



## Recognizing the Rights of the Hanalei River in Kaua'i, Hawai'i



Earth Law Center and the Hanalei River Heritage Foundation<sup>1</sup>

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## **Introduction**

The Hanalei River, located on the oldest of the Hawaiian Islands ([Map 1](#)), is the largest river by discharge on Kaua'i and provides critical habitat to at least 48 endangered species.<sup>2</sup> The Hanalei River flows sixteen miles from the summit of Mt. Wai'ale'ale, one of the wettest spots on terrestrial Earth<sup>3</sup> and often considered the most rained-on location in the world,<sup>4</sup> to the Hanalei Bay and the Pacific Ocean. Translating to "lei making" or "crescent bay" in Hawaiian, the Hanalei River journeys through pristine jungle wilderness, taro fields, pastureland, and the towns of Hanalei and Princeville before entering Hanalei Bay, a white sand river mouth home to super corals,<sup>5</sup> legendary surfing and snorkeling,<sup>6</sup> and a variety of marine life. Foundational to all life on Kaua'i, the Hanalei River is particularly important to Native Hawaiian culture on the island. The river's importance was externally recognized in 1982 when the National Park Service declared that the Hanalei possessed the most "outstandingly remarkable features" of all rivers in Hawai'i,<sup>7</sup> and in 1998 when Bill Clinton's administration chose to include it in the American River Heritage Program, along with 13 other timeless American rivers such as the Mississippi, Hudson, Potomac, and Rio Grande.<sup>8</sup>

Unfortunately, the Hanalei River and the life and culture it supports is threatened by heavy metal pollution, acidification, encroachment, and a warming climate. In an attempt to strengthen the ecological health and Hawaiian biocultural relationship to the Hanalei River and translate Native Hawaiian environmental values into progressive law and policy, [Earth Law](#)

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<sup>2</sup> Discovered using the US Fish and Wildlife Service's IPaC (Information for Planning and Consultation) Service, using the Endangered Species geographic mapping tool.

<sup>3</sup> Melanie Renzulli (2019). "Wettest Places in the USA" Tripsavvy.com

<sup>4</sup> Christopher Burt (2012). "New Wettest Location for the U.S.A. Discovered?" Wunderground.com

<sup>5</sup> Archives, Clinton White House (1998). "Hanalei River, Hawai'i" American Heritage Rivers Program.

<https://clintonwhitehouse2.archives.gov/CEQ/Rivers/hanalei.html>

<sup>6</sup> Summit Pacific. Kaua'i Surfing" <http://www.summitpacific.com/kauai/surfing.html>

<sup>7</sup> National Park Service, Inventory of Rivers. "Hawai'i – Rivers" <https://www.nps.gov/subjects/rivers/Hawai'i.htm>

<sup>8</sup> Cooperation Conservation America. "American Heritage Rivers Initiative"

<http://www.cooperativeconservation.org/viewproject.aspx?id=916>

[Center](#) (ELC) and the [Hanalei River Heritage Foundation](#) (HRHF) hope to recognize the legal rights of the Hanalei River. This aim to recognize the Hanalei's river rights is in accordance with the growing rights of nature movement, whereby specific ecosystems and nature as a whole are recognized and treated as subjects with rights of their own, rather than objects or property to be owned and exploited.

This piece begins with an overview of the history and implementation of the rights of nature, as it is critical to understanding the hope to recognize the legal rights of the Hanalei River. Then, this piece describes the current ecology of the Hanalei River and the variety of threats the river faces. In order to explore why the Hanalei River is a particularly deserving candidate for rights, this piece will subsequently discuss Native Hawaiian environmental values and stewardship, as well as Hawaiian water law as it relates to the Hanalei River and rivers around Hawai'i. Lastly, this piece will make the case for legal rights for the Hanalei River and will mention potential considerations that must be addressed by the local community. The piece ends with a link to an online survey to provide feedback and/or support for this campaign.

## Rights for the Natural World

### A. *Old is new again*

The rights of nature movement aims to recognize nature as a living entity, and translates this philosophy into modern, western law as granting nature *legal right*—such as the right to exist, regenerate, and be free of pollution—and *legal standing*, or the ability to bring a case to court. The underlying philosophies behind the rights of nature movement are that all of nature, humans and nonhuman animals included, is deeply intertwined; humans are reliant on nature; as evident in the current climate crisis, conventional environmental law is failing humans, animals, and the planet; nature should be treated as a subject rather than an object; and nature has intrinsic values and rights that should be recognized in law.<sup>9</sup> Rights of nature advocates believe western law currently treats nature and nonhuman animals as property to be owned and exploited, which has led to normalization of widespread exploitation, pollution, extinction, and damage, ultimately resulting in the current climatic catastrophe. As author and rights of nature advocate David Boyd puts it, “The idea that nature is merely a collection of things intended for human use is one of the most universal and unquestioned concepts in contemporary society,” and is largely responsible for the current condition of the planet.<sup>10</sup>

For the large majority of human history, however, many societies and cultures lived with a worldview that rejected the idea that nature is merely a collection of things intended for human use, opting instead to recognize the intrinsic value and ‘being’ that nature possesses. Such worldviews are reflected through religion, oral histories, creation stories, legends, and environmental conservation practices. These worldviews are most evident in traditions of

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<sup>9</sup> Global Alliance for the Rights of Nature, *What is Rights of Nature?* (2020); Earth Law Center, *What is Earth Law?* (2020); World People’s Conference on Climate Change and the Rights of Mother Earth, *Universal Declaration of Rights of Mother Earth* (2010).

<sup>10</sup> David R. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World*, ECW Press, Toronto, Introduction (2017).

animism, a localized spirituality that revolves around the “belief that all natural things, such as plants, animals, rocks, and thunder, have spirits and can influence human events.”<sup>11</sup> Before the development of the modern world religions, animism was the “predominant philosophy all over the world,”<sup>12</sup> and can be traced back to all continents, excluding Antarctica.<sup>13</sup> Although the current number of animists is unknown, many argue that it is the world’s largest religion due to its ability to merge with other religions such as Hinduism and Buddhism, its large numbers of followers in highly populated places such as Southeast Asia and Sub-Saharan Africa, as well as the fact that many animists do not necessarily identify as such.<sup>14</sup>

As the universal aspect of animism throughout history, these ancient values respecting nature as a living entity have gradually been neglected by key concepts of western society, such as private property, industrialization, commodification and economic evaluation of nature. Oren R. Lyons Jr., Faithkeeper of the Turtle Clan of the Seneca Nations of the Iroquois Confederacy, highlighted this societal abandonment of nature’s rights when he represented indigenous peoples of the Western Hemisphere at the 1993 United Nations General Assembly,

There is a hue and cry for human rights – human rights, they said, for all people. And the indigenous people said: What of the rights of the natural world? Where is the seat for the buffalo or the eagle? Who is representing them here in this forum? Who is speaking for the waters of the earth? Who is speaking for the trees and the forests? Who is speaking for the fish – for the whales, for the beavers, for our children?<sup>15</sup>

Since the start of the 21<sup>st</sup> century, however, communities, cities, tribes, and federal governments around the world—cognizant of traditional environmental law’s inability to avoid the current

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<sup>11</sup> Cambridge Dictionary, *Animism*; As seen in Eugen Cadaru, *Rights of Nature: Myth, Film, Law, and Culture*, Sustainability and the Rights of Nature in Practice, CRC Press, p.39 (2017).

<sup>12</sup> Id.

<sup>13</sup> It is well known that numerous societies in the Americas (such as the Navajo, Aztec, and Inca to name a few), Africa (such as the Dorobo and Sandawe), Asia (such as the indigenous Bhutanese and Ilongot), and Oceania (such as the Paakantyi and Whanganui iwi), and Europe (ancient Celtic, Greek and Roman traditions) featured an animistic worldview; Id.

<sup>14</sup> Stephen T. Asma, *The New Atheists’ Narrow Worldview*, The Chronicle of Higher Education (2011).

