Ke Kulanakauhale o Wai`anae:
Wai`anae, a City of Refuge

…you might feel that you had understood the meaning of the Age of Enlightenment (though, as far as I can see, it had done you very little good); you loved knowledge, and wherever you went you made sure to build a school, a library, (yes, and in both of these places you distorted or erased my history and glorified your own). But then again, perhaps as you observe the debacle in which I now exist, the utter ruin that I say is my life, perhaps you are remembering that you had always felt people like me cannot run things, people like me will never grasp the idea of Gross National Product, people like me will never be able to take command of the thing the most simpleminded among you can master, people like me will never understand the notion of rule by law, people like me cannot really think in abstractions, people like me cannot be objective, we make everything so personal. You will forget your part in the whole setup, that bureaucracy is one of your inventions, that Gross National Product is one of your inventions, and all the laws that you know mysteriously favour you. Do you know why people like me are shy about being capitalists? Well, it's because we, for as long as we have known you, were capital, like bales of cotton and sacks of sugar, and you were the commanding, cruel capitalists, and the memory of this is so strong, the experience so recent, that we can't quite bring ourselves to embrace this idea that you think so much of. As for what we were like before we met you, I no longer care. No periods of time over which my ancestors held sway, no documentation of complex civilisations, is any comfort to me. Even if I really came from people who were living like monkeys in trees, it was better to be that than what happened to me, what I became after I met you.

-Jamaica Kincaid, *A Small Place*

The invasion and occupation of Hawai`i is not a unique story. As this quote from Jamaica Kincaid illustrates, Western imperialism created a model of colonization and cultural destruction that can be found in every corner of the world. The story Kincaid shares about her homeland Antigua rings true in every land impacted by imperialism and colonization. Hawai`i is no exception. And while foreign impact signals a devastating and anguishing moment in the histories of colonized and dispossessed peoples through the world, to the West, we were just another stop on the supposed divined path of their manifest destiny. For, like Kincaid, I whole heartedly agree, that "even if I really came from people who were living like monkeys in trees, it was better to be that than what happened to me, what I became after I met you."

Before contact, when the laws of Kamehameha still ruled in Hawai`i, places of refuge existed throughout the islands. Two of the most famed sources of refuges in Hawai`i were the lands sacred to the war god Kuka`ilimoku and the lands belonging to Kamehameha's wife, Ka`ahumanu.[1] It is written that those who entered into those places would be safe from harm. As such, people would flee to these sacred places to seek refuge. Hence, they were called pu`uhonua, and were considered to be places of peace and safety. Cities that served as sites of refuge were called kulanakauhale pu`uhonua.[2]

After Liholiho ended the active practice of the `aikapu[3] many of the Hawaiian beliefs and traditions were forced into the shadows. Customs once openly exercised transformed to become more subtly embedded in the culture, as to not arouse suspicion or attention from those who sought to extinguish all traces of the traditional culture. This transformation was a long, painful one that transpired over 200 years, as Hawaiians actively and passively resisted the foreign imperialism that infested their islands. Yet, today we find that Hawaiians are bringing back our beliefs and traditions into the light, openly practicing customary rights suppressed by foreign rule. Therefore, while many practices may not be supported or recognized by existing, American law, we find that in places throughout Hawaii, Hawaiians abide by their own set of traditional laws and beliefs. It is this *de facto* existence of traditional practices that allow for the perpetuation of the Hawaiian culture in the face of American imperialism.

In Wai`anae, on the island of O`ahu, residents have regularly and vocally resisted foreign invasions: pathological, ideological, political, and economic. They were even known resisters to the Maui ali`i who took over O`ahu prior to Kamehameha's unification of the islands.[4] The ali`i of Wai`anae aligned with Kā`eokūlani, the high ali`i

of Kaua`i, in his campaign to protect his island from Kalanikūpule, high ali`i of Maui and O`ahu.[5] Historian Stephen L. Desha writes of this resistance: "On the arrival of Nā`ili and Nu`uanu, the Wai`anae ali`i, Nā`ili spoke these words of Kā`eokūlani:"

> Ea, `auhea mai `oe e ke ali`i nui o Kaua`i, I have a word to say to you. Those people you established at Wai`anae, in other words, your warriors and some of your canoe paddlers, have discussed and decided, that if you are thinking of being cowardly and perhaps fetching some more warriors from Kaua`i, then they will throw you into the sea, as it would be shameful to retreat to Kaua`i in this cowardly way.[6]

This sort of straight-forward pride was a good example of the character of the people of Wai`anae. Kā`eokūlani followed Nā`ili and Nu`uanu back to Wai`anae where they decided to challenge Kalanikūpule. Desha explains: "Those rebellious O`ahu chiefs bowed their heads in assent, and Kā`eokūlani understood that they would stand behind him and reinforce him and his warriors. He said to them: ``Auhea mai `oukou, e nā ali`i, our battle is at Waikīkī, that is where this struggle will be.''"[7] This episode in Wai`anae's history reflected how the Wai`anae of people there stood up against systemic "hewa,"[8] or wrongs, even if it meant standing up against the reigning authority. Residents actively protected their community, usually against external political forces. In this regard, it has maintained its status as a wahi pana, or sacred place, and to its residents, who remain predominately Hawaiian; it is a place of refuge: ke kulanakauhale pu`uhonua o Wai`anae.

Historically, Wai`anae served as a refuge for Hawaiians, feeding the reverence for Wai`anae as a pu`uhonua. A number of the residents of Wai`anae now can trace their first settlement of the region to the reign of Kamehameha. One text explains:

> …. The district of Wai`anae. After the rout of the army of Kalanikupule, the king of Oahu at Nuuanu, April 29, 1795 by the invading army of Kamehameha Nui, the conquered Oahuans were driven from their homes, their land seized and divided amongst the friends of Kamehameha – the despoiled people in large numbers fled to Wai`anae and settled there. This part of Oahu being hot, arid,

> isolated, with little water, was not coveted by the invaders; the sea off the coast of Wai`anae has always supplied an abundance of fish, hence the name – wai, water, anae, large mullet.
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> The kilkilo Hoku, or astrologers. To preserve the folk-lore of their homeland, Oahu, the exiled high class priests or kahunas founded a school at Pokai bay for instructing the youth of both sexes in history, astronomy, navigation, and the genealogies of their ancient chiefs and kings; romance and sentiment hovers round Mount Kaala (the mount of Fragrance), and three valleys extending from its western base to the Wai`anae shore, Makaha, the valley of robbery; Po-kai, the valley of the dark sea; meaning given in Hawaiian dictionaries. This is a vague definition, the true meaning is a cryptical allegory relating to the clever strategy of the famous Maile-kukahi, a high chief of Oahu, whose flexible flanks of warriors surrounded four invading armies from Hawaii and Maui at the great battle of Kipapa (Kipapa, paved) where the corpses of the slain paved the bottom if this ravine, about A.D. 1410. Kaala, Kane, Beautiful Kaala, Oh! (with) the golden cloak of Kane, the sun Kane was the first deity of the Hawaiian pantheon. Kaala was the guardian or sentinel of the great road of Death, Ke ala nui o ke make, along which the spirits of the dead returned to their former homeland. The Komohana or west is where the tired sun lies down to sleep. The west is Kane ne`ene`e, the departing son. The west is the much traveled road of Kanaloa, Ke ala nui maa-we-ula a Kanaloa (the second deity of the Hawaiian pantheon.)[9]

Therefore, understanding Wai`anae extends far beyond any archeological study or any analysis of its population. For indigenous peoples, understanding any place requires a knowledge and appreciation of that place's cultural import. This means knowing its legends – as geological features were often associated or created by the gods. Stripping Wai`anae of its histories as told by its Native people strips Wai`anae of its history. The recognition of Wai`anae as a pu`uhonua recognizes its history.

This chapter therefore provides a history of how ecocolonization systemically threatened Wai`anae as a pu`uhonua and how the people of Waianae constantly resisted those threats. This history is a violent and frightening one, as research demonstrates that Wai`anae was often the first sight of the various forms of invasion that came from the West. It was one of the first sites of foreign contact, and as such suffered devastating losses as the result of foreign disease.[10] The pathological invasion was exacerbated by

cruel and foreign labor practices that forced Hawaiians from their family lands into the mountains of Wai`anae to harvest sandalwood for ali`i to trade in exchange for foreign goods.[11] One source explains that between "1816 and 1818 the people of Waianae were ordered to cut sandalwood in payment for the ship, Columbia."[12] The authors continue to explain, "One result of such cruel labor of the Wai`anae Coast was that people began pulling up young sandalwood plants to avoid harvesting the adult trees later on. Today, sandalwood is nearly extinct in the Wai`anae Range. Another result of exposure, starvation and heavy labor was to lower the resistance of the people to haole (white) disease."[13] As a favorite spot of residence and recreation for ali`i, Wai`anae also withstood early efforts to force the people to adopt Christian cultures and practices.[14] As shown in the last chapter, it would have land seized for military uses, in a devastating departure from traditional natural resource management practices. This departure would deprive many of the families in the region the ability to feed and care for themselves. The seizure of land and resources coupled with depopulation forced the residents of this region into America's capitalist economy as cheap laborers on the ranches and plantations that now occupied land once used to feed the native population. The use of artesian wells in the regions permanently changed perennial water flows making Wai`anae the dangerously dry region it is today. As a result of these constant assaults on the people and their land, Wai`anae is one of the most economically devastated regions in Hawai`i, and home to the largest Native Hawaiian population in the islands.

Nothing devastated the Native people of Hawai'i more than the arrival of the westerns. Of all the weapons of colonization these foreigners brought with them, none has been more lasting in its impact or devastating in its result than capitalism. The

Native Hawaiian population survived the diseases of the western world, accommodated Christian beliefs, adopted (forcibly) western law, and has begun the restoration of culture values and the native tongue, but commercialization and capitalism, started when the first western voyagers arrived, continues to dispossess and displace Native Hawaiians today. Therefore, no laws created by the Kingdom government have proven more devastating to the Native people and the indigenous way of life than those that integrated capitalism and commercialism into the laws of the lāhui and the resulting seizure of their resources, particularly water.

