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Preface

Ellen R. Ashford and Kauluponookaleilehua M. Lu'uwai*

In the wake of growing calls to critically analyze the institutions of our society for a more just and equitable world, we found the biennial University of Hawai'i Law Review Symposium to be an apt event to breathe new life into a seminal Hawai'i decision that did just that. Twenty-five years after *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*)[1] was decided, the Law Review enlisted some of Hawai'i's greatest legal minds with boots on the ground to help us in evaluating the effects this decision continues to have on Hawai'i's land and people.

As Hawai'i grapples with decisions that will shape the future of the islands, we hope that the topics discussed in the Symposium will guide policymakers in decisions about Native Hawaiian traditional and customary rights as well as climate change. In this rapidly changing world that presents novel challenges for society, the Law Review remains committed to providing a space for dialogue about critical legal issues that Hawai'i faces.

We would like to express our appreciation for the contributions of our learned moderators, Professor Susan Serrano, Professor David L. Callies, and Professor Emirita Melody Kapilialoha MacKenzie, as well as our symposium panelists: Robert G. Klein, Suzanne Case, David M. Forman, Roy A. Vitousek III, Colin Lee, Samuel J. Lemmo, Robert H. Thomas, Bill Wynhoff, Simeon R. Acoba, Jr., William K. Meheula III, Mark M. Murakami, and Summer Lee Haunani Sylva. We are deeply grateful for Julie Suenaga, the technical support staff, our advisors, and our members who went above and beyond to continue this Law Review tradition in the midst of the COVID-19 Pandemic. Finally, we are grateful to Dean Camille Nelson for her support of Law Review.

Within this issue you will also find a piece by Justice Todd W. Eddins honoring the impressive career of Justice Richard W. Pollack following his retirement from the Hawai'i Supreme Court in 2020.

Mahalo for supporting the Law Review. We hope you enjoy the scholarship presented in these pages that provide thoughtful analyses of *PASH*-related issues for Hawai'i.

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* Co-Editors-in-Chief, Volume 43, University of Hawai'i Law Review.

[1] 79 Hawai'i 425, 903 P.2d 1246 (1995).

PASH: Vital 25 Years Later

Robert G. Klein*

Mahalo to the University of Hawai'i Law Review staff for their hard work in assembling the excellent panels you will hear from today and the selection of "25 Years of PASH" as the prime topic.

I am humbled by the attention given to *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*),[1] a case I wrote in 1995 on cert from the Hawai'i Intermediate Court of Appeals. As the authoring Justice of *PASH* I would be remiss if I did not point out that the entire Hawai'i Supreme Court signed the opinion without dissent or concurrence. The decision affirmed the lower court ruling concluding that appellants Public Access Shoreline Hawaii (PASH), a citizens' organization, and Angel Pilago, an individual, had asserted protected rights that would be impacted by the Special Management Area permit being considered by and ultimately issued by the Hawai'i Planning Commission. Plaintiffs' request for a contested case hearing was denied partly because the panel decided that PASH and Pilago had no rights that differed from those of the general public and thus lacked standing.

In a broad sense *PASH* attempted to balance certain competing interests: on the one hand the private interests of landowners to use their property exclusively and on the other the right of Native Hawaiians to exercise protected, traditional practices on public and private lands. *PASH* did not settle these competing interests but set out to examine them in the context of a discretionary government permit hearing. How does a court, even today, 25 years thereafter, begin to address and balance such fundamentally competing interests?

Well, what *PASH* caused was a re-examination of certain case law and statutes that underlie our understanding of the interplay between competing protected interests. Fundamentally, how do the statutory protections set forth in Hawai'i Revised Statutes sections 1-1[2] and 7-1[3] that protect

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* Former Associate Justice of the Hawai'i Supreme Court. Managing Partner, Klein Law Group, LLLC. University of Oregon School of Law, J.D. Stanford University, B.A.

[1] 79 Hawai'i 425 (1995).

[2] "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or the laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State." HAW. REV. STAT. § 1-1 (2021).

[3] "Where the landlords have obtained, or may hereafter obtain, allodial titles to their

customary rights (that existed and were practiced on the 'āina by Native Hawaiians successfully for generations) continue to exist if such rights are marginalized, contained, restricted, and limited in favor of "progress"? And should these historic practices be protected to the same extent as their late arriving Western law concepts of property ownership and exclusivity? Is there a balance?

PASH attempts to provide that balance. Legitimate, historic Native Hawaiian practices and traditions make Hawai'i a special place. Why? My view is that the continuation via preservation and exercise of Native Hawaiian culture, practices, and traditions makes Hawai'i exceptionally unique. Native practices are essential, often run with the 'āina, and are worth protecting. To the extent that the courts have the tools and the perception that Native Hawaiian culture and practices ought to be embraced and protected they will not be regulated out of existence because of *PASH*, its ancestors, and its progeny. Western land rights are equally, if not more potent rights in certain respects (possessing due process constitutional protections that guarantee property rights) and also deserve recognition and protection. The key is to harmonize each set of rights with decisionmakers in the legislature, the county governments, and state agencies and the ultimate goal being to protec the value of Hawai'i's history and traditions and legitimately harmonize them with modern societal expectations. No mean feat!

Mahalo, and I hope the panels today with their exceptional teachers, administrators, and practitioners breathe new life and interest into the many dynamic concepts discussed in *PASH*.

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lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use." HAW. REV. STAT. § 7-1 (2021).

Reoccurring Cultural Insensitivity: Confronting the Abdication of Core Judicial Functions

David M. Forman*

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* Director, Environmental Law Program (ELP) and Faculty Specialist, Ka Huli Ao Center for Excellence in Native Hawaiian Law (KHA), William S. Richardson School of Law, University of Hawai'i at Mānoa. The term "Native Hawaiian" as used in this article means any person of Hawaiian ancestry without regard to blood quantum, consistent with NATIVE HAWAIIAN LAW: A TREATISE xiv (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat, eds., 2015) [hereinafter NATIVE HAWAIIAN LAW TREATISE]. I frequently deliver presentations on Traditional and Customary Rights during Native Hawaiian Law trainings co-sponsored by KHA and the Office of Hawaiian Affairs (OHA), mandated by state law for appointed and volunteer members of boards of commissions but also conducted for community groups throughout the state. In addition, I have taught administrative law for over a decade among a long list of other law school courses including appellate advocacy. Debts of gratitude are owed to Kealoha Pisciotta, Alan Murakami, David Kimo Frankel, Mahesh Cleveland, Bianca Isaki, Carl Christensen, Hannah Kihalani Springer, Jonathan Likeke Scheuer, and William Tam for their comments on early drafts of this article. To focus more directly on the symposium topic, I have carved out (for publication elsewhere) my earlier application of critical race theory to indigenous environmental justice issues—which, regrettably, continue to plague practitioners of traditional and customary rights.

The cultural impact assessment prepared for the University of Hawai'i in 1999 concerning Mauna Kea[1] became part of the administrative agency record on remand from *Mauna Kea Anaina Hou v. Board of Land & Natural Resources* (*Mauna Kea I*),[2] upon submission as an exhibit by Mauna Kea Anaina Hou (MKAH), Kealoha Pisciotta, Clarence Kūkauakahi Ching, the Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and Kāhea: The Hawaiian Environmental Alliance (collectively, the MKAH Appellants):[3]

> To Native Hawaiians, the natural elements of the physical environment – the land, sea, water, winds, rains, plants, and animals, and their various embodied spiritual aspects – comprise the very foundation of all cultural life and activity – subsistence, social, and ceremonial; to Native Hawaiians, the relationship with these natural elements is one of family and kinship.
>
> The Native Hawaiian cultural practices identified as currently associated with the University of Hawaii Mauna Kea Science Reserve Master Plan project area . . . [include] experiential activities focused on "becoming one" with natural setting; that is, behaviors relating to spiritual communication and

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[1] Paul H. Rosendahl, Ph.D., Inc. (PHRI), CULTURAL IMPACT ASSESSMENT STUDY: NATIVE HAWAIIAN CULTURAL PRACTICES, FEATURES, AND BELIEFS ASSOCIATED WITH THE UNIVERSITY OF HAWAI'I MAUNA KEA SCIENCE RESERVE MASTER PLAN PROJECT AREA (Aug. 1999) (Report 1876-040199, prepared by PHRI for University of Hawaii – Institute for Astronomy c/o Group 70 International), https://dlnr.hawaii.gov/mk/files/2016/10/Ex.-A-067.pdf [hereinafter MAUNA KEA CIA STUDY].

[2] 136 Hawai'i 376, 363 P.3d 224 (2015).

[3] E-mail from MKAH President Kealoha Pisciotta to author (Feb. 3, 2021) (on file with author); *In re* Conservation District Use Application (CDUA) HA-3568 (*Mauna Kea II*), 143 Hawai'i 379, 387 n.5, 431 P.3d 752, 760 n.5 (2018) (identifying the MKAH Appellants); *see also infra* note 222 (citing testimony about corporate efforts to tamper with cultural impact assessment, which urged "no further development" at Mauna Kea).

Notwithstanding (now retired) Hawai'i Supreme Court Associate Justice Richard W. Pollack's use of the short form *In re TMT* in two subsequent opinions—viz., *Lāna'ians for Sensible Growth v. Land Use Comm'n* (*LSG IV*), 146 Hawai'i 496, 509 n.14, 463 P.3d 1153, 1166 n.14 (2020), and *Ching v. Case*, 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019)—this article opts for the short form *Mauna Kea II* as more recently used by *Mauna Kea I* author Associate Justice Sabrina S. McKenna in *In re Gas Co.* (*Gas Co.*), 147 Hawai'i 186, 206, 465 P.3d 633, 653 (2020), in recognition of the fact that both Justice McKenna's majority opinion and Justice Pollack's partial concurring opinion in *Mauna Kea II* referenced the court's prior opinion as "*Mauna Kea I*[.]" *Mauna Kea II*, 143 Hawai'i at 387, 431 P.3d at 760; *see also id.* at 410, 431 P.3d at 783 (Pollack J., concurring in part and concurring in the judgment, Wilson, J., joining as to Parts I–III).

interaction that reaffirm and reinforce familial and kinship relationships with the natural environment.

. . . [S]everal of the identified practices and beliefs would appear to fall within . . . the purview of Article XII, Section 7, of the [Hawai'i] State Constitution ("Traditional and Customary Rights"), particularly as reaffirmed in 1995 by the [Hawai'i] State Supreme Court in the decision commonly referred to as the "*PASH* decision," and further clarified in the 1998 decision in "State v. Hanapi," and which would include various cultural practices and beliefs associated with the general geographical area of the summit region, rather than a clearly definable property or site. While certain other practices, such as prayer and ritual observances involving the construction of new *kuahu* (altars), or the releasing of cremated human remains rather than interment on *pu'u*, might seem to be contemporary cultural practices, they may as well be considered to be reasonable cultural developments evolving from earlier traditional practices.

. . . While knowledgeable informants and cultural practitioners acknowledge that several of the *pu'u* have been damaged by past construction activities, they also appear to believe that the *pu'u* have not been so substantially damaged as to destroy their integrity. . . .

With regard to the current practices identified by Maly (1999) as contemporary cultural practices, it would seem that they all bear close enough relationships to earlier traditional cultural practices associated with the upper slopes and summit region of Mauna Kea so that no purpose would be served by distinguishing them as something different. Furthermore, as has been pointed out previously, it is likely that they represent reasonable cultural evolution from earlier traditional practices.

. . . SHPD [State Historic Preservation Division] staff have recently indicated that they will be proposing a historic district designation for the summit region of Mauna Kea which they believe will meet the eligibility criteria for inclusion in both the [Hawai'i] State and the National Register of Historic Places. A historic district is defined as a historic property that " . . . possesses a significant concentration, linkage, or continuity of sites . . . united historically or aesthetically by plan or physical development" (NPS 1990:5).

. . . The proposed district includes the total of 93 archaeological sites identified within the Science Reserve, three landscape features within the reserve believed to qualify as traditional cultural properties, and the Mauna Kea Adze Quarry Complex situated within the Natural Area Reserve.

Consideration of the properties included within this proposed historic district, and their associated practices and beliefs, suggests it to represent a type of historic property best referred to as a cultural landscape. A cultural landscape is a geographical[ly] definable area that clearly reflects patterns of occupation

> and land use over a long time period, as well as the cultural values and attitudes which guide and regulate human interaction with the physical environment. Based on the Native Hawaiian traditional cultural practices and beliefs associate[d] with Mauna Kea, as documented in the Maly (1999) oral history and consultation study, the proposed historic district could perhaps even more appropriately be considered to be a special type of cultural landscape referred to by the National Park Service as ethnographic landscapes: "those landscapes imbued with such intangible meanings that they continue to be deemed significant or even sacred by contemporary people who have continuous ties to the site or area". Such an ethnographic landscape would seem to be embodied in the concept of "cultural attachment" used by Maly (1999:27) to describe the connection of many Native Hawaiians to Mauna Kea.[4]

The agency's final decision and order on remand from *Mauna Kea I* includes just one citation to this MAUNA KEA CIA STUDY (merely defining traditional and customary rights),[5] and there is *no mention* of the Mauna Kea Summit Region Historic District in the Hawai'i Supreme Court's *Mauna Kea II* decision.

By comparison, Figure 1 below provides a partial map of traditional Hawaiian view planes emanating from the lele (altar) where solstice and equinox ceremonies are currently performed at Mauna Kea, drawing from information provided by MKAH President Kealoha Pisciotta and utilizing University of Hawaii Institute for Astronomy planning documents that show a

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[4] MAUNA KEA CIA STUDY, *supra* note 1, at 42–45 (citing Kepa Maly, "Mauna Kea Science Reserve and Hale Pohaku Complex Development Plan Update: Oral History and Consultant Study, and Archival Literature Research; Ahupua'a of Ka'ohe (Hamakua District) and Humu'ula (Hilo District), Island of Hawai'i" (Feb. 1999) (Report HiMK-21 (120199), including Appendices A thru E, prepared by Kumu Pono Associates (Hilo) for Group 70 International (Honolulu)). Pisciotta explains that MKAH introduced this exhibit to rebut the University's newly raised argument on remand that mere "contemporary" practices are not entitled to protection as traditional and customary rights. Telephone Interview with Kealoha Pisciotta (Apr. 24, 2021). *See infra* Section III.C.2., notes 157–92 and accompanying text (discussing the *Mauna Kea II* court's clarification, upon reconsideration, that Hawai'i law requires consideration of a proposed project's impacts on "contemporary (as well as customary and traditional) Native Hawaiian cultural practices" outside the area at issue, in addition to within the project site and its immediate vicinity).

[5] *In re* Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002, Findings of Fact, Conclusions of Law and Decision and Order, at 116 (Haw. Bd. of Land & Nat. Res. Sept. 28, 2017) (citing MAUNA KEA CIA STUDY, *supra* note 1, at 1–2), https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf [hereinafter BLNR Decision].

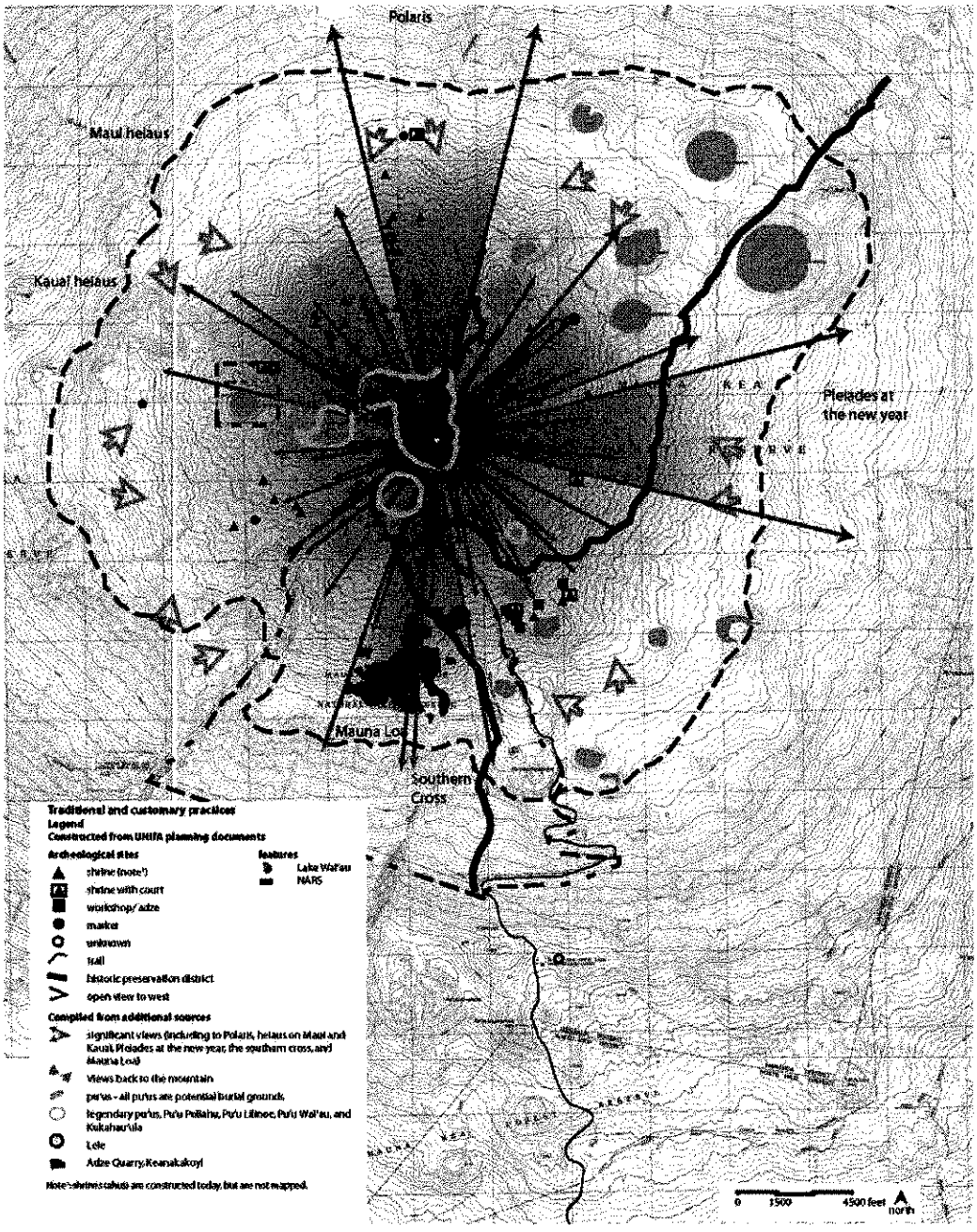

Fig 1. Traditional Viewsheds from Mauna Kea (partial map). Map by Community by Design.

"ring of shrines" in the Mauna Kea Summit Region Historic District.[6] Of course, traditional kilo hōkū practices (observation and study of stars) involve views both from Mauna Kea as well as looking back toward Mauna Kea, occurring much more frequently than just four times a year marked by the winter/summer solstices and equinoxes.[7] According to the University's own environmental impact statement, "[h]istorical documents reveal that most shrines are located on the summit plateau (mostly on the north and northeast side of the mountain), not the core summit region or the tops of cinder cones, suggesting that *the* [summit] *area was likely avoided because of its high degree of sacredness*."[8]

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[6] Community By Design is a planning group from the University of California-Berkeley powered by industrious students who arrived in Hawai'i thanks to donated frequent flier miles arranged by Lea Hong. Zoom Interview with Kealoha Pisciotta (Dec. 16, 2020). The map was submitted as Exhibit C-5 in the 2011 contested case hearing, and Exhibit B.01t in the 2017 contested case hearing. *Id.*

As a civil and commercial litigator with Alston Hunt Floyd & Ing (AHFI), now known as Dentons, I assisted then AHFI partner Lea Hong in representing OHA—on behalf of Native Hawaiian members of MKAH, who are also OHA beneficiaries—in *Office of Hawaiian Affairs v. O'Keefe*, Civ. No. 02-00227 SOM/BMK (D. Haw. July 13, 2003) (granting motion for summary judgment on inadequacy of the National Aeronautical and Space Administration's environmental assessment for the KECK Outrigger Telescopes project). The importance of traditional and customary practices involving view planes to the preservation of indigenous cultural knowledge will be explored further in a subsequent article applying critical race theory to indigenous environmental justice issues. *See, e.g.*, *infra* notes 140, 175–177, 181, 187, 224, 227, 239 and accompanying text (regarding view plane impacts on traditional and customary practices at Mauna Kea, Haleakalā, Kalaemanō, and Kohanaiki).

[7] *See generally, e.g.*, Exhibit B.01a, Written Direct Testimony of Ms. K. Kealoha Pisciotta, Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002 (Haw. Bd. of Land & Nat. Res. Sept. 28, 2017), https://dlnr.hawaii.gov/mk/files/2016/10/B.01a-Kealoha-Pisciotta-WDT-2016-C-1-amend.pdf [hereinafter Pisciotta Written Testimony]; Exhibit B.01h, Kealoha Pisciotta's testimony and cross at 86–87, 89–90, 94–96, 99, 103, *In re* Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002 (Haw. Bd. of Land & Nat. Res. Sept. 28, 2017), https://dlnr.hawaii.gov/mk/files/2016/10/B.01h-Kealoha-Pisciotta-testimony-and-cross-9.26.11.pdf [hereinafter Pisciotta Oral Testimony].

[8] UNIV. OF HAWAI'I AT HILO, FINAL ENVIRONMENTAL IMPACT STATEMENT, VOLUME 1, at P-2 (2010) (emphasis added), http://www.malamamaunakea.org/uploads/management/plans/TMT_FEIS_vol1.pdf; *id.* at 3-15 ("[T]here are *at least 222 shrines around the circumference of the summit area*, between the 11,000 and 13,000 foot elevation") (emphasis added); *id.* at 3-31 (acknowledging that the view of the summit from "a few of the shrines on the northern plateau" will be impacted by the TMT Observatory); *id.* at 3-33 ("The TMT Observatory will add a new visual element to the northern plateau area that will be visible to varying degrees from the shrines along the northern slopes of Maunakea[.]"); *id.* at 3-50 ("[T]he TMT Observatory . . . will be visible to varying degrees from the northern ridge of Kūkahau'ula, Pu'u Pōhaku, Pu'u Poli'ahu, and some of the historic shrines and other historic properties along the northern slopes of

Over objections by the MKAH Appellants and other intervening practitioners, the State of Hawai'i Board of Land and Natural Resources (BLNR) nevertheless issued, and the Hawai'i Supreme Court affirmed, a conservation district use permit (CDUP) authorizing construction of a Thirty Meter Telescope (TMT) at Mauna Kea on the island of Hawai'i, pursuant to a conservation district use application (CDUA) submitted by the University of Hawai'i (University) on behalf of TMT Observatory Corporation, later renamed TMT International Observatory, LLC (TIO).[9]

ROAD MAP

Before discussing the *Mauna Kea II* court's inappropriate deference to agency decision making that privileged cultural insensitivity, this article begins by taking the reader on a guided tour of footnotes from the landmark *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*) decision relating to the doctrine of custom as it applies under Hawai'i law.[10] Regrettably, many agency decisionmakers, lawyers, and judges skip over these *PASH* Guidelines during what appear to be fleeting (if any) visits to the *PASH* opinion. As a result, restorative justice efforts initiated by the people of Hawai'i through the 1978 constitutional convention continue to be hampered by ongoing failure to give the *PASH* Guidelines their due consideration.

Part I introduces the most recent member of the *PASH* progeny (as of mid-2021), an unpublished Intermediate Court of Appeals (ICA) memorandum opinion that exposes allegedly consistent refusals by the Maui County Planning Commission (MPC) to implement the core holding in *PASH*. Correcting erroneous legal interpretations by both the agency and the lower court, the ICA framed the dispositive question around the applicable standard of review: highlighting *PASH*'s conclusion that restrictive agency interpretations of their own administrative regulations are

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Maunakea[.]").

[9] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 384–87, 387 n.5, 409, 431 P.3d 752, 757–60, 760 n.5, 782 (2018).

[10] 79 Hawai'i 425, 437–51, 903 P.2d 1246, 1258–72 (1995), *cert. denied*, 517 U.S. 1163 (1996). Under the leadership of Hawai'i Supreme Court Chief Justice Ronald T. Y. Moon (1993 to 2010), the "Moon Court" authorized me to disclose that I performed substantial research and drafted opinions for the court as a law clerk to the Honorable Robert G. Klein, Associate Justice of the Hawai'i Supreme Court (Jan. 1994 to Aug. 1996), including the court's unanimous decisions authored by Justice Klein in: *PASH*; *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 891 P.2d 729 (1995); and *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994). *See also Bush v. Watson* (*Bush II*), 81 Hawai'i 474, 918 P.2d 1130 (1996).

not entitled to deference and must, instead, be reviewed *de novo* under the right/wrong standard.[11]

Next, Part II identifies the Hawai'i Supreme Court's latest (June 2020) citation to *PASH*: *In re Application of The Gas Co.* (*Gas Co.*).[12] The *Gas Co.* decision references the element of "reasonable[ness]" under the doctrine of custom as it applies in Hawai'i (hereinafter Hawai'i's Custom Doctrine), also briefly discussed two years earlier in *Mauna Kea II*.[13] Part II continues by casting the *PASH* Guidelines as an effort to implement a measure of restorative justice under the Hawai'i Constitution by providing "badly needed judicial guidance" and enforcement,[14] but also acknowledging the case-specific nature of traditional and customary rights inquiries under HRS section 1-1[15] and article XII, section 7 of the Hawai'i Constitution.[16]

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[11] "Anew; afresh; a second time." *De Novo*, BLACK'S LAW DICTIONARY 435 (6th ed. 1990), *quoted in* State v. Hoshijo *ex rel.* White, 102 Hawai'i 307, 315, 76 P.3d 550, 558 (2003) (explaining "[b]y way of illustration, [that] it is 'as if the reviewing court is the front-line judicial authority and, therefore, accords no deference to the lower courts' [or the agency's] determinations"; in other words, "the agency's conclusions of law are freely reviewable" under the right or wrong standard pursuant to the Hawai'i Administrative Procedure Act (HAPA), Hawai'i Revised Statutes (HRS) § 91-14(g)(1), (2), (4)) (2012 & Supp. 2019) (citations and alterations omitted).

[12] 147 Hawai'i 186, 206, 465 P.3d 633, 653 (2020).

[13] *Id.* (citing *Mauna Kea II*, 143 Hawai'i at 395, 431 P.2d at 768).

[14] Stand. Comm. Rep. No. 57, *in* 1 Proceedings of the Constitutional Convention of 1978, at 640 (1980), *quoted in* Ka Pa'akai O Ka 'Āina v. Land Use Comm'n (*Ka Pa'akai*), 94 Hawai'i 31, 50, 7 P.3d 1068, 1087 (2000), and Pele Def. Fund v. Paty (*PDF v. Paty*), 73 Haw. 578, 619–20, 837 P.2d 1247, 1271 (1992), *cert. denied*, 507 U.S. 918 (1993); *see also* Kalipi v. Hawaiian Trust Co. (*Kalipi*), 66 Haw. 1, 5, 656 P.2d 745, 748 (1982) (quoting page 637 of the same source). *Cf.* Mana Maoli, *"Hawai'i '78" Song Across Hawai'i Playing for Change Collaboration*, YOUTUBE (June 29, 2019), https://www.youtube.com/watch?v=HVuvKIFa6kc (reimagining the official video: ISRAEL KAMAKAWIWO'OLE, HAWAI'I '78 (Mountain Apple Co. 2010)).

[15] HRS section 1-1 provides that:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of [Hawai'i] in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HAW. REV. STAT. § 1-1 (2009 & Supp. 2019) (emphasis added); *see also PASH*, 79 Hawai'i at 437, 903 P.2d at 1258 (quoting HAW. REV. STAT. § 1-1). *PASH* traces the recognition of usage in this provision back before the origins of Hawai'i's constitutional democracy in the early nineteenth century and the establishment of private property in the Kingdom of Hawai'i. *Id.* at 437 n.21, 903 P.2d at 1258 n.21 ("[T]he Hawaiian kingdom was *governed*

Part III then places the court's *Mauna Kea I* and *Mauna Kea II* decisions in the context of ongoing Native Hawaiian claims for restorative justice, more than twenty-five years after the *PASH* decision, and more than four decades after the 1978 constitutional amendments. Recognizing that it would be premature to offer a definitive assessment of the jurisprudence issued under Chief Justice Mark E. Recktenwald's capable leadership, Part III nevertheless offers a critical preliminary examination of select Recktenwald Court opinions: identifying occasional lapses in the application of established jurisprudential principles, to the detriment of constitutionally protected public trust resources that include traditional and customary rights.[17] To illustrate this fact, Part IV briefly summarizes an octet of striking analogies between *Mauna Kea II* and two Moon Court opinions (*Wai'ola* and *Kukui I*), which vacated agency decisions that erroneously shifted the burden of proof in contested case hearings[18] from

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until the year 1838, without other system than usage, and with a few trifling exceptions, without legal enactments."); *see also id.* at 440 n.24, 445 n.33, 903 P.2d at 1261 n.24, 1266 n.33 (quoting reservation of tenant rights in land titles and an 1846 law requiring Land Commission decisions to be made in accordance with native usage).

[16] "The State reaffirms and *shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes* and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, *subject to the right of the State to regulate such rights.*" *Id.* at 437, 903 P.2d at 1258.

[17] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 11–13 (2008); *see also infra* note 210 and accompanying text (rejecting deference to agency determinations about witness credibility and conflicting testimony, as unsuccessfully urged by the Commission on Water Resource Management in *In re Wai'ola O Moloka'i, Inc.* (*Wai'ola*), 103 Hawai'i 401, 441, 83 P.3d 664, 704 (2004)); *infra* notes 148–49, 154–55 and accompanying text (discussing *Mauna Kea II*'s failure to address a point of error based on shifting the burden of proof from applicants to intervening practitioners in violation of *Wai'ola* and *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.* (*Kukui I*), 116 Hawai'i 481, 174 P.3d 320 (2007)); *infra* notes 230–46, 250–51 and accompanying text (contrasting applicable limitations on the principle of agency deference under Hawai'i law with Hawai'i Supreme Court decisions that appear to treat standards of review as boilerplate—i.e., inappropriate "lawyering by headnote"—including, but certainly not limited to: *Kilakila 'O* [*Haleakalā*] *v. Board of Land & Natural Resources* (*Kilakila III*), 138 Hawai'i 383, 396, 406, 382 P.3d 195, 208, 218 (2016), and *Lāna'ians for Sensible Growth v. Land Use Comm'n* (*LSG IV*), 146 Hawai'i 496, 504, 463 P.3d 1153, 1161 (2020)).

[18] HAPA defines "contested case" (circularly) as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing" where "agency hearing" is defined as "only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." HAW. REV. STAT. § 91-1 (2012 & Supp. 2019). *See also id.* § 91-10(5) (2012 & Supp. 2019) ("Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the

applicants to intervening Native Hawaiian practitioners.[19] After initially mischaracterizing *PASH* and its Progeny, the *Mauna Kea II* majority deleted the offending language upon reconsideration *without bothering to address fundamental due process issues*.

The Recktenwald Court's inexplicable decision(s) to ignore binding precedent in *Mauna Kea II* is no isolated error, unfortunately. That opinion is, instead, sandwiched between the court's initial missteps in *Kilakila III* and its later decision in *LSG IV* compounding those errors. To avoid what appears to be a looming constitutional crisis, this article pulls back the judicial curtains and urges both greater respect and fidelity to the powers enshrined in Hawai'i Constitution article VI, section 1[20]—along with other unique provisions developed in response to Hawai'i's colonial history, including the 1978 constitutional amendments. By embracing its core judicial functions, the court can correct course by reestablishing the restorative justice legacy of our Law School's founder, former Chief Justice William S. Richardson (affectionately known as "CJ"), as dutifully carried out, for example, by three of CJ's former law clerks who participated in this symposium: Professor Emerita Melody MacKenzie, and former Hawai'i Supreme Court Associate Justices Robert G. Klein and Simeon R. Acoba.

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burden of persuasion."); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 391, 363 P.3d 224, 239 (2015) (observing that contested case hearing procedures including the opportunity to issue subpoenas, cross-examine witnesses, and present evidence through documents and testimony "are designed to ensure that the record is fully developed and subjected to adversarial testing *before* a decision is made").

[19] *Kukui I*, 116 Hawai'i at 507–09, 174 P.3d at 346–48; *Wai'ola*, 103 Hawai'i at 441–42, 83 P.3d at 704–05.

[20] In *Alaka'i Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 277 P.3d 988 (2012), Justice Simeon R. Acoba distinguished Article III of the U.S. Constitution from article VI, section I of the Hawai'i Constitution as follows: "the existence, structure, and composition of our judiciary is established by the Hawai'i Constitution and cannot be altered by the legislature. This indicates that the power to administer justice and adjudicate disputes that is conferred upon the courts is *presumed* and will be available to the people of the state" through the "constitutional power to administer justice" including the inherent, corollary power, which provides "that parties should have appropriate access to the courts of this state in resolving disputes." *Id.* at 283, 277 P.3d at 1008 (emphasis added). *Compare id.* at 288, 277 P.3d at 1013 (Recktenwald, C.J., concurring in part and dissenting in part, Nakayama, J., joining) ("I would hold that the legislature clearly intended to preclude judicial review of these protest decisions under . . . HRS chapter 103F. I would further hold that preclusion of judicial review does not raise *separation of powers concerns* in the circumstances presented here.") (emphasis added).

I. AGENCY INTERPRETATIONS OF THEIR OWN ADMINISTRATIVE REGULATIONS ARE NOT ENTITLED TO DEFERENCE UNDER *PASH*

In September 2020, the ICA issued an unpublished memorandum opinion, *Protect and Preserve Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n* (*PPKAA*),[21] which represents the most recent of more than eighty appellate court decisions in Hawai'i that cite to *PASH*. *PPKAA* cites *PASH* for the proposition that "restrictive interpretations of standing requirements imposed by an agency are not entitled to deference and may be reviewed *de novo* on appeal."[22] At the urging of an applicant seeking a shoreline management area (SMA) use permit to develop a mix of affordable and market units and housing types on undeveloped and vacant land along the shoreline in Lāhainā, Maui,[23] the MPC applied a restrictive interpretation of the following administrative regulation: "[a]ll persons who . . . can demonstrate they will be so directly and immediately affected by the matter before the commission that their interest in the proceeding is *clearly distinguishable from that of the general public* shall be admitted as parties upon timely application for intervention."[24]

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[21] No. CAAP-15-0000478, 2020 WL 5512512 (Haw. Ct. App. Sep. 14, 2020), *cert. granted*, 2021 WL 195053 (Haw. Jan. 20, 2021). Joined by six individual petitioner-appellants, Protect and Preserve Kahoma Ahupua'a Association (PPKAA) is "an unincorporated organization whose mission is to preserve, protect, and restore the natural and cultural environment of the Kahoma Ahupua'a, including the Alamihi cultural area" and "[m]any of PPKAA's officers, members, and supporters are homeowners or lessees within the Kahoma Ahupua'a and reside within 500 feet of the proposed project site." *Id.* at *2.

[22] *Id.* at *4 (citing Public Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995), in addition to the court's earlier reference to *Wai'ola*, 103 Hawai'i at 425, 83 P.3d at 688, for the proposition that "an agency's interpretation of its own rules is entitled to deference *unless it is plainly erroneous or inconsistent with the underlying legislative purpose*") (emphasis added). *PPKAA* cites *PASH* three additional times for the proposition that such "restrictive" interpretations are subject to de novo review and/or not entitled to deference. *Id.* at *6 & n.4, *8.

[23] *Id.* at *1 (describing the project as covering 21.6 acres located within the Urban district and including "203 housing units, parking, landscaping, roadways, utility improvements, and 1.75 acres of residential parks"); *id.* at *2 (noting motion in opposition to PPKAA's petition to intervene, which argued failure to meet intervenor standing requirements under the MPC Rules).

[24] *Id.* at *4–5 (quoting Maui Planning Commission Rules of Practice and Procedure (MPC Rules) § 12-201-41(b) (2010)) (emphasis added). *See also PASH*, 79 Hawai'i at 432 n.9, 903 P.2d at 1253 n.9 (observing that MPC actions on SMA use permit applications are final and appealable under HAPA rather than to the Zoning Board of Appeals); Chang v. Plan. Comm'n, 64 Haw. 431, 450–51, 643 P.2d 55, 60 (1982) (citing an earlier version of the MPC Rules which, likewise, makes HRS chapter 91 applicable to proceedings on SMA use permit applications in Maui County).

By a vote of five-to-one, the MPC denied PPKAA's petition to intervene and orally approved the developer's SMA use permit application.[25] In their objection to this oral ruling, PPKAA noted the MPC's "*practice of always denying* complete Petitions to Intervene claiming that all petitioners' interests are not distinguishable from the general public."[26] After the MPC refused to reconsider PPKAA's initial decision denying the petition to intervene, the association filed an appeal with the Circuit Court for the Second Circuit of Hawai'i (Second Circuit Court)—which entered its (1) Findings of Fact, Conclusions of Law, Decision and Order Denying Appeal, and (2) Final Judgment on June 19, 2015, affirming the MPC's refusal to grant PPKAA's petition and instead approving the SMA use permit application.[27] On secondary appeal, the ICA agreed with PPKAA's argument that the MPC abused its discretion by denying the petition to intervene as a matter of right based on a restrictive interpretation of the agency's standing requirements.[28] The ICA also concluded that constitutional due process requires that PPKAA be afforded a contested case hearing on the SMA use permit application.[29]

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[25] *PPKAA*, 2020 WL 5512512, at *3.

[26] *Id.* (emphasis added); *see also id.* (arguing further that the MPC's "*consistent denial* of petitions to intervene on this basis amounted to the enforcement of 'a new rule regarding those who have standing to intervene in SMA permit application proceedings' that was promulgated without following the rule making procedures under HRS chapter 91") (emphasis added).

[27] *Id.* at *1, *3 (summarizing the relevant part of the Second Circuit Court's conclusions as follows: the MPC properly considered and applied MPC Rule section 12-201-41(b); the MPC did not abuse its discretion in denying permissive intervention; PPKAA's due process rights were not violated; the MPC's determination that the project was exempted from the General Plan was not clearly erroneous; and the MPC did not improperly engage in *de facto* rule making or fail to promulgate rules in compliance with HRS chapter 91).

[28] *Id.* at *4–8 (concluding that the ICA need not reach the points of error pertaining to the MPC's denial of permissive intervention and its alleged *de facto* rule making).

[29] *Id.* at *9–11. The ICA also concluded that before the MPC may approve the SMA use permit application on remand, the agency must make specific findings on the project's consistency with the Maui County General and Community Plans under HRS section 205A-26(2)(C), notwithstanding Maui County's designation of the project as an HRS section 201H-38 housing development via County Council Resolution 14-14. *Id.* at *11–12. HRS section 201H-38 purports to exempt certain housing projects "from all statutes, ordinances, charter provisions, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon." On the same day it accepted the application for certiorari by MPC and Stanford Carr Development, LLC, the Hawai'i Supreme Court issued a supplemental briefing order instructing the parties to address "whether HRS [Hawai'i Revised Statutes] § 201H-38 allows for exemptions from HRS § 205A-26(2)(C)." *PPKAA*, No. SCWC-15-0000478 (Haw. Jan. 20, 2021).

Rather than deferring to another county planning commission's interpretation of its administrative regulations, *PASH* applied *de novo* review in evaluating whether the putative intervenor satisfied standing requirements necessary to establish appellate jurisdiction under HRS section 91-14(a):[30]

> Although the HPC [Hawai'i County Planning Commission] Rules allow formal intervention through specified procedures, PASH was denied standing to participate in a contested case hearing because the agency found that its asserted interests were "substantially similar" to those of the general public. The HPC's restrictive interpretation of standing requirements is *not entitled to deference*. *See* [*Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67 & 70, 881 P.2d 1210, 1213 & 1216 (1994)] (citing *Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989); *Akau v. Olohana Corp.*, 65 Haw. 383, 388–89, 652 P.2d 1130, 1134 (1982)). *Cf. Mahuiki*, 65 Haw. at 515, 654 P.2d at 880 (recognizing that "a decision to permit the [proposed] construction . . . on undeveloped land in the [SMA] could only have an adverse effect on" the appellants' "essentially aesthetic and environmental" interests). Accordingly, we review *de novo* whether PASH has demonstrated that its interests were injured.[31]

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[30] HAPA includes a provision entitled "Judicial review of contested cases" that provides in relevant part:

> Any *person aggrieved* by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

HAW. REV. STAT. § 91-14(a) (2012 & Supp. 2019) (emphasis added). The standing analysis in *PASH* derives from this requirement that appellate jurisdiction of contested case hearings under HAPA extends only to persons who are "aggrieved" by an agency action.

[31] Public Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995) (initial emphasis added) (footnote omitted). *PASH* footnote 15 explains further that:

> individuals or groups requesting contested case hearing procedures on a SMA [Shoreline Management Area] permit application before the HPC must demonstrate that they will be "directly and immediately affected by the Commission's decision[.]" HPC Rule 4-2(6)(B). However, standing requirements are not met where a petitioner merely asserts "value preferences," which are not proper issues in judicial (or quasi-

Similar to MPC Rules § 12-201-41(b), HPC Rules § 4-2(6)(B) applied to persons who file timely requests demonstrating that they "will be so directly and immediately affected by the [HPC's] decision that that person's interest in the proceeding is *clearly distinguishable from that of the general public*"—language that the HPC erroneously relied upon to determine PASH did not have standing to participate in the contested case.[32] On certiorari from the ICA, the Hawai'i Supreme Court agreed that PASH sufficiently demonstrated "[t]hrough unrefuted testimony" its standing to participate in the contested case based on interests clearly distinguishable from those of the general public—viz., based on Native Hawaiian members' exercise of rights customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands.[33]

Although the ICA correctly applied the twenty-five-year-old *PASH* decision in *PPKAA*, the court nevertheless missed an important opportunity to highlight ongoing failures by government agencies to properly implement the *PASH* Guidelines. As previously explained by the Hawai'i Supreme Court in *PASH* footnote 15:

> The *cultural insensitivity* demonstrated by Nansay and the HPC in this case—particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public—emphasizes the need to avoid "foreclos[ing] challenges to administrative determinations through restrictive applications of standing requirements."[34]

Coincidentally, the Hawai'i County Planning Director who presumably provided the HPC with technical advice prior to the *PASH* decision, subsequently assumed BLNR's Hawai'i County seat from 1990 to 1998

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judicial) proceedings. *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216. Although the HPC Rules do not expressly require petitioners to detail the nature of their asserted interests in writing until *after* the HPC has determined whether a contested case hearing is required, *see* HPC Rules 4-6(b) and (c), a petitioner who is denied standing without having had an adequate opportunity to identify the nature of his or her interest may supplement the record pursuant to HRS § 91-14(e).

Id. at 434 n.15, 903 P.2d at 1255 n.15.

[32] *Id.* at 429 & n.4, 903 P.2d at 1250 & n.4 (emphasis added).

[33] *Id.* at 434, 903 P.2d at 1255.

[34] *Id.* at 434 n.15, 903 P.2d at 1255 n.15 (emphasis added) (citing Mahuiki v. Plan. Comm'n, 65 Haw. 506, 512, 654 P.2d 874, 880 (1982)). For the sake of clarity, given the titles provided for both the symposium and its initial panel, this article conforms to the short form *PASH* subsequently utilized by the Hawai'i Supreme Court, notwithstanding my previous effort to infuse a Hawaiian sense of place through use of the alternative short form *PASH/Kohanaiki*. David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 HAW. B.J. 13, 1997, at 1 & n.1.

(before returning as Hawai'i County Planning Director from 2000 to 2008), then serving another term with BLNR from 2014 to 2020, and ultimately receiving confirmation by the Hawai'i State Senate to BLNR's Hawai'i County seat again in 2020.[35]

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[35] Michael Brestovansky, *State Senate reappoints Yuen to BLNR*, HAW. TRIBUNE HERALD (July 11, 2020 12:05AM), https://www.hawaiitribune-herald.com/2020/07/11/hawaii-news/state-senate-reappoints-yuen-to-blnr/ (reporting that the State Senate voted 16-9 to confirm, after the Senate Committee on Water and Land voted 4-1 to issue a negative recommendation under the leadership of the committee's Hawai'i Island chair). *See, e.g.*, *In re* Conservation District Use Application (CDUA) HA-3568 (*Mauna Kea II*), 143 Hawai'i 379, 394, 431 P.3d 752, 767 (2018) (holding that constitutional due process did not require Yuen's disqualification based on comments made in a 1998 interview which "did not indicate he would approve all future telescope applications" and, thus, "did not fairly give rise to an appearance of impropriety and did not reasonably cast suspicion on Yuen's impartiality") (footnote omitted); *An Interview with Chris Yuen As He Leaves the Land Board*, ENV'T HAW. (July 1998), https://www.environment-hawaii.org/?p=3393 ("Once the state decided to have the astronomical facilities on Mauna Kea, the way the landscape looks is pretty changed. To me that's an *irrevocable* decision.") (emphasis added).

In the restorative justice context, it is worth noting retired William S. Richardson School of Law (WSRSL) Professor Chuck Lawrence's argument that courts should examine the cultural meaning of laws to determine the presence of collective, unconscious racism rather than looking for discriminatory motives, then demonstrating further how (i) the intent requirement in antidiscrimination law restricts notions of causation, and (ii) the individual fault model prevents collective healing from the wounds of racism. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–25 (1987), *cited in* Mari J. Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2202 n.33 (2000). In the context of tort reform, WSRSL Professor Mari Matsuda sounds an analogous call to exchange egocentric notions for more communal and connected understandings of social responsibility. *Id.* at 2195. These parallel analyses by Professors Lawrence and Matsuda deserve further scrutiny in the context of unsuccessful efforts by Native Hawaiian practitioners in both *Kilakila III* and *Mauna Kea II* to meet the high bar required to disqualify decisionmakers and/or the agency's legal counsel.

Professors Lawrence and Matsuda are among our country's most-cited law review authors. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 757 n.24, 769 (1996) (identifying Lawrence as the *only* minority author on the all-time list of the 100 most-cited articles); *id.* at 761 (listing Matsuda and Lawrence among a select group of authors with *multiple* publications on a second list consisting of the top-ten most-cited articles published each year for the ten most recent years); *id.* at 775–77 (listing articles written by Matsuda in 1987, 1989 and 1991, along with Lawrence's 1987 article above and a subsequent article written in 1990); *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 368-88 (1987) (including a call to provide reparations for Kānaka Maoli), *cited in* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1492 (2012); *id.* at 1489 (listing Lawrence's 1987 article *eighth* on the updated all-time top 100 list); *id.* at 1490, 1492, 1504 (identifying Matsuda among the authors with *multiple* articles on the updated all-time top 100 list, including her thirty-third ranked 1989 article and

II. REVISITING THE *PASH* GUIDELINES: ELEMENTS OF HAWAI'I'S CUSTOM DOCTRINE AND OTHER "BADLY NEEDED JUDICIAL GUIDANCE"

Just a few months before the Intermediate Court of Appeal's *PPKAA* decision, the Hawai'i Supreme Court reiterated in *Gas Co.*, *supra*, that *PASH* "reaffirmed the State's obligation to protect the *reasonable* exercise of customary and traditionally exercised rights of Hawaiians to the extent feasible."[36] Interestingly, this reference to the element of "reasonable[ness]"—one of seven elements under Hawai'i's Custom Doctrine addressed by the *PASH* Guidelines[37]—is the *one and only* proposition in the court's amended *Mauna Kea II* opinion that explicitly relies on *PASH*.[38] *PASH* addressed *numerous* other issues that touch upon "confusion surrounding the nature and scope of customary Hawaiian rights under HRS § 1-1,"[39] thereby seeking to effectuate (at least implicitly) the 1978 constitutional convention delegates' desire to ensure that "enforcement by the courts of these rights is guaranteed."[40] By further describing the *PASH* Guidelines as "applicable requirements for establishing such rights *in the instant case*," the court simultaneously acknowledged the case-by-case nature of inquiries concerning traditional and customary rights.[41] The following sections lay out some of these guidelines in greater detail, highlighting the agency-approved cultural insensitivity and unjustifiable lack of respect facilitated by *Mauna Kea II*.

A. PASH *footnote 43*

> The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights, *see* Haw. Const. article XII, § 7, necessarily allows the State to permit development that interferes with such rights in certain circumstances—for example, where the preservation and protection of such rights would result in "actual harm" to the "recognized interests of others." *Kalipi,* 66 Haw. at 12, 656 P.2d at 752. Nevertheless, the State is obligated to

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ninety-seventh ranked 1987 article).

[36] 147 Hawai'i 186, 206, 465 P.3d 633, 653 (2020) (citing *Mauna Kea II*, 143 Hawai'i at 395, 431 P.3d at 768) (emphasis added).

[37] 79 Hawai'i at 441 n.26, 903 P.2d at 1262 n.26 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 76–78 (Sharwood ed. 1874)).

[38] *Mauna Kea II*, 143 Hawai'i at 395, 431 P.3d at 768 (citing *PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43).

[39] 79 Hawai'i at 448, 903 P.2d at 1269.

[40] *See supra* note 14 and accompanying text.

[41] 79 Hawai'i at 448, 903 P.2d at 1269 (emphasis in original).

> protect the *reasonable* exercise of customarily and traditionally exercised rights of Hawaiians *to the extent feasible*.[42]

PASH footnote 43 recognized that an agency is authorized to permit development when it is *not feasible* to protect the exercise of such constitutionally protected rights without causing actual harm to other people's *recognized interests*—as opposed to "value preferences"[43] or mere privileges subject to agency discretion (and as further distinguished from various *constitutional* obligations).

In this regard, it is important to remember that the parties in *PASH* did not brief—nor did the court attempt to address—the interplay between article XII, section 7 and other constitutional public trust obligations.

B. PASH *footnotes 23 and 25*

> "All the witnesses who testified regarding traditional custom testified that the custom requires that anyone seeking access to the ahupua'a may only exercise those rights in the *uninhabited portions* of the ahupua'a where that person is a tenant, *always respecting the private areas* of other tenants." Kalipi's Reply Brief (No. 6957) at 11 (emphases added). Furthermore, as Kalipi understood his asserted gathering rights, "custom require[d] that *anything planted and cared for by people should be left alone*." Kalipi's Opening Brief (No. 6957) at 49 (emphasis added).[44]

A little later in the same section of the *Mauna Kea II* opinion discussed in Section II *supra*,[45] the court references BLNR's reliance on an earlier part of the *PASH* decision where the court explains that:

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[42] *Id.* at 450 n.43, 903 P.2d at 1271 n.43 (emphases added). *Cf.* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 174, 623 P.2d 431, 438, 439–40 (1981) (discussing "injury to legally-recognized rights or interests which are personally and peculiarly theirs" and citing Dalton v. City and Cnty., 51 Haw. 400, 403, 462 P.2d 199, 202 (1969), as requiring a "concrete interest" in a "legal relation" subject to protection).

[43] *See PASH*, 79 Hawai'i at 434 n.15, 903 P.2d at 1255 n.15 (quoting *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216), *supra* quoted note 31.

[44] *Id.* at 439 n.23, 903 P.2d at 1260 n.23; *id.* at 429 n.1, 903 P.2d at n.1 (defining ahupua'a as "a land division usually extending from the mountains to the sea along rational lines, such as ridges or other natural characteristics"). *See also id.* at 440 & n.25, 903 P.2d at 1261 & n.25 (acknowledging that "Plaintiff's witnesses [in Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982),] testified at trial that there have continued in certain [ahupua'a] a range of practices associated with the ancient way of life which required the utilization of the *undeveloped property* of others and which were not found in § 7-1" including "the gathering of items *not delineated* in § 7-1 and the use of defendants' lands for *spiritual and other purposes*") (emphases added); *infra* Section II.C. (discussing *PASH* footnotes 24 and 27).

[45] 143 Hawai'i at 396, 431 P.3d at 769 (noting that BLNR "concluded that the two ahu

> [T]he non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances. *See, e.g.*, *supra* note 23 and *infra* note 43. In any event, we reiterate that the State retains the ability to *reconcile* competing interests under article XII, section 7. We stress that *unreasonable* or *non-traditional* uses are not permitted under today's ruling. . . .
>
> There should be little difficulty accommodating the customary and traditional Hawaiian rights asserted in the instant case with Nansay's avowed purposes. A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the *continued viability* of Hawaiian land tenure ideals in the modern world.[46]

PASH footnote 23 directly contradicts the asserted rationale for *Kalipi*'s judicially crafted requirement purporting to limit traditional and customary gathering practices to "undeveloped lands"[47]:

> The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the [ahupua'a], including fully developed property, to gather the enumerated items.[48] *See*, *Pacific Ins. Co., Ltd. v. Oregon Ins. Co.*, 53 Haw. 208, 490 P.2d 899 (1971) (departure from express language permitted to avoid absurd and unjust result and is clearly inconsistent with purpose of the Act). *In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.*[49]

In other words, the *Kalipi* court invoked a canon of statutory interpretation applicable to ambiguous statutory language: "[e]very construction which leads to an absurdity shall be rejected."[50] As explicated by the *PASH* court, however, *all* the witnesses who testified regarding traditional and customary gathering practices in *Kalipi* indicated that the private areas of

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built on the Access Way in 2015 as protests against the TMT [Thirty Meter Telescope] did not constitute a traditional and customary right or practice, and in any event *did not meet* PASH*'s requirement of reasonableness*") (emphasis added) (citing *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268).

[46] 79 Hawai'i at 447, 903 P.2d at 1268 (emphasis added).

[47] 66 Haw. at 7–9, 656 P.2d at 749–50.

[48] *But see supra* text accompanying note 44 (quoting *PASH* footnote 23).

[49] *PASH*, 79 Hawai'i at 439, 903 P.2d at 1260.

[50] HAW. REV. STAT. § 1-15(3) (2009 & Supp. 2019).

others were *always respected* and these practices were only exercised in uninhabited areas within the ahupua'a.[51]

Available evidence thus rebutted the absurdity conjured up by the *Kalipi* court, thereby undermining this judicially crafted interpretation—which the opinion's author, perhaps, may have included to ensure his colleagues' unanimous support.[52]

C. PASH *footnote 26*

Among other things, *PASH* footnote 26 cites BLACKSTONE'S COMMENTARIES for the proposition that "continuous exercise is not required: 'the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove'"—in other words, "the alleged custom must be, or have been . . . without interruption (as to the *right* versus *exercise* thereof . . .)."[53] Accordingly, *PASH* reconciled Chief Justice Richardson's initial references to what a casual reader might interpret as the imposition of a "continued use" requirement,[54] with the CJ's subsequent use of *future* tense as follows: "the *Kalipi* court also indicated that the traditional practices enumerated under HRS § 7-1 remain 'available to those who *wish to continue* those ways.'"[55]

A crabbed interpretation of this particular *PASH* Guideline arose in relation to the Kūkaniloko Birthstones State Monument (Wahiawā, O'ahu). A Deputy Attorney General (who, coincidentally, represented BLNR in both *Mauna Kea I* and *Mauna Kea II*) responded to a legislator's inquiry about the extent to which article XII, section 7 codifies the traditional and customary right to subsistence with this misleading statement: "Hawaiian

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[51] *PASH*, 79 Hawai'i at 439 n.23, 903 P.2d at 1260 n.23.

[52] In preparation for an upcoming Native Hawaiian Land Rights Seminar, Professor Mackenzie asked me to prepare a memorandum for her and CJ (who "agrees with the discussion of *Kalipi* in *PASH*"). Memorandum from David M. Forman to Melody K. MacKenzie and CJ Richardson, Dec. 4, 1995 (on file with author; presumably misdated given textual discussion of two subsequent events: a December 8, 1995 "Island Issues" television broadcast, and a December 18, 1995 forum). The following year, CJ Richardson reportedly said he would have voted the same way had he been sitting on the court for the *PASH* decision. Janice Otaguro, *Islander of the Year*, HONOLULU MAG. 33, 69 (Jan. 1996).

[53] *Id.* at 441 n.26, 903 P.2d at 1262 n.26 (emphasis in original), *cited supra* note 37.

[54] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10–12, 656 P.2d 745, 751–52 (1982), *cited with approval in* Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992); *PASH*, 79 Hawai'i at 440, 903 P.3d at 1261.

[55] *PASH*, 79 Hawai'i at 449, 903 P.2d at 1270 (emphasis added) (quoting *Kalipi*, 66 Haw. at 9, 656 P.2d at 750); *see also id.* at 439, 903 P.2d at 1260 (quoting *Kalipi*, 66 Haw. at 8–9, 656 P.2d at 749–50).

usage must be based on an actual traditional practice that has been continued[.]"[56] However, the Deputy's letter notably omits reference to the *PASH* court's unmistakable clarification provided on one of the cited pages:

> [T]he right of each ahupua'a tenant to exercise traditional and customary practices *remains intact, notwithstanding arguable abandonment of a particular site*, although this right is potentially subject to regulation in the public interest. *See supra* note 26 (citing Blackstone's Commentaries for the proposition that *continuous exercise is not absolutely required* to maintain the validity of a custom).[57]

D. PASH *footnote 27*

The very next footnote in *PASH* recognizes the importance of considering both the original Native Hawaiian language and English language versions of legislation adopted during the Kingdom of Hawaii. More specifically, the court acknowledged incorporation of traditional Native Hawaiian world views reflecting a cultural link to the land when the constitutional monarchy created private property rights to preserve the "political existence" of the Kingdom,[58] while continuing to protect the rights of native tenants.[59] Thus, *PASH* footnote 27 provides:

> *Kalipi* implicitly rejected the Hawaiian Trust Company's argument, which was based on language in [*Oni v. Meek*, 2 Haw. 87 (Haw. Kingdom 1858),] to the effect that the rights provided by the Act of August 6, 1850, were declarative of "*all* the specific rights of the [*hoa'āina*] (except fishing rights) which should be held to prevail against the fee simple title of the konohiki[.]" 2 Haw. at 95.[60]

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[56] Letter from Deputy Att'y Gen. Julie H. China to Rep. Amy Perruso, (Nov. 27, 2019) (citing *PASH*, 79 Hawai'i at 449–50, 903 P.3d at 1270–71).

[57] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271 (emphasis added).

[58] *Id.* at 444, 903 P.2d at 1265 (quoting 1 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 3 (1845–46)). *See also id.* at 437 n.21, 903 P.2d at 1258 n.21 (tracing the origins of protections for traditional and customary rights under HRS section 1-1 to unwritten laws predating the Kingdom's first constitution in 1840).

[59] *Id.* at 443–44, 903 P.2d at 1264–65 (observing that the 1839 Declaration of Rights incorporated in the 1840 constitution, provided that "nothing whatever shall be taken from any individual except by express provision of the laws" and citing Kekiekie v. Dennis, 1 Haw. 42, 43 (1851), for the proposition that the rights of each hoa'āina—or ahupua'a tenant—were secured by the 1840 Constitution); *id.* at 445 n.33, 903 P.2d at 1266 n.33 (quoting the Act of April 27, 1846, requiring the Land Commission to make its decisions "in accordance with . . . native usages in regard to landed tenures").

[60] *Compare* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 121–22, 122 n.133 (1998) (arguing that this narrow reading of *Oni* reiterated in Forman & Knight, *supra* note 34, at 8–

> The English version of the 1850 Act uses the term "people," which was held to be synonymous with the word "hoa'āina." *Id.* at 96. The word "hoa'āina" is defined as "[t]enant, caretaker, as on a *kuleana*." Pukui & Elbert, *Hawaiian Dictionary* 73 (2nd ed. 1986). Meanwhile, the term "tenant" includes "one who holds or possesses real estate or sometimes personal property . . . by *any kind* of right[.]" *Webster's Third New Int'l Dictionary* 2354 (1967 ed.) (emphasis added). Therefore, it is possible to construe the term "tenant" so as to incorporate the traditional native Hawaiian concept of a cultural link to the land. *See McBryde Sugar Co. v. Robinson* [*McBryde II*], 55 Haw. 260, 289 n.29, 517 P.2d 26, 42 n.29 (1973) *cert. denied,* 417 U.S. 976, 94 S. Ct. 3183, 41 L.Ed.2d 1146 (1974) (Levinson, J., dissenting) (suggesting the need for comparative analysis of bilingual statutes because the English version is binding under HRS § 1–13 only when there is a "radical or irreconcilable difference" between the two versions); *In re Ross,* 8 Haw. 478, 480 (1892) ("[t]he effort is always made to have [the two versions] exactly coincide, and the legal presumption is that they do"). *See also infra* note 35 (discussing the definition of "maka'āinana"). Nevertheless, we recognize that the Hawaiian language version of this Act actually uses the word "kanaka." *See supra* note 24.[61]

Surprisingly, it does not appear than *any* opinion issued since *PASH* cites this footnote acknowledging the traditional and customary Native Hawaiian concept of a *cultural link to the land.* Nor is the author aware of any subsequent decision involving the exercise of traditional and customary

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13, "is most difficult to reconcile with the *Oni* court's broad and unqualified language and its manifest awareness of the sweeping consequences of its decision"), *with* Forman & Knight, *supra* note 34, at 12 (quoting the 1839 Declaration of Rights, as incorporated in the 1840 Constitution: "nothing whatsoever shall be taken from any individual except by express provision of the laws"). With all due respect to the late Paul Sullivan—former attorney for the U.S. Navy in Hawai'i and adjunct faculty member of the William S. Richardson School of Law—his interpretation of dicta in *Oni* fails to address the applicable *constitutional* prohibition against implied abrogation.

[61] *PASH,* 79 Hawai'i at 441 & n.27, 903 P.2d at 1262 & n.27. In addition to defining the word "kanaka," *PASH* footnote 24 is further significant because it reaffirms the following proposition:

> *Territory v. Liliuokalani,* 14 Haw. 88, 95 (Haw. Terr. 1902) (holding that a similar reservation did not incorporate any public right to the use of certain shoreline areas included within a grant of land), does not necessarily dispose of the "kuleana" reservation [in the title to the lands in question] as a source of additional gathering rights beyond HRS § 7-1. [*Kalipi,* 66 Haw.] at 12, 656 P.2d at 752.

PASH, 79 Hawai'i at 440 & n.24, 903 P.2d at 1261 & n.24 (discussing the "other requirements of *Kalipi*"—besides "undeveloped lands" and "no actual harm"—as discussed in *PDF v. Paty,* 73 Haw. at 615–18, 837 P.2d at 1269–71).

rights that undertakes a comparative analysis of the Hawaiian and English versions of relevant statutory provisions.[62]

E. PASH *footnote 28*

PASH exposed another inconsistency in *Kalipi* regarding Billy Kalipi's unaddressed, alternative assertion of traditional and customary gathering rights under HRS section 1-1; the *Kalipi* court erroneously suggested that a special jury verdict decided the issue adverse to the practitioner:

> Immediately prior to its substantive analysis, the court in *Kalipi* summarily stated:
>
> > Kalipi asserts that it has long been the practice of him and his family to travel the lands of the Defendants in order to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices. . . .
> >
> > A trial was had and *the jury, by special verdict, determined that Kalipi had no such right.* He now alleges numerous errors in the trial court's instructions to the jury and conduct of the trial. We find, for the reasons stated below, that none of the alleged errors warrants reversal.
>
> *Kalipi,* 66 Haw. at 3–4, 656 P.2d at 747 (emphases added). Nevertheless, the undisputed facts of the case reveal that the jury asked the trial court, "May we

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[62] *See, e.g.*, David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. HAW. L. REV. 319, 335–43 (2008) (challenging statements concerning Hawaiian Kingdom law reportedly made by the federal trial court judge who presided over Doe v. Kamehameha Schools, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd in part and rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007), in addition to a prominent kumu hula, or dance teacher, and stressing the importance of analyzing claims involving traditional and customary usage on a case-by-case basis); *id.* at 343–45 (discussing the continuing relevance of Hawaiian custom and usage relating to the term hānai—viz., the traditional practices of adoption (both formal and informal), sometimes including rights of inheritance or other rights—as reflected in cases including Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), and Young v. State Farm Mutual Auto. Ins. Co., 67 Haw. 544, 697 P.2d 40 (1985)); *id.* at 347–48 (discussing the reemergence of core Hawaiian values and explaining that "[c]ontinuous exercise is not required to establish a Hawaiian custom or usage" because "Hawaiian culture . . . renews itself in waves or pulses that are 'transformations'") (citations omitted); *id.* at 351–53 (citing scholarship that supports development of an "aloha jurisprudence" along with the "embrace [of] American cultural responsibility . . . in light of the unique historical and legal context of these Hawaiian islands"); *id.* at 354 (concluding with a call for advocates to "pursue a renewed focus upon the Hawaiian usage exception as a vehicle for perpetuating cultural values and resources").