<sup>15</sup> Oren Lyons, *Our Mother Earth*, World Wisdom, Inc. (2003); As seen in. Boyd, supra, Introduction.

climate crisis and treat nature as an entity with rights—have recognized nature’s rights or the rights of specific environmental features, often with the knowledge that they are translating ancient human worldviews into modern law.<sup>16</sup> As environmental lawyer Maia Wikaira puts it, “It’s another example of where long-held Indigenous perspectives and association with the natural world are not only being embedded within our legal system – they’re being seen in popular environmental movements as an innovative way forward and a necessary step. So, old is new again.”<sup>17</sup>

### *B. A radical idea*

The “rights of nature” was first introduced to the modern legal world in 1972 by University of Southern California Law Professor Christopher Stone. Stone originally expressed his ideas as a thought experiment to his property law class, and then published his thoughts in his celebrated piece, *Should Trees Have Standing?* in the Southern California Law Review.<sup>18</sup> Central to Stone’s argument was that nature, as is the case with humans, corporations,<sup>19</sup> ships, universities, and other inanimate objects, should be granted *legal rights* and *legal standing*.<sup>20</sup> In conventional environmental law, nature itself has no legal standing to bring a case to court, which oftentimes forces individuals and environmental organizations to make a roundabout claim that they suffered an injury themselves in order to protect nature. In Christopher Stone’s proposed framework, however: (1) nature is able to bring a case on its own behalf, as represented by a legal guardian, (2) damages are calculated by loss to nature itself, and (3) judgement and

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<sup>16</sup> Nature’s rights have been recognized in some form in fourteen nations: Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Colombia, Ecuador, El Salvador, India, Mexico, New Zealand, Uganda, and the United States. For a more complete list and for more information, see Addison Luck, *The Rights of Nature (RoN) and Earth Law Around the World*, ArcGIS, (2019).

<sup>17</sup> Anna V. Smith, *Some Indigenous Communities Have a New Way to Fight Climate Change: Give Personhood Rights to Nature*, MotherJones (2019).

<sup>18</sup> Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Southern California Law Review 45, p.450-501 (1972).

<sup>19</sup> Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).

<sup>20</sup> Stone, *supra*, p.450-501.

award goes to nature itself rather than an interested human.<sup>21</sup> Stone's framework in real life could look like: (1) a forest ecosystem (the trees, plants, rivers, animals, etc.) in Appalachia brings a case, as represented by a legal guardian, against a mining company for improperly disposing of mining waste in a remote area, (2) injury is calculated by the damage the ecosystem itself faced and not by the economic damage or other injury faced by a human, and (3) the judgement and any monetary award goes to restoring the forest ecosystem to its pre waste-disposal state, rather than to humans that may have property or an economic interest in the forest ecosystem. This system simplifies the ability for nature to gain legal standing, protection, and representation within the court system, as it does not rely on a plaintiff proving economic harm, the traditional way to demonstrate legal standing.<sup>22</sup> For an unjust and easily understood historical instance of a being that underwent this transition from rightless to possessing rights, Christopher Stone provided the example of a court case concerning an enslaved human who is beaten by someone other than his 'owner.' Using Stone's methodology, this would have looked like: (1) the slave-owner, if so inclined, could go to trial on behalf of his property and economic interest, the slave, being beaten and damaged, (2) damages are calculated by the slave-owner's economic loss in potential work, and (3) any judgment or award goes to the slave-owner and not to the enslaved person. Just as society has expanded legal rights and standing to include formerly enslaved humans, racial minorities, women, children, and inanimate entities, Stone argued through this analogy that nature should similarly make the legal and societal transition from an object to be owned and exploited to a subject with rights of its own.<sup>23</sup>

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<sup>21</sup> *Id.* p.459.

<sup>22</sup> Marissa Martin and James Landman, *Standing – Who Can Sue to Protect the Environment?* American Bar Association (2019).

<sup>23</sup> Stone, *supra*, p.450-501.



During the publication process of *Should Trees Have Standing?* Supreme Court Justice William O. Douglas – a former editor of the Southern California Law Review – greatly expanded the reach of Stone’s ideas and became a notable advocate for nature’s rights. Douglas was one of seven Supreme Court Justices to decide *Sierra Club v. Morton*, a 1972 case that featured environmental organization the Sierra Club in their attempt to stop the development of a Walt Disney Enterprises ski resort in Mineral King Valley, an undeveloped area of Sequoia National Forest in California.<sup>24</sup> Although the Supreme Court ruled 4-3 that the Sierra Club did not have standing to sue on behalf of Mineral King Valley, Justice Douglas—who was exposed to Christopher Stone’s work a few months prior—voted in favor of the Sierra Club and wrote a passionate dissenting opinion, arguing for legal rights and standing for nature. Douglas, the longest-serving Supreme Court Justice in United States history, put Stone’s ideas at the forefront of the legal world when he wrote,

The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation (See Stone, *Should Trees Have Standing?*) ...This suit [*Sierra Club v Morton*] would therefore be more properly labeled as *Mineral King v. Morton*.<sup>25</sup>

### C. River rights

Simply put, “river rights” expands on and applies the philosophies behind the rights of nature to rivers and watersheds. This movement recognizes the extreme importance of rivers and watersheds for all life on earth, establishes substantive and fundamental rights for rivers and watersheds, and recommends independent appointment of legal guardians to represent rivers in legal, administrative, and planning matters. Although not always the case, river rights and other

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<sup>24</sup> *Sierra Club v. Morton*, 405 US 727 (1972).

<sup>25</sup> *Id.* p.405.

environmental features often take the form of legal personhood. At a minimum, enacting river rights establishes the following fundamental rights, as defined by the Earth Law Center's *Universal Declaration of the Rights of Rivers*:<sup>26</sup>

- (1) The right to flow<sup>27</sup>
- (2) The right to perform essential functions within its ecosystem<sup>28</sup>
- (3) The right to be free from pollution
- (4) The right to feed and be fed by sustainable aquifers
- (5) The right to native biodiversity
- (6) The right to regeneration and restoration

River rights, an extremely recent movement within the rights of nature and borne out of ancient human philosophies, currently exist in a variety of forms and levels in six countries: New Zealand, Colombia, Ecuador, Bolivia, the United States, and Bangladesh. In 2017, New Zealand broke trail for river rights when they recognized the indigenous Māori worldview towards the environment in modern law and declared the Whanganui River a “legal person”, the first river in the world to be given this status.<sup>29</sup> In doing this, the New Zealand Parliament eloquently described the human dependence on the river and established a council of indigenous and non-indigenous guardians to represent the river in legal, administrative, and planning matters.<sup>30</sup> Perhaps inspired by New Zealand, three countries in South America have recognized the rights of rivers. Colombia has recognized the rights of four specific rivers (the Atrato,<sup>31</sup> Cauca,<sup>32</sup> La Plata,<sup>33</sup> and the entire Amazon River Ecosystem<sup>34</sup>) while Ecuador and Bolivia have essentially

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<sup>26</sup> Earth Law Center. “[Universal Declaration of the Rights of Rivers](#)”

<sup>27</sup> Flows must, at minimum, follow natural flow patterns and be sufficient in quantity to maintain the ecosystem health of the entire river system. In addition, rivers – not people – own the water that flows within them

<sup>28</sup> These include flooding, moving and depositing sediment, recharging groundwater, providing adequate habitat for native flora and fauna, and other essential functions

<sup>29</sup>; Eleanor Ainge Roy (2017). “New Zealand river granted same legal rights as human being” *The Guardian*.

