

FRANCIS ALLAN ORNELLAS

2016 FEB -5 AM 9:57

P.O. Box 1104

Wailuku, Hawai'i 96793

(808) 633-0283

WATER USE PERMIT APPLICANT PRO SE

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications,	)	Case No. CCH-MA15-01
Integration of Appurtenant Rights and	)	
Amendments to the Interim Instream Flow	)	TESTIMONY OF FRANCIS ALLAN
Standards, Nā Wai 'Ehā Surface Water	)	ORNELLAS; EXHIBITS "2370-
Management Areas of Waihe'e, Waiehu,	)	ORNELLAS-1" - "2370-ORNELLAS-4"
'Āao, & Waikapū Streams, Maui	)	
	)	
	)	
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TESTIMONY OF FRANCIS ALLAN ORNELLAS

1. This testimony is provided in support of Surface Water Use Permit Application ("SWUPA") No. 2370N, filed with this Commission on Water Resource Management on April 30, 2009, for four parcels in Wailuku, Tax Map Key ("TMK") Nos. (2) 3-5-001:002, (2) 3-5-001:003, (2) 3-5-001:004, and (2) 3-5-001:005. Our kuleana land (TMK No. (2) 3-5-001:002) has been in our 'ohana since time immemorial, and other than as described below, we have no reason to believe that our appurtenant rights were extinguished.

2. We are a Native Hawaiian 'ohana who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778. Pursuant to Article XII, Section 7 of the Hawai'i Constitution and Hawai'i Revised Statutes ("HRS") section 174C-101(c), our intended use of stream water is a traditional and customary Native Hawaiian practice and, thus, a protected public trust purpose.

3. Our domestic water use is also a protected public trust purpose.

4. Our property has an appurtenant right to water because it was in kalo and other cultivation at the time of the Māhele of 1848. In fact, the stream water we are seeking via this application is for kalo cultivation in ancient lo'i that our 'ohana is in the process of restoring.

5. As to the three pō'alima on our land, which are designated as TMK Nos. (2) 3-5-001:003, (2) 3-5-001:004, and (2) 3-5-001:005, and total 0.24 acres, as well as an undivided 33.33% interest in TMK No. (2) 3-5-001:002, Wailuku Agribusiness Co., Inc. ("WACI") came to own these when, according to family legend, one of my wife's relatives sold his interest in the land to pay a gambling debt. I purchased these interests from WACI in 2002 via a quitclaim deed in which WACI purported to reserve all water rights within or appurtenant to the property. In the event of a legal determination that the appurtenant rights for our pō'alima and a portion of TMK No. (2) 3-5-001:002 were not extinguished, I am providing further information regarding water use at the time of the Māhele.

6. Based on the information set forth below, if appurtenant rights survived the deed's reservation (for our three pō'alima and a 33.33% undivided interest in TMK No. (2) 3-5-001:002), I request recognition of appurtenant rights for TMK Nos. (2) 3-5-001:002, (2) 3-5-001:003, and (2) 3-5-001:004, and (2) 3-5-001:005, in the amount of 227,280 gallons per day ("gpd"). I request a Surface Water Use Permit for a reasonable-beneficial use for TMK Nos. (2) 3-5-001:002, (2) 3-5-001:003, and (2) 3-5-001:004, and (2) 3-5-001:005 in the amount of 426,567 gpd.

#### **QUANTIFICATION OF APPURTENANT RIGHTS**

7. "2370-ORNELLAS-1" is a true and correct copy of a TMK map showing that our property includes all of LCA No. 2414, confirmed by Royal Patent No. 6863, and three pō'alima.

“2370-ORNELLAS-2” is a true and correct copy of a map from the Kīpuka database that shows the borders of our TMK superimposed on LCA No. 2414, as surveyed at the time of the Māhele. Having consulted with experts in Nā Wai ‘Ehā land tenure at the time of the Māhele, I understand that pō‘alima in Nā Wai ‘Ehā, including mine, were all cultivated in lo‘i kalo. Other exhibits contain true and correct copies of various Māhele documents and translations that also confirm water use at the time of the Māhele, as explained below.