> please have the book with the 1892 reference to rights in question . . . [i.e., Special Verdict Interrogatory Number 8]?" The trial court responded by instructing the jury to *disregard* Special Verdict Interrogatory Number 8, which read: "Did Hawaiian custom and usage as of 1892 include the right of a tenant of land in an [ahupua'a] to gather native products from his [ahupua'a]?" *See* Kalipi's Opening Brief (No. 6957) at 14, 53–57; Hawaiian Trust's Answering Brief (No. 6957) at 52–54."
>
> Although Jury Instruction No. 21 already contained the 1892 reference (i.e., the text of HRS § 1–1), it is difficult to reconcile the trial court's response, or the appellate court's conclusion that there was no reversible error, with the implicit rejection of related Jury Instruction No. 19 in *Kalipi*. *See supra* note 27 & accompanying text (rejecting an argument based on parallel language from *Oni*). Jury Instruction No. 19 read:
>
> > If you find that prior customs, usages and practices with respect to rights of kuleana owners *have been superseded or abrogated by the enactment of [HRS] § 7–1* or its predecessor statutes, then you may find that the specific rights which are enumerated in [HRS] § 7–1 are *all of the rights* . . . which Plaintiff may be entitled to exercise.
>
> Kalipi's Opening Brief (No. 6957) at 54 (emphases added); Hawaiian Trust's Answering Brief (No. 6957) at 10 (emphases added).[63]

Explicitly incorporating by reference the court's earlier discussion,[64] Justice Klein's unanimous *PASH* opinion explained that "[t]he *Kalipi* court *implicitly acknowledged* the possibility of recognizing certain customary rights, under HRS § 1-1, to gather items that are not specifically delineated in HRS § 7-1" without fully embracing "the opportunity to clarify *Oni* with respect to the potential application of the doctrine of custom."[65]

F. PASH *footnote 29*

> Kalipi focused on his status as a landowner merely as an attempt to show that he belonged to the class of persons intended to benefit under HRS § 7–1. *See* Kalipi's Opening Brief (No. 6957) at 28 (citing *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 192, 504 P.2d 1330, 1341 (defining "people" in HRS § 7–1 parenthetically as "meaning owners of land"), *aff'd upon rehearing,* 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed* and *cert. denied,* 417 U.S. 962, . . . *cert. denied,* 417 U.S. 976 . . . (1974)). In other words, Kalipi claimed that the statute preserved access and gathering rights as an incident of ownership, so long as these rights were utilized for valid purposes associated

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[63] 79 Hawai'i at 441–42 n.28, 903 P.2d at 1262–63 n.28.

[64] *Id.* at 440 & n.25, 903 P.2d at 1261 & n.25, *quoted supra* note 44.

[65] *Id.* at 441, 903 P.2d at 1262 (emphasis added).

> with that particular site. *Cf. Damon v. Tsutsui,* 31 Haw. 678, 687 ([Terr. Haw.] 1930); *Smith v. Laamea,* 29 Haw. 750, 755–56 ([Terr. Haw.] 1927); *Haalelea v. Montgomery,* 2 Haw. 62, 71 ([Haw. Kingdom] 1858) (interpreting the term "tenant" as passing the common right of piscary to the grantee, through sale or other conveyance, as an appurtenance to the land). The claim in *Oni* involved a purported right of pasturage arising primarily from the claimant's status as a landowner. 2 Haw. at 90. To the extent that Oni's claims might have otherwise been based on ancient tenure, he abandoned these claims by entering into a special contract to provide labor for the konohiki in exchange for the right to pasture his horses. *Id.* at 91.[66]

Consistent with the discussion of *PASH* footnotes 23, 25, 27 & 28 in Sections II.B., II.D. and II.E. above, the *PASH* court opined that "the *Kalipi* court's preoccupation with residency requirements under HRS § 7-1 obfuscated its cursory examination of Kalipi's alternative claim based on customarily and traditionally exercised Hawaiian rights" and, accordingly, "read the discussion of customary rights in *Oni* and *Kalipi* as merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner."[67]

With that premise in mind, the *PASH* court proceeded to disavow dicta in several cases that might otherwise have supported the adoption of relevant common law principles. First, the court disapproved any additional requirements for the establishment of customary rights based on *Kalipi*'s description of the relevant inquiry as "whether the privileges which were permissibly or contractually exercised persisted to the point where it had evolved into an *accepted* part of the culture and whether these practices had continued without *fundamentally violating the new system*."[68]

Second, *PASH* noted that "[o]ne of the most dramatic differences in the application of custom in Hawai'i is that passage of HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice[,]"[69] relying on *Zimring I, supra*, as having "implicitly disapproved the 'time immemorial' standard"[70]—which *Oni v. Meek* suggested in dicta to the contrary, without offering a conclusive

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[66] *Id.* at 442 n.29, 903 P.2d at 1263 n.29.

[67] *Id.* at 441–42, 903 P.2d at 1262–63.

[68] *Id.* at 446 & n.37, 903 P.2d at 1267 & n.37 (quoting *Kalipi*, 66 Haw. at 11 n.5, 656 P.2d at 751 n.5).

[69] *Id.* at 447–48 & n.39, 903 P.2d at 1268–69 & n.39 (relying instead on State v. Zimring (*Zimring I*), 52 Haw. 472, 475, 479 P.2d 202, 204 (1970) ("the Hawaiian usage mentioned in HRS § 1-1 is usage which predated November 25, 1892")).

[70] *Id.* at 447 n.39, 903 P.2d at 1268 n.39.

opinion, "is entitled to great weight[.]"[71] Presumably, the *more demanding* time immemorial standard would have instead required practitioners to establish the origins of their claimed traditional and customary practices as far back in history such that "the memory of man runneth not to the contrary[.]"[72] Moreover, *PASH* footnote 39 observed that:

> Contrary to the apparent understanding of the *Oni* court: (1) "consistency" is properly measured against other customs, not the spirit of the present laws; (2) a particular custom is "certain" if it is objectively defined and applied; certainty is not subjectively determined; and (3) "reasonableness" concerns the manner in which an otherwise valid customary right is exercised—in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no "good legal reason" against it.[73]

The *PASH* court then added that "Nansay is not precluded from *raising the issue* of standing on remand" under HRS section 91–9(c).[74] This reference to HRS chapter 91, at least arguably, implies the *PASH* court's recognition that the burden of proof in contested case hearings under HRS section 91–10(5) must be borne by the applicants: "Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence."

A third difference in Hawai'i's Custom Doctrine is that the English common law prohibition on *profit a prendre*[75] is clearly inapposite.[76]

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[71] 2 Haw. 87, 90 (Haw. Kingdom 1858), *quoted in PASH*, 79 Hawai'i at 447, 903 P.2d at 1268.

[72] *See PASH*, 79 Hawai'i at 441 n.26, 903 P.2d at 1262 n.26 (quoting the first of seven elements under the doctrine of custom as listed in BLACKSTONE'S COMMENTARIES, *supra* note 37).

[73] *Id.* at 447 n.39, 903 P.2d at 1268 n.39.

[74] *Id.* (emphasis added).

[75] *See, e.g.*, *In re* West Chestnut Realty of Haverford, Inc., 173 B.R. 322, 324–25 (E.D. Pa. 1994) (defining *profit a prendre* as "a right to make use of the soil of another" including "the right of entry and the right to remove and take from the land the designated products or profit" as well as "the right to use such of the surface as is necessary and convenient for the exercise of the profit").

[76] *PASH*, 79 Hawai'i at 448, 903 P.2d at 1269. *Cf.* United Congregational and Evangelical Churches of Moku'aikaua v. Heirs of Kamamalu (*United Churches*), 59 Haw. 334, 343, 582 P.2d 208, 214 (1978) (Richardson, C.J.) ("The State, as holder of the title, is *free to use and develop the lots so long as the State does not interfere substantially* with religious and educational uses by the churches. As a matter of sound administrative policy, the State presumably will in any event *give full consideration to the historical and cultural values which have attached to the lots*") (emphasis added); *id.* (acknowledging "evidence showing religious and educational uses by the United Churches and its predecessors since

Fourth, and finally, *PASH* declined to decide whether rights under HRS section 1-1 may be invoked by "descendants of citizens . . . who *did not* inhabit the Hawaiian islands prior to 1778" and expressly reserved comment regarding "whether non-Hawaiian members of an 'ohana . . . may legitimately claim rights protected by article XII, section 7 of the state constitution and HRS § 1-1."[77] The court clarified that passing references to a lower court finding in *PDF v. Paty* that PDF's membership included persons of "fifty percent or more Hawaiian blood"[78] and citations to affidavits of persons with at least one-half native Hawaiian blood[79]—were not meant to imply the court's endorsement of a fifty percent blood quantum requirement for claims based upon traditional and customary rights.[80]

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the infancy of modern Hawaiian property law, under a good faith claim of right, leads us to the conviction that, under the special facts of this case, justice requires our recognition that the United Churches possess limited equitable rights in the lots"). *United Churches* drew an analogy to the law regarding presumed lost grants of easements, "hold[ing] that the United Churches possess equitable rights in the lots which entitle the churches to continue to use the lots for religious and educational purposes, including burial purposes, until such uses are abandoned." *Id.* at 344, 582 P.2d at 213; *id.* at 338, 582 P.2d 211 (concluding that, notwithstanding the state's fee simple title, the churches had "an equitable right akin to a prescriptive easement, entitling the churches to continue to use the lots for religious and educational purposes, without interference from the State, until such uses are abandoned"). *Id.* at 342 n.9, 582 P.2d at 214 n.9 (noting the trial court's determination that "any abandonment has not been voluntary but has been induced by the State's insistence on its ownership of the lots"). By comparison, traditional and customary rights trace back *prior* to the creation of private property rights in the mid-nineteenth century, suggesting a much more substantial foundation than equitable rights. *See supra* note 15 (citing *PASH*, 79 Hawai'i at 437 n.21, 903 P.2d at 1258 n.21); *see also* discussion *supra* Section II.C. (citing *PASH*, 79 Hawai'i at 441 n.26, 803 P.2d at 1262 n.26).

[77] *PASH*, 79 Hawai'i at 449 & n.41, 903 P.2d at 1270 & n.41. See also *infra* note 96 (discussing State v. Hanapi, 89 Hawai'i 177, 186 & n.8, 970 P.2d 485, 494 & n.8 (1998), which references the *disavowal* of any blood quantum requirement under the *PASH* Guidelines and *expressly declines* to reach the issues left open in *PASH* footnote 41). In *Pele Def. Fund v. Estate of Campbell*, No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002), a trial court concluded that non-Hawaiians married to Hawaiians have the same right to claim constitutional protection for the exercise of traditional and customary practices. *Id.* (listing Conclusions of Law (COL) 33–36 and 64).

[78] 73 Haw. 578, 615 n.28, 837 P.2d 1247, 1269 n.28 (1992).

[79] *Id.* at 620 n.34, 837 P.2d at 1272 n.34.

[80] *PASH*, 79 Hawai'i at 448–49, 903 P.2d at 1269–70; *see also id.* at 449, 903 P.2d at 1270 (explaining that: (i) the term "native Hawaiian" in the Hawaiian Homes Commission Act is "not expressly applicable to other Hawaiian rights or entitlements"; (ii) the word "native" does not appear in HRS § 1-1; (iii) "[b]ecause a specific proposal to define the terms 'Hawaiian' and 'native Hawaiian' in the 1978 Constitutional Convention was not validly ratified, the relevant section was deleted from the 1985 version of HRS"; and (iv) "[c]ustomary and traditional rights in these islands flow from native Hawaiians' pre-existing

G. PASH *footnote 44*

PASH then proceeded to reconcile the discrepancies identified in Sections II.A. through II.F. above, by providing additional "badly needed judicial guidance"[81]—viz., clarifying that *Kalipi* "did not expressly hold that the exercise of customary gathering practices would be absurd or unjust when performed on land that is *less than fully developed*."[82] *PASH* further acknowledged the court's choice "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed'"[83] (presumably due to the absence of a mature administrative record), then explained the court's decision to:

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sovereignty" such that "[t]he rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States") (citing Kahalekai v. Doi, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979); Hawai'i Organic Act, § 83 (2009 & Supp. 2019); Act of April 30, 1900, c. 339, 31 Stat. 141, 157 (as amended).

[81] *See supra* text accompanying note 14.

[82] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271 (emphasis added).

[83] *Id. See, e.g.*, STATE OF HAW. OFF. OF PLAN., *PASH* – KOHANAIKI STUDY GROUP: ON NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY PRACTICES FOLLOWING THE OPINION OF THE SUPREME COURT OF THE STATE OF HAWAI'I IN PUBLIC ACCESS SHORELINE HAWAII V. HAWAI'I COUNTY PLANNING COMMISSION, H.R. 19-197, Reg. Sess., at 9–10, 28 (1998). The report provides a list of factors—recognizing that "[s]ome of these factors may not be applicable in every case" but should, nevertheless, "be considered in determining whether a particular parcel should be considered fully developed" while combining "[u]ndeveloped and not yet (or less than) fully developed land . . . because both are subject to a higher level of scrutiny than fully developed land when analyzing proposed uses." *Id.* at 28 (section 2.2.2.). Factors listed under the fully developed category where it may be inconsistent to allow [or] enforce the practice of traditional Hawaiian gathering rights" include:

> [i] Parcel has been issued last discretionary permit to construct improvements (e.g.[,] zoning, shoreline management permits, etc.).
>
> [ii] Parcel does not require any discretionary permits to implement the desired use.
>
> [iii] The landowner's expectation of the need to exclude those who exercise traditional and customary rights is high.
>
> [iv] The owner's expectation, based in part on the history of the property and the absence of natural and cultural resources, is low that both access and traditional practices will be exercised on the property.
>
> [v] The expectation of those who exercise traditional and customary practices is low that they will have both access and the ability to practice.
>
> [vi] There is substantial investment in infrastructure on or improvements to the property, and appropriate access to natural and cultural resources is available.

> [R]efuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications. Such an approach would reflect an *unjustifiable lack of respect for gathering activities as an acceptable cultural usage* in pre-modern Hawai'i, . . . which can also be successfully incorporated in the context of our current culture.[84]

The reference above to an "unjustifiable lack of respect" recalls the *PASH* court's earlier criticism of "cultural insensitivity[.]"[85]

In this regard, several of the *PASH* court's statements can be interpreted as tacit rejection of the developer's argument: "[w]hen the owner develops land, the gathering rights disappear."[86] For example:

1) "the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property'"[87];
2) "the western concept of exclusivity is not universally applicable in Hawai'i"[88]; and

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[vii] Agricultural District lands in cultivation or improved for pasturage, where appropriate access to natural and cultural resources is available.

[viii] Agricultural lots that have improvements, structures, and infrastructure equal to urban and rural lots, where appropriate access to natural and cultural resources is available.

[ix] State urban classified lands with buildings, development permits, infrastructure, improvements or cultivated crops or husbanded animals, where appropriate access to natural and cultural resources is available.

[x] Property is zone or used for intensive residential, commercial, industrial or hotel use, and appropriate access to natural and cultural resources is provided.

[xi] Lot size is small: under [ ] in the Urban District; under [ ] in State Conservation and Agricultural Districts.

Id. at 29 (bracketed material left blank in original).

[84] 79 Hawai'i at 450, 903 P.2d at 1271 (citation omitted).

[85] *See supra* text accompanying note 31 (quoting *PASH* footnote 15).

[86] *See* Melody Kapilialoha MacKenzie, *Ke Ala Pono – The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447, 457 & n.75 (2011) [hereinafter MacKenzie, *Ke Ala Pono*] (citing the Second Supplemental Brief (Opening Brief) for Petitioner-Appellee-Appellant Nansay Hawaii at 19, [*PASH*] (No. 15460) (Haw. Aug. 27, 1993)); Forman & Knight, *supra* note 34, at 18 & n.126. Ultimately, the HPC did not have an opportunity to implement the *PASH* Guidelines because no agency hearing was held on remand after the developer withdrew its permit application due to lost financing from the Japan-based investor. Forman & Knight, *supra* note 34, at 20 n.139.

[87] 79 Hawai'i at 442, 903 P.2d at 1263.

[88] *Id.* at 447, 903 P.2d at 1268.

> 3) "In the instant case, Nansay argues that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights. However, Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawai'i."[89]

Regrettably, however, *PASH* remains the *only* Hawai'i Supreme Court opinion to rely on a statutory provision enacted nine years earlier in 1986 authorizing the judiciary (along with other branches of government) to give "consideration to the 'Aloha Spirit'" when exercising their powers on behalf of the people.[90]

By considering and applying the aloha spirit, the justices in *PASH* implicitly embraced restorative justice principles previously developed under the leadership of Chief Justice William S. Richardson (1966 to 1982).

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[89] *Id.* at 451, 903 P.2d at 1272.

[90] *Id.* at 450 n.44, 903 P.2d at 1271 n.44 (quoting HRS § 5–7.5(a) and (b), which authorize decisionmakers to "give consideration to the 'Aloha Spirit[,]'" meaning "the working philosophy of native Hawaiians" that reflects "the essence of relationships in which each person is important to every other person for collective existence"). *But see* Bettencourt v. Bettencourt, 80 Hawai'i 225, 228–30 & n.1, 909 P.2d 553, 556–58 & n.1 (1995) (noting an attorney's citation to the "Aloha Spirit" statute as his lone authority—despite arguably applicable precedent, and notwithstanding five extensions of time to file the brief—which "excoriates individual family court judges personally in a scathingly contemptuous diatribe" accompanied by "running sarcastic commentary" that compelled the Hawai'i Supreme Court to refer the record on appeal to the Office of Disciplinary Counsel for review and action).
First Circuit Court Judge Daniel Glen Heely also relied upon the Aloha Spirit statute in his subsequent (July 1996) oral and (October 1996) written rulings leading to Office of Hawaiian Affairs v. Housing and Community Dev. Corp. of Hawai'i (*HCDCH I*), 117 Hawai'i 174, 177 P.3d 884 (2008), *reversed*, Hawai'i v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). *See* Alan Matsuoka, *The Ceded Lands Ruling: Will it Break the Bank?*, HONOLULU STAR-BULLETIN, Jan. 13, 1997, http://archives.starbulletin.com/97/01/13/news/story1.html (reporting that Judge Heely's rulings "cited the federal government's apology for the illegal overthrow of the Hawaiian kingdom, and invoked a state law allowing him to 'contemplate and reside with the life force,' and consider the aloha spirit" before adding that "[t]he court cannot conceive of a more appropriate situation in which to attempt to apply the concepts set forth in the Aloha Spirit law . . . than ruling on issues that are directly related to the betterment of the native Hawaiian people").

III. PLACING *MAUNA KEA I* & *MAUNA KEA II* IN THE CONTEXT OF ONGOING NATIVE HAWAIIAN CLAIMS FOR RESTORATIVE JUSTICE

The Richardson Court recognized background principles of property law in Hawai'i that supported numerous restorative justice rulings:

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of the Hawai'i Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases – and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[91]

The "primarily Western orientation and sensibility" mentioned by CJ Richardson reflects the incomplete and exclusionary "grand narratives"[92] that prevailed in Hawai'i during the Republic and Territorial periods.

By comparison, from 1982 to 1993 "the court under Chief Justice Herman T.F. Lum . . . issued relatively few opinions on Native Hawaiian issues"[93] with the notable exception of *PDF v. Paty*, "in which Associate

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[91] Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6–7 (2010) (quoting Chief Justice Richardson's acceptance speech at the 2007 American Bar Association Spirit of Excellence Awards Luncheon in Miami, Florida).

[92] *See, e.g.*, Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 21–22 & nn.51–52 (1994) [hereinafter Yamamoto, *Courts and the Cultural Performance*] (citing sources with differing perspectives on "cultural narratives" that raise silenced voices and challenge the notion of objectivity in decisions process, versus "grand narratives"—which use prevailing language and imagery to translate perceptions and experiences of others into dominant understandings of society); *id.* at 3 (discussing "society's treatment of outsiders" during "slavery, the internment, and the statue of liberty immigrant experience"—which "ignore[d] the physical and cultural domination of America's indigenous peoples[.]"). As explained *supra* notes * and 6, I have carved out for publication elsewhere my application of critical race theory to indigenous environmental justice issues that continue to plague practitioners of traditional and customary rights.

[93] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448 n.4 (citing Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992)

Justice Robert G. Klein, writing for a unanimous court less than six months after his appointment, established important principles on standing and sovereign immunity in addition to substantive law regarding traditional and customary rights and the State's trust duties relative to the public land trust."[94]

The Honorable Ronald T.Y. Moon served as Chief Justice from 1993 to 2010 (just one month shorter than the Richardson Court's tenure). The Moon Court, likewise, furthered efforts by Hawai'i's people to engage in "a reconciliation process rooted in [kānaka] maoli or Native Hawaiian values . . . by opening the courts to Native Hawaiian claims and by understanding and recognizing the true harm[—]the emotional and spiritual costs as well as the loss of land and sovereignty[—]to the Native Hawaiian community."[95] For example, the Moon Court: rejected efforts to erect

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[hereinafter MacKenzie, *The Lum Court*]). Professor MacKenzie's earlier assessment described a pattern of "fidelity to established precedent and an avoidance of 'hard' issues" in which the court "consistently declined the opportunity to expand the law and give recognition to the unique cultural and religious claims of Native Hawaiians." MacKenzie, *The Lum Court*, *supra* this note, at 393; *see, e.g.*, Dedman v. Bd. of Land & Nat. Res., 69 Haw. 255, 261–62, 740 P.2d 28, 33 (1987), *cert. denied*, 485 U.S. 1020 (1988) (holding that the constitutional Free Exercise clause was not violated absent proof that native Hawaiian practitioners held ceremonies to honor the deity Pele in a Wao Kele 'O Puna rainforest area proposed for geothermal development).

[94] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448 n.4. In 2000, after two decades of service to the judiciary and at the age of fifty-two, Justice Klein retired from the court and transitioned to private practice well before the constitutionally mandated retirement age of seventy. *See generally* Kahikina Noa Detweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005) (discussing several of the most important Native Hawaiian Rights cases decided by Chief Justice William S. Richardson and Associate Justice Robert G. Klein).

Two years after Justice Klein's retirement from the bench, then Judge (and future BLNR Hearing Officer in *Mauna Kea II*) Riki May Amano issued her long-awaited decision on remand from the Hawai'i Supreme Court's 1992 order in Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993). *See* Pele Def. Fund v. Estate of Campbell, No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002) (relying on HRS section 1-1, as reaffirmed in article XII, section 7 of the Hawai'i Constitution, to rule in favor of Native Hawaiian plaintiffs' exercising traditional and customary subsistence, cultural, and religious practices beyond the boundaries of the ahupua'a where they reside). The landowner elected not to appeal the decision. *See id.* Less than seven months later, the state Judicial Selection Commission voted not to retain Judge Amano for a second term. Christie Wilson, *Hilo judge loses bid to stay on for second term*, HONOLULU ADVERTISER, Mar. 19, 2003, http://the.honoluluadvertiser.com/article/2003/Mar/19/ln/ln32a.html.

[95] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 447–48. "'Kānaka Maoli' literally means 'true people' and is [another] term that Native Hawaiians have traditionally used to refer to themselves; in modern times, it is used to refer to all persons of Native Hawaiian ancestry."

jurisdictional and procedural barriers to claims that involve traditional and customary rights,[96] recognized the right of Hawaiian Home Lands trust beneficiaries to file breach of trust claims against the State,[97] and "fully

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NATIVE HAWAIIAN LAW TREATISE, *supra* note *, at xv. In addition to the thirteen cases discussed in Professor MacKenzie's article involving traditional and customary rights, Hawaiian Home Lands trust breaches, and public land trust or "ceded" land claims, she acknowledged in a footnote that the Moon Court also decided "important water rights and environmental cases that significantly impact the Native Hawaiian community." MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448 n.4; *but see id.* at 448 (conceding that "[i]t would be a mistake to conclude that the Moon Court always ruled in favor of Native Hawaiian interests" because: (1) "the court has rebuffed attempts to clarify the public trust land revenues due to the Native Hawaiian community[;]" and (2) "[i]n a criminal law context, the court also limited Native Hawaiian traditional and customary rights.").

For example, in *State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998), the court established three minimum requirements for successfully pleading the affirmative defense of privilege in a criminal case based on constitutionally-protective Native Hawaiian rights: (1) qualification as a Native Hawaiian under *PASH*, leaving open the question of whether non-Hawaiian descendants of Hawaiian Kingdom citizens, or other non-Hawaiian members of an 'ohana—presumably including duly trained members of hālau hula in addition to other cultural, subsistence and religious practices—may assert such rights; (2) an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary Native Hawaiian practice, including testimony of experts or kama'āina witnesses; and (3) exercise of the right on undeveloped or less than fully developed property—i.e., specifically excluding lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure. *Id.* at 186 & n.8, 970 P.2d at 494 n.8.

[96] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448; *see also id.* at 455–59, 461–62 & 463-66. *See, e.g.*, Public Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995) (*see infra* Part II); Ka Pa'akai O Ka 'Āina v. Land Use Comm'n (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000) (providing an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests"); Kaleikini v. Thielen (*Kaleikini I*), 124 Hawai'i 1, 237 P.3d 1067 (2010) (allowing the court's first case involving 'iwi kūpuna, or Native Hawaiian ancestral remains, to proceed under the public interest exception to the mootness doctrine). Curiously, Professor MacKenzie neglected to discuss *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994), which held that agency hearings are required by law where issuance of a permit adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases—except as cited in *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 211, 891 P.2d 729, 298 (1995). MacKenzie, *Ke Ala Pono*, *supra* note 86, at 470 n.195.

[97] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448; *see also id.* at 469–82. *See, e.g.*, Bush v. Hawaiian Homes Comm'n (*Bush I*), 76 Hawai'i 128, 870 P.2d 1272 (1994) (declining to exercise appellate jurisdiction under HRS chapter 91 concerning the agency's approval of third party agreements benefiting non-Hawaiians in alleged violation of the Hawaiian Homes Commission Act (HHCA), because the beneficiaries lacked a property interest sufficient to establish a constitutional due process right to a hearing); Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawai'i 192, 891 P.2d 729 (1995) (upholding challenge involving the agency's refusal to hold contested case hearings on requests for

acknowledged the historical basis for Native Hawaiian claims when deciding controversial issues surrounding the public land trust or 'ceded' lands."[98]

For multiple reasons, it remains premature to attempt a holistic assessment of judicial decisions concerning Native Hawaiian issues under the Recktenwald Court since September 2010.[99] The State of Hawai'i Judicial Selection Commission retained our Chief Justice for a second ten-year term beginning in September 2020,[100] although he will reach the constitutionally mandated retirement age in early October 2025. The sheer number of cases concerning Native Hawaiian issues decided by the

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pastoral leases by Hawaiian Home Lands beneficiaries, who overcame a dizzying array of jurisprudential hurdles); Bush v. Watson (*Bush II*), 81 Hawai'i 474, 918 P.2d 1130 (1996) (invaliding third party agreements in action filed under 42 U.S.C. § 1983 and the HHCA, while laying the groundwork for future analyses of constitutional due process in administrative contested case hearing contexts through a unanimous opinion joined by the author of *Bush I*); Kepo'o v. Watson, 87 Hawai'i 91, 952 P.2d 379 (1998) (determining that beneficiaries had standing to challenge agency's failure to prepare an environmental impact statement for a proposed cogeneration power plant on Hawaiian Home Lands); Kalima v. State, 111 Hawai'i 84, 137 P.3d 990 (2006) (concluding that beneficiaries stablished their right to sue the State for breach of trust).

[98] MacKenzie, *Ke Ala Pono*, *supra* note 86, at 448; *see also id.* at 485–501. *See, e.g.*, Off. of Hawaiian Affs. v. State (*OHA I*), 96 Hawai'i 388, 31 P.3d 901 (2001); Off. of Hawaiian Affs. v. State (*OHA II*), 110 Hawai'i 338, 133 P.3d 767 (2003); Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH I*), 117 Hawai'i 174, 177 P.3d 884 (2008), *rev'd sub nom.* Hawai'i v. Off. of Hawaiian Affs., 556 U.S. 163 (2009); Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH II*), 121 Hawai'i 324, 219 P.3d 1111 (2009).

[99] One such reason is Associate Justice Richard Pollack's mandatory retirement from the bench on July 1, 2020. Chad Blair, *A New Direction for the Hawaii Supreme Court?*, HONOLULU CIVIL BEAT (June 30, 2020), https://www.civilbeat.org/2020/06/a-new-direction-for-the-hawaii-supreme-court/ (quoting Chief Justice Mark E. Recktenwald, Hawai'i State Supreme Court, Proclamation (July 1, 2020), https://www.courts.state.hi.us/wp-content/uploads/2020/07/07.01.20-Proclamation-Richard-Pollack.pdf: "[Justice Pollack] shaped the court's jurisprudence in areas including public trust resources and the environment, criminal procedure, evidence, and public access to governmental proceedings. He was always respectful in his decisions, even when others held different points of view."). On November 19, 2020, the Hawai'i State Senate confirmed Associate Justice Todd W. Eddins to replace Justice Pollack. Dan Nakaso, *Todd Eddins unanimously confirmed to Hawaii Supreme Court*, Honolulu STAR-ADVERTISER (Nov. 19, 2020), https://www.staradvertiser.com/2020/11/19/breaking-news/todd-eddins-unanimously-confirmed-to-hawaii-supreme-court/.

[100] Staff, *Recktenwald Retained as Hawaii Supreme Court Chief Justice*, W. HAW. TODAY (Apr. 11, 2021, 12:05 AM), https://www.westhawaiitoday.com/2020/09/23/hawaii-news/recktenwald-retained-as-hawaii-supreme-court-chief-justice/.

Recktenwald Court from 2010 through 2020,[101] however, hint at a strong desire for restorative justice that has "welled" up within the community over time:[102]

> In Kanaka ʻŌiwi[103] political discourse, aloha ʻāina is at the center of the resistance against other rationalizations that threaten place . . . and articulates

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[101] *See, e.g.*, Kalima v. State, 148 Hawai'i 129, 468 P.3d 143 (2020); Lāna'ians for Sensible Growth v. Land Use Comm'n (*LSG IV*), 146 Hawai'i 496, 463 P.3d 1153 (2020); Ching v. Case, 145 Hawai'i 148, 449 P.3d 1146 (2019); Clarabal v. Dep't of Educ., 145 Hawai'i 69, 446 P.3d 986 (2019); *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 431 P.3d 752 (2018); Nelson v. Hawaiian Homes Comm'n (*Nelson II*), 141 Hawai'i 411, 412 P.3d 917 (2018); Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114, 424 P.3d 469 (2018); Kilakila ʻO [Haleakalā] v. Bd. of Land and Nat. Res. (*Kilakila III*), 138 Hawai'i 383, 382 P.3d 195 (2016); Kilakila ʻO [Haleakalā] v. Univ. of Haw. (*Kilakila II*), 138 Hawai'i 364, 382 P.3d 176 (2016); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 363 P.3d 224 (2015); Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i, 133 Hawai'i 141, 324 P.3d 951 (2014); State v. Armitage, 132 Hawai'i 36, 319 P.3d 1044 (2014); Kilakila ʻO [Haleakalā] v. Bd. of Land & Nat. Res. (*Kilakila I*), 131 Hawai'i 193, 317 P.3d 27 (2013); Blake v. Cnty. of Kaua'i Plan. Comm'n, 131 Hawai'i 123, 315 P.3d 749 (2013); *In re* ʻĪao Groundwater Mmgt. Area (*Nā Wai ʻEhā*), 128 Hawai'i 228, 287 P.3d 129 (2012); Kaleikini v. Yoshioka (*Kaleikini II*), 128 Hawai'i 53, 283 P.3d 60 (2012); Nelson v. Hawaiian Homes Comm'n (*Nelson I*), 127 Hawai'i 185, 277 P.3d 279 (2012); Corboy v. Louie, 128 Hawai'i 89, 283 P.3d 695 (2011).

[102] *See, e.g.*, D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV'T L.J. 157, 169–81 (2016) [hereinafter Sproat, *Climate Change Devastation*] (documenting the physical and cultural genocide facilitated by the arrival of westerners in Hawai'i, followed by the deployment of various tools of colonialism including the illegal overthrow in 1893 that resulted in persisting harms which affect the realms of native land, culture, social welfare, and self-determination—harms further exacerbated by the looming threat of climate change impacts on place-based practices); *see also id.* at 183–95 (discussing Hawai'i's commitment to restorative justice, but noting that "it remains unclear for state, county, and other decision-makers what this concept [of restorative justice] means in practice [because] . . . [t]here has been no delineation in the laws themselves or even in related court decisions"); *Aloha ʻĀina: Native Hawaiian Land Restitution*, 133 HARV. L. REV. 2148, 2149 (2020) [hereinafter *Unjust Enrichment*] ("Mauna Kea is just one recent case in Hawaiian history that betrays a restitution claim. This Chapter argues that the lands of the Hawaiian Kingdom unjustly enriched the United States when the Kingdom was overthrown, and that the State of Hawai'i benefited from the same when it was admitted to the Union . . . [and] wealth accrued due to the possession of this land has continued to unjustly enrich these governments.").

[103] "Kanaka ʻŌiwi" (or the plural "Kānaka ʻŌiwi") literally means person(s) "of the ancestral bone[,]" which is where the "core of ancestral memory and knowledge" reside. DAVIANNA PŌMAIKA'I MCGREGOR & MELODY KAPILIALOHA MACKENZIE, OFF. OF HAWAIIAN AFFS., MO'OLELO EA O NĀ HAWAI'I: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAI'I 1 (2014).

> a political strategy of resistance that is anchored in spiritual and kinship relationship to place.
>
> The Kanaka ʻŌiwi political community is diverse and heterogenous. Ongoing political campaigns to protect land and water rights, food security and our wahi pana (sacred places), like the earlier political campaigns from the 1970s onward, involve individuals who are able to work together to achieve political goals even as they follow different ideologies. These coordinated efforts are possible because aloha ʻāina is a unifying discourse that calls Kanaka ʻŌiwi and allies to kūʻē, participate in acts of resistance, and to kūkulu, build a shared and abiding relationship to place that is grounded in aloha.
>
> Aloha ʻāina discourse includes a number of place-based values . . . [or] discursive filaments that are continuously being woven into strong, flexible and resilient nets of discursive meaning that create the possibility for material transformation of settler relations to land. Two political tropes co-articulate in this net(work) of transformative social relations: the raised fists of kūʻē and the hands in the earth of kūkulu.
>
> Kūʻē encompasses acts of political resistance to dominant authority over land. . . . Refusing to let bulldozers onto the sacred Mauna a Wākea is an act of kūʻē.
>
> Kūkulu are acts that (re)build social structures outside of the dominant authority. Teaching the principles of kapu aloha to all those who come to Mauna a Wākea is an act of kūkulu.
>
> In order to re-establish our relationships to land and ancestors (grounded normativity), kūʻē (resistance) must be complemented by kūkulu (build). Kūkulu works on a long trajectory of social transformation. . . . Kūʻē at its most effective is event based with clearly articulated material goals such as preventing annexation, regaining control of Kahoʻolawe, or preventing the construction of yet another telescope on Mauna a Wākea.[104]

Before describing the *Mauna Kea I* and *Mauna Kea II* decisions in greater detail, it is important to acknowledge four salient points:

1) The long history of opposition to further telescope development at Mauna Kea voiced by Native Hawaiian communities (dating before 1978 amendments to the Hawaiʻi Constitution);[105]

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[104] Mary L. Baker, Hoʻoulu ʻĀina: Embodied Aloha ʻĀina Enacting Indigenous Futurities 55–57 (May 2018) (Ph.D. dissertation, University of Hawaiʻi at Mānoa) (ScholarSpace at University of Hawaiʻi at Mānoa), https://scholarspace.manoa.hawaii.edu/handle/10125/62695; *see also* Mana Maoli, *supra* note 14 (reimagining ISRAEL KAMAKAWIWOʻOLE, HAWAIʻI '78 (Mountain Apple Co. 2010)).

[105] Kuʻupuamaeʻole Kiyuna, Ka Piko o ka ʻĀina: Additional Context for Understanding the Cultural Significance of Mauna Kea 1 (figshare) (citing Senator Kai Kahele, The Future of Mauna Kea at Ka Waiwai Collective (Apr. 11, 2018)) ("Within six years of the Mauna

2) The documented mismanagement of Mauna Kea (often to the detriment of traditional and customary rights);[106]
3) Despite the Hawai'i Supreme Court's eventual recognition of a "heightened duty of care owed to the Native Hawaiians"[107] it took the court *forty-seven years* after the University of Hawai'i secured its 1968 lease over the Mauna Kea Science Reserve from BLNR—and more than *twenty* years after *PASH*[108] (despite multiple prior opportunities[109])—to formally recognize Native

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Kea Science Reserve's genesis, universities and developers collectively erected six telescopes on Mauna Kea *despite opposition* from the community.") (emphasis added); *see also* Kanaeokana, *Fifty Years of Mismanaging Mauna Kea*, [Vimeo] (Dec. 12, 2017), https://vimeo.com/247038723.

[106] In its 1998 audit of the management at Mauna Kea, the State of Hawai'i Office of the Auditor found "the [U]niversity [of Hawai'i]'s management of the science reserve was inadequate to ensure that natural resources are protected . . . [and] that permit conditions, requirements, and regulations were not always enforced." STATE OF HAW., OFF. OF AUDITOR, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE REP. NO. 05-13, at iii–iv (2005) (citing STATE OF HAW., OFF. OF AUDITOR, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE REP. NO. 98-6 (1998)), http://www.malamamaunakea.org/uploads/management/Audit_05-13.pdf. The 2005 audit similarly noted mismanagement in several key areas: (1) "[u]nder the general lease, the university is responsible for the protection of cultural and natural resources within its jurisdiction, but currently does not provide protection due to its lack of authority to establish or enforce administrative rules for the science reserve"; (2) "[t]he university also does not appear to systematically monitor its tenant observatories for compliance with [CDUP] requirements"; and (3) "[DLNR,] as landowner, has not provided a mechanism to ensure compliance with lease and permit requirements in protecting and preserving Mauna Kea's natural resources . . . [and] has not regularly monitored the university for compliance with [CDUP] requirements." *Id.* at i–ii. The 2005 audit further criticized "critical management issues, such as the lack of administrative rule-making and enforcement authority, unresolved public access control, weak permit monitoring, and indeterminate management plans," and advised that DLNR "still needs to intensify its efforts to protect Mauna Kea's natural and cultural resources." *Id.* at 13.

[107] *In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 430, 83 P.3d 664, 693 (2004) (citing Pub. Access Shoreline Hawaii v. Hawai'i County Plan. Comm'n (*PASH*), 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995); Pele Def. Fund v. Paty, 73 Haw. 578, 620–21, 837 P.2d 1247, 1272 (1992); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7–8, 656 P.2d 745, 749 (1982); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982)).

[108] *See supra* notes 22, 31 and accompanying text (discussing the *PASH* court's holding that an agency's restrictive interpretation of standing requirements "is not entitled to deference").

[109] Justice Acoba authored at least three concurring opinions addressing this point. Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res. (*Kilakila I*), 131 Hawai'i 193, 206–14, 317 P.3d 27, 40–48 (2013) (Acoba, J., concurring, Pollack, J., joining) ("I would hold that jurisdiction . . . arises independently under article XI, section 7 of the Hawai'i Constitution[] in light of specific provisions therein protecting native Hawaiian rights.") (footnote omitted);

> Hawaiians' constitutional due process rights to be heard in administrative proceedings[110] that might affect their exercise of traditional and customary practices for subsistence, cultural or spiritual purposes, a proposition that the court belatedly recognized in 2015 through its *Mauna Kea I* decision;[111] and,

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Nā Wai 'Ehā, 128 Hawai'i 228, 271–72, 287 P.3d 129, 172–73 (2012) (Acoba, J., concurring) (observing that petitioners asserting adverse effects on their traditional and customary right to cultivate taro under article XII, section 7 "have a legitimate claim of entitlement under the Constitution and would be entitled to a due process hearing on their claim"); Kaleikini v. Thielen, 124 Hawai'i 1, 27, 30–31, 42–43, 237 P.3d 1067, 1093, 1096–97, 1108–09 (2010) (Acoba, J., concurring) ("I would hold that Petitioner's constitutional due process right as a Native Hawaiian practicing the native and customary traditions of protecting iwi mandated that a contested case hearing be held.").

Earlier, Justice Acoba authored two dissenting opinions along the same lines. Hui Kako'o Aina Ho'opulapula v. Bd. of Land & Nat. Res., 112 Hawai'i 28, 43, 143 P.3d 1230, 1245 (2006) (Acoba, J., concurring and dissenting, Del Rosario, J., joining) ("I would hold, rather, that Hui Kako'o was not provided an adequate opportunity to establish its standing as allowed under the Hawai'i Constitution, article XII section 7. . . ."); Kaniakapupu v. Land Use Comm'n, 111 Hawai'i 124, 142–43, 139 P.3d 712, 730–31 (2006) (Acoba, J., dissenting, Duffy, J., joining) (observing that the "rights, duties, and privileges" of a Hui formed to steward the historic ruins of Kamehameha III's royal summer cottage were determined for purposes of appellate jurisdiction under the Hawai'i Administrative Procedure Act, HRS section 91-14, when the agency denied their motion for an order to show cause why the property should not be reclassified back to conservation from urban as a result of the property owner's alleged failure to comply with conditions attached to the original reclassification order, then noting further that "it must be the substance of the agency proceeding, not its form, that controls").

[110] For purposes of establishing appellate jurisdiction under HRS section 91-14, a contested case hearing is required by statute in every case involving proposed uses of land within the conservation district for commercial purposes (excluding use of land for utility purposes). HAW. REV. STAT. §§ 91-1, -14 (2012 & Supp. 2019); *id.* § 183C-6(c) (2011 & Supp. 2019).

[111] The *Kilakila I* majority concluded that constitutional due process concerns need not be reached because DLNR administrative rules required that a contested case hearing be held. 131 Hawai'i at 202 n.5, 317 P.3d at 36 n.5 (disregarding arguments that a hearing was also required by due process considering the protections afforded under article XI, section 9 and article XII, section 7 of the Hawai'i Constitution with respect to environmental and Native Hawaiian issues). However, as Justice Acoba explained in his *Kilakila I* concurrence:

> This case illustrates precisely why this court has taken a *functional approach* to what can be considered a contested case hearing for purposes of judicial review, consistent with the policy of "favoring judicial review of administrative actions." *Alaka'i Na Keiki, Inc. v. Matayoshi*, 127 Hawai'i 263, 279, 277 P.3d 988, 1004 (2012). . . . The legislature did not define "contested case" with respect to the *agency's classification* of a particular proceeding as a "contested case", but instead defined the term with respect to the *result*. Thus, "*it must be the substance of the agency proceeding, not its*

4) when MKAH and other kia'i mauna were finally provided with a forum to assert their restorative justice claims, the hearings officer, BLNR *and* the court essentially turned deaf ears to their pleas (including a host of allegedly prejudicial legal process rulings).[112]

A. Putting the Cart Before the Horse in Mauna Kea I

In *Mauna Kea I*, the Hawai'i Supreme Court vacated and remanded BLNR's initial issuance of a conservation district use permit (CDUP) authorizing construction of a Thirty Meter Telescope (TMT) at Mauna Kea.[113] The unanimous *Mauna Kea I* court chastised BLNR for violating the Hawai'i Constitution's due process guarantee by "put[ting] the cart

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form, that controls." *Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124, 143, 139 P.3d 712, 731 (2006) (Acoba J., dissenting, joined by Duffy, J.). In other words, "[t]he controlling principle is not the *label* accorded the motion or proceeding, but the *effect* of the agency's decision."

Id. at 214, 317 P.3d at 48 (Acoba, J., concurring, Pollack, J., joining) (alteration in original) (emphasis added); *accord PASH*, 79 Hawai'i at 432 n.11, 903 P.2d at 1253 n.11 (citing Town v. Land Use Comm'n, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974)). *See supra* note 20 (discussing *Alaka'i Na Keiki* in greater detail).

[112] *See* Petitioners Exceptions/Responses to Hearing Officer Riki May Amano's Proposed Findings of Fact, Conclusions of Law, Case No. HA-CC 16-002 ¶¶ 29, 38, 40–81 (Aug. 21, 2017) [hereinafter MKAH Exceptions], https://dlnr.hawaii.gov/mk/files/2017/08/808-MKAH-Exceptions.pdf (referring to a multitude of Minute Orders "obviously made long after the fact and thus rendered moot" and arguing that the agency's failure to rule on the dispositive motions "in a timely manner means our due process rights again have been violated . . . with only 5 days to file Motions for Reconsideration [while] simultaneously holding us to [the] deadline for filing our collective FOF[,] COL, [and] D&O"); *id.* ¶ 30 (objecting to BLNR's decision not to upload a full set of transcripts to the online electronic Documents library, along with a letter from the Attorney General's Office precluding Librarians holding the transcripts from allowing petitioners to copy them); *id.* ¶ 35 (objecting to the requirement of hand signatures on filings and hard copies to be delivered on a different island than where the hearing took place and the petitioners resided). *See generally*, Yamamoto, *Courts and the Cultural Performance*, *supra* note 92, at 7, 9 (explaining how "volatile, deeply-rooted cultural and political indigenous land trust controversies" reflecting a "history of culture destruction and land dispossession" are sometimes "largely stripped [of] those issues . . . through the limiting language of legal process"—i.e., the rule of law).

[113] 136 Hawai'i 376, 380, 399, 363 P.3d 224, 228, 247 (2015) (holding that BLNR violated constitutional due process by approving an application seeking authority to construct a Thirty Meter Telescope below the Mauna Kea summit, subject to a condition prohibiting commencement of construction until the agency resolved a subsequent contested case hearing in which practitioners of traditional and customary would be allowed to present evidence, testify, and cross-examine the applicant's witnesses and experts).

before the horse when it issued the permit before the request for a contested case hearing was resolved and the hearing was held."[114]

A majority of the court went a bit further,[115] holding that "[a]n agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision"[116] and stressing that "[t]he non-delegable nature of any agency's duty [under *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000),] to protect and enforce constitutional rights only intensifies the important role that an agency plays."[117] The court explained that an agency's statutory duties must be performed in a manner that "not only avoid[s] infringing upon protected rights to the extent feasible," while also "[fulfilling] the State's affirmative constitutional obligations" including but not limited to "active and affirmative protection"[118] of Native Hawaiian traditional and customary rights under article XII, section 7,[119] as previously set forth by the court in: *Ka Pa'akai*,[120] *In re Water Use Permit Applications* (*Waiāhole I*),[121] and,

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[114] *Id.* at 381, 363 P.3d at 229. *See generally id.* at 380, 363 P.3d at 228 (quoting Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989), for the proposition that due process includes the right to be heard at "a meaningful time and in a meaningful manner"); *id.* at 390–91, 363 P.3d at 238–39 ("Given the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government . . . a contested case hearing was 'required by law' *regardless* of whether BLNR had voted to approve one on its own" and "BLNR's decision to vote on the permit *prior* to the contested case hearing denied Appellants a meaningful opportunity to be heard in both reality and appearance"); *id.* at 399, 363 P.3d at 247 ("In short, BLNR acted improperly when it issued the permit prior to holding a contested case hearing. No case or argument put forth by [the University] or BLNR persuades otherwise.").

[115] *Id.* at 413–15, 363 P.3d at 261–63 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

[116] *Id.* at 415, 363 P.3d at 263.

[117] *Id.* at 415 n.17, 363 P3d at 263 n.17.

[118] *Id.* at 414, 363 P.2d at 263 (quoting Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984)).

[119] *Id.* at 413 & nn.14–15, 363 P.3d at & 261 nn.14–15.

[120] 94 Hawai'i at 45, 7 P.3d at 1082, *cited with approval in Mauna Kea I*, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

[121] 94 Hawai'i 97, 143, 9 P.3d 409, 456 (2000), *cited with approval in Mauna Kea I*, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

Kauai Springs, Inc. v. Planning Commission of County of Kaua'i (*Kauai Springs*).[122]

B. Misapplying and Ignoring Applicable Law in Mauna Kea II

Following its second contested case hearing on remand from *Mauna Kea I*, BLNR issued the University a second CDUP authorizing construction of the TMT.[123] The agency's decision contradicted the *plain language* of applicable regulatory criteria, considering that "the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea, even without the TMT, have *already resulted* in substantial, significant and adverse impacts."[124] However, the *Mauna Kea II* majority concluded that BLNR did not clearly err in interpreting its regulatory criteria to allow consideration of measures designed to reduce or offset the impact of the proposed TMT project.[125]

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[122] 133 Hawai'i 141, 174–75, 324 P.3d 951, 984–85 (2014), *cited with approval in Mauna Kea I*, 136 Hawai'i at 414, 363 P.3d at 262 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV).

[123] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 384, 431 P.3d 752, 757 (2018).

[124] *Id.* at 403, 431 P.3d at 776 (emphasis added). *Compare* HAW. REV. STAT. § 183C-1 (2011 & Supp. 2019) (finding that "lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply" and proclaiming "the intent of the legislature to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare"), *with id.* § 205A-26 (2021) (authorizing "significant adverse environmental or ecological effect" where "minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests").

[125] *Mauna Kea II*, 143 Hawai'i at 404 n.31, 431 P.3d at 777 n.31 (citing BLNR FOF 522 which lists a "number of measures designed to reduce or offset the negative impact of the project" in addition to FOF 344 indicating TIO's commitment to restore an abandoned road, as well as CDUP Special Conditions 10 and 11 providing a legally binding commitment to permanently decommission three telescopes as soon as reasonably possible, without constructing any new observatories on those sides, along with two additional observatories by December 31, 2033); *id.* at 404–05, 431 P.3d at 777–78 (citing Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res., 138 Hawai'i 383, 404–05, 382 P.3d 195, 216–27 (2016), and Morimoto v. Bd. of Land & Nat. Res., 107 Hawai'i 296, 303, 113 P.3d 172, 179 (2005), to support the conclusion that "[i]t was appropriate for the BLNR to consider these measures in its [Hawai'i Administrative Rules (HAR)] § 13-5-30(c)(4) analysis). *Cf. In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 441, 83 P.3d 664, 704 (2004) (rejecting the applicant's argument on appeal that the agency's permit issuance should be upheld because "the cumulative effect of reducing groundwater discharge . . . [would] not be the 'straw that broke the camel's back'" with respect to nearshore environmental impacts).

The *Mauna Kea II* court's reliance on *Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources* (*Kilakila III*)[126] as justification for considering mitigation measures under Hawai'i Administrative Rules (HAR) § 13-5-30(c)(4) fails to consider the relative dearth of legal analysis involving traditional and customary rights in *Kilakila III*. Indeed, counsel for Kilakila 'O Haleakalā consciously avoided raising arguments rooted in public trust obligations or Native Hawaiian traditional and customary rights under article XII, section 7, based on his belief that the absence of any "balancing" language under BLNR's rules would be preferable to the potential alternative of a balancing test under the court's recently issued decision in *State v. Pratt*.[127]

The *Mauna Kea II* and *Kilakila III* courts' reliance on the earlier *Morimoto v. Board of Land & Natural Resources* decision to authorize consideration of mitigation measures likewise ignores the fact that the "quixotic"[128] *Morimoto* appellants "present[ed] no new arguments" under article XI, section 1.[129] In addition, *Morimoto* preceded (by more than eight years) the Hawai'i Supreme Court's recognition of a self-executing private right of action for environmental wrongs under article XI, section 9 of the Hawai'i Constitution.[130] Notwithstanding the *Mauna Kea II* majority's express rejection of the University's "*incorrect* position that 'cultural practices' are not 'natural resources'"[131]—again, contrary to applicable agency rules[132]—and despite BLNR's concomitant suggestion that cultural

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[126] 138 Hawai'i 383, 405, 382 P.3d 195, 217 (2016).

[127] Telephone Interview with David Kimo Frankel (Dec. 27, 2020) (referencing State v. Pratt, 127 Hawai'i 206, 277 P.3d 300 (2012)).

[128] *See* Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation*, 33 U. HAW. L. REV. 581, 583, 629, 633 n.395 (2011).

[129] *Morimoto*, 107 Hawai'i at 308, 113 P.3d at 184 ("[A]s support, Morimoto only refers to (1) 'contradictions of the factual conclusions in the record, including the finding of no substantial impact upon the Palila' and (2) 'the court's failure to ensure that BLNR followed proper legal requirements, including rule-making.'"). In other words, the *Morimoto* appellants failed to present any arguments rooted in the constitutional provision. *See id.*

[130] *See* Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 412–13, 235 P.3d 1103, 1124–25 (2013).

[131] 143 Hawai'i at 403 n.30, 431 P.3d at 776 n.30 (emphasis added). *See also* Kilakila 'O [Haleakalā] v. Bd. of Land & Nat. Res. (*Kilakila I*), 131 Hawai'i 193, 212, 317 P.3d 27, 46 (2013) (Acoba, J., concurring, Pollack, J., joining) (noting the organizational goal of Kilakila 'O Haleakalā "to protect the natural resources, including cultural resources, of the area").

[132] *See, e.g.*, HAW. CODE R. § 13-5-2 (Westlaw 2020) (defining "natural resource" to mean "resources such as plants, aquatic life and wildlife, cultural, historic, recreational, geologic, and archeological sites, scenic areas, ecologically significant areas, watersheds, and minerals").

practices are not necessarily cultural *resources*,[133] the court concluded that the error, if any,[134] was "harmless" because the agency's analysis contained numerous references to its assessment of the TMT project's impact on cultural practices.[135]

Justice Richard W. Pollack's separate concurrence lamented the majority's failure to fully apply "fundamental" public trust principles to conservation land, given that "neither the text nor the history of article XI, section 1 provides for differing levels of protection for individual natural resources, such as water as compared to land" and argued that "this court should not establish artificial distinctions without a compelling basis for doing so."[136] Justice Pollack nevertheless concluded that the Hawai'i Supreme Court was obligated to accept BLNR's findings and conclusions

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[133] *Mauna Kea II*, 143 Hawai'i at 403 n.30, 431 P.3d at 776 n.30 (explaining that "BLNR suggested in COL 203 that cultural practices are not cultural resources protected by HAR § 13-5-30(c)(4)"); *see also id.* at 396 n.16, 431 P.3d at 769 n.16 (concluding that "BLNR appropriately took into account contemporary (as well as customary and traditional) Native Hawaiian cultural practices . . . in *other areas of Mauna Kea, including the summit region*" (emphasis added)). *Compare* BLNR Decision, *supra* note 5, at 222 (noting COL 204 which states "[t]he effect on cultural practices is *analyzed elsewhere*") (emphasis added), *with id.* at 223 (noting COL 211 which states "Petitioners' and Opposing Intervenors' argument is factually and legally incorrect"—viz., contending that proposed mitigation measures which *do not specifically address the environmental and cultural impacts of the project* cannot be considered in connection with HAR § 13-5-40(c)(4)) (emphasis added).

[134] *Mauna Kea II*, 143 Hawai'i at 403 n.30, 431 P.3d at 776 n.30 (observing that the court declined to define "cultural resources" in Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 47 n.27, 7 P.3d 1068, 1084 n.27 (2000), stating instead that "'cultural resources' is a broad category, of which *native Hawaiian rights is* only *one subset* . . . [and] we do not suggest that the statutory term, 'cultural resources' is synonymous with the constitutional term, customary and traditional native Hawaiian rights) (alteration in original) (emphasis added).

[135] *Id.* at 403 n.30, 431 P.3d at 776 n.30 (observing that "DLNR had included Native Hawaiian 'cultural practices' within its assessment of 'natural resources,' despite the University's *incorrect* position that 'cultural practices' are not 'natural resources'") (emphasis added); *id.* (citing COLs 198, 199, 205–10, 212, and 215, for the proposition that "BLNR's HAR § 13-5-30(c)(4) analysis contains numerous references to its assessment of the impact of the TMT Project on cultural practices") (alteration in original).

[136] *Id.* at 410, 431 P.3d at 783 (Pollack, J., concurring in part and concurring in the judgment) (declining to join Part V.C.1. of the majority opinion and, instead, calling for application of a "uniform standard" based on public trust principles governing water resources "that may easily be applied to other natural resources with only minor alterations"). In Part IV, Justice Pollack nevertheless concluded that the University "sufficiently carried its obligation to demonstrate that damage to public trust purposes will be offset by the implementation of reasonable mitigation measures." *Id.* at 420, 431 P.3d at 793 (Pollack, J., concurring in part and concurring in the judgment).

regarding the public trust on appeal because they "appear to be supported by substantial evidence and are thus not clearly erroneous."[137]

In his dissenting opinion, Justice Michael D. Wilson (former BLNR Chair, 1994 to 1999) coined the phrase "degradation principle" to describe the agency's conclusion, which he criticized for effectively determining that "cultural and natural resources protected by the Constitution of the State of Hawai'i and its enabling laws lose legal protection where degradation of the resource [as a result of both permitted and, at least initially, unpermitted development] is of sufficient severity as to constitute a substantial adverse impact"[138]—such that further development associated with constructing the TMT (a proposed land use that eclipses all other telescopes in magnitude[139]) can no longer create a tipping point where impacts become significant.[140]

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[137] *Id.* at 417, 431 P.3d at 790; *see also id.* at 416–20 & nn.9–13, 431 P.3d at 789–793 & nn.9–13 (applying the framework laid out in Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 324 P.3d 951 (2014)). However, Justice Pollack would have further held that BLNR "is obligated to utilize Special Condition Forty-Three in its Decision and Order, which permits the Chairperson to prescribe additional conditions on the conservation district use permit, to require the permittee to provide concrete information demonstrating the ability of the responsible parties to acquire the requisite construction and operation funding prior to beginning construction." *Id.* at 421, 431 P.3d at 794.

[138] *Id.* at 421–22, 431 P.3d at 794–95 (Wilson, J., dissenting). *See also id.* at 410–17, 431 P.3d at 783–90 (Pollack, J., concurring in part and concurring in the judgment, Wilson, J., joining as to Parts I–III) ("Public Lands Have Long Been Regarded as a Public Natural Resource Held in Trust by the State for the Benefit of the People"; "The Existing Public Trust Framework May Be Applied to Public Lands"; and "The Approaches Taken by the Hearing Examiner and the Board, are Inconsistent with the Law, and the Majority Offers Little Guidance to Correct These Missteps").

[139] *Id.* at 428, 431 P.3d at 807 (Wilson, J., dissenting). The *Mauna Kea II* majority's original slip opinion was, surprisingly, published ten days *before* publication of Justice Wilson's dissenting opinion. *See infra* note 142.

[140] *Mauna Kea II*, 143 Hawai'i at 422, 431 P.3d at 795 (Wilson, J., dissenting) (observing that the "degradation principle ignores the unequivocal mandate contained in [HAR] § 13-5-30(c)(4) prohibiting a [CDUP] for a land use that would cause a substantial adverse impact to existing natural [including cultural] resources"). In this regard, BLNR's determinations appear to have been heavily influenced by the "cumulative impacts on cultural, archaeological, and historic resources that are considered substantial, significant, and adverse" due to *existing* observatories—so much so that construction of the TMT would *not* adversely impact traditional and customary rights. BLNR Decision, *supra* note 5, at 21 (FOF 135); *id.* at 219–22 (COLs 176, 180, 183–87, 189–92, 196, 198–200, 202). *See also id.* at 89 (FOF 514: "TMT Observatory will not significantly add to or burden the balance of any existing impact from a level that is currently less than significant to a significant level within the Astronomy Precinct . . . [t]his means that the TMT Project itself will not cause substantial adverse impacts"); *id.* (FOF 515: Petitioners and Opposing Intervenors' acknowledge "that Mauna Kea has suffered previous 'unlawful' significant and adverse

Moreover, "the party that caused the substantial adverse impact [the State of Hawai'i, by authorizing previous construction within the Astronomy Precinct] is empowered by the degradation principle to increase the damage . . . contrary to accepted norms of the environmental rule of law" and, thus, "renders inconsequential the failure of the State to meet its constitutional duty to protect natural and cultural resources for future generations."[141]

C. Mauna Kea II *Reconsidered*

Returning more directly to the Symposium panel topic: *PASH* and its Progeny, this section examines the MKAH Appellants' partially successful motion for reconsideration[142] of the court's original October 30, 2018 slip opinion.[143] Four justices joined the order granting in part MKAH's motion by deciding "to delete footnote 15" and "to modify footnote 17[.]"[144] Former *Mauna Kea II* footnote 15 appeared in Section V.B.1.[145] of the

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impacts"). For example, "the existing level of the cumulative visual impact from past observatory construction projects at the summit ridge area has been considered to be substantial, significant, and adverse." *Id.* at 21–22 (FOF 136). *Compare id.* at 107 (FOF 623: noting an anthropology professor's testimony that "the CDUA underestimates the visual impact of the TMT Project on cultural practitioners" by failing to "adequately recognize the impacts to 'intangible' cultural resources"), *with id.* at 158 (FOF 860: "The TMT Project will add a visual element to the summit of Mauna Kea, but it will be one such element among many. The incremental increase in cumulative visual impact due to the TMT Project will be less than significant. Therefore, the TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea"). Moreover, "[d]evelopment of existing observatories . . . significantly modified the preexisting terrain" such that "the existing level of cumulative impact from preexisting observatories on geology, soils, and slope stability is considered to be substantial, significant, and adverse." *Id.* at 22 (FOF 137).

[141] *Mauna Kea II*, 143 Hawai'i at 423, 431 P.3d at 796 (Wilson, J., dissenting).

[142] [MKAH] Petitioners-Appellants' Motion for Reconsideration at 5 n.1, *Mauna Kea II* (Haw. filed Nov. 19, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) [hereinafter MKAH Reconsideration Motion] (challenging as error "and request[ing] for reconsideration the entire footnote 15 and 17" in addition to, unsuccessfully, requesting that the court take into consideration Justice Wilson's dissenting opinion issued on November 9, 2018, ten days after issuance of the majority's slip opinion).

[143] *See In re* Conservation District Use Application (CDUA) HA-3568, *Mauna Kea II* (Haw. Oct. 30, 2018) (No. SCOT-17-0000777) [hereinafter *Mauna Kea II*, slip op.].

[144] Order Granting in Part and Denying in Part Motion for Reconsideration at 1, *Mauna Kea II* (Haw. Nov. 29, 2018) (No. SCOT-17-0000777) [hereainfter Order Granting Partial Reconsideration] (signed by Recktenwald, C.J., McKenna, J., and Judge Castagnetti); *see also* Order Concurring in Part, and Dissenting in Part, to the Majority's Order Denying Motion for Reconsideration Filed by [MKAH Appellants] at 3, *Mauna Kea II* (Haw. Nov. 29, 2018) (SCOT-17-0000777) (Wilson, J.) ("I concur with the order to the extent that the order deletes footnote 15 and modifies footnote 17 of the Majority Opinion").

[145] *Mauna Kea II*, slip op. at 34 ("B. Native Hawaiian Rights Issues"; "1. Whether the

majority opinion immediately after the following sentence: "MKAH and Kihoi Appellants assert that the BLNR failed to meet these obligations[—viz., article XII, section 7, as explicated by *PASH* and *Ka Pa'akai*]."[146] Curiously, this alleged error was not expressly included in the court's "categorized and summarized" outline of questions preserved on appeal.[147]

Although removal of the footnote eliminated some of the court's more disturbing misapplications of *PASH* and its Progeny (including *Ka Pa'akai*, *Hanapi*, *Pratt* and *PDF v. Paty*),[148] this erasure did not cure the *Mauna Kea*

BLNR fulfilled its duties under Article XII, Section 7 and *Ka Pa'akai O Ka 'Āina v. Land Use Commission*"); *see also In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 388, 431 P.3d 752, 761 (2018) ("III. Points of Error on Appeal").

[146] *Id.* The court subsequently identified the "Kihoi Appellants" as Mehana Kihoi, Joseph Kuali'i Camara, Leina'ala Sleightholm, Kalikolehua Kanaele, Tiffnie Kakalia, Brannon Kamahana Kealoha, Cindy Freitas and William Freitas. *Id.* at 387 n.5, 431 P.3d at 760 n.5.

[147] *Mauna Kea II*, 143 Hawai'i at 388, 431 P.3d at 761; *but see id.* at 389 n.7, 431 P.3d at 762 n.7 ("[s]ome points of error are addressed in footnotes").

[148] *See, e.g.*, MKAH Reconsideration Motion, *supra* note 142, at 6–11 (citing HRS § 91-10(5) and *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 174 P.3d 320 (2007), in addition to distinguishing Pele Def. Fund v. Paty (*PDF v. Paty*), 73 Haw. 578, 837 P.2d 1247 (1992), as an action under 42 U.S.C. § 1983 rather than an administrative proceeding before an agency, clarifying that *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), "was a case involving standing" which did not address the burden of proof, and stressing that *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000), did more than establish a "procedural requirement" by specifically recognizing the State's affirmative obligation to protect and preserve traditional and customary rights under article XII, section 7—i.e., as a matter of substantive due process); [Proposed] Brief for Kua'āina Ulu 'Auamo et al. as Amici Curiae Supporting Plaintiff-Appellants' Motion for Reconsideration at 1–6, *Mauna Kea II* (Haw. Nov. 19, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) [hereinafter KUA/Machado/Ahuna *Unfiled* Amici Curiae Brief] (urging the court to exercise its authority under HRS section 5-7.5; suggesting that "the majority opinion erodes Chief Justice . . . Richardson's legacy regarding Native Hawaiian traditional and customary rights and the public trust doctrine" because footnote 15 "do[es] not accurately reflect the law and will needlessly complicate the protection of Native Hawaiian rights, or worse, invite agencies to diminish their affirmative constitutional obligations to protect these rights"; arguing that the court muddied the burden of proof issue by failing to correct and admonish BLNR's misstatements of the law in its COLs 82, 371–75, 379, 384, 386–88, 391–93, 396 and 399; quoting *PASH* footnote 15 and referencing the *PASH* Guidelines; distinguishing *PDF v. Paty*; as well as, citing HRS § 91-10(5) and *Kukui I*). *But see* Order Denying Motion for Leave to Appear and File a Brief as Amicus Curiae, *Mauna Kea II* (Haw. Nov. 29, 2018) (No. SCOT-17-0000777).