<sup>30</sup> New Zealand Parliament (2017) “Te Awa Tupua (Whanganui River Claims Settlement) Act 2017”

<sup>31</sup> <https://redjusticiaambientalcolombia.files.wordpress.com/2017/05/sentencia-t-622-de-2016-rio-atrato.pdf> (Spanish text)

<sup>32</sup> <http://files.harmonywithnatureun.org/uploads/upload837.pdf> (Spanish text)

<sup>33</sup> <http://files.harmonywithnatureun.org/uploads/upload823.pdf> (Spanish text)

<sup>34</sup> IUCN (2018). “Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem”

granted rights to all rivers located in the country through constitutional recognition of the rights of nature.<sup>35</sup> In 2011, Ecuador's Vilcabamba River was the first river in the world to win a court case on its own behalf.<sup>36</sup> In North America, the Yurok Tribe of northern California established river rights for the Klamath River in May of 2019,<sup>37</sup> and most recently, in July of 2019, Bangladesh—often called the “land of the rivers”—granted rights to all rivers in the country and appointed the River Conservation Commission as the legal guardian.<sup>38</sup>

There are also a variety of current campaigns pushing to recognize the rights of rivers and their watersheds that are worth noting. For example, the Earth Law Center is campaigning to recognize the rights of the Boulder Creek Watershed (Colorado, USA),<sup>39</sup> Doljanka River (Bosnia),<sup>40</sup> Indus River (Pakistan),<sup>41</sup> and River Ethiope (Nigeria).<sup>42</sup> Additionally, the Community Environmental Legal Defense Fund (CELDF) is assisting multiple Florida counties to recognize the rights of five different rivers.<sup>43</sup> In sum, this movement to grant rights to rivers is a new legal and ecological framework that hopes to raise the status of rivers in society, leading to a more harmonious relationship between humans and the environment.

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<sup>35</sup> Ecuador Constitution 2008, translated by Georgetown University <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>; John Vidal (2011). “Bolivia enshrines natural world's rights with equal status for Mother Earth” *The Guardian*.

<sup>36</sup> Natalia Greene. “The first successful case of the Rights of Nature implementation in Ecuador” *Global Alliance for the Rights of Nature*

<sup>37</sup> Anna Smith (2019). “The Klamath River Now Has the Legal Rights of a Person” *Intercontinental Cry*.

<sup>38</sup> CTV News (2019). “Bangladesh declares its rivers 'legal persons'”

<sup>39</sup> Earth Law Center. “Boulder Creek” <https://www.earthlawcenter.org/boulder-creek>

<sup>40</sup> Earth Law Center. “Bosnian River” <https://www.earthlawcenter.org/bosnian-river>

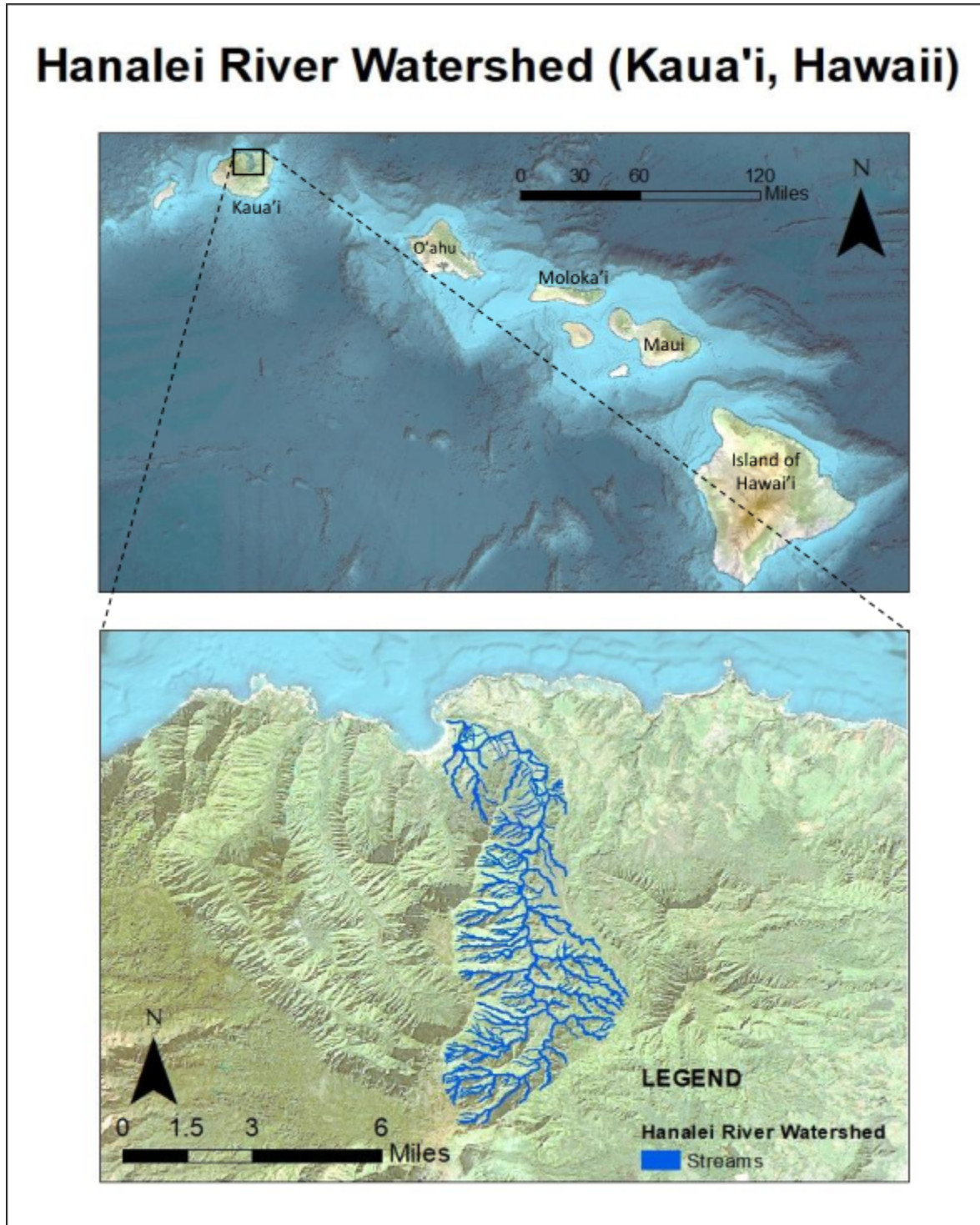
<sup>41</sup> Earth Law Center. “Indus River” <https://www.earthlawcenter.org/indus-river>

<sup>42</sup> Earth Law Center. “River Ethiope” <https://www.earthlawcenter.org/river-ethiope>

<sup>43</sup> Community Environmental Legal Defense Fund (2019). “Flurry of Rights of River Ballot Initiatives Proposed to Save Drinking Water, Ecosystems”