8. Attached as “2370-ORNELLAS-3” are true and correct copies of LCA No. 2414 to Kailihuna, the native register for the award, and the English translation of the native register. These documents confirm the presence of “23 lo‘i kalo, five lo‘i at the Northern end of the stream, eighteen on the Southern end of the stream . . . a wauke field . . . [and] a house lot” at the time of the Māhele. Because this LCA is 1.27 acres, no more than 0.25 ac could have been for the house (since that was all that was awarded in the Māhele for pāhale), leaving the remaining acreage for wetland kalo and wauke (0.51 ac each). In addition, the three pō‘alima were also in wetland kalo (a total of 0.24 ac).

9. Those figures, especially the acreage in lo‘i kalo, are very conservative. Based on our ‘ohana’s knowledge of the land, the majority of our property was used for lo‘i kalo in ancient times. Attachment C to our SWUPA contains pictures plainly showing the ancient ‘auwai and lo‘i features, which are still visible on our site, and which confirm that lo‘i were cultivated throughout what is now TMK No. (2) 3-5-001:002 at the time of the Māhele. Moreover, as shown in the map for LCA No. 2414 in “2370-ORNELLAS-3”, the river used to flow right through our property, which is also close to the pō‘alima – based on this information and the understanding of elders in our ‘ohana, lo‘i kalo were cultivated throughout LCA No. 2414 at the time of the Māhele.

10. While the attached materials confirm the use of our land for kalo and other cultivation at the time of the Māhele, additional information documenting these uses and the associated appurtenant water rights were already filed with this Commission on April 30, 2009 in my SWUPA No. 2370 and the exhibits appended thereto. Those attachments also depict historical features and topography that further establish the Māhele-era use of our 'ohana's land for kalo cultivation. As also noted in our SWUPA, we are already in the process of restoring all of the ancient lo'i on our property. All we need are our permits so that we can access water from Wailuku River. Exhibit "2370-ORNELLAS-4" contains true and correct copies of pictures that accurately depict the conditions of our land, in addition to those contained in our SWUPA, showing the ancient features still present on our land that clearly establish the Māhele-era use of our 'ohana's land for kalo cultivation.

11. Based on the attached Māhele documents, discussed above, if appurtenant rights survive the deed's reservation of rights for the pō'alima and portion of TMK No. (2) 3-5-001:002, the quantification of the appurtenant rights is the amount of water: (1) for one house occupying a maximum of 0.25 acres; (2) sufficient to grow kalo on 0.75 acres using traditional methods, and (3) for 0.51 acres of diversified ag (wauke).

12. It is my understanding that, on average, taking into account fallow lo'i and uncultivated areas such as banks between lo'i, healthy wetland kalo cultivation requires up to 300,000 gallons of water per acre per day ("gad"), and that areas with greater proportions of lo'i in cultivation – like ours – require an amount closer to the upper end of this range.

13. According to the County of Maui's water system standards, domestic use requires 3,000 gad. That amount should also be sufficient for wauke cultivation.

14. Thus, in my best estimation, the water right appurtenant to my four parcels is:

Domestic Use:

TMK No. (2) 3-5-001:002:  $(0.25 \text{ ac}) \times (3,000 \text{ gad}) = 750 \text{ gpd}$

Wetland Kalo Cultivation:

TMK No. (2) 3-5-001:002:  $(0.51 \text{ ac}) \times (300,000 \text{ gad}) = 153,000 \text{ gpd}$

TMK Nos. (2) 3-5-001:003, 004, & 005:  $(0.24 \text{ ac}) \times (300,000 \text{ gad}) = 72,000 \text{ gpd}$

Wauke Cultivation:

TMK No. (2) 3-5-001:002:  $(0.51 \text{ ac}) \times (3,000 \text{ gad}) = 1,530 \text{ gpd}$

Total:  $750 + 153,000 + 72,000 + 1,530 = 227,280 \text{ gpd}$

**AMOUNT REQUESTED UNDER PERMIT**

15. We use a total of 0.089 acres within TMK No. (2) 3-5-001:002 for domestic purposes, including our home and for non-commercial gardening. According to the County of Maui's water system standards, domestic use requires 3,000 gad. We are in the process of establishing lo'i kalo on the remainder of our land, comprising a total of 1.421 acres.