II court's continuing failure to address otherwise binding court precedent in *Kukui I* and *Wai'ola*.[149]

The court also modified former *Mauna Kea II* footnote 17, which appears a little later in the same Section V.B.1. of the majority opinion—presumably due to carelessness during the editorial process.[150] In any event, the court once again eliminated its misstatements of the law under *PASH* and *Hanapi*, while attempting to adhere more closely to the *Ka Pa'akai* framework as correctly argued by the MKAH and Kihoi Appellants. *Mauna Kea II* nevertheless fails to demonstrate careful consideration of the *PASH* Guidelines, specifically with respect to the court's summary conclusion about the "reasonable[ness]"[151] element of Hawai'i's Custom Doctrine (if not also the "without interruption" element[152]).

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[149] Both TIO and the University opposed the KUA/Machado/Ahuna *Unfiled* Amici Curiae Brief, *supra* note 148. *See* Intervenor-Appellee [TIO]'s Response in Opposition to Motion for Leave to Appear and File a Brief as Amici Curiae, *Mauna Kea II* (Haw. Nov. 23, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) (arguing that the motion was untimely filed because the issues were extensively addressed, argued, and briefed over a year earlier; contending that the proposed brief would not add any new arguments not already raised, considered, and properly addressed); Appellee University of Hawai'i at Hilo's Opposition to Motion for Leave to Appear and File a Brief as Amici Curiae, *Mauna Kea II* (Haw. Nov. 23, 2018) (Nos. SCOT-17-0000777, SCOT-17-0000811 & SCOT-17-0000812) (arguing that that motion was untimely, unwarranted, and would create dangerous precedent if granted; contending further that OHA trustees Machado and Ahuna are biased due to their lawsuit alleging mismanagement of Mauna Kea). Extending these arguments to their logical limits, the reasoning advanced by TIO and the University regarding timeliness implicitly supports the need for Native Hawaiian rights advocates to consider seeking intervention in contested case hearings more frequently in the future to guard against the court mischaracterizing and/or ignoring applicable precedent.

[150] *Compare Mauna Kea II*, 143 Hawai'i at 388, 431 P.3d at 761 (identifying Section III.B.2. as "Whether the BLNR erred in concluding that the Hawai'i Constitution does not protect contemporary native Hawaiian cultural practices" but omitting that section heading later in the opinion), *with id.* at 398, 431 P.3d at 771 ("2. Whether the TMT Project violates religious exercise rights of Native Hawaiians protected by federal statute"—previously listed in Part III as Section B.3.).

[151] *See supra* notes 4, 13, 36–38, 42–52, 67–73 and accompanying text (discussing the "reasonable[ness]" element of Hawai'i's Custom Doctrine under the *PASH* Guidelines).

[152] *See supra* notes 53–57 and accompanying text (explaining the distinction between uninterrupted rights versus exercise of such rights, and disavowing any "continuous exercise" or use requirement under the *PASH* Guidelines). *See also* Appellee University of Hawai'i at Hilo's Answering Brief to Petitioner-Appellants Mauna Kea Anaina Hou et al.'s Opening Brief at 26, *Mauna Kea II* (Haw. Apr. 9, 2021) (No. SCOT-17-0000777) (arguing that "Appellants *conflate the burden* of BLNR to conduct a *Ka Pa'akai* analysis with the burden of proof discussed in BLNR's COL 82" without even attempting to rebut the Appellants' reliance on *Kukui I*) (emphasis added).

1. Former Mauna Kea II *footnote 15.*

Recalling the detailed description of *PASH* footnote 15 above,[153] the numbering of former *Mauna Kea II* footnote 15 is a painfully ironic reminder of reoccurring cultural insensitivity:

> Appellants preliminarily assert that in COL 82, the BLNR *improperly shifted the burden of establishing Native Hawaiian cultural and traditional practices from itself to them*. In this regard, they appear to conflate the procedural requirements imposed by *Kā Pa'akai* [sic] on administrative agencies with the burden of proof imposed on Native Hawaiian practitioners, arguing that our cases place the burden of proof on practitioners only in criminal cases, and not in civil cases. The burden of proof is not at issue because *Kā Pa'akai* [sic] concerns procedural requirements placed on agencies in order to protect Native Hawaiian rights. In any event, Appellants' assertion that our cases do not recognize any burden on practitioners in civil cases is erroneous. . . . In *State v. Hanapi*, a criminal case, we stated:
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> > In order for a defendant to establish that his or her conduct is constitutionally protected as a native Hawaiian right, he or she must show, at minimum, the following three factors. First, he or she must qualify as a "native Hawaiian" within the guidelines set out in *PASH* . . . [as] "those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778,' . . . regardless of their blood quantum." Second, once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. . . . Finally, a defendant claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or "less than fully developed property."
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> 89 Hawai'i 177, 185–86, 970 P.2d 485, 493–94 (1998) (citations and emphasis omitted). *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), another criminal case, reaffirmed the *Hanapi* factors and added the additional requirement that any Native Hawaiian rights be balanced against the State's right to regulate Native Hawaiian traditional and customary practices. *Pratt*, 127 Hawai'i at 218, 277 P.3d at 312.
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> In placing the burden of proof on the native practitioner, however, the *Hanapi* court had drawn all three factors from *PASH*, a land use case involving a contested case hearing over a special management area permit. *Hanapi*, 89 Hawai'i at 185–86, 970 P.2d at 493–94. Additionally, the *Pratt* court noted that *Paty* [sic] (a case involving the exchange of ceded lands) had been

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[153] *See supra* notes 31–34 and accompanying text.

> remanded for the Native Hawaiian practitioners "to prov[e] that the [Native Hawaiian] practice is traditional and customary," in addition to "show[ing] that it meets 'the other requirements of *Kalipi* [*v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982)],'" which were that the land the practitioners sought to enter was undeveloped or less than fully developed, and that no actual harm result from the cultural practices. *Pratt*, 127 Hawai'i at 215, 277 P.3d at 309 (citing *Pele Def. Fund v. Paty*, 73 Haw. 578, 621, 837 P.2d 1247, 1272 (1992)). Thus, the burden upon Native Hawaiian practitioners set forth in *Hanapi* and *Pratt* is not limited to the criminal context and is drawn from the civil context, with its origin in *PASH*, a land use case. We need not decide if *Kā Pa'akai* [sic] implicitly placed any evidentiary burden on the applicants because, as discussed infra, the BLNR's conclusion that no cultural or traditional practices existed at the TMT site is affirmatively supported by substantial evidence.[154]

The court's (now deleted) suggestion that the burden of proof is "not at issue" because the intervening practitioners only have procedural (rather than substantive) due process rights inexplicably ignored binding Hawai'i Supreme Court precedent.[155] In this context, the court's order granting reconsideration by deleting the references to *PASH*, *Hanapi*, *Pratt* and *Ka Pa'akai* (along with *PDF v. Paty*) further highlights the incongruity of BLNR Chair Suzanne Case's reaction to my February 5, 2021 symposium presentation, when she reiterated the agency's faulty reliance on these very decisions:

> My one comment in response—from my *direct* experience with the TMT BLNR decision—is that it, in fact, *very extensively* analyzed the project under *PASH* and *Hanapi* and *Pratt* and *Ka Pa'akai* tests *for* impacts to archaeological and historic and cultural resources and practices for over *seventy-five pages* of its 280 page decision, and didn't just *not find* evidence of impacts at the project site but found affirmatively, based on all of the evidence, that the traditional and customary cultural practices were elsewhere on Mauna Kea.[156]

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[154] *Mauna Kea II*, slip op. at 34–35 n.15 (emphasis added).

[155] *See infra* Part IV (discussing the court's prior holdings that shifting an applicant's contested case burden of proof to intervening Native Hawaiian practitioners constitutes an error of law).

[156] Law Review Spring 2021 Symposium – 25 Years of PASH: A symposium celebrating the landmark Hawai'i Supreme Court decision Public Access Shoreline Hawaii v. Hawai'i County Planning Commission, 79 Hawai'i 425 (1995), https://vimeo.com/519658393/7233498d4b (Panel 1, PASH and its Progeny, at 0:53:29 to 0:54:09) (noting speaker's emphases).

2. *Former* Mauna Kea II *footnote 17.*

Although one of the alleged points of error on appeal identified in Section III.B.2. does not actually appear as a section heading in the court's Discussion of Points of Error on Appeal (Part V), former *Mauna Kea II* footnote 17 addressed the issue of "contemporary" versus "traditional" cultural practices as follows:

> The Kihoi Appellants allege in Point of Error B(2) that the BLNR erred by stating that Article XII, Section 7 does not protect contemporary Native Hawaiian cultural practices. In *Hanapi*, we stated, "To establish the existence of a traditional or customary native Hawaiian practice, we hold that there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice." 89 Hawai'i at 187, 970 P.2d at 495 (footnote omitted; emphases added). Also, *PASH* defined a "customary" native Hawaiian usage as one that "must have been established in practice" as of "November 25, 1892. . . ." *PASH*, 79 Hawai'i at 447, 903 P.2d at 1268. Thus, Native Hawaiian cultural practices are protected by Article XII, Section 7 if there is an adequate foundation connecting the practice to a firmly rooted traditional or customary Native Hawaiian practice that was established as of November 25, 1892. The BLNR properly analyzed the cultural practices at issue under this standard.[157]

Before devoting approximately five pages of their motion for reconsideration to urging proper application of the *Ka Pa'akai* framework by the *Mauna Kea II* court,[158] the MKAH Appellants notably argued that:

> Footnote 17 deals with the misplaced and unfounded concept of "contemporary" practices. If the navigators of the Hokule'a, for example, gained learning from a non-Hawaiian, Mau Piailug, from Satawal, would the Court characterize the navigational practices of the Polynesian Voyaging Society to not be a native Hawaiian traditional and customary practice? If younger generation Native Hawaiians learn ['Ōlelo] Hawai'i in immersion schools or at the University and revitalize the language after it became nearly extinct [sic] with the impacts of American colonialism during earlier generations, does that mean the speaking of the Hawaiian language is no longer part of native Hawaiian culture or should not be practiced?[159]

After once again deleting erroneous references to *PASH* and *Hanapi* previously contained in the court's slip opinion, the now revised *Mauna Kea II* footnote 16[160] clarified that the *reasonable* exercise of

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[157] *Mauna Kea II*, slip op. at 36 n.17.

[158] *See* MKAH Reconsideration Motion, *supra* note 142, at 7–11 & 14.

[159] *Id.* at 5 n.2.

[160] Following the deletion of former *Mauna Kea II* footnote 15, former *Mauna Kea II*

"contemporary (as well as customary and traditional) Native Hawaiian cultural practices" within the project site and its immediate vicinity, along with "possible native Hawaiian rights or cultural resources outside the area at issue[,]"[161] must indeed be evaluated under the *Ka Pa'akai* framework. Yet again, however, the court appears to have given short shift to the *PASH* Guidelines concerning "reasonable[ness]" as an element of Hawai'i's Custom Doctrine.[162]

In addition, the *Mauna Kea II* court's curious use of the phrase "immediate vicinity" in its revised *Mauna Kea II* footnote 16 is belied by the court's subsequent holding that *Ka Pa'akai*[163] required BLNR to

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footnote 17 now appears in the published decision as *Mauna Kea II* footnote 16—immediately after a sentence that reads: "In addition to testimonial evidence, in reaching its findings, the BLNR had available numerous recent research studies, plans, and impact assessments documenting cultural resources on Mauna Kea, including Native Hawaiian traditional and customary practices." *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea* II), 143 Hawai'i 379, 396, 431 P.3d 752, 769 (2018). The footnote now reads:

> The Kihoi Appellants allege in Point of Error B(2) that the BLNR erred by stating that Article XII, Section 7 does not protect contemporary Native Hawaiian cultural practices. The record reflects, however, that the BLNR appropriately took into account *contemporary* (as well as customary and traditional) Native Hawaiian cultural practices, finding and concluding that none were taking place *within the TMT Project site or its immediate vicinity*, aside from the recent construction of ahu to protest the TMT Project itself, which was not found to be a *reasonable* exercise of cultural rights. Further, although the BLNR defined the "relevant area" in its *Ka Pa'akai* analysis as the TMT Observatory site and Access Way, the Board's findings also identified and considered the effect of the project upon cultural practices in the vicinity of the "relevant area" *and in other areas of Mauna Kea, including the summit region*, as [*Ka Pa'akai O Ka 'Āina v. Land Use Comm'n* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000)] requires. *See* 94 Hawai'i at 49, 7 P.3d at 1086 (faulting the agency for failing to address "possible native Hawaiian rights or cultural resources *outside* [the area at issue]") (emphasis added, brackets in original).

Id. at 396 n.16, 431 P.3d at 769 n.16 (emphases added).

[161] *Id.* at 396 n.16, 431 P.3d at 769 n.16.

[162] *See supra* notes 4, 13, 36–38, 42–52, 67–73, 151, 161, and accompanying text (discussing the "reasonable[ness]" element of Hawai'i's Custom Doctrine under the *PASH* Guidelines).

[163] Interestingly, Justice Pollack's dissenting opinion in *Kilakila 'O [Haleakalā] v. Board of Land and Natural Resources* (*Kilakila III*), 138 Hawai'i 383, 382 P.3d 195 (2016), contains that court's *sole* reference to *Ka Pa'akai*—merely citing the requirement that agencies "'make specific findings and conclusions' regarding certain factors '[i]n order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible[.]'" *Kilakila III*, 138 Hawai'i at 416 n.3, 382 P.3d at 228 n.3 (Pollack, J., dissenting, Wilson, J., joining as to Parts IA and II); *cf. supra* note 127 (noting the professed

identify and consider "the effect of the project upon cultural practices in the vicinity of the 'relevant area' *and in other areas of Mauna Kea, including the summit region*."[164] The *Mauna Kea II* court used the "[*s*]*ee*" signal (signifying that the authority supports but does not directly state the proposition), noting that *Ka Pa'akai* faulted the State Land Use Commission (LUC) "for failing to address 'possible native Hawaiian rights or cultural resources *outside* [the area at issue]"—inserting the bracketed phrase in place of the *Ka Pa'akai* court's reference to the developer's "235 acre RMP [or, Resource Management Plan],"[165] which is located within a nearly 1,010 acre parcel that the developer sought to reclassify from conservation to urban land use.[166] In addition to mauka-makai trails

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effort by Kilakila's counsel to focus on a plain reading of BLNR's applicable regulatory provisions).

[164] 143 Hawai'i at 396 n.16, 431 P.3d at 769 n.16 (citing *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086) (emphasis added). Under the circumstances, a more culturally-attuned assessment with respect to the "reasonableness" of constructing an ahu on the Access Way might have considered (on remand, or otherwise) whether arguably analogous actions were undertaken in response to past actions taken by ali'i, the Kingdom of Hawaii, or others in positions of authority, which traditional and customary practitioners considered to be hewa (wrong, improper, erroneous), particularly where threats of harm to sacred areas or resources were concerned—e.g., sandalwood or whales. Such weighty issues surely deserved more than mere conclusory analysis under the *Ka Pa'akai* framework. *Contra* BLNR Decision, *supra* note 5, at COL 383 ("Two 'ahu were built on the TMT access road in 2015. *See* FOF #791, *supra*. These are not shrines. They were built as a protest against the TMT project. *Id.* The building of rock piles in the right-of-way of another person is *obviously not an accepted native Hawaiian tradition and custom*. Nor does it conform to the [*Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995),] requirement [sic] that practices be reasonable. 79 Hawai'i at 447, 903 P.2d at 1268.") (emphasis added). *See supra* notes 13, 36–38, 42–52, 67–73, 151, 161–62, and accompanying text (discussing the "reasonable[ness]" element of Hawai'i's Custom Doctrine under the *PASH* Guidelines); *see also supra* text accompanying notes 54–57 (discussing a similarly crabbed interpretation of the *PASH* Guidelines, albeit in a different context, but also delivered by one of the Deputy Attorney Generals who represented BLNR in both *Mauna Kea Anaina Hou v. Board of Land and Natural Resources* (*Mauna Kea I*), 136 Hawai'i 376, 363 P.3d 224 (2015), and *Mauna Kea II*).

[165] *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086 (emphasis added); *see also id.* at 36–37, 7 P.3d at 1073–74 (observing that the 235-acre RMP included a resource management area of about 198 acres, plus an approximately 37-acre archaeological preserve intended to remain within the conservation district). One acre (or 43,650 square feet) is a little less than 91% the size of an American football field excluding the end zones (48,000 square feet).

[166] *Id.* at 34 & 35, 7 P.3d at 1071 & 1072. The 1,010-acre parcel lies within an even larger parcel that covers approximately 2,181 acres. *In re* Kaupulehu Developments, Findings of Fact, Conclusions of Law, and Decision and Order, Docket No. A93-701, at 8, para. 36 (Land Use Comm'n June 17, 1996), https://files.hawaii.gov/luc/cohawaii/a93701kaupulehu_dev06171996.pdf (last visited Mar.

providing access to salt-gathering areas, other areas where hālau hula (dance schools) gather Pele's Tears,[167] and the religious significance of the 1800–1801 lava flow, Ka Pa'akai O Ka 'Āina member Aunty Hannah Kihalani Springer also testified that she and her family utilize the lateral coastline trails as did "people from Mahai'ula, from Makalawena, [and] from Kukio . . . down the coastline from their home ahupua'a"[168]—many miles away from both the embedded 235-acre RMP and the larger 1,010-acre parcel in *Ka Pa'akai*.[169] Accordingly, the *Ka Pa'akai* court observed that the agency's failure to "articulate whether the area lying outside the RMP *lacked* cultural resources or that the resources present *lacked significance* warranting protection or management" were "omissions . . . of particular significance because these activities fall *outside* the 'protection' of [Kaupulehu Develoment's] conceptual RMP area."[170] In other words, the failure to protect practices taking place *outside* the specific project site (i.e., "elsewhere on Mauna Kea" as stated by BLNR's Chair[171]) can be considered a violation of the *Ka Pa'akai* framework.

Considering the context provided by a close examination of *Ka Pa'akai*, the *Mauna Kea II* court's reliance on BLNR's finding that "since 2000, cultural and/or spiritual practices have been occurring while astronomy facilities have existed, and that those activities would not be *prevented* [sic: applying a higher standard than set forth in HAR sections 13-5-40(c)(4) to (6)] by the TMT Observatory located 600 feet below the summit ridge"[172] is

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10, 2021). Thus, potential impacts on traditional and customary practices outside the 235-acre RMP beyond the salt beds, including access rights, also needed to be taken into consideration pursuant to *Ka Pa'akai*. By comparison, the Astronomy Precinct of the Mauna Kea Science Reserve covers only 525 acres—of which astronomy development is restricted to a defined portion that covers a mere 150-acres. 143 Hawai'i at 405–06, 431 P.3d at 778–79.

[167] Pele's Tears are "tiny teardrop-shaped globule[s] of black volcanic glass similar to obsidian" that are formed after molten masses of lava are launched through the air. Hobart M. King, *Pele's Hair and Pele's Tears*, https://geology.com/volcanoes/peles-hair/ (last visited Mar. 10, 2021).

[168] 94 Hawai'i at 49 & n.30, 7 P.3d at 1086 & n.30.

[169] Email from Hannah Kihalani Springer to David M. Forman (Dec. 12, 2019) ("It is approximately 9 miles from the Pu'uwa'awa'a / Ka'ūpūlehu boundary [where the salt beds are located in Kalaemanō] to the Mahai'ula / Kaulana boundary"—i.e., at the opposite end of the coast covered by Ms. Springer's testimony in *Ka Pa'akai*).

[170] *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086 (initial emphases in original, latter emphasis added).

[171] *See supra* note 156 (quoting BLNR Chair Case's February 5, 2021 comment).

[172] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 397, 431 P.3d 752, 770 (2018) (emphasis added). Presumably, the "600 feet" reference represents elevation as distinguished from distance. *See id.* at 406, 431 P.3d at 779 (observing that "BLNR noted that the proposed location of the TMT project is a half mile

befuddling—particularly when viewed in light of the testimony provided by intervening practitioners including Kealoha Pisciotta, Uncle Kū Ching, and Mehana Kihoi, among numerous others.[173]

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from the summit area"—i.e., 2,640 feet). Regardless, the "vicinity" of cultural practices at issue in *Mauna Kea II* to the TMT Project site appears significantly closer than: (a) the distance between the shoreline areas where cultural practices were threatened by proposed uses of the respective wells in *Wai'ola* (approximately 2.51 miles as the crow flies, or a little more than 13,000 feet) and *Kukui I* (approximately three miles, or around 16,000 feet as the crow flies), *see, e.g.*, Delwyn S. Oki, Geohydrology and Numerical Simulation of the Ground-Water Flow System of Molokai, Hawaii, Rep. No. 97-4176, at 16, Fig. 8 (U.S. Geological Survey, 1997); Email from Glenn Teves to David M. Forman (Dec. 25, 2020); or (b) the distance between the Kalaemanō salt beds and both the 235-acre RMP and the larger 1,010-acre parcel at issue in *Ka Pa'akai*. *See supra* note 169 (approximately nine miles).
In any event, the *Mauna Kea II* court's reference to BLNR's use of the term "prevented" contrary to HAR sections 13-5-30(c)(4), (5), and (6) deserves further scrutiny. *Compare* BLNR Decision, *supra* note 5, at FOF 838 ("Since the year 2000 and up to the present, the reliable probative evidence shows that those cultural and/or spiritual practices can continue to be conducted with the existing astronomy facilities and those activities will not be *prevented* by the TMT Observatory which will be located 600 ft. below the summit ridge.") (emphasis added), *with id.* at FOF 757 ("Evidence was presented that certain Petitioners and Opposing Intervenors have been conducting cultural practices on Mauna Kea since at least 2000. These practices have occurred within the presence of the thirteen observatories at the summit area and were not *prevented or curtailed* by these astronomical facilities.") (emphasis added); and *id.* at FOF 825 ("Petitioner Ching testified that he participates in cultural practices . . . [including] performance of traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. . . . Since 2002, Ching has participated in a group (Huaka'i I Na 'Aina Mauna) that hikes ancient trails that traverse certain areas on Mauna Kea" but "none of the ancient trails go to the summit of Mauna Kea" and "Ching did not establish that any of his cultural practices at the Mauna Kea Summit area that [sic] are connected to a firmly rooted traditional or customary native Hawaiian practice dating back to 1892. Ching also did not establish that he performs any historical or traditional native Hawaiian practice at the TMT Project site. No evidence was presented that his practices would be *substantially impacted or prevented* by the TMT Project.") (emphasis added). *See also id.* at COL 110 (summarizing the second *Ka Pa'akai* requirement as requiring an examination whether traditional and customary Native Hawaiian rights "will be affected or impaired by the proposed action" as opposed to whether such practices will be prevented); *id.* at COL 366 (same).

[173] *See, e.g.*, MKAH Reconsideration Motion, *supra* note 142, at 12–15 (providing numerous record citations for testimony about traditional and customary practices "connected to the entire mountain, including the northern plateau"—i.e., the location of the TMT Project site—for example: gathering medicinal items from the Northern side of Mauna Kea that are different from any other place on earth due to unique wind and rain patterns; recitation of traditional chants honoring iwi kupuna at the site; erection of ahu at the site; and, uncontradicted testimony that constructing the TMT in the proposed location would obstruct view planes for solstice and equinox observations, as well as star tracking, from areas in addition to the summit that include areas where practitioners were forced to move

Although the *Mauna Kea II* majority does not actually cite *Kilakila III* in connection with its use of the phrase "immediate vicinity" (nor did BLNR[174]), the court's decision concerning the proposed telescope at Haleakalā on the island of Maui did note the intervening practitioners' arguments "that the ICA erred in affirming BLNR's interpretation of 'locality and surrounding areas' in HAR § 13-5-30(c)(5) as the *immediate vicinity* of the proposed ATST [Advanced Technology Solar Telescope] site" and stressing, further, the absence of any evidence that the proposed project would be compatible with the Haleakalā National Park.[175] Nevertheless, the *Kilakila III* court expressly noted a Federal Environmental Impact Statement (FEIS) determination with respect to cultural and visual resources, which concluded that construction of the proposed telescope "would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources" within the "Region of Influence" defined to include "the HO site [i.e., Haleakalā High Altitude Observatory] *and surrounding areas including* [*Haleakalā*] *National Park*."[176]

Regarding the applicable regulatory criteria for permit issuance under HAR section 13-5-30(c)(5), the *Kilakila III* court noted BLNR's focus on the HO site where "[a]stronomical and observatory facilities have existed . . . since 1951" along with the agency's determination that the "ATST Project includes the construction of astronomical facilities which are compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel."[177] Ultimately, the Hawai'i Supreme Court deferred to BLNR's interpretation—while, at least nominally, applying the "clearly erroneous" standard of review—explaining that Governor William Quinn specifically set aside the HO site

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their practices as a result of the construction of two earlier telescopes).

[174] *See* BLNR Decision, *supra* note 5, at FOF 974 (using the terms "immediate vicinity" repeatedly); *id.* at COL 239–40 & 380–81 (same). Interestingly, the phrase "immediate vicinity" does not appear in the Hearing Officer's proposed decision. *In re* Conservation Dist. Use Application (CDUA) HA-3568, Case No. BLNR-CC-16-002, Proposed Findings of Fact, Conclusions of Law and Decision and Order (Haw. Bd. of Land & Nat. Res. July 26, 2017), https://dlnr.hawaii.gov/mk/files/2017/07/783-Hearing-Officers-Proposal.pdf (last visited Mar. 10, 2021).

[175] *Cf.* Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources (*Kilakila III*), 138 Hawai'i 383, 406, 382 P.3d 195, 218 (2016) (emphasis added).

[176] *Cf. id.* at 388 & n.8, 382 P.3d at 200 & n.8 (emphasis added).

[177] *Id.* at 406, 382 P.3d at 218 (inferring that "BLNR necessarily interpreted 'locality and surrounding areas' as the areas within the HO site" because the agency did not mention areas outside the HO site).

for observatory purposes via executive order in 1961.[178] Thus, *Kilakila III* relied on actions initiated by the executive branch in 1951, eight years prior to statehood, and twenty-seven years before the 1978 constitutional convention.[179] Those initial executive actions during Hawai'i's territorial period were later formalized under the 1961 executive order issued by Governor Quinn—the last of twelve persons *appointed* as Governor of the Territory; although he also became the first person elected Governor for the State of Hawai'i, Governor Quinn soon was voted out of office in 1962 (with the election of Governor John A. Burns and Lieutenant Governor William S. Richardson), just one year after issuing the executive order concerning observatories at Haleakalā.[180]

In any event, *Mauna Kea II* also fails to explain or otherwise distinguish seemingly relevant testimony cited by the *Ka Pa'akai* court: "[w]hat is critical to the performance or the practice is that the body, and thus the spirit, becomes imbued with the character of the land . . . other than . . . our workaday world, we are allowed to experience and be imbued with the characteristics of the land, the quiet, *as well as what we see* . . . all of which is setting the tone" for the exercise of traditional and customary practices.[181]

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[178] *Id.* (citing Kaleikini v. Yoshioka (*Kaleikini II*), 128 Hawai'i 53, 67, 283 P.3d 60, 74 (2012), and *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 425, 83 P.3d 664, 688 (2004), regarding deference to agency interpretations except where plainly erroneous or inconsistent with the legislative purpose); *id.* at 407, 382 P.3d at 219 (dismissing the intervening practitioners' contrary reliance on a quote in the BLNR order approving the permit, which allegedly recognized that Haleakalā National Park was part of the "surrounding area").

[179] *See, e.g.*, *IfA Maui History*, UNIV. OF HAW. INST. FOR ASTRONOMY, http://about.ifa.hawaii.edu/facility/history-of-ifa-maui/ (discussing identification of Halaeakalā as the most practical site for astronomy experiments "due to the relatively easy access" in 1951). Further critical-contextual analysis of this executive order will be pursued in a subsequent publication. *See supra* notes * and 6.

[180] *Cf.* Robinson v. Ariyoshi, 65 Haw. 641, 667 n.25, 658 P.2d 287, 306 n.25 (1982) ("[D]uring the territorial period ['when the resources of our land were subject to an authority which did not directly represent Hawaii's people'] . . . the judiciary was not a product of local sovereignty. . . . [U]pon our assumption of statehood our own government assumed the whole of that responsibility [to frame the law], absent any explicit federal interest") (citing Erie v. Tompkins, 304 U.S. 64, 79 (1938), for the proposition that "the voice adopted by the State as its own . . . should utter the last word" concerning applicable common law). Once again, however, the application of critical race theory to indigenous environmental justice issues is beyond the scope of this article.

[181] 94 Hawai'i 31, 49 n.32, 7 P.3d 1068, 1086 n.32 (2000) (emphasis added). *See also* MAUNA KEA CIA STUDY, *supra* note 1, at 43 (quoting cultural impact assessment prepared in connection with the University's Mauna Kea Science Reserve Master Plan, which identifies Native Hawaiian cultural practices including "experiential activities focused on 'becoming one' with natural setting; that is, behaviors relating to spiritual communication and

The late Shirley Naomi Kanani Garcia made a prescient observation about the likelihood of fully realizing the promise associated with even the "minimal prerequisites" required by *Ka Pa'akai*:[182]

> [I]n the end, the analytical [*Ka Pa'akai*] framework may fail to live up to the court's expectations. To protect the traditional and customary practices of Native Hawaiians, the State must protect the cultural and natural resources upon which these practices depend. Native Hawaiian identity is located in the *'āina*, the land. . . .
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> *For agencies to fulfill their constitutional mandate, judicial guidance is needed.* Cultural sensitivity and understanding, however, cannot be judicially mandated through the application of a three-pronged test, no matter how well intentionally crafted to "accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other." To better ensure Native Hawaiian traditional and customary rights are adequately protected, what is needed is meaningful, consistent, and permanent representation of Native Hawaiian cultural practitioners in decision-making that affects how land use and development proceeds in the state.[183]

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interaction that reaffirm and reinforce familial and kinship relationships with the natural environment"); Otaguro, *supra* note 52, at 35 (quoting practitioner Mahealani Pai: "You do your practice, you *pule*, you pray, and you have this huge building right in front of you and these tourists looking at you, observing you. Plus, there are a lot of sites over there that we're afraid they're going to destroy. They only call for a 40-foot buffer. All the infrastructure they have to put in—utility, conduits—they have to dig, make puka [a hole]. With a huge construction like that, we feel they're going to plug up the puka for the 'ōpae 'ula"; presumably, Pai's latter "puka" reference invoked the anchialine nature of the ponds, which include subterranean connections to the ocean and are influenced by the tides); *id.* at 62 (quoting CJ Richardson: "Fee simple rights have always been limited by Native Hawaiian rights. You go back all the way to the Mahele if you want to. The Hawaiian rights have always been there. What we think of as fee simple ownership never cut off any Native rights or customs").

[182] 94 Hawai'i at 50, 7 P.3d at 1087.

[183] Shirley Garcia, *Ka Pa'akai o Ka 'Āina v. Land Use Commission: Fulfilling the State's Duty to Protect the Traditional and Customary Rights of Native Hawaiians?*, at 30, http://www.hawaii.edu/elp/publications/moolelo/ELP-PS-Spring2004.pdf (published as part of the Environmental Law Program's Spring 2004 paper series, He Mau Mo'olelo Kānāwai o ka 'Āina "Stories of the Law of the Land") (emphasis added, footnote omitted). Before joining the Law School as a full time faculty member, I had the pleasure of litigating cases with Shirley as a fellow Enforcement Attorney at the Hawai'i Civil Rights Commission from 2004 to 2010 (although she took leave beginning in 2005 to serve as Interim Director of the Law School's Ulu Lehua Program when Professor Chris Iijima was diagnosed with a rare blood disease, and continued in that role after Iijima passed away at the end of the year, through 2007 when the Law School hired Professor Linda Krieger as the program's new Director).

Proposed legislation to require the appointment of a Native Hawaiian cultural practitioner to BLNR was ultimately amended, however, to instead authorize appointment of a "cultural expert" regardless of ethnicity.[184]

Rather than providing the "badly needed judicial guidance" and "enforcement by the court of these rights" as specifically called for by delegates to the 1978 constitutional convention,[185] the court's recent decisions in several agency appeals suggest a willingness to abdicate the court's constitutional duties to the detriment of public trust (including natural and cultural) resources. Whether through application of standards of review that evoke parallels to the criticism that "there is a rule of statutory construction for every outcome[,]"[186] or by ignoring the court's own

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[184] *See also* Candace Fujikane, *Mapping Abundance on Mauna a Wākea as a Practice of Ea*, 11 HŪLILI: MULTIDISCIPLINARY RESEARCH ON HAWAIIAN WELL-BEING 23, 28 (Sept. 2019) ("[B]earing witness to the unjust processes of the settler state that amended the legislative language of HB1618 CD1 from requiring the BLNR to have a seat for a member with expertise in native Hawaiian traditional and customary practices in order 'to better administer the public lands and resources with respect to native Hawaiian issues and concerns' to a seat for a 'cultural expert' who does not represent Hawaiian concerns.[] The governor subsequently appointed an Asian settler to this seat on the BLNR, a board member who voted to approve the permit for the TMT on three separate occasions"); Ashley Nagaoka, *3 arrested for disorderly conduct while protesting BLNR member*, HAW. NEWS NOW, Oct. 27, 2017, https://www.hawaiinewsnow.com/story/36705694/3-arrested-at-state-meeting-amid-protests-of-board-member/ ("Sam ['Ohu] Gon . . . recently voted to approve the [TMT] construction permit and serves as the board's official cultural adviser" as a "well-respected practitioner of Hawaiian culture" but "because he's not Native Hawaiian, the protesters say he should not be making decisions that affect their people"); Associated Press, *Supreme Court Justice Reports Improper Emails Regarding TMT*, HONOLULU CIV. BEAT, Aug. 10, 2018, https://www.civilbeat.org/2018/08/supreme-court-justice-reports-improper-emails-regarding-tmt/ ("When asked if he could provide copies of the emails, Gon said the state Attorney General's office advised him to destroy them. A spokeswoman for the office said Gon was not advised to destroy the emails. On Friday, Gon denied initially saying he was told to destroy the emails and declined further comment").

[185] STAND. COMM. REP. NO. 57, *supra* note 14, at 640 (quoted *in Ka Pa'akai*, 94 Hawai'i at 50, 7 P.3d at 1087, and Pele Def. Fund v. Paty (*PDF v. Paty*), 73 Haw. 578, 619–20, 837 P.2d 1247, 1271 (1992)); *see also* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 5, 656 P.2d 745, 748 (1982) (quoting page 637 of the same source). *Cf.* Mana Maoli, *supra* note 14 (reimagining ISRAEL KAMAKAWIWO'OLE, HAWAI'I '78 (Mountain Apple Co. 2010)).

[186] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 279–80 (1990), *quoted in* Richardson v. City and Cty. of Honolulu, 76 Hawai'i 46, 54 n.14, 868 P.2d 1193, 1201 n.14 (1994) (describing the "often illusory and self-serving" nature of the canons, which are "[c]autionary rather than directive, often pulling in opposite directions like their counterparts, the maxims of ordinary life . . . , the canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved"); *but see id.* at 75 n.18, 868 P.2d at 1222 n.18 (Klein, J., dissenting, Moon,

precedent invalidating agency proceedings that erroneously shifted the applicants' contested case hearing burdens of proof to intervening practitioners, or via selective application of [rebuttable] presumptions, the court has essentially deferred to agency actions that turn a blind eye to "volatile, deeply-rooted cultural and political indigenous land trust controversies" reflecting a "history of culture destruction and land dispossession"[187]—despite the express language of the Hawai'i Constitution, and at the expense of those who wish to continue exercising traditional and customary practices.

In this regard, recent scholarship concerning the obligation of Free, Prior Informed Consent under the United Nations Declaration on the Rights of Indigenous Peoples is informative[188]—as are formally binding international

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C.J., joining) ("[T]he fact that the legislature's reasons for acting are 'ultimately unknowable' is not a sound basis for disregarding legislative actions and applicable rules of construction. In fact, it is precisely because the legislature's reasons are ultimately unknowable that rules of construction have developed."). *See also* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) ("[T]here are two opposing canons on almost every point.").

[187] *See, e.g.*, Fujikane, *supra* note 184, at 26 (describing "the mapping of ancestral knowledges of the abundance that is Mauna a Wākea as part of an education in 'ea' a word meaning life, breath, sovereignty, and a rising—the rising of the people to protect the 'āina, the land that feeds physically, intellectually, and spiritually"); *see also id.* at 42-43 (discussing the term "EAducation" coined by one of the Kia'i Mauna leaders, Kaho'okahi Kanuha, who explains that "EAducation is what will return breath and life to our lāhui [nation], it will give us the ability to have sovereignty, rule and independence over all the decisions we make and over the future of our lāhui").

[188] *See* Julian Aguon & Julie Hunter, *Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime*, 38 STAN. ENV'T. L.J. 3 (2018) [hereinafter Aguon & Hunter, *Second Wave*]; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]. *See also Unjust Enrichment*, *supra* note 102, at 2159–60 & n.135 (citing [U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples 1] (2011), https://2009-2017.state.gov/documents/organization/154782.pdf, for the "moral and political force" of UNDRIP, and Julian Aguon, *Native Hawaiians and International Law*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note *, at 399–401, for the proposition that UNDRIP could eventually be invoked as a source of customary international law"); Hilding R. Neilson & Samantha Lawler, *Canadian Astronomy on Mauna Kea: On Respecting Indigenous Rights* (Oct. 14, 2019), https://arxiv.org/pdf/1910.03665.pdf (presenting recommendations based on UNDRIP for the Canadian astronomical community to better support Indigenous rights on Mauna Kea and Hawai'i while providing clear guidelines for the astronomical community to participate in activities conducted on Indigenous land—including, but not limited to, "a process that requires clear Native Hawaiian consent for future projects" and that "Canadian engagement on Maunakea must be consistent with the spirit of the Calls to Actions of the Truth and Reconciliation Commission and [UNDRIP]"). Note that the State Department

instruments including the Convention on the Elimination of Racial Discrimination, along with the International Covenant on Civil and Political Rights, if not also the Convention on Biological Diversity (which the United States has signed but not ratified).[189] For example, the United States has been required to provide "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent[.]"[190] Moreover, "the scope of indigenous peoples' rights to make autonomous decisions regarding development projects [has been expanded] beyond the limits of their traditional lands" to include "the total environments" of areas used by indigenous peoples[191] and "have the right to maintain and strengthen their distinctive spiritual relationship with their . . . waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[192]

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announcement concerning UNDRIP refers to the traditional Native Hawaiian skill of wayfinding across the world's largest ocean as "one of the greatest feats of human kind."

[189] *See* Letter from Noureddine Amir, Chair, Comm. on the Elimination of Racial Discrimination, Off. of the United Nations High Commissioner for Human Rights, to Mark J. Cassayre, Permanent Rep. of the U.S. to the United Nations Off., Geneva (May 10, 2019) https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_ALE_USA_8932_E.pdf (noting receipt of information about impending construction of the TMT at Mauna Kea under the committee's early warning and urgent action procedure, and expressing concern about allegations involving "the lack of adequate consultation and the failure to seek free, prior and informed consent" which "could constitute a breach of the State party duty to recognize and protect the rights of indigenous people to own, develop, control and use their communal lands, territories and resources"; citing the Committee's General Recommendation No. 23 on the rights of indigenous peoples (1997), along with recommendations on the rights of indigenous peoples made in paragraph 24 of its concluding observations of September 2014 (CERD/C/USA/CO/7-9); encouraging the United States to seek assistance from the United Nations Expert Mechanism on the Rights of Indigenous Peoples mandated by the Human Rights Council (resolution 33/25, paragraph 2); and, requesting a formal response under article 9(1) of the Convention and article 65 of its Rules of Procedure).

[190] Aguon & Hunter, *Second Wave*, *supra* note 188, at 30 n.115 (citing Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 131 (2003)).

[191] *Id.* at 33 & n.124 (citing BIRGITTE FEIRING, INT'L LAND COAL., INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES, AND RESOURCES, 17 (2018), http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf).

[192] *Id.* at 33 & n.125 (citing UNDRIP, art. 25; arguing further that Pacific peoples' resources and/or territories extend throughout large swaths of the Pacific Ocean where islanders practiced expert navigation and sustainable resource practices).

IV. THE RELEVANT RULE OF LAW IN HAWAI'I: IT IS AN ERROR OF LAW TO SHIFT THE APPLICANT'S BURDENS (AND THE AGENCY'S DUTIES) IN A CONTESTED CASE HEARING ONTO INTERVENING NATIVE HAWAIIAN PRACTITIONERS

> "Expedients are for the hour, but principles are for the ages. Just because the rains descend, and the winds blow, we cannot afford to build on shifting sands."
>
> —Henry Ward Beecher[193]

The Hawai'i Supreme Court has twice held (in *Wai'ola* and *Kukui I*) that a state agency committed legal error by shifting the burden of proving harm in administrative contested case hearings to intervening practitioners who asserted traditional and customary Native Hawaiian rights, instead of requiring the permit applicant to affirmatively demonstrate that its proposed use would not abridge or deny those constitutionally-protected practices.[194] In both cases, the court stressed that agencies are "duty bound" to hold applicants to their burden of proof during contested-case hearings.[195]

The absence of discussion regarding these holdings in the *Mauna Kea II* majority,[196] concurring[197] (except for an indirect reference[198]), and

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[193] American Presbyterian Minister (1813–1887), prolific author and speaker, abolitionist—and brother of Harriet Beecher Stowe (author of *Uncle Tom's Cabin*)—as well as a supporter of continued Chinese immigration, women's suffrage, and U.S. presidential candidate Grover Cleveland (who recognized the illegal overthrow of the Hawaiian Kingdom).

[194] *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 507–09, 174 P.3d 320, 346–48 (2007); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 441–42, 83 P.3d 664, 704–05 (2004).

[195] *Kukui I*, 116 Hawai'i at 490, 509, 174 P.3d at 329, 348 (citing *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000), and *Wai'ola*, 103 Hawai'i at 336, 342, 441–42, 83 P.3d at 689, 695, 704–05); *see also Waiāhole I*, 94 Hawai'i at 136–38, 9 P.3d at 448–50.

[196] Although perhaps coincidentally, *In re Conservation Dist. Use Application (CDUA) HA-3658* (*Mauna Kea II*), 143 Hawai'i 379, 431 P.3d 752 (2018)—authored by Justice McKenna, with Chief Justice Recktenwald and Justice Nakayama joining, and Justice Pollack concurring in part and concurring in the judgment—appears immediately before Justice Pollack's unanimous opinion in *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui II*), 143 Hawai'i 434, 431 P.3d 807 (2018). In *Kukui II*, those four justices were joined by Judge Collete Y. Garibaldi (in place of Justice Wilson, recused). It seems implausible that any member of the *Mauna Kea II* majority would have failed to refresh their recollection about the *Kukui I* holding during their deliberations over *Kukui II*.

[197] Justice Pollack's *Mauna Kea II* concurring opinion cites *Wai'ola* three times, but not regarding the impropriety of burden-shifting in a contested case hearing from applicants to intervening practitioners. *See Mauna Kea II*, 143 Hawai'i at 411, 431 P.3d at 784 (Pollack,

dissenting[199] opinions—in addition to the underlying BLNR Decision at issue in *Mauna Kea II*—is glaring, to say the least.[200] This omission is

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J., concurring) (citing *Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692, for its interpretation of Hawai'i Constitution article XI, section 1 public trust obligations regarding the use of water); *id.* at 418 n.10, 431 P.3d at 791 n.10 (citing the holding in *Wai'ola*, 103 Hawai'i at 409, 83 P.3d at 672, that the Commission failed to discharge its public trust duty to protect traditional and customary rights as guaranteed by article XII, section 7 of the Hawai'i Constitution—in the context of concluding substantial evidence supported the agency's determination that implementation of reasonable mitigation measures to address harm to public trust purposes, including traditional and cultural practices); *id.* at 418 n.11, 431 P.3d at 791 n.11 (citing *Wai'ola*, 103 Hawai'i at 429–31, 83 P.3d at 692–94, for the framework that sets forth evidentiary principles to guide agency determinations).

[198] Justice Pollack instead relies on *Kauai Springs, Inc. v. Planning Commission of County of Kaua'i* (*Kauai Springs*), 133 Hawai'i 141, 324 P.3d 951 (2014), for the proposition that "*applicants have the burden* to justify the proposed use of conservation lands in light of trust purposes" including demonstration of (1) "actual needs and the propriety of using state conservation lands to satisfy those needs" and (2) "the absence of a practicable alternative location for the proposed project" as well as (3) "[i]f there is a *reasonable allegation of harm* to public trust purposes, then the applicant must implement reasonable measures to mitigate such cumulative impact from existing and proposed projects using conservation land." *Mauna Kea II*, 143 Hawai'i at 419 n.12, 431 P.3d at 792 n.12 (Pollack, J., concurring in part and concurring in the judgment) (emphases added); *see also id.* at 414, 431 P.3d at 787 (citing *Kauai Springs*, 133 Hawai'i at 174, 324 P.3d at 984). Although the cited portion of *Kauai Springs* does rely on *Kukui I*, 116 Hawai'i at 490, 499, 174 P.3d at 329, 338, the relevant burden of proof discussion takes place much later in *Kukui I*. *See id.* at 507–09, 174 P.3d at 466–68.

[199] Justice Wilson's dissenting opinion, likewise, does not discuss *Kukui I* and only cites *Wai'ola* regarding the principle of intergenerational equity under article XI, section 1 of the Hawai'i Constitution. *See generally*, *Mauna Kea II*, 143 Hawai'i at 421–34, 431 P.3d at 794–807 (Wilson, J., dissenting); *id.* at 428 n.11, 431 P.3d at 801 n.11 (citing *Wai'ola*, 103 Hawai'i at 429–31, 83 P.3d at 692–94). As mentioned *supra* note 196, Justice Wilson was recused from *Kukui II*.

[200] Justice McKenna previously joined the *Wai'ola* opinion as a then-Circuit Court judge assigned to sit in place of recused Associate Justice James E. Duffy (now retired). *Wai'ola*, 103 Hawai'i at 406, 83 P.3d at 669. Also joining the *Wai'ola* opinion authored by Associate Justice Steven H. Levinson were Chief Justice Ronald T. Y. Moon (now-retired) and Justice Nakayama. *Id.* A separate concurring opinion filed by Justice Acoba (now-retired) stated simply that he "concur[red] in the result." *Id.* at 451, 83 P.3d at 714. In addition, Justice McKenna joined Justice Pollack's *Mauna Kea Anaina Hou v. Board of Land & Natural Resources* (*Mauna Kea I*) "concurring opinion"—along with Justice Wilson, therefore representing a majority of the court—as to Part IV entitled "Constitutional Responsibilities of an Agency" and holding that "[a]n agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision." 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015).
Justice Nakayama previously authored the Hawai'i Supreme Court's landmark *Waiāhole I* decision (joined by Moon, C.J., Klein and Levinson, JJ.), which provided a framework for the *Wai'ola* and *Kukui I* opinions with only the late Justice Mario R. Ramil dissenting.

particularly disconcerting in light of the court's prior acknowledgment of Pisciotta's argument on behalf of MKAH, that its members' due process rights would be violated by "shifting the burden of proof, and thereby forcing us to have to change BLNR's mind, rather than BLNR listening with an open mind to hear all evidence."[201]

At least two,[202] if not all four of the justices who deliberated over both *Mauna Kea I* and *Mauna Kea II* (not counting Circuit Court Judge Jeannette Castagnetti, who sat by designation in *Mauna Kea II* following the recusal of Justice Paula A. Nakayama), were also specifically aware of the *Kukui I* opinion in the context of ongoing efforts to obtain the privilege of permission to construct an additional telescope near the summit of Mauna Kea:

> The court clarified, in [Kukui I], that in cases where Native Hawaiian rights figure in an agency's public trust balancing, the burden is not on parties of Native Hawaiian ancestry to prove that the proposed use would harm traditional and customary Native Hawaiian rights; rather, the permit applicants and the agency are the parties obligated to justify the proposed use and the approval thereof in light of the trust purpose of protecting Native Hawaiian rights.[203]

A comparison of the agency actions previously vacated by the Moon Court in *Wai'ola* and *Kukui I*, reveals eight striking similarities with the underlying facts in *Mauna Kea II*—raising serious questions about the differing outcomes in these cases. Both the Commission on Water Resource Management (CWRM) in *Wai'ola* and *Kukui I*, as well as BLNR in *Mauna Kea II*:

Waiāhole I, 94 Hawai'i at 190–98, 9 P.3d at 502–10 (Ramil, J., dissenting). In addition to joining the *Wai'ola* opinion, Justice Nakayama would later author the court's unanimous *Kukui I* opinion. 116 Hawai'i at 484, 174 P.3d at 324 (Nakayama, J., Moon, C.J., Levinson and Acoba, JJ., and Circuit Judge Karl K. Sakamoto in place of Duffy, J., recused, joining). However, Justice Nakayama was recused from *Mauna Kea II*, with Circuit Judge Castagnetti assigned to take her place. 143 Hawai'i at 383, 431 P.3d at 756.

[201] *Mauna Kea I*, 136 Hawai'i at 386, 363 P.3d at 234 (quoting the University's response as "we didn't shift—the burden of proof did not shift. The University agreed and has continued to agree to accept the burden of proof of the eight criteria for the issuance of a CDUP"). However, the unanimous part of *Mauna Kea I* does not otherwise address the burden of proof and the University apparently changed course following remand and joined arguments by Intervenor TIO that the burden should shift to the intervening practitioners under *Hanapi* and *Pratt*.

[202] *Mauna Kea I*, 136 Hawai'i at 399–418, 363 P.3d at 247–63 (Pollack, J., concurring, Wilson, J., joining).

[203] *Id.* at 406 n.8, 363 P.3d at 254 n.8 (emphasis added) (citing *Kukui I*, 116 Hawai'i at 507–09, 174 P.3d at 346–48).

1) acknowledged that applicants bear the *burden of proof and persuasion* with respect to applicable statutory/regulatory criteria;[204]
2) recognized the existence of traditional and customary Native Hawaiian practices *outside* the project site,[205] but "no evidence"[206] of such practices *within* the project site;
3) shifted the contested case hearing burden from the applicant to intervening Native Hawaiian practitioners—implicitly by CWRM,[207] and explicitly by BLNR as follows:

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[204] *Compare Kukui I*, 116 Hawai'i at 498, 174 P.3d at 337, *and Wai'ola*, 103 Hawai'i at 415–19, 83 P.3d at 678–82, *with In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 408, 431 P.3d 752, 781 (2018) (quoting HAR § 13-1-35(k)). *See also Mauna Kea I*, 136 Hawai'i at 386, 363 P.3d at 234 (quoting the University's prior argument that "the burden of proof did not shift. The University agreed and has continued to agree to accept the burden of proof of the eight criteria for the issuance of a CDUP.").

[205] *Compare Kukui I*, 116 Hawai'i at 508–09, 174 P.3d at 347–48, *and Wai'ola*, 103 Hawai'i at 412–13, 413 n.15, 419 & n.22, 83 P.3d at 675–76, 676 n.15, 682 & n.22, *with Mauna Kea II*, 143 Hawai'i at 395–96, 396 & nn.15–16, 431 P.3d at 768–69, 769 & nn.15–16. *See also supra* Section III.C.2. (discussing the *Mauna Kea II* court's curious use of the term "immediate vicinity" when applying its analysis under Ka Pa'akai O Ka 'Āina v. Land Use Commission (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 1086 (2000)). Note, further, that the *Mauna Kea II* court effectively diminished protections for traditional and customary rights by deferentially incorporating BLNR's categorization of issues in a manner that obscures the overlapping nature of these serious questions raised by practitioners. *See id.*

[206] *Compare Kukui I*, 116 Hawai'i at 509, 174 P.3d at 348, *and Wai'ola*, 103 Hawai'i at 442, 83 P.3d at 705, *with Mauna Kea II*, 143 Hawai'i at 396, 431 P.3d at 769. The *absence* of physical signs of activity by traditional and customary practitioners within the "relevant area" of a proposed use and its surroundings (*see supra* text accompanying note 8, noting the "high degree of sacredness" suggested by the presence of a ring of shrines surrounding the summit area)—i.e., what would appear to be one of the *least* intrusive forms of cultural, spiritual and/or religious practices when a regulatory authority attempts to balance competing interests under article XII, section 7 of the Hawai'i Constitution—is a curious basis for justifying the extinguishment of "possible native Hawaiian rights or cultural resources" in the relevant area under a true *Ka Pa'akai O Ka 'Āina v. Land Use Commission* (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000), analysis. *See id.* at 47 n.28, 49, 7 P.3d at 1084 n.28, 1086 (adding emphasis to a Standing Committee Report for H.B. No. 2895, 20th Leg., Reg. Sess. (Haw. 2000), concerning Native Hawaiian cultural impact statements—"Your Committee believes that this measure will result in '*a more thorough consideration of an action's potential adverse impact on Hawaiian culture and tradition, ensuring the culture's protection and preservation*'"—before noting that the bill's "requirements and purposes provide strong support for the" *Ka Pa'akai* framework (quoting H. Stand. Comm. Rep. No. 3298, 20th Leg., Reg. Sess. (Haw. 2000))).

[207] *Kukui I*, 116 Hawai'i at 507–09, 509 n.20, 174 P.3d at 346–48, 346 n.20 ("[T]he Commission's conclusion that 'no evidence was presented' to suggest that the rights of native Hawaiians would be adversely affected erroneously shifted the burden of proof to

> Petitioners and Opposing Intervenors are required to carry the burden of proof on issues asserted by them. In particular, to the extent that Petitioners and Opposing Intervenors are claiming to assert native Hawaiian rights based on customary and traditional practices, the burden is on them to establish that the claimed right is constitutionally protected as a customary and traditional native Hawaiian practice. The standards for establishing constitutional protection of practices that are claimed to be customary and traditional are set forth in *State v. Hanapi*, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (1998)[,] and *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), and are discussed in detail below.[208]

Although BLNR acknowledged the obvious distinction between criminal prosecutions and the agency's obligations in a contested case hearing under the *Ka Pa'akai* framework, the agency contended that the criminal burden of proof "should apply" without citing any support and without addressing applicable constitutional mandates, statutory and regulatory provisions, or binding precedent (e.g., *Wai'ola* and *Kukui I*):

> *Hanapi* was a criminal prosecution. In a CDUA, under *Ka Pa'akai* . . . , the BLNR, prior to granting a permit, must establish what protected traditional and customary rights might be affected by the project, even if there is no opposition to the permit and no one comes forward to claim any rights. In the context of the present application, where exhaustive efforts were made to investigate and determine the extent of traditional and customary practices even before the application was filed, and a contested case hearing has been held, *Hanapi*'s burden of proof *should apply* to any new claims of traditional and customary rights asserted by a party or other individual that were not previously identified by the applicant. In other words, it is the claimant's burden to present evidence sufficient to establish the existence of the right; *it is not the applicant's burden to negate the claimed right*.[209]

[appellants]."); *Wai'ola*, 103 Hawai'i at 442, 83 P.3d at 705 ("[The Commission] erroneously placed the burden on the Intervenors to establish that the proposed use would abridge or deny their traditional and customary gathering rights.").

[208] BLNR Decision, *supra* note 5, at 205 (COL 82); *see also id.* at 248 (COL 396: citing the need to balance interests applying a "totality of the circumstances" test under *Pratt*, 127 Hawai'i 206, 216–17, 277 P.3d 300, 310–11 (2012)). *But see supra* Section III.C. (discussing the *Mauna Kea II* court's reconsideration of its original opinion by deleting references to *Pele Def. Fund v. Paty* (*PDF v. Paty*), 73 Haw. 578, 837 P.2d 1247 (1992), *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), *Ka Pa'akai, State v. Hanapi*, 89 Hawai'i 177, 970 P.2d 485 (1998), and *State v. Pratt* 127 Hawai'i 206, 277 P.3d 300 (2012), in the context of alleged errors involving the applicable burden of proof).

[209] BLNR Decision, *supra* note 5, at 209 (COL 103A); *see also id.* at 245 (COL 371–75) (citing various elements laid out in *Hanapi*). The alphanumeric identifier "103A" reflects BLNR's insertion of this particular COL following receipt of written exceptions filed by the Petitioners and Opposing Intervenors. *See, e.g.*, MKAH Exceptions, *supra* note 112, at ¶¶

4) weighed conflicting testimony in the applicant's favor;[210]
5) concluded that the intervening Native Hawaiian practitioners failed to meet their burden;[211]

13, 216–17, 221, 474, 490 (objecting to the erroneous shifting of burdens from the applicant and agency to the intervening practitioners). Proceeding pro se after the Hearings Officer refused to grant a stay (thus forcing MKAH's counsel to withdraw due to scheduling conflicts), MKAH's written exceptions erroneously characterized portions of Justice Pollack's *Mauna Kea I* concurrence as having received three votes—however, Justice McKenna only joined Part IV of Justice Pollack's *Mauna Kea I* opinion (thus constituting a majority of the court, *see supra* notes 115–22). *Compare Mauna Kea I*, 136 Hawai'i at 413–15, 363 P.2d at 261–63 (Pollack, J., concurring, Wilson, J., joining, McKenna, J., joining as to Part IV), *with* MKAH Exceptions, *supra* note 112, at ¶¶ 217, 490 (quoting *Mauna Kea I*, 136 Hawai'i at 406 n.8, 363 P.3d at 254 n.8, which in turn cites with approval *Kukui I*, 16 Hawai'i at 507–09, 174 P.3d at 346–48); *see supra* Section III.C.1. (discussing the deletion of former *Mauna Kea II* footnote 15).

The *Mauna Kea II* court's initial error was corrected after MKAH counsel Richard Naiwieha Wurdeman resumed his legal representation of the unincorporated organization on appeal. Petitioner-Appellants' Opening Brief on Appeal at 29, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Feb. 26, 2018) (No. SCOT-17-0000777) (citing *Kukui I* for the proposition that BLNR "improperly plac[ed] the burden on these Petitioner-Appellant native Hawaiian cultural practitioners the extent to which these rights are affected or impaired and the feasible action to protect these rights were not properly considered as required under *Ka Pa'akai*"). Meanwhile, the Answering Briefs filed by BLNR and the University failed to rebut MKAH's citation to *Kukui I*, *see* Appellees State of Haw. Bd. of Land & Nat. Res. Answering Brief, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Apr. 9, 2018) (No. SCOT-17-0000777); Appellee Univ. of Haw. at Hilo's Answering Brief, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Apr. 9, 2018) (No. SCOT-17-0000777), and TIO's Answering Brief merely offered an unpersuasive non sequitur suggesting that MKAH's reliance on *Kukui I* was "misplaced" because that case involved a public trust analysis in the context of a water use permit application. Intervenor-Appellee TMT Int'l Observatory, LLC's Answering Brief at 31, *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (Apr. 9, 2018) (No. SCOT-17-0000777); *see also id.* at 29 n.20 (adding emphasis to the phrase "*When* an individual of Native Hawaiian descent *asserts*" from the *Mauna Kea I* concurring opinion and, thus, misconstruing this apparent reference to an intervenor's burden of *production* rather than a burden of *proof*).

[210] Although the BLNR's findings and conclusions in this regard are more extensive by comparison, the agency's ultimate conclusions about the intervening practitioners' supposed failure to present scientific data, research, or empirical evidence about perceived harms are functionally indistinguishable from the CWRM conclusions vacated by *Wai'ola* and *Kukui I*. *Compare Kukui I*, 116 Hawai'i at 507–09, 509 n.20, 174 P.3d at 346–48, 348 n.20, *and Wai'ola*,103 Hawai'i at 412–13, 440 n.35, 83 P.3d at 675–76, 703 n.35, *with* BLNR Decision, *supra* note 5, 161–62 (FOFs 871, 873–75), 220–21 (COLs 191–92), 247 (COLs 385–86).

[211] *See also supra* notes 204–10 and accompanying text. *Compare Kukui I*, 116 Hawai'i at 507–09, 509 n.20, 174 P.3d at 346–48, 348 n.20, and *Wai'ola*, 103 Hawai'i at 419, 442, 83 P.3d at 682, 705, *with* BLNR Decision, *supra* note 5, at 246 (COLs 379-81), 247 (COL 387).

6) determined that the applicants' proposed uses would not adversely impact Native Hawaiian traditional and customary rights;[212]
7) nevertheless, addressed potential harm to traditional and customary Native Hawaiian rights by imposing conditions upon issuance of the requested permits;[213] and
8) ultimately, issued the permits because the agencies determined that the applicants satisfied the applicable statutory/regulatory criteria.[214]

The striking similarities summarized above make it exceedingly difficult to reconcile, on the one hand, *Mauna Kea II*'s failure to address the point of error involving burden-shifting by the agency[215] and, on the other hand, the court's binding precedent in *Wai'ola* and *Kukui I* that vacated another agency's erroneous determination about questions involving mixed questions of fact and law then remanded the matter for further agency

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[212] *Compare Kukui I*, 116 Hawai'i at 508–09, 506 n.20, 174 P.3d at 347–38, 347 n.20, *and Wai'ola*, 103 Hawai'i at 394–95, 419, 83 P.3d at 682, 705–06, *with* BLNR Decision, *supra* note 5, at 60 (FOF 326), 70 (FOFs 369–70), 76 (FOF 418), 109 (FOF 633), 161–62 (FOFs 872–79), 163 (FOFs 881–82, 885–86), 166 (FOFs 900–01). For conflicting accounts regarding water, see Pisciotta Oral Testimony, *supra* note 7, at 37, and Pisciotta Written Testimony, *supra* note 7, at 10. Additionally, relevant BLNR findings and conclusions include: BLNR Decision, *supra* note 5, at 80 (FOF 456), 87 (FOFs 502–05), 88 (FOFs 511–12), 91 (FOF 529), 105 (FOF 610), 126 (FOF 731), 154–55 (FOFs 834–39), 158–61 (FOFs 861–70), 162 (FOF 880), 163 (FOF 888), 165 (FOFs 898–99), 166 (FOF 903), 171 (FOF 937), 218–19 (COLs 172–74), 222-23 (COLs 205, 207, 210), 229 (COL 255), 238 (COL 326).

[213] *Compare Kukui I*, 116 Hawai'i at 495–96, 174 P.3d at 334–35, *and Wai'ola*, 103 Hawai'i at 419–20, 433–34 & n.30, 440–41 & n.34, 444, 83 P.3d at 682–83, 696–97 & n.30, 703–04 & n.34, 707, *with* BLNR Decision, *supra* note 5, at 129 (FOF 747), 223–25 (COLs 208, 212–22). *See also Mauna Kea II*, 143 Hawai'i at 397 & nn.17–18, 431 P.3d at 770 & nn.17–18.

[214] *Compare Kukui I*, 116 Hawai'i at 498, 174 P.3d at 337, *and Wai'ola*, 103 Hawai'i at 407 n.1, 415–19, 83 P.3d at 670 n.1, 678–82, *with* BLNR Decision, *supra* note 5, at 77–189 (FOFs 429–1040), 213–37 (COLs 121–321). *See also Mauna Kea II*, 143 Hawai'i at 401 n.25, 431 P.3d at 774 n.25 (declining to address the underlying constitutional questions); *id.* at 404–07, 431 P.3d at 776–79 (determining that appellants' allegations were without merit). Unlike the intervening practitioners in *Wai'ola* and *Kukui I*, Mauna Kea practitioners' ongoing efforts to pursue restorative justice were (at least temporarily) silenced through the limiting language of legal process. *See* Yamamoto, *Courts and the Cultural Performance*, *supra* note 92, at 6–7, 9, 21–22 & nn.51–52.