There is little doubt that the chiefs and kings of early Hawai‘i were active in trade with the westerners. Kamakau notes on Cook's first visit to Hawai‘i: "[The Native people] greeted [Cook] well and gave him gifts of hogs, chickens, bananas, taro, potatoes, sugar cane, yams, fine mats, and bark cloth. Captain Cook accepted their gifts… To the Hawaiians he gave gifts of cloth, iron, a sword, knives, necklaces, and mirrors".[15] Kamakau describes a quick descent into increased desire for trade with the foreigners.[16] There was little reason to believe that the Native people were not trading with the foreigners. Yet, the trade between the Hawaiians and the westerns very rapidly turned dangerous.

The Native people lived a sustenance lifestyle where people only harvested and used only what they needed prior to contact. Suddenly, Natives were trading for things that were not necessary to their traditional lifestyle. And to obtain these items, they would soon be expected to harvest their natural resources, beginning with sandalwood. Kamakau describes a famine that resulted from the effort to cultivate sandalwood: "[foreigners] informed the king and his chiefs that the fragrant sandalwood was a

valuable article of trade with the people of China. …The king accordingly …sent his people to the mountains after this wood… The chiefs also were ordered to send out their men to cut sandalwood. This rush of labor to the mountains brought about a scarcity of cultivated food throughout the whole group".[17] While the loss of sandalwood as a natural resource was not particularly devastating to the Native people, here we already see how commercialization of the land (and its related impact on labor) hurt the Native people. The events Kamakau describes would only become the precursor for the events that would occur after 1840, the most devastating being the Māhele.

For nearly two hundred years, the historians have battled over the full extent of the devastation the Māhele causes the Native Hawaiian people. Non-Hawaiian historians argue that pre-contact land tenure involved a feudal system that oppressed most residents and therefore conversion to a fee simple ownership system amounted to liberation. Some fringe Hawaiian scholars have argued that the import of this ownership conversion has been overstated and that it would be occupation by the military that would truly devastate the Native Hawaiian people. My position isn't original, but it stands by the majority of Hawaiian scholars. The Māhele was the single most devastating legal decision in Hawaiian history; more devastating that the creation of a Constitutional monarchy, more devastating than the overthrow; it took land away from Hawaiians and gave it to non-Hawaiians. Nothing has proven to be more devastating to our people. It has been an act we have yet to figure out how to reverse.

Native scholar Lilikalā Kame'eleihiwa explains: "The 1848 *Māhele* was the legal mechanism by which the model of private property ownership of *'Āina* replaced that of the traditional Hawaiian system of sharing control and use of the *'Āina*".[18] Nothing in the

colonial history of Hawai‘i has been more devastating than the Māhele. The Māhele was in many ways just an extension of the commercialization of the natural resources that begun with the sandalwood trade.[19] Prior to the Māhele, capitalism in the islands, while problematic, had not been devastating to the people, especially in comparison to other western imports, like disease and Christianity. Sandalwood, for example, had little usefulness in the traditional culture according to Malo.[20] Therefore, aside from the collateral impacts of labor consumption, the trading of natural resources had not been devastating to the society. The Māhele changed the impact of capitalism, trade and consumerism from one of inconvenience to one of complete devastation.

It's unclear if the Native people were able to completely appreciate what the Māhele would mean for the lāhui. One must continue to wonder if the Native government would have allowed the Māhele to go forward had they fully understood the potential consequences of private property ownership of land in the islands. Osorio specifies:

> The single most critical dismemberment of Hawaiian society was the Māhele or division of lands and the consequent transformation of ‘āina into private property between 1845 and 1850. When it was concluded, the Mō‘ī possessed more than one million acres of the kingdom's 4.2 million acres, 251 Konohiki and Ali‘i Nui owned or possessed about a million and a half acres, and the 80,000 Maka‘āinana had managed to secure about 28,000 acres among them.[21]

Kame‘eleihiwa comes to a similar conclusion in *Native Land and Foreign Desires*, in which she writes: "the real loss of Hawaiian sovereignty began with the 1848 *Māhele*, when the *Mō‘ī* and the *Ali‘i Nui* lost ultimate control of the *‘Āina*".[22] Where the Māhele grew out of the infusion of western beliefs about commerce into the islands that began with Cook's arrival in 1778, it also marked a significant "dropping off" point that lead to the near-complete obliteration of the Native Kingdom, culture and its Native people.

Kame‘eleihiwa’s text is essential to any discussion on the infestation of capitalism in Hawai‘i, because in her text she emphasizes how Ka‘ahumanu resisted the land tenure conversion in Hawai‘i.[23] One must therefore wonder, if “[i]t was not until 1848 that the *Ali‘i Nui* were finally convinced by their missionary advisors that capitalism and the private ownership of *‘Āina* was unavoidable”,[24] perhaps the Ali‘i Nui appreciated the consequences of commercialization in the islands. Yet, as they had come to do with so many things, it seems that the Ali‘i Nui deferred to the increasingly powerful missionary contingent that continuously called for the islands to “westernize” both in private conversation and from the pulpit.[25]

Yet, analysis of Wai‘anae in the time leading to the conversion of land tenure reveals a great deal about what communities were doing in response to the change. Due to the role of sandalwood harvesting in the region, the people of Wai‘anae were subject to strenuous labor conditions in the early days of post-contact, when the impact of foreign disease remained most devastating. The reality was that people were dying, constantly. The population of Wai‘anae plummeted. By the mid 1800s, there were less than 1,000 residents in the region. Therefore, in this context, attempting to put land title in the hands of residents makes sense. Even if family members died or families move away, they would at least still hold title to their family lands. Yet, what we know is that for many families, this effort comes too late. While we cannot know for sure how many people were in Wai‘anae at contact, we surely know that less than 1000 is a fraction of this population. As such, the Māhele becomes an extremely poor and misleading effort to establish land rights for Hawaiian families in Wai‘anae, because most families who cared

for those lands and were entitled to them were gone. And other residents simply rejected the notion that land could be owned.

Native peoples had a completely different paradigm as to their relationship with the land. Therefore, the process of confiscating natural resources through alien laws can be defined as ecocolonization. Ecocolonialism refers to the process by which western forces simultaneously colonize indigenous natural resources and the First People who inhabit that environment. The colonization of these two entities cannot be separated.

Ecocolonization speaks of the land and its indigenous people as a single unit, although the patterns of colonization throughout the world have not treated them as such. Imperial ideologies, without an appreciation of this fundamental link between the people and land, severe them in discursive discussions. They talk about the land and the people as separate entities when they are not. Therefore, understanding the ways in which houselessness occur and the social ills of the people sustain themselves requires a serious investigation into who the surrounding natural resources have been too injured.

The fundamental notion that "we belong to the land… not the land to us" is echoed in most environmental theories. Yet, ecocolonialism differs from these known theories in that it contends that the Native people of a land have a fundamentally different stake and relationship to land than other groups, who may also support environmentally-friendly policies. Most lands have kamaʻāina, children of the land. Those children, the indigenous peoples of that land, typically have relationships with that land tracing back thousands of years. From this unique relationship, the very identity of those peoples is directly tied to their ancestral lands.

While the long-term effects of the Māhele are widely noted as devastating to the Native people, even the short-term effects were devastating. Such effects began to quickly reveal themselves after the lands were divided. Merry explains: "Although the intention of the Māhele was to give the aliʻi and mōʻī their own lands and to provide firm title to the makaʻāinana, the people on the land, very few commoners actually acquired land in their own names. Instead, large tracts of the land passed into the hands of naturalized foreigners and, after 1850, non-naturalized foreigners".[26] This occurred in Waiʻanae. High Chief Abner Pākī would receive the majority of the unclaimed lands in the Māhele. Land Commission Awards tell us very little about the families of Waiʻanae because many families did not apply for the awards.

The true intent of the Māhele revealed itself. It had not been a mechanism by which to secure the rights of the makaʻāinana but a way for foreigners to wrestle land from the Kingdom into their own private possession. Nothing evidences true intent of the Māhele and the missionary "confidants" who continuously pressed the Kingdom into it than the explosion of economic prosperity that followed for haole. The Māhele allowed for the second most destructive western contribution to the islands: sugar.

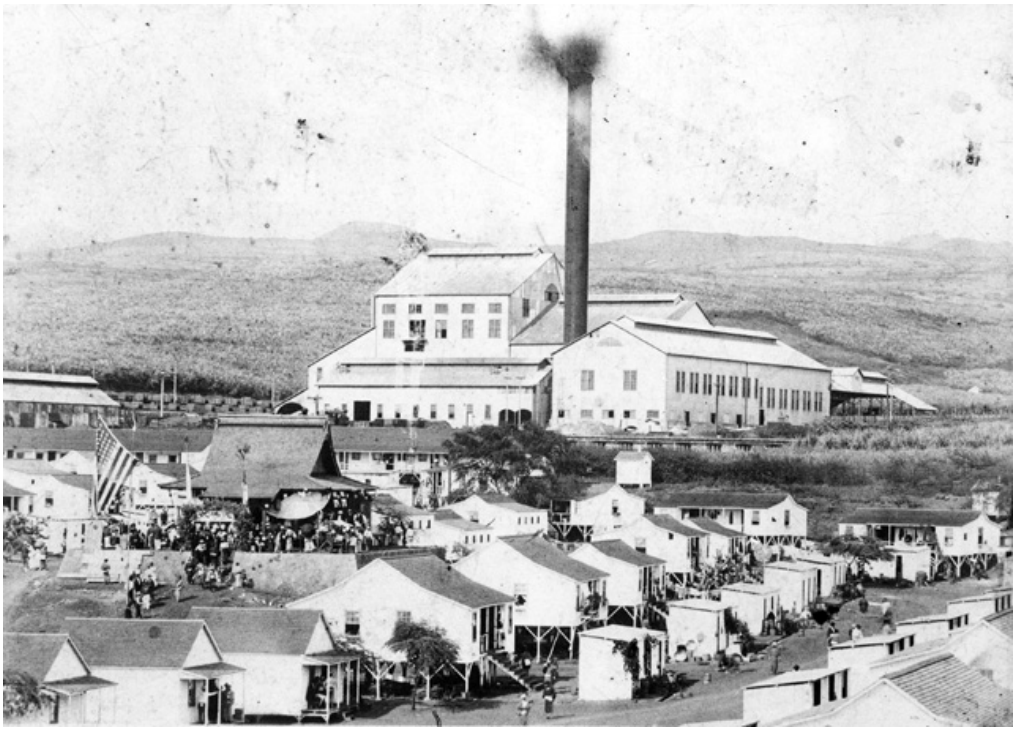
The sugar industry was more than just a commercial enterprise. For haole it was certainly primarily about money, lots of money. Yet, for those who continue to feel the impact of this industry, sugar triggered a series of changes in Hawaiʻi that decimated once and for all the traditional life that existed prior to western contact. If in 1840 there perhaps still existed some remote possibility that the Native Hawaiian people could ward off colonization and occupation and protect the traditional people and the lifestyle, the

Māhele in 1848 and the rise of the sugar industry immediately thereafter ensured that would never happen.