16. As described in my SWUPA, I intend to restore all of my land that is not occupied by my domestic uses to wetland kalo cultivation. I therefore require **426,567 gpd** from Wailuku River, which is calculated as follows:

Domestic use:

TMK (2) 3-5-001-002:  $(0.089 \text{ ac}) \times (3,000 \text{ gad}) = 267 \text{ gpd}$

Wetland kalo cultivation:

TMK (2) 3-5-001-002:  $(1.181 \text{ ac})^1 \times (300,000 \text{ gad}) = 354,300 \text{ gpd}$

TMK (2) 3-5-001-003:  $(0.180 \text{ ac}) \times (300,000 \text{ gad}) = 54,000 \text{ gpd}$

TMK (2) 3-5-001-004:  $(0.030 \text{ ac}) \times (300,000 \text{ gad}) = 9,000 \text{ gpd}$

TMK (2) 3-5-001-005:  $(0.030 \text{ ac}) \times (300,000 \text{ gad}) = 9,000 \text{ gpd}$

Total:

$267 + 354,300 + 54,000 + 9,000 + 9,000 = 426,567 \text{ gpd}$

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<sup>1</sup> In my SWUPA, this figure is 1.118, which was a math error. When the acreage for my domestic use (0.089 ac) is subtracted from the total acreage (1.27), that amount is 1.181 (1.27 - 0.089 = 1.181).

### **Reasonable-Beneficial Analysis**

17. In the event of a legal determination that any of my appurtenant rights were extinguished, my use is still “reasonable-beneficial,” defined as: “the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and public interest.” HRS § 174C-3.

18. The quantity I am requesting is necessary for the economic and efficient irrigation of wetland kalo and my home garden. My use of stream water is economic and efficient, as I plan to only use the amount needed to irrigate my land, and I will implement measures to minimize water loss, including using pipes and garden hoses where practicable, which reduce evaporation and leakage.

19. My use of stream water to irrigate my garden is also consistent with the state and county land use plans and the public interest. My land is classified by the State as rural, and zoned by the County as agricultural. Generally, “water use for diversified agriculture on land zoned for agriculture is consistent with the public interest.” *In re Waiāhole Ditch Combined Contested Case*, 94 Haw. 97, 162, 9 P.3d 409, 474 (2000). My water use on my land for domestic cultivation and traditional and customary Native Hawaiian practices is in the public interest and fulfills multiple public trust purposes. For example, the majority of the water from my lo‘i will return to Wailuku River, a public trust purpose that supports other instream uses.

### **Alternatives Analysis**

20. If my land has appurtenant rights to stream water, and because our uses are traditional and customary Native Hawaiian practices and protected public trust purposes, I am not required to provide an alternatives analysis to show that I have no practicable alternative

source of water. My appurtenant right is for stream water, not for water from any other source, and my exercise of these rights enjoy maximum protection and first priority under the law. Nonetheless, the Alternatives Analysis set forth in my SWUPA, filed April 30, 2009, remains applicable, true, and correct.

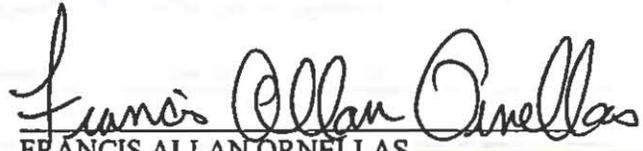
21. As detailed in my SWUPA, there are no practicable alternatives to using the water to which I have appurtenant, traditional and customary Native Hawaiian, and domestic water rights. I propose using a reasonable amount of stream water to maintain my non-commercial lo'i and garden. Other alternatives, such as municipal water, reclaimed wastewater, water from other ditch systems, desalinized water, and groundwater, are not practicable alternatives to water from the Wailuku River. Requiring me to pay for these alternatives instead of diverting a small amount of water from the river that runs alongside my land would impose an unfair and impracticable cost on me and my 'ohana, given that we are a small, Native Hawaiian, non-commercial, domestic water user. Additionally, any excess water will be returned to the river.

#### **SUMMARY**

22. In sum: (1) my 'ohana's traditional and customary Native Hawaiian right to grow kalo is a protected public trust purpose; (2) the exercise of my appurtenant right is also a protected public trust purpose; (3) my domestic water use is a third protected public trust purpose; (4) if appurtenant rights survived the deed's reservation (for TMK Nos. (2) 3-5-001:003, (2) 3-5-001:004, (2) 3-5-001:005, and only 33.33% of (2) 3-5-001:002), I am entitled to 227,280 gpd; (5) at this time, I request a permit for 426,567 gpd, which will enable a reasonable-beneficial use of stream water in support of my traditional and customary Native Hawaiian right to cultivate kalo in the traditional manner on our kuleana land in ancient lo'i that we are restoring, for which there is no reasonable alternative.