[215] The KUA/Machado/Ahuna *Unfiled* Amici Curiae Brief suggests that former *Mauna Kea II* footnote 15 constituted "dicta that serve[d] no necessary purpose for the majority's rulings[,]" adding that the court could "avoid the problems of footnote 15 [regarding the burden of proof] by simply deleting it," and "[a]t minimum, deleting this footnote would avoid exacerbating misconceptions by BLNR and other agencies." *Id.*, *supra* note 148, at 2, 3, 6.

proceedings. Importantly, *Wai'ola* emphasized the court's holding in *Waiāhole I* "that the Code 'does not supplant the protections of the public trust doctrine,' . . . [and] recognized that '[e]ven with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence.'"[216] Accordingly, the *Wai'ola* court relied on Hawai'i Constitution article XII, section 7 and *PASH*, in addition to summarizing (without specifically citing to) the *Ka Pa'akai* framework.[217]

Thus, constitutional protections for traditional and customary rights are *not* dependent upon the State Water Code—consistent with the mandate that "provisions of this constitution shall be *self-executing* to the fullest extent that their respective natures permit."[218] "[W]hile overlap may occur,

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[216] *Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692 (quoting *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 133, 9 P.3d 409, 445 (2000)). The *Wai'ola* court's analysis applied even where the proposed use involved *public benefits*—viz., domestic water needs, including consumption and other uses. *Compare Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692 (discussing public rights in trust resources that are "superior" to private interests, which imposes a "higher level of scrutiny" requiring applicants and agencies to bear the burden of justifying of the latter), *with* BLNR Decision, *supra* note 5, at 241 (COL 346) (concluding that "UH Hilo's public trust uses are 'superior to' the private interests discussed in [*Waiāhole I*]" and citing *Wai'ola*, but *failing to address* the intervening practitioner's public trust uses—instead, apparently treating traditional and customary practices as individual, *private* interests). *See also* Suzanne Case, *Implementing* PASH *and its Progeny Within DLNR*, 43 U. HAW. L. REV. (forthcoming 2021) (arguing that *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), "applies to individual gathering rights" notwithstanding the facts that (i) *PASH* was also an unincorporated association, albeit with fewer members than MKAH who were Native Hawaiian practitioners but, and more importantly, (ii) traditional and customary rights are a public trust purpose).

[217] *Wai'ola*, 103 Hawai'i at 419, 83 P.3d at 682; *see also Kukui I*, 116 Hawai'i at 507–09, 174 P.3d at 346–48 (citing article XII, section 7, *PASH* and Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 5, 656 P.2d 745, 748 (1982)—*in addition to* the State Water Code, *Waiāhole I* (upholding "the exercise of traditional and customary rights as a public trust purpose"), and *Wa'iola*—to support its holding that the Commission "failed to adhere to the proper burden of proof standard to maintain the protection of native Hawaiians' traditional and customary gathering rights in discharging its public trust obligation").

[218] HAW. CONST. art. XVI, § 16 (emphasis added). In determining whether a particular provision is self-executing, its language must be closely reviewed "to determine whether it indicates that the adoption of implementing legislation is *necessary*." Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 412, 235 P.3d 1103, 1124 (2013) (emphasis added). On the one hand, a reference to laws or legislation may refer to an existing body of statutory laws (as in HAW. CONST. article XI, section 9: "laws relating to environmental quality, including pollution and conservation, protection and enhancement of natural resources"), or it may simply refer to *supplemental, rather than implementing*, legislation (as in HAW. CONST. article XII, section 7: "subject to the right of the state to regulate such

the State's constitutional public trust obligations exist *independent of any statutory* [or regulatory] *mandate* and must be fulfilled regardless of whether they coincide with any other legal duty."[219]

Flores v. Board of Land & Natural Resources[220] is another beguiling decision juxtaposed against the court's admonishment of BLNR in *Mauna Kea I* for violating constitutional due process by putting "the cart before the horse" when the agency acted on a permit application before considering questions raised by intervening practitioners. Given that allegations of error relating to constitutional due process were still pending before the Hawai'i Supreme Court in *Mauna Kea II*, it appears that the *Flores* court itself prejudged the question whether Mr. Flores was indeed afforded a "full and fair opportunity to express his views and concerns" in the BLNR proceeding on remand from *Mauna Kea I*. In any event, the *Flores* decision appears to raise more questions than it does answers, particularly since the opinion's author was recused from deliberations concerning *Mauna Kea II*, the very proceeding relied upon for the proposition that Flores received an opportunity to be heard at a meaningful time and in a meaningful manner.[221]

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rights"). *Cf. Ala Loop*, 123 Hawai'i at 412–13, 235 P.3d at 1124-25 (emphasis added). On the other hand, provisions that require implementing legislation are *not* self-executing (as in HAW. CONST. article XI, section 3: "[t]he legislature shall provide standards and criteria to accomplish the foregoing"—viz., requirement that "[t]he State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands"). *See also* Save Sunset Beach Coal. v. City & Cnty. of Honolulu, 102 Hawai'i 465, 474–76, 78 P.3d 1, 10–12 (2003) (holding that the constitutional provision's subsequent prohibition on reclassification or rezoning of land unless "approved by a two-thirds vote of the body responsible for the reclassification" under article XI, section 3, was legally inoperative in the absence of relevant standards and criteria duly adopted by the legislature).

[219] Ching v. Case, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) (citing Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014)) (emphasis added).

[220] 143 Hawai'i 114, 424 P.3d 469 (2018) (rejecting BLNR's and University's argument that HRS chapter 91 does not cover the agency's consent to a sublease where a Native Hawaiian practitioner properly requests a contested case hearing pursuant to the agency's rules then concluding, nevertheless, that a contested case hearing was not required by statute, regulation, or constitutional due process—thus, reversing the environmental court's ruling to the contrary); *id.* at 128, 424 P.3d at 483 (concluding that "Flores has already participated in the separate contested case hearing on the CDUP, and was thereby afforded a *full and fair opportunity to express his views and concerns* as to the effect . . . on his interest in engaging in traditional and cultural practices on Mauna Kea. To require BLNR to hold another contested case hearing in such circumstances would require BLNR to shoulder duplicative administrative burdens and comply with additional procedural requirements that would offer no further protective value") (emphasis added).

[221] *But see id.* at 127 & n.7, 424 P.3d at 482 & n.7 ("Flores does not clarify the extent to

V. CONCLUSION

In *Mauna Kea II*, the State of Hawai'i Board of Land and Natural Resources (BLNR) dismissed uncontradicted kama'āina testimony on the grounds that it lacked credibility—based on the purported absence of supporting data (and notwithstanding the applicant's failure to provide any of its own data or other proof to the contrary)—even though the applicant's own cultural assessments themselves *documented* substantial, adverse impacts to traditional and customary Native Hawaiian rights.[222] In addition to MKAH President Kealoha Pisciotta,[223] many other Native Hawaiian practitioners testified about alleged harms to their traditional and customary rights during the second BLNR contested case hearing on remand from *Mauna Kea I* including Clarence Kūkauakahi Ching[224] (who would later

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which, if BLNR held a contested case hearing . . . he would put forth evidence and arguments materially different from that which he already proffered at the CDUP contested case hearing" and "the potential impact of the Sublease on Flores's asserted interests would appear to overlap entirely with the potential impacts of the CDUP").

[222] Cultural Impact Assessment (CIA) author Brian J. "Kawika" Cruz of Cultural Surveys Hawai'i, Inc. (CSH) testified that after he refused an allegedly unprecedented request from Parsons Brinckerhoff employee Jim Hayes to remove a recommendation based on research and interviews with affected practitioners that "no further development" take place at Mauna Kea, that recommendation and nine additional recommendations relating to proposed mitigation measures and alternative actions were removed from the CIA submitted to the agency by the applicant in apparent violation of HAR § 11-200-17. Although the recommendations were subsequently reinserted into the final EIS, they were not included in the CIA provided within the draft EIS published for review and comment by decisionmakers and other interested persons. *TMT Hearing: Cultural Impact Assessment 'Falsified*,' BIG ISLAND NOW (Mar. 3, 2017), https://bigislandnow.com/2017/03/03/tmt-hearing-cultural-impact-assessment-falsified/; *see also Near Close of TMT Contested Case, Witness Says EIS Process Was Flawed*, ENV'T HAW. (Apr. 2017), https://www.environment-hawaii.org/?p=9592 (reporting on cross-examination efforts by University counsel Tim Lui-Kwan); Pi'ikea Keawekane-Stafford, *Brian Cruz - Expert Witness for Mauna Kea*, YOUTUBE (Aug. 2, 2019), https://www.youtube.com/watch?v=D5g0sdiRTws (crediting Na Leo TV and Occupy Hawaii, filmed Feb. 29, 2017; providing an apparently edited version that omits cross-examination of the witness).

[223] *See supra* note 7 (providing links to Pisciotta's written and oral testimony). Pisciotta credited a workshop conducted by former ELP Director M. Casey Jarman (now Leigh) as "instrumental" in the MKAH President's ability to navigate BLNR contested case hearings, particularly after the practitioners' counsel had to withdraw due to scheduling conflicts. Telephone Interview with Kealoha Pisciotta (Jan. 8, 2021); *see also* M. CASEY JARMAN, MAKING YOUR VOICE COUNT: A CITIZEN GUIDE TO CONTESTED CASE HEARINGS 3 (2002) (identifying me as one of seven "actors" contributing to the video project).

[224] Ex. B. 19a, Written Direct Testimony for Clarence Kukauakahi Ching, Oct. 9, 2016, at 11–12, https://dlnr.hawaii.gov/mk/files/2016/10/B.19a-Ching-WDT.pdf [hereinafter Uncle Kū Testimony] (describing the practitioner's active and continuous involvement in

prevail against BLNR in the civil action *Ching v. Case*,[225] which concerned another location near the mauna, or mountain), Mehana Kihoi,[226] and a host of others including but not limited to: Paul K. Neves, William Freitas, E. Kalani Flores, Pua Case, Hāwane Rios, Laulani Teale, and Hank Fergerstrom.[227]

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natural and cultural resources protection of Mauna Kea since the 1980s, including traditional and customary practices consisting of cultural as well as religious or spiritual rituals and ceremonies "from sea level to the summits of Mauna Kea, Mauna Loa, Hualalai and Kilauea and back. . . ."); *see also id.* at 12–13 (noting his prior participation in disputes concerning proposed observatory facilities on Mauna Kea in 2002 and 2004; listing "use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adze making and other crafts, depositing of the 'piko' or umbilical cord in and around Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve" including non-Equinox and non-Solstice times).

[225] 145 Hawai'i 148, 449 P.3d 1146 (2019) (holding that BLNR breached its public trust duty to reasonably monitor or inspect trust land leased to the United States military—viz., the Pōhakuloa Training Area, located in Ka'ohe, Hāmākua and Pu'uanahulu, North Kona, Hawai'i Island, in the "saddle" between Mauna Kea and Mauna Loa—in order to preserve the asset and allow trust beneficiaries to prevent irreparable harm before it occurs). Pisciotta testified in the proceeding below as a cultural monitor for the battle area complex, noting "a range of debris left over from military exercises, including munitions and UXO [unexploded ordinance], stationary targets, junk cars, an old tank, crudely built rock shelters, and other miscellaneous military rubbish" and further testifying "that some of her reports recommended that the debris be cleaned up, but not all of the UXO that she observed was removed." *Id.* at 160, 449 P.3d at 1158.

[226] *See* Aff. of Mehana Kihoi, Exhibit S-1, Aug. 9, 2016, https://dlnr.hawaii.gov/mk/files/2016/10/C-Freitas-Exhibits-S-1-to-S-6.pdf (stamped as received Oct. 10, 2016, Office of Conservation and Coastal Lands, Department of Land and Natural Resources, State of Hawai'i); *id.*, ¶¶ 16–17 ("Having a direct ancestral connection to Mauna Kea, I am an active steward of this land to ensure there is no more further desecration of this land because it is tied to my spiritual and cultural identity, health and well-being as a Native Hawaiian"; "I have built ahu and intend to build more ahu on Mauna Kea to pay tribute to my ancestors and our creators Papa and Wākea"); *see also* Fujikane, *supra* note 184, at 41 (quoting Kihoi with regard to proposed mitigation efforts: "Would there be any outreach provided to our Native Hawaiian children who have been emotionally, physically, mentally, and spiritually traumatized by this project? More specifically, my child who was present for the arrest on the mountain, who saw me being handcuffed while I was in pule [prayer ceremony] on the summit of Mauna Kea. . . . What does your project have in place to address her concerns, her pain, and her suffering? I am speaking on behalf of my daughter who is here with me today who does not have a voice. I am her voice.").

[227] MKAH Reconsideration Motion, *supra* note 142, at 12–14 (citing voluminous evidence of traditional and customary practices and beliefs from the administrative record that contradicts BLNR's conclusion affirmed by *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 431 P.3d 752 (2018), including: gathering of medicinal items on the Northern side of the mauna under the direction of recognized cultural expert Papa Henry Auwae; identifying the Northern Plateau area—

Numerous individuals with subject matter expertise in a variety of disciplines also provided testimony in support of the intervening practitioners, including but not limited to: Kū Hinahinakūikahakai Kahakalau, Ph.D.; Kehaunani Abad, Ph.D.; Noelani Kaʻōpua-Goodyear, Ph.D.; Peter Mills, Ph.D.; Candace Lei Fujikane, Ph.D.; Jonathan Kay Kamakawiwoʻole Osorio, Ph.D.; Maile Tauali'i, Ph.D.; Manulani Aluli Meyer, Ph.D.; Joseph Keaweʻaimoku Kaholokula, Ph.D.; Kawika Liu, M.D., J.D., Narissa P. Spies; David Kimo Frankel, Esq.; and, Mililani B. Trask, Esq. After determining that the collective kamaʻāina and other supportive testimony did not *credibly* establish that TMT construction would harm traditional and customary practices, BLNR decided (for the second time) to issue a conservation district use permit to the University of Hawai'i authorizing TMT construction; this time, a majority of Hawai'i Supreme Court justices decided to uphold the agency's action on appeal—relying on the "clearly erroneous" and "substantial evidence" (or "sufficiency") standards of review, while ignoring substantive constitutional issues raised on appeal.[228]

"There you go again."[229] "As sometimes happens in the law, the misapplication of a standard is perpetuated by its repetition."[230] For

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location of the proposed TMT project site—as uniquely critical to traditional and customary gathering practices because "[t]he wind and rain patterns of the Northern Plateau of Mauna Kea are different from any other place on earth which means the medicines of that area are different from all others"; chanting and honoring iwi kūpuna at the proposed TMT site; erection of ahu at the site; multiple view plane impacts, including ancient practices involving sun and star tracking).

[228] *Mauna Kea II*, 143 Hawai'i at 383–409, 431 P.3d at 756–82 (McKenna, J., Recktenwald, C.J., and Nakayama, J., joining); *see also id.* at 384, 431 P.3d at 757 (observing that Justice Pollack joined the majority opinion except as to Part V.C.1). The portion of the majority opinion Justice Pollack refused to join is entitled: "Whether the TMT Project violates Article XI, Section 1 of the Hawai'i Constitution and public trust principles." *Id.* at 400, 431 P.3d at 773; *see also id.* at 402, 431 P.3d at 775 (emphasizing BLNR's determination that "there was *no actual evidence of use* of the TMT Observatory site and Access Way by Native Hawaiian practitioners" and "in general, astronomy and Native Hawaiian uses on Mauna Kea have co-existed for many years and the TMT Project *will not curtail or restrict* Native Hawaiian uses") (emphasis added).

[229] Then candidate Ronald Reagan won over voters during his one and only debate in 1980 against President Jimmy Carter, when he deployed (for the first time) what would later become his signature one-line rejoinder to critics. *See, e.g.*, Courtney Weaver, *There You Go Again: Lessons from Previous US Debates*, FIN. TIMES (Sep. 25, 2016), https://www.ft.com/content/15e746b6-81ce-11e6-8e50-8ec15fb462f4.

[230] Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 422, 91 P.3d 494, 504 (2004) (Acoba, J., concurring) ("The grounds set forth in HRS § 91-14(g) establish the authority of the appellate courts to remand, reverse, or modify an agency decision 'if the substantial rights of the petitioners may have been prejudiced'" and "there is little gain in according

example, despite the decision in *Paul's Electrical Service, Inc. v. Befitel*, that "[a]gency determinations, even if made within the agency's sphere of expertise are *not* presumptively valid,"[231] the Hawai'i Supreme Court has since repeatedly invoked such a presumption.[232] In this context, it is worth noting Justice Acoba's prescient warning that: "the retention of 'high burden,' and 'heavy burden' . . . will cloud the issue" because these "imprecise" terms "beg the question as to what the burden relates to . . . and may reasonably but mistakenly be perceived as establishing something more than the requirement that the action of the agency be 'arbitrary, capricious or characterized by . . . unwarranted discretion' to warrant judicial action."[233]

'deference' to agency decisions . . . in terms other than those expressly defined and stated in HRS § 91-14(g).") (citations omitted); *id.* at 422, 91 P.3d at 504 (explaining that "the 'unjust and unreasonable' language, has heretofore, crept into various non-rate-making cases as an independent standard of appellate review").

[231] *Id.* at 419, 91 P.3d at 501 (Duffy, J., Moon, C.J., Levinson & Nakayama, JJ., joining) (quoting Michael J. Yoshii, *Appellate Standards of Review in Hawaii*, 7 U. HAW. L. REV. 273, 292–93 (1985)) (emphases added); *cf. id.* at 421–22, 91 P.3d at 503–04 (Acoba, J., concurring) ("I do not find any viability in qualifying review of agency decisions 'by the principle that the agency's decision carries a presumption of validity[, *id.* at 417, 91 P.3d at 499,]' and that appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences'").

[232] Lāna'ians for Sensible Growth v. Land Use Comm'n (*LSG IV*), 146 Hawai'i 496, 504, 463 P.3d 1153, 1161 (2020); Morita v. Gorak, 145 Hawai'i 385, 391, 453 P.3d 205, 211 (2019); *In* re Hawai'i Elec. Light Co., 145 Hawai'i 1, 23, 445 P.3d 673, 695 (2019); Kilakila 'O [Haleakalā] v. Board of Land & Natural Resources (*Kilakila III*), 138 Hawai'i 383, 401, 382 P.3d 195,213; Sierra Club v. Castle & Cooke Homes Hawai'i Inc., 2016 WL 2940851, *8 (Haw. Apr. 6, 2016); Sierra Club v. D.R. Horton-Schuler Homes LLC, 136 Hawai'i 505, 516, 364 P.3d 213, 224 (2015); *In re* 'Īao Groundwater Mgmt. Area (*Nā Wai 'Ehā*), 128 Hawai'i 228, 238, 287 P.3d 129, 139 (2012); Paul v. Dep't of Transp., 115 Hawai'i 416, 425, 168 P.3d 546, 555 (2007); *see also* Kolio v. Haw. Pub. Hous. Auth., 135 Hawai'i 267, 271, 349 P.3d 375, 378 (2015) (acknowledging that determinations within an "agency's sphere of expertise, are not presumptively valid; however, an agency's discretionary determinations are entitled to deference, and an appellant has a high burden to surmount that deference") (citation omitted); *In re* Waikoloa Sanitary Sewer Co., 109 Hawai'i 263, 271, 125 P.3d 484, 492 (2005) (same). *But see* Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 164–65, 324 P.3d 951, 974–75 (2014) (citing "a presumption of validity . . . within the agency's expertise" but then clarifying that "[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state").

[233] *Compare Paul's Elec.*, 104 Hawai'i at 423, 91 P.3d at 505 (Acoba, J., concurring) (citing HRS § 91-14(g)(6)), *with id.* at 417–20, 91 P.3d at 499–502 (addressing "Deference to administrative agencies" as a standard of review under Section II.A.2. of the court's opinion).

Even setting aside for the sake of argument the court's obligation to analyze constitutional public trust mandates,[234] the relevant statutory authority governing conservation district lands specifically requires compliance with HRS chapter 91 absent any conflict with HRS chapter 183C[235]—and, neither *Kilakila III*, nor *Mauna Kea II*, identified any such conflicts. Nevertheless, immediately prior to the Hawai'i Supreme Court's grant of certiorari in *Kilakila III*,[236] the ICA issued an unpublished memorandum decision[237] that presages *Mauna Kea II* with respect to view plane impacts. Among other things, the ICA rejected as "inapposite" the practitioners' reliance on *State v. Diamond Motors, Inc.*,[238] for the proposition that protecting an industrial district from further encroachment—viz., adding a structure that would "substantially impair the view"—remains important notwithstanding the presence of numerous structures already existing at a site.[239]

In addition, the ICA repeatedly cited *In re Application of Hawaiian Elec. Co.* (*In re HECO*),[240] to support its conclusion that BLNR must be afforded the discretion to *discredit* Native Hawaiian practitioners' testimony about impacts associated with construction of a telescope on view planes at

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[234] *See supra* notes 216–19 and accompanying text.

[235] HAW. REV. STAT. § 183C-9 (2011 & Supp. 2019) ("Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply."). *See, e.g.*, *id.* § 183C-6(b) (2011 & Supp. 2019) ("If within one hundred eighty days after acceptance of a completed application for a permit, the department shall fail to give notice, hold a hearing, and render a decision, the owner may automatically put the owner's land to the use or uses requested in the owner's application.").

[236] *But see supra* notes 127, 163 (discussing conscious efforts by Kilakila's counsel to avoid constitutional issues on appeal).

[237] Kilakila 'O Haleakalā v. Bd. of Land and Nat. Res. (*Kilakila III* (ICA)), 134 Hawai'i 132, 337 P.3d 53 (Table), 2014 WL 5326757 (Haw. Ct. App. Oct. 17, 2014).

[238] 50 Haw. 33, 429 P.2d 825 (1967).

[239] *Id.* at 36, 429 P.2d at 828, *cited in Kilakila III* (ICA), 2014 WL 5326757, at *18 (dismissing, further, dicta in *Diamond Motors* that accepted "beauty as a proper community objective, attainable through the use of the police power"); *but see Kilakila III* (ICA), 2014 WL 5326757, at *17 n.19 (noting the National Science Federation's Record of Decision, which "agrees that the construction and operation of *the* [*Solar Telescope*] *will have major adverse short-term and long-term impacts to visual resources and view planes within key areas of the Park that will thus result in major adverse impacts to the visitor experience within the Park*"—while implicitly adopting the master narrative by ignoring the corresponding impact on traditional and cultural practices associated with view planes); *Kilakila III*, 138 Hawai'i at 388 & n.8, 382 P.3d at 200 & n.8 (quoting the FEIS regarding "major, adverse, short- and long-term, direct impacts on the traditional cultural resources within" the project site and surrounding areas, including Haleakalā National Park).

[240] 81 Hawai'i 459, 918 P.2d 561 (1996).

Haleakalā.[241] The ICA specifically noted BLNR's conclusion that Kilakila "failed to show that its directors or members engaged in traditional and customary activities, i.e., activities protected under Hawai'i law, according to *Pratt*[,]"[242] but the court's accompanying footnote clarified the agency's ultimate decision to "accept[]" the practitioners testimony consistent with information contained in cultural assessments for the proposed project.[243]

The Hawai'i Supreme Court *failed to acknowledge* in *Kilakila III* that BLNR's COL 29(a) "accepted" the alleged traditional and customary practices set forth in the cultural assessments, notwithstanding the agency's earlier conclusion about Kilakila's purported failure to satisfy the burden of proof under *Pratt*;[244] nor does *Kilakila III* address the ICA's misstatement of law regarding agency deference under *In re HECO*.[245] Of course, the

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[241] *Compare Kilakila III* (ICA), 2014 WL 5326757, at *10, *14, *15, *16, *17, *19 (citing *In re HECO*, 81 Hawai'i at 465, 918 P.2d at 567), *with supra* note 210 and accompanying text (citing *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 174 P.3d 320 (2007), and *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 83 P.3d 664 (2004)).

[242] *Compare Kilakila III* (ICA), 2014 WL 5326757, at *16, *with supra* Section III.C.1. (discussing the *Mauna Kea II* court's decision to delete its former footnote 15), *and supra* notes 206–09, 211–12 and accompanying text (citing *Kukui I* and *Wai'ola*).

[243] *Kilakila III* (ICA), 2014 WL 5326757, at *16 n.18 (quoting the contradictory determinations embedded in COL 29(a) as follows):

Although Kilakila has not shown that its directors or members engage in activities that are traditional and customary, according to *Pratt*, the Cultural Resources Assessment and the Supp. Cultural Assessment conducted in connection with the [Solar Telescope] have established that traditional cultural practice, such as religious prayer and ceremonies, the burying of piko [(umbilical cord)], and connection with akua (gods) and ancestors, have occurred and continue to occur in the summit area. The practices engaged in by the directors and members of Kilakila are consistent with the cultural practices set forth in the cultural assessments and will be *accepted* as such.

See also id. at *16 n.16 (quoting FOFs 3, 156, 165).

[244] *See supra* notes 241–43 and accompanying text.

[245] *See supra* notes 227–41 and accompanying text. As support for its characterization of the relevant standard of review, *In re HECO* cites *Application of Hawaii Elec. Light Co.* (*In re HELCO*), 60 Haw. 625, 594 P.2d 612 (1979), a decision that *does not even mention* "credibility of witnesses or conflicts in testimony[.]" *Compare In re HECO*, 81 Hawai'i at 465, 918 P.2d at 567, *with In re HELCO*, 60 Haw. at 629, 594 P.2d at 617 (describing the clearly erroneous test, instead, as "whether the appellate court is left with a firm and definite conviction that a mistake has been made"). Contrary to the court's unsupported statement in *In re HECO*, *In re HELCO* actually applied a standard that "gives an appellate court *greater leeway* in exercising its functions" and despite "evidence to support an agency finding, *if the court is left with a firm and definite conviction that a mistake has been made, the court will, under the clearly erroneous rule, reject the tribunal's findings*." 60 Haw. at 629, 594 P.2d at 617 (internal quotation marks and citations omitted) (emphasis added); *accord* Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004). Before the *In re HECO* court improperly relied on decisions from outside Hawai'i that restate a purported

separation of powers principles underlying agency deference *do not* justify abdication of the judiciary's fundamental role as final arbiter of constitutional questions. Rather, where questions of constitutional law are involved, courts must exercise their *independent judgment* under the right or wrong standard "without being required to give *any weight* to the trial court's answer to it."[246] To hold otherwise would arguably create a state constitutional crisis approaching the magnitude of *Marbury v. Madison*.[247]

The foregoing analysis highlights the public lament by Native Hawaiian practitioner Kahele Dukelow who, along with other Native Hawaiians, offered a consistent message in opposition to continued desecration of Haleakalā as a sacred place: "The courts, and the whole legal process, we always lose. It's not set up for us to win. It's set up for a process so they can say we consulted, there's the mitigation, we move on. And we're saying,

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"presumption of validity" for agency decisions within their sphere of expertise and the supposed "heavy burden" of showing invalidity under the "unjust and unreasonable" standards of review—which the Hawai'i Supreme Court later rejected in *Paul's Electrical Service, Inc. v. Befitel*, 104 Hawai'i 412, 91 P.3d 494 (2004), *see supra* note 231—*In re HELCO* characterized agency deference as a constitutional *separation of powers* issue recognizing both the function of agencies (to discharge their "delegated duties") *and* the function of courts (to "review[] agency determinations"). 60 Haw. at 630, 594 P.2d at 617.

[246] Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 221, 140 P.3d 985, 1001 (2006) (emphasis added), *cited with approval in* Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 165, 324 P.3d 951, 975 (2014). *Accord* Ching v. Case, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) ("[W]hile overlap may occur, the State's constitutional public trust obligations exist *independent of any statutory* [or regulatory] *mandate* and must be fulfilled regardless of whether they coincide with any other legal duty") (emphasis added); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015) (Pollack, J., concurring) ("An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision."); *Kukui I*, 116 Hawai'i 481, 491, 174 P.3d 320, 330 (2007) (citing *In re* Water Use Permit Applications (*Waiāhole II*), 105 Hawai'i 1, 15–16, 93 P.3d 643, 657–58 (2004), for the proposition that "this court must take a 'close look' at the Water Commission's action to determine if it complies with the Water Code and the public trust doctrine"); *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) ("[T]he ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state."), *cited in Kelly*, 111 Hawai'i at 217, 140 P.3d at 997; *Kauai Springs*, 133 Hawai'i at 172, 324 P.3d at 982 (quoting *Waiāhole I*, 94 Hawai'i at 132, 9 P.3d at 444, for the proposition that "'mere compliance by agencies with their legislative authority' may not be sufficient to determine if competing uses are properly balanced in the context of uses protected by the public trust and its foundational principals [sic]"); *id.* (quoting *Kukui I*, 116 Hawai'i at 496, 174 P.3d at 335, for the proposition that an agency "cannot fairly balance competing interests . . . if it renders its decision prior to evaluating the availability of alternative[s]").

[247] 5 U.S. (1 Cranch) 137 (1803).

nope."[248] Likewise, the *Mauna Kea II* court's departure from *Wai'ola* and *Kukui I* (see Part IV *supra*) exacerbated the deleterious effect of the majority and concurring opinions' decisions, respectively, not to address or apply the available framework for determining whether BLNR's action complied with its public trust obligations.[249] The court later repeated its mistakes in *LSG IV*,[250] by inexplicably ignoring the Land Use Commission's allegedly erroneous shifting of the project proponent's burden onto intervening practitioners.[251]

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[248] Noe Tanigawa, *Haleakalā: A History of Telescopes*, HAW. PUB. RADIO, (July 7, 2015), https://www.hawaiipublicradio.org/post/haleakal-history-telescopes#stream/0. *See also supra* notes 102–04 (discussing the cultural imperatives of kū'ē and kūkulu, which lie at the root of Nā Kia'i Mauna's commitment to oppose ongoing injustices through non-violent resistance).

[249] *In re* Conservation Dist. Use Application (CDUA) HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 401 n.25, 431 P.3d 752, 774 n.25 (declining to address the issue); *id.* at 416–20, 431 P.3d at 789–93 (applying a more deferential standard of review). *Contra* David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49, 95 (2007) (arguing that *Kukui I*'s reliance on *Waiāhole I* continues "to overstate both the place of the public trust doctrine . . . and the preeminence of native Hawaiian rights in water allocation matters" and ignores the constitutional right to regulate native Hawaiian rights, instead of placing "commercially economic uses of water in a superior position over native Hawaiian and conservation rights and uses"); *see also id.* at 49 (characterizing Hawai'i's public trust doctrine as an "*elitist, communitarian regime* that bears no relationship to either *traditional* notions of water rights or constitutionally protected rights in property") (emphasis added). The framing by Professor Callies and his co-author call to mind Professor Yamamoto's observations about the power of narratives. Yamamoto, *Courts and the Cultural Performance*, *supra* note 92, at 6–7, 21–22 & nn.51–52 (discussing "prevailing" narratives); *see also Waiāhole I*, 94 Hawai'i at 138, 9 P.3d at 450 (stating that public trust principles must recognize "public rights in trust resources separate from, and superior to, the *prevailing* private interests in the resources") (emphasis added); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Hawai'i 401, 429, 83 P.3d 664, 692 (2004); *id.* at 442, 83 P.3d at 705.

[250] 146 Hawai'i 496, 463 P.3d 1153 (Pollack, J., McKenna, J., joining, and Wilson, J., joining except as to Parts III(E) and IV) (2-2-1 plurality opinion) (affirming, for inconsistent reasons, an LUC decision vacating the agency's earlier cease and desist order issued in 1996—the year following issuance of the *PASH* decision).

[251] Opening Brief for Petitioner at 12, Lāna'ians for Sensible Growth v. Land Use Comm'n, 146 Hawai'i 496, 463 P.3d 1163 (2020) (SCOT-0000526), 2017 WL 11604591, at *12 [hereinafter LSG Opening Brief] (listing Question Presented A.1.d.ii.: "Did the LUC shift the burden of proof and clearly err by concluding there was no evidence of possible harm from the leakage of potable water from upper level wells into Wells 1 and 9?"); *id.* at 14–31, 24 n.35 (citing *Wai'ola* and *Kukui I*—in addition to other applicable cases—concerning the applicable standards of review and standards of proof, including the applicant's burden of proof in administrative contested case hearings and the obligation to analyze reasonable alternatives to the proposed use); Reply to Answering Brief of Petitioner at 6, Lāna'ians for Sensible Growth v. Land Use Comm'n, 146 Haw. 496, 463 P.3d 1163 (2020) (SCOT-17-0000526), 2018 WL 11299039, at *6 [hereinafter LSG Reply Brief]

Thus, the cultural insensitivity[252] attributable to the respective applicants, agencies, and courts in *Kilakila III*, *Mauna Kea II*, *LSG IV* (and most recently, the applicant and agency[253] in *PPKAA*) provide painful reminders that true restorative justice under the constitutional amendments adopted in 1978 remains elusive. Although beyond the scope of this article, further inquiry under the framework articulated by Professor Yamamoto appears necessary:

> Critical-contextual analysis interrogates, what is really at stake, who benefits and who is harmed (in the short and long-term), who wields the behind-the-scenes power, which social values are supported and which are subverted,

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(citing LSG Opening Brief, at 24 n.35, 26–30, along with HAW. CODE R. § 15-15-59(a) [sic: presumably invoking HAW. CODE R. § 15-15-77(a) (Westlaw 2020), which currently provides that "[t]he commission shall not approve an amendment of a land use district boundary unless the commission finds upon the clear preponderance of the evidence that the proposed boundary amendment is reasonable, not violative of section 205-2, HRS, and consistent with the policies and criteria established pursuant to sections 205-16, 205-17, and 205A-2, HRS"]); *see also id.* at *1 ("Even if Condition 10 allows use of high[-]level aquifer ([]HLA) water, THE RESORT would still have to prove non[-]potable water exists in the HLA, *leaving it up to the LUC to determine whether THE RESORT carried its burden of proof.*") (emphasis added); *id.* at *2 (citing HAW. REV. STAT. § 91-14(g)(1) concerning violation of constitutional provisions as a basis for reversing agency action); *id.* at *3–4 (arguing that typical agency deference does not apply where a public trust resource is at stake, which negates the "presumption of validity" otherwise afforded to agency action as well as the "heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences"); *id.* at *4 (asserting that the burden of proving with certainty that the water sources used to irrigate the resort's golf course contained non-potable water "remains with THE RESORT [as applicant] to demonstrate, which it has failed to do"—as opposed to the mere *possibility* inferred by the court in *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 310, 97 P.3d 372, 386 (2004)). *Compare id.* at 314 n.45, 97 P.3d at 390 n.45 (rejecting the applicant's argument that the burden of proving compliance with the 1991 Order was *not* its burden to bear under the preponderance of evidence standard properly applied by the LUC).

[252] *See supra* notes 31–34 and accompanying text (discussing *PASH* footnote 15); *see also supra* notes 84–92 (discussing the "unjustifiable lack of respect" acknowledged by the *PASH* court, in partial reliance on the Aloha Spirit statute, as well as the Richardson Court's affirmative efforts to avoid the "primarily Western orientation and sensibilities" reflected in judicial decisions during the Territorial and Republic periods).

[253] The allegedly "consistent" behavior by the Maui County Planning Commission, *see supra* note 26 and accompanying text, in contravention of clear guidance from *PASH*, *see supra* notes 31–34 and accompanying text, deserves a stinging rebuke from the Hawai'i Supreme Court, regardless of how the court decides the question whether HRS section 201H-38 allows for exemptions from HRS section 205A-26(2)(C) currently pending review on certiorari from the ICA in *Preserve Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n* (*PPKAA*), No. CAAP-15-0000478, 2020 WL 5512512 (Haw. Ct. App. Sep. 14, 2020), *cert. granted*, 2021 WL 195053 (Haw. Jan. 20, 2021).

> how political [or economic] concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision[s].[254]

To correct course and return to the path carved out by CJ Richardson and carried on by his former law clerks Melody MacKenzie, Robert Klein, and Simeon Acoba, this article urges the Hawai'i Supreme Court to demonstrate increased fidelity to the (sometimes case-dispositive) standards of review under the Hawai'i Administrative Procedure Act, as codified in HRS section 91-14(g), rather than jurisprudential standards applicable within other jurisdictions[255] or based upon standards of review rooted in otherwise inapplicable statutory schemes.[256]

Instead of applying agency deference principles at odds with the Hawai'i Constitution, the court should recognize that "the ultimate authority to interpret and defend [state constitutional guarantees] in Hawai'i rests with the courts of this state."[257] Such an approach would be consistent with

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[254] Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 781 (2017) (quoting Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 291–92 (2005); *see also* Yamamoto, *Courts and the Cultural Performance*, *supra* note 92. Further critical-contextual analysis of these decisions will be pursued in a subsequent publication. *See supra* notes * and 6.

[255] *See supra* note 245 (discussing Application of Hawaii Elec. Light Co. (*In re HELCO*), 60 Haw. 625, 594 P.2d 612 (1979), which cites decisions from outside Hawai'i as support for its reliance on agency deference principles).

[256] *See supra* notes 230-31, 233, and accompanying text (discussing Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 91 P.3d 494 (2004))

[257] Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 165, 324 P.3d 951, 975 (2014) (quoting *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000)); *id.* at 172, 324 P.3d at 982 (quoting *Waiāhole I*, 94 Hawai'i at 132, 9 P.3d at 444, for the proposition that "'mere compliance by agencies with their legislative authority' may not be sufficient to determine if competing uses are properly balanced in the context of uses protected by the public trust and its foundational principles"). *See also Ching v. Case*, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019) ("[W]hile overlap may occur, the State's constitutional public trust obligations exist *independent of any statutory* [or regulatory] *mandate* and must be fulfilled regardless of whether they coincide with any other legal duty."); Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015) ("An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision"); *In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui I*), 116 Hawai'i 481, 491, 174 P.3d 320, 330 (citing *In re* Water Use Permit Applications (*Waiāhole II*), 105 Hawai'i 1, 15–16, 93 P.3d 643, 657–58 (2004), for the proposition that "this court must take a 'close look' at the Water Commission's action to determine if it complies with the Water Code and the public trust doctrine"); Kelly v. 1250

seemingly neglected portions of HRS section 1-1 that precede the phrase "established by Hawaiian usage[,]" specifying that "[t]he common law . . . as ascertained by . . . American decisions" does not apply where in conflict with the "the laws of the State, or fixed by Hawaiian judicial precedent."[258] In addition, governmental decisionmakers in the legislative, executive, and judicial branches should seriously consider their authority to "contemplate and reside with the life force and give consideration to the 'Aloha Spirit'" under HRS section 5-7.5(b).[259] Doing so could help avoid the reoccurring cultural insensitivity and unjustifiable lack of respect associated with ignoring familial and kinship relationships between Kānaka Maoli and natural elements—whether involving ethnographic landscapes like Mauna Kea, or other culturally significant locations in these Hawaiian islands.[260]

Oceanside Partners, 111 Hawai'i 205, 221, 140 P.3d 985, 1011 (2006) ("[t]he court's interpretations of . . . set forth in *Ka Pa'akai* [*O Ka 'Āina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000),] implicate questions of constitutional law, which this court answers 'by exercising [its] own independent judgment based on the facts of the case"); *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 ("[T]he ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state.").

[258] HAW. REV. STAT. § 1-1 (2009 & Supp. 2019), quoted *supra* note 15.

[259] *See supra* notes 90, 148 and accompanying text.

[260] *See supra* notes 4–8, 34, 58, 84–92, 102–06, 167–73, 181, 187, 223–27 and accompanying text; *see also* Mana Maoli, *supra* note 14 (reimagining ISRAEL KAMAKAWIWO'OLE, HAWAI'I '78 (Mountain Apple Co. 2010)).

Implementing *PASH* and Its Progeny Within DLNR

Suzanne Case

Chair, Hawai'i Department of Land and Natural Resources (DLNR) in collaboration with Pua Aiu, Alan Carpenter, Linda Chow, Curt Cottrell, Leimana DeMate, Ian Garrod, Ian Hirokawa, Luna Kekoa, Sam Lemmo, Sara Levins, Kaleo Manuel, Robert Masuda, Heather McMillen, Brian Neilson, Jan Pali, Ryan Peralta, Jason Redulla, Hinano Rodrigues, Irene Sprecher, and Marigold Zoll.

Representing DLNR Chair's Office, Water Commission, Aha Moku, Aquatic Resources, Conservation and Coastal Lands, Conservation and Resource Enforcement, Forestry and Wildlife, Historic Preservation, Land Division, and State Parks, with guidance from the Attorney General's office.

The Hawai'i Department of Land and Natural Resources (DLNR) has been at the forefront of the implementation of the PASH decisions on public and private lands for over twenty-five years. DLNR manages over one million acres of Hawai'i's open lands—one quarter of the state—including our forests, streams, reefs, parks, and coastlines, and regulates private uses in the conservation district and historic sites. Government's unique role is to balance protection of rights with reasonable regulation. This comment discusses DLNR's experience in implementing PASH and its progeny: what works, what is challenging, and what remains to be clarified, as well as DLNR's broader efforts to protect Hawai'i's natural and cultural resources under related cases including Ka Pa'akai and Pratt, and generally pono stewardship.

I. INTRODUCTION

This comment reviews the application of *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*)[1] and its progeny from Government's perspective. Government's particular role is to balance protection of rights with reasonable regulation. Government's perspective is unique because under the Constitution only the government can regulate and balance public rights and interests. Individuals and groups representing

[1] 79 Hawai'i 425, 903 P.2d 1246 (1995).

diverse and often opposing viewpoints advocate for their interests.[2] Not everyone even agrees on what are traditional and customary practices of Native Hawaiians, either generally or in specific locations. Government's responsibility is to listen to all perspectives, understand the laws and its responsibilities in implementing them, and make decisions.

DLNR participated in this symposium for two main objectives: first, to share its perspective and experience in implementing *PASH* and its progeny with interested members of the public—what works, what is challenging, and what remains to be clarified. Second, as a refresher opportunity, to review *PASH* internally at DLNR as part of putting this paper together. We formed a group of about twenty staff from different divisions this past fall, included one of our Deputy Attorneys General, and met weekly for a couple of months, to go over the *PASH* cases and how we at DLNR have implemented them.

PASH applies to undeveloped or less than fully developed land in Hawai'i.[3] Of Hawai'i's four million acres of land, DLNR manages over one million acres, or one quarter of Hawai'i's land, and regulates public and private uses over two million acres that is undeveloped or less than fully developed.[4]

DLNR has a vast kuleana in land stewardship in Hawai'i, including forestry and wildlife, aquatic resources, conservation district and coastal regulation, historic preservation, state parks, conservation and resources enforcement, management of state lands, and fresh stream and ground water protection and use.[5]

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[2] *See* HAW. CONST. art. XII, §7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, *subject to the right of the State to regulate such rights*.") (emphasis added).

[3] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n. (*PASH*), 79 Hawai'i at 450, 903 P.2d 1246 ("For the purposes of this opinion, we choose not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed.' Nevertheless, we refuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications.").

[4] *See About DLNR*, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/about-dlnr/ (last visited Mar. 1, 2021), for an overview of the work that DLNR does as well as the many divisions, offices, boards, and commissions that comprise the Department.

[5] This obligation to stewardship for all resources and for all generations is immortalized in DLNR's mission statement: "Enhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of the people of Hawaii nei, and its visitors, in partnership with others from the public and private sectors." *Id.*

II. DISCUSSING DLNR APPLYING THE *PASH* CASES

DLNR is directly involved with the whole line of supreme court cases analyzing traditional Hawaiian gathering rights and access rights, including *Hanapi*,[6] *PASH*, *Ka Pa'akai*,[7] *Pratt I*[8] and *Pratt II*,[9] and others. Here, we discuss the application of four salient cases together.

PASH, *Ka Pa'akai*, and *Pratt I* and *II* taken together form a body of law: *PASH* examines the perspective of a person seeking to gather and practice, asserting traditional and customary rights, and the others discuss the perspective of the government regulating uses of public land on which a person may seek to gather and practice, reviewing potential impacts of regulated uses on traditional and customary practices:

- *PASH* looks at the assertion of traditional and customary rights by an individual.[10]

- *Ka Pa'akai* looks at the responsibility of a regulatory body issuing a decision to protect traditional and customary rights in the area: what are the traditional and customary practices in an area; how will they be impacted by the decision; what mitigation can be required to limit impacts?[11]

  The *Ka Pa'akai* case notably held that an agency cannot delegate its responsibility to protect traditional and customary rights to a private developer, and for the most part traditional and customary rights cannot be developed out of existence.[12] Project approval generally requires mitigation measures to ensure those rights continue to exist in practice.[13]

- *Pratt I* and *II* examine what are traditional and customary rights and how the exercise of those rights is balanced by the State's reasonable regulation of the exercise of those rights.[14]

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[6] State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998).

[7] Ka Pa'akai O Ka 'Āina v. Land Use Com'n (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000).

[8] State v. Pratt (*Pratt I*), 124 Hawai'i 329, 243 P.3d 289 (Ct. App. 2010).

[9] State v. Pratt (*Pratt II*), 127 Hawai'i 206, 277 P.3d 300 (2012).

[10] 79 Hawai'i at 447–48, 903 P.2d at 1268–69.

[11] 94 Hawai'i at 1090, 7 P.3d at 53.

[12] *Id.* at 44–52, 7 P.3d at 1081–90.

[13] *Id.* at 50–52, 7 P.3d at 1087–90.

[14] *Pratt II*, 127 Hawai'i at 213–18, 277 P.3d at 307–12; *Pratt I*, 124 Hawai'i 329, 342–50, 243 P.3d 289, 302–10 (App. 2010).

In *Pratt I*, DLNR was directly involved in a question of traditional and customary practices in Kalalau Valley through its Division of State Parks, which manages the Nāpali Coast State Wilderness Area.[15] The case involved Lloyd Pratt who asserted his right to reside in Kalalau Valley, without a camping permit and outside of the designated camping area, because, he asserted, he was a lineal descendant of early Hawaiians who had lived in Kalalau Valley.[16] However, the court found that Pratt needed to provide proof that he was a lineal descendant, holding mere assertion was not enough to entitle him to rights under a claim of traditional and customary practices.[17]

DLNR's Division of State Parks maintains a permit system, in place before *Pratt*, to allow for people to camp in designated areas of Kalalau Valley—with toilets.[18] The Division of State Parks documented that Pratt was camping outside of the designated camping areas, impacting cultural sites, and leaving unprocessed human waste.[19]

The court found that the State can reasonably regulate uses in its areas.[20] Balancing Pratt's interest in asserting his rights, the court looked at alternatives to the unpermitted use such as Pratt applying for a permit to camp in the valley.[21] The court affirmed that the State has a legitimate interest in managing impacts to cultural sites and environmental impacts in the valley.[22]

A. Pratt I Analysis

In outlining the factors to be reviewed in *Pratt I*, the court recognized that in order to be entitled to constitutional protection, the activity had to (i) be asserted by a Native Hawaiian; (ii) involve constitutionally protected traditional and customary rights; and (iii) be on undeveloped or less than fully developed land.[23]

In determining whether an asserted traditional and customary practice should receive constitutional protections, Dr. Davianna McGregor proposed

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[15] *Pratt I*, 124 Hawai'i 329, 334–35, 339, 243 P.3d 289, 294–95, 299 (App. 2010) (discussing the Nā Pali coast as an archaeological resource and DLNR's involvement in the *Pratt I* decision).

[16] *Id.* at 337–39, 243 P.3d at 295–97.

[17] *Id.* at 357, 243 P.3d at 317; *aff'd*, 127 Hawai'i 206, 277 P.3d 300 (2012).

[18] DEP'T LAND & NAT. RES., PERMITS & FEES, https://dlnr.hawaii.gov/dsp/camping-lodging/permits-fees/ (last visited April 30, 2021).

[19] *See Pratt I*, 124 Hawai'i at 356, 243 P.3d at 316.

[20] *Id.* (citing HAW. CONST. art. XII, § 7).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 349, 243 P.3d at 289.

a six-element standard.[24] The court did not adopt two elements[25] but did accept the following four as the test:

i. The practice must be related to extended family needs, i.e., to fulfill a responsibility related to subsistence, religious, or cultural needs of one's family or extended family.

ii. The rights must have been customarily and traditionally held by ancient Hawaiians. To meet this burden, "the practitioner must bring forward evidence that the practice handed down was an established native Hawaiian custom or tradition prior to 1892."

iii. A practice cannot be for a commercial purpose.

iv. The manner in which the practice is conducted must be consistent with tradition and custom and the practice must be conducted in a respectful manner.[26]

PASH came about because of conflicts surrounding the erosion of access to places important for traditional and customary practices, first via destruction of midland sites by landscape-scale conversion to sugar cane and pineapple, then by coastal development intensifying starting in the 1960s blocking trails and access to the sea and sometimes destroying ancient coastal trails and sites.[27]

Awareness of these conflicts and the loss of traditional and customary practices grew within the State along with the "Hawaiian renaissance" and the court cases expounding on constitutional rights to traditional and customary practices.[28]

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[24] *Id.* at 337, 243 P.3d at 297.

[25] It was not clear to the court whether the third point set out by Dr. McGregor [limiting customary practice to an area "that the person has a traditional connection to"] was connected to ancient Hawaiian ways versus a modern, nontraditional formulation. Similarly, the court questioned Dr. McGregor's fourth point [that "the right of access has to be to fulfill a traditional responsibility"] saying that the formulation of the requirement appeared to be disconnected from any reference to ancient practices. *See id.* at 352–54, 243 P.3d at 312–314.

[26] *Id.*

[27] *See, e.g.*, Samuel J. Panarella, *Not In My Backyard* PASH v. HPC*: The Clash Between Native Hawaiian Gathering Rights and Western Concepts of Property in Hawai'i*, 28 ENV'T L. 467, 469–75 (1998).

[28] *See, e.g.*, Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 135–39 (1998) (discussing Kalipi v. Hawaiian Trust Co. (*Kalipi*), 66 Haw. 1, 656 P.2d 745 (1982) and Pele Defense Fund v.

As DLNR is the state agency in charge of most underdeveloped or partially developed State land, it most often deals with the intersection of government actions and traditional and customary practices.[29]

Longtime DLNR employees recall that when *PASH* first came out, DLNR staff had a bit of a "deer in the headlights" reaction. No one quite knew how to implement the decision. Nevertheless, they tackled the challenge and came up with policies, by division, both formal and informal, to ensure access for traditional and customary practices as provided in *PASH*.

B. Ka Pa'akai Analysis

The *Ka Pa'akai* case resulted in much more formal and detailed departmental analyses, typically in writing, as part of a decision.[30] In short, *Ka Pa'akai* requires application of the following three-prong analysis when a state agency makes a land use decision that substantially affects traditional and customary exercise of Native Hawaiian rights and practices:

i. Determining the identity and scope of "valued cultural, historical, or natural resources" in an area, including the extent to which traditional and customary Native Hawaiian rights are exercised in the area;

ii. The extent to which those resources—including traditional and customary Native Hawaiian rights—will be affected or impaired by the proposed action; and

iii. The feasible action, if any, to be taken by the agency to reasonably protect Native Hawaiian rights if they are found to exist.[31]

Much of DLNR's internal discussions regarding *Ka Pa'akai* have focused on what kind of analysis is fully adequate to conform to the *Ka Pa'akai* requirements, what resources are readily available for the review, and what geographical area should be included in the review. For example,

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Paty, 73 Haw. 578, 837 P.2d 1247 (1992) as precursor cases from which the *PASH* decision derives its rationale).

[29] *See* HAW. REV. STAT. § 171-3 (enabling and authorizing the DLNR to "manage, administer, and exercise control over" noncommercial public lands, including state parks, historical sites, and more).

[30] *See Ka Pa'akai*, 94 Hawai'i 31, 53, 7 P.3d 1068, 1090 (2000).

[31] *Id.*

the Commission on Water Resource Management staff include a *Ka Pa'akai* analysis in its stream diversion works permit submittals to the Water Commission.[32] The Office of Conservation and Coastal Lands includes a *Ka Pa'akai* analysis in its Conservation District Use Application submittals to the Board of Land and Natural Resources, which is then incorporated into the Board's Conservation District Use Permit decisions.[33]

For complex projects, cultural impact analyses in environmental assessments and environmental impact statements provide detailed information that can be the basis for DLNR's *Ka Pa'akai* analysis.

DLNR also looks for other resources that staff can utilize to support the *Ka Pa'akai* analyses required of DLNR. These include environmental review documents; the Office of Hawaiian Affairs' Kīpuka database;[34] the Ulukau website[35] with all of its Hawaiian cultural resources, such as the numerous 19th century Hawaiian language newspapers; archaeological reports filed with the State Historic Preservation Division (SHPD)[36] (which highlights the importance of digitizing SHPD's library to ensure availability of important information to everyone); and local information provided by lineal and cultural descendants of an ahupua'a or moku in interviews and oral histories.

Key questions for DLNR staff to consider when applying *Ka Pa'akai* analysis are: how deep a dive into these resources is adequate, and what is the relevant geographical area? The analysis should be commensurate to the size and potential impact of the project.

III. COMMUNITY NETWORKS AND PROGRAMS CONNECTED TO DLNR

This section discusses a handful of organizations and programs which have partnered with DLNR staff in implementing the *PASH* and *Ka Pa'akai* line of cases in practice.

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[32] COMM'N ON WATER RES. MGMT., DEP'T LAND & NAT. RES., STREAM DIVERSION WORKS PERMIT APPLICATION, https://files.hawaii.gov/dlnr/cwrm/forms/FormSDWP-APP.pdf (last visited May 1, 2021).

[33] OFF. CONSERVATION & COASTAL LANDS, DEP'T LAND & NAT. RES., CONSERVATION DISTRICT USE APPLICATION (CDUA), https://dlnr.hawaii.gov/occl/forms-2/ (follow "Conservation District Use Application" hyperlink; then open the downloaded form) (last visited May 1, 2021).

[34] OFF. HAWAIIAN AFFAIRS, KĪPUKA DATABASE, http://kipukadatabase.com/kipuka/ (last visited May 1, 2021).

[35] ULUKAU, https://ulukau.org (last visited May 1, 2021).

[36] DIV. STATE HISTORIC PRES., DEP'T LAND & NAT. RES., RESEARCH, RESOURCES, & LIBRARY, https://dlnr.hawaii.gov/shpd/about/research-resources-library/ (last visited May 1, 2021).

A. Aha Moku Advisory Council

In 2012, the Hawai'i State Legislature created the State Aha Moku Advisory Council through Act 288.[37] It is administratively attached to DLNR, meaning it is housed within DLNR for purposes of managing its personnel and finance systems,[38] but it is governed independently by its own Council consisting of eight members statewide appointed by the Governor and confirmed by the Senate, and the Executive Director is selected by the Council.[39]

The Aha Moku Advisory Council sees itself as the implementation of the *Ka Pa'akai* decision, through the integration of the *Ka Pa'akai* principles into government practices and decisions.[40]

In practice, Aha Moku and other community networks function best when they can connect DLNR staff on the ground with genuine generational descendants of an area. When these connections are made, community members can help authenticate traditional and customary practices, support pono[41] practices, and assess potential impacts to those practices by State actions in advance, thus avoiding harm through "doing something stupid" by mitigating impacts of certain actions. The Aha Moku network and similar formal and informal connections are important tools the government can use to help establish authenticity, to vet genealogical connection to place, and to establish relationship to place and cultural practice.

B. Hālau 'Ōhi'a

In 2019, the Office of Hawaiian Affairs, Kamehameha Schools, and DLNR partnered to support their staff through Hālau 'Ōhi'a, a professional development environmental stewardship training program created and taught by Kekuhi Keali'ikanaka'oleohaililani. Since 2016, the program has provided training to a diverse group of resource managers, field technicians, researchers, interns, educators, cultural practitioners, administrators, students, and land managers, representing many organizations, generations, and life experiences.[42] The program provides DLNR and others opportunities to learn and practice Hawai'i lifeways and ways of seeing

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[37] HAW. REV. STAT. § 171-4.5 (2012).

[38] *Id.* § 171-4.5(a) (2012).

[39] *Id.* § 171-4.5(b) (2012).

[40] *See id.* § 171-4.5(d) (2012); *Ka Pa'akai*, 94 Hawai'i 31, 53, 7 P.3d 1068, 1090 (2000).

[41] To be "*pono*," among other things, means to be good, upright, moral, fair, and proper. HAWAIIAN DICTIONARIES, wehewehe.org (last visited May 1, 2021).

[42] *See* HĀLAU 'ŌHI'A, https://halauohia.org/ (last visited May 1, 2021).

through engaging language, story, ritual, music, dance, poetry, chant, geography, family life, genealogy, the arts, spirituality, and many other aspects. In the process, participants become more familiar and connected to the places and communities in which they work, strengthen and grow their relationships with each other, and deepen their understandings of their roles in these multiple and nested relationships.[43] To date, dozens of DLNR staff have engaged in the program.

C. 'Āina Summit

'Āina Summit is another partnership of the Office of Hawaiian Affairs, Kamehameha Schools, and DLNR, "designed to be a true community-public-private partnership to convene experts and create a call for integrated action across and between sectors."[44] The 2018 summit aimed to build on collective 'āina-based work by better coordinating efforts and resources, sharing information, and setting collective goals to address accelerating threats to our lands and waters.[45]

D. What Works Well, What Doesn't Work, What Questions Remain

Generally speaking, what works well for DLNR in implementing the *PASH* and *Ka Pa'akai* decision is when the question deals with genuine traditional and customary practices, when DLNR staff seek to and are able to connect with community groups, kūpuna and others from the potentially impacted area, and when there is trust and good communication.

Implementation works less well when DLNR staff are uninformed, or when they are dealing with a person or people asserting rights for practices that are not actually traditional and customary, or when the traditional and customary practice argument is put forward to advocate for an issue or agenda that is not directly related to a traditional and customary practice.

One specific challenge DLNR staff are frankly uncomfortable with, and in practice work around, is having to ask people if they are actually of Native Hawaiian ancestry, which is necessary to establish a traditional and customary right.[46]

Another key challenge for DLNR staff is how to analyze claims of traditional and customary practices in the context of the modern world and

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[43] *See id.*

[44] *E Ho'olau Kānaka: 'Āina Summit*, OFFICE OF HAWAIIAN AFFAIRS, https://www.oha.org/ainasummit (last visited May 1, 2021) .

[45] *Id.*

[46] State v. Hanapi, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (citing *PASH*, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995)).

modern practices. For example, urban and community forestry can apply traditional agroforestry practices to produce food for communities and restore Hawaiian culture.

A classic dilemma is analyzing use of traditional and customary practices for commercial sale or for barter. The fundamental rule is, if a use is commercial, it is by law not a traditional and customary right.[47] Use of traditional and customary practices for personal economic gain or unsustainable use is also considered by many not to be a pono practice. For example, the sale of forest products, or of kalo, can be used to provide cash to support a cultural practice. But is that in fact a protected traditional and customary practice? Similarly, while subsistence fishing is a traditional and customary practice, sale of fish to pay for gas for fishing is not considered a customary practice but rather a commercial one. Such dilemmas raise questions about the application of *PASH* to these circumstances.

1. Open Issues Requiring Further Review

A number of unsettled issues relating to the application of the *PASH* line of cases remain for future interpretation by the courts, such as:

i. The application to practices not enumerated in the constitution or statutes;[48]
ii. The application to gathering in the marine environment;[49]
iii. The inappropriate assertion of *PASH* protections for modern cultural practices that are not traditional Hawaiian customary practices in root, such as pig hunting;[50]
iv. Continuously evolving traditional Hawaiian cultural practices;

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[47] *See Pratt I*, 124 Hawai'i at 352–54, 243 P.3d at 312–314.

[48] *See, e.g.*, Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 2 (1982) ("[L]awful occupants of an ahupuaa may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather *those items enumerated* in HRS § 7-1.") (emphasis added).

[49] *See In re* Waiola O Molokai, Inc., 103 Hawai'i 401, 419, 83 P.3d 664, 682 (2004) (finding that certain marine environment uses have a minimal harmful impact on Native Hawaiian gathering rights).

[50] *See* Pele Defense Fund v. Dep't Land & Nat. Res., No. CAAP-14-0001033, 2018 WL 496431, at *13–14 (Haw. App. Jan. 22, 2018) (determining that the plaintiffs did not provide sufficient evidence, such as witness testimony, that pig hunting in the Ka'ū Forest Reserve constitutes a traditional or customary Native Hawaiian practice). *But see* State v. Palama, No. CAAP-12-0000434, WL 8566696, at *1, *11–12 (Haw. App. Dec. 11, 2015). In this unpublished memorandum opinion, the Hawaii Intermediate Court of Appeals upheld the trial court's dismissal of criminal trespass charges against a pig hunter who asserted that his unpermitted entry on private property was privileged because he was exercising his traditional and customary Native Hawaiian right to hunt feral pigs. *Id.*

v. The balance of protected practices and reasonable regulation for resource protection, such as for ecosystem and endangered species protection, and related enforcement and fees;
vi. The use of modern technology for traditional and customary practices that better protects the resource;[51]
vii. The level of adequacy of articulation of information, analysis, and reason for regulation in board submittals and rules.

IV. DIVISIONS OF DLNR AND *PASH*

This section discusses numerous and diverse examples of situations in which DLNR staff analyze and implement the *PASH* and *Ka Pa'akai* line of cases in practice.[52]

A. Division of Forestry and Wildlife (DOFAW)

When the *PASH* and *Pratt* decisions came out, DOFAW formed a core group that got together once a year for some years to discuss how to address requests for gathering rights in a consistent manner as required by those decisions.[53]

The *Pratt I* decision requires that the State determine whether an applicant for a gathering permit is of Native Hawaiian descent.[54] In practice, DOFAW staff are uncomfortable asking people this question. As a solution, DOFAW staff have sometimes refrained from inquiring about ancestry. As an alternative, DOFAW staff have sometimes asked applicants to fill out a form with a check box to self-report Native Hawaiian ancestry.

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[51] *See* Kelly v. 1250 Oceanside Partners, No. 00-1-0192K, slip op. at *10–11 (Haw. 3d Cir. Ct. Oct. 21, 2002) ("Fishing and gathering practices lose their traditional and customary nature when performed with modern technology that: (a) substantially replaces human dexterity, energy or propulsion . . . or natural energy or propulsion . . . with engines or motors; or (b) replaces and substantially extends the scope or intensity of traditional methods[.]"); *see also* Andrew R. Carl, *Method is Irrelevant: Allowing Native Hawaiian Traditional and Customary Subsistence Fishing to Thrive*, 32 U. HAW. L. REV. 203 (2019) (arguing that "Native Hawaiians have the constitutional right to fish for subsistence purposes" regardless of the method and use of modern fishing technology).

[52] Out of respect for the sometimes-sensitive nature of cultural practices, the specific locations and identities of practitioners have been left out intentionally.

[53] The State of Hawai'i DLNR's Division of Forestry and Wildlife (DOFAW) is responsible for "manag[ing] and protect[ing] watersheds, native ecosystems, and cultural resources and provid[ing] outdoor recreation and sustainable forest products opportunities, while facilitating partnerships, community involvement, and education." DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dofaw/ (last visited Mar. 10, 2021).

[54] 124 Hawai'i at 349–50, 243 P.3d at 309–10.

The box says "[b]y checking here I certify that this request is to allow me to engage in traditional and customary Native Hawaiian gathering practices defined in and protected pursuant to sections 1-1, 7-1, Hawaii Revised Statutes; article XII, section 7 of the Hawai'i State Constitution; and rules of Hawai'i case law, and that I am qualified to engage in these practices."[55]

The *Pratt I* decision also requires that the practice be for subsistence purposes.[56] There is a second check box on the DOFAW form that allows applicants to affirm "[b]y checking here I certify that the forest product collected will not be used for commercial purposes."[57]

Many activities fall under normal gathering in forested areas for non-commercial purposes addressed through DOFAW rules and permits, thus not requiring special procedures to address *PASH* rights.[58] In forest reserves, people wishing to collect forest items for personal use and at no charge must obtain a collecting permit authorizing the collection in a specific area.[59] In natural area reserves, which are highly intact protected native ecosystem areas,[60] gathering is permitted only by special use permit,[61] and the proposed special use must be consistent with the purpose and objectives of the natural area reserves system.[62]

The normal permitting process covers the great majority of collection requests.[63] Whenever possible, DOFAW follows those rules rather than following a *PASH* application process. In actuality, the *PASH* application process is rarely used because the existing permit system suffices. To address any areas of uncertainty, DOFAW has developed *PASH*-specific protocols to guide whether a traditional and customary gathering right applies to a specific instance.

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[55] DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES., APPLICATION FOR PERSONAL COLLECTING IN THE FOREST RESERVE, https://dlnr.hawaii.gov/forestry/files/2012/11/FRCollectingPermit-Final_2018.pdf (last visited May 1, 2021).

[56] 124 Hawai'i at 352, 243 P.3d at 312.

[57] Forms on file with DOFAW.

[58] *See* HAW. ADMIN. R. § 13-104-21 (2020) (allowing for collection of "forest products for personal use" with a collecting permit).

[59] *Id.*

[60] *See* HAW. REV. STAT. § 195-1 (2021) (setting out the purposes of the natural area reserves as to protect and preserve Hawai'i's "unique natural resources, such as geological and volcanological features and distinctive marine and terrestrial plants and animals, many of which occur nowhere else in the world"); HAW. REV. STAT. § 195-3 (2021) (establishing the natural area reserves system and placing it under the management of DLNR).

[61] *See* HAW. ADMIN. R. § 13-209-4(1) (2020) (prohibiting the removal of "any form of plant or animal life" from natural area reserves); HAW. ADMIN. R. § 13-209-5(a) (2020) (allowing for the issuance of special permits "to conduct activities otherwise prohibited").

[62] HAW. ADMIN. R. § 13-209-5.5(b)(2) (2020).

[63] *See id.* § 12-104-21.

