Kaomileika‘ahumanu Kamahanakapu must be

put back into its proper resting place at Waipouli and sealed permanently as well as the ki'i and any other funerary objects taken by Haseko, 'Ewa, Inc. Lee Declaration at 39.

124. A kahukahu ritual must be performed to restore the rights of the iwi kūpuna by myself as the kahu iwi kūpuna Ali'i 'Aimoku. Lee Declaration at 40. Exhibit 164.

Departmental Failures

125. BLNR 2000 fofo col entrance channel in finding 140 found "No fishing villages, burial grounds, or other spiritual sites in the area where the proposed channel is to be constructed." (Exhibit 114)

126. In a Memorandum, dated March 9, 1998, regarding preliminary analysis of bone material recovered from SIHP No. 50=80-12-3215, Feature Q, from Sara Collins and Muffet Jourdane, State Historic Preservation Division Archaeologists, to Kai Markell of the Burial Sites Program, Dr. Collins notes reports of "burial site disturbance" at the 'Ewa Marina project area. (Exhibit 98)

127. OHA to the DLNR placing the Department on notice of significant ali'i burial sites associated with O'ahu Chiefs such as Kalaniopu'u in the One'ula area in 2005 (Exhibit 116)

128. Lee resubmitted request for a contested case in December 18, 2008 calling for more archaeological exploration of marina entrance, restoration of sites, again putting the BLNR on notice of significant burial sites. Exhibit 158

129. OHA to SHPD Aiu 2010 urging follow through with identification of burial sites as recommended by OIBC on April 14, 2010(Exhibit 120)

130. There exists a U.S. Geological Survey (1927, 1928 and 1930) map depicting the One'ula area and two waterholes which are evidence of a karst system running mauka/makai. Exhibit 160

131. Michael Kumukauoha Lee submitted a lineal descendancy claim to Kalanikupule, on April 29, 2010, through the SHPD (Exhibit 103)

132. Michael Kumukauoha Lee submitted a lineal descendancy claim to Ka'omileika'ahumanu, on April 16, 2010, through the SHPD (Exhibit 104)

133. 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, Kalanikupule, Ka'eokulani, and other famous chiefs, and discussing the karst system. Mr. Lee also submitted a descendancy claim for Kualii, Ka'eokulani, and one for Kalanikupule. Exhibit 183

134. The State Historic Preservation Division has suffered a great loss of staff and institutional knowledge since 2004 with a mass exodus of staff. Exhibit 24

135. BLNR Minutes December 12 2008 show where Lee brought up the existence of the ali'i and 1927 USGS map of springs to the attention of the BLNR in his request for a contested case hearing on the proposed 'Ewa Marina shrinkage. (Exhibit 28)

136. The State Historic Preservation Division underwent a National Park Service audit which noted deficiencies in the office's ability to fulfill its review function mandates. Exhibit 32.

137. In April of 2001, the O'ahu Island Burial Council Chairperson A. Van Horn Diamond, wrote a letter to Mr. W.G. Lee, Executive Vice President, Haseko, referencing a February 28, 2001 site visit by the OIBC to One'ula, and requesting a "supplemental archaeological inventory survey" based upon the burial finds of 1992 and 2001, subsequent to the original survey work in 1990. (Exhibit 101)

138. PHRI Scope 2004 scope (Exhibit 95) which 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."

139. PHRI Supplemental 'Ewa Marina 2004 (Exhibit 94) report dated July 2004

140. On November 28, 2005, Perry White of Planning Solutions, who was assisting Haseko, 'Ewa, Inc. with their Papipi 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)

141. Michael Kumukauoha Lee applied for lineal descendency to burial site of Ka'eokulani located at One'ula in 'Ewa on O'ahu through an application submitted to the SHPD, dated April 29, 2010. There is also included a genealogy and the chant of Kalanikupule. (Exhibit 97)

142. The threat of irreparable physical, emotional and spiritual harm to the iwi kūpuna and Native Hawaiians witnessing such harm is extremely high especially when ground disturbing activity directly and destructively impacts burial sites.

143. In general burial sites that are classified as "inadvertent" are more likely to be disturbed and relocated than those burial sites designated as "previously identified."

144. In the past, despite the legislative scheme designed to encourage the identification of burial sites before construction starts, the SHPD has allowed and followed interpretations of the law that frustrates the objective of identifying burial sites before land use permits are issued.