I, Francis Allan Ornellas, do declare under penalty of law that the foregoing is true and correct.

Dated: Wailuku, Hawai'i, February 3, 2016.

  
FRANCIS ALLAN ORNELLAS  
WATER USE PERMIT APPLICANT PRO SE

**Exhibits:**

- ORNELLAS -2370-1: TMK Map
- ORNELLAS -2370-2: Map of LCA No. 2414
- ORNELLAS -2370-3: Māhele documents for LCA No. 2414
- ORNELLAS -2370-4: Additional pictures establishing the Māhele-era use of our 'ohana's land for kalo cultivation





TMK No. (2)3-5-001-002  
(approximate)

LCA (2414)

ORNELLAS-2370-2



W. L. Lee  
J. M. Robertson  
I. M. Kaulahas

Honolulu June 21, 1852

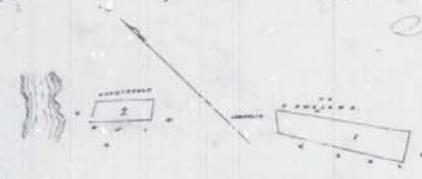
File 3335 Karmohi

Kaula 2<sup>o</sup> Uailuku Hawaii

Palapala i ke ana ana i ke Kaula 3335 i Karmohi ma ka ala o Kaula 2. Uailuku Hawaii.  
Apana 1 E hoomaka ma ka hiki Kihuna i ke ana ana i ke Kaula 2. Uailuku Hawaii.  
a e hiki ana ana i ke Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.

Apana 2 E hoomaka ma ka hiki Kihuna i ke ana ana i ke Kaula 2. Uailuku Hawaii.  
a e hiki ana ana i ke Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.

Uku pua loa  
i ke ana ana  
i ke Kaula 2



Ma E. Bailey i ana

W. L. Lee  
J. M. Robertson  
I. M. Kaulahas

Honolulu June 21, 1852

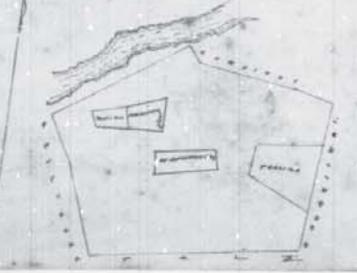
File 5330 Polokuua

Kamamae, Uailuku Hawaii

Palapala i ke ana ana i ke Kaula 5330 i Polokuua i ke ana ana i ke Kaula 2. Uailuku Hawaii.  
Apana 1 E hoomaka ma ka hiki Kihuna i ke ana ana i ke Kaula 2. Uailuku Hawaii.  
a e hiki ana ana i ke Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.

Apana 2 E hoomaka ma ka hiki Kihuna i ke ana ana i ke Kaula 2. Uailuku Hawaii.  
a e hiki ana ana i ke Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.

Apana 3 E hoomaka ma ka hiki Kihuna i ke ana ana i ke Kaula 2. Uailuku Hawaii.  
a e hiki ana ana i ke Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.  
Ma ka ala o Kaula 2. Uailuku Hawaii. Ma ka ala o Kaula 2. Uailuku Hawaii.



Ma E. Bailey i ana

makou, ia Kalahouika i kōu makoukane. <sup>1847</sup>  
 a make iā ili māi iāiāi keia mānawa, iā  
 puna no i mā makua a hiki i keia. Eia na hoi  
 ke i Kapu, o Pūloa, o Pūloa, oia hoi kulewa ma Pūloa  
 Eia he ana o kōu mānawa, ma Pūloa oia, i  
 ka wa o Kūhulani iho nei no kōu mānawa  
 loaa i iāiāi mā Kūhulani māi. Oia i hōia no kōu  
 kulewa. Eia na hōi ke i Pūloa Kūhulani Kapu.  
 Aloha oukou. Oia mā ka māhala iā oukou  
 Na Kuwāki

