

**Response to the Commission on
Water Resource Management's
Request for Information on
Hawaiian Traditional & Customary
Practices at Kaloko-Honokōhau U.S.
National Park**

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Kailua-Kona, Hawai'i

Report Overview

- 1. Background (historical, legal, procedural)**
- 2. Ancient, Current, and Future T&C Practices**
- 3. Current "management" of T&C Practices**

Report Ordered December 29, 2014

The National Park Service (Kaloko-Honokohau National Historical Park) is requested to provide specific information to the Commission about:

- a) The quantity of ground water needed to support 1) natural resources, and 2) cultural resources of the Kaloko-Honokohau National Historical Park.
- b) Specific traditional and customary practices that are exercised in the Kaloko Honokohau National Historical Park.
- c) How NPS manages traditional and customary practices in the Kaloko Honokohau National Historical Park.

Background - Historic

1400-1500s: Kaloko fishpond constructed

1600-1700s: `Umi-a-Liloa establishes residence in Kona; Kaloko fishpond / inland agriculture

1800 – 1850: depopulation; relocation

1850 – 1900: Title passes to private corporations

Background – 1960s – 70s

- 1960s:** The Kona Coast Company and Lanihau Corp. propose resort development, removal of 2/3 of Kaloko kuapā so a resort beach can be created
- 1964:** “On Being Hawaiian” published
- 1971:** DLNR & State DOT grants permits for kuapā modification
- 1971:** USACE consults with ACHP; ACHP recommends project be held in abeyance

Background – 1960s – 70s

- 1972:** U.S. Public Law 92-346 sets up Study Commission
- 1972-4:** Hearings held; Spirit Report Completed
- 1978:** Park Authorized by Congress
- 1978:** Legal protections for traditional and customary rights, public trust in water reaffirmed in Constitution

Background – 1980s – 90s

- 1987:** Water Code passed
- 1990:** NPS acquires lands for Park
- 1990s:** Reconstruction of Kaloko kuapā begins
- 1999:** Oki Groundwater study published – current management could reduce groundwater flow by almost half

Background – Procedural

- May 30, 2007:** NPS Meets with Roy Hardy; Superintendent Bell seeks designation
- November 13, 2007:** NPS writes to Deputy Kawahara, requesting creation of a ground water protection working group
- May 14, 2008:** Alternate “Kona Water Roundtable” created

Background – Procedural

2008 – 2013: NPS meets with stakeholders

September 13, 2013: NPS files Petition

**October 2014: CWRM extends “60 day”
review till December 2015**

**December 2015: Commission orders report
on specific traditional and
customary practices at the
Park**

May 29, 2015: Report submitted

Legal Background

Hawai‘i Constitution, art. XII, sec. 7

State Water Code, HRS Chap. 174C

Hawai‘i Court decisions

**PLEASE
DO NOT
FEED
THE BIRDS
AND FISH**

MAHALO

Hawai'i Constitution Art. XII, Sec. 7

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

State Water Code, HRS Chap. 174C

Declared policy mandates “adequate provision” for public interests, including “the protection of traditional and customary Hawaiian rights[.]” HRS § 174C-2(c).

State Water Code, HRS Chap. 174C

**Native Hawaiian Water Rights:
Traditional and customary rights
“shall not be abridged or denied by”
the Water Code. HRS § 174C-101(c).**

Ka Pa‘akai o Ka ‘Āina (2000)

Agencies must:

- 1. Identify valued cultural, historical, or natural resources and the extent to which traditional practices are exercised;**
- 2. The extent to which resources and rights will be effected or impaired; and**
- 3. The feasible action to be taken to protect rights**
 - This can not be delegated to the developer / user**

Kaua'i Springs (2014)

- a. The agency's duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use.
- b. The agency must determine whether the proposed use is consistent with the trust purposes:

Kaua'i Springs (2014)

- c. The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.
- d. The agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water

Kaua'i Springs (2014)

- e. If the requested use is private or commercial, the agency should apply a high level of scrutiny.
- f. The agency should evaluate the proposed use under a “reasonable and beneficial use” standard, which requires examination of the proposed use in relation to other public and private uses.

Kaua'i Springs (2014)

Applicants have the burden to justify the proposed water use in light of the trust purposes.