The rights to gather salt and aho, enumerated in the statutes and constitution,[64] are for materials that are not rare in any event, and they can be gathered under a regular permit.[65]

The role of kumu in leading, guiding and educating their haumana and the general public has been instrumental and inspirational over the years. Kumu hula and hālau led the pono practices response to forest gathering in recent years in the face of the new threat of Rapid 'Ōhi'a Death.[66] Hālau made the necessary adaptations of incorporating plant materials from non-sensitive areas instead of relying on 'ōhi'a forest materials as a necessary adaptation to reduce the spread of Rapid 'Ōhi'a Death.[67]

In Moanalua Valley, DOFAW has worked with a respected kahu for Moanalua Valley, a Hawaiian practitioner and lineal descendant of the area, throughout the planning and development of the Moanalua Education Forest.[68] The practitioner helped identify where to build an education forest and trails. The practitioner also identified kapu areas.

DOFAW worked with the same kahu through the planning and development of another Moanalua project, the Ala Mahamoe Restoration Project.[69] The practitioner identified which plants to be planted to support a la'au lapa'au program.[70] The practitioner has been taking students to the restoration site for both education and stewardship activities.

At the border of the Wai'anae Kai Forest Reserve, DOFAW worked with community members to build a fence around Punanaula Heiau to protect it

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[64] HAW. CONST. art. 12, § 7; HAW. REV. STAT. § 7-1 (2021).

[65] *See* HAW. ADMIN. R. § 13-104-21 (2020).

[66] *See* David Corrigan, *VIDEO: Halau Takes Action on Rapid Ohia Death*, BIG ISLAND VIDEO NEWS (Oct. 16, 2016, 7:17 AM), https://www.bigislandvideonews.com/2016/10/01/video-halau-takes-action-on-rapid-ohia-death/. Rapid 'Ōhi'a Death is a fungal pathogen that "attacks and can quickly kill" 'ōhi'a trees whose lehua blossoms are traditionally worn in hula. *Rapid Ohia Death*, HAW. INVASIVE SPECIES COUNCIL, https://dlnr.hawaii.gov/hisc/info/species/rapid-ohia-death/ (last visited Mar. 11, 2021); Molly Solomon, *Ohia Death Leaves Imprint on Native Culture*, HAW. PUB. RADIO (Mar. 31, 2016), https://www.hawaiipublicradio.org/post/ohia-death-leaves-imprint-native-culture#stream/0.

[67] *See* Solomon, *supra* note 66.

[68] Identity of practitioner withheld for privacy.

[69] The Ala Mahamoe Restoration Project seeks to increase water recharge capacity in the Ko'olau Mountains by restoring 5.1 acres of forestry land. *USA: Ala Mahamoe Restoration Project*, SOC'Y FOR ECOLOGICAL RESTORATION (SER), https://www.ser-rrc.org/project/ala-mahamoe-restoration-project/ (last visited Mar. 11, 2021).

[70] "Through community and volunteer support, [the Ala Mahamoe] area will be restored to create a Hawaiian cultural garden using species native to dryland forest habitats and those which are important in practices such as la'au lapa'au (traditional Hawaiian Medicine)." *Volunteer*, KO'OLAU MOUNTAINS WATERSHED P'SHIP, http://koolauwatershed.org/volunteer/ (last visited Mar. 15, 2021).

from cattle damage. Both the fence materials and the labor were paid for by DOFAW. DOFAW also worked with Kaʻala Farms[71] and the community, including multiple interested parties, to issue permits, build a fence, and facilitate the maintenance of the loʻi in the Waiʻanae Forest Reserve. Permits were issued and a fence was built around the loʻi.

In several Waiʻanae Forest Reserves, DOFAW issues long term access permits over management roads that are closed to the public, so that kumu hula and other Native Hawaiian practitioners can gather and perform protocol and religious ceremonies.

At Kaniakapūpū in the Honolulu Forest Reserve, DOFAW issues access permits and special use permits for the stewardship of the ruins of the former summer palace of King Kamehameha III and Queen Kalama.[72] The access permit is necessary because Kaniakapūpū is located within a restricted watershed that is closed to the public.[73] The stewardship group protects the ruins by keeping the area clear of vegetation and by educating visitors on the historical and cultural significance of the site through a controlled and steward-led tour. The group also helped develop a site plan, and built low impact barriers, a trail and signage to keep visitors from trespassing into the ruins and damaging them.[74]

In the Poamoho section of the ʻEwa Forest Reserve, a loʻi was built in a stream without permits. DOFAW is consulting with the Wahiawā Hawaiian

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[71] Kaʻala Farm is a nonprofit located in Waiʻanae Valley that functions as: (1) an agricultural complex, restoring Native Hawaiian kalo production; (2) a Cultural Learning Center, teaching school children through hands-on science programs; and (3) a "cultural kipuka where Hawaiian traditions are practiced daily[.]" KAʻALA FARM, https://kaalafarm.org (last visited Mar. 15, 2021).

[72] Aha Hui Mālama O Kaniakapūpū is the nonprofit authorized by DOFAW to steward Kaniakapūpū. *07/02/19-After at Least Two Incidents of Vandalism Kaniakapūpū Ruins Gets Better Protection*, DEPʻT OF LAND & NAT. RES. (July 2, 2019), https://dlnr.hawaii.gov/blog/2019/07/02/nr19-129/.

[73] *See* HAW. ADMIN. R. § 13-105-5 (2020) (designating the Honolulu Restricted Watershed within the Honolulu Watershed Forest Reservation and noting that "all survey maps . . . and bounds descriptions are on file with the survey division of the department of accounting and general services (DAGS)"); HAW. ADMIN. R. § 13-105-3 (2020) (prohibiting entry into restricted watersheds except as provided in section 13-105-4); HAW. ADMIN. R. § 13-105-4 (2020) (authorizing the Board of Land and Natural Resources to issue permits to enter restricted watersheds).

[74] *See After at Least Two Incidents of Vandalism Kaniakapūpū Ruins Get Better Protection*, DEPT. LAND & NAT. RES. (July 2, 2019), https://dlnr.hawaii.gov/blog/2019/07/02/nr19-129/; *Group Fights to Protect Ancient Hawaiian Site*, KHON2 (June 10, 2015), https://www.khon2.com/local-news/group-fights-to-protect-ancient-hawaiian-site/.

Civic Club[75] and the Aha Moku representative on this issue, particularly on whether they feel the lo'i is a traditional use of the site.

A local family residing in Hau'ula approached DOFAW with the desire to enter into an agreement for long term stewardship of two heiau in the Forest Reserve. DOFAW has met with the family and is gathering information from both a local archaeological firm and the Aha Moku Council to design informational and educational signs to protect the site, as well as to get direction on the proper way to rebuild the walls. DLNR staff are also working with the Ko'olauloa Hawaiian Civic Club to engage the community on this project.

A unique request under *PASH* has been to gather koa trees for canoe logs. Kapāpala forest in Ka'ū on Hawai'i Island seems to produce koa trees that grow especially tall and straight.[76] DOFAW coordinates the Kapāpala Koa Canoe Area working group and development of applications and permits[77] to make koa logs available for traditional and customary construction of koa canoes.[78]

This is an area of very specialized requests under *PASH*. As discussed, *PASH* applies to individual gathering rights.[79] Canoe logs are for canoe clubs, which are not individuals. If a *PASH* request comes in, DOFAW needs to work out who is making the request and for what purpose, often the canoe builder.[80] Other state laws already encourage the sport of canoe paddling, such as the priority given by DLNR's Division of Boating and Ocean Recreation, Land Division and the Office of Conservation and Coastal Lands, for beach area to store canoes belonging to active canoe clubs.[81]

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[75] The Wahiawā Hawaiian Civic Club is a part of the Association of Hawaiian Civic Clubs, a not-for-profit organization and community-based advocacy movement for the "educational, civic, health, cultural, economic and social well-being" of Native Hawaiians. *Our Organization*, ASS'N OF HAWAIIAN CIVIC CLUBS, https://aohcc.org/our-organization/ (last visited Mar. 11, 2021).

[76] *Request for Proposals RFP No. HI-KAP-CANOE-19*, DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES. (Apr. 24, 2019), https://hands.ehawaii.gov/hands/api/opportunity-attachment?id=17531&attachmentId=24979.

[77] *See Permit Guidelines*, DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dofaw/permits/ (last visited Mar. 16, 2021).

[78] *See Kapāpala Canoe Forest*, DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/forestry/frs/timber-management-areas/kapapala-canoe-forest/ (last visited Mar. 16, 2021).

[79] *PASH*, 79 Hawai'i 425, 903 P.2d 1246 (1995).

[80] *Id.*

[81] Hawai'i Administrative Rules Section 13-5-22 limits public purpose uses to "[n]ot for profit land uses undertaken in support of a public service by an agency of the county, state, or federal government, or by an independent non-governmental entity, except that an independent non-governmental regulated public utility may be considered to be engaged in a

An interesting question also arises as to what exactly constitutes the traditional practice of gathering a canoe log. The modern practice of using a chain saw to cut down a koa log may not be considered a traditional and customary practice. On the other hand, using a chain saw will often be safer and less destructive to both the log and the surrounding forest. This exemplifies the question of legitimacy of evolution of traditional and customary practices with modern methods.

Several specialized permits have also been issued for kauila, a federally-listed threatened and endangered species, for traditional and customary uses, such as in the Pu'u Wa'awa'a Community Forest establishment, and eighty-acre project area.[82] All of these gathering practices are managed to ensure the resources are sustained for future generations.[83]

B. Division of State Parks (State Parks)

Hawai'i's State Park System hosts a high percentage of culturally and historically significant sites, six of which are also National Historic Landmarks.[84] State Parks has collaborated on access protocols for traditional and customary practices and site stewardship in specific park units since the Division's inception.

State Parks has established formal agreements with a variety of Hawai'i organizations for access to and stewardship of some of the most significant of these cultural resources.[85] These agreements allow for traditional and customary practices and stewardship of sites, honoring the intent of *PASH* and formalizing standards and expectations. Some examples include:

On Hawai'i Island, at Lapakahi State Historic Park, a traditional Hawaiian cultural group maintains cultural sites and hosts la'au lapa'au training and gathering.[86] At Kukuipahu Heiau within Kohala Historical

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public purpose use. Examples of public purpose uses may include but are not limited to . . . recreational facilities, . . . intended to benefit the public in accordance with public policy and the purpose of the conservation district." HAW. ADMIN. R. § 13-5-22 (2021).

[82] *See Pu'u Wa'awa'a Biological Assessment*, DIV. FORESTRY & WILDLIFE, DEP'T LAND & NAT. RES. (Aug. 2003), https://www.fs.fed.us/psw/ef/hawaii/documents/PWW_biol_assessment.pdf.

[83] *See* DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/ (last visited Mar. 16, 2021) (mission statement).

[84] *See Archaeology & History*, DIV. STATE PARKS, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dsp/archaeology-history/ (last visited Mar. 16, 2021).

[85] *Partners*, DIV. STATE PARKS, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dsp/partners/ (last visited Mar. 17, 2021); *see, e.g.*, *Establishment of a Curator Agreement with the Kuamo'o Foundation for Kukuipahu Heiau State Historic Site*, DIV. STATE PARKS, DEP'T LAND & NAT. RES. (Mar. 13, 2015).

[86] *DLNR Closes Lapakahi State Park for Native Gathering*, HONOLULU CIV. BEAT (Oct.

Sites State Monument, a group maintains the heiau site, hosts cultural gatherings, and develops projects for stabilization and interpretation of the site.[87] At Kealakekua Bay State Historical Park, a group maintains cultural sites of the Napo'opo'o Section and hosts an annual Makahiki gathering.[88]

On Maui, State Parks cooperates with the descendants of the Wai'ānapanapa cemeteries, which are privately owned.[89] Access is through the state park to engage in traditional and customary protocols.[90]

On O'ahu, at Ulupō Heiau, a group oversees traditional lo'i kalo, native plantings, and care of heiau, and hosts cultural group visits and educational programs for schools and community.[91] At Pohakea at Kawainui, a group manages traditional agriculture and hale construction, and hosts annual Makahiki gatherings, cultural groups, and educational programs. At the Makua-Keawaula Section of Ka'ena Point State Park, a group maintains cultural sites, including a cemetery, and hosts educational programs.[92]

Also on O'ahu, State Parks works with Hawaiian cultural groups to maintain structures of important historic cultural significance. At 'Iolani Palace State Monument, the Friends of 'Iolani Palace manages the Palace, the Barracks, and the Coronation Pavilion.[93] State Parks regulates and issues permits for special cultural access on the grounds of the Palace. At Mauna Ala Royal Mausoleum State Monument, a Memorandum of Understanding with the Ali'i Trusts expresses commitments for taking care of specific structures or parts of the grounds.[94]

26, 2012), https://www.civilbeat.org/2012/10/dlnr-closes-lapakahi-state-park-for-native-gathering/.

[87] *See* HAW. REV. STAT. § 6E-38.5 (2019); *Kukuipahu Agreement*, *supra* note 85.

[88] *See Kealakekua Bay State Historical Park Master Plan Improvements Final Environmental Statement*, DEP'T OF LAND AND NAT. RES. (Oct. 2020), https://dlnr.hawaii.gov/dsp/files/2021/01/Kealakekua-Bay-SHP-FEIS_Oct.2020_26MB.pdf.

[89] *DLNR News Release: DLNR Begins Improvements to the Walkways at Wai'ānapanapa State Park*, OFF. GOVERNOR STATE OF HAW. DAVID Y. IGE (Aug. 24, 2016), https://governor.hawaii.gov/newsroom/latest-news/dlnr-news-release-dlnr-begins-improvements-to-the-walkways-at-waianapanapa-state-park/.

[90] *See id.*

[91] *See* KAILUA HAWAIIAN CIVIC CLUB, http://www.kailuahawaiiancivicclub.org/index.html (last visited Mar. 16, 2021); AHAHUI MALAMA I KA LOKAHI, https://ahahui.wordpress.com/about/ (last visited Mar. 16, 2021).

[92] *About Us*, FRIENDS OF KA'ENA, http://www.friendsofkaena.org/about-2 (last visited Mar. 16, 2021).

[93] *'Iolani Palace State Monument*, DIV. STATE PARKS, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dsp/parks/oahu/iolani-palace-state-monument/ (last visited Mar. 16, 2021).

[94] Cataluna, Lee, *Ali'i Trusts Share Kuleana in Perpetuating Mauna 'Ala*, HONOLULU STAR ADVERTISER (May 20, 2016), https://onipaa.org/pages/mauna-ala.

On Kaua'i, at Hā'ena State Park, a group of generational descendants of the area farm traditional lo'i kalo, and host cultural group visits and educational programs for schools and community.[95] At Nāpali Coast State Wilderness Park, Nu'alolo Kai, a group restores cultural landscapes and sites, and hosts cultural groups and gatherings.[96]

Many archeological and sensitive cultural features in State Parks are unfortunately eroding and degrading due to inadequate capacity to protect them. Oftentimes members of the public, unknowingly or intentionally, harm these sites while engaged in recreational activities such as taking apart ancient rock walls to make fireplaces or camp sites. Also, entering a cultural site, such as a heiau that is "wahi pana,"[97] and posting photos on social media, encourage more damage to the site.

There is growing challenge and public tension where recreational uses and traditional and customary practices coexist in parks. There is a need for criteria to balance these two sometimes polarized uses and perceptions.

An emerging issue is that State Parks with cultural landscapes are now being subject to high amounts of inappropriate, illicit, and disrespectful recreational uses, which degrade the resources and sanctity of these cultural landscapes. Examples include raves or other large, loud gatherings with attendant trash, driving on sand dunes containing iwi kupuna in Native Hawaiian burials, using drones that invade privacy and quiet, or hikers veering off established trails to "bag a selfie."[98] Social media attraction can exacerbate this.

State Parks has a process under its Hawai'i Administrative Rules to issue Special Use Permits for unique access for individuals to engage in traditional and customary practices, as contrasted with the formal agreement with established organizations.[99] The most significant challenge with this process of establishing cultural access is the lack of definitive

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[95] *See Hā'ena State Park*, DIV. STATE PARKS, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dsp/parks/kauai/haena-state-park/ (last visited Mar. 17, 2021); *Hā'ena State Park Master Plan Final Report*, DIV. STATE PARKS, DEP'T LAND & NAT. RES. (May 2018), https://dlnr.hawaii.gov/dsp/files/2018/03/Haena-MP-FINAL.pdf.

[96] *Partners*, *supra* note 85; NĀPALI COAST 'OHANA, http://www.napali.org/ (last visited Mar. 16, 2021).

[97] "Wahi pana" translates to legendary place. NĀ PUKE WEHEWEHE 'OLELO HAWAI'I, http://wehewehe.org (last visited May 1, 2021).

[98] *See, e.g.*, *Large Gatherings, Trucks Driving Over Hawaiian Burial Sites, Widespread Defecation Force Closure of Polihale State Park on Kauai*, STAR ADVERTISER (July 28, 2020) https://www.staradvertiser.com/2020/07/28/breaking-news/large-gatherings-trucks-driving-over-hawaiian-burial-sites-widespread-defecation-forces-closure-of-polihale-state-park-on-kauai/.

[99] HAW. ADMIN. R. § 13-146-54 (2021).

standards to authenticate the request. Some people say, simply, and wrongly, "I'm Hawaiian. I can do what I want."

A recurring example is a request for nighttime use of a park unit where no camping is allowed. There are a variety of traditional and customary practices that require night use, but how do you distinguish that from someone who is trying to use that process simply to camp out in an area prohibited to the general public?

Twenty-five years after *PASH*, this remains the most significant impediment to implementing the spirit and legal intent of *PASH*. There are situations where an individual or group attempts to engage in an activity under the veil of traditional and customary practices for access purposes that are disingenuous or inappropriately interpreted. Some simply argue that they are entitled to unregulated access for any purpose.

One example of this is posing in Hawaiian costume for out of state visitors in a park and then collecting money for photos. Collecting money is not a cultural practice; charging money to share one's cultural practices is not considered pono nor an element of *PASH* rights.[100] Aha Moku representatives helped clarify that the practice of collecting money, and doing so outside the person's moku, is not considered culturally legitimate.[101]

Another example is where people ascribe cultural values, or assert traditional and customary rights, as a way to interfere with a project for public recreational safety, such as the installation of handrails or creating off-limits sensitive areas.[102] Objecting to the methods of construction and claiming a traditional and customary practice to disrupt a State Parks management project is neither an element nor the intent of *PASH* rights.[103]

In another example, vehicles were prohibited in a state beach park to restrict group gatherings during the COVID-19 pandemic, while pedestrian access was not prohibited.[104] Some fishers argued for vehicle access based on traditional and customary rights of access. Cultural consultants advised State Parks: "Culturally, as there were no vehicles in ancient times, and you do allow pedestrian access, we agree with your current mandates due to

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[100] *See PASH*, 79 Hawai'i 425, 438, 903 P.2d 1246, 1259 (1995).

[101] *See* H.B. 288, 2012 Leg., 26th Sess. (Haw. 2012). The Aha Moku Advisory Committee was established to provide advice to the chairperson of the Board of Land and Natural Resources on traditional Hawaiian knowledge of land and natural resource management. *See* H.B. 288 at (d)(1)–(7).

[102] *See 8/14/20-Temporary Suspension of Construction of the Hanakāpī'ai Bridge Project*, DEP'T OF LAND & NAT. RES., https://dlnr.hawaii.gov/blog/2020/08/14/nr20-118/ (last visited May 1, 2021).

[103] *See PASH*, 79 Hawai'i 425, 438 903 P.2d 1246, 1259 (1995).

[104] Identities and details omitted here for privacy purposes.

limited capacity to manage the park. In traditional practice, if a kupuna wished to fish and could not make the walk, then their descendants would walk to where the resource was and take the mea'ai to them."

As discussed above, Aha Moku representatives helped clarify that the practice of collecting money and doing so outside the person's moku was not considered culturally legitimate. In the other case, Aha Moku representatives consulted with generational families and confirmed support of the park project.

Establishing ongoing relationships and trust with lineal and cultural descendants associated with various park units, such as through Aha Moku representatives, Hawaiian Civic Clubs, or other local groups or individuals from the area, has become a positive step in determining authentic access and practices of the respective moku and park unit. Optimally, the regulatory body would have vetted criteria in permit applications to review these requests.

C. Division of Aquatic Resources (DAR)[105]

Given the wide variety of the issues addressed by the Division of Aquatic Resources (DAR), the following subsections present some relevant historical and practical context.

1. Konohiki Rights Under the Hawaiian Kingdom

The konohiki[106] system of the ancient Hawaiians provided strong local governance in managing resources and made feeding a large population in Hawai'i possible. Kamehameha the Great placed restrictions on sea fisheries for periods of five months, and lifted them on the sixth month, allocating catch by day among ali'i, landlords, and commoners for an open fishing period. "At the end of this period restrictions were again placed over certain fish in order that they might increase," says Kamakau. These restrictions were also extended to the deep-sea fishing grounds to increase the fish that go in schools, such as uhu, aku, and flying fish.[107]

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[105] DIV. AQUATIC RES., DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/dar/ (last visited May 1, 2021). The Division of Aquatic Resources' mission is to "work with the people of Hawai'i to manage, conserve and restore the state's unique aquatic resources and ecosystems for present and future generations." *Id.*

[106] This konohiki rights section is taken from an unpublished paper written by the author. Suzanne Case, Yoo Hoo, I'm Looking For An Uhu (2015) (unpublished manuscript) (on file with author).

[107] SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAI'I 177–78 (Kamehameha Schools,

In 1839, Kamehameha III took the fishing grounds from Hawai'i to Kaua'i and redistributed them—those named without the coral reef, and the ocean beyond—to the people: those "from the coral reef to the sea beach for the landlords and for the tenants of their several lands, but not for others."[108]

In 1859, the fishing laws of the kingdom were codified in the civil code in sections 384–396, setting forth the powers of the konohiki to hold private fisheries for themselves and tenants, to set apart one variety of fish for themselves each year after giving adequate notice, to prohibit fishing during certain months, and to exact portions of fish for themselves from each fisherman. They also established laws against the selling of fish to places outside the kingdom and boundaries for various properties of the konohiki.

Annexation and the Hawai'i Organic Act of 1900[109] changed everything for Hawai'i's fisheries.

Section 95 of the act repealed all laws conferring exclusive fishing rights to any private party and opened all fisheries to full free public access.[110] Section 96 required anyone who claimed a private right to a fishery to file a petition within two years.[111] If no claim was made within that two-year period, then the law provided for the condemnation of that fishing right.[112]

The Hawai'i Supreme Court made clear that "[t]he intent of the Congress in enacting Sections 95 and 96 of the Organic Act was to destroy, so far as it was in its power to do so, all private rights of fisheries and to throw open the fisheries to the people."[113]

The result of this full turnaround in policy has been dramatic: Hawai'i's near shore fisheries have declined 75 percent in the past century.[114]

While no konohiki are registered or recognized, the konohiki rights statute [115] that originated from the Hawaiian Kingdom remains on the books.[116]

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rev. ed. 1992).

[108] MARGARET TITCOMB, NATIVE USE OF FISH IN HAWAII 15 (University of Hawai'i Press, 2d ed. 1972).

[109] An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900), *reprinted in* 1 HAW. REV. STAT. § 43 [hereinafter *Organic Act*].

[110] *Id.* § 95.

[111] *Id.* § 96.

[112] *See id.*

[113] State v. Hawaiian Dredging Co., 48 Haw. 152, 155, 397 P.2d 593, 596 (1964).

[114] *See, e.g.*, Jeffrey Maynard et al., *Assessing the Resilience of Leeward Maui Reefs to Help Design a Resilient Managed Area Network*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Mar. 2019), at 5, https://www.ncei.noaa.gov/data/oceans/coris/library/NOAA/CRCP/NOS/OCM/Projects/198/NA17NOS4820077/Maynard2019_CRCP_TM33_Maui_Resilience_Report.pdf.

[115] HAW. REV. STAT. § 187A-23 (1985).

2. *Community-Based Subsistence Fishing Areas (CBSFAs) and Community-Based Managed Areas*

Governor John Waihe'e convened a Task Force in the early 1990s to determine the importance of subsistence living on Moloka'i, identify problems affecting subsistence practices, and recommend policies and programs to improve the situation.[117] The legislature passed a statute in 1994 as a result of Governor Waihe'e's task force's policy recommendations giving DLNR the authority to create CBSFAs to protect and reaffirm fishing practices customarily and traditionally exercised for purposes of Native Hawaiian subsistence, culture, and religion.[118]

Under Hawaii Revised Statutes (HRS) section 188-22.6(a), DLNR can designate CBSFAs and carry out fishery management strategies for such areas by adopting rules in accordance with the administrative rule-making procedures for state agencies outlined in HRS Chapter 91.[119] In addition, the CBSFA statute requires that community organizations propose CBSFAs to DLNR for consideration by submitting a management plan,[120] which includes regulatory recommendations.

A report by the DLNR Division of Aquatic Resources provides:

> While CBSFAs and community-based managed areas are community-driven initiatives, it is not always possible to accommodate community-proposed management recommendations based on traditional knowledge and practices within the State's existing regulatory and legal framework (e.g. restricting access to ahupua'a residents only, or self-enforcement by members of the community). Before adapting community-proposed management recommendations into a rule package, DLNR must ensure adherence to Federal, State, and County law as well as consider its own agency management mandates and priorities. Furthermore, there are State-mandated public input opportunities that ensure due process and the consideration of all public interests during rulemaking, and so the public input received can further influence the final content of the rules. Although DLNR is unable to

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[116] *See* Malia Akutagawa, *Evaluation of Proposed Hawai'i Noncommercial Marine Fishing Registry, Permit, and License Design Scenarios & Policy Recommendations for Resolving Potential Conflicts with Native Hawaiian Rights*, CONSERVATION INT'L FOUND. (Nov. 9, 2016), at 14, https://dlnr.hawaii.gov/dar/files/2017/10/NCMF_APPENDIX_G.rev_.pdf.

[117] Jon Matsuoka et al., *Governor's Moloka'i Subsistence Task Force Final Report*, MOLOKA'I SUBSISTENCE TASK FORCE & DEP'T BUS., ECON. DEV. & TOURISM (June 1994), at 4, http://oeqc2.doh.hawaii.gov/Miscellaneous_Docs/1994-Governors-Molokai-Subsistence-Task-Force-Final-Report.pdf.

[118] HAW. REV. STAT. § 188-22.6(a) (1994).

[119] *Id.*

[120] *Id.* § 188-22.6(b)(6).

> guarantee the adoption of all management recommendations proposed by a community group, the Division of Aquatic Resources is committed to working with groups that adhere to the CBSFA designation procedures, as capacity permits.[121]

Communities can work in other formal and informal structures with DAR for community managed marine areas. DAR worked with the Hā'ena community group on Kaua'i to establish the Hā'ena CBSFA by rule in 2015,[122] and with the Ka'ūpūlehu community group to establish the "Try Wait" marine reserve by rule in 2016,[123] and continues to work with other groups on similar rules proposals.

3. Lay Net, Monofilament Throw Net, and Scuba Spearing

Modern fishing gear and methods—including nylon nets, lay gill nets and scuba spearing— are very destructive and wasteful.[124] Sometimes fishers try to assert traditional and customary rights without restrictions or for commercial sale. This is not correct.

All fishing is subject to reasonable regulation by the State of Hawai'i.[125] Traditional and customary fishing and gathering rights are not only dependent on access to areas to conduct those practices, but they are also dependent on the availability of healthy marine resources to gather. If the State fails to adequately regulate fishing to ensure the availability of fishery resources, fishing and gathering rights will be meaningless.

Many local communities promote traditional Hawaiian subsistence fishing by using traditional fishing gear like woven nets, kapu during spawning seasons, and maintaining other pono practices.[126]

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[121] Erin Zanre, *Community-based Subsistence Fishing Area Designation Procedures Guide*, DIV. AQUATIC RES., DEP'T LAND & NAT. RES. (2014), at 4, https://dlnr.hawaii.gov/coralreefs/files/2015/02/CBSFA-Designation-Procedures-Guide_v.1.pdf.

[122] *Management Plan for the Hā'ena Community-Based Subsistence Fishing Area, Kaua'i*, DIV. AQUATIC RES., DEP'T LAND & NAT. RES. (Aug. 2016), at 8, https://dlnr.hawaii.gov/dar/files/2016/08/Haena_CBSFA_Mgmt_Plan_8.2016.pdf.

[123] *See Ka'ūpūlehu Administrative Record*, KA'ŪPŪLEHU LIFE ADVISORY COMM., at 70–75, HTTP://DLNR.HAWAII.GOV/DAR/FILES/2016/02/KAUPULEHU_ADMINISTRATIVE_RECORD_PUBLIC.PDF (last updated Feb. 2, 2016).

[124] *See* William Walsh, *Background Paper on SCUBA Spearfishing*, DIV. AQUATIC RESOURCES, DEP'T LAND & NAT. RES. (Jan. 2013), https://dlnr.hawaii.gov/dar/files/2014/05/WHI_SCUBA_Background.pdf.

[125] *See generally Hawai'i Fishing Regulation*, DIV. AQUATIC RESOURCES, DEP'T LAND & NAT. RES. (July 2019), https://dlnr.hawaii.gov/dar/files/2019/06/fishing_regs_Jul_2019.pdf (providing a list of fishing regulations applicable to the State of Hawai'i).

[126] *See* Eva Schemmel et al., *The codevelopment of coastal fisheries monitoring methods*

4. Whales, Sharks, Monk Seals, Dolphins, Turtles

The DLNR's Divisions of Aquatic Resources (DAR) and Conservation and Resources Enforcement (DOCARE),[127] with their federal National Oceanic and Atmospheric Administration (NOAA) counterparts, have been working with groups such as the Kia'i Kanaloa, a network of Native Hawaiian cultural and religious practitioners from each island who acknowledge a genealogical relationship with and kuleana for cetaceans as akua and kinolau of Kanaloa, akua of the sea.[128] DAR and DOCARE have been working closely with NOAA and practitioners to ensure that whales and other cetaceans, sharks, monk seals, dolphins, turtles, and other kinolau of Kanaloa and marine wildlife are afforded the respect due to them when they are in distress, stranded, injured, and/or have expired on our shores. Their peaceful transition to pō and honoring their remains are important to all cooperators.

D. Office of Conservation and Coastal Lands (OCCL)

OCCL's responsibility is to ensure the *Ka Pa'akai* analysis is adequately done for regulatory decisions in the conservation district, which covers public and private mauka forest lands and coastal lands up to the shoreline, which is the highest wash of the waves.[129] The *Ka Pa'akai* analysis is summarized in the board submittals for conservation district use applications for approval by the Board of Land and Natural Resources (BLNR).[130]

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to support local management, 21 ECOLOGY & SOC., no. 4, Dec. 2016, http://www.ecologyandsociety.org/vol21/iss4/art34/.

[127] *See Aloha From DOCARE*, Div. CONSERVATION & RES. ENF'T, https://dlnr.hawaii.gov/docare/ (last visited Mar. 14, 2021).

[128] *See* Whale Carcass Moves Closer to the Shore Amid Renewed Safety, Cultural and Legal Warnings, DEP'T LAND & NAT. RES. (Jan. 17, 2019), https://dlnr.hawaii.gov/docare/news/nr19-014d/. *See generally Palaoa or Cetaceans*, KAI PALAOA, http://kaipalaoa.weebly.com/palaoa-cetaceans.html (last visited Mar. 14, 2021).

[129] *See generally Conservation District*, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/occl/conservation-district/ (last visited Mar. 14, 2021) (explaining the Conservation District's categorical subzones and the authority upon which the Conservation District is regulated).

[130] *Conservation District Use Application*, OFF. CONSERVATION & COASTAL LANDS, DEP'T LAND & NAT. RES., https://dlnr.hawaii.gov/occl/ (choose "Applications" from dropdown; then select "Blank Applications"; scroll down then click "Conservation District Use Application") (last visited Mar. 10, 2021).

1. Fishponds

OCCL worked extensively with community groups, the State Department of Health and the U.S. Army Corps of Engineers on a programmatic environmental impact statement and streamlined approval process to facilitate restoration of ancient Hawaiian fishponds statewide.[131]

Similar streamlined processes could be developed for restoration of lo'i kalo and heiau. OCCL must consider what is reasonable regulation in this context.[132]

2. Thirty Meter Telescope (TMT)

The 2017 Board of Land and Natural Resources' Decision and Order[133] for a conservation district use permit for TMT, upheld on appeal to the Hawai'i Supreme Court,[134] analyzed the project for impacts to archaeological, historic, and cultural resources and practices for over 75 pages of its 280-page decision, and specifically analyzed the project under *PASH*, *Hanapi*, *Pratt* and *Ka Pa'akai* tests.[135] It summarized the analysis in the Preface as follows:

> The TMT will not pollute groundwater, will not damage any historic sites, will not harm rare plants or animals, will not release toxic materials, and will not otherwise harm the environment. It will not significantly change the appearance of the summit of Mauna Kea from populated areas on Hawai'i Island.
>
> The TMT site and its vicinity were not used for traditional and customary native Hawaiian practices conducted elsewhere on Mauna Kea, such as depositing *piko*, quarrying rock for adzes, pilgrimages, collecting water from Lake Waiau, or burials. The site is not on the summit ridge, which is more visible, and, according to most evidence presented, more culturally important than the plateau 500 feet lower where TMT will be built.

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[131] *Final Environmental Assessment / Finding of No Significant Impact*, DEP'T LAND & NAT. RES. (Oct. 2013), at 13, https://dlnr.hawaii.gov/occl/files/2013/08/Loko-Ia-Final-EA1.pdf.

[132] *See id.*

[133] *In re Contested Case Hearing Re Conservation District Use Application Findings of Fact*, DEP'T OF LAND & NAT. RES., https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf (last visited Mar. 10, 2021) [hereinafter *TMT Decision and Order*].

[134] *In re* Conservation Dist. Use Application HA-3568 (*In re* TMT), 143 Hawai'i 379, 384, 431 P.3d 752, 757 (2018).

[135] TMT Decision and Order, *supra* note 135 at 98–158, 208–211, 244–254.

> Some groups perform ceremonies near the summit. The evidence shows that these ceremonies began after the summit access road and first telescopes were built, but, in any case, the TMT will not interfere with them.
>
> Individuals testified that seeing the TMT will disturb them when they are doing ceremonies or other spiritual practices. The TMT cannot be seen from the actual summit or from many other places on the summit ridge. Where it would be visible, other large telescopes are already in view. It will not block views from the summit ridge of the rising sun, setting sun, or Haleakalā.
>
> Some native Hawaiians expressed that Mauna Kea is so sacred that the very idea of a large structure is offensive. But there are already twelve observatories on Mauna Kea, some of them almost as large as the TMT. They will remain even if the TMT is not built. No credible evidence was presented that the TMT would somehow be worse from a spiritual or cultural point of view than the other large observatories.[136]

E. COMMISSION ON WATER RESOURCE MANAGEMENT (CWRM)

1. Gathering in Streams, Lo'i Kalo, and Instream Flow Standards

CWRM's[137] primary public trust responsibilities are:

- Maintenance of waters in their natural state;
- Domestic water uses of the general public, particularly for drinking;
- Native Hawaiian traditional and customary practices, including appurtenant rights; and
- Reservations of water for the Department of Hawaiian Home Lands.[138]

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[136] *Id.* at ii–iii.

[137] The CWRM is a seven-member commission that was established by the 1978 Constituitional Convention to administer the state's Water Code. HAW. CONST. art. XI, § 7; HAW. REV. STAT. § 174C (2020); HAW. ADMIN. R. §§ 13-167-1–13-171-63. Article XI, Section 7 of the Hawai'i Constitution directs the State "to protect, control, and regulate the use of Hawai'i's water resources for the benefit of its people." HAW. CONST. art. XI, § 7. The constitution also mandates that the State hold "all public natural resources" in trust "for the benefit of the people." HAW. CONST. art. XI, § 1. In *In re Water Use Permit Applications* (*Waiāhole I*), the Hawai'i Supreme Court declared that "article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000). This public trust principle is rooted in Native Hawaiian customs and laws of the Kingdom of Hawai'i. D. KAPUA'ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I 7 (2009).

[138] *E.g.*, *Waiāhole I*, 94 Hawai'i at 137–39, 9 P.3d at 449–51; *In Re* Contested Case Hearing on Water Use, Well Constr., & Pump Installation Permit Applications (*Wai'ola O Moloka'i*), 103 Hawai'i 401, 431 83 P.3d 664, 694 (2004); HAW. REV. STAT. § 174C-101(a) (2020).

The Water Commission must balance these primary public trust responsibilities with reasonable and beneficial off-stream uses.[139]

The landmark 2018 East Maui interim instream flow standards decision by the Commission on Water Resource Management recognized these responsibilities. From the Executive Summary of the 2018 decision: "Hawaii's Water Code recognizes kalo and other traditional agriculture as an instream use. The Commission's decision will return free flowing water, with no upstream diversions, to all streams which have historically supported significant kalo cultivation (Honopū, Huelo, Hanehoi, Pi'ina'au, Palauhulu, 'Ōhi'a (Waianui), Waiokamilo, Kualani, Wailuanui, Makapipi)."[140] The Water Commission also recognized the importance of protecting stream habitat for native stream life such as o'opu and 'ōpae in protecting traditional and customary gathering rights.[141] With this in mind, the Commission set instream flows for a variety of other streams at sixty-four percent of median base flow (BFQ_{50}) as generally representing the flow necessary to restore ninety percent of the habitat in a stream (H_{90}).[142]

Other issues related to protections for traditional and customary Native Hawaiian rights that the Water Commission adjudicates include the extent to which more efficient water pipes can or should be used with or in place of 'auwai for delivery of water to lo'i while minimizing waste, and how to classify lo'i kalo that is used to produce kalo for personal or 'ohana consumption but also for commercial sale.

F. DLNR Regulation of Traditional and Customary Rights in Other Areas

In addition to regulating the exercise of and impacts on traditional and customary rights under *PASH* and *Ka Pa'akai,* DLNR works in other areas where traditional and customary practices may exist that are regulated by state statutes, including historic trails, historic buildings and burials, kuleana lot access, mauka land access, and bilateral shoreline access.

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[139] *Waiāhole I*, 94 Hawai'i at 138–39, 9 P.3d at 450–51 (providing that the State has a "dual mandate of 1) protection and 2) maximum resonable and beneficial use").

[140] Petition to Amend Interim Instream Flow Standards for Honopou Stream, Case No. CCH-MA13-01, Comm'n on Water Res. Mgmt. iv (June 20, 2018), https://files.hawaii.gov/dlnr/cwrm/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf.

[141] *Id.* at iv, 44.

[142] *Id.* at iii, v.

1. Historic Trails

The State Highways Act of 1892, codified in HRS section 264-1, provides that public roads and trails that were in existence prior to 1892 remain public.[143] Those that are not now either state highways or county roads can be claimed as public trails under the jurisdiction of the BLNR.[144] This is a unique law that originated under the Kingdom of Hawai'i, continued through the territorial period, and is now codified in state law.

Hawai'i Revised Statutes chapter 198D, requires DLNR to keep an inventory and classify all existing trails, as well as adopt rules regulating trail use.[145] DLNR established the Nā Ala Hele trail system to manage historic as well as recreational trails.[146] The Nā Ala Hele advisory councils must have Native Hawaiian cultural representation. HRS chapter 198D-9 does not require Indigenous ancestry or cultural training for members of the advisory council,[147] but the Nā Ala Hele system adopted a rule that requires Hawaiian cultural representatives or practitioners on the council.[148]

Most of the challenges in protecting these trails for public use lie in documenting the actual historical location of the trails and protecting them from obliteration by public or private land development. If they are not physically existent currently, the government ownership still remains and, in some instances, the interest has been exchanged for a new or superior trail location in collaboration with landowners and developers.

DLNR's Division of Forestry and Wildlife has a title Abstractor whose full-time job is researching the existence and location of these ancient roads and trails. The burden of proof of ownership lies with the governments, even though private landowners cannot adversely possess government land.[149] The primary tool of the Abstractor is to locate a certified government survey map that was created prior to 1892 and, if the trail is on the map, the government may lay claim to the trail. In rare instances in litigation, oral history has been used to confirm the trail's existence. This is a real estate issue and a powerful legal method to protect and preserve Hawaiian cultural and archeological features, even if the need for the trail

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[143] HAW. REV. STAT. § 264-1 (2021).

[144] *Id.* § 264-1(2).

[145] HAW. REV. STAT. § 198D-3, D-4, D-6 (2021).

[146] *Id.* § 198D-2.

[147] *See id.* § 198D-9.

[148] HAW. ADMIN. R. § 13-130-5(a) (2021).

[149] *Application of Kamakana*, 58 Haw. 632, 641, 574 P.2d 1346, 1351 (1978) (citing, *inter alia*, Thurston v. Bishop, 7 Haw. 421, 437 (1888); Application of Kelley, 50 Haw. 567, 445 P.2d 538 (1968))

or the public's interest in its use no longer exists. However, this is not a constitutional issue as in *PASH* or *Ka Pa'akai*.

2. Historic Buildings and Burials

The statutory mandate of the State Historic Preservation Division (SHPD) is to protect historic properties, not rights or uses.[150] "Historic properties" is defined by statute as non-residential sites over fifty years old.[151] Non-cemetery burials are regulated by SHPD through the Island Burial Councils.[152] The primary work of SHPD is to review, identify and mitigate impacts to archaeological sites and burial sites statewide, on public and private property.

SHPD also regulates historic buildings,[153] including such culturally and historically significant State Parks sites as 'Iolani Palace, Washington Place, Hulihee Palace, and the Queen Emma Summer Palace. These are important historic and cultural sites, though *PASH* rights are not involved.[154]

Many people and groups in Hawai'i desire to protect, restore and rebuild their cultural sites. They now have to go through the same challenging process set forth in HRS chapter 6E, establishing a plan and inventory survey, as the development of a hotel must follow.

One option to facilitate this process could be a programmatic agreement between SHPD and State Parks for repairs to cultural sites under watch by an archaeologist. A programmatic agreement can be done under federal historic preservation law, but there is currently no parallel programmatic agreement mechanism in place under state law. HRS 6E-8(a) provides for programmatic agreements under limited circumstances.[155] Rules need to be adopted to make that section effective. A programmatic agreement in this section refers to more of a phased approach than a program as set forth in federal law.

3. Right of Access to Kuleana Lots—By Foot or Horse

Under case law interpreting kuleana rights, a right to access a kuleana is by foot or horse. As to access by car, there is a difference between an

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[150] *See* HAW. REV. STAT. § 6E-1 (2021).
[151] *Id.* § 6E-43.5.
[152] *See id.* § 6E-3.
[153] *Id.* § 6E-5.5.
[154] *See* 79 Hawai'i 425, 903 P.3d 1246 (1995).
[155] HAW. REV. STAT. § 6E-3 (2021).

assertion of a kuleana right and a request for an access easement.[156] The kuleana owner will also be allowed the access by foot or horse but will not be issued an access easement document. For vehicular access, utilities, or a written easement across State land to a kuleana, the normal process is to file a request for an easement for Land Board approval, with the normal required payment of appraised fair market value.

4. Hunting, Hiking, Fruit Picking, Ti Leaf Sliding

Hawai'i Revised Statutes section 46-6.5 is an old, seldom considered statute requiring access to mauka lands for "hunting, hiking, fruit picking, ti leaf sliding," mandated in 1963 when subdivisions began to be developed between urban areas and forest areas, threatening to cut off access to the forest.[157] Many current conflicts in neighborhoods adjacent to trailheads, with parking challenges and people walking through neighborhoods, came about not because the trailheads were built in the neighborhoods, but because subdivisions were built right next to ancient forest trails. In many cases, statutes and planners have allowed for public access but have not made provisions for public parking and increasing public-private conflicts in these locations.

5. Shoreline Lateral Access

Beaches makai of the shoreline, generally defined as the highest reach of the waves in a normal year,[158] are public.[159] DLNR holds title to the beaches for the State, everywhere in Hawai'i except in a few locations where title has been transferred by executive order to a County, for example adjacent to Kūhiō Beach Park in Waikiki. DLNR, through its Land Division and its Office of Conservation and Coastal Lands, focuses on maintaining unobstructed public lateral access along the shoreline in accordance with HRS chapter 115, by ensuring that plants such as naupaka and grass are neither planted nor encouraged to grow below the shoreline, and that walls,

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[156] *See* Palama v. Sheehan, 50 Hawai'i 298, 440 P.2d 95 (1968) (giving tenant reasonable access right to kuleana plot); *see also* HAW. REV. STAT. § 7-1 (giving tenants right of way).

[157] HAW. REV. STAT. § 46-6.5 (2009) (requiring the counties to guarantee public access to the shoreline and to existing mountain trails).

[158] Hawai'i's Coastal Zone Management Act defines the "shoreline" as the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves. HAW. REV. STAT. § 205A-1 (2021); *see also* Diamond v. Dobbin, 132 Hawai'i 9 (2014).

[159] *In re* Ashford, 50 Haw. 314, 316, 440 P.2d 76, 78 (1968).

fences and stairways are not built below private beachfront land extending into the public beaches. This is important, for example, for fishers throwing net from the shore.

6. Other Government Agencies

Other government agencies are increasingly seeing the need to protect traditional and customary practices under other existing laws. At the Hanapēpē Salt Pans on Kaua'i, a traditional practice of salt processing has been threatened by water runoff and disturbed by low-flying helicopters.[160] Conversations are ongoing with the County of Kaua'i as to activities on the adjacent beach park area and upland urban and rural watershed, and with the Department of Transportation and DLNR as to the adjacent airstrip, but problems persist.[161]

V. CONCLUSION

Along with the restoration of Hawaiian culture has come growth in the number of people now participating in natural and cultural resource management in Hawai'i, both professionally and personally. Many at DLNR, and many Hawaiians, have over decades lost and then regained a strong sense of connection between culture and nature in Hawai'i.

Traditional Hawaiian culture, the State constitution, and modern DLNR, share an interest in balancing resource protection and sustainable use:

> Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
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> All public natural resources are held in trust by the State for the benefit of the people.[162]

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[160] *See* Brittany Lyte, *Brittany Lyte: The Imperiled Legacy of the Hanapepe Salt Flats*, HONOLULU CIV. BEAT (Feb. 7, 2018), https://www.civilbeat.org/2018/02/brittany-lyte-the-imperiled-legacy-of-the-hanapepe-salt-flats/.

[161] *See generally Hawaii Salt Makers Working to Save Cultural Practice*, ASSOCIATED PRESS (Aug. 12, 2018), https://apnews.com/article/99e158c7589a4efaa3406f30062b693c (discussing the involvement of the County of Kaua'i, the Department of Land and Natural Resources, and the Department of Transportation).

[162] HAW. CONST. art. XI, § 1; *see also Hawai'i: Sustainability as a Lived Practice*, UNIV. HAW. OFF. OF SUSTAINABILITY, https://www.hawaii.edu/sustainability/hawaii-sustainability-as-a-lived-practice/ (last visited Mar. 16, 2021).

DLNR now works to provide more access and to implement standard protocols and respect for traditional and customary practices. DLNR continues to try to improve its protocols, analyses, and connections to people and places in its work. Authenticity of the request to practice or assertion of the right to practice is key. Respect for legal rights and pono practices by government, along with transparency and fair processes, is key.

Conflicts still exist, but are often fewer, with more culturally attuned people stewarding resources. Philosophical differences do exist about how government balances conflicting viewpoints, but less so because of ignorance or apathy on the part of the people implementing the decisions.

DLNR and communities together can pursue active management of important places, natural and cultural resources, and practices, that is meaningful, productive, and culturally sustaining. We can work together to educate residents and visitors alike to understand our living natural and cultural world and to respect it. We can together learn, understand, practice and evolve our living culture, stop harmful practices, and heal broken connections.[163]

As protection becomes more important to everyone, it becomes more intrinsic and second nature, so the legal protections become less important.

Relationship is key. Authenticity is key. Respect is key. Trust is key.

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[163] *See also Landscape Conservation in a Changing Climate: Lessons from the Pacific Islands Climate Change Cooperative*, EAST-WEST CENTER, https://www.eastwestcenter.org/sites/default/files/filemanager/pubs/Summary%20of%20Landscape%20Conservation%20in%20a%20Changing%20Climate.pdf (last visited April 29, 2021).

PASH: No One Legacy

Roy A. Vitousek III*

Since receiving the request from Ellen Ashford and Kaulu Lu'uwai to participate in this symposium I have been giving a great deal of thought to the question, "What is the legacy of *PASH*?" I have thought about this at my desk, in my truck on my daily drive between Waimea and Kona, as I walk the mountains and coastlines of the Big Island, and too often when I wake up in the middle of the night worried about deadlines, commitments, and what work I have left until the last minute to produce.

I find there is no one answer, no one legacy, positive or negative, and no one theme that brings together thirty years of trying to develop and implement a legal construct which enables people who are closest to the land to have their interests thoughtfully and rigorously taken into consideration where land uses are proposed which could adversely impact important cultural resources or practices.

I. On the Positive Side of the Legacy Ledger

A. Agency Decisions

As a result of *PASH*,[1] *Ka Pa'akai*,[2] their progeny, and the related changes in state statutes and regulations and county ordinances and regulations, there are now clear legal requirements and criteria for cultural impact assessment, historic preservation review, and formal consideration of customary and traditional practices as part of assessing applications for most forms of permits and approvals which would authorize development.[3]

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* Resident Partner for the Cades Schutte LLP, Hawai'i Island Offices, Chair of the Land Use, Zoning, and Entitlements Practice Group, and former Adjunct Professor at the William S. Richardson School of Law. A member of the first graduating class of the Richardson School of Law, Mr. Vitousek was a law clerk to Justice H. Baird Kidwell in the Hawai'i Supreme Court then joined Cades Schutte in 1977 and opened the firm's Hawai'i Island Offices in 1987. His practice focuses on real estate and administrative law (with a focus on land acquisition and permitting in highly regulated environments), hospital law, commercial law and litigation, and hotel and hospitality law. J.D. William S. Richardson School of Law; B.A. Williams College; Hawai'i Preparatory Academy.

[1] Pub. Access Shoreline Haw. v. Hawai'i Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995).

[2] Ka Pa'akai O Ka'Aina v. Land Use Comm'n (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000).

[3] *See, e.g.*, *PASH*, 79 Hawai'i at 437–42, 903 P.2d at 1258–63 (discussing traditional and customary rights under article XII, section 7 of the Hawai'i Constitution); *In re*

This, to me, is the most important, most concrete result of *PASH* and its progeny.

Nearly every government permit which would authorize development of previously undeveloped land, by law, cannot be approved unless a formal assessment of historic sites, cultural resources and, in varying degrees of rigor, cultural practices is conducted and formally considered by the approving agency.[4] This includes district boundary amendments,[5] changes in zoning, special management area use permits,[6] conservation district use permits,[7] shoreline setback variances, any actions which trigger HRS Chapter 343, special permits, use permits, subdivision applications, and grading permits for more than one acre. With these statutory and rule changes have come increased public outreach before applications are filed, increased public notice of applications and hearings, more opportunity for potentially impacted persons to become aware of pending applications, and clearly a lower threshold for permitting agencies to find that potentially impacted individuals and/or groups have standing to participate in the permitting process and to potentially seek a contested case hearing which would make the issues ripe for judicial review.[8]

It is the big cases, the ones which blossom into community-wide controversy, that get the attention of the appellate courts, the greater community, and the media. Certainly, TMT is such a case.[9] But when I personally look at the real on-the-ground legacy of *PASH* and its progeny, I see the hundreds of matters in which I have been involved day-to-day since

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Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve (*In re TMT*), 143 Hawai'i 379, 402–03, 431 P.3d 752, 775–76 (2018) (citing HAW. CODE R. § 13-5-30 (2021) on general requirements for permits).

[4] *See, e.g.*, HAW. CODE R. § 13-5-39 (2021) (requiring a comprehensive management plan where development "may lead to significant natural, cultural, or ecological impacts within the conservation district."); HAW. CODE R. § 13-5-2 (2021) (defining "[c]omprehensive management plan" as a "comprehensive plan to manage multiple uses and activities in order to protect and conserve natural and cultural resources."); *see generally PASH*, 79 Hawai'i at 450–51, 903 P.2d at 1271–72 (discussing case law regarding access under article XII, section 7 to "undeveloped lands").

[5] *See Ka Pa'akai*, 94 Hawai'i at 47–50, 7 P.3d at 1084–87 (discussing the sufficiency of Land Use Commission findings in granting a petition to reclassify a district).

[6] *See PASH*, 79 Hawai'i at 436–37, 903 P.2d at 1257–58 (explaining that negative effects on native Hawaiian cultural resources and historic sites are adverse effects for purposes of a Special Management Area (SMA) use permit and that "the HPC may not issue a SMA use permit unless it finds that the proposed project will not have any significant adverse effects.").

[7] *See generally* HAW. CODE R. § 13-5-1 (2021) (setting forth administrative rules "to regulate land-use in the conservation district[.]").

[8] *See generally* HAW. REV. STAT. ch. 91 (governing Hawai'i administrative procedure).

[9] *In re TMT*, 143 Hawai'i 379, 431 P.3d 752 (2018).

1990 and the tens of thousands of other permit applications over the last twenty-five years where the cultural assessment processes born in *PASH* and *Ka Pa'akai* were utilized, where information as to cultural and historical resources was carefully collected and presented to the relevant agency, where the agency formally considered the potential that proposed action might adversely impact customary and traditional practices or resources, and where the agency's decision was guided, at least in part, by the now widely understood legal mandate to "protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible."[10]

B. Cultural Education and Preservation

A second very positive aspect of the legacy of *PASH* and its progeny is the enhanced role that Hawaiian cultural values have played in education, planning, and environmental preservation throughout Hawai'i.[11] This is more a result of the continued renaissance of Hawaiian culture and cultural values which started before and led to *PASH*, but to which *PASH* and its progeny have contributed.[12]

There is a growing recognition that Hawaiian cultural practices were instrumental in enabling a large indigenous population to live sustainably in a resource-limited environment and that, as such, these practices can serve as a model for humanity and for the future. As the Honorable Sir Joe Williams of Aotearoa said, "The future of humanity lies at the confluence of the rigors of modern science and Pacific Island people's special relationship with their environment. It is at this confluence that we will find the third path by which Pacific Island people will lead the world into the future."[13]

This is real. Over the last twenty-five years, numerous projects and programs on every island have worked to make cultural practices part of our daily lives and our future. These include:

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[10] *Ka Pa'akai*, 94 Hawai'i at 35, 7 P.3d at 1072 (citing *PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43).

[11] *See, e.g.*, *In re TMT*, 143 Hawai'i 379, 431 P.3d 752; Kaleikini v. Yoshioka, 128 Hawai'i 53, 283 P.3d 60 (2012).

[12] *See, e.g.*, Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982); Shari Nakata, *Language Suppression, Revitalization, and Native Hawaiian Identity*, 2 CHAP. DIVERSITY & SOC. JUST. F. 14, 14 (2017), https://www.chapman.edu/law/_files/publications/2017-dsj/nakata.pdf (discussing the role of the Hawaiian language in the resurgence of interest in Native Hawaiian culture).

[13] Letter from Joe Williams, Justice, Supreme Court of New Zealand, to author (March 18, 2013) (on file with author).

Sustainable fisheries:

- Hāʻena Community-Based Subsistence Fishery Area on Kauaʻi[14]
- Hui Makaʻāinana o Makana[15]
- Hui Mālama o Moʻomomi on Molokaʻi[16]

Agriculture:

- Waipā Foundation[17]
- Ulu Mau Puanui[18]

Loko iʻa:

- Paepae o Heʻeia[19]
- Kuaʻaina Ulu ʻAuamo[20]
- Hui Mālama Loko Iʻa[21]

Trail and access organizations

- Na Ala Hele[22]
- Ala Kahakai[23]

Land acquisition and conservation easements by Hawaiʻi Land Trust,[24] Trust for Public Land,[25] and The Nature Conservancy,[26] often with

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[14] *Hāʻena Community-Based Subsistence Fishing Area*, STATE OF HAWAIʻI DIVISION OF AQUATIC RESOURCES, https://dlnr.hawaii.gov/dar/ (follow "Regulations" hyperlink; then click "Regulated Fishing Areas on Kauaʻi"; then click "Hāʻena Community-Based Subsistence Fishing Area") (last visited Mar. 1, 2021).

[15] *Hāʻena Community-Based Subsistence Fishing Area (CBSFA)*, HUI MAKAʻĀINANA O MAKANA, https://www.huimakaainanaomakana.org/fisheries (last visited Mar. 1, 2021). Hui Makaʻāinana o Makana supported the "management planning and rule-making process" for the Hāʻena Community-Based Subsistence Area on Kauaʻi. DIV. AQUATIC RES. HAW. DEPʻT LAND & NAT. RES., MANAGEMENT PLAN FOR THE HĀʻENA COMMUNITY-BASED SUBSISTENCE FISHING AREA, KAUAʻI (2016).

[16] *Hui Mālama o Moʻomomi*, MAUI NUI MAKAI NETWORK, https://www.mauinui.net/hui-malama-o-moomomi.html (last visited Mar. 1, 2021).

[17] *ʻĀina Restoration & Learning Sites*, WAIPĀ, https://waipafoundation.org/malama-aina/ (last visited Mar. 1, 2021).

[18] *Ulu Mau Puanui*, ULU MAUI PUANUI, http://www.ulumaupuanui.org/ (last visited Mar. 1, 2021).

[19] PAEPAE O HEʻEIA, https://paepaeoheeia.org/ (last visited Mar. 1, 2021).

[20] *About KUA*, KUAʻĀINA ULU ʻAUAMO, http://kuahawaii.org/about/ (last visited Mar. 1, 2021).

[21] *Hui Mālama Loko Iʻa*, KUAʻĀINA ULU ʻAUAMO, http://kuahawaii.org/huimalamalokoia/ (last visited Mar. 1, 2021).

[22] *Na Ala Hele – Hawaiʻi Trail and Access System*, STATE OF HAWAII, DIVISION OF FORESTRY AND WILDLIFE: OUTDOOR RECREATION, https://dlnr.hawaii.gov/recreation/nah/ (last visited Mar. 1, 2021).

[23] *Ala Kahakai Information*, NATIONAL PARK FOUNDATION, https://www.nationalparks.org/connect/explore-parks/ala-kahakai-national-historic-trail (last visited Mar. 1, 2021).

[24] *Programs and Initiatives*, HAWAIʻI LAND TRUST, https://www.hilt.org/ (scroll down and click "About Us"; then click "Programs and Initiatives") (last visited Mar. 1, 2021).

[25] *Our Work in Hawaii*, THE TRUST FOR PUBLIC LAND, https://www.tpl.org/our-

assistance from county, state, and federally funded land acquisition and open space funds.

These programs are awesome and are, in part, the legacy of *PASH* and its progeny. More importantly, they are the way forward.

C. What We Can Do as Individuals

To carry forward the positive legacy of PASH, we, each of us who care about these things, must continue to exercise the cultural practices associated with the areas where we live. We must continue to make it real.

We must make these practices part of our daily lives. Gather what resources are important to us. Walk the land with purpose and intention. Go on the land to fish, gather limu, hunt, gather edible, medicinal, decorative plants; bring the products or resources home to enhance your life. Exercise spiritual practices regularly and in the ways and at the places where you find spiritual value, whatever helps you look closer, feel deeper, listen to the land, make up your own mind. By perpetuating these practices in our own lives, we preserve them for the future.

II. THE OTHER SIDE OF THE LEDGER: WHERE THE LEGACY OF *PASH* IS NOT POSITIVE, OR NOT POSITIVE YET

Have you been to Kohanaiki (*PASH*) or Ka'ūpūlehu Development (*Ka Pa'akai*)? Both are large-scale, ultra-luxury resort/residential projects which had difficulty on the market.

A. Kohanaiki (PASH)

Kohanaiki brought us the *PASH* case.[27] The customary and traditional practice identified in *PASH* was the gathering of 'ōpae 'ula in the anchialine ponds to use as bait in offshore 'ōpelu ko'a.[28] Mahealani Pai described this practice.[29] His testimony gave Public Access Shoreline

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work/hawaii (last visited Mar. 1, 2021).

[26] THE NATURE CONSERVANCY, https://www.nature.org/en-us/ (last visited Mar. 1, 2021).

[27] 79 Hawai'i 425, 903 P.2d 1246 (1995).

[28] *Id.* at 430 n.6, 903 P.2d at 1251 n.6.

[29] *See* Pub. Access Shoreline Haw. v. Hawai'i Cnty. Plan. Comm'n, 79 Hawai'i 246, 249, 900 P.2d 1313, 1316 (Haw. App. 1993) (explaining that "[Pai] and his ancestors had customarily gathered opae in and maintained the anchialine ponds on Nansay's property . . . ") (footnote omitted).

Hawaii standing to pursue its public access agenda.[30] There is now regulated public access to half of the Kohanaiki shoreline.[31] This is a tremendous benefit to the general public and is a direct result of *PASH*.

But one price of public access is that the coastal anchialine ponds are tremendously degraded. During a recent visit to Kohanaiki to go surfing with our granddaughters, every anchialine pond I saw was in an advanced state of senescence: covered with algae mats and populated by guppies and other introduced fish species. I was not able to find a single ʻōpae ʻula, ʻōpae lolo, or ʻōpae lohena. Is this the legacy of *PASH*?

B. Kaʻūpūlehu Development (Ka Paʻakai)

Kaʻūpūlehu Development (KD) gave us Ka Paʻakai. At KD, the primary cultural practices identified were the gathering of salt and fishing.[32] There was testimony from lineal descendants which brilliantly and articulately described gathering salt of the highest quality at Kalaemanō and subsistence fishing and gathering of limu and ʻopihi along the coastline and in the nearshore waters.[33] This testimony was born of personal and family experience.

The Supreme Court of Hawaiʻi vacated the Land Use Commission's initial Decision and Order and remanded the application back for further fact finding.[34] The Land Use Commission issued an amended Decision and Order on October 18, 2001, which, among other conditions of approval, provided for the creation of a Kaʻūpūlehu Development Monitoring Committee.[35] The Decision and Order also set aside certain areas for

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[30] *See id.* (explaining that the circuit court's order overturning the Commission's decision to grant a Special Management Area Use Permit was "based in large measure on an affidavit filed in the circuit court by [Public Access Shoreline Hawaiʻi] . . . ").

[31] *See generally PASH*, 79 Hawaiʻi at 452, 903 P.2d at 1273 (concluding that the Coastal Zone Management Act and the Hawaiʻi Constitution require the preservation and protection of "native Hawaiian rights . . . when issuing a SMA permit").

[32] *Ka Paʻakai*, 94 Hawaiʻi 31, 48, 7 P.3d 1068, 1085 (2000) ("The shoreline portion of the Property is used for fishing and gathering of limu, [ʻ]opihi, and other resources, and for camping. The area closest to Kalaeman[ō] was traditionally used for salt gathering. Hannah Springer, a kamaʻāina of the mauka portion of Kaʻūpūlehu, and her ʻohana have traditionally gathered salt in this area on an occasional basis.") (footnotes omitted).

[33] *Id.* at 48–49, 7 P.3d 1085–86.

[34] *Id.* at 53, 7 P.3d at 1090.

[35] Kaʻūpūlehu Developments, No. A93-701 (Haw. Land Use Comm'n Oct. 18, 2001) (decision and order), http://luc.hawaii.gov/wp-content/uploads/2012/11/a93701kaupulehu_10182001.pdf. The Kaʻupulehu Development Monitoring Committee (KDMC) was required to include "a person of native Hawaiian ancestry who is knowledgeable regarding the type of cultural resources and practices within the Petition Area. . . ." *Id.* at 1a. Condition 1d. provides that "The KDMC shall monitor the

cultural use[36] and required public access to the shore.[37] The applicant, KD, was required to provide public shoreline access, parking, and trails *contemporaneously* with opening of the golf course.[38]

KD first developed and sold the highest value "front row" lots. Many are now developed with homes which probably average 20,000 sq. ft. Behind the front row lots, there are many graded pads which remain bare, undeveloped, and unsold. Grading and construction are still ongoing.

Over the years, KD decided not to develop a golf course, so it did not develop public access. Between 2001 and 2019, there was no public access to the Ka'ūpūlehu /Kalaemanō shoreline through KD.

In 2019, KD applied to the Hawai'i County Council to extend some of its zoning conditions. In a hearing before the Leeward Planning Commission, the issue came up that KD had not provided public access because the timing of public access was tied to development of the golf course which KD had decided not to develop. The Leeward Planning Commission included a condition in its recommendation to the County Council requiring KD to provide public access as a condition of extending deadlines in the zoning ordinance, which was accepted by the Council. Limited public access to the shoreline was opened in 2019. I have to wonder what the KDMC had been telling KD about the importance of public access during those almost twenty years between 2001 and 2019.

In the interim, a developer-sponsored group called the Ka'ūpūlehu Marine Life Advisory Committee (KMLAC) proposed creating a no-fishing zone from the south side of the Kūki'o Resort through the Ka'ūpūlehu Resort and Kona Village Resort, to Kalaemanō on the north side of KD.[39] The KMLAC included lineal and cultural descendants.[40] The group advocated for a ten-year complete ban on any form of fishing or marine gathering along the same coastline involved in Ka Pa'akai.[41] Governor Ige approved the creation of the new marine reserve at Ka'ūpūlehu on July 29, 2016.[42]

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quality of the salt gathering resource and the effectiveness of Petitioner's actions to provide access to and/or preserve and maintain traditional and customary native Hawaiian practices and cultural resources." Id. at 1d.