145. This unfortunate pattern too often leads to the discovery of burial sites during construction which proper archaeological review and comment by the SHPD might have led to an earlier identification of those same burial sites during the permit review period.

146. In the course of reviewing possible approval of a land use permit, SHPD reviewers and contract archaeologists hired by a land developer rely too often on the notorious practice of requiring simple archaeological monitoring of project construction, as a poor substitute for standard practices which would require more rigorous demands for archaeological testing and sampling at a project site early in the process.

147. Archaeological monitoring does not avoid, minimize, rectify, or reduce impacts to the Hawaiian cultural practice of protecting iwi.

148. Rather, archaeological monitoring is a means by which a developer can avoid the oversight of the applicable burial council of "previously identified" burial sites which could have been reasonably found with the reasonable application of standard archaeological testing and sampling. By avoiding burial council review, the developer can obtain speedier approval to relocate any burials.

149. The Supreme Court in Ku'ilima showing that Supplemental Environmental Impact Studies are proper when a development has spanned so many years since original studies were completed. Exhibits 34, 35 and 36.

150. The process and procedures outlined in Chapter 6E, HRS and Chapter 13-300, HAR, specify all the steps required to address the inadvertent discovery of human skeletal remains including documentation and good faith consultation Exhibit 43

151. Haseko, 'Ewa, Inc. has had a history of performing unpermitted activities. Exhibit 54

152. Haseko in an April 2010 letter to OHA still refers to Kaomileika'ahumanu as the "alleged Chiefess" despite knowing of her existence and high status burial goods since 2001. (Exhibit 228)

153. Other complaints exist against SHPD for failure to properly identify and protect Native Hawaiian burial sites. Exhibit 269

154. The Advisory Council on Historic Preservation acknowledges SHPD having difficulties maintaining qualified staff in August of 2009. Exhibit 270

155. The BLNR is aware that Haseko destroyed sites committed to preservation as noted by U.S. Army Corps in January of 2006 and violated a Federal Permit condition in destroying an 'opae sinkhole. Exhibits 274 and 288

156. A Monitoring Compliance Plan and Report Regarding Haseko Properties Located at Honouliuli, 'Ewa, O'ahu, TMK: (1) 9-1-011:001-007 and 9-1-012; 008-13, 016, 017 by the State Historic Preservation Division, Department of Land and Natural Resources, dated January 25, 2008, acknowledges the damage to, and destruction of, historic sites, and that Haseko has been "self-monitoring" and that the SHPD has not been monitoring the progress of this project since 2004. Due to high staff turnover in the SHPD and the loose (sic) of institutional knowledge, there has been no oversight of this project." Exhibit 273

Conclusion

117. In sum, Haseko's proposal to reduce the size of the 'Ewa Marina and expedite the construction of an entrance channel would significantly impact natural and cultural resources.

PROPOSED CONCLUSIONS OF LAW

Standing

1. Haseko has not questioned or challenged Michael Kumukauoha Lee's standing. TR 7/26/11.

2. Michael Kumukauoha Lee has standing to appear in this contested case hearing as a party and is properly before the Board pursuant to HAR § 13-1-31.

Applicant's Burden

3. "The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria [in HAR § 13-5-30(c)]." HAR 13-5-30(c).

4. The applicant's burden is compounded by the duties imposed by the public trust doctrine, pre-existing native Hawaiian rights and the State Constitution. *In Re Wai`ola O Moloka`i Inc.*, 103 Hawaii 401, 83 P.3d 664 (2004).

5. The applicant for a permit is obligated to demonstrate affirmatively that the proposed use will not affect Native Hawaiian rights. *Wai`ola* at 442; 83 P.3d at 705.

6. 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. *Wai`ola* at 429, 83 P.3d at 692.

HAR § 13-5-31

7. "No permit application shall be processed by the department until any violations pending against the subject parcel are resolved." HAR § 13-5-31(e).

8. Haseko's destruction of historic features H1 and H2 within Site 3205, damaging historic features F1 and G1 within Site 3205, and failure to install proper buffers violated the Memorandum of Agreement that Haseko entered into with the Army Corps of Engineers, the State of Hawai'i State Historic Preservation Officer, the Office of Hawaiian Affairs and the Advisory Council on Historic Preservation.