Wāitūe Maui Dek. 27 1847

2414 Kailihune Wāitūe Maui Dek 27 1847  
 Aloha oukou e ma Lūna Lūna

He hāi aku nei au i kōu kulewa aia, aia no  
 mā Wāitūe māi, aia hoi mā ka aia i Kapu  
 o Kūhulani iho nei, he 23 loi kōu, iāiāi loi kōu  
 mā ka aia o Akau, o ke ke hōi, he rōmi kōu  
 mānawa hoi mā ka aia o hōi o kōu mānawa.  
 He kōu mānawa ke kōu, iā mā keia aia, ke  
 pū i aia mā ka aia mānawa i ka aia o Kōu  
 he ka hōi hōi iā mānawa o kōu aia,  
 o Akau hōi mānawa, he kōu, he pū i aia i ke  
 Kōu mānawa

Na Kailihune

2415 Mahana Anuaua Dek 24 1847

Aloha oukou e ma Lūna Lūna. He  
 hāi aku nei au i kōu kulewa iā oukou. Oia mā  
 o Mahana he mānawa iā mānawa, aia o Pa  
 lauā, o Kōu mānawa, o kōu mānawa, o Mahana  
 kōu mānawa, mā ka Akau, o Kōu mānawa, o  
 Mahana kōu mānawa, o Kōu mānawa, o Mahana  
 mānawa iā mānawa, o Mahana kōu mānawa, o  
 Mahana kōu mānawa

Akau, o Mahana, o Kōu mānawa, o Kōu  
 mānawa, o Kōu mānawa, he mānawa mānawa,  
 he mānawa mānawa. Eia no keia kōu mānawa

LCA No. 2414  
Native Register

2414 Kailihune

Wailuku, Maui December 27, 1827

Aloha oukou e na Luna Hoona. Ke hai aku nei au i keia kuleana aina aia no ma Wailuku nui, aia hoi ma ka aina I ka paia o Kumuwiliwili he 13 lo'i kalo, elima lo'i kalo ma ka aoao Akau o ke kahawai. He umi kumawalu hoi ma aoao hema o ke kahawai.

He kula wauke kekahi o'u ma keia aina. Ke hele akula ma ka aoao makai o ka aina o Kane, he kahuahale kekahi o'u ma loko o keia aina o Ahuwahine ka inoa, he kula, ke pili la I ko Kalaeloa aina.

Na Kailihune

2414 Kailihune

Wailuku, Maui December 27, 1827

Aloha the Land Commissioners. I hereby swear on this kuleana land parcel; it is at Wailuku, it is at the wall of Kumuwiliwili. There are 23 lo'i kalo, five lo'i at the Northern end of the stream, eighteen on the Southern end of the stream. There is a wauke field on the land as well. If you go on the makai end of Kane's land, there is a house lot as well on the land. 'Ahuwahine is the name of this land, it is plain land, adjoining with Kalaeloa's land.

Sincerely Kailihune



**Ancient rock walls and terracing are still visible on our property, showing locations of ancient lo'i.**

**ORNELLAS-2370-4-P.1**



**Ancient rock walls and terracing are still visible on our property, showing locations of ancient lo'i. Note the temporarily dry lo'i due to lack of available 'auwai water.**

**ORNELLAS-2370-4-P.2**

FRANCIS ALLAN ORNELLAS

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and Waikapū Streams, Maui )  
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)  
)  
)

WITNESS LIST

**PARTY: FRANCIS ALLAN ORNELLAS**

NAME/ ORGANIZATION/ POSITION	SUBJECT MATTER	EXHIBIT(S) TO BE INTRODUCED BY WITNESS
Francis Allan Ornellas	Need for and use of Nā Wai 'Ehā water	ORNELLAS-2370-1 to -4

FRANCIS ALLAN ORNELLAS

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and Waikapū Streams, Maui )  
)  
)  
)

EXHIBIT LIST

PARTY: FRANCIS ALLAN ORNELLAS

EXHIBIT NUMBER	DESCRIPTION	REFERENCES	REC'D INTO EVIDENCE
ORNELLAS-2370-1	County Tax Map	Testimony of Francis Allan Ornellas	
ORNELLAS-2370-2	Screen Shot Showing TMK and LCA No. 2414	Testimony of Francis Allan Ornellas	
ORNELLAS-2370-3	LCA No. 2414, Native Register and Translation	Testimony of Francis Allan Ornellas	
ORNELLAS-2370-4	Photos of Ancient Rock Walls and Terracing	Testimony of Francis Allan Ornellas	