[36] *Id.* at 2a.

[37] *Id.* at 2c.

[38] *Id.* at 2a, 2c, 2d.

[39] KA'ŪPŪLEHU MARINE LIFE ADVISORY COMMITTEE, KA'ŪPŪLEHU ADMINISTRATIVE RECORD (updated Feb. 2, 2016), http://dlnr.hawaii.gov/dar/files/2016/02/Kaupulehu_Administrative_Record_Public.pdf.

[40] *See id.* at 14.

[41] *Id.* at 12.

[42] *Marine Reserve Established at Ka'ūpūlehu, West Hawai'i*, STATE OF HAW., DIV. AQUATIC RES., https://dlnr.hawaii.gov/dar/announcements/marine-reserve-established-at-

I was at a meeting at KD in 2019 where the developer's representative explained to KD homeowners that while KD was going to be required to provide public access to the shoreline, "it should not be a problem" because no fishing was allowed and most of the people who wanted public access to the coastline would have been fishermen. Is this the legacy of *PASH* and *Ka Pa'akai*?

I myself gather salt at Kalaemanō. I have been doing this regularly for decades. This is what high-quality salt ("ka pa'akai") from Kalaemanō looks like:

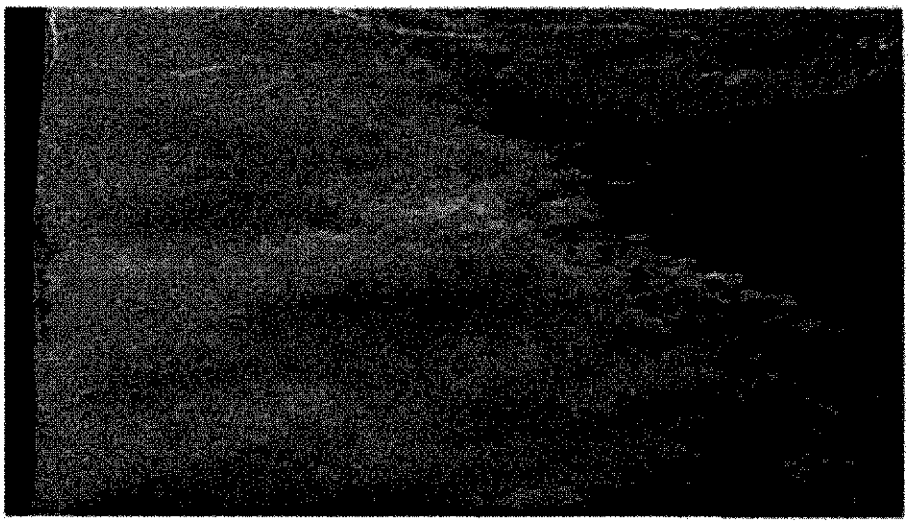

Figure 1

kaupulehu-west-hawaii/ (last visited Mar. 4, 2021).

This is what the salt which you can find on the coastline in front of KD looks like today:

Figure 2

It used to look like the salt in Figure 1. For the last five years, it has looked like the salt in Figure 2. Dirt and rock powder from the grading activity, and from graded but not yet vegetated lots, blow into the salt pools and pans on the coast. One wonders why KDMC has allowed this to occur. Is this the legacy of *PASH* and *Ka Pa'akai*?

C. Moving Towards a Model of PASH *Based on Cooperation, Noninterference and Non-Confrontation*

Another aspect of the legacy of *PASH* which will hopefully gain importance as we go forward is found in the statements in *PASH* and other Hawai'i Supreme Court opinions as to how certain attributes of traditional Hawaiian culture will minimize the potential disruption which might result from the exercise of customary and traditional practices.

The Hawai'i Supreme Court in *Kalipi*, *PASH*, and other opinions has repeatedly stated that "the non-confrontational aspects of traditional Hawaiian culture"[43] and the "traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents

[43] *PASH*, 79 Haw. 425, 447, 903 P.2d 1246, 1268 (1995).

were integral parts of the culture"[44] were important factors to reduce the risk that the exercise of customary and traditional rights and practices would cause potential disturbance or disruption to the legitimate interest of others in the community.[45] The Hawai'i Supreme Court obviously believed this is important, but is it accurate?

Personally, I believe it is very important and partly accurate. I believe these rights and practices grew out of a cooperative model of access to resources necessary to sustain life in pre-contact Hawai'i, and I believe that, as in all cultures, some people are more cooperative and non-confrontational than others. Where some people exercise and defend cultural and traditional rights for their own intrinsic importance, others weaponize traditional rights to oppose developments which they do not want to occur. They are legally entitled to do this, but I believe this relegates important traditional rights and practices to the contentious world of courthouses and agency hearing rooms.

III. MODEL OF *PASH* "RIGHTS" BASED ON MUTUAL BEST INTERESTS

I hope that as the legacy of *PASH* grows, we can move to a model of *PASH* rights based on cooperation and the mutual best interests of all people on the land.

I am neither Hawaiian nor a scholar of Hawai'i's history or culture. I have spent my life in Hawai'i, both on the land and in the ocean. I fish, hunt, and gather. I walk the trails and where there are no trails. In the places I frequent, I have learned the ahupua'a, the habitation sites and cultivation sites, the offshore ko'a,[46] and more or less what grows where. I listen to and learn from a lot of other men and women of the land—fishermen, hunters, farmers, scientists, practitioners, landowners, and regulators—people who do the things I do and do them better.

I have come to believe that one reason why Hawaiian culture was so successful is because in each ahupua'a it was in the mutual best interest of all ahupua'a residents that each and every ahupua'a resident could access resources that they needed to survive and to thrive on that land.[47]

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[44] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 9, 656 P.2d 745, 750 (1982).

[45] *See PASH*, 79 Hawai'i at 447, 903 P.2d at 1268; *Kalipi*, 66 Haw. at 9, 656 P.2d at 750.

[46] Coral, coral head, or fishing grounds. *Ko'a, Wehewehe Wikiwiki*, https://hilo.hawaii.edu/wehe/?q=Ko%CA%BBa&l (last visited Mar. 23, 2021).

[47] *See* Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 5, 8–9 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015) ("Within the boundaries of the ahupua'a, the maka'āinana ("people of the land") also had liberal rights to use ahupua'a resources. These included the

I am told that, historically, ahupua'a tenants were not bound to the land. They could pull up and move.[48] If this was the case, then it would be in the best interest of the ali'i or konohiki to encourage ahupua'a tenants to remain on the land and not move.

To continue to live on the ahupua'a, people needed access to food, including fish, agricultural crops that grow in different climatic zones, and places to gather wild food. They also needed access to water, religious sites, and places to gather forest products and whatever else they may need. It was in the ali'i or konohiki's best interest that the people on the land received access to whatever they needed.

I doubt that ahupua'a tenants made demands on or claimed rights against their ali'i or konohiki. I believe that practices evolved out of necessity based on mutual respect, mutual interests, and the force of history as Pacific people learn to thrive on small islands. I am not suggesting that modern landowners have stepped into the roles of konohiki and certainly not ali'i. They have not. Modern landowners do have legitimate interests in the use, safety, and, yes, privacy of lands within their control. Those interests deserve respect.

I believe it would be more consistent with traditional practices if people seeking to exercise *PASH* rights on lands owned by others would communicate their interest and seek cooperative access directly with the landowners before exercising access and gathering rights and certainly before going before agencies or courts to assert and/or enforce them. I am not saying gatherers should ask for permission. I do not believe that permission is required. I believe gatherers should communicate with the landowner, hear the landowner's concerns, and try to work out cooperative access. Gatherers should help landowners understand the nature and importance of traditional practices and landowners should help gatherers understand their concerns.

I believe that making a real effort at cooperative, non-confrontational access should be a prerequisite to claiming *PASH* rights in court or agency processes. This would avoid disputes and might help the decision-makers analyze the interests of both parties, assess what is a reasonable or unreasonable exercise of rights, and help find the balance.

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right to hunt, gather wild plants and herbs, fish offshore, and use parcels of land for kalo cultivation together with sufficient water for irrigation . . . All of these activities were regulated by an intricate system of rules designed to conserve natural resources and provide for all ahupua'a residents.") (footnote omitted).

[48] *Id.* at 9. ("Even though the maka'āinana owed a work obligation to those above them in the societal structure, they were not serfs bound to the land. They could freely move to other areas if treated unfairly.").

The goal, and perhaps the most enduring legacy of *PASH*, is to have all of Hawai'i's people recognize the importance of traditional practices and to understand how mutual cooperation and mutual respect perpetuate these rights and keep them real and useful in the modern world.

Eliminating the Hardship Variance in Honolulu's Shoreline Setback Ordinance: The City and County of Honolulu's Public Trust Duties as an Exception to Regulatory Takings Challenges

Colin A. Lee*

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* J.D., William S. Richardson School of Law. Editorial Staff Writer, The University of Hawai'i Law Review. I would like to thank my parents for all their love and support throughout law school. I would also like to thank Dolan Eversole, Dr. Charles "Chip" Fletcher, Brad Romine, and everyone at the University of Hawai'i Sea Grant College Program for their patience while teaching me about coastal processes. I would also like to thank Professor Kapua Sproat for all her help guiding me through writing the article, and Professors Denise Antolini and Richard Wallsgrove for their thoughtful feedback and willingness to answer all my questions. I would also like to thank Matthew Prellberg and Senator Chris Lee for their unwavering support and important insight.

The inspiration for writing this article came from my upbringing on the Windward side of O'ahu, where I have witnessed the beautiful sandy beaches slowly disappear in my own lifetime, combined with my fortunate opportunity to learn about coastal processes as a Peter J. Rappa sustainable coastal development fellow at the University of Hawai'i Sea Grant College Program.

I. INTRODUCTION

With the advent of each new year, O'ahu experiences stronger storms, bigger waves, and unprecedented damage to its shorelines.[1] Climate change is making Hawai'i's coastal waters more dangerous: low-lying coastal infrastructure is flooded and washed-away, and private coastal landowners lose property and in some cases their homes.[2] Hawaiian residents and our

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[1] HAWAI'I CLIMATE CHANGE MITIGATION AND ADAPTATION COMM'N, HAWAI'I SEA LEVEL RISE VULNERABILITY AND ADAPTATION REPORT 31 (2017), https://climateadaptation.hawaii.gov/wp-content/uploads/2017/12/SLR-Report_Dec2017.pdf ("Rising sea level and projections of stronger and more frequent El Niño events and tropical cyclones in waters surrounding Hawai'i, all indicate a growing vulnerability to coastal flooding and erosion.").

[2] Nathan Eagle, Climate Change is Making Hawaii's Beaches More Dangerous, HONOLULU CIV. BEAT (Aug. 14, 2019), https://www.civilbeat.org/2019/08/climate-change-is-making-hawaiis-beaches-more-dangerous/; Nathan Eagle, Losing A Beachfront Home Isn't Just a Rich Person's Problem, HONOLULU CIV. BEAT (Mar. 4, 2019), https://www.civilbeat.org/2019/03/losing-a-beachfront-home-isnt-just-a-rich-persons-problem/.

state and local governments struggle to put the pieces back together and rebuild what the waves have taken but government officials acknowledge that due to the uncertainty of many dynamic climate factors there "is no set game plan."[3] Sea level rise due to climate change is an imminent threat to Hawai'i's pristine beaches, coastal infrastructure, and private property.[4] The most recent scientific data suggests that by the end of the century, three feet of sea level rise is expected, with "up to eight feet or more of sea level rise as a worst-case scenario[.]"[5]

Climate change is undoubtedly causing sea level to rise across the globe.[6] The last three decades have been successively warmer on the earth's surface than any decade since 1850 and "[s]ixteen of the [seventeen] warmest years in the span of the 136-year temperature record have all occured since 2001."[7] As the planet heats up, glaciers and ice sheets in the polar regions melt and enter the oceans.[8] Then, like an enormous bathtub, sea level on shorelines globally rise with increased volume.[9] In addition, just as air expands when it warms, so does water.[10] Therefore as the oceans warm, seawater expands and that expansion contributes even more to sea level rise globally.[11] This expansion is exacerbated in the equatorial regions of the globe such as Hawai'i, where the waters get relatively warmer on average than in areas closer to the planet's poles.[12] As if the impacts of global warming were not being exacerbated enough, scientists recently discovered that the slowing of ocean currents could also lead to increased

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[3] Claire Caulfield, *Are We Doomed? What is Hawaii Government Doing About Sea-Level Rise?*, HONOLULU CIV. BEAT (Jan. 27, 2020), https://www.civilbeat.org/2020/01/what-is-hawaii-government-doing-about-sea-level-rise/.

[4] *See generally* HAWAI'I CLIMATE CHANGE MITIGATION AND ADAPTATION COMM'N, *supra* note 1, at iv.

[5] UNIV. OF HAW. SEA GRANT COLLEGE PROGRAM, SEA LEVEL RISE & CLIMATE CHANGE, PRIMARY URBAN CENTER DEVELOPMENT PLAN: FINAL WHITE PAPER 12 (Dec. 2018) https://cc3cbeb5-ec5a-4085-a604-bf234e6332b7.filesusr.com/ugd/e3bef4_895ce353905246679264395f47f764ef.pdf.

[6] *See e.g.* HAWAI'I CLIMATE CHANGE MITIGATION AND ADAPTATION COMM'N, *supra* note 1, at iv.

[7] *Id.* at 19.

[8] *Id.* at v.

[9] *Id.*

[10] *See* UNIV. OF HAW. SEA GRANT COLLEGE PROGRAM, *supra* note 5, at 12.

[11] *Id.*

[12] *See Is Sea Level Rising? Yes, Sea Level is Rising at an Increasing Rate*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/facts/sealevel.html (last visited Apr. 19, 2020). "The two major causes of global sea level rise are thermal expansion caused by warming of the ocean (since water expands as it warms) and increased melting of land-based ice, such as glaciers and ice sheets." *Id.*

sea level rise, hotter heat waves, and stronger hurricanes in some sectors of the earth.[13]

Elevated ocean temperatures in the Pacific Ocean also drive the increased frequency of El Niño[14] weather patterns.[15] El Niño weather patterns create larger storm systems in the northern hemisphere, and in turn, larger storms lead to stronger wave energy received by Hawai'i's north-facing shores.[16] But the increase in size and frequency of waves is not the only factor in the increased amount of damage from waves and erosion.[17] Coral bleaching caused by temperature rise in Hawai'i's nearshore waters is also killing coral life across the islands.[18] Water temperatures in Hawai'i have been steadily increasing since the mid-twentieth century and coral, as almost stationary lifeforms, have never in their history been exposed to or had to adapt to such high temperatures.[19] In addition, just as our atmosphere heats up and is absorbing carbon, so do our oceans, creating another problem called ocean acidification.[20] As the oceans absorb more carbon and heat, the

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[13] Jackson Dill & Brandon Miller, *The Slowing Down of Ocean Currents Could Have a Devastating Effect on Our Climate*, CNN (Mar. 2, 2021), https://www.cnn.com/2021/03/02/world/climate-change-ocean-currents-weakening/index.html.

[14] "El Nino can affect our weather significantly. The warmer waters cause the Pacific jet stream to move south of its neutral position. With this shift, areas in the northern U.S. and Canada are dryer and warmer than usual. But in the U.S. Gulf Coast and Southeast, these periods are wetter than usual and have increased flooding." *What are El Niño and La Niña?*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/facts/ninonina.html (last visited Apr. 19, 2020).

[15] Tetsuhiko Endo, *Changing Weather Patterns Create Hawaii's Largest Waves in Years*, NAT'L GEOGRAPHIC (Feb. 26, 2016) https://www.nationalgeographic.com/adventure/article/50-foot-swells-beckon-surfers-to-hawaii-why-are-the-waves-so-big.

[16] *Id.*

[17] Interview with Bradley Romine, Coastal Processes Specialist, Sea Grant College Program, Univ. of Haw. at Mānoa (Feb. 14, 2020).

[18] U.S. ENV'T PROTECTION AGENCY, EPA 430-F-16-013, WHAT CLIMATE CHANGE MEANS FOR HAWAII (Aug. 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-hi.pdf. "Rising water temperatures can harm the algae that live inside corals. Because algae provide food for the coral, a loss of algae weakens corals and can eventually kill them. This process is commonly known as 'coral bleaching,' because the loss of the algae also causes the corals to turn white. Mass bleaching events are becoming more common, with documented cases in the north-western Hawaiian Islands in 1996 and 2002. Water temperature spikes in Hawaii have also been linked to coral disease outbreaks." *Id.*

[19] *Id.* ("[T]he waters around Hawaii have been warming since the 1950s, with temperatures rising by several degrees from the ocean surface down to at least 600 feet.").

[20] *Id.* ("Increasing ocean acidity can also damage corals, as well as shellfish and other organisms that depend on minerals in the water to build their skeletons and shells. The

pH balance tips closer to acidic, making it less and less habitable for vulnerable coral and other species.[21] In Hawai'i, coral reef systems act as the first defense for beaches because wave energy approaching the shoreline is dissipated by and refracted off of the coral, diffusing the energy that reaches the beach.[22] But as Hawai'i's front line of shoreline protection decay and die off, so too do its beaches because reef decay allows more wave energy to reach the shoreline which accelerates erosion.[23] Furthermore, the white sand on Hawai'i's beaches "are primarily composed of the carbonate shells and skeletons of marine organisms, such as corals," and therefore, as coral reefs lose their ability to survive, the beaches lose their source of replenishment.[24] White sandy beaches in Hawai'i beaches are also the only critical habitat remaining for many endangered and endemic species in the state, including the Hawaiian Monk Seal ('Ilioholoikauaua or *Neomonachus schauinslandi*) and Hawaiian Green Sea Turtle (Honu or *Chelonia mydas*).[25] Humans may be able to survive without beaches, but beaches are vital to the survival of many other species.[26]

Hawai'i's beaches are an integral part of its residents' lives, but the beaches are also an indispensable factor in Hawai'i's most important economic driver: tourism.[27] A 2016 study conducted by the Sea Grant College Program at the University of Hawai'i found that the total erosion of Waikīkī Beach alone would result in a loss of over two billion dollars in spending and revenue by visitors.[28] People from all over the world visit Hawai'i to experience its beautiful sandy beaches, but if the state does not preserve its beaches, its residents and its coffers will perish.[29] During the COVID-19 pandemic, Hawai'i witnessed the economic devastation that a downturn in tourism can have on our state economy, which "draws 17% of

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acidity of the Pacific Ocean has increased by about 25 percent in the past three centuries, and it is likely to increase another 40 to 50 percent by 2100.")

[21] *Id.*

[22] Interview with Bradley Romine, *supra* note 17.

[23] *Id.*

[24] Jodi N. Harney, *Sand in Hawaii*, Univ. of Haw. Sch. Of Ocean and Tech.: Coastal Geology Grp., http://www.soest.hawaii.edu/GG/STUDENTS/jharney/sand.html#:~:text=Because%20Hawaii%20does%20not%20have,foraminifera%2C%20echinoderms%2C%20and%20bryozoans (last visited Apr. 19, 2020).

[25] Interview with Bradley Romine, *supra* note 17; WAIKIKI AQUARIUM, ANIMAL GUIDE, https://www.waikikiaquarium.org/experience/animal-guide/ (last visited Apr. 19, 2020).

[26] Interview with Bradley Romine, *supra* note 17.

[27] Nori Tarui, Marcus Peng & Dolan Eversole, *Economic Impact Analysis of the Potential Erosion of Waikīkī Beach: A 2016 Update*, UNIV. OF HAW. SEA GRANT COLLEGE PROGRAM (Apr. 2018).

[28] *Id.*

[29] *See id.*

its gross domestic product . . . from tourism."[30] Tourists are drawn in large part to the state to visit Hawai'i's majestic beaches, and it is clear that a decline in Hawai'i's beaches would mean a decline in tourism.[31]

Article XI, Section 1 of the Hawai'i Constitution bestows a duty upon the state government and all of its political subdivisions for the benefit of present and future generations to "conserve and protect Hawai[']i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[32] Further, the Hawai'i Constitution mandates that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[33] Sea level rise in Hawai'i presents many challenges for government officials at the state and local levels, especially in light of their fundamental constitutional duties.[34] For state and local governments, two prominent challenges are protecting or relocating public infrastructure and negotiating complicated land use issues with private coastal property owners.[35] One official from the state Office of Conservation and Coastal Lands has expressed concern that dealing with private coastal properties is clearly the harder of the two issues because although it is costly to protect or relocate infrastructure, the government already has the authority to do so.[36] One of the most important tools that local governments may utilize to deal with private coastal property is through shoreline setback regulation.[37] The shoreline setback is primarily

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[30] Allison Schaefers, *Hawaii Tourism Leaders Urge State Recovery Plan*, HONOLULU STAR ADVERTISER (May 5, 2020), https://www.staradvertiser.com/2020/05/05/hawaii-news/tourism-leaders-urge-state-recovery-plan/.

[31] Tarui, Peng, & Eversole, *supra* note 27.

[32] HAW. CONST. art. XI, § 1.

[33] *Id.*

[34] *See generally* Claire Caulfield, *supra* note 3.

[35] *See id.*

[36] *Id.* On the issue of sea level of rise affecting landowners, "Sam Lemmo, with the Hawaii Office of Conservation and Coastal Lands, said that he's not too worried about public infrastructure. While it might be expensive to move a road or water treatment plant, the government has the authority to do so. Private property, on the other hand, presents unique challenges when planning for sea level rise . . . Lemmo said he's been investigating the possibility of tapping into funds from the Federal Emergency Management Agency to buy out homeowners who will lose their houses." *Id.*

[37] Douglas Codiga & Kylie Wager, *Sea-Level Rise and Coastal Land Use in Hawai'i: A Policy Tool Kit for State and Local Governments*, UNIV. OF HAW. SEA GRANT COLLEGE PROGRAM, CENTER FOR ISLAND CLIMATE ADAPTATION AND POLICY (2011), https://seagrant.soest.hawaii.edu/hawaii-slr-policy-tool-kit/.

used by county governments to control how close to the shoreline a coastal property owner may build.[38]

This article focuses on the City and County of Honolulu (the City) and argues that the City must remove the hardship variance for artificial shoreline hardening measures and properties that do not meet the coastal setback minimum in Revised Ordinances of Honolulu Chapter 23 (Chapter 23) to fulfill its duty under the public trust doctrine to protect O'ahu's sandy beaches. This article concludes that the City will be immune to regulatory takings challenges from coastal property owners for eliminating the hardship variance because of the background state property law exception in the regulatory taking doctrine in United States Supreme Court jurisprudence.

Part II begins with a discussion of the most current climate change science related to sea level rise, the effects of artificial shoreline hardening on beaches in Hawai'i, the beach loss impacts Hawai'i has already undergone, and an overview of the City's response to these impacts. Part III overviews the legal framework of government regulation of the shoreline, the public trust doctrine in Hawai'i, regulatory takings, and other private property rights along the shoreline associated with a regulatory taking analysis. Part IV first explains the exceptions to the regulatory takings doctrine as set forth by the United States Supreme Court; specifically, the exception for background state law principles including the public trust doctrine. Part IV then discusses the duties of the Hawai'i government and all of its political subdivisions under Hawai'i's public trust doctrine and Constitution. Finally, Part V first posits that to fulfill its duties under the public trust doctrine and protect O'ahu's sandy shorelines, the City must eliminate the hardship variance in Chapter 23 for hardening measures and single-family detached houses on lots that are too small to meet the minimum setback. Section V then details how the City would be immune from regulatory takings challenges for such an action because of the public trust doctrine exception to the regulatory takings analysis. Finally, this article will conclude if the City fulfills its duty under the public trust doctrine by removing the hardship vairnace in Chapter 23, then it will not be liable to coastal property owners for regualatory takings claims. Further, this article will discuss recent amendments to the Hawai'i Coastal Zone Management Act which limits the City's discretion in approving variances.

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[38] *See infra* Part III.

II. SEA LEVEL RISE AND BEACH LOSS IN HAWAI'I, THE EFFECTS OF ARTIFICIAL SHORELINE HARDENING, AND THE CITY'S RESPONSE

A. Sea Level Rise and Beach Loss in Hawai'i

Coastal erosion and the loss of natural sandy beaches is a serious problem for Hawai'i.[39] As of 2012 "70% of beaches on O'ahu, Maui, and Kaua'i experience an erosional trend" and "shoreline hardening has caused a total of 21.5 km of beach loss statewide."[40] By 1995 on O'ahu's 115-kilometer shoreline alone, shoreline hardening measures have caused the narrowing of 17.3 kilometers of beach and the overall loss of 10.4 kilometers of beach sand.[41] Since 1949, O'ahu alone has lost twenty-five percent of its beaches as a direct result of shoreline hardening and at least sixty percent of the island's beaches are in a state of chronic erosion.[42] The stark trend that these figures depict will only worsen as sea level continues to rise at an exponential rate.[43]

B. The Effects of Artificial Shoreline Hardening on Hawai'i's Sandy Beaches

Hawai'i's shorelines are naturally capable of adjusting to changes in sea level if they are left unimpeded.[44] Twenty thousand years ago at the culmination of the last ice age, sea level surrounding the Hawaiian archipelago was over four hundred feet lower than it is today, but as the ice that covered the planet melted, the water filled the oceans and global sea levels rose significantly.[45] As the sea level rose, the sand on Hawai'i's

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[39] HNN Staff, *In 7th State of the City, mayor focuses on threat of 'climate crisis'*, HAWAII NEWS NOW (Oct. 18, 2019). Coastal erosion is "the process by which local sea level rise, strong wave action, and coastal flooding wear down or carry away rocks, soils, and/or sands along the coast." U.S. CLIMATE RESILIENCE TOOLKIT, COASTAL EROSION, https://toolkit.climate.gov/topics/coastal-flood-risk/coastal-erosion (last modified Mar. 20, 2020).

[40] Alisha Summers, Charles H. Fletcher, Daniele Spirandelli et al., *Failure to Protect Beaches Under Slowly Rising Sea Level*, 151 Climatic Change 427, 428 (2018).

[41] *Id.*

[42] CITY AND CTY. OF HONOLULU OFF. OF CLIMATE CHANGE, SUSTAINABILITY AND RESILIENCY, OLA: O'AHU RESILIENCE STRATEGY, at 90 (2019) https://resilientoahu.org/resilience-strategy.

[43] *See* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 12.

[44] Interview with Dr. Charles "Chip" Fletcher, Assoc. Dean for Acad. Affairs and Professor, Dept' of Earth Sci., Sch. of Ocean and Earth Sci. and Tech., Univ. of Haw. at Mānoa and Vice-Chair, Honolulu Climate Change Comm'n (Feb. 14, 2020).

[45] *Id.*

beaches rolled mauka[46] and wave energy pushed the sand on the former shorelines inland into the beach formations we see today.[47] Today's shorelines are, in some cases, many miles from the former shorelines and there is evidence of this all over our islands.[48] Although the state-certified shoreline distinguishes where the beach ends for regulatory purposes, the sand that makes up Hawai'i's beaches does not end at the private property line or where the vegetation begins.[49] In fact, there is an abundance of sand in the backshore,[50] underneath the ground, vegetation, and private coastal residences that beaches have naturally accrued to withstand and adapt to large wave events and changes in sea levels.[51] "These dunes were formed in centuries or millennia past when waves from storms stockpiled sand just inland of the shoreline where ordinary waves could not reach."[52]

Beaches cannot access the sand reserves in the backshore if they are impeded by development, sea walls, or other shoreline hardening measures.[53] In addition, research has conclusively proven that shoreline hardening accelerates erosion on adjacent shorelines.[54] This process—known as "flanking"[55]—can be understood in terms of a domino effect: harden one coastal property, the hardening accelerates erosion on the adjacent beaches, and the erosion triggers the adjacent property owners to harden their shoreline or risk losing property.[56] Scientists and policymakers in Hawai'i have known about the negative impacts of shoreline hardening

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[46] The Hawaiian Dictionary Nā Puke Wehewehe 'Ōlelo Hawai'i defines Mauka as "Inland, in a direction opposite to the sea; opposite to *makai*, towards the sea." NĀ PUKE WEHEWEHE 'ŌLELO HAWAI'I, wehewehe.org (last visited Apr. 19, 2020).

[47] Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

[48] *Id.*

[49] *Id.*

[50] The backshore is the "[t]he part of the beach lying between the foreshore and coastline. The backshore is dry under normal conditions, is often characterized by berms and is without vegetation. The backshore is only exposed to waves under extreme events with high tide and storm surge. *Backshore*, COASTAL WIKI, http://www.coastalwiki.org/wiki/Backshore (last visited Apr. 19, 2020) (citation omitted).

[51] Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

[52] Sam Lemmo, *Column: Protect Our Precious, Eroding Beaches*, HONOLULU STAR ADVERTISER, (Oct. 21, 2020), https://www.staradvertiser.com/2020/10/21/editorial/island-voices/column-protect-our-precious-eroding-beaches/.

[53] *Id.*

[54] *Id.*

[55] Flanking refers to artificial shoreline hardening causing "accelerated erosion on adjoining unprotected shoreline as waves and currents bend around the end of the structure . . . which in turn prompts requests for additional shoreline protection from neighboring properties." HAWAI'I CLIMATE CHANGE MITIGATION AND ADAPTATION COMM'N, *supra* note 1, at 58.

[56] Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

for many years.[57] A recent study by University of Hawai'i scientists summarized the effects as follows:

> Shoreline hardening disrupts natural processes, accelerates erosion on adjacent lands (known as "flanking"), and limits the natural dynamic behavior of the environment. Hardening on sandy beaches experiencing chronic erosion, ultimately the result of long-term sea level rise, causes beach narrowing and loss (Fletcher et al. 1997), and flanking triggers more hardening leading to additional beach degradation.[58]

An even more recent study by the Coastal Geology Group at the University of Hawai'i's School of Ocean and Earth Science and Technology found that "as much as 40% of all beaches on O'ahu, Hawai'i could be lost before mid-century," and identified artificial shoreline hardening as the cause.[59] Painting a worrisome picture of the future of O'ahu's beaches if beach management policies are not changed, some have noted that:

> In an era of rising sea level, beaches need to migrate landward, otherwise they drown. Beach migration, also known as shoreline retreat, causes coastal erosion of private and public beachfront property. Shoreline hardening, the construction of seawalls or revetments, interrupts natural beach migration—causing waves to erode the sand, accelerating coastal erosion on neighboring properties, and dooming a beach to drown in place as the ocean continues to rise.[60]

In October 2020, Sam Lemmo, the Director of Hawai'i's Office of Conservation and Coastal Lands, authored an editorial in which he stated that Hawai'i's beaches have "reached a tipping point . . . in which the loss of our beaches is a realistic future."[61] Lemmo continued:

> While shoreline armoring can, albeit temporarily, stop erosion and protect whatever lies behind it, the act is profoundly destructive to the beach because it cuts off the beach's supply of inland sand, which the beach needs to remain healthy during periods of higher sea level. Seawalls essentially starve beaches of sand.

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[57] *Id.*

[58] Summers, Fletcher, Spirandelli et al., *supra* note 40 (citation omitted).

[59] Marcie Grabowski, 40% of O'ahu Beaches Could Be Lost by Mid-Century, SCH. OF OCEAN AND EARTH SCI. AND TECH. (Sept. 21, 2020), https://www.soest.hawaii.edu/soestwp/announce/news/40-of-o%ca%bbahu-beaches-could-be-lost-by-mid-century/; Kammie-Dominique Tavares, Charles H. Fletcher, & Tiffany R. Anderson, RISK OF SHORELINE HARDENING AND ASSOCIATED BEACH LOSS PEAKS BEFORE MID-CENTURY: O'AHU, HAWAII, NATURE RESEARCH at 8 (2020), https://www.nature.com/articles/s41598-020-70577-y.

[60] Grabowski, *supra* note 59.

[61] Lemmo, *supra* note 52.

> The other major impact armored structures have on beaches is that they do not allow wave energy to naturally dissipate. When a wave crashes against a hardened feature, whether it's a seawall or natural geologic feature, the force of that impact causes water to speed up such that sand is picked up and carried away. But when a wave washes up and slowly back down a sloping sand beach, water moves slowly enough that sand can fall out of suspension and be deposited which assists with beach formation.[62]

Widespread recognition of the detrimental effects of shoreline hardening will be crucial to raising awareness and putting pressure on local governments, such as the City, to make policy changes because the counties, not the state, have jurisdiction over permitting permanent shoreline hardening measures like seawalls.[63]

C. The City and County of Honolulu's Response to Sea Level Rise

In Hawai'i, the island of O'ahu (which encompasses the entire City and County of Honolulu) is the most vulnerable island to economic losses due to sea level rise.[64] Because Hawai'i has very limited tidal ranges, development has been densely propagated near shorelines and has resulted "in Honolulu having some of the lowest elevation flood thresholds in the United States, similar to Baltimore, Washington D.C., San Francisco, and others."[65] In the summer of 2017, the City saw one of its worst flooding incidents to date.[66] High average global sea levels and seasonal high tides combined and water levels reached "more than 0.35 m[eters] above the mean higher high water datum at the Honolulu Tide Station."[67] This culmination of tidal events and sea level rise negatively affected roadways near Daniel K. Inouye International Airport, flooded basements and underground parking garages, and contributed to traffic congestion in Waikīkī.[68]

Given the reality of rising global sea levels the City has recognized the need to prepare its shorelines and flood-prone areas for flooding events and as will be discussed below, has made a concerted effort to plan for the future.[69] Every ten years, the City receives proposals that voters consider

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[62] *Id.*

[63] *See infra* Part III.

[64] Shellie Habel, Charles H. Fletcher, Tiffany R. Anderson, & Philip R. Thompson, *Sea-Level Rise Induced Multi-Mechanism Flooding and Contribution to Urban Infrastructure Failure*, SCI. REPORTS (2020) 10:3796, at 1, https://doi.org/10.1038/s41598-020-60762-4.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Interview with Matthew Gonser, Coastal and Water Program Manager, City and Cty.

via City Charter amendments by ballot initiative.[70] In the 2015 to 2016 proposal cycle, Honolulu citizens voted to push the City towards a future more prepared for the realities of climate change.[71] To do so, voters supported the creation of the City's Office of Climate Change, Sustainability and Resiliency (the "Office") and created the Honolulu Climate Change Commission (the "Commission").[72]

1. The Office of Climate Change, Sustainability and Resiliency and the O'ahu Resilience Strategy

The Office of Climate Change, Sustainability and Resiliency's mission statement declares that it is "tasked with tracking climate change science and potential impacts on City facilities, coordinating actions and policies of departments within the City to increase community preparedness, developing resilient infrastructure in response to the effects from climate change, and integrating sustainable and environmental values into City plans, programs, and policies."[73] As a member of the Rockefeller Foundation's 100 Resilient Cities Grant, the Office developed Honolulu's first comprehensive climate change plan: the O'ahu Resilience Strategy.[74]

The O'ahu Resilience Strategy is comprehensive in its scope and substance, aesthetically pleasing, accessible for community members, and importantly—it is written to be easily understood and considered by all of the City's stakeholders.[75] The O'ahu Resilience Strategy lists purpose-driven "Actions" that the City intends to take to prepare and adapt for the future and organizes the Actions by "Pillars" that represent overarching goals.[76] In Pillar III: Climate Security, two actions are directly relevant here: Action 29 and Action 30.[77]

Action 29—Protect Beaches and Public Safety with Revised Shoreline Management Rules—acknowledges the stark losses of sandy beaches on

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of Honolulu Off. of Climate Change, Sustainability and Resiliency (Feb. 19, 2020).

[70] *Id.*

[71] *Id.*

[72] *What We Do*, CITY AND CTY. OF HONOLULU OFF. OF CLIMATE CHANGE, SUSTAINABILITY AND RESILIENCY, RESILIENCE OFF., https://www.resilientoahu.org/what-we-do; *About*, CITY AND CTY. OF HONOLULU OFF. OF CLIMATE CHANGE, SUSTAINABILITY AND RESILIENCY, RESILIENCE OFF., [hereinafter *About the Climate Change Commission*] https://www.resilientoahu.org/about-the-commission.

[73] *Id.*

[74] *Id.*

[75] *See generally* OLA: O'AHU RESILIENCE STRATEGY, *supra* note 42.

[76] *Id.*

[77] *Id.* at 90–92.

O'ahu, and the chronic erosion of the majority of its beaches, and identifies shoreline hardening as the underlying cause.[78] In response, the City notes that it is necessary and critical for the future of O'ahu's coastal zone that the City revise and update certain sections of the Revised Ordinances of Honolulu: Chapter 21A, Flood Hazard Areas; Chapter 23, Shoreline Setbacks; and Chapter 25, Special Management Area.[79] By updating these ordinances, the City promises to:

> 1) better protect and preserve the natural shoreline, especially sandy beaches; 2) protect and preserve public pedestrian access laterally along the shoreline and to the sea; 3) protect and preserve open space and ecosystems along the shoreline with improved regulation; 4) reduce risk and damages to properties and structures; and 5) help protect people from the impacts of coastal hazards and climate change, especially sea level rise, erosion, and storm surge.[80]

Action 30—Protect Coastal Property and Beaches Through Innovation and Partnership—describes challenges the City faces when considering protecting O'ahu's coastal communities including the necessity of large scale efforts and the challenge of finding funding to implement solutions.[81] In response, the City intends to engage in meaningful partnerships with state agencies and private coastal property owners "to support beach restoration projects that avoid lateral armoring and instead promote solutions that can preserve beach resources."[82] The City also intends to develop policies with the purpose of funding beach restoration and nourishment, work with private entities to locate and harvest offshore sand reserves, and develop property tax relief to coastal landowners who work collaboratively to manage their beaches.[83] Over the long term, Action 30 could "eventually result in a continuous effort by recovery teams circulating the island to nourish and maintain partnership-supported beaches."[84]

2. *The Honolulu Climate Change Commission and Its Guidance on Sea Level Rise and Shoreline Setbacks*

The City and County of Honolulu's 2016 Charter Amendments also created the Honolulu Climate Change Commission (the Commission).[85] The Commission is made up of five experts on climate change in Hawai'i

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[78] *Id.* at 90.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 92.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *About the Climate Change Commission*, *supra* note 72.

whose mission is to "gather the latest science and information on climate change impacts to Hawai'i and provide advice and recommendations to the mayor, City Council, and executive departments of the City as they look to draft policy and engage in planning for future climate scenarios."[86] The members are mandated to convene at least twice a year but have already far exceeded that minimum.[87] The Commission has adopted three formal guidance papers for the City and County of Honolulu: Climate Change Brief, Sea Level Rise Guidance, and Revised Ordinances of Honolulu Chapter 23 Shoreline Setback Guidance.[88]

By Executive Directive in July 2016, Mayor Kirk Caldwell formally accepted the Commission's Sea Level Rise Guidance and instructed that the guidance shall apply to all the City's executive branch departments and agencies.[89] The Executive Directive lists eight future requirements for the City's executive departments and agencies, but the overall policy of the directive is:

> Each City department and agency shall . . . consider the need for both climate change mitigation and adaptation as pressing and urgent matters, to take a proactive approach in both reducing greenhouse gas emissions and adapting to impacts caused by sea level rise, and to align programs wherever possible to help protect and prepare the infrastructure, assets, and citizens of the City for the physical and economic impacts of climate change.[90]

In the Executive Directive, Mayor Caldwell also put City departments and agencies on notice that without any action by the City and County:

> [S]ea level rise and its associated erosion, flooding, and waves will chronically impact, displace, and/or permanently inundate: 9,400 acres of land (over half of which is designated for urban land uses); $12.9 billion in building and land values, which does not account for public infrastructure and other utilities; 13,300 residents; 3,880 structures; and 17.7 miles of major roadway.[91]

In Mayor Caldwell's seventh State of the City address in 2019, he declared that one of his top personal priorities was to place a moratorium on the construction of new sea walls, while also acknowledging that it would

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[86] *Id.*

[87] Interview with Matthew Gonser, *supra* note 69.

[88] *About the Climate Change Commission*, *supra* note 72.

[89] OFF. OF THE MAYOR, CITY AND CTY. OF HONOLULU, EXEC. DIRECTIVE NO. 18-2 (Jul. 16, 2018).

[90] *Id.*

[91] *Id.*

likely be highly controversial.[92] The Commission adopted its guidance on amending Chapter 23 Shoreline Setbacks in December of 2019, but Mayor Caldwell did not formally issue an executive directive on the matter.[93] The Commission initially published draft guidance in December of 2019, in which it offered many science-backed ideas regarding amending Chapter 23, including guidance related to seawalls and other artificial shoreline hardening measures. Later that month, the Commission formally adopted its final guidance on amending Chapter 23.[94]

III. COASTAL ZONE MANAGEMENT, THE PUBLIC TRUST DOCTRINE, AND REGULATORY TAKINGS

A. Coastal Zone Management from the United States Congress to the Shores of Hawai'i

1. The Federal Coastal Zone Management Act

In 1972, the United States Congress responded to domestic environmental advocacy pressure by enacting the federal Coastal Zone Management Act (CZMA).[95] The federal government passed the CZMA to encourage states to develop and implement management plans for their coastal zones.[96] Congressional findings for the CZMA explain "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone" and importantly that climate change could "result in a substantial sea level rise with serious adverse effects in the coastal zone, [and] coastal states *must* anticipate and plan for such an occurrence."[97] Congress also found that the coastal zone has many important resources and values that were being depleted due to "increasing

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[92] HNN Staff, *supra* note 38.

[93] *About the Climate Change Commission*, *supra* note 72. As of March 10, 2021, Mayor Rick Blangiardi has also not issued any executive order regarding the Commission's guidance.

[94] CITY AND CTY. OF HONOLULU CLIMATE CHANGE COMM'N, GUIDANCE ON REVISIONS TO THE REVISED ORDINANCE OF HONOLULU CHAPTER 23, REGARDING SHORELINE SETBACKS (Dec. 23, 2019), https://static1.squarespace.com/static/5e3885654a153a6ef84e6c9c/t/5ef1217d6457de797a36100b/1592861069692/ROH+23+Shoreline+Setback+Guidance.pdf.

[95] Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-464 et seq. (2000); DAVID CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 209 [hereinafter CALLIES, REGULATING PARADISE] (Univ. of Haw. Press 2d ed. 2010).

[96] CALLIES, REGULATING PARADISE, *supra* note 95.

[97] Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451(a), 1451(l) et seq. (2000) (emphasis added).

and competing demands" from population growth, economic development, commerce, residential development, and pollution.[98] Congress appropriates CZMA money for eligible states if a state enacts its own coastal zone management act that includes "a management plan/program, implementation regulations, and consistency regulations" which all abide by the federal guidelines in the CZMA.[99] Currently, every coastal and Great Lakes state except for Alaska participates in the CZMA.[100]

2. Chapter 205A: Hawai'i Coastal Zone Management Act

In 1975, Hawai'i passed the Shoreland Protection Act and later adopted Hawai'i's Coastal Zone Management Act (HCZMA), codified as Hawai'i Revised Statutes (HRS) Chapter 205A.[101] In 1978, the National Ocean and Atmospheric Administration approved the HCZMA as adhering to the federal guidelines and Hawai'i became an official participant in the federal CZMA.[102] The HCZMA is not as coastal as it sounds because, in fact, all of the land in the state is within the boundaries of the HCZMA.[103] The HCZMA is managed by the State's Office of Planning.[104] Until 2020, the statute had not been significantly updated in decades.[105]

In its recent update, the HCZMA established shoreline setbacks statewide to be between twenty and forty feet from the state-certified shoreline but explicitly gives each county the power to expand its shoreline setback "at distances greater than that established" and develop administrative regulations to accomplish the same.[106] The State-certified shoreline is defined as the "upper reaches of the wash of the waves, other than storm or tidal waves, at high tide during the season of the year in which the highest

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[98] *Id.* § 1451(c).

[99] CALLIES, REGULATING PARADISE, *supra* note 95, at 210.

[100] *Coastal Zone Management Programs,* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., OFF. FOR COASTAL MGMT., https://coast.noaa.gov/czm/mystate/ (last visited April 7, 2021).

[101] CALLIES, REGULATING PARADISE, *supra* note 95, at 210; HAW. REV. STAT. § 205A-1 (1993).

[102] *Coastal Zone Management Programs*, *supra* note 100.

[103] *Id.* Even more surprising is that roughly three-fourths of the United States' population lives within the coastal zone. CALLIES, REGULATING PARADISE, *supra* note 95.

[104] CALLIES, REGULATING PARADISE, *supra* note 95, at 224–25.

[105] CITY AND COUNTY OF HONOLULU CLIMATE CHANGE COMMISSION, DRAFT WHITE PAPER, CHAPTER 23, SHORELINE SETBACK REVISED ORDINANCES OF HONOLULU (November 2019).

[106] HAW. REV. STAT. §§ 205A-43, -45 (1977). Act 16 (2020) amended HRS § 205A-43 to mandate that shoreline setbacks throughout the state be "not less than forty feet inland from the shoreline." *Id.*; *see also* S.B. No. 2060, Act 16 (Haw. 2020).

wash of the waves occurs, usually evidenced by the edge of the vegetation growth, or the upper limit of debris left by the wash of the waves."[107]

The HCZMA also prescribes that county departments "shall review the plans of all applicants who propose any structure, activity, or facility that would be prohibited without a variance" but does not affirmatively mandate that the counties must adopt procedures for landowners to apply for a variance.[108] Furthermore, the HCZMA states that before a county may act on a variance application that it "shall hold a public hearing under [the Hawai'i Administrative Procedure Act]."[109] The county must also provide public notice and private notice to abutting property owners by request.[110]

3. Revised Ordinances of Honolulu Chapter 23: Shoreline Setbacks and the Hardship Variance

Honolulu's shoreline setback ordinance, Chapter 23, is administered by the City's Department of Planning and Permitting (DPP),which is generally a forty-foot setback from the State-certified shoreline.[111] The City's primary purpose for Chapter 23 is "to protect and preserve the natural shoreline, especially sandy beaches; to protect and preserve public pedestrian access laterally along the shoreline and to the sea; and to protect and preserve open space along the shoreline."[112] If a permit applicant does not meet the City's shoreline setback requirements or if an applicant would like to build a nonconforming structure (such as a seawall) within the shoreline setback, Chapter 23 provides a process by which the applicant may apply for a variance.[113] Chapter 23 allows variances for reasonable and publicly-beneficial reasons such as for the cultivation of crops, aquaculture, or replacing sand on the beach.[114] Chapter 23 also allows variances "if hardship will result . . . if the facilities or improvements are not allowed

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[107] Diamond v. Dobbin, 132 Hawai'i 9, 12, 319 P.3d 1017, 1020 (2014) (finding that a private property boundary on Kaua'i could be evidenced by Kama'āina testimony and that inland erosion of private property transfers title to state) (citing Cty. of Haw. v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 62 (1973)). "Kama'āina" can be defined as "[n]ative-born, one born in a place, host; native plant; acquainted, familiar." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 124 (1986).

[108] *See* HAW. REV. STAT. § 205A-43(b)(2) (2020).

[109] *Id.* § 205A-43.5(a).

[110] *Id.*

[111] HONOLULU, HAW., REVISED ORDINANCES OF HONOLULU (ROH) § 23-1.4(a) (1992). For different lot sizes there are different regulations.

[112] ROH § 23-1.2(a) (1992).

[113] *Id.* § 23-1.8 (1992).

[114] *Id.* § 23-1.8(a)(1)–(4).

within the shoreline area."[115] Echoing United States Supreme Court jurisprudence on regulatory takings, Chapter 23 states that hardship upon an applicant may only be found if, *inter alia*, "the applicant would be deprived of reasonable use of the land if required to comply fully with the shoreline setback ordinance."

The hardship standard serves two general purposes for which a coastal property owner may need a hardship variance—to build a house within the shoreline setback or build a seawall or other artificial hardening measure along the shoreline.[116] In relevant part, Chapter 23 states that a variance may be granted for:

> (i) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; and
>
> (ii) Private facilities or improvements that may artificially fix the shoreline, but only if hardship is likely to be caused by shoreline erosion and conditions are imposed prohibiting any such structure seaward of the existing shoreline unless it is clearly in the public interest.[117]

Under normal circumstances, Chapter 23 requires the Director of DPP to hold a public hearing on each variance application.[118] If granted, the City's hardship variance permits a shoreline property owner to erect a permanent hardening measure that artificially fixes the shoreline, but property owners may also seek an emergency permit from the state government to temporarily harden their property.[119]

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[115] ROH § 23-1.8(b)(3)(A); *see generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (finding that a coastal landowner had suffered a regulatory taking for which the government needed to pay him just compensation because a South Carolina law had prevented him from reasonable use of his land).

[116] *See* ROH § 23-1.8(b)(3)(A)(i)–(ii).

[117] *Id.*

[118] *Id.* § 23-1.11(a) (1992).

[119] The emergency hardening permit, administered by the State Department of Land and Natural Resources' Office of Conservation and Coastal Lands ("OCCL"), has come under strong media and public scrutiny over the course of the past year due to a series of articles by ProPublica partnering with the Honolulu Star Advertiser. *See e.g.* Sophie Cocke, *How Wealthy Homeowners Are Endangering Hawaii's Beaches*, HONOLULU STAR ADVERTISER (Dec. 5, 2020), https://www.staradvertiser.com/2020/12/05/hawaii-news/how-famous-surfers-and-wealthy-homeowners-are-endangering-hawaiis-beaches/. Although there is generally little distinction between the state and county processes because the boundary between state and county jurisdiction exists at the state-certified shoreline, discussed above. Thus the state has the authority to regulate and approve temporary emergency hardening on beaches that were formerly private property because once the shoreline shifts, the land becomes conservation land and is no longer under county control. In recent years, to circumvent the City's hardship variance process, property owners have waited until their

B. The Public Trust Doctrine in Hawai'i

1. The History of the Public Trust Doctrine

In most places, the modern public trust doctrine traces its roots back to the Roman Empire, through the English Common Law and the American adoption of the public trust doctrine principles.[120] At its essence, the public trust doctrine proclaims that the state holds submerged lands, navigable waters, and lands adjacent to navigable waters in trust for the benefit of the people.[121] One important tenet of the public trust doctrine is that "[t]he state has a duty to ensure that these lands are utilized in a manner benefitting the public, and to prevent any use substantially impairing this trust."[122] Furthermore, the public trust doctrine mandates that the state has a duty to ensure access to these lands and waters held in trust for public purposes and public uses such as recreation and commerce.[123]

Generally, the state may not alienate lands held under the public trust doctrine,[124] but in some instances may convey some interest in the trust land to private control.[125] In these limited instances, the conveyance must still benefit the public, the private owner is still bound by the public trust

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structures were imminently threatened by the ocean and waves to apply for an emergency permit to build temporary structures the protect coastal property, which most often included large geotextile sandbags, sometimes referred to as "burritos." The OCCL allows this by issuing property owners whose structure is less that twenty feet from the ocean a letter, essentially an informal Conservation District Use Permit, for the temporary hardening. The main issue with these temporary measures is that the state has largely not enforced deadlines to remove the structures and thus have become quasi-permanent fixtures on the shoreline and influencing coastal processes. *See id.* Furthermore, property owners and private contractors who legally or illegally install these measures or knowingly refuse to remove them after expiration have rarely, if ever, been fined for breaking the law. *See id.* There have been recent efforts at the state legislature to attempt to address this issue, notably a measure by Senator Chris Lee in the 2021 legislature session, but the bill was unfortunately deferred. *See* S.B. 1310, 31st Leg. Sess. (2021); *see also* Sophie Cocke, *Bills That Would Place Limit on Emergency Beach Sandbags in Hawaii Shelved*, HONOLULU STAR ADVERTISER (Mar. 1, 2021), https://www.staradvertiser.com/2021/03/01/hawaii-news/bills-that-would-place-limit-on-emergency-beach-sandbags-in-hawaii-shelved/.

[120] *See e.g.*, David L. Callies, *The Public Trust Doctrine*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 71, 72 [hereinafter Callies, *The Public Trust Doctrine*] (2019); Kent D. Morihara, Comment, *Hawai'i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 181 (1997).

[121] Callies, *The Public Trust Doctrine*, *supra* note 120; Morihara, *supra* note 120, at 177, 181–83.

[122] Morihara, *supra* note 120, at 183.

[123] Callies, *The Public Trust Doctrine*, *supra* note 120.

[124] Callies, *The Public Trust Doctrine*, *supra* note 120.

[125] Morihara, *supra* note 120.

doctrine, and the state must regulate the owner as necessary to ensure that the trust lands are maintained for the public.[126] Generally, this exception to the inalienable aspect of trust lands is understood as the ability to grant private owners submerged land for docks, piers, and wharves used for commerce or recreation.[127]

2. The Public Trust Doctrine in Hawai'i

Each state may determine the scope of its public trust doctrine, including what lands and resources should be covered under the trust, as well as the scope of fiduciaries', the public's, and private parties' rights and duties.[128] Hawai'i also uniquely traces its modern public trust doctrine back to Native Hawaiian traditional and customary law.[129] Under traditional Hawaiian practices, beaches and the ocean adjacent to the beaches were held in trust by royalty who promoted and ensured that commoners would sustainably use the trust resources.[130]

When the Hawaiian monarchy was overthrown in 1893, it ceded all land held by the Hawaiian Kingdom's government and by the Crown itself to the new Republic of Hawai'i.[131] In 1898 when the United States annexed the Republic of Hawai'i, these lands formerly held by the Hawaiian government and Crown were then transferred again to the Territory of Hawai'i.[132] Finally, when the Territory of Hawai'i was admitted by Congress into the Union of the United States, the lands were again transferred to the State of Hawai'i.[133] This final transfer of land to the new State of Hawai'i was explicitly subject to public trust provisions in the State of Hawai'i Admission Act which reads that the "lands granted to the State of Hawaii . . . shall be managed and disposed of . . . in such manner as the constitution and laws of said State shall provide."[134]

Prior to Hawai'i's statehood, the Supreme Court of the Republic of Hawai'i had already adopted the ruling set down by the United States Supreme Court in *Illinois Central Railroad v. State of Illinois* in *King v.*

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[126] *Id.* at 183–84.

[127] Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

[128] D. Kapua'ala Sproat, *Chapter 13*: *Kahakai: Shorelines*, *in* NATIVE HAWAIIAN LAW: A TREATISE, 736, 739–40 (2015).

[129] *Id.* at 740.

[130] *Id.*

[131] Pele Def. Fund v. Paty, 73 Haw. 578, 585, 837 P.3d 1247, 1254 (1992).

[132] *Id.*

[133] *Id.*

[134] *Id.* at 585–86; 837 P.3d at 1254–55 (citing Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959)).

Oahu Railway & Land Co.[135] In *King*, following the public trust doctrine law of the United States Supreme Court, the Supreme Court of the Republic of Hawai'i held that the state has title to all submerged lands and it is held in trust so that the people may use and enjoy it.[136] Further, the court made it clear that the "people of Hawaii hold the absolute rights to all its navigable waters and soils underneath them for their own common use."[137]

In 1978, Hawai'i held a Constitutional Convention to amend the state constitution and codified its public trust doctrine and applicable resources to encompass more than what is historically understood to qualify under the public trust doctrine.[138] This expansion of public trust resources is separate doctrinally from the public trust doctrine principles rooted in Roman and English law[139] and is notably more open to interpretation by Hawai'i's courts.[140] As mentioned in Section I, Article XI, section 1 of the Hawai'i Constitution States that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

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[135] King v. Oahu Ry. & Land Co., 11 Haw. Terr. 717, 723 (1899) (adopting the ruling of the United States Supreme Court in Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892)).

[136] *Id.*

[137] *Id.* at 725.

[138] *See* Callies, *The Public Trust Doctrine*, *supra* note 120, at 79. "California and Hawai'i have most extensively developed their ecological public trust doctrines, and they have done so by making law apart from the traditional common-law doctrine related to waterways and tidelands . . . [C]ourts, legislators, and state constitutions often declare various lands and other resources to be held in trust for the public. However, they rarely declare such land and resources to be subject to the public trust doctrine." *Id.* at 78–79. However, even without the 1978 Constitutional Amendments to clarify this expansion of the public trust doctrine in Hawai'i, HRS section 1-1 would have imparted all traditional and customary Hawaiian public trust principles in addition to the historical western trust principles. HRS section 1-1 states that:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, *or fixed by Hawaiian judicial precedent, or established by Hawaiian usage*; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HAW. REV. STAT. § 1-1 (1955) (emphasis added).

[139] *See* Callies, *The Public Trust Doctrine*, *supra* note 120, at 79.

[140] In re Waiāhole Ditch Combined Contested Case Hrg. (*Waiāhole I*), 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000).

> All public natural resources are held in trust by the State for the benefit of the people.[141]

In *In re Waiāhole Ditch Combined Contested Case Hearing* ("*Waiāhole I*"), the Hawai'i Supreme Court emphatically reminded the other subdivisions of the state that "[t]he public trust, however, is a state constitutional doctrine. As with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state."[142]

Under state land use classification, all lands makai of the state-certified shoreline are classified as being within the conservation district.[143] Through statute, Hawai'i has clarified that the public has a distinct right to use the beaches on every sandy shoreline of the state.[144] It is primarily the duty of the counties to ensure public access to beaches in Hawai'i.[145] The beaches

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[141] HAW. CONST. art. XI, § 1.

[142] *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455.

[143] HAW. CODE R. § 15-15-20(6) ("Except as otherwise provided in this chapter, in determining the boundaries for the "C" conservation district, the following standards shall apply: . . . It shall include lands having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps.") (LexisNexis 2019). Furthermore, because beaches are classified as conservation land they are entitled the government's trust duties are even greater; although the distinction has been criticized. *Compare* In re Conservation Dist. Use Application (*Mauna Kea II*), 143 Hawai'i 379, 400, 431 P.3d 752, 773 (2018) ("We therefore now hold that conservation district lands owned by the State, 22 such as the lands in the summit area of Mauna Kea, are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1.") *with id.* at 410, 431 P.3d at 783 (Pollack, J., concurring). ("However, Hawaii's public lands have long been regarded as subject to the doctrine incorporated by article XI, section 1, having been held in trust for the people's benefit since the times of the Hawaiian Kingdom.")

[144] HAW. REV. STAT. § 115-4 (2010).

[145] *See id.* § 46-6.5(a) (2015) ("Each county shall adopt ordinances which shall require a subdivider or developer, as a condition precedent to final approval of a subdivision, in cases where public access is not already provided, to dedicate land for public access by right-of-way or easement for pedestrian travel from a public highway or public streets to the land below the high-water mark on any coastal shoreline, and to dedicate land for public access by right of way from a public highway to areas in the mountains where there are existing facilities for hiking, hunting, fruit-picking, ti-leaf sliding . . . "); *see id.* § 115-2 ("Aquisition of lands for public rights-of-way and public transit corridors. When the provisions of section 46- 6.5 are not applicable, the various counties shall purchase land for public rights-of-way to the shorelines, the sea, and inland recreational areas, and for public transit corridors where topography is such that safe transit does not exist."); *see also* Asami Miyazawa, *Public Beach Access: A Right for All? Opening the Gate to Iroquois Point Beach*, 30 U. HAW. L. REV. 495 (2008) (discussing the history of public beach access in Hawai'i and arguing that the public should be given access to the beach at Iriquois Point).

themselves are controlled and regulated by the State of Hawai'i's Department of Land and Natural Resources (DLNR), specifically its Office of Conservation and Coastal Lands (OCCL).[146] OCCL's Coastal Land Program manages coastal resources such as beaches and sand dunes that are seaward of county jurisdiction and within the State Conservation District.[147] OCCL's purpose is coupled with the purpose of the HCZMA to: "[p]rovide coastal recreational opportunities . . . to the public; . . . [p]rotect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources; and to [p]rotect beaches for public use and recreation."[148]

Hawai'i's courts have long recognized the principle that as public land, beaches are "a public natural resource within the meaning of article XI, section 1" of the Hawai'i Constitution and are therefore afforded public trust protections.[149] Furthermore, it has been argued that as a public trust resource, beaches "[enjoy] a stature equal to that afforded to public water resources under the [Article XI, section 1], and the same principles should generally apply to our interpretation of agencies' constitutional public trust obligations" with regard to the resource.[150] The duties of the Hawai'i government and its subsidiaries under the Constitutional public trust doctrine exist independently and are distinct from its obligations under Hawai'i statutory law.[151] There is "some congruence" between the state's duties under the public trust doctrine and statutory law,[152] but the Hawai'i government recognizes that "public rights in trust resources" are "superior to" private interests and uses of the trust resource.[153]

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[146] *Coastal Lands Program*, STATE OF HAW., OFF. OF CONSERVATION AND COASTAL LANDS, https://dlnr.hawaii.gov/occl/coastal-lands/ (last visited Mar. 22, 2021).

[147] *Id.*; *see also* HAW. CODE R. § 15-15-20(6) (land seaward of state-certified shoreline is within the Conservation district).

[148] HAW. REV. STAT. § 205A-2(b)(1)(A), (b)(3)(A), (b)(9)(A)(i) (2020).

[149] *See* In re Conservation Dist. Use Application (*Mauna Kea II*), 143 Hawai'i 379, 413, 431 P.3d 752, 786 (2018) (Pollack, J., concurring).

[150] *See id.*

[151] *See* Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014). The Hawai'i Supreme Court has not yet held that the public trust doctrine alone would support property interest for the purposes of due process. Community groups and other litigants have thus far relied on statutorily created rights, sometimes in conjunction with their individual right to a clean and healthful environment under Article XI, section 9 of the Hawai'i Constitution. Kilakila 'O Haleakala v. Bd. of Land & Nat. Resources, 131 Hawai'i 193, 206, 317 P.3d 27, 40 (2013) (Acoba, J., concurring) (finding that a community group should have been granted standing to protect its public trust doctrine rights alone under Article XI, section 1 of the Hawai'i Constitution.)

[152] *See Mauna Kea II*, 143 Hawai'i at 413–16, 431 P.3d at 786–89 (Pollack, J., concurring).

[153] In re Waiāhole Ditch Combined Contested Case Hrg. (*Waiāhole I*), 94 Hawai'i 97,

Section IV of this article will discuss the Hawai'i Supreme Court's relevant interpretations of the specific duties and obligations of the Hawai'i state government and all of its subdivisions under the public trust doctrine.

C. Regulatory Takings and Private Property Rights on the Shoreline

1. Regulatory Takings

In the United States, private property rights have their "foundation in state law" and states have the right to shape and define the property rights of private owners.[154] This ability of states to define the scope and boundaries of property rights, however, is not unfettered and must leave property owners with some recourse against unreasonable regulations.[155] The Fifth and Fourteenth Amendments to the United States Constitution protect private property owners from unreasonable adjustments of their rights by the government.[156] The Fifth Amendment declares that the federal government may not take private property unless it is for public use and the government pays the property owner just compensation.[157] The Fourteenth Amendment incorporates this same protection against state governments.[158] But since its inception, the United States Supreme Court has interpreted these Constitutional Amendments to apply to far more than a direct physical taking or invasion of private property.[159]

In 1922, the United States Supreme Court examined a law enacted in Pennsylvania that prevented coal mining where it could adversely affect the integrity of the surface land.[160] Pennsylvania Coal Company retained mining rights under a property it had recently conveyed to Mahon.[161] Mahon, the surface property's new owner, sued Pennsylvania Coal arguing that the new regulation barred the company from mining under Mahon's property.[162] Justice Oliver Wendell Holmes, writing for the Court, found the regulation was an invalid exercise of the state's police power because the

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138, 9 P.3d 409, 450 (2000) ("[U]nderlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.") (quoting Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 312 (1982))).

[154] Murr v. Wisconsin, 137 S. Ct. 1933, 1944–45 (2017).

[155] *Id.*

[156] U.S. CONST. amends. V, XIV.

[157] *Id.* at amend. V.

[158] *Id.* at amend. XIV.

[159] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

[160] *Id.* at 412.

[161] *Id.*

[162] *Id.*

regulation diminished all of Pennsylvania Coal's property value and Mahon had assumed the risk when he purchased the property.[163] Justice Holmes held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[164] Since Justice Holmes' famous decision in 1922, the Supreme Court has continued to test the bounds of Justice Holmes' now famous statement.[165] As will be discussed in Section IV, in addition to expanding what constitutes a regulatory taking under Justice Holmes' "goes too far" framework, the Supreme Court has also created logical exceptions to indemnify government from takings claims for property rights the owner did not have.[166] Because of the dynamic nature of coastal and riparian land, coastal property owners rights to shoreline accretion and shoreline erosion have evolved over time.

2. The Law of Shoreline Accretion in Hawai'i

The shorelines of Hawai'i are a very dynamic environment, and over time, the boundary between private shoreline property and land held by the state under the public trust doctrine has ebbed and flowed with the tides.[167] The Hawai'i Supreme Court has generally held that natural and gradual changes in the shoreline may change the boundaries of private property and trust land, but that "rapid and sudden changes such as avulsion and lava extensions do not affect original land boundaries."[168]

Under Hawai'i law, a private landowner along the shoreline may quiet title to lands seaward of their property boundary gained by accretion.[169] However, this ability is limited because in order to be successful the landowner must prove that the accretion was natural and that the land they would like to quiet title to has been there for at least twenty years.[170] This time period is congruent with state law regarding claims of adverse possession.[171] Unfortunately, some coastal landowners allegedly abused

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[163] *Id.* at 415–16.