Sugar is a horrible industry. It requires excessive amounts of labor capital and subjects those working the fields to terrible and dangerous conditions. Yet, far worse than the human labor costs of sugar would be the political and environmental ones. Sugar planting required huge tracts of land. The acquisition and control of these huge tracts of land led to the mass dispossession and displacement of the Native people. People were being moved to make way for sugar. Not only this, but sugar (far more than other crops), requires water. Lots of water. The complex and environmentally responsible irrigation system that the Native Hawaiians used for thousands of years would be completely wiped out by the sugar industry. Each of these impacts will be discussed in turn, as they each required some support by the ruling government.

The Māhele opened the door for the sugar industry. Sugar planters would surely not have been comfortable, particularly coming from a western ideology that considered private property a fundamental right, building plantations if they did not own the land. Merry explains: "In 1850, the sugar plantation economy was still in its infancy. The legal groundwork for this system, however – private ownership of land, masters and servants legislation, and a system of government and law that protected private property in American terms – was in place".[27] The government enabled the sugar planters. Most were active in the Kingdom government. Others simply benefited from the various government actions that supported the budding industry: land grants or discounted sales on land, infrastructure improvements paid for by the Kingdom, bounties on exports, immigration laws.

Massive displacement and dispossession among the Native people occurred as a result of the Māhele. Whereas the Native people firmly believed that (despite the Māhele) they would retain rights to live on and cultivate the land, this proved to not be the case, as best evidenced in cases like *Oni v. Meek*, where the Supreme Court decided "the relationship that had defined both Ali'i and Maka'āinana for centuries was replaced by legal definitions of rights, definitions that could be altered by each new statute and each new decision".[28] And not only were people being forced off their land, but they were being forced to work for the plantations and live in camps, like refugees.



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This photo taken in Leeward O'ahu of a sugar mill perfectly illustrates both the large amounts of land required for plantations (both for crops, milling and living quarters). We also see how workers were herded into tiny living structures. Quite the monumental

change for Native people who (only one generation previous) had been living a far more traditional lifestyle.

For only one generation before, the Leeward area (like most of Hawai‘i) thrived economically and culturally. Yet, with colonization, the land in this area would quickly be devoured by foreigners eager to use the land for their own economic gain. The region would bear witness to the famous *Oni v. Meek* conflict, which historically became one of the worst legal decisions in Hawai‘i’s judicial history in that it helped ensure the dispossession of Hawai‘i’s native people. It deprived the people of the lifestyle that had been their tradition for thousands of years. This lifestyle both provided for the Native Hawaiian people economically and culturally, but it also allowed them an active, healthy lifestyle. Therefore, *Oni v. Meek* did more than dispossess people of their land; it stripped them of their health.

This case involved a dispute between two parties, the Plaintiff, Oni (no first name provided) and the Defendant, John Meek over the land use rights in the Honouliuli ahupua‘a. John Meek was the leaseholder of a large tract of kula land in Honouliuli (pictured below). A status only recently created through changes in the land tenure system from one that favored and protected the Native people to one that overwhelmingly favored and benefited foreigners. Before and after the changes to the land tenure laws, Oni was a hoa‘āina in Honouliuli, residing on his kuleana, which he had been previously awarded.

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The controversy in this case arose when Meek seized two of Oni's horses who had been grazing on his (Meek's) land. The Court found that for three years Meek had repeatedly notified Oni to remove his horses from the land. Finally, Meek seized the horses. After seizing the horses, Meek took them to the Government pound where they were sold. Oni then sued Meek for the value of the horses.

Oni first argued that a reservation clause in one of the three leases Meek held stated that Meek's leasehold rights could not interfere with the rights of the konohiki. Because the lease Oni referred to only related to one small section of Meek's leases land, and because Oni could not prove that his horses were seized from that specific section of land – the Court rejected this argument. The Court states that even if Oni had been able to show that his horses were taken from that specific tract of land, the reservation in the lease would not have created any right beyond the rights already provided to the tenants in statutory law.

Oni then argued that he had a customary right to the use of Meek's land. Oni argued that since their arrival in Hawai‘i in 1833, horses belonging to nā hoa‘āina had been allowed to pasture on the kula land along with the horses belonging to the konohiki.

Oni argued that this right continued despite changes in the land use laws. The Court disagreed with Oni's argument, stating that "the custom contended for [was] so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority."[29] This basically means that the customary right, based on the old land law system, conflicted with the new land law system. Yet, despite the Court's strong language, it does not completely reject the argument that under the right circumstances, customary rights could still exist. They simply find that Oni had no customary right to the use of Meek's kula land because Oni failed to show customary use. The Court was particularly persuaded by the fact that Oni went to the konohiki, Mr. Haʻalelea, after Meek was awarded the land and offered to continue to be a laborer for him in consideration for being able to "enjoy all their accustomed rights and privileges."[30] Therefore, the Court found that the relationship between Meek and Oni was a contractual one, and not based on customary rights.

The Court determined that when weighing customary rights against the rights of the fee simple landowner, the fee simple land owner prevailed – it was a triumph of Western law over the Native legal system that existed before it. This decision became the basis under which customary rights would be denied until the 1980s. Yet, customary rights must be seen as more than just legal rights – it was also the source of the healthy lifestyle that created such a healthy, thriving Native people in pae ʻāina in the first place. Embedded in customary rights are the rights to practice our traditional economy and traditional vocations.

Oni also argued that he had a statutory right to the use of the land. The statute referred to a joint resolution passed in 1846, prior to the Act of 1850, which was the basis

for Meek's land ownership. Oni argued that the rights provided to the hoa'āina in the 1846 Act were never "expressly repealed by the Legislature." The Court found the two Acts to be inconsistent, but they resolved this inconsistency by holding that "by necessary implication" the 1850 Act repealed the 1846 Act. The Court stated:

> It was evidently the intention of the Legislature at the time of the passage of the Act of 1850, that the former right of the hoa'āina to "pasture his horse and cow, and other animals, on the land, but not in such numbers as to prevent the konohiki from pasturing his," should cease to exist. It was inconsistent with the new system, and therefore was not reserved on the change of the law.[31]

Essentially, the Court found that since the two Acts conflicted with one another, the second Act (passed in 1850) overruled the first Act (passed in 1946).

The Court decision in this case largely settled the issue of traditional and customary rights. The Court finding states that only those rights that are specifically identified in the law survived the Māhele. In the case of *Oni v Meek*, the Court specified:

> When the landlords have taken allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people shall also have a right to drinking water, and running water, and the right of way.[32]

The Court continued: "That it was the intention of the Legislature to declare, in this enactment, all the specific rights of the hoa'āina (excepting fishing rights) which should be held to prevail against the fee simply title of the konohiki, we have no doubt."[33] The Court decides that since Oni's claim is not based on a right specifically mentioned in the law, it does not exist. This would have a very important impact on the hoa'āina right to bring traditional and customary rights claims.

Oni v Meek is an important part of this region's history. And although many know of the case, most do not know where the land in dispute was located. The case shows how as soon as the laws changed, foreigners were dispossessing the Native people physically and economically. Because foreigners were so quick to buy up their region and did not hesitate to push the Native people of this land off the land, the area would become a major site of plantation enterprises by the end of the 19th century.

Waiʻanae would also become home to the first plantation on Oʻahu, not far from the site of the *Oni v. Meek* conflict. While many believed that the kula lands of Waiʻanae were not necessarily well suited for a plantation, one foreigner put his money and influence into the venture.

> … Honolulu's armchair experts shook their heads in 1878 when word got out that a well known judge was signing big money into a plantation at Waiʻanae, the first on Oʻahu. … His name was Hermann A. Widemann, a German jack of all trades, promoter and intellectual. Widemann had prospected for gold in California and tried growing sugar on Kauaʻi. He had also been circuit judge there, tax assessor, road supervisor, government clerk and owner of a dairy. In the 1860s he sold his unprofitable sugar plantation and moved with his Hawaiian wife to Honolulu. King David Kalākaua appointed the mercurial Widemann to his first cabinet in 1774 (sic). He also served for a time as an associated justice of the Hawaiian Supreme Court.
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> On the fact of it, prospects at Waiʻanae appeared dim. But Widemann could count on a number of things in his favor. For one thing, he had solid financial backing through Hackfeld & Co. (now known as Amfac) and he was sponsored by one of Hawaiʻi's most reputable and technically qualified sugar planters, George N. Wilcox of Kauaʻi. It was Wilcox who had taken over Widemann's struggling Grove Farm Plantation near Līhuʻe and turned it into a thriving venture. On July 9, 1878, Wilcox loaned Widemann $40,000 secured through Hackfeld & Co. to start Waiʻanae Sugar Co. Also in Widemann's favor was his staunch support of the Hawaiian monarchy. This gave him influence with the king which helped him obtain a lease on Waiʻanae crown lands. In 1879 he leased all of Waiʻanae Kai for 25 years.[34]

The economic venture was unprecedented for the moku. The venture would succeed, but it would thrive at the expense of the health and labor of the local people, much as the sandalwood industry had.

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This photograph of laborers working in a pineapple field on the Leeward Coast illustrates that plantation work required a great use of energy; this use of labor was largely inefficient. Comparatively, labor in the traditional Hawaiian lifestyle mastered efficient use of water and land.