9. Haseko's failure to install proper buffers violated Haseko's February 1993 `Ewa Marina Community Project Memorandum of Agreement Items 2.a,b Compliance Plans and its preservation plan.

10. Haseko violated the terms of its conservation district use permit it obtained for the `Ewa Marina project by violating condition 26 regarding the treatment of historic sites on the project site.

11. “It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.” HRS § 6E-11(c).

12. Because Haseko’s `Ewa Marina project required state approval, DLNR reviewed Haseko’s `Ewa Marina project pursuant to HRS § 6E-42.

13. Haseko injured, destroyed and/or altered historic property during the course of land development to which HRS § 6E-42 applies – without obtaining required approval for the destruction of the historic features.

14. Because Haseko has consistently viewed the subject parcel (where a portion of the drainage infrastructure is proposed) as part of the entire Ewa Marina (or Ocean Pointe) project, and because Haseko has treated the subject parcel as part of the same parcel where the historic sites are located, each of these violations (of the MOA, the compliance and preservation plans, the CDUP and HRS § 6E-11(c)) took place on the subject parcel.

15. Because Haseko’s violations are unresolved, the conservation district use application cannot be processed and it must be denied.¹

The Context for HAR § 13-5-30 Decisionmaking

16. Public purpose uses of land in the conservation district have been and may be permitted where the circumstances and legal criteria have been met. It is not correct, however, to conclude that every project, which benefits the public to any degree, should be approved. A thorough evaluation and weighing of project alternatives must be presented to consider if the impact to conservation lands, natural resources, and cultural resources can be mitigated or avoided altogether. *In re: HECO’s CDUA to Construct a 138-kV Transmission Line at Wa`ahila Ridge*, DLNR File No. OA-2801 at COLs 12 and 13, pp 63-64. (Exhibit B-38).

¹ The failure of the state historic preservation division to vigorously enforce agreements, plans, promises and permit conditions regarding historic preservation is distressing. SHPD’s inaction flies in the face of HRS § 6E-1: “The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage. . . . The legislature further declares that it shall be the public policy of this State to provide leadership in preserving, restoring and maintaining historic and cultural property. . . .”

17. The Board is not deciding what alternative Haseko (or others) will pursue if this application is denied. *Id.* at COL 24 p. 67.

18. An archaeological inventory survey is merely a preliminary, informational document which is intended to provide an agency sufficient information within the context of HRS chapter 343 and Chapter 6E, HRS. The BLNR is not bound by the conclusions of a document prepared pursuant to chapter 343. *Matina Kea Power Co. v. Board of Land & Natural Resources*, 76 Haw. 259, 265 (1994)(upholding the BLNR's decision which concluded that the assertion in the applicant's EIS that there would be no effect on the surf shoal at Honoli'i beach was unsupported).

20. The BLNR has a duty to independently determine whether a CDUA is consistent with HRS Chapter 205A. HRS § 205A-4(b), -5(b), -6(a)(1); HAR § 13-5-30(c)(3).²

The Criteria Pursuant to HAR 13-5-30

22. HAR § 13-5-30(c)(1) requires that a proposed use be consistent with conserving, protecting, and preserving the important natural resources of the State. *See* HAR § 13-5-1. Haseko's proposal to reduce the size of their marina without properly identifying and mitigating the adverse impacts to the underground karst system and cultural sites is inconsistent with HAR § 13-5-30(c)(1). Rather than conserving, protecting and preserving natural resources, Haseko's proposal harms them.

23. Haseko's proposal is inconsistent with HAR § 13-5-30(c)(4). It will cause substantial adverse impacts to existing natural resources within the surrounding area.

26. Haseko's proposal is inconsistent with HAR § 13-5-30(c)(8). It will be materially detrimental to the health of Native Hawaiians and others who worship ancestral burials sites in the area.

27. Haseko's proposal is inconsistent with HAR § 13-5-30(c)(3). It is inconsistent with many of the provisions and guidelines in HRS chapter 205A including HRS §§ 205A:

² HRS § 205A-4(b) provides: "The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority." HRS § 205A-5(b) provides: "All agencies shall enforce the objectives and policies of this chapter. . ."; HRS § 205A-6(a)(1) authorizes civil suit against any agency that is not complying with one or more of the objectives, policies and guidelines of HRS Chapter 205A.

a. -2(b)(2)(A), by adversely affecting the natural resources of an area that are significant in Hawaiian culture;

28. Haseko has not met its burden of proving by a preponderance of the evidence that its project is consistent with HAR § 13-5-30(c).