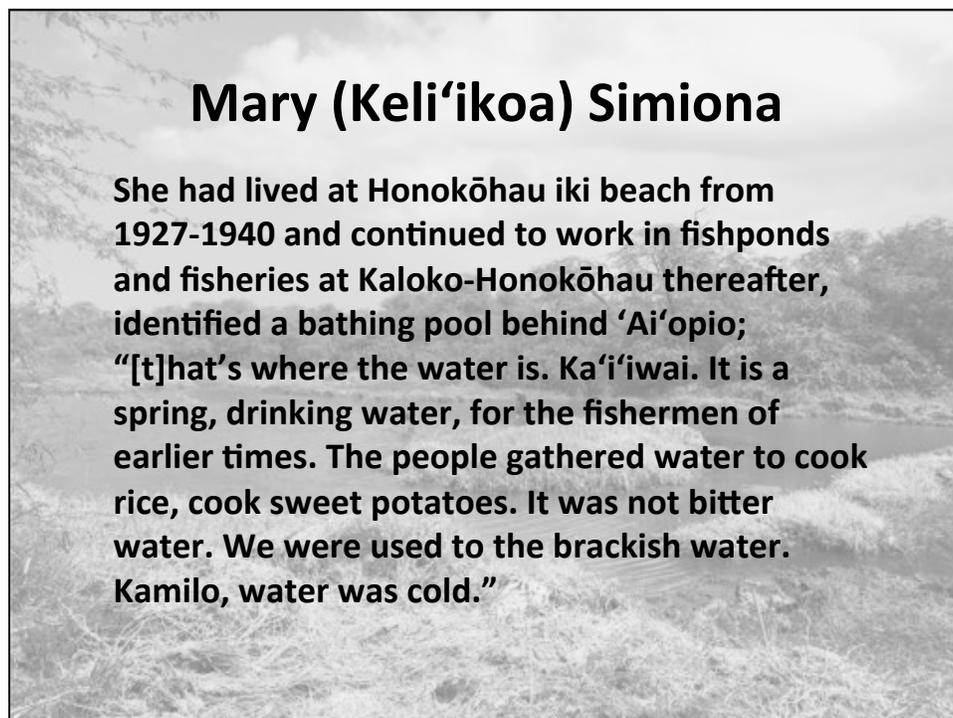
- a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.

Kaua'i Springs (2014)

- b. The applicant must demonstrate the absence of a practicable alternative water source.
- c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.

Kaua'i Springs (2014)

- d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.