## I. Hanalei River Watershed

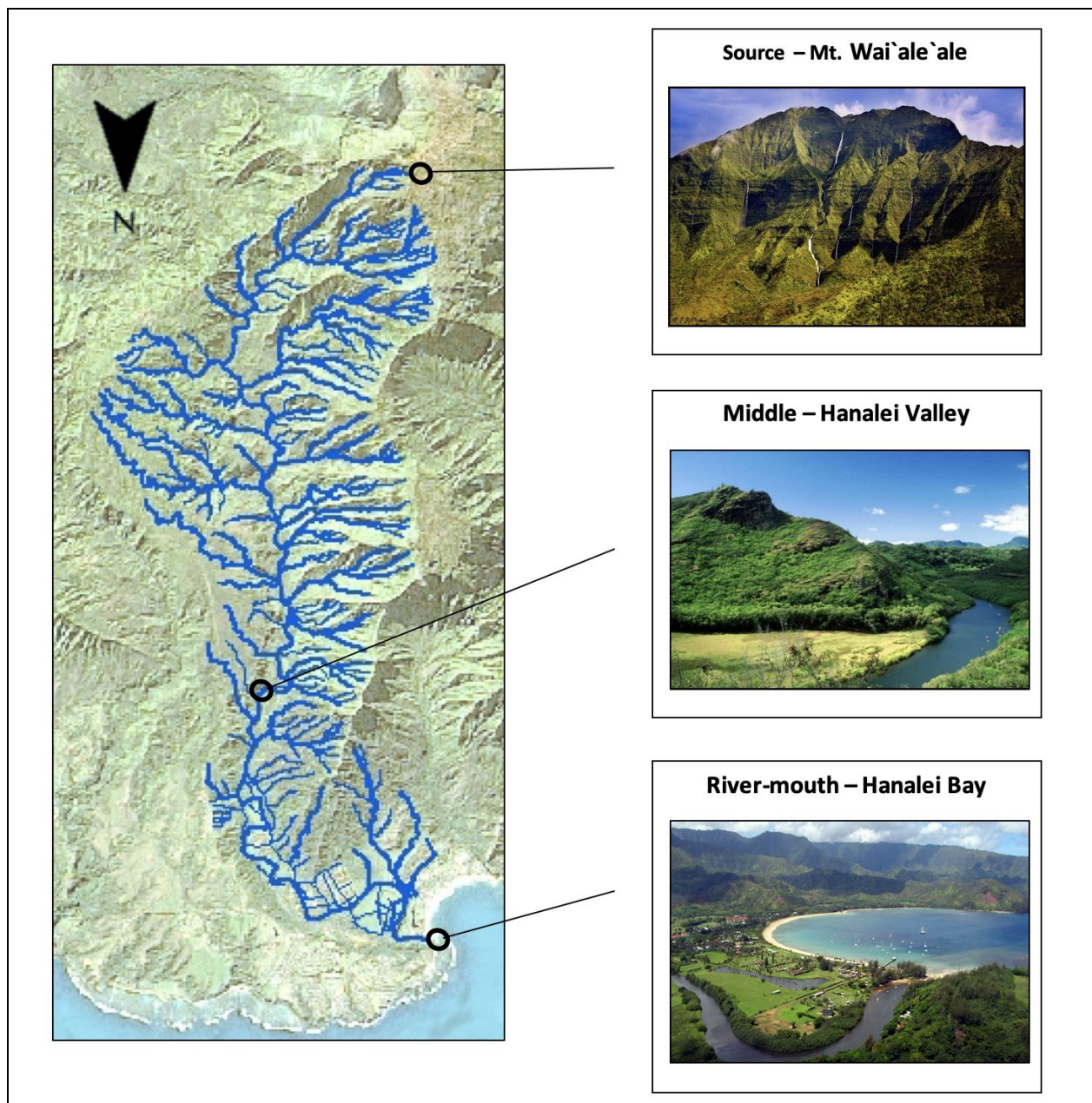
**Map 1:** Hanalei River Watershed, on the island of Kaua'i and in relation to all islands of Hawai'i.<sup>44</sup>



<sup>44</sup> Map made by author using ArcGIS and data from [geoportal.Hawai'i.gov](http://geoportal.Hawai'i.gov)



**Map 2:** Hanalei River Watershed with photos of source, middle, and river-mouth. Locations are meant to be general and are not entirely accurate.<sup>45</sup>



<sup>45</sup> Map made by author using ArcGIS and data from [geoportal.Hawaii.gov](http://geoportal.Hawaii.gov)

### *A. Ecology*

The Hanalei River Watershed existed long before the first humans arrived in Kauaʻi around 300 A.D.<sup>46</sup> Around 5.6 million years ago, hundreds of millions of years of lava flow from a rupture at the bottom of the Pacific Ocean eventually rose above the surface of the sea to create the island of Kauaʻi. Kauaʻi is the oldest and most circular of all Hawaiian Islands, and the island's central and largest volcano, Mt. Waiʻaleʻale, oozed lava downwards around itself and created Kauaʻi as it exists today (see [Map 1](#)).<sup>47</sup> Mt. Waiʻaleʻale, a former volcano that is now one of the wettest locations on Earth,<sup>48</sup> provides the current source for the Hanalei River, a perennial stream that flows sixteen miles from the mountains (5,128 feet high) to the ocean. With a total stream length of 76.5 miles, the Hanalei River Watershed includes the Hanalei River as well as the smaller Kaʻapahu, Kaʻapoko, Kaʻiwa, Pekoa, and Waipunaea streams.<sup>49</sup> The watershed is broken into four sections, with 66% of the stream length occurring in the upper portion, 25% in the middle portion, 8% in the headwaters, and 1% in the estuary. The upper portion of the watershed is large, narrow, and steep, with striking views, waterfalls, and lush steep growth. The middle portion is a gentle incline with tropical evergreen forest and bush. The headwaters feature taro crops and residential zones along its banks, and the estuary is the white sand, crescent-shaped Hanalei Bay, home to some of Hawaii's most developed coral reefs (see [Map 2](#)).<sup>50</sup> With an average discharge of 6.5 cubic meters per second, the Hanalei River is the largest river by volume in Kauaʻi.<sup>51</sup>

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<sup>46</sup> Daniel Harrington (2008). "Hanalei: a Kauaʻi River Town" Mutual Publishing.

<sup>47</sup> Edward Joesting (1984). *Kauaʻii: The Separate Kingdom*" University of Hawaiʻi Press. p13-14.

<sup>48</sup> Melanie Renzulli (2019). "Wettest Places in the USA" [Tripsavvy.com](#)

<sup>49</sup> Hawaiʻi Division of Aquatic Resources (2008). "Hanalei River, Kauaʻi" *Atlas of Hawaiian Watersheds & Their Aquatic Resources*.

<sup>50</sup> Edward Joesting (1984). *Kauaʻii: The Separate Kingdom*" University of Hawaiʻi Press. p15

<sup>51</sup> Hawaiʻi Division of Aquatic Resources (2008). "Hanalei River, Kauaʻi" *Atlas of Hawaiian Watersheds & Their Aquatic Resources*.

The Hanalei River Watershed provides critical habitat to an incredible amount of endangered species. The US Fish and Wildlife Service lists 192 threatened or endangered species in Kauaʻi,<sup>52</sup> and at least 90 are found in the Hanalei River Watershed (see [Map 3](#)).<sup>53</sup> Additionally, the Hanalei River Watershed serves as “critical habitat” (meaning it is essential to the conservation of the species and deserves special management or protection) for 48 endangered species, many of which are endemic to Hawaiʻi, and 11 migratory birds of conservation concern.<sup>54</sup> See [Tables 1](#) and [2](#) for a sample of these endangered species. The Hanalei River also provides the largest critical habitat in the world for the Newcomb’s Snail (see [Map 4](#)), an endangered snail endemic to Kauaʻi that requires perennial streams with steep or overhanging waterfalls. There are only six recorded watersheds in the world where the snail lives.<sup>55</sup> Additionally, the watershed provides critical nesting and feeding habitat for at least five endangered waterbirds: the Hawaiian duck (koloa maoli), Hawaiian moorhen (ʻalae ʻula), Hawaiian coot (ʻalae keʻokeʻ), Hawaiian stilt (aeʻo), and the Nēnē.<sup>56</sup>

Although species that face threats of extinction are widely discussed and receive a lot of attention, the Hanalei River Watershed also provides habitat for a variety of native and introduced species that are not facing the same level of threats as defined by the US Fish and Wildlife Service. Since 1965, there have been around twenty recorded biota samplings of the Hanalei River, which is now known to provide habitat for a variety of crustaceans, fish, snails, insects, and birds.<sup>57</sup> See [Table 3](#) for a sample of these species.

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<sup>52</sup> US Fish and Wildlife Service. “Species By County Report:Kauaʻii, Hawaiʻi”.

<sup>53</sup> Chad Jones (2019). “Hawaiian Islands Endangered Species Map 1” ArcGIS <https://yalemaps.maps.arcgis.com/home/item.html?id=f7dd546441164881b51742c101107f0a>





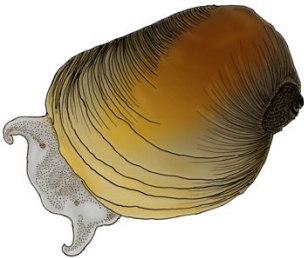



<sup>54</sup> Discovered using the US Fish and Wildlife Service’s IPaC (Information for Planning and Consultation) Service, using the Endangered Species geographic mapping tool.