Public Trust Doctrine

29. “The scope of Hawai‘i’s Public Trust Doctrine is set forth in Article XI, section 1 of the Hawai‘i Constitution and provides: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people. *Morgan v. Planning Dept., County of Kaua‘i*, 104 Hawai‘i 173, 184 n. 12, 86 P.3d 982, 993 n.12 (2004). The public trust doctrine applies to all water resources without exception or distinction. *Waiahole*, 94 Hawai‘i at 133, 9 P.3d at 445.

31. “The state also bears an affirmative duty . . . to protect public trust uses whenever feasible.” *Waiahole*, 94 Hawai‘i 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.

32. 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 rights and purposes. . .” *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987).

33. A developer has no right to use *public* land to impair public trust resources. *King v. Oahu Railway & Land Co.*, 11 Haw. 717, 725 (1899).

34. Haseko’s proposal to reduce the size of the ‘Ewa Marina and expedite the breaching of the entrance channel without proper archaeological investigation would adversely affect public trust resources and violates the public trust doctrine.

35. Haseko's proposal to reduce the size of the 'Ewa Marina without mitigating, investigating and restoring portions of the breached karst system would adversely affect public trust resources and violates the public trust doctrine.

35. Haseko's proposal would also violate Article XI § 9 of the Hawai'i State Constitution.

Native Hawaiian Rights

36. "[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." *PASH v. Cty. Planning Comm*, 79 Hawai'i 425, 449 (1995). "[T]he right of each ahupua'a tenant to exercise traditional and customary practices remains intact. . ." *Id.* at 450.

37. The Board 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 Comm'n*, 94 Hawai'i 31, 45 (2000). The Board is under "an affirmative duty" to "protect these rights and to prevent any interference with the exercise of these rights." *Id.*

38. Haseko's proposal to to reduce the size of the 'Ewa Marina and expedite the breaching of the entrance channel without proper archaeological investigation would adversely affect Native Hawaiian rights.

39. Haseko's proposal to to reduce the size of the 'Ewa Marina and fail to properly mitigate previous breaches of the karst system through proper archaeological investigation would adversely affect Native Hawaiian rights.

PROPOSED DECISION AND ORDER

It is hereby ordered that Haseko's conservation district use application to reduce the size of their 'Ewa Marina through amendment of their CDUP is denied until such time that proper archaeological inventory level testing is conducted to locate and protect significant burial sites and cultural artifacts located in the karst systems.

Dated: Honolulu, Hawai'i, September 12, 2011


Michael Kumukauoha Lee

Michael Kumukauoha Lee
Pro Se
91-1200 Keaunui Drive, Unit 614
'Ewa Beach, HI 96706

BOARD OF LAND AND NATURAL RESOURCES

State of Hawai'i

In the matter of Limited Contested Case) DLNR File No. 0A-2670
Petition Regarding a Request to Amend)
Conservation District Use Permit (CDUP)) MICHAEL KUMUKAUOHA LEE'S
OA-2670 to Construct a Marina Entrance) PROPOSED FINDINGS OF FACT,
Channel Located at Honouliuli, 'Ewa, O'ahu) CONCLUSIONS OF LAW, DECISION
Plat (1) 9-1-012 by Haseko to Reduce the) AND ORDER; CERTIFICATE OF
Size of the Marina.) SERVICE
_____)

CERTIFICATE OF SERVICE

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

- 1) MICHAEL KUMUKAUOHA PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

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

Yvonne Y. Izu
Moriyama Lau & Fong LLP
400 Davies Pacific Center
841 Bishop Street
Honolulu Hawaii 96813

William J. Wynhoff
Land/Transportation Division
Department of the Attorney General
Kekuanao'a Building, Room 300
465 South King Street
Honolulu, HI 96813

Steven Jacobson
Environmental Hearing Officer
Office of the Director
Kinau Hale, 3rd Floor
1250 Punchbowl St.
Honolulu, Hawaii 96814

Dated: Honolulu, Hawaii September 13, 2011


Michael Kumukauoha Lee
Petitioner Pro Se