[164] *Id.* at 415.

[165] *See, e.g.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

[166] *Mahon*, 260 U.S. at 415; *Lucas*, 505 U.S. at 1015.

[167] Sproat, *supra* note 126, at 748.

[168] *Id.*

[169] *Id.* at 750. Accretion refers to the "accumulation of (beach) sediment, deposited by natural fluid flow processes." *Accretion*, COASTAL WIKI, http://www.coastalwiki.org/wiki/Accretion (last visited Apr. 19, 2020).

[170] Sproat, *supra* note 126, at 750.

[171] *Id.* Adverse possession refers to "[w]hen a party claims ownership of a property they have been in for more than 12 years. It can also be claimed [as] abandoned property or it can go unchallenged by the actual owner." *What is Adverse Possession?*, THE LAW DICTIONARY, https://

their right to claim title to accreted land by planting sand-tolerant species on the makai[172] edge of their property line to "gain" more property.[173] In response, the legislature took up a measure that sought to expand the state's public beaches and prevent coastal landowners' inappropriate and bad faith practices.[174] House Bill 192 proposed amendments to Hawai'i's statutory law regulating accretion rights.[175] In the House, the Committee on Water, Land Use, and Hawaiian Affairs reported that "the State must act decisively to protect the people's right to use and enjoy the state's beaches against those private property owners seeking to increase their original titled-lands by accretion."[176] In a joint committee hearing in the Senate, the Committee on Water, Land, and Agriculture and the Committee on Energy and Environment went as far as to declare that "this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right supposedly belonging to shorefront property owners."[177]

House Bill 192 passed and became Act 73 when Governor Linda Lingle signed it into law.[178] The Act made several amendments to HRS, but most importantly it mandated that all lands accreted after its enactment would automatically be under state ownership.[179] Act 73 also gave the state the exclusive right to bring actions to quiet title to land that had not accreted prior to 2003 and limited the ability of coastal landowners to quiet title only to those accreted land that restored property already lost to erosion.[180] In 2009, landowners on the Big Island challenged Act 73's legality as it related to the ability of landowners to claim title to accreted land, only if the accretion restored previously eroded land.[181] The Hawai'i Intermediate

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thelawdictionary.org/adverse-possession/ (last visited Apr. 19, 2020). The period required for adverse possession varies by states through codification in statute. *Adverse Possession*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/adverse_possession (last visited Mar. 16, 2021).

[172] The Hawaiian Dictionary Nā Puke Wehewehe 'Ōlelo Hawai'i defines "makai" as "at the sea, seaward." NĀ PUKE WEHEWEHE 'ŌLELO HAWAI'I, wehewehe.org (last visited Apr. 19, 2020).

[173] Interview with Dr. Charles "Chip" Fletcher, *supra* note 43.

[174] E. Kumau Pineda-Akiona, *The Wash of the Waves: How the Stroke of a Pen Recharacterized Accreted Lands as Public Property*, 34 U. HAW. L. REV. 525, 536 (Spring 2012).

[175] *Id.*

[176] H. STAND. COMM. REP. NO. 369 (2003).

[177] S. STAND. COMM. REP. NO. 1224 (2003).

[178] Pineda-Akiona, *supra* note 171, at 537.

[179] *See* HAW. REV. STAT. §§ 171-1, 171-2, 343-3, 501-33, 669-1 (2019).

[180] Sproat, *supra* note 126, at 750; HAW. REV. STAT. § 501-33 (2019).

[181] Maunalani Bay Beach Ohana 28 v. State, 122 Hawai'i 34, 222 P.3d 441 (2009).

Court of Appeals agreed with the property owners in part, and in 2012 the legislature further amended HRS section 171-2 to clarify the law.[182] As it stands, any land that did not naturally accrete and remain on a private shoreline property since May 20, 2003 for the entire period until 2023 is indefinitely owned by the state and subject to the public trust doctrine.[183]

It is important to note that in other states this dichotomy of gaining property to accretion and losing property to erosion has not been adjusted. In 1874, the United States Supreme Court stated in *County of Saint Clair v. Lovingston* that:

> The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "*qui sentit onus debet sentire commodum*" lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.[184]

However, as discussed above, Hawai'i has statutorily distinguished from other states with respect to accretion. As a final note on accretion, Hawai'i has also statutorily prohibited any "structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted on accreted land . . . [and a]ny structure or action in violation of this section shall be immediately removed or stopped and the property owner shall be fined."[185]

3. The Law of Shoreline Erosion in Hawai'i

In the year following Hawai'i Constitutional Convention of 1978, the Hawai'i Supreme Court decided *County of Hawaii v. Sotomura*, the first case in which the court was asked to determine who owns coastal land lost

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[182] Act 56 § 1, 2012 Haw. Sess. Laws 122.

[183] HAW. REV. STAT. § 501-33 (2019). For in in-depth analysis of this change in law, *see* Pineda-Akiona, *supra* note 172. A similar measure had passed the Legislature in 2002, but a more cautious Governor Ben Cayetano vetoed the bill.

[184] 90 U.S. 46, 68–69 (1874) (emphasis added). The maxim qui sentit onus debet sentire commodum roughly translates to "he who enjoys the benefit ought also to bear the burdens." U.S. v. Milner, 583 F.3d 1174, 1187–88 (2009) (finding that the shoreline boundary of a property should be properly assessed where it would have been naturally if not impeded by private shore defense structures).

[185] HAW. REV. STAT. § 183-46 (1995).

to erosion.[186] In *Sotomura*, Hawai'i County sought to take a property owner's coastal landowners property by eminent domain to create a beach park.[187] The landowner challenged the trial court's valuation of his property.[188] Although the landowner had registered his property's boundaries with the Land Court, erosion had caused the makai boundary of his property to move inland and the trial court had used the shifted property line in determining the property's value.[189] On appeal to the Hawai'i Supreme Court, the landowner argued that the trial court had improperly redefined his property line and the high court considered "whether title to land lost by erosion passes to the state."[190] Chief Justice William S. Richardson, writing for the majority, found that without Hawaiian custom or testimony from Native Hawaiians relevant to the question, the issue could be resolved by relying on the common law of littoral land ownership:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state.[191]

Chief Justice Richardson also referred back to the Hawai'i Supreme Court's decision in *King v. Oahu Railway & Land Co.*, discussed in Part B, when Hawai'i adopted the American public trust doctrine principles regarding submerged lands and found that "[p]ublic policy, as interpreted by this court, favors extending to public use and ownership as much of Hawai'i's shoreline as is reasonably possible."[192] The Hawai'i Supreme Court has since upheld this public policy in numerous cases, favoring the public trust doctrine as it applies to public use and enjoyment of the state's beaches.[193] The United States Court of Appeals for the Ninth Circuit also

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[186] 55 Haw. 176, 183, 517 P.3d 57, 62 (1973).

[187] *Id.* at 177, 517 P.2d at 59.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 183, 517 P.2d at 62.

[191] *Id.* at 183, 517 P.2d at 62–63 (quoting *In re* City of Buffalo, 325, 99 N.E. 850, 852 (N.Y. 1912) (internal quotation marks omitted)).

[192] *Id.* at 182, 517 P.2d at 61–62. This judicial and public policy alone begs the question of whether favoring public use and ownership to beaches as much as is reasonably possible necessarily means preventing complete loss of the state's beaches.

[193] *See, e.g.*, Gold Coast Neighborhood Ass'n v. State, 140 Hawai'i 437, 458, 403 P.3d 214, 235 (2017) (finding that the state of Hawai'i was responsible for maintaining a seawall that had been built by private landowners over eight years ago but was now available for public use under the public trust doctrine); Diamond v. Dobbin, 132 Hawai'i 9, 26, 319 P.3d 1017, 1034 (2014) (finding that a private property boundary on Kaua'i could be evidenced

came to the same conclusion in *Napeahi v. Paty* that shoreline erosion of private property that shifted the shoreline makai transferred title to the land to the public.[194]

In 2017, State of Hawai'i Deputy Attorney General William J. Wynhoff authored an advisory opinion to the Chair of the Department of Land and Natural Resources, Suzanne D. Case, regarding "Shoreline Encroaching Easements."[195] To determine whether the state must approve the acquisition of property it gains through shoreline erosion under statute, the Wynhoff relied on Hawai'i Supreme Court precedent in *State v. Zimring*.[196] In *Zimring*, the court considered whether several acres of land recently created by volcanic lava belonged to the coastal property owner or the state.[197] The Hawai'i Supreme Court found for the state, determining "the term 'property,' as used in the Joint Resolution of Annexation, is 'extremely broad,' and includes 'property which is real, personal and mixed, choate and inchoate, corporal or incorporeal.'"[198] Therefore the state had an inchoate property right to new land created by lava flow when the Republic of Hawai'i ceded its lands in 1898; a right that ripened when the land was created and was automatically under state ownership.[199]

The Attorney General then referred back to *Napeahi v. Paty*, a case in which the Ninth Circuit Court of Appeals applied the same understanding of inchoate property interests ceded to the United States by the Republic of Hawai'i to newly submerged shoreline eroded from private property.[200] The Ninth Circuit in *Napeahi*, relying on *Zimring* and *Sotomura*, found that:

> There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to conclude that if [the private property] became submerged land because of natural erosion after 1898 and before being altered

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by kama'āina testimony and that inland erosion of private property transfers title to state).

[194] 921 F.2d 897, 903 (9th Cir. 1990).

[195] State of Haw. Att'y Gen., Opinion Letter on Shoreline Encroachment Easements 13 (Dec. 11, 2017).

[196] *Id.* at 12 (citing 58 Haw. 106, 566 P.2d 725 (1977)).

[197] *Id.*

[198] *Id.* (citing 58 Haw. at 122–23, 566 P.2d at 736).

[199] *Id.* Inchoate means a "legal right or entitlement that is in progress and is neither ripe, vested no perfected." *Inchoate Definition*, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/I/Inchoate.aspx (last visited Apr. 19, 2020).

[200] Opinion Letter on Shoreline Encroachment Easements, *supra* note 192, at 12–13 (citing 921 F.2d 897, 903 (9th Cir. 1990)).

> by the actions of the property owner, then that property would be ceded lands *subject to the terms of the trust.*[201]

Based on the foregoing, the Hawai'i Attorney General found that:

> We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it *by erosion or sea level rise*. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property . . . [202]

Notably, the Ninth Circuit in *Napeahi* explicitly found that the newly ripened state shoreline land was subject to the terms of the ceded land trust and therefore, the state is bound to care for it under the public trust doctrine.[203] In light of *Napeahi*, the Attorney General explicitly considered shoreline erosion and sea level rise as the forces that may cause the state's inchoate interest in the private land to ripen.[204]

The Attorney General Opinion also concluded that there are no "viable federal [takings] claims" associated with the shoreline erosion because "the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land."[205] Relying on and quoting *Lucas v. South Carolina Coastal Council*, discussed *infra*, the Attorney General found that there is no viable federal taking claim because "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with . . . thus there is no taking."[206] The question of whether there is a viable regulatory taking caused by gradual change in property ownership due to erosion is a separate issue from the one which this article addresses.[207] Namely, whether it is a taking if the City eliminates the hardship variance in Chapter 23 to fulfill its duties under the public trust doctrine and denies a coastal property owner the right to build an artificial shoreline hardening measure or a structure within the shoreline setback.

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[201] 921 F.2d at 903 (emphasis added).

[202] Opinion Letter on Shoreline Encroachment Easements, *supra* note 192, at 13 (emphasis added).

[203] *See* 921 F.2d at 903.

[204] Opinion Letter on Shoreline Encroachment Easements, *supra* note 192, at at 13.

[205] *Id.* at 15.

[206] *Id.* at 15–16 (quoting 505 U.S. 1003, 1027 (1992)).

[207] *Id.* at 15 (quoting 505 U.S. at 1027).

IV. THE CITY AND COUNTY OF HONOLULU'S PUBLIC TRUST DUTIES AND THE PUBLIC TRUST DOCTRINE EXCEPTION TO REGULATORY TAKINGS CHALLENGES

A. Public Trust Doctrine Exception to Regulatory Takings Challenges

In *Lucas v. South Carolina Coastal Commission*, the United States Supreme Court re-examined the boundaries of the regulatory takings doctrine under the Fifth and Fourteenth Amendments, originally interpreted by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[208] In 1986, plaintiff David Lucas purchased two vacant beachfront properties in South Carolina, on which Lucas intended to build single-family homes.[209] Two years later, the South Carolina Legislature passed the Beachfront Management Act,[210] which rendered Lucas's two beachfront parcels useless because the law prevented the erection of permanent habitable structures on the property.[211] The Court was asked to decide whether the act's dramatic effect on Lucas's property use went so far as to be considered a taking under the Fifth and Fourteenth Amendments and therefore required the payment of just compensation.[212]

Justice Antonin Scalia wrote for the Court and held that where a government regulation of real property forces a landowner to "sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[213] But Justice Scalia made sure to clarify that the government is not required to pay just compensation "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the property owner's] title to begin with."[214] Justice Scalia recognized that American property owners "necessarily expect" the government to regulate their land under states' police power and therefore are limited by a state's property law and the bundle of rights based on state law that existed when they acquired title to the property.[215] Justice Scalia wrote that any state restrictions on the scope of property ownership must be firmly rooted in the

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[208] *Lucas*, 505 U.S. 1003; Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

[209] 505 U.S. at 1006–07.

[210] *Id.* at 1007. Many states enacted coastal zone management acts after the federal government passed the CZMA in 1972. Before the Beachfront Management Act at issue in *Lucas*, South Carolina had already passed its own complying Coastal Zone Management Act in 1977.

[211] *Id.*

[212] *Id.*

[213] *Id.* at 1019.

[214] *Id.* at 1027.

[215] *Id.*

"background principles of the State's law of property and nuisance already place[d] upon land ownership" and therefore, any takings claim by landowners would face the same result in court whether the action was brought by private parties or the state.[216]

A state's law of nuisance is regarded as the clearest exception to *Lucas* regulatory takings exception framework,[217] and in fact, Justice Scalia offered distinct examples.[218] Less developed is what qualifies as a sufficient background principle.[219] But based on recent scholarship, it is accepted that at least three sources of state property law may qualify for the *Lucas* exception, including statutory law, state custom, and state public trust doctrine.[220] While newly created statutory rights are least likely to qualify as sufficient background principles, state custom and public trust are "clearly appropriate candidates for identification as categorical takings exceptions."[221] The rights of the public under the public trust doctrine are "on a footing similar to an easement, leasehold, covenant burden, license, or other recognized private property right in the land of another: a limitation or restriction on the title of and, usually, use by the landowner."[222]

One modern commentator discussing the importance of the public trust doctrine post-*Lucas*, Professor Hope M. Babcock, stated that the public trust doctrine "has shown enormous vitality and flexibility in the modern era."[223] Professor Babcock noted most American states have found that

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[216] *Id.* at 1029.

[217] David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (MIS)use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 339 (2002).

[218] *Lucas*, 505 U.S. at 1029–30. ("[T]he owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.")

[219] Callies & Breemer, *supra* note 218, at 340–41 (discussing the background principles of state law as an exception to the *Lucas* regulatory takings analysis).

[220] *Id.* at 341 ("[I]t is now clear that at least three sources of state property restrictions may qualify as background principles within the meaning of *Lucas:* statutory law existing prior to the acquisition of land, custom, and public trust." (footnotes omitted).

[221] *Id.* at 369.

[222] *Id.*

[223] Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches* 19 HARV. ENVTL. L. REV. 1, 37 (1995) (footnotes

state governments may use the public trust doctrine to restrict "actions that adversely affect trust resources" but that only a few states had imposed affirmative duties to protect trust resources for the public.[224] Contrasting the public trust doctrine to common law nuisance, Professor Babcock acknowledged that the public trust doctrine "does not require the courts to balance public and private interests" because "[o]nce a public trust interest is found in property on behalf of the sovereign, that interest is dominant over any private interest."[225] Summarizing the importance of each state's public trust doctrine after the Supreme Court of the United States' decision in *Lucas*, Professor Babcock wrote:

> The doctrines of custom and public trust could thwart the decision's preference for private property rights by underscoring the public's superior right to access and use certain resources, but this is not as destabilizing as it sounds because both common law doctrines are a reflection of public expectations.
>
> The most significant change *Lucas* has made in takings jurisprudence is to shift its focus to the states. The content of the new takings paradigm established in *Lucas* will be defined by each state's common law of nuisance and property. This presents a unique opportunity to merge the laws of ecology with the laws that govern the use and disposal of property. Even with the possibility of significant state-to-state variation, one would nevertheless expect common holdings to emerge affirming the need to preserve critical ecosystems like wetlands and barrier beaches because of public understandings about the importance of those systems. How successfully the new common law takings jurisprudence will now fulfill property owners' expectations about their bundle of rights in the twentieth century awaits *Lucas*' state progeny.[226]

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omitted).

[224] *Id.* at 45.

[225] *Id.* at 46–47.

[226] *Id.* at 67 (footnotes omitted). Another recent scholar suggested using the public trust doctrine and rolling easements in the coastal zone to prepare for sea level rise on the Atlantic Coast. *See* Erica Novack, *Resurrecting the Public Trust Doctrine: How Rolling Easements Can Adapt to Sea Level Rise and Preserve the United States Coastline*, 43 B.C. ENV'T. AFF. L. REV. 575 (2016). Novack argued that prohibited shoreline armoring and required the movement or abandonment of property would allow shorelines to migrate inland naturally, provide notice to coastal property owners, reduce future emergency response costs, reduce future litigation and costs resulting from it, and protect invaluable coastal resources. *See id.* Furthermore, Novack argued that "[b]ecause the public already has a cognizable legal right in the coastline from the public trust doctrine, enacting a rolling easement policy to protect that legal right would not constitute a regulatory taking of private property." *Id.* at 575.

As will be discussed below, the public trust doctrine in Hawai'i is likely the most progressive and expansive in the nation.[227]

B. The State of Hawai'i's Duties To Protect and Preserve Conservation Land under the Hawai'i's Public Trust

1. The State's Duty To Ensure Continued Availability and Existence of Public Trust Resources under Waiāhole I

In 2000, the Hawai'i Supreme Court decided *Waiāhole I*, which is regarded as the "most far-reaching extension[n] of the public trust doctrine" in the United States.[228] The court's expansive interpretation of the public trust doctrine in *Waiāhole I* was, however, firmly rooted in Hawai'i's constitution and indigenous cultural history.[229] Broadly, the court observed that Hawai'i's constitution and history require that when public and private rights compete, the guarantees of the public trust counsel that "any balancing between public and private purposes begins with a presumption in favor of public use, access, and enjoyment."[230]

At issue in *Waiāhole I* was a ditch and tunnel system from the O'ahu's Windward side to the central plain built in the early twentieth century to bring fresh water to a sugar cane plantation owned by Oahu Sugar Company.[231] The ditch and tunnel system collected fresh water naturally stored in the Ko'olau Mountain range that should have flowed through the Waiāhole, Waianu, Waikāne, and Kahana streams but was instead redirected for private interests.[232] This unnatural redirection of fresh water significantly reduced historical stream flows to the detriment of the windward environment and ecosystems including the Kāne'ohe Bay estuary and fishery and the native fishponds reliant upon them.[233] Almost a century later when this action was brought, various private interests still claimed rights to this fresh water but were no longer actively using it.[234]

In 1992, the Commission on Water Resource Management (the "Water Commission") designated the aquifer systems connected to the ditch and

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227 Callies & Breemer, *supra* note 218, at 357.

228 *Id.*

229 In re Waiāhole Ditch Combined Contested Case Hrg. (Waiāhole I), 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000).

230 *Id.* (citing State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977)).

231 *Id.* at 111, 9 P.3d at 423.

232 *Id.*

233 *Id.*

234 *Id.*

tunnel system as management areas that required existing water users and other parties to apply for permits, but the resulting application process was highly contentious.[235] Many parties filed applications for use and petitions for reservation of the fresh water supply including the Waiāhole Irrigation Company, the Hawai'i Department of Agriculture, the Office of Hawaiian Affairs, the Department of Hawaiian Homelands, Kamehameha Schools, Castle & Cook, Inc., and various community groups from O'ahu's windward side.[236] To resolve these competing claims for water, the Water Commission needed to determine who should qualify for water rights because collectively the requests for water "exceeded the flow of the ditch."[237]

In 1995, the Water Commission ordered a combined contested case hearing on all of the permit applications and reservation petitions to determine the rights of applicants, and more importantly to establish interim instream flow standards (IFS)[238] for the negatively affected windward O'ahu streams.[239] The Hawai'i Constitution, State Water Code, and common law guided the Water Commission's decision making, which acknowledged that the fresh water resource was protected under the public trust doctrine and that its ultimate decision must adhere to the Water Commission's duty to protect the resource.[240] The Water Commission found that higher flow volumes had a positive effect on the streams' biological processes and ecology.[241] Specifically, the increased flow flushed out alien species that were harmful to native species, and experts "saw excellent potential for the repopulation of native stream life."[242] Ultimately, the Water Commission permitted over half of the ditch's twenty-seven million gallons of water per day to leeward agricultural and nonagricultural uses, increasing the windward streamflow by almost thirteen million gallons per day, and denied several of the applications for water use.[243]

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[235] *Id.* at 111–12, 9 P.3d at 423–24.

[236] *Id.* at 110–12, P.3d at 422–24.

[237] *Id.* at 112, 9 P.3d at 424.

[238] "These interim IFS were defined as the amount of water flowing in each stream (with consideration for the natural variability in stream flow and conditions) at the time the administrative rules governing them were adopted in 1988 and 1989." *Instream Flow Standards*, STATE OF HAW., COMM'N ON WATER RES. MGMT., https://dlnr.hawaii.gov/cwrm/surfacewater/ifs/.

[239] *Waiāhole I*, 94 Hawai'i at 113, 9 P.3d at 425.

[240] *Id.* at 112–13, 9 P.3d at 424–25.

[241] *Id.* at 112–14, 9 P.3d at 424–26.

[242] *Id.*

[243] *Id.* at 118, 9 P.3d at 430.

Several of the applicants who were denied water use permits appealed the Water Commission's decision.[244]

On appeal, the Hawai'i Supreme Court considered many issues in *Waiāhole*. Ultimately, Justice Nakayama writing for the high court commended the Water Commission for the "considerable time and attention it devoted" to deciding the contested case and for its efforts to fulfill its Constitutional duties to conserve and protect a public trust resource by allocating more water to the adversely affected windward streams.[245] Given the "ultimate importance of the matters to the present and future generations of [Hawai'i]," the Supreme Court ruled that the Water Commission needed to work considerably harder "in the critical years ahead if the [Water] Commission is to realize its constitutionally and statutorily mandated purpose."[246] The high court emphasized that the framers of the Hawai'i Constitution and the legislature intended for the Water Commission to be "an instrument for judicious planning and regulation, rather than crisis management."[247] Recognizing the ecological importance of increased freshwater flow on the windward side, the court vacated the Water Commission's decision in part and remanded the matter for the Water Commission to determine, *inter alia*, the proper instream flow standards for the Windward streams using the best information available.[248]

In its opinion, the Hawai'i Supreme Court gave the Water Commission numerous instructions. With respect to the public trust doctrine, Justice Nakayama clarified that the State Water Code ("Code") did not "supplant" or "override" the Commission's duties under the public trust doctrine.[249] The court recognized that the Code and the public trust doctrine shared "similar core principles" but that the public trust doctrine justifies the existence of the Code and ultimately must continue "to inform the Code's interpretation, define its permissible 'outer limits.'"[250] Justice Nakayama reminded the Water Commission of the value of the trust resource to Native Hawaiians and the "inescapable" responsibility of the sovereign to "guarantee public rights" to the resource.[251] The court highlighted the public trust doctrine's dynamic nature, which "does not remain fixed for all

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[244] *Id.*
[245] *Id.* at 189, 9 P.3d at 501.
[246] *Id.*
[247] *Id.*
[248] *Id.* at 189–90, 9 P.3d at 501–02.
[249] *Id.* at 133, 9 P.3d at 445.
[250] *Id.*
[251] *Id.* at 135, 9 P.3d at 447.

time, but must conform to changing needs and circumstances."[252] Justice Nakayama explained that private uses of public trust resources may produce some public benefits that may be weighed when balancing competing public and private interests, but, ultimately, private uses are not "a protected 'trust purpose'" and have lesser status.[253] Justice Nakayama continued, writing that "if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time."[254]

With respect to the its duties under the public trust doctrine, the court found that the Water Commission "has both the authority and duty to preserve the rights of present and future generations" in the trust resource and that this authority "precludes any grant or assertion of vested rights to use [the trust resource] to the detriment of public trust purposes."[255] Further, the public trust doctrine "empowers the state to revisit prior" lawfully permitted private uses of the trust resource, "even those made with due consideration of their effect on the public trust."[256] Under Hawai'i's constitution, the state and its subsidiaries "bea[r] an 'affirmative duty to take the public trust into account in the planning and allocation of [trust resources], and to protect public trust uses whenever feasible.'"[257] The *Waiāhole* court agreed with the Water Commission's conclusion that the public trust "'prescribes 'a higher level of scrutiny'"[258] for private use of trust resources but clarified that "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust."[259] Given this ultimate burden, the Hawai'i Supreme Court unequivocally distinguished that the state and its subdivisions as the primary guardian of public rights under Article XI, section 7 of the state constitution:

> [M]ust not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the

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[252] *Id.*

[253] *Id.* at 138, 9 P.3d at 450.

[254] *Id.* at 138, 9 P.3d at 450 (citing Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 312 (1982)) ("[U]nderlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.").

[255] *Id.* at 141, 9 P.3d at 453 (citing *Robinson*, 65 Hawai'i at 677, 658 P.2d at 312).

[256] *Id.* (citing Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cty., 685 P.2d 709, 728 (Cal. 1983)).

[257] *Id.* (citing *Nat'l Audubon Soc'y*, 685 P.2d at 728, 189 Cal.Rptr. at 365).

[258] *Id.* at 142, 9 P.3d at 454 (2000) (citing *Nat'l Audubon Soc'y*, 685 P.2d at 189 Cal.Rptr. at 365).

[259] *Id.*

> initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process.[260]

Taking into account this affirmative obligation under the public trust doctrine, the court went on to clarify that the doctrine "compels the state duly to consider the cumulative impact of existing and proposed" private uses of trust resources on the purpose of the trust and to mitigate the impact on the trust resource.[261]

2. Duty To Monitor and Regulate Third Parties in Control of Public Trust Lands under Pōhakuloa

In 2019, the Hawai'i Supreme Court decided *Ching v. Case* (*Pōhakuloa*), yet another important decision defining the State and its subdivisions' duties under the Hawai'i Constitution and the public trust doctrine.[262] *Pōhakuloa* centered on a lease agreement between the State of Hawai'i Department of Land and Natural Resources (DNLR or the Department) and the United States Military for three expansive tracts of land on Hawai'i Island.[263] The parties entered into the lease in 1964 for a period of sixty-five years (expiring in 2029).[264] One of the three tracks of land was 22,900 acres and was "contained within the Pōhakuloa Training Area" which was to be used by the United States for military purposes.[265] The lease allowed the United States "unrestricted control" of the leased tracts of land and established "several duties that the United States is obligated to fulfill during the course of the lease."[266] Most importantly, the United States is required to "'make every reasonable effort to . . . remove and deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the [] public, whichever is sooner.'"[267] Additionally, the United States agreed to "'take reasonable action during its use . . . to prevent

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[260] *Id.* at 143, 9 P.3d at 455 (citing Save Ourselves, Inc. v. La. Env't Control Comm'n, 452 So.2d 1152, 1157 (La. 1984) (citing Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1119 (D.C. Cir. 1971); Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 620 (2d Cir. 1965))).

[261] *Id.*

[262] *See* Ching v. Case (*Pōhakuloa*), 145 Hawai'i 148, 152, 449 P.3d 1146, 1150 (2019).

[263] *Id.*

[264] *Id.* The price of the lease was for the nominal amount of one dollar. *Id.*

[265] *Id.* "The [Pōhakuloa Training Area] The PTA as a whole is approximately 134,000 acres and includes land ceded to the United States military by Presidential and Governor's Executive Orders, land purchased by the United States in fee simple from a private owner, and land that is leased from the State. *Id.* at n.2.

[266] *Id.*

[267] *Id.* (quoting para. 9 of State General Lease No. S-3849).

unnecessary damage to or destruction of vegetation, wildlife and forest cover, geological features and related natural resources" and to 'avoid pollution or contamination of all ground and surface waters and remove or bury all trash . . . or other waste.'"[268] The lease also articulated DLNR's rights and duties, including a corresponding duty to remove or bury trash when the land was used by the public and DLNR's right to enter the leased lands to reasonably conduct operations that would not unduly interfere with the military activity.[269]

In 2014, two Native Hawaiian cultural practitioners and beneficiaries of the ceded land trust, Clarence Ching and Maxine Kahaulelio, brought an action in the State Circuit Court of the First Circuit against DLNR, Chair Case, and the Board of Land and Natural Resources alleging that the State had breached its duties under the public trust doctrine to protect and maintain the trust lands.[270] The Plaintiffs did not allege that the United States had breached the terms of the lease "but rather that the State has reason to believe that the lease terms may have been violated and has a trust duty to investigate and take all necessary steps to ensure compliance with the terms of the lease."[271] The circuit court agreed with the Plaintiffs' allegations and found that the State had in fact breached its duties under the public trust by failing to take a proactive role in managing the trust lands, failing to inspect the land, and failing to consider the cumulative impacts of the United States' use of the land.[272]

On appeal to the Hawai'i Supreme Court, the litigants brought forward many procedural and administrative issues embedded in *Pōhakuloa*.[273] Ultimately, the court also agreed with the Plaintiffs that the State had breached its duties under the public trust doctrine.[274] Writing for a unanimous court, Justice Richard Pollack illuminated the State's proper role as the guardian of public trust land.[275] With regard to the public trust doctrine, Justice Pollack first clarified that it was not necessary to determine whether the United States had breached any portion of the lease or its duties under it to determine that DLNR had not properly fulfilled its own duties as

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[268] *Id.* at 152–53, 449 P.3d at 1150–51 (quoting para. 14 of State General Lease No. S-3849).

[269] *Id.* at 153, 449 P.3d at 1151 (citing paras. 18–19 of State General Lease No. S-3849, which also requires that DLNR must first obtain advance clearance from the United States before entering the land).

[270] *Id.* at 154, 449 P.3d at 1152.

[271] *Id.*

[272] *See id.* at 164, 449 P.3d at 1162.

[273] *See id.* at 169–185, 449 P,3d at 1167–83.

[274] *See id.* at 186, 449 P.3d at 1184.

[275] *See id.* at 185–86, 449 P.3d at 1183–84.

the trustee of the public trust lands.[276] The court went on to remind DLNR that the "most basic aspect of the State's trust duties is the obligation 'to protect and maintain the trust property and regulate its use.'"[277]

Justice Pollack emphasized that the State's duty to monitor the trust land under the control of a third party is fundamental and critical if the State intends to ensure that the trust lands are not degraded or "'fall into ruin on [its] watch.'"[278] Further, the unanimous court maintained that:

> To hold that the State does not have an independent trust obligation to reasonably monitor the trust property would be counter to our precedents and would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs.[279]

Confirming the conclusion of the circuit court, Justice Pollack stated that the State's obligation to reasonably monitor trust lands "inherently includes a duty to make reasonable efforts to monitor third parties' compliance with the terms of agreements designed to protect trust property."[280] Overall, *Pōhakuloa* affirmed the Hawai'i Supreme Court's willingness to defend the fundamental public trust principles embedded in the State Constitution and shaped by Hawaiian history, in a modern era when there are many competing interests for trust lands and resources.[281]

V. ELIMINATION OF THE HARDSHIP VARIANCE IN CHAPTER 23

A 2009 law review article by Madeline Reed, examined shoreline hardening in Hawai'i, its negative effect on coastal processes, and variances granted to coastal property owners.[282] Reed argued that Hawai'i counties should allow shoreline development but forbid damaging coastal

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[276] *Id.* at 170, 449 P.3d at 1168.

[277] *Id.* (quoting State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977)).

[278] *Id.* (quoting United States v. White Mt. Apache Tribe, 537 U.S. 465, 475 (2003)).

[279] *Id.* at 177–79, 449 P.3d at 1175–77 (comparing Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006) (holding that the Department of Health's article XI, section 1 public trust duty to protect coastal waters required it to "not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented." (emphasis omitted)).

[280] *Id.* at 177-78, 449 P.3d at 1175-76 (comparing *Kelly*, 111 Hawai'i at 231, 140 P.3d at 1011).

[281] *See id.*

[282] *See* Madeline Reed, *Seawalls and the Public Trust: Navigating the Tension between Private Property and Public Beach Use in the Face of Shoreline Erosion*, 20 FORDHAM ENVTL. L. REV. 305 (2009). Reed is a 2009 graduate of the University of Hawai'i, William S. Richardson School of Law and holds an Environmental Law Certificate.

armoring.[283] After discussing Justice Scalia's exceptions in the *Lucas* regulatory takings investigation, Reed concluded "Public Trust Principles will probably be insufficient to defend government against most total takings claims based on shoreline setbacks."[284] Reed acknowledged, however, that "the primary advantage of basing shoreline management practices on the Public Trust Doctrine is that it trumps takings claims."[285] In contrast to Reed argument, this article concludes that Hawai'i's public trust doctrine would sufficiently defend the City and County of Honolulu from total or partial regulatory takings claims under the United States Supreme Court's public trust doctrine exception in *Lucas*.[286]

In a recent and soon-to-be published paper, Stacey Gray similarly analyzed Honolulu's coastal setback ordinance and the variance allowance for coastal hardening measures.[287] Gray proposed a thoughtful and novel approach for citizens to challenge the issuance of coastal hardening measures by using another provision in Article XI of the Hawai'i Constitution which guarantees "a substantive due process right to every citizen to enforce environmental shoreline setback laws."[288] Differing from Gray's argument, this article reinforces the proposition that it is first and foremost the City's duty—not Hawaiian citizens'—as a trustee of public trust lands and resources to preserve and protect O'ahu's sandy beaches by eliminating the hardship variance for coastal armoring and damaging coastal development.[289] Hawai'i's citizens face an undue burden to enforce their environmental rights using the Hawai'i Constitution because "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust."[290]

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[283] *Id.* at 337 ("It is good policy for government to allow coastal development, but then require landowners to forfeit structures if the shoreline encroaches on them, rather than save them at the expense of the *jus publicum*.")

[284] *Id.* at 332.

[285] *Id.* at 335.

[286] *Contra id.* at 332.

[287] *See* Stacey F. Gray, *The Risks of Agency Inaction on Hardship Variance Policy in Hawai'i* (2018) (unpublished) (on file with author). Gray is a 2019 graduate of the University of Hawai'i, William S. Richardson School of Law and holds an Environmental Law Certificate.

[288] *Id.* at 58 (2018) (citing In re Application of Maui Elec. Light Co., 141 Hawai'i 249, 260, 408 P.3d 1, 12 (2017)). In its entirety, Article XI, section 9 of the Hawai'i Constitution states: "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art. XI, § 9.

[289] *Contra id.*

[290] In re Waiāhole Ditch Combined Contested Case Hrg. (Waiāhole I), 94 Hawai'i 97,

Since this article was first drafted, the hardship variance in the City's shoreline setback came under increased scrutiny after the recent purchaser of a notable property in Waimānalo—a property associated with President Barack Obama—sought a hardship variance to repair and expand an existing seawall.[291] The variance application faced significant opposition at the Department of Planning and Permitting's public hearing on the matter in early October of 2020 and made headlines with community groups going so far as to argue that the public trust doctrine supported removal of the seawall altogether.[292] Two months after the hearing, the City granted the controversial hardship variance, likely allowing the property to continue to destroy a beautiful historic beach fronting a Native Hawaiian Honu pond.[293]

142, 9 P.3d 409, 454 (2000); *Compare* Gray, *supra* note 289 at 58.

[291] Sophie Cocke, *Obama and the Beach House Loopholes*, HONOLULU STAR ADVERTISER (Aug. 15, 2020) (The property had one major problem though: a century-old seawall. While the concrete structure had long protected the estate from the sea, it now stood at odds with modern laws designed to preserve Hawaii's natural coastlines. Scientists and environmental experts say seawalls are the primary cause of beach loss throughout the state. Such structures interrupt the natural flow of the ocean, preventing beaches from migrating inland.") https://www.propublica.org/article/obama-and-the-beach-house-loopholes.

[292] Sophie Cocke, *Seawall Expansion Along Property Tied to Former President Obama Runs into Strong Opposition*, HONOLULU STAR ADVERTISER (Oct. 3, 2020) ("Plans to overhaul a seawall to protect a Waimanalo property with ties to former President Barack Obama ran into public opposition on Friday, with the Oahu chapter of the Surfrider Foundation going so far as to advocate for the complete removal of the wall so that the beach could be restored . . . Doorae Shin, coordinator for the local Surfrider Foundation, told city officials during a public hearing on Friday that they would be violating their fiduciary duty under the Hawaii Constitution to preserve and protect public trust resources if they grant the exemption.") https://www.staradvertiser.com/2020/10/03/hawaii-news/seawall-expansion-along-property-tied-to-former-president-obamaruns-into-strong-opposition/.

[293] Sophie Cocke, *Oceanfront Property Tied to Obama Granted Exemption from Hawaii's Environmental Laws*, HONOLULU STAR ADVERTISER (Nov. 18, 2020) ("Officials in Honolulu have granted the developers of a luxury, oceanfront estate tied to Barack Obama a major exemption from environmental laws designed to protect Hawaii's beaches."). To be certain, news articles referencing the City's variance process have often referred to the process as an "exemption," but this is not the case and in this article's author's opinion undeservedly shifts responsibility from the government. The variance process is de facto and de jure complying with the City's laws and regulations, and it should be clear that the City needs to change its laws and practices, as opposed to making it appear as though private parties are just clever or sophisticated enough to circumvent regulation.

A. The City and County of Honolulu's Duty to Conserve and Protect Public Trust Land and Resources by Eliminating the Hardship Variance in Chapter 23

Former Mayor Caldwell publicly called for a moratorium "on the construction of new sea walls in vulnerable areas," stating that it was one of his top personal priorities.[294] In addition, Mayor Caldwell has discussed his ongoing work with the City Climate Change Commission on amending Chapter 23 although Caldwell failed to formally adopt the Climate Commission's recommendations on the matter during his incumbency.[295] Dr. Chip Fletcher, an expert on coastal geology and himself a member of the Commission, characterized the hardship variance in Chapter 23 as "fatal" to O'ahu's sandy beaches and described Mayor Caldwell's proposed sea wall moratorium as being "probably the strongest coastal conservation step in the nation that I know of."[296] The Commission's final guidance to the City on amending Chapter 23, adopted in December 2019, recommends that the City:

> **Carefully review and revise Section 23-1.8 "Criteria for granting a variance.** It is important to acknowledge the established science regarding shoreline hardening. Efforts to stop coastal erosion such as a sea wall or revetment will damage, narrow, and *eventually destroy the beach*. A wall of any type will also cause flanking (accelerated erosion to a neighboring property), as well as wave reflection (energy transmitted seaward by waves that "bounce" *off* a wall) that disrupts incident waves, benthic ecosystems, and water quality.[297]

This recommendation suggests it is established scientifically that shoreline hardening "will damage, narrow, and eventually destroy the beach"[298] but the recommendation does not go far enough to meet the City's responsibility to protect O'ahu's beaches under the public trust doctrine.[299] In addition, it has also been argued that progressive shoreline setbacks themselves offer "no long-term benefit" to resolve the underlying problem of protecting public beaches from private artificial shoreline

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[294] HNN Staff, *supra* note 39.

[295] *Id.*

[296] *Id.* (quoting Dr. Chip Fletcher) (internal quotation marks omitted); Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

[297] CITY AND CTY. OF HONOLULU CLIMATE CHANGE COMM'N, *supra* note 94 (emphasis added).

[298] *Id.*

[299] *See* Ching v. Case (*Pōhakuloa*), 145 Hawai'i 148, 165–178, 449 P.3d 1146, 1163–76 (2019); In re Waiāhole Ditch Combined Contested Case Hrg. (*Waiāhole I*), 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000)

hardening but instead "only delay the clash of public and private interests."[300] With the City's express purpose of amending Chapter 23, it must meet the demands of the Hawai'i public trust doctrine and protect our trust resources.[301]

The HCZMA and Chapter 23 taken together do not "supplant" or "override" the City and County of Honolulu's duty under the public trust doctrine.[302] Contending that acting within the statute and ordinance is especially harmful in light of the prevailing scientific consensus that the HCZMA and Chapter 23 have failed to fulfill the purpose of protecting Hawai'i's beaches,[303] and the view in the scientific community that shoreline hardening and variances for coastal hardening and development are "absolutely fatal" to natural coastal processes.[304] The City's duties under the public trust doctrine to conserve and protect O'ahu's beaches are distinct from its obligations under the HCZMA, including its ability to enact Chapter 23.[305] Further, the Hawai'i Supreme Court's decision in *Waiāhole* confirms to the proposition that acting withing the statute and ordinance does not absolve the City of responsibility for allowing O'ahu's beaches to decline so long as the City was acting lawfully within the HCZMA.[306] In fact, the court ordered that the public trust doctrine "justifies the existence" of the HCZMA and Chapter 23 and the trust should be the basis for interpretation of Chapter 23 to "define its outer limits."[307]

Before the reality of sea level rise was undeniable and before there was scientific consensus that artificial shoreline hardening on sandy beaches causes beach erosion, it may not have been unreasonable for the City to permit coastal property owners to build walls within the shoreline setback.[308] But given what scientists and policymakers have known now for

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[300] Reed, *supra* note 284, at 334 (2009).

[301] CITY AND CTY. OF HONOLULU CLIMATE CHANGE COMM'N, *supra* note 94; *see Pōhakuloa*, 145 Hawai'i at 165-78, 449 P.3d at 1163-76; *Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445.

[302] *See Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445.

[303] Summers, Fletcher, Spirandelli, D. et al., *supra* note 40, at 427–443.

[304] Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

[305] In re Conservation Dist. Use Application (*Mauna Kea II*), 143 Hawai'i 379, 416, 431 P.3d 752, 789 (2018) (Pollack, J., concurring) ("Thus, although some congruence exists, [the Board of Land and Natural Resources'] and the University of Hawai'i's public trust obligations are distinct from their obligations under [Hawai'i's administrative rules].").

[306] *See Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445 (finding the Commission on Water Resource Management had breached their duties under the public trust although they lawfully abided by the State Water Code).

[307] *See id.* at 133, 9 P.3d at 445.

[308] Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

decades, the dynamic nature of the public trust doctrine dictates that the City's response must "conform to changing needs and circumstances."[309] The *Waiāhole* Court recognized that to fulfill its duties under the public trust doctrine, the state and its subdivisions would undoubtedly need to make difficult choices in the future during periods when trust resources were scarce.[310] State officials have every right to be frustrated with the situation at hand because in large part this is the result of poor or no planning by prior policymakers combined with accelerating global climate change.[311] Sam Lemmo, was quoted recently as being frustrated with the current situation, asking "[w]hy didn't they think about [coastal erosion] when they built roads, sewage treatment plant and residential communities?"[312] Referring to a state report written during the tenure of Governor Lingle, who has been out of office for over a decade, Lemmo frustratingly stated that "there has been little to no planning for long-term shoreline change" in the interim and the state's approach is "almost entirely reactionary and contentious."[313] Here, it is clear that O'ahu's sandy beaches are shrinking and the public trust doctrine mandates that the City has an "inescapable" responsibility to "guarantee public rights" and access to O'ahu's sandy beaches as a protected trust resource.[314]

Another related issue of growing importance is what to do about the artificial shoreline hardening that already lines "almost 30 percent of all present-day sandy shoreline on O'ahu."[315] The City must recognize that private landowners' use of the beaches and the sand in the backshore has a lesser status than public use and as a private use is not "a protected 'trust purpose.'"[316] Beach loss on O'ahu is exacerbated by private landowners but the public trust "empowers the [City] to revisit prior" lawfully-permitted artificial shoreline hardening measures—"even those made with due

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[309] *See Waiāhole I*, 94 Hawai'i at 135, 9 P.3d at 447.

[310] *Id.* at 142, 9 P.3d at 454.

[311] Sophie Cocke, *Hawaii's Eroding Coastline Puts Homeowners and Government At Odds*, HUFFINGTON POST (Jan. 3, 2014) https://www.huffpost.com/entry/hawaii-eroding-coastline_n_4537537.

[312] *Id.* (quoting Sam Lemmo) (internal quotation marks omitted).

[313] *Id.* (quoting Sam Lemmo) (internal quotation marks omitted).

[314] *See Waiāhole I*, 94 Hawai'i at 135, 9 P.3d at 447.

[315] *40% of O'ahu Beaches Could Be Lost by Mid-Century*, UNIV. OF HAW. NEWS, https://www.hawaii.edu/news/2020/09/21/oahu-beaches-lost-mid-century/ (Sept. 21, 2020) (quoting Tiffany Anderson, co-author of the main study).

[316] *Waiāhole I*, 94 Hawai'i at 138, 9 P.3d at 450 ("Although its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction.").

consideration of their effect on the public trust."[317] Whether this mandates that the City require seawalls that have proven to adversely affect the beach process be removed raises many issues.[318] What is clear is that the City bears an "affirmative duty" to protect O'ahu's sandy shorelines for public use "whenever feasible," and a necessary component to ensure beaches can naturally adjust to sea level rise is by eliminating the possibility of private shoreline hardening to allow the shoreline to access its sand reserves in the backshore and shift mauka as necessary.[319]

The public trust doctrine "prescribes 'a higher level of scrutiny'" for private coastal owners hardening of O'ahu's beaches, but the burden ultimately lies with both the private landowners and the City to justify that shoreline hardening promotes the purposes protected by the public trust – a contention that coastal processes specialists emphatically discredit as

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[317] *See id.* at 141, 9 P.3d at 453 (citing Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cty., 685 P.2d 709, 728 (Cal. 1983)).

[318] *See id.* In my opinion, a scientific analysis should be done of the coastal processes at each private artificial shoreline hardening measure on O'ahu. For those that have adversely affected beach process, consideration should be given to the feasibility of a natural beach reforming, but by and large the City should order walls with adverse effects on coastal processes to be removed to allow a beach to reform. Regulatory takings claims are inherently factual inquiries, and therefore it must be conclusive that a natural sandy beach would reform. *See* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978) (discussing ad hoc regulatory takings inquiries).

Many question why Waikīkī should be allowed to be artificially hardened to the degree that it is, and why it should continually receive beach nourishment, and futhermore whether this is a clear case of the state protecting the deep pockets of the tourism industry. *See* Mindy Pennybacker, *As Rising Seas Invade Waikiki Resorts, State Proposes Adding More Groins*, HONOLULU STAR ADVERTISER (Mar. 8, 2021) https://www.staradvertiser.com/2021/03/08/hawaii-news/as-rising-seas-invade-waikiki-resorts-the-state-proposes-adding-more-groins/. However, as is widely known, Waikīkī is not a natural sandy beach, and if left unhardened, a natural beach would not reform. Therefore, there is no rational public trust doctrine application of this article's argument to Waikīkī and other adjacent or similar areas.

In fact, it is arguable that it is in the public interest to support continual strengthening of hardening in conjunction with periodic renourishment of the beaches in Waikīkī because of the important tax revenue that is directly attributable to Waikīkī beach. *See* Tarui, Peng, & Eversole, *supra* note 27. Furthermore, by encouraging visitors to remain in Waikīkī, it relieves less resilient beaches of extra stress from increased visitor exploitation and thus serves the public interest. For the same reason, it is is arguable that the public interest supports the temporary hardening of the coastal highways on O'ahu's Windward side and North Shore until a long term solution can be established to allow people to continue to access and live in those areas.

[319] *Waiāhole I* (citing *Nat'l Audubon Soc'y*, 685 P.2d at 728, 189 Cal.Rptr. at 365); Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

having no merit.[320] The City is the primary guardian of O'ahu's beaches and cannot rightfully relegate itself to "the role of a mere 'umpire passively calling balls and strikes'" for private coastal landowners.[321] Instead, the City must "take the initiative in considering, protecting, and advancing public rights" to O'ahu's beaches at "every stage of the planning and decision making process."[322] The public trust doctrine compels the City "duly to consider the cumulative impact of existing and proposed" artificial hardening measures permitted under the hardship variance in Chapter 23.[323] Beaches such as Lanikai on the windward side of O'ahu, which have topped lists of the world's best beaches are now facing an uncertain future because of the cumulative impact of many seawalls which caused flanking and erosion.[324] Dr. Fletcher posits that "by mid-century we are looking at a future where we are down to just a handful of healthy beaches and by the end of the century those will be disappearing, or gone already."[325]

As discussed, the state holds "an inchoate right to land that may pass to it by erosion or sea level rise" underneath private shoreline property in the backshore of public trust land.[326] Further, the increasing rate of sea level rise will unquestionably lead to the ripening of the state's inchoate interest in this public trust land in the foreseeable future.[327] As a political subdivision of the state, the City must heed the instructions of the Hawai'i Supreme Court regarding regulation of third parties in control of public trust land in the court's recent *Pōhakuloa* decision.[328] First, it is not necessary for the City to determine that shoreline property owners have violated the law to be able to determine whether the City has fulfilled its obligations under the public trust doctrine.[329] The "most basic aspect of the

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[320] *See Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454; Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

[321] *See Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455 (citing Save Ourselves, Inc v. La. Env't Control Comm'n., 452 So.2d 1152, 1157 (La. 2000).

[322] *See id.*

[323] *See id.*

[324] Sophie Cocke, *Oahu Faces a Future With Far Fewer Beaches*, HONOLULU CIVIL BEAT (Apr. 9, 2015) https://www.civilbeat.org/2015/04/oahu-faces-a-future-with-far-fewer-beaches/.

[325] *Id.* (quoting Dr. Chip Fletcher) (internal quotation marks omitted).

[326] State of Haw. Att'y Gen., *supra* note 196, at 13.

[327] *See* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 12.

[328] HAW. CONST. art. XI, § 1; *see* Ching v. Case (*Pōhakuloa*), 145 Hawai'i 148, 449 P.3d 1146 (2019).

[329] *See Pōhakuloa*, 145 Hawai'i at 148, 171, 449 P.3d at 1146, 1169 ("Thus, the State might breach its fiduciary duty by failing to reasonably monitor public ceded lands [and] . . . [s]uch a breach would be complete upon the State's failure to reasonably monitor the ceded land – irrespective of whether the United States actually violated the lease."). Historically in fact, many property owners, or the former owners of the property, have

[City's] trust duties is the obligation to protect and maintain the trust property and regulate its use."[330] It is paramount to the City's duties under the public trust to monitor the state of O'ahu's sandy beaches and regulate the third party owners who are either actively damaging the beach or are in control of the state's inchoate interest in the backshore sand to ensure that the trust lands are not degraded or "fall into ruin on [the City's] watch."[331] As discussed in Section II, beaches are naturally capable of adapting to changing sea levels and erosion, and will shift mauka in response to natural forces.[332] A beach cannot naturally shift mauka, however, if it is impeded by artificial shoreline hardening, permitted with a variance under Chapter 23, and cannot access its reserves in the backshore.[333] The City has an independent duty under the public trust doctrine to monitor and regulate shoreline property owners' control of public trust beach land and it would be a violation of the City's duties "to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs" as the state supreme court warned against in *Pōhakuloa*.[334]

B. Hawai'i's Public Trust Doctrine as an Exception to Regulatory Takings Challenges under the Lucas

Private property rights in the United States are an integral part of American history and tradition.[335] The United States Supreme Court summarized this fundamentally American connection to property in *Murr v. Wisconsin*, recognizing that "[p]roperty rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[336] In competition with this basic American principle is the well-established duty of the government to manage private property rights for

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illegally hardened their shorelines and were later granted after-the-fact permits by the City. Cocke, *Oahu Faces a Future With Far Fewer Beaches*, *supra* note 328.

[330] *See Pōhakuloa*, 145 Hawai'i at 168, 449 P.3d at 1170 (quoting State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977)) (internal quotation marks omitted).

[331] *Id.* (quoting United States v. White Mt. Apache Tribe, 537 U.S. 465, 475) (2003) (internal quotation marks omitted).

[332] Interview with Dr. Charles "Chip" Fletcher, *supra* note 44.

[333] *Id.*

[334] *See Pōhakuloa*, 145 Hawai'i at 168, 449 P.3d at 1170 (comparing Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006)).

[335] Murr v. Wisconsin, 137 S.Ct. 1933, 1943 (2017).

[336] *Id.*

the public good.[337] Balancing these two competing ideals, Justice Holmes in *Pennsylvania Coal Company v. Mahon* concluded that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.[338]

As discussed in Section III, private property rights in the United States have their foundation in state law, and states have the right to shape and define the property rights of private owners.[339] States may define the scope and boundaries of property rights but this power is not unfettered and must leave property owners with some recourse against unreasonable regulations.[340] After describing the relevant exceptions to the categorial regulatory takings rule, the Supreme Court in *Lucas* ruled that it would be unable to decide the issue at hand because the question was "one of state law to be dealt with on remand."[341]

Due to the significance of private property rights in American history and tradition, the City's decision to remove the hardship variance in Chapter 23 is not to be taken lightly.[342] Attorneys at the City's DPP such as George Atta are rightfully worried that "[i]f the county refuses to allow a home damaged by erosion to rebuild, it can be considered an illegal taking of property."[343] However, under Hawai'i law private shoreline hardening for property protection on public trust beaches has a lesser status than the City's "inescapable" responsibility to "guarantee public rights" rights to the beaches, especially when such private use is to the detriment of the trust resource itself.[344]

In *Lucas*, Justice Scalia recognized that shoreline property owners like those on O'ahu "necessarily expect" the City to regulate their property using the state's police power and therefore property owner's on O'ahu are necessarily limited to Hawai'i law including the City's duties under the

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[337] *Id.*

[338] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[339] *Murr*, 137 S.Ct. at 1944–45.

[340] *Id.*

[341] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

[342] *See Murr*, 137 S.Ct. at 1943.

[343] Cocke, *Hawaii's Eroding Coastline Puts Homeowners and Government At Odds*, *supra* note 315 (quoting George Atta) (internal quotation marks omitted). "On the other hand, the county may be legally responsible if it allows a homeowner to rebuild their home, but at the same time doesn't allow her or him to build a seawall." *Id.*

[344] *See* In re Waiāhole Ditch Combined Contested Case Hrg. (*Waiāhole I*), 94 Hawai'i 97, 135–38, 9 P.3d 409, 447–450 (2000).

public trust doctrine when the owner acquired title to their property.[345] To qualify as an exception to the categorical regulatory takings rule in *Lucas*, Justice Scalia held that the state restriction must be firmly rooted in the "background principles of the State's law . . . already in place upon land ownership."[346] The public's rights in Hawai'i under the public trust doctrine are "on a footing similar to an easement, leasehold, covenant burden, license, or other recognized private property right in the land of another: a limitation or restriction on the title of and, usually, use by the landowner."[347] Hawai'i's Attorney General found that there are "no viable federal [takings] claims" associated with the shoreline erosion because "the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land."[348] This same possibility of ripening the state's inchoate interest in the backshore under private land precludes the possibility that private coastal landowners have the right to prevent the inevitable and inherent aspect of their title to the land.[349] Further, the Hawai'i Supreme Court has continually reinforced the precedence public rights under the public trust doctrine with regards to government action as it relates to private rights, and in none of these cases did the court "suppose that the constitutional mandates of the public trust

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[345] *Lucas*, 505 U.S. at 1027 ("It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; '[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.'" (internal citations omitted)).

[346] *Id.* at 1029. Justice Scalia also explicitly recognized other clear title restrictions from a state's law of public and private nuisance. *Id.* ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.").

Shoreline hardening causes and exacerbates erosion on adjacent properties – that is clearly a private nuisance to neighboring property owners. Shoreline hardening also causes and accelerates erosion of public beaches and leads to permanent beach loss – that is clearly a public nuisance for which the government could seek an injunction against a property owner. For these reasons, even without a public trust doctrine argument, artificial shoreline hardening would qualify as an exception to the categorical regulatory takings rule under Hawai'i's law of nuisance. *See Lucas*, 505 U.S. at 1029.

[347] Callies & Breemer, *supra* note 218, at 369.

[348] State of Haw. Att'y Gen., *supra* note 196, at 15.

[349] *See id.*; Ching v. Case (*Pōhakuloa*), 145 Hawai'i 148, 165–78, 449 P.3d 1146, 1163–76 (2019); *Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445.

doctrine were inoperable or unrecognizeable because the parties did not have express notice of the existence of the rights protected under the doctrine."[350]

Understandably, the City is averse to litigation and regulatory takings issues would inevitably be tested by the courts.[351] Unfortunately, if the City does take the initiative to protect public trust beaches on its own, then it is likely that coastal property owners on O'ahu, who almost certainly have more resources than the average beachgoer, will file takings lawsuits against the City.[352] On the other hand, it is not unforeseeable that a Hawaiian citizen could enforce their constitutional environmental rights against the City under Article XI, section 9 of the Hawai'i Constitution if the City does not take action to conserve and protect O'ahu's pristine beaches.[353]

As discussed in Part IV.A, Hawai'i's public trust doctrine dictates that shoreline property owners do not have the right—and never did—to damage a public trust resource and public trust land because the City cannot constitutionally permit property owners a hardship variance under Chapter

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[350] Lāna'ians for Sensible Growth v. Land Use Comm'n, 146 Haw. 496, 508, 463 P.3d 1153, 1165 (2020).

[351] Babcock, *supra* note 224, at 55. ("Few courts have adjudicated the issue of whether application of the [public trust] doctrine will provide a complete defense to a takings claim or, conversely, whether a state can effect a taking of private property when, acting under authority of the public trust doctrine, it limits the use of that property in some way.")

[352] *See* Felkay v. City of Santa Barbara, No. B304964 (Mar. 18, 2021), https://www.courts.ca.gov/opinions/documents/B304964.PDF (finding that a coastal property owner in California who was denied the right to build on his property had suffered a regulatory taking and was entitled to compensation); *see also* Sophie Cocke, *How Wealthy Homeowners Are Endangering Hawaii's Beaches*, *supra* note 119 (discussing how wealthy beachfront homeowners have been able to disregard state orders and requirements for shoreline hardening with almost no consequences).

[353] HAW. CONST. art. XI, § 9. ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.")

In Hawai'i Supreme Court jurisprudence, there is some question as to whether a person could establish standing to meet the injury in fact test with a public trust doctrine property interest alone under Article XI, section 9. *See* Kilakila 'O Haleakala v Bd. Of Land & Nat. Resources, 131 Haw. 193, 213, 317 P.3d 27, 47 (2013) (Acoba, J., concurring) (stating that he would have found community group had standing to entitle it to a contested case hearing under the public trust doctrine in a lawsuit about a large telescope on the summit of Haleakala). However, becuase the HCZMA already claims to protect and preserve beaches, and views to and along the shoreline, a user of O'ahu's beaches would clearly be able to establish an injury for standing purposes, meeting "as defined by laws relating to environmental quality." *See* HAW. CONST. art. XI, § 9.

23 to do so.[354] The situation here on O'ahu is very similar to that in *Lucas*, except in Hawai'i "the logically antecedent inquiry into the nature of [a shoreline property] owner's estate shows that the proscribed use interests *were not* part of [their] title to begin with."[355] Therefore if the City chooses to fulfill its obligations under the public trust doctrine and remove the hardship variance in Chapter 23, coastal property owners will have no viable federal regulatory takings claims against the City.[356]

CONCLUSION

There is scientific consensus that artificial shoreline hardening on O'ahu's beaches is the main cause of beach loss, which will be exacerbated by inevitable sea level rise due to climate change. Unimpeded by artificial hardening, O'ahu's beaches would naturally adapt, access sand reserves in the backshore, and shift inland thus preserving O'ahu's beaches for future generations. Under current practices, the City permits coastal property owners to artificially harden their shoreline with a hardship variance under Chapter 23. However, under the Hawai'i public trust doctrine, the City has a duty to protect beaches as a trust resource and as trust land, and to ensure its availability for future generations. One way to resolve this constitutional failure of the state is clear: to fulfill its duties under the public trust doctrine the City must eliminate the hardship variance in Chapter 23. In doing so, the City will not be liable to coastal landowners for regulatory takings because coastal landowners did not have the right to destroy public trust beaches and the City did not, and does not, have the right to permit landowners to do so.

EPILOGUE

On September 15, 2020, Governor David Ige signed Senate Bill 2060 into law, which has important implications with regard to this article because the measure makes significant changes to the HCZMA.[357] In passing the measure, the Hawai'i Legislature found that, *inter alia*, "the convergence of dense development along shorelines, increasing landward

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[354] *See Pōhakuloa*, 145 Hawai'i at 165-78, 449 P.3d at 1163-76; In re Waiāhole Ditch Combined Contested Case Hrg. (*Waiāhole I*), 94 Hawai'i 97, 133, 9 P.3d 409, 445 (200.

[355] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (emphasis added).

[356] *See id.*; *Pōhakuloa*, 145 Hawai'i at 165–78, 449 P.3d at 1163–76; *Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445.

[357] S.B. 2060, 30th Leg. (Haw. 2020), https://www.capitol.hawaii.gov/session2020/bills/SB2060_HD2_.pdf.

migration of shoreline due to sea level rise and other human and natural impacts, and extensive beach loss fronting shoreline armoring necessitates revision of existing policies and regulations."[358] Basing its analysis on the 2020 study from the University of Hawai'i mentioned in Part II, the state legislature further found that "hardship variances set into motion a cycle of shoreline armoring that causes "flanking", or amplified erosion, on properties adjacent to armored shorelines . . . [and t]his cycle, caused by a combination of beach erosion and coastal policy, has resulted in the narrowing and even elimination of beaches to the extent that they can no longer be used for public recreation or cultural practice."[359]

Senate Bill 2060, now Act 16, made several important changes to the HCZMA. The first change that the legislature made is that it amended the definition of the term "beach" to include "sand deposits in nearshore submerged areas, or sand dunes or upland beach deposits landward of the shoreline, that provide benefits for public use and recreation, for coastal ecosystems, and as a natural buffer against coastal hazards."[360] This change is important for two reasons. First, in response to shifting wind and wave fields, beaches change shape by exchanging sand with adjacent dunes and offshore sand fields.[361] It is canonical among coastal scientists that the physical forces driving beaches to change, are themselves forever changing.[362] Thus, beaches rarely reach a state of equilibrium.[363] Second, sea level rise is not inherently *bad* for a beach; provided that a beach is able to migrate upward and landward, through space and time, as the ocean rises, it should be able to survive sea level rise.[364]

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[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] L.D. Wright, & A.D. Short, *Morphodynamic Variability of Surf Zones and Beaches: A Synthesis*, 56 MARINE GEOLOGY 93–118 (1984), https://doi.org/10.1016/0025-3227(84)90008-2.

[362] *Id.* Wright and Short describe a series of six "morphodynamic states" marking beach transition from fully eroded (dissipative) to accreted (reflective). This model is now foundational to any study of beaches and it does not work unless the beach is defined as extending offshore and onshore of the intertidal zone. *Id.*

[363] *Id.*

[364] Charles H. Fletcher & Anthony T. Jones, *Sea-Level Highstand Recorded in Holocene Shoreline Deposits on Oahu, Hawaii*, 66 JOURNAL OF SEDIMENTARY RESEARCH 632-51 (1996), https://pubs.geoscienceworld.org/sepm/jsedres/article-abstract/66/3/632/98778/Sea-level-highstand-recorded-in-Holocene-shoreline?redirectedFrom=fulltext. On tropical Pacific islands a special condition promotes this process. For reasons related to global geophysics, regional Pacific sea level was higher than today by 0.5-2 m ca. 3-4 kyrs BP. Since then, falling sea level has left deposits of beach sand that form broad coastal plains and which have hosted coastal dune fields prior to anthropogenic development. As modern sea level rise caused by climate change drives a beach to retreat landward, these sand

Further, it is crucial that the HCZMA now protects beaches including the sand deposits in the dune systems, including the sand that lies beneath coastal properties, which would naturally be part of a beach's transition landward if the beach were unimpeded by a seawall.

Another important amendment from Act 16 pertains to rebuilding or replacing currently permitted artificial shoreline hardening measures. The legislature amended HRS section 205A-44 to require that "permitted structures may be repaired, but shall not be enlarged within the shoreline area without a variance."[365] This is crucial because traditionally, private property owners could repair or rebuild decrepit seawalls without applying for a new variance. It is foreseeable that many of the seawalls that line the shorelines today will require replacement or enlargement in the near future, and thus the property owner will be required to acquire a new variance. The question remains at what point does a repair constitute a replacement. Under the existing framework, property owners can repair walls so long as the value of repair is less than half the value of the structure itself—a clear loophole for avoiding the variance process, especially for something so hard to objectively value.[366]

Most significantly, the legislature amended the HCZMA's objectives section at HRS section 205A-2 to "[p]rohibit construction of private shoreline hardening structures including seawalls and revetments, at sites having sand beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities."[367] In conjunction, the legislature also amended HRS section 205A-46 to change the standard for a variance for private facilities to clarify that "a variance to artificially fix the shoreline shall not be granted in areas with sand beaches or where artificially fixing the shoreline may interfere with existing recreational and waterline activities unless the granting of the variance is clearly demonstrated to be in the interest of the general public . . ."[368] Together, these changes mark a significant change in what a private coastal property owner must prove to acquire a variance. By shifting the standard to focus on whether a proposed wall *may* interfere with existing recreational and waterline activities, experts hired by coastal landowners may no longer

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deposits are eroded and incorporated in the beach as a critical resource in the process.