<sup>55</sup> US Fish and Wildlife Service (2004). “Draft Recovery Plan for the Newcomb’s Snail”

<sup>56</sup> US Fish and Wildlife Service. “Endangered Waterbirds of Hanalei”

<sup>57</sup> Hawaiʻi Division of Aquatic Resources (2008). “Hanalei River, Kauaʻi” Atlas of Hawaiian Watersheds & Their Aquatic Resources.





**Table 1:** Sample of Endangered Species (8 of 48) endemic to Kaua'i and reliant on the Hanalei River Watershed as “Critical Habitat”<sup>58</sup>

<p style="text-align: center;"><b>Akeke'e</b> <i>Loxops caeruleirostris</i></p> 	<p style="text-align: center;"><b>Broad-leaf yellow loosestrife</b> <i>Lysimachia pendens</i></p> 
<p style="text-align: center;"><b>Hawaiian picture wing fly</b> <i>Drosophila sharpi</i></p> 	<p style="text-align: center;"><b>Kamakahala</b> <i>Labordia pumila</i></p> 
<p style="text-align: center;"><b>Newcomb's snail</b> <i>Erinna newcombi</i></p> 	<p style="text-align: center;"><i>Polyscias bisattenuata</i></p> 
<p style="text-align: center;"><b>'akikiki, Kaua'i creeper</b> <i>Oreomystis bairdi</i></p> 	<p style="text-align: center;"><b>Veined Yellow Loosestrife</b> <i>Lysimachia venosa</i></p> 

<sup>58</sup> Made by author using the US Fish and Wildlife Service's IPaC (Information for Planning and Consultation) Service, using the Endangered Species geographic mapping tool.



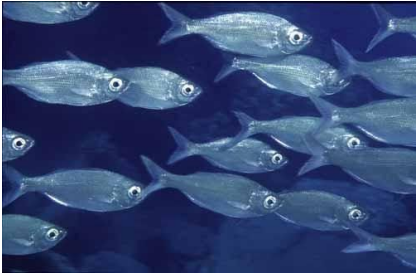







**Table 2:** Sample of Migratory Birds of Conservation Concern (4 of 11) reliant on the Hanalei River Watershed as “Critical Habitat”<sup>59</sup>

<p style="text-align: center;"><b>Laysan albatross</b> <i>Phoebastria immutabilis</i></p> 	<p style="text-align: center;"><b>Brown booby</b> <i>Sula leucogaster</i></p> 
<p style="text-align: center;"><b>Black noddy</b> <i>Anous minutus melanogenys</i></p> 	<p style="text-align: center;"><b>Apapane</b> <i>Himatione sanguinea</i></p> 

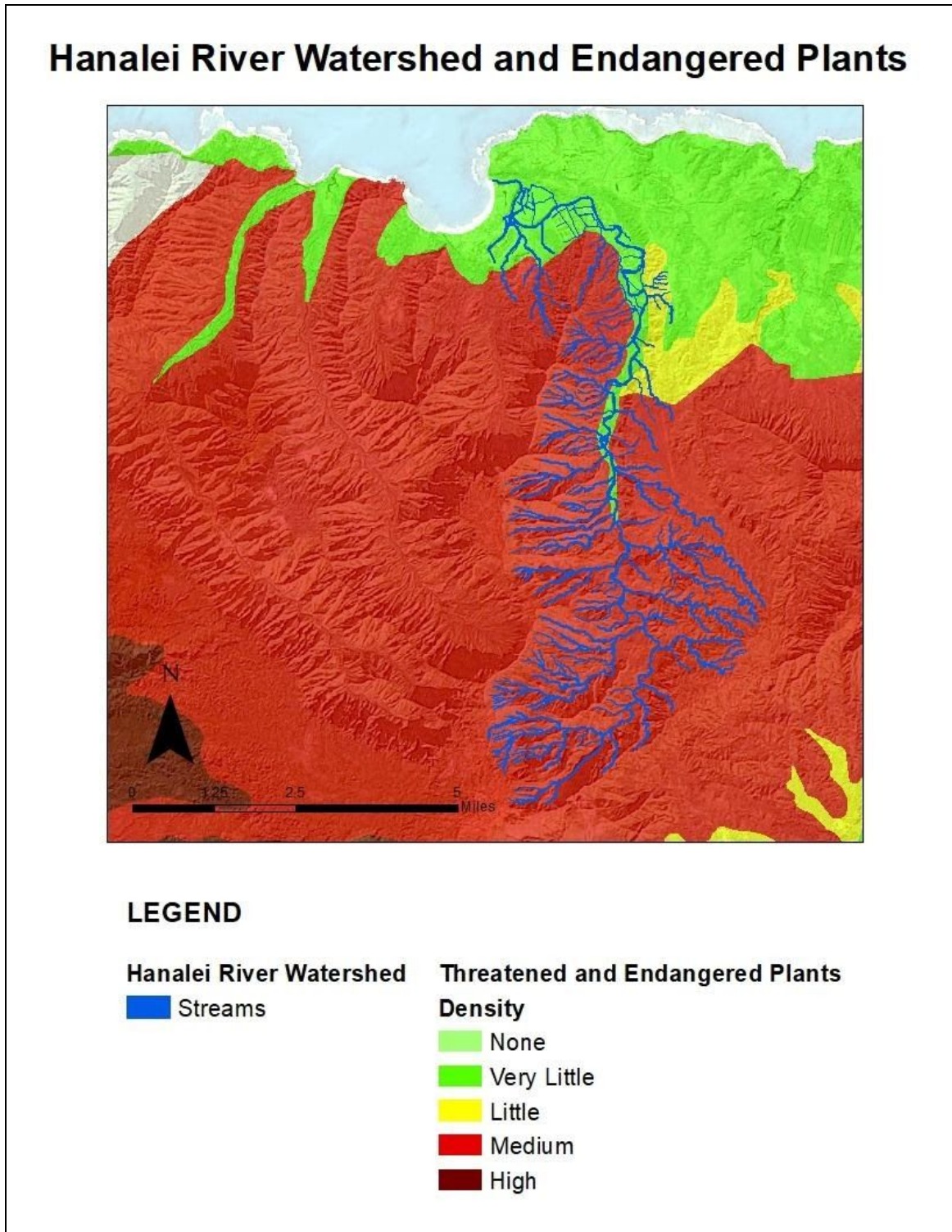
<sup>59</sup> Made by author using the US Fish and Wildlife Service’s IPaC (Information for Planning and Consultation) Service, using the Endangered Species geographic mapping tool.

**Table 3:** Sample of Native and Introduced Species in the Hanalei River Watershed<sup>60</sup>

<p><b>Damselfly (endemic)</b> <i>Megalagrion eudytum</i></p> 	<p><b>Hawaiian river shrimp (endemic)</b> <i>Machrobrachium grandimanus</i></p> 
<p><b>Hawaiian flagtail (endemic)</b> <i>Kuhlia sandvicensis</i></p> 	<p><b>Hawaiian freshwater goby (endemic)</b> <i>Lentipes concolor</i></p> 
<p><b>Naniha goby (endemic)</b> <i>Stenogobius hawaiiensis</i></p> 	<p><b>Familiar bluet (introduced)</b> <i>Enallagma civile</i></p> 
<p><b>Green swordtail (introduced)</b> <i>xiphophorus helleri</i></p> 	<p><b>Chinese mystery snail (introduced)</b> <i>cipangopaludina chinensis</i></p> 