The people of Wai‘anae were particularly resistant to the plantations as they came into their district. They identified early on that the ways in which land and water were being acquired and used were dangerously inconsistent with the traditional practices of

mahiʻai or native farmers. It is explained: "Part of the price of this progress was the ill will of some of Waiʻanae's stubbornly traditional residents. Already, kāhunas had placed a curse on [Julius Lyman] Richardson [the manager of the Waiʻanae plantation]. Waiʻanae tradition tends to be critical of the plantation for obtaining the water rights at Kamaile by trading Hawaiians for land up mauka. Also, Waiʻanae Sugar Co. had frozen out the Chinese planters by refusing to grind their cane. This was not considered correct conduct in Waiʻanae."[35] Waiʻanae again identified itself as a place of ideological conflict between foreign ideas of commerce and development and Hawaiian ideologies of sustainability.

For Hawaiians, life on the land was not work but *life*. As Handy, Handy and Pukui write: "The gardener was a man of peace, concerned with the production of food and the utilization of his natural resources, rather than with prowess; content to share his provender with his landlord who held title to the land he worked. His cultural heritage was that of a seasoned and mature knowledge of the art of gardening and of seasons, weather, water, and soil."[36] This emphasizes the emotional and spiritual health of the traditional Hawaiian lifestyle. The writers also express how this lifestyle led to physical health. In their words: "The planter himself, in pre-European Hawaiʻi, was as an organism physically benign in breed, blending in happy combination elements derived from several superior racial strains, and enjoying the stimulating factors of climate, secure personal and social existence, plus sound subsistence, vigorous exercise, and to a remarkable extent, freedom from disease."[37] Therefore, removal from this lifestyle, whether to plantations or resorts, logically results in physical illness. All of this, largely, in the name of sugar.

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Sugar, more than any other industry, commodified the land and natural resources of Hawai‘i. It commercialized water – a concept that would have been both absurd and appalling prior to contact. Yet, the sugar industry could not survive without excessive water use.

> The sugar industry diverted a lot of water. On O‘ahu, the Waiāhole Tunnel delivered an average of 30 million gallons a day (mgd) and Lake Wilson yielded another 30 mgd. On Hawai‘i, the Kohala and Hāmākua watersheds yielded 80 mgd. On Kaua‘i, Kekaha Sugar Company brought down an average of 50 mgs, Hawaiian Sugar Company another 65 mgs, and Līhu‘e Plantation averaged 100 to 140 mgs. The East Maui Irrigation Company’s system averaged 160 mgs – and could deliver 445 mgs. By 1920, the sugar industry was diverting in excess of 800 mgs of surface water and, in addition, pumping almost 400 mgs of groundwater. The entire city of Boston used 80 mgd in 1939.[38]

This atrocity was enabled by Kingdom law. Even after the Māhele, the sugar planters wanted more. Hence the push for the Reciprocity Treaty in 1876. Wilson explains that

the Reciprocity Treaty was critical in securing the continued support and increased investment by sugar planters in Hawai‘i. She writes: “The Reciprocity Treaty was predicated on full government support of the fledgling sugar industry, including its efforts to develop water. Without that support, which included allowing the sugar planters to transport water out of the watershed, investors would not have been attracted to Hawai‘i”.[39] Once the Reciprocity Treaty passed, the government would be giving out licenses to divert water for sugar within the year.[40] As the hydrology atlas of Wai‘anae explains, much of the water of Wai‘anae would be diverted from the region during the first half of the 20th century. Water licensing still occurs on the Leeward Coast today, but the people of Wai‘anae certainly fought for their water.

In the 1880s, as the sugar industry continued to grow, the need for water also grew. They began to take water at the expense of lo‘i kalo, kalo fields that fed the families of the region.

> In Mākaha Valley, the pioneer planters were not very successful. The first one failed within a year, probably, for lack of capital. His lease was taken over in 1882 by A. Hastings & Co. In 1883 Hastings enraged Mākaha taro farmers by blocking the ‘auwai (irrigation ditch) that fed the taro patches from Mākaha Stream. Apparently, the haole sugar planter assumed that his lease of the land gave him right to all water flowing through it. The Hawaiian operated under the traditional system of sharing water.
>
> Eleven taro farmers led by M. K. Maikai brought suit against Hastings. In 1884 the Hawaiian Supreme Court ruled that the water must be shared on the same basis it had been traditionally. The decision set a precedent for similar disputes that were breaking out all over the Islands.
>
> Thirsty sugar plantations had increased the importance of water rights, especially, on the arid Wai‘anae Coast. Without irrigation water, no plantation could succeed. In order to increase acreage, the planter had also to increase his water supply. At Wai‘anae, the supply was severely limited. If the sugar plantations took too much, the taro farmers got too little. This limitation of water, and squabbles over how much each should receive, became a constant source of aggravation to managers of Wai‘anae Sugar Co.

> Sill Widemann's luck held. Almost in his backyard, an enterprising mechanic had discovered how to tap underground water by drilling. The discovery took place at nearby 'Ewa in 1879 not long after Widemann's men had planted his first crop of cane at Wai'anae. While other planters were still bringing water down from mountain streams, Widemann was dickering with well drillers at Wai'anae.[41]

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This taking of water in Wai`anae proved a pivotal point in the ecocolonization of Wai`anae, as it would critically change the ecology of the entire region. Wai'anae, although always a dry region, certainly enjoyed more water than it enjoys today. Those who participate in Makahiki ceremonies in Mākua valley in fact learn chants to express joy and lament for the water lost in the valley by foreign settlement. For despite being a fairly dry region today, Wai'anae nonetheless possessed enough natural resources to provide for those who lived there. As Handy, Handy and Pukui write: "The third dry area on O'ahu was the coast along the leeward flank of the Wai'anae range, from Mākua to Nānākuli. Only Wai'anae Valley supported a number of areas where wet taro was planted, watered by streams from the Wai'anae range, streams whose flows were probably constant owing to the high bogs on top of the mountains. … It is probable that there was also a village up in Mākaha Valley, where the taro terraces are still to be seen,

having been in use up to fairly recent times."[42] Clearly, the region provided support for the population living there. Yet, with western contact, both the population of the region grew and the amount of water being provided to the region decreased, although this did not occur without resistance from the Wai`anae residents.

So Hawaiians, namely taro farmers, certainly resisted the systematic colonization of their land and resources, especially their water rights. The holding in the Maika`i decision, where the farmers sued for their water rights, read:

> We are of the opinion that the petitioners, Maikai, Waikane and Pauli, and also Kahalemake, who did not sign the petition, are entitled to water from the Makaha stream in Waianae, with which to irrigate the lands held by them. All these persons are holders of kuleanas, awarded by the Land Commission.
>
> The other petitioners are hoaainas or tenants at sufferance under the Konohiki, and they must look to him for their supply of water. By the lease from him to the defendant's assignors, it appears that he has parted with his right to the water, reserving only two hours' use of the same for his own kalo lands, and reserving (what he could not dispose of) the water for native kuleana holders, the exact expression in the lease being, "sufficient water for all kuleana rights."
>
> It is difficult to estimate exactly how much water will be required to supply the parties to whom we award it, but the best conclusion at which we can arrive is that the plaintiffs are to have the use of all the water from Makaha stream from 7 o'clock p. m. of every day to 12 o'clock midnight, and the rest of the time the defendants are to have the use of the water. The konohiki is to take his water out of the time allotted to defendants.[43]

While this decision affirmed water rights for taro farmers, it also started to partition these rights. As other economic interests would move in, the rights of farmers would continue to be whittled away, most effectively by legislation passed after the overthrow and the implementation of these laws.

Wai‘anae would be particularly devastated by foreign economic interests that targeted land and natural resources. The changes in land tenure began with the separation between Hawaiians and their land, but the effort would be considerably furthered by

government seizure of lands in Wai‘anae. Shortly after the overthrow, the Organic Act[44] would give the governor of the territory the right to setting aside lands for public purposes. It would also give the U.S. President an equal amount of power to seize land for public use. Therefore, there were two separate provisions in the Act, sections 71 and 91, which give the Governor of Hawai`i and President of the United States, both the power to take any land for public use. Much of the seizure of land and water thereby occurred under Government Leases, State Executive Orders and Presidential Executive Orders.

The territorial government would issue numerous government leases to various foreign commercial interests, essentially handing over huge tracts of land in Wai‘anae for development and militarization. Thousands of acres of land would be taken from the people of Wai‘anae through State Executive Orders. One example would be the seizure of nearly 2,000 acres for a “transmitting station for national defense.” Executive Order No. 599 reads:

> I, Lawrence M. Judd, Governor of the Territory of Hawai‘i, by virtue of the authority vested in me by paragraph q of Section 73 of the Hawaiian Organic Act, and every other authority me hereunto enabling, do hereby order that the following described public land be and the same is hereby by aside for public purposes, to-wit, for site for “TRANSITTING STATION FOR NATIONAL DEFENSE”, to be under the control and management of the Navy Department.
>
> Portion of the Government Land of Lualualei, situation between Land Court Application 1026, (Wai‘anae Company, Applicant), and Lualualei Homesteads, 3rd Series, and the Navy Ammunition Depot, located in the Lualualei Homesteads, 1st Series, Lualualei, Wai‘anae, O‘ahu, acquired from L. L. McCandless by Condemnation, and Lot 7-A, covered by Governor’s Executive Order No. 382.[45]

Executive Order 599 continues to declare: “Together with that portion of the Lualualei Road (60 feet wide), extending from the South side of Mikilua Road to the North boundary of Land Court Application 130, said road having a length of 8,250 feet, more or

less, said tract containing 1,737 acres and 11.4 acres in Lualualei Road, MAKING A TOTAL AREA OF 1748.4 ACRES."[46] The only restrictions to this gift were the lands already in use through government leases to Wai'anae Co. and Hawaiian Electric Co.

Mākua valley would be seized in a similar fashion, as discussed in the next chapter. It is important to note that these powers would not end when Hawai`i became a State in 1959. The practice would continue well into the later part of the 20th century. In 1981, Governor George Ariyoshi would set aside over 1,100 acres of land for a natural area reserve that surrounds multiple military installations.