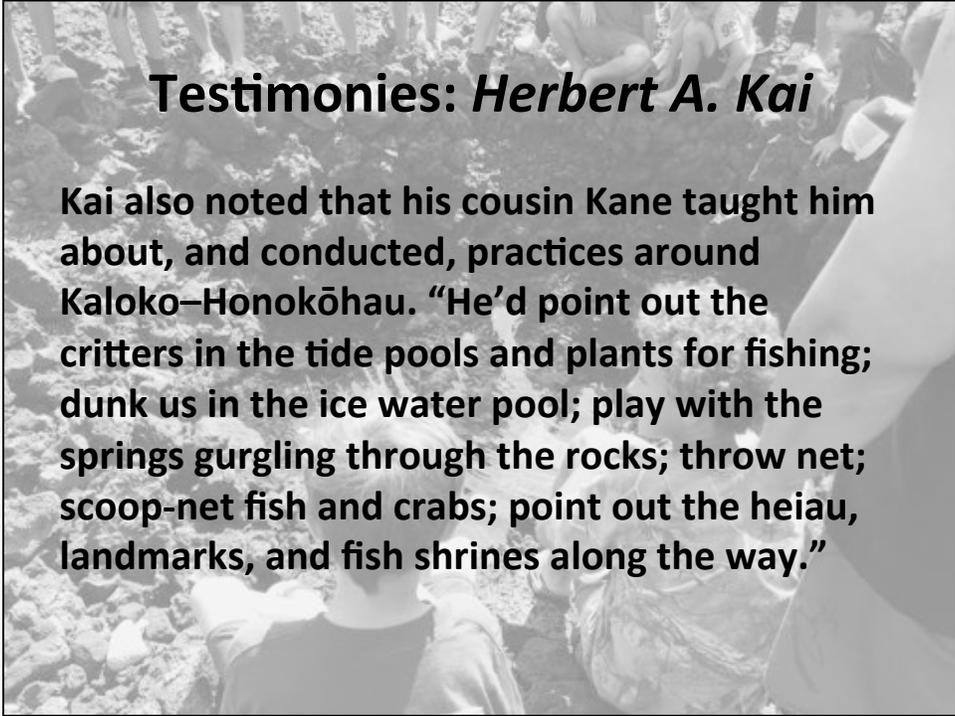


Peter Keka

A lineal descendant of Honokōhau-Kalaoa section of Kekaha, North Kona and whose family has had a working relationship with Kaloko and Honokōhau (‘Aimakapā) fishponds for at least three generations. Keka recalled his grandfather referring to a pond, ‘Oia ka wai inu – water that they could drink. This pond’s water had been fresh enough to drink in Keka’s early years, but is no longer drinkable.

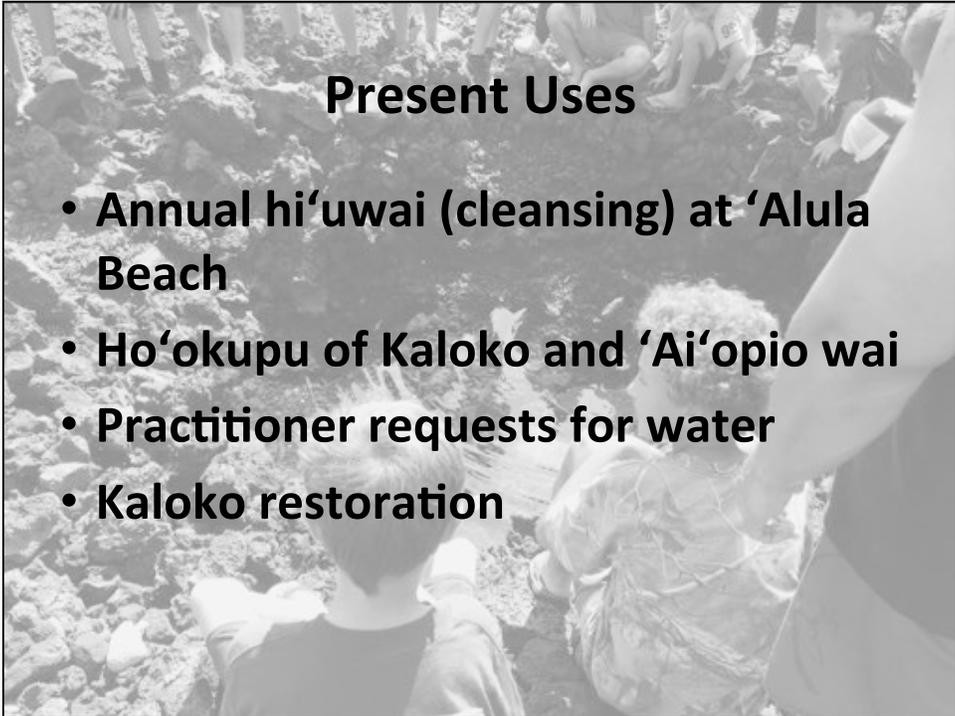
Testimonies: *Herbert A. Kai*

He and his ‘ohana have practiced fishing, gathering, drinking and bathing practices proximate to “where the flowing fresh water, fresh water springs, brackish water pools, and opae ula were . . . not to mention the wana, lobsters, and octopi.” He specifically noted, “[t]hese flowing fresh water, fresh water springs, brackish water pools, and opae ula ARE GONE... or, at least not easy to find; they’ve been slowly diminishing since the Kahalu‘u well was drilled in 1975”



Testimonies: *Herbert A. Kai*

Kai also noted that his cousin Kane taught him about, and conducted, practices around Kaloko–Honokōhau. “He’d point out the critters in the tide pools and plants for fishing; dunk us in the ice water pool; play with the springs gurgling through the rocks; throw net; scoop-net fish and crabs; point out the heiau, landmarks, and fish shrines along the way.”



Present Uses

- Annual hi‘uwai (cleansing) at ‘Alula Beach
- Ho‘okupu of Kaloko and ‘Ai‘opio wai
- Practitioner requests for water
- Kaloko restoration

NPS Management

- NPS is not the NSA
- No one would disagree – we can improve
- Perpetuating practices is core to the Park
- Workdays illustrate ongoing and future practices

Quantification

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