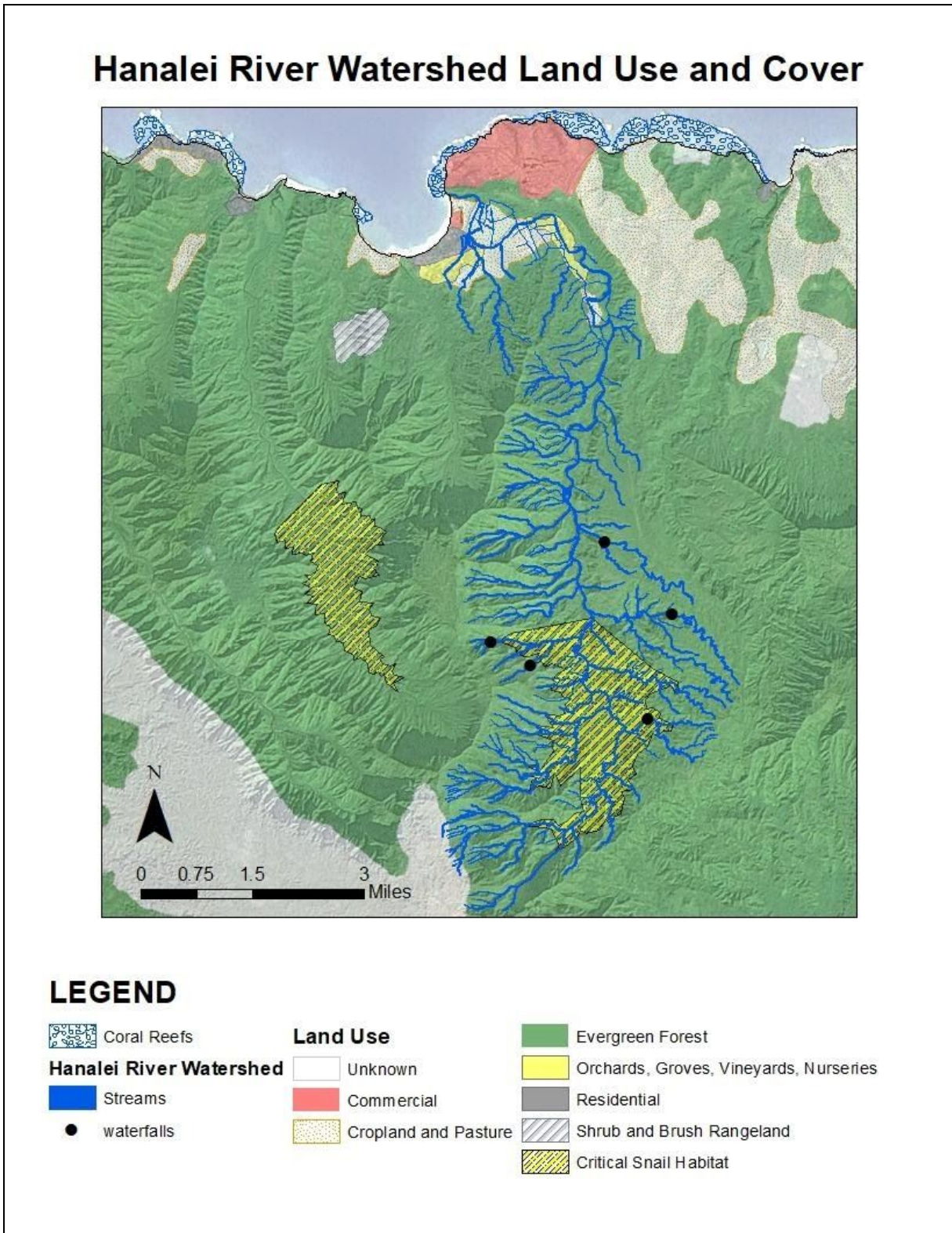
<sup>60</sup> Made by author using information from: Hawai'i Division of Aquatic Resources (2008). "Hanalei River, Kaua'i" Atlas of Hawaiian Watersheds & Their Aquatic Resources.



**Map 3: Hanalei River Watershed and Endangered Plants<sup>61</sup>**

<sup>61</sup> Map made by author using ArcGIS and data from [geoportal.Hawaii.gov](http://geoportal.Hawaii.gov)

Map 4: Hanalei River Watershed Land Use and Cover<sup>62</sup>



<sup>62</sup> Map made by author using ArcGIS and data from [geoportal.Hawaii.gov](http://geoportal.Hawaii.gov)

### *B. Threats*

The Hanalei River and Watershed, being a popular tourist destination and historic home to a variety of agricultural practices, has faced the threats of human impact and land-based pollutants. These threats continue to degrade the Hanalei River and Hanalei Bay's water quality, ecosystem vitality, wildlife populations, and coral reefs. Based on three studies in the past fifteen years, the EPA has continually listed the Hanalei River as impaired,<sup>63</sup> and one independent found 18 pollutants in the river and surrounding watershed that do not meet state water quality standards.<sup>64</sup> In the past fifteen years, there has been record of Roundup herbicide contamination,<sup>65</sup> high levels of arsenic and phosphorus,<sup>66</sup> unsafe amounts of enterococci,<sup>67</sup> and reports of other toxic substances in the Hanalei River.<sup>68</sup> In all three of its studies, the EPA found high levels of enterococci,<sup>69</sup> a bacteria that causes a variety of human and animal health complications including endocarditis, urinary tract infections, prostatitis, cellulitis, and intra-abdominal infections.<sup>70</sup>

The variety of land-based pollutants entering the Hanalei River Watershed, as well as overfishing, acidification, and warming ocean temperatures have also contributed to the rise of coral reef disease in the Hanalei Bay.<sup>71</sup> According to a Hanalei Bay Management Plan created by an environmental consultancy group, the pollutants of primary concern in the Bay are: 1)

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<sup>63</sup> Environmental Protection Agency (2015). "305(b) Assessed Waterbody History Report"

[https://ofmpub.epa.gov/waters10/attains\\_wb\\_history\\_au.control?p\\_assessment\\_unit\\_id=HI2-1-19&p\\_cycle=2014](https://ofmpub.epa.gov/waters10/attains_wb_history_au.control?p_assessment_unit_id=HI2-1-19&p_cycle=2014)

<sup>64</sup> Sustainable Resources Group, Intl. (2014). "Watershed Management Plan for Hanalei Bay Watershed Volume 2: Strategies and Implementation" Kailua, HI.

<sup>65</sup> Maureen Mitra. "Trouble in Paradise" Earth Island Journal: Joh Myers et al. (2016). "Concerns over use of glyphosate-based herbicides and risks associated with exposures: a consensus statement" Environmental Health Journal.

<sup>66</sup> Renne Haines (2012). "Tests show toxins polluting Hanalei river mouth, bay" The Garden Island.

<sup>67</sup> Star Advertiser (2017). "Public urged to stay out of Hanalei Bay and Kuhio Beach because of bacteria"

<sup>68</sup> Lee Ann Woodward et al (2002). "Environmental Contaminants Program On-Refuge Investigations Sub-Activity" <https://ecos.fws.gov/ServCat/DownloadFile/21733?Reference=23214>

<sup>69</sup> Environmental Protection Agency (2015). "305(b) Assessed Waterbody History Report"

<sup>70</sup> Larry Bush and Maria Perez (2019). "Enterococcal Infections"

<sup>71</sup> Kim Murphy (2012). In Hawai'i, a coral reef infection has biologists alarmed" Los Angeles Times.

sediment and plant detritus, 2) bacteria, and 3) nutrients, with a large portion of each coming from the Hanalei River.<sup>72</sup> Activities in the Hanalei River Watershed and Hanalei Bay that produce high amounts of sediment, bacteria, and nutrients are the built environment, road surfaces and motor vehicle use, general erosion, earthwork activities, unpermitted grading, grazing of cattle and buffalo, uprooting of forest by feral ungulates, and pesticide usage on taro farms. Additionally, “the largest contributors to bacterial presence within Hanalei Bay Watershed are human waste (introduced via three subsurface disposal systems) and animal waste (land-based).”<sup>73</sup> Lastly, river narrowing and construction of a rockwall near the mouth of the river have altered the river’s flow and exacerbated floods in the watershed. The rockwall—which has caused negative risks to aquatic life, altered the flow regime, and increased the risk of floods that regularly devastate Hanalei—was likely constructed without a permit and in violation with the Clean Water Act §401 and §404.<sup>74</sup>

## II. Native Hawaiian Environmental Practices

### A. Values

As a non-Hawaiian, it is impossible to fully grasp the incredibly unique Native Hawaiian relationship with the environment and specifically rivers. From descriptions provided by Native Hawaiian scholars, scientists, community members, artists, and more, it is evident that this genuine relationship centers around a personal, communal, familial, ancestral, and reciprocal intertwinement with nature. The Hawaiian concept of nature and rivers is radically different to contemporary America’s and is unique in the world due to its isolated development since

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<sup>72</sup> Sustainable Resources Group, Intl. (2014). “Watershed Management Plan for Hanalei Bay Watershed Volume 2: Strategies and Implementation” Kailua, HI.