These land transfers became the topic of conflict in the early 20th century. It would also bring more of John Meek's lands back into Court. In this case, the lands impacted were Kālena. Kamehameha III would award Artemas Bishop the land known as Kālena, Wai`anae (now part of Wahiawa) in Royal Patent Grant No. 527 in January 1851. John Meek, in his efforts to purchase large tracts of land in Leeward, O`ahu, purchased Kālena from Bishop for three hundred and fifty dollars only four months later in May 1851. The Kālena land is then left to Meek's son Eli in his will. Yet, Meek was survived by his wife, who sold the Kālena land to Lincoln L. McLandless for $11,800 U.S. Gold Coin in hand paid on August 12, 1875.[47]

These lands would be taken by (U.S.) Presidential Executive Orders after the creation of the Territory. Just as the Organic Act gave the Governor authority to claim land for public use, so did the Organic Act give the U.S. President authority to claim land for public use. Thousands of acres were getting swept up into the State or Federal Government's possession, and in Kālena, "the first executive order, No. 1242, was issued by President William H. Taft on August 23, 1910, and the second, executive order No.

2800, was issued by President Woodrow Wilson on February 4, 1918. The second executive order covered substantially the land described in the first but was more precise in its description. It appears from the evidence that these two orders included the lands claimed by the applicant and that the area in question was, at the time the application was filed, and is now claimed by the United States government and was and is now occupied by the United States military forces."[48] Here was an example of the tremendous power the Organic Act gave to the U.S. President to seize lands at will. It also demonstrated the lack of restraint in using this power to take land for the U.S. Military.

The growing presence of the military in Hawai`i meant that the situation had changed considerably since Meek land holdings were at issue before a court. Now, the Territorial Court found reason to give the United States absolute authority over all State lands; the Court would not even entertain the issue of title holding that the United States did not consent to the Court's jurisdiction.[49] In an incredibly ironic twist of fate, McLandless, surely knowing he could do little to challenge the authority of the U.S. President, instead brought suit in an effort to determine his rights as land owner under the Royal Patent,[50] relying on the spirit of Monarch law that former landowner John Meek as successfully diminished. McLandless reaped what Meek sowed; McLandless found no recourse in the Court. The holding of the Court is cited in its entirety because the author is unaware of it being cited elsewhere, and it is a significant decision.

> The authority of the Presidents of the United States to so deal with the public lands of the Territory exists by virtue of the agreement of annexation entered into between the then Republic of Hawaii and the United States of America. On February 9, 1897, a resolution was passed by the senate of the Republic of Hawaii ratifying annexation of the Republic which reads in part as follows: "Be It Resolved, by the Senate of the Republic of Hawaii: That the Senate hereby ratifies and advises and consents to the ratification by the President of the treaty between the Republic of Hawaii and the United States of America on the subject of the

> annexation of the Hawaiian Islands to the United States of America concluded at Washington on the 16th day of June, A. D. 1897, which treaty is word for word as follows: * * * 'Article I. The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii. Article II. The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining. The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition. Provided: that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.' "[51]

The significance of this decision was profound. First, it remains unclear what authority the Republic of Hawai`i acted under when it ratified the Treaty referred to herein. By some accounts, it acted illegally in its overthrow of the Monarchy and in all subsequent acts.[52] This illegal Republic then ceded authority to the United States, who then used that authority to seize control of thousands of acres of lands for its own military. Actions it had been unable to accomplish with such ease under the Monarchy. When these actions were challenged, in the United States' courts, the Courts found that they had no jurisdiction over their own government and that land owners had no recourse. The growing power of the United States and State Government made it increasingly difficult for the residents of Wai`anae to maintain their region as a sacred place.

The decision also demonstrated that the Territorial Government sought control over more than just the ceded lands. The McLandless decision upheld the seizure of privately held lands. The Republic turned over control of the ceded lands, but it also

turned over sovereign authority which allowed the United States to take any lands. It seems no one could anticipate how insatiable the needs and desires of foreigners were. What began with the need to obtain title to lands evolved into a need for political power. That need for political power led to a need for absolute control over the sovereignty of the Kingdom. Control of the sovereign power led to the seizure of thousands of acres of land, private or not, for militarization and other uses. Even control of those lands was not enough. Soon efforts to control the natural resources began.

Systema Naturae

It is important to remember that while all of Wai`anae was an ecological system, with the people, land, water, flora and fauna all having critical inter-related parts. We have already noted impacts upon the people, land, water, and fauna (in our case, taro). Fauna or farae would not be spared the reach of American imperial desires. Wai`anae becomes known to us also through its legends, as does its resources. It is the birthplace of Maui, who is revered throughout the Pacific.

> …Akaalana lived with Hinakawea, and Maui-mua, Maui-waena, Maui-ikiiki, and Maui-a-kalana, all boys were born.
>
> At Ulehawa and Kaolae on the south side of Wai`anae was their birthplace. There are pointed out the things left by Maui. Among other famous things to be seen are the cave in which Hina made her tapa, the fishhook Manaiakalani, the snare for catching the sun, and all his other implements. But Maui-a-kalana went to Kahiki after the birth of his son in Hawaii and the last of his children born of Hina-a-kealoha was Hina-akeka, and these become the ancestors of all lands in the ocean as far as the country which foreigners call New Zealand. There in the islands of the ocean Maui performed those famous exploits which are ever held in remembrance among this people.[53]

Wai`anae holds particular cultural significance for the Hawaiian people, because of its relationship to Maui. This sacredness has rarely between recognized by the western world. Yet, its local people, those who celebrate its beauty, carry on its traditions. The

effort to identify why the place is sacred is a mechanism of protecting its history and culture. Fishing is a wonderful example of how Wai`anae's traditions are perpetuated.

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As this 1991 from Nānākuli photo illustrates, much of the recreation and culture of the region comes from fishing. The ocean becomes a way to enjoy free time in a healthy and productive manner. Therefore, when we deprive children and families the opportunity to fish, we deprive them of much more than food or fishing rights. We are depriving them of culture, as it celebrates the god Maui and his exploits. When we deprive the kama`āina of the ability to practice their culture; we deprive them of their history.

Fishing has always been a critical component of the lives for the families of Wai`anae. For those who may worry regularly about where their next meal will come from, fishing and the sea provides some comfort in that it ensures that the family will eat. It is one of the benefits of living on the beach. Families can fish for their meals. In this regard, fishing rights are extremely important. This need to fish applies even more in Wai‘anae than other places, because residents traditionally relied on for fishing to feed their families.

Wai‘anae is its fishing tradition. Handy, Handy and Pukui explain: “[Wai‘anae’s] compensatory feature was the exceptionally rich deep-sea fishing available off and beyond Ka‘ena Point, where the current pressed by the north-east trade winds flows in a westerly direction along these shores. It was here that the ancient chief Kawelo distinguished himself as a fisherman; and there are also many stories of the culture hero Māui as a great fisherman identified with this area. Much of the coast hereabouts is marked by steeply built-up, shifting sand dunes and treacherously rough seas, which probably accounts for the acclaim connected with particular fishing explants of the past.”[54] Therefore, threats to fishing in Wai‘anae and at all the beaches therefore not only pose a danger of denying families the ability to eat, but it also threatens to further erode the cultural practices and traditions that make the area unique.

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Fishing played a critical role in traditional Hawaiian life. Alan Murakami of the Native Hawaiian Legal Corporation explains: "Under the ancient system of land tenure, ahupua'a occupants shared fishing areas appurtenant to the ahupua'a, which were exclusively used by them. However, all were free to fish in the open ocean, except as might be directed by the ali'i, or restricted by the king or by religious or other practices."[55] The ability to fish in the open ocean is now one of the last sites of cultural practice and survival for Native Hawaiians in Wai'anae.

Fishing speaks to the importance of cultural practice as a site of history and discourse. We know that fishing was a great importance to the people of Wai`anae because of the many documented fishing shrines known in the history but that have since been destroyed.[56] Activities, both a resource management and spiritual practice, are

critical to a culture, because cultural practices speak to history and mo`okū`auhau. They speak of the people who created and maintain the practice.

Yet, the maintenance of the practice was severely disrupted by the territorial government. The efforts to alienate the people from the land extended past the changes in land title, they involved criminalization of cultural activities, like fishing.

> Act 230, S. L. 1919, by section 1 prohibits all persons other than citizens of the United States from placing, setting or operating fish traps, pounds or weirs in any location of the sea fisheries of the government of the Territory of Hawaii; by section 2 empowers the treasurer of any county or city and county to issue an annual license to any citizen applying therefore as an operator of fish traps, pounds or weirs, and by section 3 makes it a misdemeanor for any person to place, set or operate fish traps, pounds or weirs in any location of the sea fisheries of the government of the Territory of Hawaii without first complying with section 2 of the Act.[57]

Again, Wai`anae saw the government seizing control over natural resources that had been previously available to all residents. As this chapter showed, the ecocolonization began with a seizure of land, then water, than extended out into all things within the *Systema Naturae*.

The capacity of the land to heal itself once water is restored and people are allowed to serve as stewards and mālama ʻāina only reinforces the notion that returning to the land heals not only the land but the people who care for her. The land is our family, our makua, our parent. And as all good children, we only want the ability to mālama mākua.

[1] Samuel M. Kamakau, *Ruling Chiefs of Hawai'i,* Revised Edition (Honolulu: Kamehameha Schools Press, 1992), 132-133.

[2] Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* (Honolulu: University of Hawai'i Press, 1971).

[3] Liholiho supposedly ends the `aikapu upon the death of his father, Kamehameha I. Despite popular belief, he did not possess the rank or authority to do so. Such authority would have come from his mother, Keopuolani, who was of niaupio rank, or high rank obtained by the mating of a chief or chiefess with his or his half-sibling. Her ranking was passed onto her children, as it could not be lost even by Keopuolani's mating with Kamehameha, who was of lower rank than her. While the highest ranking among Kamehameha's wives, she was not the highest ranking chiefess of this time, as niaupio was not the highest rank one could achieve. That rank is the pio rank, achieved by the mating of full-blooded ali`i nui siblings. Only pio rank children were considered equals of the gods. Hence why the child of Kauikeauoli and Nahienaena was so important to the lahui, the child would have been pio ranked, and equal to the gods. Yet, since no reigning moi was of such rank and none had the akua kapu (i.e., were as sacred as the gods), it is questionable whether or not Liholiho could undo the `aikapu, which has imposed by Wākea, the sky father, upon the Hawaiian people.

[4] Stephen L. Desha, Kamehameha and his Warrior Kekūhaupi`o, (Honolulu, Kamehameha Schools Press, 2000), 386.

[5] Ibid, 387.

[6] Ibid.

[7] Ibid.

[8] Ibid, 386, the ali`i identified the invasion of the Maui chiefs onto O`ahu as "`a`e hewa."

[9] Elspeth P. Sterling and Catherine C. Summers, Sites of Oahu (Honolulu, Bishop Museum Press, 1978), 64

[10] Samuel M. Kamakau, *Ruling Chiefs of Hawai'i,* Revised Edition (Honolulu: Kamehameha Schools Press, 1992), 95

[11] Edward J. McGrath Jr., Kenneth M. Brewer, and Bob Krauss, Historic Wai`anae: Place of Kings, Honolulu: Island Heritage, 1973, 18

[12] Ibid.

[13] Ibid.

[14] Ibid, 19.

[15] Samuel M. Kamakau, *Ruling Chiefs of Hawai'i,* Revised Edition (Honolulu: Kamehameha Schools Press, 1992), 95.

[16] Ibid, 100-101.

[17] Ibid, 204.

[18] Lilikalā Kame'eleihiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* (Honolulu: Bishop Museum Press, 1992), 137.

[19] Sally Engle Merry also offers an interpretation as to the relationship between sandalwood and the Māhele.

> By the 1840s the sandalwood was gone, the peasantry was alienated and shrinking, revenues to the ali'i were being strangled by a hierarchy of konohiki (land stewards) each taking his share of a dwindling land product, and the ali'i were willing to divest themselves of their vest tracts in exchange for smaller parcels more clearly under their control. The missionaries pushed for individual land ownership in the 1840s to promote industriousness and the emergence of the bourgeois family.

Here Merry argues that the Māhele was not only the product of foreign persuasion and legal influence, but the result of economic pressures that developed as the sandalwood industry collapsed from over-harvesting.

Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton: Princeton University Press, 2000), 41.

[20] David Malo, *Hawaiian Antiquities: Mo'olelo Hawai'i*, Revised Edition (Honolulu: Bishop Museum Press, 1997), 21.

[21] Jonathan Osorio, *Dismembering Lāhui: A History of the Hawaiian Nation to 1887* (Honolulu: University of Hawai'i Press, 2002), 44.

[22] Lilikalā Kame'eleihiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* (Honolulu: Bishop Museum Press, 1992), 15.

[23] Ibid, 95.

[24] Ibid.

[25] Merry offers some explanations as to why the changes after 1840s were far more devastating to the Native people than earlier changes in the law. She explains:

> In sum, the transition of the mid 1840s to the early 1850s was very different from that of the mid 1820s to the mid 1840s. Although (William Little) Lee apparently knew some Hawaiian, neither he nor (John) Ricord had the deep understanding of the Hawaiian language and culture of the leaders of the first transition such as William Richards and Lorrin Andrews. The men who led the second transition spent far less time in Hawai‘i before they began the complex task of forming a government and legal system than did the missionaries who guided the first transition. They saw themselves as promoting the process of "civilizing" the islands and responding to the demands of resident foreigners by introducing the rule of law and the Western system of courts, codes, and legislative rule-making.

Sally Engle Merry, *Colonizing Hawai‘i: The Cultural Power of Law* (Princeton: Princeton University Press, 2000), 42.

[26] Ibid.

[27] Ibid.

[28] Jonathan Osorio, *Dismembering Lāhui: A History of the Hawaiian Nation to 1887* (Honolulu: University of Hawai‘i Press, 2002), 54.

[29] Oni v. Meek, 1858 WL 4829, 1-6 (Supreme Court of the Kingdom of Hawaii Hawai‘i, 1858).

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34]Carol Wilcox, *Sugar Water*, (Honolulu, University of Hawaii Press, 1998,) 37.

[35] Ibid, 42.

[36] E.S. Craighill Handy, Elizabeth Green Handy with Mary Kawena Pukui, *Native Planters in Old Hawai‘i: Their Life, Lore, and Environment* (Honolulu: Bishop Museum Press, 1991), 310.

[37] Ibid, 312.

[38] Waziyatawin Angela Wilson and Michael Yellow Bird, ed. *For Indigenous Eyes Only: A Decolonization Handbook* (Santa Fe: School of American Research Press, 2005), 5.

[39] Ibid, 16.

[40] Ibid, 18.

[41] Edward J. McGrath Jr., Kenneth M. Brewer, and Bob Krauss, Historic Wai`anae: Place of Kings, Honolulu: Island Heritage, 1973.

[42] E.S. Craighill Handy, Elizabeth Green Handy with Mary Kawena Pukui, *Native Planters in Old Hawai'i: Their Life, Lore, and Environment* (Honolulu: Bishop Museum Press, 1991), 275.

[43] Maikai v A. Hastings & Co., 5 Haw. 133, 133, 1884 WL 6659 (Supreme Court of the Kingdom of Hawaii, 1884)

[44] § 73. Commissioner of public lands.

(a) That when used in this section -

(1) The term "commissioner" means the commissioner of public lands of the Territory of Hawai'i;

(2) The term "land board" means the board of public lands, as provided in subdivision (1) of this section;

(3) The term "public lands" includes all lands in the Territory of Hawai'i classed as government or crown lands previous to August 15, 1895, or acquired by the government upon or subsequent to such date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; except (1) lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, (2) lands set apart or reserved by Executive order by the President, (3) lands set aside or withdrawn by the governor under the provisions of subdivision (q) of this section, (4) sites of public buildings, lands used for roads, streets, landings, nurseries, parks, tracts reserved for forest growth or conservation of water supply, or other public purposes, and (5) lands to which the United States has relinquished the absolute fee and ownership, unless subsequently placed under the control of the commissioner and given the status of public lands in accordance with the provisions of this Act, the Hawaiian Homes Commission Act, 1920, or the Revised Laws of Hawai'i of 1915; and

(4) The term "person" includes individual, partnership, corporation, and association.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawai'i of 1915, except a term defined in subdivision (a) of this section, shall, whenever

used in this section, if not inconsistent with the context or any provision of this section, have the same meaning as given it by such definition or description.

(c) The laws of Hawai‘i relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. Subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawai‘i, between the 7th day of July, 1898, and the 28th day of September, 1899, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent"; "commissioner of public lands," for "minister of the interior," "agent of public lands," and "commissioners of public lands," or their equivalents; and the words "that I am a citizen of the United States," or "that I have declared my intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawai‘i," or "that I have received letters of denization under the Republic of Hawai‘i," or "that I have received a certificate of special right of citizenship from the Republic of Hawai‘i."

(d) No lease of the surface of agriculture lands or of undeveloped and public land which is capable of being converted into agricultural land by the development, for irrigation purposes, of either the underlying or adjacent waters, or both, shall be granted, sold, or renewed by the government of the Territory of Hawai‘i for a longer period than sixty-five years. Each such lease shall be sold at public auction to the highest bidder after due notice as provided in subdivision (i) of this section and the laws of the Territory of Hawai‘i. Each such notice shall state all the terms and conditions of the sale. The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, upon the payment of just compensation for such withdrawal. Every such lease shall contain a provision to that effect: Provided, That the commissioner may, with the approval of the governor and at least two-thirds of the members of the land board, omit such withdrawal provision from, or limit the same in, the lease of any lands whenever he deems it advantageous to the Territory of Hawai‘i, and land so leased shall not be subject to such right of withdrawal, or shall be subject only to a right of withdrawal as limited in the lease.

(e) All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawai‘i and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawai‘i as are consistent with the joint resolution of annexation, approved July 7, 1898.

(f) No person shall be entitled to receive any certificate of occupation, right of purchase lease, cash freehold agreement, or special homestead agreement who, or whose husband or wife, has previously taken or held more than ten acres of land under any such certificate, lease, or agreement made or issued after May 27, 1910, or under any homestead lease or patent based thereon; or who, or whose husband or wife, or both of them, owns other land in the Territory, the combined area of which and the land in

question exceeds eighty acres; or who is an alien, unless he has declared his intention to become a citizen of the United States as provided by law. No person who has so declared his intention and taken or held under any such certificate, lease, or agreement shall continue so to hold or become entitled to a homestead lease or patent of the land, unless he becomes a citizen within five years after so taking.

(g) No public land for which any such certificate, lease, or agreement is issued after May 27, 1910, or any part thereof, or interest therein or control thereof, shall, without the written consent of the commissioner and governor, thereafter, whether before or after a homestead lease or patent has been issued thereon, be or be contracted to be in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to, or acquired or held by or for the benefit of, any alien or corporation; or before or after the issuance of a homestead lease or before the issuance of a patent to or by or for the benefit of any other person; or, after the issuance of a patent, to or by or for the benefit of any person who owns, or holds, or controls, directly or indirectly, other land or the use thereof, the combined area of which and the land in question exceeds eighty acres. The prohibitions of this paragraph shall not apply to transfers or acquisitions by inheritance or between tenants in common.

(h) Any land in respect of which any of the foregoing provisions shall be violated shall forthwith be forfeited and resume the status of public land and may be recovered by the Territory or its successors in an action of ejectment or other appropriate proceedings. And noncompliance with the terms of any such certificate, lease, or agreement, or of the law applicable thereto, shall entitle the commissioner, with the approval of the governor before patent has been issued, with or without legal process, notice, demand, or previous entry, to retake possession and thereby determine the estate: Provided, That the times limited for compliance with any such approval upon its appearing that an effort has been made in good faith to comply therewith.