<sup>73</sup> Sustainable Resources Group, Intl. (2014). “Watershed Management Plan for Hanalei Bay Watershed Volume 2: Strategies and Implementation” Kailua, HI.

<sup>74</sup> Earth Law Center (2019), unpublished report.



Polynesian people first landed on the islands around 300 A.D.<sup>75</sup> Native Hawaiians believe they are bound to maintain the continuation of natural and environmental life cycles, and that they are deeply and intimately connected to the natural world. For example, upon death, all humans return to nourish “Papa” (Earth Mother) and certain individuals transfigure into “aumākua” (guardian deities), which often take the form of animals such as sharks and owls.<sup>76</sup> Additionally, traditional Hawaiian religion is complete with deities that represent the natural world and the distinction between humans, nature, and the gods is thin.<sup>77</sup> The Native Hawaiian creation story, the Kumulipo, even describes the creation and birth of coral, seaweed, moss, earthworms, starfish, three types of sea urchins, ten types of shellfish, barnacles, oysters, mussels, and other natural features.<sup>78</sup>

Extremely important for understanding the Hawaiian relationship with nature is the Hawaiian vocabulary, or lack thereof. Because of the constant interaction between humans and the natural world, the Hawaiian language actually has no word for “nature”.<sup>79</sup> The term ‘ohana, which refers to one’s family, is the “single most important element relating to the Native Hawai’i concept of environmental kinship,” as nature is included in this scope of family.<sup>80</sup> Additionally, “Kama‘āina” is the Hawaiian word for anyone born in Hawai’i, and means “one who is physically, psychologically, biologically, and genealogically inseparable from this island environment.”<sup>81</sup> Other Hawaiian words indicative of the importance of the Natural world are: Mana’o’i’o (faith, respect for nature), Kapu (sacredness or the forbidden), ‘Aina (the living Earth), Malama (caring), Pu‘uhonua (stewardship), and Lokahi (unity, harmony).<sup>82</sup>

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<sup>75</sup> Daniel Harrington (2008). “Hanalei: a Kaua’i River Town” Mutual Publishing.

<sup>76</sup> Pualani Kanaka‘ole Kanahale et al. (2016). “Kīho‘iho‘i Kānāwai Restoring Kānāwai for Island Stewardship”

<sup>77</sup> Charles Kekuewa Pe'ape'a Makawalu Burrows (1988). “Hawaiian Conservation Values and Practices”

<sup>78</sup> University of Hawai’i translation, “Kumulipo”

<sup>79</sup> Pualani Kanaka‘ole Kanahale et al. (2016). “Kīho‘iho‘i Kānāwai Restoring Kānāwai for Island Stewardship”

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Charles Kekuewa Pe'ape'a Makawalu Burrows (1988). “Hawaiian Conservation Values and Practices”

Within environmental thinking, Native Hawaiians value freshwater and rivers with the highest regard. “Wai” is the term for freshwater, and the duplication of water, “waiwai” means wealth, value, and prosperity.<sup>83</sup> As a public resource in Hawai’i, wai could not be owned but was accessed and shared by all. Those who had the best access to wai also possessed the most waiwai, as freshwater rivers provide the basic necessities of life and allow staple crops like taro, breadfruit, sugar cane, sweet potatoes, and yam to thrive.<sup>84</sup> “Kānāwai”, the Hawaiian word for “the equal sharing of water” or “belonging to water” has evolved to represent the law, showing just how important rivers were for the formation of culture and society in Hawai’i.<sup>85</sup> As one researcher notes, “For Hawaiians, wai [water] was the perpetual life force that continuously flowed and connected the ‘Aina [living earth] with the rest of the environment and all living things.”<sup>86</sup>

*B. Stewardship (Native and Modern)—“The Land is Chief; Man is its Servant”<sup>87</sup>*

Indicative of Native Hawaiian environmental values are their traditional stewardship practices. In traditional Hawaiian communities, a special class of chiefs called the “konohiki” were tasked with stewarding the land, water, and human resources in a self-sustaining, holistic way. The konohiki were specifically chosen by the “Ali’i Nui”, the great chief, to act as “luna wai” or “water managers”. The konohiki lived in accordance with the motto, “He Ali’i Ka ‘Āina; He Kauwā ke Kanaka”, or “The Land is Chief; Man is its Servant”, and ensured fair and self-sustaining distribution of freshwater, guaranteed the health of watershed ecosystems, and penalized those who broke the water laws.<sup>88</sup> Often, the konohiki oversaw the construction and

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<sup>83</sup> Claire Hiwahiwa Steele (2015) “Traditional Hawaiian Resource Stewardship and the Transformation of the Konohiki” University of Hawai’i.

<sup>84</sup> Ibid

<sup>85</sup> Hawai’i Division of Aquatic Resources. “Hawaiian Streams: Cultural Importance” Hawai’i.gov

<sup>86</sup> Claire Hiwahiwa Steele (2015) “Traditional Hawaiian Resource Stewardship and the Transformation of the Konohiki” University of Hawai’i.

<sup>87</sup> ibid

<sup>88</sup> ibid



management of ‘auwais, small-scale irrigation canals that fed taro farms and are making a modern resurgence.<sup>89</sup> Traditional land boundaries that konohiki stewarded were called “ahapua’a”, which used river watersheds as the natural common point that defined political and social units.<sup>90</sup> For example, the Hanalei ahapua’a is simply a map of the Hanalei River Watershed (see [Map 5](#)). This traditional method of environmental stewardship and management that governed the Hanalei River Watershed and all watersheds around Hawai’i gradually became known as the Konohiki System,<sup>91</sup> but has since been replaced by traditional American land ownership and governance. This means that the federal and state governments, as well as private landowners, now own watersheds, with consequences for Native livelihoods and environmental wellbeing.

According to the Hawai’i Division of Aquatic Resources (DAR), 84% of the land in the Hanalei River Watershed is now owned or cared for by the state of Hawai’i, 10% is privately owned, and 6% federally owned (the Hanalei National Wildlife Refuge). DAR also reports that 84% of the watershed is protected but unmanaged (all state-owned land), 10% is unprotected (all private land), and 6% is permanently protected and managed (the federally owned Hanalei National Wildlife Refuge).<sup>92</sup> This low level of protection and management led DAR to give the watershed a stewardship score of 3/10 (with 10 being the highest).<sup>93</sup> As evident in the [Threats](#) section of this paper, the prevalence of unmanaged land in the watershed (94%) is highly consequential.

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<sup>89</sup> Ligaya Mishan (2019). “On Hawai’i, the Fight for Taro’s Revival” New York Times Magazine.

<sup>90</sup> Hawai’i Division of Aquatic Resources. “Hawaiian Streams: Cultural Importance” Hawai’i.gov

<sup>91</sup> Claire Hiwahiwa Steele (2015) “Traditional Hawaiian Resource Stewardship and the Transformation of the Konohiki” University of Hawai’i.

<sup>92</sup> Hawai’i Division of Aquatic Resources (2008). “Hanalei River, Kaua’i” Atlas of Hawaiian Watersheds & Their Aquatic Resources.