(i) The persons entitled to take under any such certificate, lease, or agreement shall be determined by drawing or lot, after public notice as hereinafter provided; and any lot not taken or taken and forfeited, or any lot or part thereof surrendered with the consent of the commissioner, which is hereby authorized, may be disposed of upon application at not less than the advertised price by any such certificate, lease, or agreement without further notice. The notice of any sale, drawing, or allotment of public land shall be by publication for a period of not less than sixty days in one or more newspapers of general circulation published in the Territory: *Provided however*, That (1) lots may be sold for cash or on an extended time basis, as the Commissioner may determine, without recourse to drawing or lot and forthwith patented to any citizen of the United States applying therefor, possessing the qualifications of a homesteader as now provided by law, and who has qualified for and received a loan under the provisions of the Bankhead-Jones Farm Tenant Act, as amended or as may hereafter be amended, for the acquisition of a farm, and (2) with or without recourse to drawing or lot, as the commissioner may determine, lots may be leased with or without a right of purchase, or may be sold for cash or on an extended time basis and forthwith patented, to any citizen of the United States applying

therefor if such citizen has not less than two years' experience as a farm owner, farm tenant, or farm laborer: And provided further, That any patent issued upon any such sale shall contain the same restrictive provisions as are now contained in a patent issued after compliance with a right of purchase lease, cash freehold agreement, or special homestead agreement.

The Commissioner may include in any patent, agreement, or lease a condition requiring the inclusion of the land in any irrigation project formed or to be formed by the Territorial agency responsible therefor and making the land subject to assessments made or to be made for such irrigation project, which assessment shall be a first charge against the land. For failure to pay the assessments or other breach of the condition the land may be forfeited and sold pursuant to the provisions of this Act, and, when sold, so much of the proceeds of sale as are necessary therefor may be used to pay any unpaid assessments.

(j) The commissioner, with the approval of the governor, may give to any person (1) who is a citizen of the United States or who has legally declared his intention to become a citizen of the United States and hereafter becomes such, and (2) who has, or whose predecessors in interest have, improved any parcel of public lands and resided thereon continuously for the ten years next preceding the application to purchase, a preference right to purchase so much of such parcel and such adjoining land as may reasonably be required for a home, at a fair price to be determined by three disinterested citizens to be appointed by the governor. In the determination of such purchase price the commissioner may, if he deems it just and reasonable, disregard the value of the improvements on such parcel and adjoining land. If such parcel of public lands is reserved for public purposes, either for the use of the United States or the Territory of Hawai‘i, the commissioner may with the approval of the governor grant to such person a preference right to purchase public lands which are of similar character, value, and area, and which are situated in the same land district. The privilege granted by this paragraph shall not extend to any original lessee or to an assignee of an entire lease of public lands.

(k) The commissioner may also, with such approval, issue, for a nominal consideration, to any church or religious organization, or person or persons or corporation representing it, a patent for any parcel of public land occupied continuously for not less than five years heretofore and still occupied by it as a church site under the laws of Hawai‘i.

(l) No sale of lands for other than homestead purposes, except as herein provided, and no exchange by which the Territory shall convey lands exceeding either forty acres in area or $15,000 in value shall be made. Leases may be made by the commissioner of public lands, with the approval of two-thirds of the members of the board of public lands, for the occupation of lands for general purposes, or for limited specified purposes (but not including leases of minerals or leases providing for the mining of minerals), for terms up to but not in excess of sixty-five years. There shall be a board of public lands, the members of which are to be appointed by the governor as provided in section 80 of this Act, and until the legislature shall otherwise provide said board shall consist of six

members, and its members be appointed for a term of four years: Provided, however, That the commissioner shall, with the approval of said board, sell to any citizen of the United States, or to any person who has legally declared his intention to become a citizen, for residence purposes lots not exceeding three acres in area; but any lot not sold after public auction, or sold and forfeited, or any lot or part thereof surrendered with the consent of the commissioner, which consent is authorized, may upon application be sold without further public notice or auction within the period of two years immediately subsequent to the day of the public auction, at the advertised price if the sale is within the period of six months immediately subsequent to the day of the public auction, and at the advertised price or the price fixed by a reappraisal of the land, whichever is greater, if the sale is within the period subsequent to the said six months but prior to the expiration of the said two years: and that sales of Government lands or any interest therein may be made upon the approval of said board for business uses or other undertakings or uses, except those which are primarily agricultural in character, whenever such sale is deemed to be in the interest of the development of the community or area in which said lands are located, and all such sales shall be limited to the amount actually necessary for the economical conduct of such business use or other undertaking or use: Provided further, That no exchange of Government lands shall hereafter be made without the approval of two-thirds of the members of said board, and no such exchange shall be made except to acquire lands directly for public uses: Provided further, That in case any lands have been or shall be sold pursuant to the provisions of this paragraph for any purpose above set forth and/or subject to any conditions with respect to the improvement thereof or otherwise, and in case any said lands have been or shall be used by the United States of America, including any department or agency thereof, whether under lease or license from the owner thereof or otherwise, for any purpose relating to war or the national defense and such use has been or shall be for a purpose other than that for which said lands were sold and/or has prevented or shall prevent the performance of any conditions of the sale of said lands with respect to the improvement thereof or otherwise, then, notwithstanding the provisions of this paragraph or of any agreement, patent, grant, or deed issued upon the sale of said lands, such use of said lands by the United States of America, including any department or agency thereof, shall not result in the forfeiture of said lands and shall result in the extension of the period during which any conditions of the sale of said lands may be complied with for an additional period equal to the period of the use of said lands by the United States of America, including any department or agency thereof.

(m) Whenever twenty-five or more persons, having the qualifications of homesteaders who have not therefore made application under this Act shall make written application to the commissioner of public lands for the opening of agricultural lands for settlement in any locality or district, it shall be the duty of said commissioner to proceed expeditiously to survey and open for entry agricultural lands, whether unoccupied or under lease with the right of withdrawal, sufficient in area to provide homesteads for all such persons, together with all persons of like qualifications who shall have filed with such commissioner prior to the survey of such lands written applications for homesteads in the district designated in said applications. The lands to be so opened for settlement by said

commissioner shall be either the specific tract or tracts applied for or other suitable and available agricultural lands in the same geographical district and, as far as possible, in the immediate locality of and as nearly equal to that applied for as may be available: Provided, however, That no leased land, under cultivation, shall be taken for homesteading until any crops growing thereon shall have been harvested.

(n) It shall be the duty of the commissioner to cause to be surveyed and opened for homestead entry a reasonable amount of desirable agricultural lands and also of pastoral lands in the various parts of the Territory for homestead purposes on or before January 1, 1911, and he shall annually thereafter cause to be surveyed for homestead purposes such amount of agricultural lands and pastoral lands in various parts of the Territory as there may be demand for by persons having the qualifications of homesteaders. In laying out any homestead the commissioner shall include in the homestead lands sufficient to support thereon an ordinary family, but not exceeding eighty acres of agricultural lands and two hundred and fifty acres of first-class pastoral lands or five hundred acres of second-class pastoral lands; or in case of a homestead, including pastoral lands only, not exceeding five hundred acres of first-class pastoral lands or one thousand acres of second-class pastoral lands. All necessary expenses for surveying and opening any such lands for homesteads shall be paid for out of any funds of the territorial treasury derived from the sale or lease of public lands, which funds are hereby made available for such purposes.

(o) The commissioner, with the approval of the governor, may by contract or agreement authorize any person who has the right of possession, under a general lease from the Territory, of agricultural or pastoral lands included in any homestead, to continue in possession of such lands after the expiration of the lease until such time as the homesteader takes actual possession thereof under any form of homestead agreement. The commissioner may fix in the contract or agreement such other terms and conditions as he deems advisable.

(p) Nothing herein contained shall be construed to prevent said commissioner from surveying and opening for homestead purposes and as a single homestead entry public lands suitable for both agricultural and pastoral purposes, whether such lands be situated in one body or detached tracts, to the end that homesteaders may be provided with both agricultural and pastoral lands wherever there is demand therefor; nor shall the ownership of a residence lot or tract, not exceeding three acres in area, hereafter disqualify any citizen from applying for and receiving any form of homestead entry, including a homestead lease.

(q) All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall, except as otherwise provided by the Congress, be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the governor, and all patents and deeds of such land

shall issue from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the land laws of Hawai‘i, as amended by this Act, shall, except, as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawai‘i. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory; the provisions of this paragraph may also be applied where the "public purposes" are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States. The commissioner is hereby authorized to perform any and all acts, prescribe forms of oaths, and, with the approval of the governor and said board, make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this section and the land laws of Hawai‘i into full force and effect.

All officers and employees under the jurisdiction of the commissioner shall be appointed by him, subject to the Territorial laws of Hawai‘i relating to the civil service of Hawai‘i, and all such officers and employees shall be subject to such civil service laws.

Within the meaning of this section, the management of lands set aside for public purposes may, if within the scope of authority conferred by the legislature, include the making of leases by the Hawai‘i aeronautics commission with respect to land set aside to it, on reasonable terms, for carrying out the purposes for which such land was set aside to it, such as for occupancy of land at an airport for facilities for carriers or to serve the traveling public. No such lease shall continue in effect for a longer term than fifty-five years. If, at the time of the execution of any such lease, the governor shall have approved the same, then and in that event the governor shall have no further authority under this or any other Act to set aside any or all of the lands subject to such lease for any other public purpose during the term of such lease.

(r) Whenever any remnant of public land shall be disposed of, the commissioner of public lands shall first offer it to the abutting landowner for a period of three months at a reasonable price in no event to be less than the fair market value of the land to be sold, to be determined by a disinterested appraiser or appraisers, but not more than three, to be appointed by the governor; and, if such owner fails to take the same, then such remnant may be sold at public auction at no less than the amount of the appraisal: *Provided*, That if the remnant abuts more than one separate parcel of land and more than one of the owners of these separate parcels are interested in purchasing said remnant, the remnant shall be sold to the owner making the highest offer above the appraised value.

The term "remnant" shall mean a parcel of land landlocked or without access to any public highway, and, in the case of an urban area, no larger than five thousand square feet in size, or, in the case of a suburban or rural area, no larger than one and one-half acres in size.

Any person or persons holding an unpatented homestead under a special homestead agreement, entered into prior to the effective date of this paragraph, excluding those homesteads under the control of the Hawaiian Homes Commission as provided in section 203 of the Hawaiian Homes Commission Act, 1920, shall be entitled to a reamortization of the indebtedness due the Territory of Hawai‘i on account of such special homestead agreement upon filing an application for the reamortization of said indebtedness with the commissioner within six months after the effective date of this paragraph. Upon the filing of any such application, the commissioner shall determine the balance due the Territory in the following manner: The amount of the principal which would have been paid during the full period of payment provided for in the special homestead agreement had the agreement been duly performed according to its terms and the amount of the interest which would have been paid under the special homestead agreement prior to the effective date of this paragraph had the agreement been duly performed according to its terms shall be computed and added together; from the sum of these amounts there shall be deducted all moneys that have been actually paid to the Territory on account of the special homestead agreement, whether as principal or as interest. The balance thus determined shall be the total amount remaining due and payable for the homestead covered by such special homestead agreement, any other terms, conditions, or provisions in any of said agreements, or any provisions of law to the contrary notwithstanding: Provided, however, That nothing herein contained shall be deemed to excuse the payment of taxes and other charges and assessments upon unpatented homestead lands as provided in said agreements, nor to excuse or modify any term, condition, or provision of said agreements other than such as relate to the principal and interest payable to the Territory. The total amount remaining due, determined as hereinabove provided, shall be payable in fifteen equal biennial installments. Simple interest at the rate of three per centum per annum shall be charged upon the unpaid balance of such installments, whether matured or unmatured, said interest to be computed from the effective date of this paragraph and to be payable semi-annually. The first payment on account of principal shall be due two years subsequent to the effective date of this paragraph, and thereafter the due dates of principal payments shall be at regular two-year periods; the first payment on account of interest shall be due six months subsequent to the effective date of this paragraph, and thereafter the due dates of interest payments shall be at regular six-month periods. In case of default in payments of principal or interest on the due dates as hereby fixed the commissioner may, with the approval of the governor, with or without legal process, notice, demand, or previous entry, take possession of the land covered by any such special homestead agreement and thereby determine the estate created by such agreement as hereby modified, whereupon liability for payment of any balance then due under such special homestead agreement shall terminate. When the aforesaid payments have been made to the Territory of Hawai‘i, and all taxes, charges, and assessments upon the land have been paid as provided by said agreements, and all other conditions therein stipulated have been complied with, except as herein excused or modified, the said special homestead agreements shall be deemed to have been performed by the holders thereof, and land-patent grants covering the land described in such agreements shall be issued to the parties mentioned therein, or their heirs or assigns, as the case may be.

Neither the Territory of Hawai‘i nor any of its officers, agents or representatives shall be liable to any holder of any special homestead agreement, past or present, whether or not a patent shall have issued thereon, or to any other person, for any refund or reimbursement on account of any payment to the Territory in excess of the amount determined as provided by the preceding paragraph, and the legislature shall not recognize any obligation, legal or moral, on account of such excess payments.

[Am April 2, 1908, c 124, 35 Stat 56; May 27, 1910, c 258, § 5, 36 Stat 444; July 9, 1921, c 42, §§ 304 to 311, 42 Stat 116; July 27, 1939, c 383, 53 Stat 1126; June 12, 1940, c 336, 54 Stat 345; Aug. 21, 1941, c 394, 55 Stat 568; Sept. 26, 1941, c 426, 55 Stat 734; Aug. 7, 1946, c 771, 60 Stat 871; July 9, 1952, cc 616, 617, 66 Stat 514, 515; April 6, 1956, c 180, § 1 and c 185, § 1, 70 Stat 102, 104; Aug. 1, 1956, c 820, § 1 and c 859, 70 Stat 785, 918; July 18, 1958, Pub L 85-534, § 1, 72 Stat 379; Aug. 14, 1958, Pub L 85-650, § 2, 72 Stat 606; Aug. 21, 1958, Pub L 85-718, 72 Stat 709; Aug. 28, 1958, Pub L §§ 1, 2, 72 Stat 971; L 1959, JR 21, § 1 am and rat L 1960, c 15, § 2]

Historical note. - The effective date of the last two paragraphs of this section was June 12, 1940. The Act of July 10, 1937, c. 484, 50 Stat. 508, 48 U.S.C. § 562g, provides in part: "That the Legislature of the Territory of Hawai‘i may create a public corporate authority to engage in slum clearance, or housing undertakings, or both, within such Territory. . . . The legislature . . . may, without regard to any federal Acts restricting the disposition of public lands of the Territory, authorize the commissioner of public lands, the Hawaiian homes commissioners, and any other officers of the Territory having power to manage and dispose of its public lands, to grant, convey, or lease to such authority parts of the public domain, and may provide that any of the public domain or other property acquired by such authority may be mortgaged by it as security for its bonds. . . ."

The Act of February 27, 1920, c. 89, 41 Stat. 452, 16 U.S.C. § 392, provided that the provisions of section 73 relating to exchanges should not apply with respect to the acquisition of privately owned lands within Hawai‘i National Park.

The Act of August 7, 1946, c. 787, 60 Stat. 884, provided that the provisions relating to exchange should not apply to the acquisition of certain lands in Hilo.

See the Act of August 24, 1954, c. 888, 68 Stat. 781, authorizing the commissioner of public lands to sell public lands to certain lessees, permittees and others.

The amendments of July 9, 1921, are part of the "Hawaiian Homes Commission Act, 1920." See Joint Resolution of annexation and the note thereto, RLH 1955, page 13, in regard to the cession of public lands to the United States, their status, disposition thereof, application of the proceeds thereof, and grants of franchises, between annexation and the establishment of territorial government. See Chronological Note of Acts Affecting Hawai‘i for Acts of Congress, Presidential proclamations and Executive orders relating to public lands, RLH 1955, page 9ff. See also the note to §§ 75, 89, 91, 95, 97 and 99 of the Organic Act on public lands. As to shores, harbors, etc. see § 106 the Organic Act.

Quaere, whether the federal statute, 29 Stat. 618, 8 U.S.C.A. 71-77 (see now 48 U.S.C. §§ 1501 to 1508), relating to disabilities of aliens to hold land in territories in general applies to Hawai‘i.

For related federal acts, see the Act of April 6, 1956, c. 184, 70 Stat. 104, and the Act of Aug. 20, 1958, Pub. L. 85-694, 72 Stat. 686, authorizing the amendment of certain patents of government lands by removing the conditions therein restricting use of such lands. See also the Act of August 18, 1958, Pub. L. 85-677, 72 Stat. 628, granting the status of public lands to certain reef lands.

In addition, see Chapter 173. Furthermore, see the Act of August 21, 1958, Pub. L. 85-713, 72 Stat. 707, authorizing the exchange of public lands for private lands of equal value required for highway purposes.

Moreover, see the Act of August 28, 1958, Pub. L. 85-834, 72 Stat. 987, permitting certain sales and exchanges of public lands to persons who suffered substantial real property losses due to the tidal wave of March 9, 1957.

For related territorial acts, effective upon approval by Congress of legislation making the acts valid without approval by Congress, or upon ratification by the state legislature, see L. 1957, c. 39, permitting holders of certain public lands to mortgage the land without necessity of obtaining governor's consent. See also L. 1959, c. 180, s. 2, amending the second paragraph of this section 73(r) to read: "The term 'remnant' shall mean a parcel of land unsuitable for development as a separate unit, and, in case of an urban area, no larger than five thousand square feet in size, or in case of a suburban or rural area, no larger than one and one-half acres in size." In addition, see L. 1959, c. 269, authorizing the subdivision, improvement and leasing of public lands for residential purposes to qualified persons selected by drawing without public auction. Furthermore, see L. 1959, J.R. 2, s. 1, amending this section 73(g) by adding to the first sentence proviso to read: "Provided, That if consent be given to a mortgage or other transfer for security purposes to an established lending agency and such agency be the Federal Housing Administration or other similar federal or territorial agency or a corporation authorized to do business as a lending agency in the Territory or elsewhere in the United States, no further consent shall be required for: (1) any subsequent assignment or reassignment made by such agency or assignee thereof to a like lending agency for refinancing or other security purposes; or (2) any transfer made at a foreclosure sale held pursuant to the provisions of said mortgage or transfer for security purposes; or (3) any subsequent transfer made by the purchaser at said foreclosure sale if the transferor shall be such agency or assignee thereof, provided that all other or further disposition shall be made only in accordance with the provisions of this act."

Cross References. - As to continuation of existing homestead rights and removal of certain restrictions, see § 171-97 et seq.

[45] Territory of Hawai‘i, *Executive Order No. 599: Setting Aside Land for Public Purposes*, by Lawrence M. Judd, Governor of the Territory of Hawai‘i (Honolulu: 22 December 1933).

[46] Ibid.

[47] Kālena Lands, Hawai`i State Archives, (on file with author).

[48] In re McLandless, 34 Haw. 93, 1937 WL 4437, 2 (Supreme Court of the Territory of Hawaii, 1937)

[49] In re McLandless, in which the Court states:

The sole question presented therefore is whether or not when an applicant by land court proceedings seeks to establish title to lands which the United States government possesses, occupies and claims, territorial courts have jurisdiction to try the title to such lands when the United States has not consented that a suit against it or its property may be brought.

Ibid.

[50] Ibid.

[51] The Court continues to explain:

On July 7, 1898, the Congress of the United States passed a resolution annexing the Hawaiian Islands, which reads in part as follows: “Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; Therefore *Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled,* That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America. The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the

local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In 1900 when Congress passed the Organic Act it provided in section 91 in part as follows: "That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii."

Ibid.

[52] David Keanu Sai, A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and its Use and Practice in Hawaii Today, *Journal of Law and Social Challenges* (San Francisco School of Law), Vol. 10, Fall 2008

[53] Elspeth P. Sterling and Catherine C. Summers, Sites of Oahu (Honolulu, Bishop Museum Press, 1978), 64

[54] E.S. Craighill Handy, Elizabeth Green Handy with Mary Kawena Pukui, *Native Planters in Old Hawai'i: Their Life, Lore, and Environment* (Honolulu: Bishop Museum Press, 1991), 468.

[55] Melodie Kapilialoha Mackenzie, ed., *Native Hawaiian Rights Handbook* (Honolulu: University of Hawai'i Press, 1991), 174.

[56] Elspeth P. Sterling and Catherine C. Summers, Sites of Oahu (Honolulu, Bishop Museum Press, 1978), 64

[57] Territory v Takanabe et al., 28 Haw. 43, 1924 WL 2906, 1 (Supreme Court of the Territory of Hawaii, 1924).