<sup>93</sup> *ibid*

The lack of modern stewardship does not mean that the Hanalei River Watershed has gone unrecognized by non-Hawaiians for its cultural and ecological importance as well as natural beauty. In 1982, the National Park Service (NPS) described the Hanalei River as, “Extremely photogenic stream displaying historic taro agricultural practices within the Hanalei National Wildlife Refuge. Possesses an important estuary with outstanding fishery values.” Additionally, the NPS declared that the Hanalei River possesses five of the eight possible Outstandingly Remarkable Values (Cultural, Fish, Wildlife, Scenic, and Other), the most values of any river in Hawai’i.<sup>94</sup> Additionally, in 1998, the Hanalei River was selected as one of fourteen rivers for inclusion in the American River Heritage Program, a program created by Bill Clinton in 1997 to spur special efforts to further environmental protection, economic revitalization, and historic and cultural preservation surrounding unique rivers. Although any substantial impact that came from the federal program is dubious, the external recognition of the Hanalei River put it in the ranks of classic American rivers such as the Mississippi River, Hudson River, Rio Grande, Potomac River, the New River, and the Cuyahoga River.<sup>95</sup>

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<sup>94</sup> National Park Service, Inventory of Rivers. “Hawai’i – Rivers”

<sup>95</sup> Cooperation Conservation America. “American Heritage Rivers Initiative”  
<http://www.cooperativeconservation.org/viewproject.aspx?id=916>

Map 5: Hanalei ahupua'a and Hanalei Watershed<sup>96</sup>



<sup>96</sup> Map made by author using ArcGIS and data from [geoportal.Hawaii.gov](http://geoportal.Hawaii.gov)

### III. Hawaiian Water Law

As discussed earlier, the Hawaiian word for “law” is “kānāwai”, which also means “the equal sharing of water.”<sup>97</sup> Due to the powerful entrenchment of Native Hawaiian values and stewardship concerning the environment and water in Hawai’i, modern Hawaiian water law is unique in the United States. The Public Trust Doctrine, a principle of common law that requires the state to act as trustee over natural resources, has been particularly influential in Hawai’i and is fitting in its similarities to the Native Hawaiian philosophy that “water... [is] the possession of no man.”<sup>98</sup> The idea that the state must manage the public resources for the good of the people is not far from the previously mentioned practice of the Ali’i Nui (Great Chief) designating konohiki as specific stewards of the environment and its resources.<sup>99</sup> Hawai’i, unique among all states, has widened its Public Trust Doctrine’s scope to include all freshwater (including groundwater) and to recognize and include Native Hawaiian understandings of water and other natural resources.<sup>100</sup>

From the beginnings of Hawaiian state law, this shunning of private property in favor of the public trust philosophy is evident in things such as Hawaii's First Constitution, local legislation, and court cases, all of which reaffirm the public right to use and access water and rivers.<sup>101</sup> As one professor describes,

In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but instead communal and shared. The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. The principle of malama 'aina (to take care of the land) is therefore

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<sup>97</sup> Hawai’i Division of Aquatic Resources. “Hawaiian Streams: Cultural Importance” [Hawaii.gov](http://Hawaii.gov)

<sup>98</sup> Sylva, Summer (2007) "Indigenizing Water Law in the 21st Century: Na Moku Aupuni O Ko’Olau Hui, a Native Hawaiian Case Study," *Cornell Journal of Law and Public Policy*: Vol. 16: Iss. 3, Article 5.

<sup>99</sup> *Ibid*

<sup>100</sup> *Ibid*

<sup>101</sup> See: Kuleana Act of 1850; *King v. Oahu Railway & Land Co* (1889). As seen in *Ibid*.

directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well.<sup>102</sup>

Native Hawaiian values are still extremely relevant in today's law. In 1987, Hawai'i passed the State Water Code, which established a commission (the CWRM) to "steward water for the benefit of the public" and explicitly recognized the importance of water to Native Hawaiian and thus excluded certain private property rights.<sup>103</sup>

Although the representation and recognition of Native Hawaiian environmental values and stewardship in modern law is impressive, the actual impact of these laws on state-owned environmental areas and watersheds is questionable. As evident in the large amount of protection but lack of management in the Hanalei River Watershed (all state-owned land, 84% of the watershed, is unmanaged), state agencies tasked with stewardship – such as the Commission on Water Resource Management (CWRM) and the Division of Land and Natural Resources (DLNR) – have not substantively furthered the intent of Hawaii's Public Trust Doctrine ideals. This has led to a lack of localized management efforts and a loss of Native and cultural values around Hawai'i.<sup>104</sup> In the case of the Hanalei River Watershed, this cultural negligence has similarly resulted in ecological damage and a loss in Native stewardship.

#### **IV. Rights for the Hanalei River**

Above all else, the Earth Law Center's and Hanalei River Heritage Foundation's hope to recognize the Hanalei River's rights is a movement to translate Native Hawaiian values into modern legislation, while strengthening the ability for nature and Native Hawaiian culture to exist and thrive in the region. As evident in the current situation in the Hanalei River Watershed,

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<sup>102</sup> MacKenzie et al. (2007) "Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources" NR&E Winter 2007

<sup>103</sup> Sylva, Summer (2007) "Indigenizing Water Law in the 21st Century: Na Moku Aupuni O Ko'Olau Hui, a Native Hawaiian Case Study," Cornell Journal of Law and Public Policy: Vol. 16: Iss. 3, Article 5.

<sup>104</sup> Ibid

listing water and rivers as a public resource is not enough to secure proper protection and management. Without substantive legal rights, creating and enforcing the necessary protections that nature needs is extremely challenging.

Considering the ways in which Native Hawaiians have historically valued and stewarded nature and water resources specifically, the rights of nature and river rights are particularly fitting for Hawai'i. Indeed, the rights of nature movement has already been introduced to Kaua'i in 2017 when the Kaua'i-based nonprofit Coherence Labs and the legal counsel group Community Environmental Legal Defense Fund recognized the rights of nature in a conservation easement on an individual's private property.<sup>105</sup> As the landowner is quoted saying,

Rights of nature is already in the air, the sea, and the people of Hawai'i, so recognizing legal rights of nature on land that is in my name came quite easily for me... I established the easement in hopes that other landowners and governments will also understand the need to change the status of nature from property to bearing right.<sup>106</sup>

In an effort to revitalize a central and localized aspect of traditional Hawaiian environmental management (similar to the Konohiki System), granting legal rights for the Hanalei River will provide fitting Native Hawaiian legal guardians to represent the river in legal, administrative, and planning matters. This practice will strengthen the "voice" of the river and the representation of Native Hawaiian values in local matters. This movement also falls in line with current state law and cultural movements. As the Hawaiian State Water Code says, "the protection of traditional and customary Hawaiian rights... are in the public interest."<sup>107</sup> Additionally, one Hawaiian professor notes that, following the injustices of American colonialism and in partnership with environmental nonprofits and government agencies, "Native

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<sup>105</sup> Community Environmental Legal Defense Fund (2017). "First Rights of Nature Easement Established in Hawai'i"

<sup>106</sup> Ibid

<sup>107</sup> Hawaiian State Water Code, H.R.S. §174C-2(c)

Hawaiians are regaining control over the management of their land, environment, and cultural resources.”<sup>108</sup>

Lastly, it is important to mention that river rights and the rights of nature are extremely localized and rely on the communities in question to address key issues and tailor these laws to their specific needs and requests. Potential considerations that must be addressed by the communities in the Hanalei ahupua’a, if they agree granting rights to the river is a necessary and positive step forward, include but are not limited to: the effect that river rights might have on taro farmers in the watershed, the effect that river rights might have on future natural disaster and flooding recovery efforts, how river rights will specifically fit in with the Hawaiian Public Trust Doctrine and Water Code, the role that the guardians of the rivers will play in local matters, and who might make for fitting guardians.

It is the hope of the Earth Law Center and Hanalei River Heritage Foundation to organize community events, talk-story sessions, and discussions in Kaua’i communities to explore these considerations and help grant legal rights to the Hanalei River and other environmental features on Kaua’i. This unique and necessary strategy within environmental law has the ability to create greater harmony between humans and nature, for the benefit of all, and Kaua’i has the unique opportunity to be a leader of this movement. To provide feedback and/or pledge your support for this movement, please fill out this online [form](#).

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<sup>108</sup> MacKenzie et al. (2007) “Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources” NR&E Winter 2007