[365] S.B. No. 2060, Act 16 (Haw. 2020).

[366] Email from Dr. Charles "Chip" Fletcher, Assoc. Dean for Acad. Affairs and Professor, Dept' of Earth Sci., Sch. of Ocean and Earth Sci. and Tech., Univ. of Haw. at Mānoa and Vice-Chair, Honolulu Climate Change Comm'n (Apr. 18, 2021, 16:58 HST) (on file with author).

[367] S.B. No. 2060, Act 16 (Haw. 2020).

[368] *Id.*

declare unopposed that a proposed seawall would not adversely affect coastal processes. The significance of this amendment to the variance standard itself is that a layperson can determine whether a proposed wall would interfere with recreational and waterline activities and therefore much harder to prove that a wall would not.

From here, the City must amend Chapter 23 to reflect the amendments made to the HCZMA. It is unclear what effects these amendments have on the main argument of this article, which is that a private coastal property owner on a naturally sandy beach in Hawai'i has not suffered a regulatory taking if the government prevents the owner from building an artificial shoreline hardening structure. It is unclear because the process for a variance still exists, and even if Chapter 23 is amended to reflect the heightened standard, there is still some possibility that a property owner will be able to be permitted a variance to build a wall. From here, the City should amend Chapter 23 to reflect the heightened standard. Furthermore, the City should take the initiative to protect O'ahu's beaches on its own and fulfill its duty under the public trust doctrine by preventing detrimental artificial hardening on O'ahu's beautiful sandy beaches.

Shoreline Hardening in Hawai'i: A Perspective From the Beaches

Samuel J. Lemmo* **

I will begin my commentary on Colin Lee's article[1] by reminding readers that I am not an attorney.[2] However, I am deep in the trenches of what is happening along the coastal areas of Hawai'i. Thus, while my approach and commentary may not follow traditional paths of legal analysis, I believe that various topics must be raised to address the practical realities of climate change driven sea level rise, and the impact that it will have on coastal landowners.

First, the article is terrific. Lee nails the science of sea level rise to a tee.[3] It is refreshing to hear a young, up and coming attorney understand the

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* Administrator of the State of Hawai'i's Department of Land and Natural Resources Office of Conservation and Coastal Lands.

** The Editorial Board thanks William Morrison for his fine preparation of this comment.

[1] Colin Lee, *Eliminating the Hardship Variance in Honolulu's Shoreline Setback Ordinance: The City and County of Honolulu's Public Trust Duties as an Exception to Regulatory Takings Challenges*, 43 U. HAW. L. REV. 464 (2021).

[2] As Administrator, Lemmo is responsible for ensuring the office's oversight of approximately two million acres of private and public lands within the State Land Use Conservation District, as well as the oversight of the Hawai'i's beach and marine lands. Lemmo co-authored the 2017 Hawai'i Sea Level Rise Vulnerability and Adaptation Report. HAWAI'I CLIMATE CHANGE MITIGATION AND ADAPTATION COMM'N, HAWAI'I SEA LEVEL RISE VULNERABILITY AND ADAPTATION REPORT (2017), https://climateadaptation.Hawai'i.gov/wp-content/uploads/2017/12/SLR-Report_Dec2017.pdf.

[3] Lee describes how climate change causes sea levels to rise:

> As the planet heats up, ice from the planet's glaciers and ice sheets near the poles melts and enters the oceans. Then, like an enormous bathtub, sea level on shorelines globally rise with increased volume. In addition, just as air expands when it warms, so does water. Therefore as the oceans warm, seawater expands and that expansion contributes even more to sea level rise globally. This expansion is exacerbated in the equatorial regions of the globe such as Hawai'i, where the waters get relatively warmer on average than in areas closer to the planet's poles.

Lee, *supra* note 1, at 466 (citing HAW. CLIMATE CHANGE MITIGATION & ADAPTATION COMM'N, *supra* note 2; UNIV. OF HAW. SEA GRANT COLL. PROGRAM, SEA LEVEL RISE & CLIMATE CHANGE, PRIMARY URBAN CENTER DEVELOPMENT PLAN: FINAL WHITE PAPER 12 (Dec. 2018), https://cc3cbeb5-ec5a-4085-a604-bf234e6332b7.filesusr.com/ugd/e3bef4_895ce353905246679264395f47f764ef.pdf.; *Is Sea Level Rising? Yes, Sea Level is Rising at an Increasing Rate*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/facts/sealevel.html (last visited Apr. 19, 2020).

science driving the sea level rise we are already seeing today. However, while Lee offers a strong argument that no taking may occur when coastal landowners are no longer allowed to armor their properties, the practical reality is that coastal landowners will raise such challenges, and we (the State of Hawai'i) must be prepared to defend against them.[4]

Lee contends that the City can dispense of the variance or hardship provision for seawalls without a regulatory taking.[5] Interestingly, S.B. 2060 became law[6] and effectively prohibits the City from giving variances for seawalls at sand beaches.[7] So, as it stands, the City is prohibited from granting variances for shoreline armoring where there is a beach.[8] Although a landowner could still theoretically apply for a seawall variance, the City would be violating state policy by granting it.[9] This could wind up in litigation. I suppose it is even possible for a class action suit against the new legislation similar to *Maunalua Bay Beach Ohana 28 v. State*, in which owners of oceanfront property along Maunalua Bay challenged the State's ownership of accreted lands.[10]

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[4] *See, e.g.*, Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENV'T L.J. 51, 108 (2011) (explaining that as a result of the American public being uninformed as to coastal hazards and believing that the impacts of climate change are spatially and temporally distant, coastal landowners often have unrealistic expectations as to the value of their property and, thus, "states adopting legally justified and defensible policies to limit risky coastal development may face substantial public backlash, including numerous takings claims over denied permits").

[5] Lee, *supra* note 1, at 514.

[6] S.B. 2060 SD2 HD2, 2020 Leg., 30th Sess. (Haw. 2020). S.B. 2060 was codified in Hawai'i Revised Statutes under, "Coastal zone management program; objectives and policies[.]" HAW. REV. STAT. § 205A-2 (2020).

[7] *Id.* S.B. 2060 amended HAW. REV. STAT. § 205A-46 (2020) to prohibit the granting of variances "to artificially fix the shoreline . . . in areas with sand beaches or where artificially fixing the shoreline may interfere with existing recreational and waterline activities unless the granting of the variance is clearly demonstrated to be in the interest of the general public."

[8] *See id.* (discussing how "extensive beach loss fronting shoreline armoring necessitates revision of existing policies and regulations").

[9] *See id.*

[10] 122 Hawai'i 34, 222 P.3d 441 (Haw. Ct. App. 2009), *cert. denied*, 2010 WL 2329366 (Haw. 2010), *cert. denied*, 562 U.S. 1005 (2010) (rejecting plaintiffs' claim that Act 73 effectuated a taking of future accretions primarily because of the speculative nature of the claim and remanding "for a determination of whether [p]laintiffs have accreted lands that existed when Act 73 was enacted and, if so, for a determination of damages they incurred as a result of the enactment of Act 73."). Act 73 became law in 2003, "amend[ing] HRS §§ 501-33 and 669-1(e) to provide that owners of oceanfront lands could no longer register or quiet title to accreted lands unless the accretion restored previously eroded land" and "amend[ing] HRS §§ 171-2, 501-33, and 669-1 to provide that, henceforth, accreted lands not otherwise awarded shall be considered '[p]ublic lands' or 'state land.'" *Id.* at 49–50, 222

Another practical consideration would be to move enforcement issues from the City to the State. The DLNR is currently involved in a number of illegal seawall construction cases and litigation is already happening between the State and private landowners via enforcement actions.[11] Although the legal question in an enforcement action is whether or not someone broke the law, the issue of remedies always remains. Remedies will necessarily revolve around the constitutionality of the State requiring coastal landowners to remove the structures which would expose their property to erosion.[12] The two central argument for seeking removal is that the structures are damaging the public trust resource (the public trust argument), and that coastal property owners have no inherent right to interfere with littoral processes (the common law public nuisance argument).[13] Because the landowners never had any entitlement to shoreline armoring, they do not suffer a compensable loss that the State is responsible to compensate. Sea level rise and coastal erosion was always part of the risk of living next to the sea.[14]

The DLNR's enforcement cases involve challenging a private landowner's use of State land. Generally, these cases should be easier to argue than cases in which a landowner wants to build a wall or other coastal armoring on their own property. However, this is not always the case. For example, the DLNR was involved in an enforcement action against an illegal seawall on the North Shore around the Backdoor area in the late 80's and early 90's.[15] The case ended up in the U.S. District Court for the

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P.3d at 456–57.

[11] References to ongoing enforcement actions could not be made at time of publication.

[12] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006 (1992) (finding that when legislation causes a "dramatic effect on the economic value of [a landowner's] lot[]," the court must determine whether there was "a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." (citing U.S. CONST. amend. V)); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[13] *See Lucas*, 505 U.S. at 1010 (finding that the plaintiff's construction in the coastal zone "threatened [a] public resource . . . [and] when a regulation respecting the use of property is designed 'to prevent serious public harm,' no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value" (citations omitted)); *Pa. Coal Co.*, 260 U.S. at 415–16.

[14] *See* Lee, *supra* note 1, at 515; Cnty. of Haw. v. Sotomura, 55 Hawai'i 176, 183, 517 P.2d 57, 62–3 (1973) ("The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership") (quoting City of Buffalo, 99 N.E. 850, 852 (N.Y. 1912) (internal quotation marks omitted)).

[15] Paumalu Beach Homeowners' Ass'n. v. William Paty, No. 92-00663 (D. Haw. Oct. 16, 1992).

District of Hawai'i, in which the judge overturned the DLNR decision and ordered us to grant the homeowners a sixty-five year easement for the purpose of allowing the continued use, repair, and maintenance of the existing revetment.[16] Cases like this one go to show that there are valid arguments on both sides, and even if Hawai'i's courts decide a case that is dispositive on shoreline hardening issues, challenges will continue to be brought.

Another issue to consider is the practical legacy of *Lucas v. South Carolina Coastal Council*.[17] While *Lucas* may be the preeminent United States Supreme Court case regarding regulatory takings, especially in the context of shoreline related issues, its legacy goes beyond the express holding of the Court. It is my understanding that the Supreme Court overturned the State court's decision and remanded the case back to them.[18] Rather than re-argue the case, the State purchased the *Lucas* property (which is not a good precedent for States seeking to regulate oceanfront private property).[19] The Supreme Court seemed to indicate that the State based its decision on the wrong things—benefits vs. nuisances.[20] The arguments that Lee cites by the late Justice Scalia would have possibly facilitated a victory by the State if they would have pursued, it as it seems he was amenable to an argument in favor of the State based on common law nuisance.[21] Thus, while *Lucas* provides the legal framework and regulatory taking analysis, on the ground, it remains to be seen whether the government really has to pay people.

While there is nothing wrong with advocating for public trust resources, Lee's article admittedly seems a little one-sided. That's fine. Lee is confident that there is no question that elimination of the hardship variance and denying a property owner access to a seawall without just

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[16] TERMS FOR GRANT OF NON-EXCLUSIVE EASEMENT NO. S-5342 AND CERTIFICATION OF SHORELINE, HAW. DEPT. LAND & NAT. RES. 1 (Oct. 1993) (on file with Author).

[17] 505 U.S. 1003 (1992).

[18] *Id.* at 1031–32.

[19] In 1993, South Carolina agreed to pay Lucas $850,000 for the two shorefront lots, plus interest, costs and attorney's fees, totaling some $1.5 million. Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does The Supreme Court Really Matter?*, 6 FORDHAM ENV'T L.J. 523, 545 n.112 (1995).

[20] *Lucas*, 505 U.S. at 1022–26.

[21] *Id.* at 1029–30. Justice Scalia argued that nuisance is an exception to otherwise valid Lucas regulatory takings claims. *Id.* For example, Scalia notes that though requiring a "corporate owner of a nuclear generating plant" to "remove all improvements from its land upon discovery that the plant sits astride an earthquake fault" could "have the effect of eliminating the land's only economically productive use," but the owner would not be entitled compensation because the use was not "previously permissible under relevant property and nuisance principles." *Id.*

compensation is *not* a regulatory taking because "coastal landowners [do] not have the right to destroy public trust beaches."[22] While *Lucas* came close to setting the stage, no case of this nature has been argued and decided before the U.S. Supreme Court.[23]

One interesting precedent regarding shoreline erosion is *United States v. Milner*, coming out of Washington State and decided by the United States Court of Appeals for the Ninth Circuit.[24] *Milner* dealt with tidelines held in trust by the federal government for a Native American tribe.[25] The Ninth Circuit was faced with deciding whether "a group of waterfront homeowners [were] liable for common law trespass and violations of the Rivers and Harbors Appropriation Act of 1889 . . . and the Clean Water Act . . . because the ambulatory tideland property boundary [had] come to intersect shore defense structures the homeowners [had] erected."[26] While the Ninth Circuit recognized the property owner's right to defend against erosion on their own property, this interest was limited insofar as the homeowners "do not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation."[27]

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[22] Lee, *supra* note 1, at 515.

[23] *See Lucas*, 505 U.S. at 1026–32.

[24] 583 F.3d 1174 (9th Cir. 2009).

[25] *Id.* at 1180. The 1855 Treaty of Point Elliot between the United States and several Indian tribes created certain reservation areas for these Indian tribes and an 1873 executive order from President Grant expanded the boundaries of these reservation areas. *Id.* at 1180–81. "The United States claims that it continuously has held the tidelands in trust for the Lummi Nation, pursuant to President Grant's executive order." *Id.* at 1181.

[26] *Id.* at 1180. The Ninth Circuit provided the following description of the homeowners' shoreline modifications:

> Although each property is slightly different, the Homeowners or their predecessors erected various "shore defense structures" to limit erosion and storm damage to their properties. The structures generally include "rip rap," large boulders used to dissipate the force of incoming waves, and bulkheads placed landward of the rip rap. Between 1963 and 1988, a homeowners' organization (the "Organization") had leased the tidelands from the Lummi Nation, giving waterfront property owners the right to erect shore defense structures on the tidelands; however, once the lease expired, both the Organization and the individual Homeowners declined to renew the lease.

Id.

[27] *Id.*at 1190. The Ninth Circuit acknowledged that "[t]he problem of riparian and littoral property boundaries is a recurring and difficult issue." *Id.* at 1187. ("On the one hand, courts have long recognized that an owner of riparian or littoral property must accept that the property boundary is ambulatory, subject to gradual loss or gain depending on the whims of the sea . . . On the other hand, the common law also supports the owner's right to build structures upon the land to protect against erosion."). In rejecting the applicability of the

Ultimately, the Ninth Circuit held that the homeowners had "no defense to a trespass action because they [were] seeking to protect against erosion."[28]

When Lee contends that "the Hawai'i government recognizes that 'public rights in trust resources' are 'superior to' private interest and uses of the trust resources,"[29] I doubt that the courts are completely discounting private interests.[30] There is usually some balancing of interests that must play out.[31] Furthermore, there needs to be a sufficient and supported factual basis to the claim that the seawall damages the public trust resources. Each case will involve its own factual determinations, and the State's arguments can't just base be based on an idea, theory, or generality.

The devil is always in the details.

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common enemy doctrine because "the physical encroachment of the shore defense structures" was at issue, not "the diversion of water onto the tidelands," the Court decided:
The Homeowners have the right to build on their property and to erect structures to defend against erosion and storm damage, but all property owners are subject to limitations in how they use their property. The Homeowners cannot use their land in a way that would harm the Lummi's interest in the neighboring tidelands. Given that the Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the Homeowners do not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation. The Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary and prevent accretion benefitting the Homeowners. Although the shore defense structures may have been legal as they were initially erected, this is not a defense against the trespass action nor does it justify denying the Lummi land that would otherwise accrue to them.
Id. at 1189–90.

[28] *Id.* at 1190.

[29] Lee, *supra* note 1, at 486–87.

[30] *See, e.g.*, In re Water Use Permit Applications (Waiāhole I), 94 Hawai'i 97, 138, 9 P.3d 409, 450 (2000) (holding that, "if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time."), *quoted in*, Lee, *supra* note 1, at 500 (internal quotation marks omitted).

[31] *See, e.g.*, *id.* at 142–43, 9 P.3d at 454–55 ("[W]e observe that the constitutional requirements of "protection" and "conservation," the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the "zero-sum" game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.").

Takings, *PASH*, and the Changing Coastal Environment

Robert H. Thomas*

INTRODUCTION

The topic of this portion of the Symposium is "Takings and the Changing Coastal Environment" and in this comment I focus on the "takings" part of that title, as well as offer some thoughts on our guiding subject, the Hawai'i Supreme Court's decision from a quarter-century ago in *PASH*,[1] which most famously noted "that the western concept of exclusivity is not universally applicable in Hawaii."[2] How might this statement be considered today through the lens of property law and property rights, especially if we account for the changes in the U.S. Supreme Court's approach to takings in the time since *PASH* was decided? And what implications does *PASH* have, if any, for property rights in the coastal zone?

This comment is in three parts. Section I summarizes the *PASH* opinion, and concludes that the jurisdictional questions presented in the case should have resolved the case, and the court should have avoided the takings questions, and the court reached out to resolve an issue it need not have. Next, Sections II, II, and IV offer up my three main criticisms of *PASH*: the first on the court's seemingly incomplete view of how Hawai'i property law treated the right to exclude; the second on whether defining "property" for purposes of federal takings analysis is only a matter of state law; and the third on separation of powers. Finally, Section V concludes with some thoughts about how courts should consider property rights in a changing coastal environment in light of these criticisms of *PASH*.

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* Joseph T. Waldo Visiting Chair in Property Rights Law, William & Mary Law School; Senior Attorney, Pacific Legal Foundation; Director Emeritus, Damon Key Leong Kupchak Hastert. LL.M., Columbia Law School; J.D., University of Hawai'i. During law school, the author served as Executive Editor Production for the University of Hawai'i Law Review, volume 9. This comment is based on the presentation he delivered as part of the Law Review's symposium *25 Years of PASH* on February 5, 2021. The author writes about takings, land use, property law, and related topics at *inversecondemnation.com*. The views he expresses in this comment are his own.

[1] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[2] *Id.* at 447, 903 P.2d at 1268.

I. *PASH* AND "PRE-EXISTING LIMITATIONS" ON PROPERTY

Before I consider takings and separation of powers, a word about *PASH* itself. Even though it is best remembered as focusing on the specific issue of traditional and customary Hawaiian rights and their interplay with private rights in littoral property, I find the decision highly relevant to discussions about private property rights in general because the *PASH* opinion downplays the centrality of the right to exclude—a right the U.S. Supreme Court has described (in a case also involving Hawai'i property law) as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[3] Consequently, *PASH* has provided the analytic lens through which arguments about property rights in general are processed in our jurisdiction. The result in *PASH* turned on the "traditional and customary rights" provision in the Hawai'i Constitution, ratified by the people of Hawai'i after the 1978 Constitutional Convention:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[4]

It is easy to forget that in *PASH*, the court backed into the issue the opinion is most remembered for (how "traditional and customary rights" coexist—if at all—with the private rights attendant to of property ownership) because the case itself presented a rather straightforward question of appellate jurisdiction and third-party standing under the Hawai'i Administrative Procedures Act (HAPA).[5]

The case involved a littoral property owner who sought a shoreline development permit from the Hawai'i County Planning Commission to develop a resort complex.[6] Asserting that its members possessed a more

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[3] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 433 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (both quoting *Kaiser Aetna*).

[4] HAW. CONST. art. XII, § 7; *see also* HAW. REV. STAT. § 7-1 (2021) ("Where the landlords have obtained, or may hereafter obtain, 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 ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.").

[5] *See generally* HAW. REV. STAT. ch. 91 (2021).

[6] *PASH*, 79 Hawai'i at 429, 903 P.2d at 1250.

particularized stake in the outcome than the public at large, Public Access Shoreline Hawaii (PASH), an unincorporated community association, asked the Commission to allow it to intervene as a party, and demanded that the Commission conduct a "contested case"—essentially an agency trial—rather than the usual public hearing, to consider how the development application affected the rights of PASH's members.[7] PASH asserted its members had the right to access the land and the shoreline, and thus the coastal zone permit sought by the developer would affect those rights. The Commission concluded that PASH's members did not have any particularized interest in the outcome different from the general public, and consequently denied the request for a contested case for lack of standing.[8]

After the Commission granted the property owner's shoreline development permit, PASH sought judicial review under HAPA's grant of appellate jurisdiction to circuit courts to hear appeals from final decisions in agency contested cases.[9] It asserted the permit was invalid because the Commission's denial of PASH's request for a contested case tainted the result: without PASH at the table as a party the Commission could not adequately consider the permit application. Consequently, the dispute was one of jurisdiction—the property owner and the Commission asserted the circuit court lacked appellate jurisdiction under HAPA because the Commission had denied PASH's intervention and request for a contested case, and the circuit courts could only exercise HAPA's appellate jurisdiction if the agency had actually held a contested case.[10] They asserted that because the Commission had not held a contested case—only a public hearing—the only available method to challenge the Commission's conclusion that PASH lacked standing to demand a contested case was an original jurisdiction lawsuit.[11] PASH, on the other hand, argued that having been entitled to, but denied, an evidentiary agency hearing, the proper avenue for judicial review was under HAPA's appeal process.

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[7] *Id.* at 430, 903 P.2d at 1251.

[8] *Id.* at 429–30, 903 P.2d at 1250–51.

[9] *Id.* at 430, 903 P.2d at 1251; *see* HAW. REV. STAT. § 91-14(a) (2021) ("Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter, but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term 'person aggrieved' shall include an agency that is a party to a contested case proceeding before that agency or another agency.").

[10] *PASH*, 79 Hawai'i at 431, 903 P.2d at 1252.

[11] *Id.*

The Hawai'i Supreme Court agreed with PASH. It concluded that by considering the property owner's shoreline development permit application, the Commission had conducted a contested case.[12] That was probably news to the Commission, which had not treated its hearing like an administrative trial under HAPA with the presentation of evidence and argument, but more like a hearing in which any member of the public was permitted to testify for a limited time.[13] The court, however, concluded that the way to determine whether an agency held a contested case is not to look at how the agency labeled the hearing, but at the attributes of the hearing itself.[14] HAPA defines a "contested case" as a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."[15] Thus, the court held, if there was an agency hearing of some kind at which the rights of specific parties were determined, that hearing is a "contested case," and any person aggrieved by the agency's final decision may invoke the circuit courts' appellate jurisdiction under HAPA.[16] The Commission's own rules provided for a hearing on shoreline development permits, thus meeting the "agency hearing" requirement.[17] The big question the court reached out to decide was whether PASH's claimed "legal rights, duties, or privileges" to access the land and shoreline were "determined" in the course of that hearing. The Commission and the property owner argued no, the hearing on the owner's shoreline development permit determined *the owner's* rights.[18] The court rejected that argument, concluding instead that the rights of PASH members were also at stake in the Commission's proceedings considering the owner's shoreline development permit application.[19]

It is here that we get to the heart of the decision: the court held that PASH had standing and its members' interests were different than the general public because they were native Hawaiians who alleged—without challenge—that they had exercised their traditional and customary subsistence, cultural, and religious rights on these undeveloped lands.[20] The court held that PASH's request for intervention and a contested case

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[12] *Id.* at 432, 903 P.2d at 1253.

[13] *Id.* at 429, 903 P.2d at 1250.

[14] *Id.* at 434, 903 P.2d at 1255.

[15] HAW. REV. STAT. § 91-1 (2021).

[16] *PASH*, 79 Hawai'i at 431–32, 903 P.2d at 1252–1253.

[17] *Id.* at 429 n.2, 431–32, 903 P.2d at 1250 n.2, 1252-53 (citing Haw. Plan. Comm'n R. 9-11(B) (a "hearing shall be conducted within a period of ninety calendar days from the receipt of a properly filed petition [for a SMA permit] . . . [and] all interested parties shall be afforded an opportunity to be heard")).

[18] *Id.* at 434, 903 P.2d at 1255.

[19] *Id.*

[20] *Id.*

counted as participation in a contested case sufficient to invoke HAPA appellate jurisdiction.[21] The contested case had been held by the Commission without PASH as a party, but the Commission should have included PASH in that process. Indeed, the court sent the case back to the Commission to allow PASH to intervene and present detailed evidence.[22] The court could have stopped there because, having concluded that PASH had standing to intervene and a right to be included as a party in the Commission's contested case hearing, there was no need to go further and expand what would have been a significant, yet appropriately narrow ruling. But as we know, the court did not stop there. In its "go big or go home" moment, it reached out to preemptively address two additional issues.

First, the court determined that when reviewing shoreline development permit applications, the Commission—along with every other state and county agency—has a duty to require the applicant to protect traditional and customary Hawaiian rights.[23] Second, the court rejected the property owner's suggestion that traditional and customary rights as envisioned by the Hawai'i Constitution[24] could not be applied in a way that permitted non-owners to access private property. The owner asserted that allowing third parties to exercise those traditional and customary rights on private property would result in either a regulatory or a judicial taking by eviscerating the owner's right to exclude.[25] The court rejected the argument, relying on the so-called "*Lucas* exception" to categorical takings liability.[26] It concluded that when the government (including a court) imposes what amounts to a

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[21] *Id.* at 433–34, 903 P.2d at 1254–55 ("Having followed the procedures set forth by the HPC, PASH's participation in the SMA use permit proceeding amounts to involvement 'in a contested case' under HRS § 91–14(a). The mere fact that PASH was not formally granted leave to intervene in a contested case is not dispositive because it did everything possible to perfect its right to appeal.") (citations omitted).

[22] *See id.* at 452, 903 P.2d at 1273.

[23] *See id.* at 436–37, 903 P.2d at 1257–58. *See generally* David L. Callies & J. David Breemer, *The Right To Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. L. & POL'Y 39, 55 (2000) (citing *PASH* as an example of courts using customary rights and the public trust "to derogate from private property rights, and in particular, the right to exclude others").

[24] *See* HAW. CONST. art. XII, § 7.

[25] *See PASH*, 79 Hawai'i at 451, 903 P.2d at 1272. For the U.S. Supreme Court's views on the centrality of the right to exclude, see Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

[26] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

permanent or indefinite easement-like servitude on private property, it is not a taking if the servitude is based on a background principle of state property or nuisance law. Consequently, the court held that Hawai'i law imposing a traditional and customary right of entry was simply a "pre-existing limitation on the landowner's title."[27] In short, the court asserted that Hawai'i property law did not recognize—and, critically, *had never recognized*—the right of property owners to exclude third parties from exercising traditional and customary practices on the land, even though article XII, section 7 had only been added to the Hawai'i Constitution in 1978.[28] In a section of the opinion entitled "The development of private property rights in Hawai'i,"[29] the court set forth its vision of how Hawai'i's law and culture treated property rights generally (and the right to exclude specifically), and concluded with the most-oft-cited passage of the opinion:

> Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i.[30]

The eventual denial of a writ of certiorari by the U.S. Supreme Court[31] seems for the most part to have been the closing of the circle on any serious judicial criticisms of *PASH*'s approach or suggestions the court should revisit its decision. As in many Hawai'i controversies, resolution of the immediate case at hand by the Hawai'i Supreme Court somewhat settled the matter, and with a few exceptions, there has been little serious legislative or scholarly questioning.[32] However, I suggest the questions the court attempted to cut off by its *PASH* dicta are by no means settled, and in the next sections of this comment, I argue that *PASH* is subject to three main criticisms.

II. PASH*'s Incomplete Retcon of Hawai'i Property Law*

I remain less that fully convinced that the Hawai'i Supreme Court's efforts to retcon[33] the right to exclude out of Hawai'i property law is as

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[27] *PASH*, 79 Hawai'i at 452, 903 P.2d at 1273 (quoting *Lucas*, 505 U.S. at 1028–29).

[28] HAW. CONST. art. XII, § 7.

[29] *PASH*, 79 Hawai'i at 442–47, 903 P.2d at 1263–68.

[30] *Id.* at 447, 903 P.2d at 1268 (citing Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (1993), *cert. denied*, 510 U.S. 1207 (1994); United States v. Winans, 198 U.S. 371, 384 (1905)).

[31] Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996), *denying cert.* to *PASH*, 79 Hawai'i 425, 903 P.2d 1246 (1995).

[32] *But see, e.g.*, Callies & Breemer, *supra* note 23, at 55 (challenging *PASH*).

[33] Short for "retroactive continuity," the term "retcon" "is a literary device in which established diegetic facts in the plot of a fictional work (those established through the

accurate as the *PASH* opinion made it out to be. The *PASH* court rejected the idea that the imposition of what amounts to a public easement on all private property statewide may require the government to provide the owner of the servient estate with compensation.[34] It based this conclusion on the assertion that Hawai'i's traditional cultural and legal approach to private property never considered the right to exclude as essential.[35] However, I am not so sure that *PASH*'s essential foundation takes the entire picture into account. The concept of private property (or its cultural or legal analogue) has a long and established history in Hawai'i, and the line on one hand between "western concepts" of property law such as exclusivity, and Hawaiian law and culture on the other, was not as clearly delineated as the court in *PASH* suggested.

For example, under the pre-Māhele feudal system of land tenure that existed before 1848, private property was not formally recognized, but the land was not by any stretch of the imagination *terra nullius* or subject only to cultural practices.[36] Indeed, the pre-Māhele Kingdom practiced a very formalized and complex system of what we might call "property." The "right to exclude" (otherwise known as "keep out") while not formalized as such in pre-Māhele law or culture, was not by any means a foreign concept culturally.[37] Since at least the time of conquest and unification by Kamehameha I, land was "owned"—or at least possessed—by the King as sovereign,[38] with lesser chiefs and vassals having something akin to tenure-

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narrative itself) are adjusted, ignored, or contradicted by a subsequently published work which breaks continuity with the former." Wikipedia, Retroactive continuity, https://en.wikipedia.org/wiki/Retroactive_continuity (last visited May 30, 2021); *see also* Ilya Somin, Knick v. Township of Scott: *Ending a Catch-22 that Barred Takings Cases from Federal Court*, CATO S. CT. REV. 153, 159 & n.30 (2018–19) (discussing retconning in the context of legal arguments).

[34] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1993), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[35] *Id.* at 452, 903 P.2d at 1273.

[36] "Terra nullius" is "land without a sovereign." Kingman Reef Atoll Dev., L.L.C. v. United States, 116 Fed. Cl. 708, 746 (2014); *see also* New Jersey v. New York, 523 U.S. 767, 787–88 (1998) (mentioning the doctrine of *terra nullius* (land unclaimed by any sovereign) such as "a volcanic island or territory abandoned by its former sovereign").

[37] *See, e.g.*, State v. Akahi, 92 Haw. 148, 156 n.14, 988 P.2d 667, 675 n.14 (Ct. App. 1999) ("'Kapu' is a Hawaiian word which means '[t]aboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited, forbidden; sacred, holy consecrated; no trespassing, keep out.'" (quoting MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 132 (Rev. ed. 1986))).

[38] *See* Allan F. Smith, *Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law*, 7 U. HAW. L. REV. 1, 2 (1985) ("Kamehameha I (1758? –1819) by conquest became

by-possession with accompanying feudal and tax obligations.[39] This system presupposed some notion of "private" property, as limitations on the sovereign's exercise of eminent domain-type powers through the chiefs indicated.[40] Additionally, the Declaration of Rights of 1839[41] recognized a degree of protection of private property:

> Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, nothing whatever shall be taken from any individual, except by express provision of the law.[42]

The Great Māhele of 1848[43] and the subsequent Land Commission awards resulted in the formal recognition of private rights in property,[44] and the laws of the Kingdom of Hawai'i also recognized limitations on the sovereign's power to take private property.[45] The Constitution of 1852, for example, provided that property could not be taken or appropriated for

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monarch of all the islands and, by conquest, the owner of all land.").

[39] *Id.* at 2–3 (Land was divided "among his principal warrior chiefs, retaining, however, a portion of his lands, to be cultivated or managed by his own immediate servants or attendances. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again, after passing through the hands of 4, 5, or six persons from the King down to the lowest class of tenants.") (quoting LOUIS CANNELORA, THE ORIGIN OF HAWAII LAND TITLES AND THE RIGHTS OF NATIVE TENANTS 1 (1974)).

[40] *In re* Pa Pelekane, 21 Haw. 175 (Haw. Terr. 1912). As Professor Smith noted, Hawai'i's development of a feudal system was quite similar to England's property concepts. *See* Smith, *supra* note 38, at 2 ("The fascinating aspect of this is that in Hawaii, halfway around the world, a very similar feudal system arose in lands with no seeming connection with England and apparently for exactly the same societal purpose: land was governmental power, and it was used for that purpose.").

[41] KE KUMUKĀNĀWAI O KA MAKAHIKI CONSTITUTION 1839 (Haw.).

[42] *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (Haw. Kingdom 1864) (citation omitted). Hawai'i's notion of private property was also somewhat similar to English law as it moved from the feudal system to one of common law. *See* The Case of the King's Prerogative in Saltpetre, (1606) 77 Eng. Rep. 1294, 1294–95 (KB); 12 Co. Rep. 12, 12–13 (Lord Edward Coke noted that English homeowners could not prevent agents of the Crown from entering private property and removing saltpeter, an essential component of gunpowder, even if it resulted in damage to the property. But the sovereign's prerogative was limited, and the King's saltpetre men "are bound to leave the inheritance of the subject in so good plight as they found it."); *id.* at 1295–1296; 12 Co. Rep. 12, 12–13 ("They ought to make the places in which they dig, so well and commodious to the owner as they were before.").

[43] The "Great Māhele" was the division of law between King Kamehameha III and his chiefs in 1848. *See generally* JON J. CHINEN, THE GREAT MAHELE – HAWAII'S LAND DIVISION OF 1848 15–22 (1958).

[44] *See In re* Kamakana, 58 Haw. 632, 638, 574 P.2d 1346, 1349 (1978).

[45] *In re* Pa Pelekane, 21 Haw. 175 (Haw. Terr. 1912).

public use by the King unless "reasonable compensation" was provided.[46] This obviously seems modeled on the similar limitations in the U.S. Constitution (and the current Hawai'i Constitution), which recognizes the sovereign power to take or damage private property for public use or public benefit, as long as the owner is justly compensated for being forced to give up private rights for the public good.[47] Thus, the notion of private property—and the commensurate power to exclude others—was not merely a creature of "western" law imposed on the Kingdom, but was in a large sense a homegrown notion, ingrained in the culture and eventually the law.[48]

That private rights approach is very consistent with western concepts of private property; indeed, as one U.S. Supreme Court decision illustrates, it is extremely compatible. I am referencing, of course, *Kaiser Aetna v. United States*.[49] In that case, the owner of a loko kuapā fishpond on O'ahu dredged and filled it to create what is now known as Hawai'i Kai Marina.[50] The developer also removed an existing barrier beach, thus connecting the new Marina with the adjacent Maunalua Bay, resulting in the marina

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[46] *See* KINGDOM OF HAWAII CONSTITUTION June 14, 1852, art. 15 ("Each member of society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his proportional share to the expense of his protection; to give his personal services, or an equivalent, when necessary; but no part of the property of any individual, can, with justice, be taken from him or applied to public uses without his own consent, or that of the King, the Nobles, and the Representatives of the people. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore.").

[47] *See* U.S. CONST. amend. V ("[N]or shall private property be taken without just compensation."); HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged without just compensation").

[48] *See also* Damon v. Hawaii, 194 U.S. 154, 157–158 (1904) (holding that offshore fisheries, created and recognized by local law and custom, are private property: "The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months, and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right") (alteration in original) (citation omitted).

[49] 444 U.S. 164 (1979).

[50] *Id.* at 167.

becoming actually navigable from public waters of the Pacific Ocean.[51] A dispute arose between the owner—who wished to keep the marina private and exclude the boating public—and the federal government, which asserted that the act of converting the private fishpond to an actually-navigable marina by connecting it to the ocean resulted in a loss of the owner's right to exclude.[52] As the Court put it:

> The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.[53]

The Court rejected the government's argument, concluding that despite being actually accessible by public navigation, the marina never lost its pre-development character as private property, which included the right to exclude under Hawai'i property law. The Court did not take a formalistic approach that relied solely on Hawai'i property law's recognition of fishponds as private property. Instead, the Court noted that included in the analysis is the owner's "'economic advantage' that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'"[54] Hawai'i's law was squarely "in back of" the owner's assertion of privacy. More importantly, the Court recognized that certain elements, including long-standing governmental assurances, could lead to expectancies that, when backed with the owner's economic investment, the Court would call "property"—

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property

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[51] *Id.*

[52] *Id.* at 168–69.

[53] *Id.* at 176.

[54] *Id.* at 178 (quoting United States v. Willow River Co., 324 U.S. 499, 502 (1945)).

> right, falls within this category of interests that the Government cannot take without compensation.[55]

In *Kaiser Aetna*, the U.S. Supreme Court relied mostly on Hawai'i law to conclude that the fishpond never lost its character as private property. Thus, to require it to be opened to the public would be a taking requiring compensation. The Court's reliance on local property law should not be surprising because it has long held that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."[56]

III. THE U.S. SUPREME COURT MAY NOT AGREE WITH HAWAI'I'S VISION OF "PROPERTY"

That relates to my second criticism of *PASH*: that the Hawai'i Supreme Court's dismissal of takings liability under the U.S. Constitution is much too facile. As I noted earlier, *PASH*'s rejection of the property owner's takings argument was based on the notion from *Lucas* that preexisting restrictions in "background principles of the State's law of property and nuisance" may limit a property owner's rights without fear of a taking.[57] Viewing this as nearly a free hand (state law creates and defines property, after all), the *PASH* court concluded that Hawai'i property law had never recognized the right of property owners to exclude third parties from exercising traditional and customary practices on the land, [58] even though the provision requiring the state to protect and regulate traditional and customary practices was a relatively recent product of the 1978 Hawai'i Constitutional Convention.[59]

But state law has never been the be-all and end-all answer to the question of what constitutes "property," at least as far as what is a compensable

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[55] *Id.* at 179–80 (citing Montana v. Kennedy, 366 U.S. 308, 314–15 (1961); INS v. Hibi, 414 U.S. 5 (1973)).

[56] Board of Regents v. Roth, 408 U.S. 564, 408 U.S. 577 (1972); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law.").

[57] *Lucas*, 505 U.S. at 1029.

[58] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1993), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996) (citing Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (1993), *cert. denied*, 510 U.S. 1207 (1994); United States v. Winans, 198 U.S. 371, 384 (1905)).

[59] *Id.* at 452, 903 P.2d at 1273 (quoting *Lucas*, 505 U.S. at 1028–29).

property interest in takings.[60] In a critical footnote in *Kaiser Aetna*, the Court relied on federal law, not Hawai'i law, for the notion that the right to exclude is "universal" and "fundamental."[61] This means that local law cannot simply minimize or define such rights out of existence if owners have expectations of privacy backed by law. Federalism strains aside, the U.S. Supreme Court—not any state court—may be the ultimate arbiter of what qualifies as private property.

In that regard, the Court has traditionally been most protective of the right to exclude others, and it is one of the areas in which the Court has exhibited some "anti-federalism" leanings—by concluding that there are certain fundamental notions of private property in which state law may not intrude, even if state law for the most part defines and shapes property law. Justice Thurgood Marshall said it best in *Pruneyard Shopping Center v. Robins*,[62] where the Court considered whether a shopping center open to the public was a forum for public speech. The California Supreme Court had expressly changed its prior view of the California Constitution's free speech provision, overruled an earlier decision holding that it did not protect speech on shopping center property, and held that shopping centers therefore were fora for public speech.[63] The shopping center owner appealed to the United States Supreme Court, asserting what later became known as a judicial taking: the owner argued that when the California Supreme Court changed its speech jurisprudence to allow a physical invasion of its property by handbillers the owner wished to exclude, a taking resulted.[64] The U.S. Supreme Court held that the California Supreme Court's decision was not a taking, even though the California court acknowledged it had changed California law.[65] The change in law did not interfere with the shopping center owner's right to exclude because it had voluntarily opened its property to the public for shopping for the owner's commercial gain, it thus possessed only a limited right to exclude, and it had failed to demonstrate that allowing both handbillers and shoppers

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[60] *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) (state law defines property but that "is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property") (citing Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979)).

[61] *See Kaiser Aetna*, 444 U.S. at 180 n.11 (citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975); United States v. Lutz, 295 F.2d 736, 740 (5th Cir. 1961); Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[62] Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

[63] Robins v. Pruneyard Shopping Center, 23 Cal.3d 889, 910 (1979).

[64] *Pruneyard*, 447 U.S. at 78–79.

[65] *Id.*

would interfere with whatever right to exclude remained.[66] Having invited the public in to shop, the owner could not be heard to complain that others entered as well. In short, the shopping center owner "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[67] Despite that holding, however, the Justices did not seem at all bothered by the notion that the takings doctrine might require them to make qualitive judgments about state property law.

Justice Marshall concurred in a separate opinion setting forth his view that property has a "normative dimension" which the U.S. Constitution protects from state court redefinition:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.[68]

Justice Marshall continued:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[69]

In *Stop the Beach Renourishment*, for example, six Justices agreed that "private property" is not a completely malleable concept that may be redefined at will by state courts.[70] The plurality noted that in *Lucas*, the

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[66] *Id.* at 77 ("The Pruneyard is open to the public for the purpose of encouraging the patronizing of its commercial establishments.").

[67] *Id.* at 84. In other words, the depriving the shopping center owner of its absolute right to exclude others was not the functional equivalent of an exercise of eminent domain, because the owner had affirmatively opened up its property to the public and had not shown that handbilling would interfere with whatever right to exclude remained.

[68] *Id.* at 93 (Marshall, J., concurring).

[69] *Id.* at 93–94 (Marshall, J., concurring). Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 94 n.3 (Marshall J., concurring) (quoting *Ingraham*, 430 U.S. at 672–73).

[70] Justice Scalia, writing for himself, Chief Justice Roberts, Justice Thomas, and Justice

Court had reserved for itself the determination whether the restriction in the regulation that was claimed to work a taking was inherent in title and a preexisting limitation on land ownership.[71]

The "core" common law property rights referenced by Justice Marshall include aspects of property such as interest following principal,[72] obtaining ownership of accretion,[73] the ability to transfer property,[74] and making reasonable use and development of land.[75] And, of course, the right to exclude others.[76] When these core rights are threatened, the U.S. Supreme Court has had little difficulty finding them to be fundamental property rights that transcend a state's ability to redefine them by regulating them out of existence without just compensation,[77] and without detailed reliance on state law.[78] But *PASH*'s approach is based on the tail wagging the dog:

Alito wrote that the State's argument that judges need flexibility to alter the common law has "little appeal when directed against the enforcement of a constitutional guarantee. . . ." *Stop the Beach Renourishment*, 560 U.S. at 727 (Scalia, J., plurality opinion). Justice Kennedy, writing for himself and Justice Sotomayor, stated that although "[s]tate courts generally operate under a common-law tradition that allows for incremental modifications to property law, but 'this tradition cannot justify a carte blanch judicial authority to change property definitions wholly free of constitutional limitations.'" *Id.* at 736 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis in original) (quoting Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 435 (2001)).

[71] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992). *See also id.* at 1014 ("[T]he government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.") (citation omitted).

[72] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980) (legislature may not simply declare that interest on principal is state-owned property); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (interest on lawyers' trust accounts is "property").

[73] Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68–69 (1874) (right to future accretions is a vested right and "rests in the law of nature").

[74] Hodel v. Irving, 481 U.S. 704, 716 (1987) (passing property by inheritance is a fundamental attribute of property).

[75] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[76] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); *see also* Palmer v. Atl. Coast Pipeline, LLC, 293 Va. 537, 583 (Va. 2017) (fundamental right to exclude may also be subject to certain common law privileges, such as the right of a potential condemner to enter the land for a survey to determine its suitability).

[77] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

[78] *See*, *e.g.*, *Lucas*, 505 U.S. at 1019; *Webb's Fabulous Pharmacies*, 449 U.S. at 155, 162; *see also Pruneyard*, 447 U.S. at 93-94 (1980) (Marshall, J., concurring); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 560 U.S. 702, 713 (2010) (plurality opinion) (noting "[s]tates effect a taking if they recharacterize as public property what was

an invocation of background principles (such as the public trust) is viewed as a nearly complete insulation of any changes a state court may want to make with property law, no matter how contrary that may appear to such core principles.

The Supreme Court recently reconfirmed the fundamental, federally-protected nature of the ability of property owners to say "keep out," otherwise known as the right to exclude. In *Cedar Point Nursery v. Hassid*,[79] the Court held that a California Agricultural Labor Relations Board regulation requiring agricultural employers to open their land to labor union organizers is a categorical taking, even though the resultant occupations are not permanent.[80] The Court emphasized that the regulation—which is framed as protecting the rights of agricultural employees to access union organizers, and allows the union access to an owner's property for up to three hours per day, 120 days per year—inflicts a special form of constitutional wrong. A "different standard applies" to analysis of these type of regulations than to other regulations that merely regulate use.[81] Leaning heavily on *Kaiser Aetna*'s view of the right to exclude as the stick in the property rights bundle "universally held the be a fundamental element of the property right" and "one of the most essential sticks," the Court held that physical invasions at the invitation of the government undermine the "central importance" of property.[82] Finally, the Court noted that a physical invasion may not be a categorical taking if the intrusion is "consistent with longstanding background restrictions on property rights."[83]

Will this reemphasis of "background principles" continue to insulate *PASH* easements from federal takings jeopardy? I conclude no, for two reasons. First, the Court noted that the background principles of property law exception is focused primarily on nuisance prevention, and "also encompass traditional common law privileges to access private property" such as necessity to avoid a public disaster or harm, or the police

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previously private property").

[79] 141 S. Ct. 2063 (2021).

[80] *Id.* at 2073 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred[.'"').

[81] *Id.* at 2071 ("When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies.").

[82] *Id.* at 2073 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176, 179–180 (1979); Dolan v. City of Tigard, 512 U.S. 374, 384, 393 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (noting the right to exclude is the "sine qua non" of property)).

[83] *Id.* at 2079 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–1029 (1992)).

apprehending a suspect.[84] By contrast, *PASH* easements are not imposed to prevent harm and are the result of positive law with no Hawai'i common law roots, having only been added to the Hawai'i Constitution after the 1978 Constitutional Convention. Second, *Cedar Point* rejected the argument that state law alone defines "property," and can with the stroke of a pen—whether by amending the state constitution, or by issuing a judicial opinion—"manipulate" certain concepts inherent in the notion of the Court's conception of what it means to own property.[85] The Court noted that this conclusion is an "intuitive" one,[86] the product of "common sense" as much as Blackstone.[87] This reemphasized Justice Marshall's concurring opinion in *Pruneyard*, which asserted that "serious constitutional questions" would result if the "legislature attempted to abolish certain categories of common-law rights in some general way," and that "'core' common-law rights, including rights against trespass," cannot simply be abandoned.[88]

In sum, the *PASH* process remains subject to a federal constitutional analysis that it has not been seriously subject. Certiorari denied twenty-five years ago should not give much comfort that the present or future U.S. Supreme Court would respond similarly. We may prefer decisions about Hawai'i property law be made exclusively at Ali'iolani Hale, but like all important decision these days, we all know that the buck truly stops only at 1 First Street, NE, Washington, D.C.

IV. SEPARATION OF POWERS: WHY IS THE COURT LEADING THE CHARGE?

My final criticism of *PASH*'s rationale is related and is steeped in separation of powers. In *PASH*, the court "constitutionalized" the analysis by basing it on article XII, section 7 of the Hawai'i Constitution, which I view as an effort to insulate the result from any legislative tinkering or significant limitations by other parts of government, even while the court acknowledged that traditional and customary rights are subject, at least theoretically, to regulation by the other two branches.[89] That seems illusory

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[84] *Cedar Point*, 141 S. Ct. at 2079 (citations omitted).

[85] *Id.* at 2076 (citing Phillips v. Washington Legal Foundation, 524 U.S. 156, 164 (1998); *Lucas*, 505 U.S. at 1030; Horne v. Dep't of Agriculture, 576 U.S. 350, 365 (2015); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

[86] *Id.* at 2076.

[87] *Id.* at 2074.

[88] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

[89] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1993) ("In any event, we reiterate that the State retains the ability to reconcile competing interests under article XII, section 7. We stress that unreasonable or non-traditional uses are not permitted under today's ruling."), *cert. denied sub nom.*, Nansay

because by constitutionalizing the issue, the court made the essential point that the court reserved for itself the role of ultimate arbiter of questions of what practices constitute reasonable traditional and customary rights, whether to recognize those rights in any particular case, and whether any regulation by other branches is "reasonable." This approach held fast to the Hawai'i Supreme Court's established tradition of retaining for itself the role of gatekeeper for most decisions on resource allocation such as property development,[90] water law,[91] and environmental law.[92] For one rather seemingly-routine example, the common-law vested rights and zoning estoppel doctrines have been established by the court in such a way to avoid the more bright-line rules adopted by other jurisdictions.[93] Instead, Hawai'i law considers a particular use of land "vested" only after a property owner has relied "substantially" on official assurances by the government, after what is deemed by a court to be the "last discretionary action" in the applicable development process.[94] This standard results in the courts generally—and the Hawai'i Supreme Court specifically—retaining the final word on any remotely-controversial use of land statewide in any dispute in which vested rights are at issue. Allocation of water resources provides another example. After *PASH*, the Hawai'i Supreme Court extended that opinion's constitutional approach to curbing private rights to other areas of property law, most notably by expanding the notion of the public trust in water, concluding it is an overarching creature of Hawai'i constitutional law—and thus beyond the reach of mere legislation—which requires every agency in both state and municipal government to consider water allocation in every one of its decisions that might remotely affect the resource.[95]

Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[90] *See, e.g.*, Cnty. of Haw. v. Ala Loop Homeowners, 123 Hawai'i 391, 235 P.3d 1103 (2010) (holding that private parties may enforce state land use statutes).

[91] *See, e.g.*, Kauai Springs, Inc. v. Plan. Comm'n of Kauai, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) (holding that Hawai'i's version of the public trust doctrine requires every state and county agency to consider water resource allocation in every decision made).

[92] *See, e.g.*, Sierra Club v. Dep't of Trans., 120 Hawai'i 181, 197–200, 202 P.3d 1226, 1242–45 (2009) (holding that the legislature's reaction to the Supreme Court's earlier decision requiring environmental assessment of a highly-contentious interisland car ferry was unconstitutional special legislation).

[93] *See generally* Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17 (2004) (comparing Hawai'i's doctrines with other jurisdictions).

[94] Cnty. of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 325–29, 653 P.2d 766, 773–74 (1982).

[95] *See, e.g.*, *Kauai Springs*, 133 Hawai'i at 141, 324 P.3d at 951; Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 140 P.3d 985 (2006).

After recognizing the revolutionary nature of the *PASH* analysis (in what may be the most extreme understatement in any Hawai'i Supreme Court opinion, the court acknowledged, "this premise clearly conflicts with common 'understandings of property' and could theoretically lead to disruption"[96]), the court downplayed the conflict with the remarkable assertion that "the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances."[97] The court's baseless prediction seemed very much off the mark (which the court itself seemed to recognize a mere three years later): in a case reviewing a conviction for trespassing in which the defendant asserted a *PASH* privilege, the court had to "clarify" the ruling to categorically exclude "fully developed" lands from *PASH*'s reach:

> To clarify *PASH*, we hold that if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, improvements and infrastructure, it is *always* "inconsistent" to permit the practice of traditional and customary Native Hawaiian rights on such property. In accordance with *PASH*, however, we reserve the question as to the status of native Hawaiian rights on property that is "less than fully developed." [98]

This limitation was not based on any textual or explicit constitutional source, but was of the court's own invention in the earlier *Kalipi* case, in which the court based the curbing of traditional and customary rights on the court's own cultural notions of cooperation:

> In *PASH,* we reaffirmed the *Kalipi* court's nonstatutory "undeveloped land" requirement. We noted that "the *Kalipi* court justified the imposition of . . . [such a requirement] by suggesting that the exercise of traditional gathering rights on fully developed property 'would conflict with our understanding of the traditional Hawaiian way of life in which *cooperation*

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[96] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1993) (citing Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 7, 8–9, 656 P.2d 745, 749–750 (1982) ("The problem is that the gathering rights of § 7-1 represent remnants of an economic and physical existence largely foreign to today's world. Our task is thus to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title.")), *cert. denied sub nom.*, Nansay Haw. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996).

[97] *Id.*

[98] State v. Hanapi, 89 Hawai'i 177, 186–87, 970 P.2d 485, 494–95 (1998) (emphasis in original).

> *and non-interference with the wellbeing of other residents were integral parts of the culture.*'"[99]

The plethora of legal challenges in the quarter-century since that rely on *PASH*'s approach would seem stark evidence that the court's prediction did not bear out at all.[100]

This "judicializing" approach is antidemocratic and wrongly arrogates power in the least accountable branch. Property scholar Professor Thomas Merrill has written that by constitutionalizing the consideration of water resource allocations, the Hawai'i Supreme Court has shifted the "complex decisions" from the people's representatives (the legislature) to what may be the least democratic branch of government, the judiciary.[101] This same criticism can be leveled at *PASH* and its constitutionalizing of both traditional and customary Hawaiian rights, and inroads into property rights.[102] The essential question remains: do we want unelected judges, lawyers, and expert witnesses, and a narrow class of litigants alone shaping what qualify as traditional and customary rights, the limitations those rights may be subject to, and the extent of "the right of the state to regulate" these rights?[103] Or should these types of important decisions be made by "We the People?" I think this is uncharted territory, and even if the legislature has been content to avoid asserting its primary role in the past, it is worth reevaluating *PASH*'s conclusion that judges, and not the representatives of the people, make those calls. Courts are institutionally better equipped to consider restrictions on government actions that infringe on fundamental rights and enforcing the boundaries between other branches of government than they are at championing and enforcing positive assertions of government power. Until the debate on shoreline rights and responsibilities and *PASH* shifts from the courts to back to the branch most responsive to the people—the legislature—the legitimacy of *PASH*'s concrete should never be quite set.

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[99] *Id.* at 186, 970 P.2d at 494 (quoting *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271; *Kalipi* 66 Haw. at 9, 656 P.2d at 750).

[100] Westlaw, for example, shows the *PASH* case being referred to in no less than 84 reported cases, and cited to in secondary works such as law journal articles 169 times.

[101] *See* Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261, 282 (2016).

[102] Curiously, the court has never taken the same analytical approach with other Hawai'i constitutional mandates such as the imperative that the State "conserve and protect agricultural lands." *See* HAW. CONST. art. XI, § 3 ("The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.").

[103] HAW. CONST. art. XII, § 7.

V. PROPERTY RIGHTS IN A CHANGING COASTAL ENVIRONMENT

Finally, I arrive at some brief thoughts about how the above ideas can be applied in a changing coastal environment. In the coastal zone, we tend—wrongly, I believe—to think in absolutes.[104] After all, one of the major risks of owning real estate near a boundary that shifts due to natural forces is that the oceans will rise, and if so, well, that is just too bad. This is the idea that because sea levels are rising, littoral property owners just have to take the hit, and that they have no right to affirmatively protect their property from being consumed by the ocean or natural beach processes. And what of the science? Does it not inform us that shoreline hardening, seawalls, sandbags, and other artificial measures designed to protect littoral homes and property do more overall harm than good, and simply push the problems to neighbors?[105] I suggest that such references alone will not resolve the difficult legal questions posed by the changing coastal environment.

First, as I noted above, traditional Hawai'i law and culture recognized private rights—including ability to use, keep,[106] and modify property. These cultural and legal concepts were applied in the coastal environment as well, and Hawai'i law recognized what looks very much like private rights in littoral or even submerged land. For example, in In re *Kamakana*,[107] Chief Justice William S. Richardson, writing for the unanimous Hawai'i Supreme Court agreed that traditional fishponds—specifically loko kuapā, which are complex artificial structures engineered and built in the ocean adjacent to, and makai of, the shoreline[108] (much like a modern-day seawall)—are

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[104] *See, e.g.*, David Schultz, *A Dilemma For California Legislators: Preserve Public Beaches Or Protect Coastal Homes*, CLEAN TECHNICA (May 31, 2021), https://cleantechnica.com/2021/05/31/a-dilemma-for-california-legislators-preserve-public-beaches-or-protect-coastal-homes/ ("Often, these goals are mutually exclusive. If officials build a sea wall, they may end up sacrificing a public beach to protect the homes beside it. If they decline to build a sea wall, they may surrender the homes to preserve the beach. The conflicting dictates of the Coastal Act of 1972 have led to decades-long legal disputes with activists on one side, property owners on the other and the Coastal Commission caught in the middle.").

[105] *See generally*, Colin Lee, *Eliminating the Hardship Variance in Honolulu's Shoreline Setback Ordinance: The City and County of Honolulu's Public Trust Duties as an Exception to Regulatory Takings Challenges*, 43 U. HAW. L. REV. 464, 470 (2021) ("the City and County of Honolulu (the City) must remove the hardship variance for artificial shoreline hardening measures and properties that do not meet the coastal setback minimum on O'ahu's sandy beaches in Revised Ordinances of Honolulu Chapter 23 ("Chapter 23") to fulfill its duty under the public trust doctrine to protect O'ahu's sandy beaches").

[106] *See, e.g.*, Donald J. Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. ST. U. L. REV. 1021 (2018).

[107] 58 Haw. 632, 574 P.2d 1346 (1978).

[108] "'Makai' means 'on the seaside, toward the sea, in the direction of the sea.'" Bremer

"treated under our land system in the same manner as are the land areas."[109] In short, these artificial structures are considered part of the land, not part of the ocean, and treated legally as fast (dry) land, and private property. There, the court was presented with a Land Commission ruling that awarded the ahupua'a of Kawela by name only and without reference to metes-and-bounds (and with no express mention of the littoral fishpond).[110] The question was whether the grant, which described the boundary as "following the shore to the point of commencement" included or excluded the fishpond.[111] If the "shore" meant the mauka beach, then the fishpond was not part of the Land Commission award and was in the public domain because it was makai of the shore.[112] By contrast, if the fishpond existed at the time of the Land Commission award in 1854, it was considered by law and culture as part of, and inseparable from, the land—private and not open to anyone but the grantee—and the "shore" ran along the pond's makai wall, even if the grant and Land Commission award did not expressly mention it.[113] The court concluded that "[w]hen an ahupua'a was awarded by name, the grant was meant to cover all that had been included in the ahupua'a according to its ancient boundaries."[114] Because "both inland and shore fishponds were considered to be part of the ahupua'a and within its boundaries," the award and grant were presumed to include the fishponds as private property.[115] With private status came the right to exclude others.

These structures were prolific. For example, one survey estimated that on the island of Moloka'i, "[t]here are evidence of forty-one fish ponds along the section of the coast . . . between Kaunakakai and Kainalu."[116] And not just Moloka'i; the private nature of these artificial littoral structures was essential to the creation of much of urban Honolulu (for example, Hawai'i

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v. Weeks, 104 Hawai'i 43 n.3, 45, 85 P.3d 150, 152 n.3 (2004) (quoting MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 114 (Rev. ed.1986)).

[109] *Kamakana*, 58 Haw. at 640, 574 P.2d at 1351.

[110] *Id.* at 634, 574 P.2d at 1348–49.

[111] *Id.* at 634, 574 P.2d at 1348.

[112] *Id.* at 636, 574 P.2d at 1348 (citing State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 114, 566 P.2d 725, 731 (1977) (lands "overlooked" in the Māhele and not awarded were unassigned and part of the public domain)).

[113] *Id.* at 640, 574 P.2d at 1350.

[114] *Id.* at 638, 574 P.2d at 1340 (citing *In re* Boundaries of Pulehunui, 4 Haw. 239 (Haw. Kingdom 1879); *see also In re* Boundaries of Paunau, 24 Haw. 546 (Haw. Terr. 1918)).

[115] *Kamakana*, 58 Haw. at 639, 574 P.2d at 1350 (citing Harris v. Carter, 6 Haw. 195, 197 (Haw. Kingdom 1877); 1939 Haw. Op. Att'y Gen. No. 1689, at 456).

[116] Letter from James K. Dunn, Surveyor, Territory of Hawaii to Hon. Frank W. Hustace, Jr., Comm'r of Public Lands re: Molokai Fish Ponds 1 (Mar. 18, 1957) (on file with the author); *see also* CATHERINE C. SUMMERS, MOLOKAI: A SITE SURVEY (1971) (details on each then-existing or historical fishpond).

Kai, Wailupe, Niu, and Enchanted Lake are all former fishponds, dredged and filled by asserting private property rights). My point in all this is not to explicate the nuances of Hawai'i's law of fishponds, merely to suggest that the culture and law both accommodated and promoted substantial modifications to otherwise natural shoreline areas that substantially modified the natural beach condition and sand replenishment process, and also recognized private rights—including the right to exclude and the right to use and to keep and protect property—including in the littoral zone or in the shoreline. These may not be mere unilateral expectations, but those which have longstanding law "back of them."[117]

Second, many proposals to undermine these rights are based on the assumption that the baseline for analysis should be the properties in their "natural" condition, whatever that might be.[118] However, the search for a condition of an ever-changing and modified shoreline is a chimera. Land in Hawai'i is always changing, and it has been centuries since Hawai'i's shoreline was in what we might deem a pristine or unaltered condition. Referring to the building of littoral fishponds in Hawai'i, one researcher noted:

> Modifications of the environment by human beings have been going on for centuries in Hawaii. From the moment people first set foot on these islands the process of altering the environment to provide for their needs has continued.[119]

Did these historical and customary alterations of the shoreline noted above also alter the "natural" beach processes and create effects on the usual functioning of wave action and accretion and erosion? Undoubtedly. Thus, the courts should avoid taking positions based on what is supposedly a property's natural condition, as such baselines are both historically inaccurate, and often limited by the viewer's own temporal perspective.

Third, what of the government's obligation to affirmatively protect private property, and an owner's right to protect their land.[120] These are

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[117] Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (quoting United States v. Willow River Co., 324 U.S. 399 (1945)).

[118] *See* Lee, *supra* note 105 at 476 (noting that the City and County of Honolulu's ordinances seek to "better protect and preserve the natural shoreline, especially sandy beaches").

[119] MARION KELLY, LOKO I'A O HE'EIA: HE'EIA FISHPOND iii (1975) (describing the "environmental adaptations" made historically, and contrasting "those made today," and suggesting that although ancient littoral construction such as enclosing reefs with rock walls and altered the ecology, those changes were "implemented with conservation of the productive resources as the guiding principle").

[120] *See, e.g.*, Lauri Alsup, *The Right to Protect Property*, 21 ENV'T. L. 209, 216 (1991) (arguing that courts should recognize a property owner's fundamental right to protect her

hardly novel concepts. For one longstanding example, in *The Case of the Isle of Ely*,[121] Lord Coke concluded that the sewer commissioners possessed only the power to repair existing sewers, and not create new ones. In the course of the analysis, Lord Coke recognized that the sovereign has the obligation "to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted." The same should apply to littoral properties today.

Finally, I return to takings. The takings clauses of the Hawai'i and U.S. Constitutions do not, by themselves, act as direct limitations on the Hawai'i Supreme Court's ability to impose a *PASH* easement on private property or otherwise alter the longstanding common law of accretion and erosion (for example), but instead assign the price tag to those decisions which are made for the public's benefit. The clauses limit the ability to regulate only indirectly, under the idea that the cost of public benefits should not be placed solely on the individual owners who are called upon to contribute their rights, but should be borne, in the words of the U.S. Supreme Court, "by the public as a whole."

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[122]

Any analysis in *PASH* of regulatory inroads into private rights should have included a discussion of both the costs of that exercise of regulatory authority, and who, "in justice and fairness," bears those costs. And, most critically, who decides the public benefit. If we like public parks, then we should not mind paying the freight—the taxes—to acquire and maintain them, and to fully compensate the owners whose property is taken for them. The takings clauses democratize the costs of public uses and benefits, by forcing an evaluation of the actual cost of government action by distributing the economic burden to the benefitted public. They require the government to ask, "can we afford this?" Justice Holmes famously wrote in *Pennsylvania Coal Co. v. Mahon*, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[123] But when a court is doing the taking, that question is never asked.

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own property from waste).

[121] Isle of Ely, 77 Eng. Rep. 1139, 1139 (K.B. 1609).

[122] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[123] 260 U.S. 393, 416 (1922).

The compensation imperative is not limited to the paradigmatic government action triggering compensation—cases of actual physical invasion or seizure where the government recognizes its obligation to pay compensation. The Supreme Court has acknowledged that there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests[.]"[124] Compensation is not limited to those instances in which the government is affirmatively acquiring property. It also includes situations in which the government does not exercise eminent domain, but its actions to regulate for the public health, safety, and welfare under the police power affect the property's use and value nonetheless.[125] In these types of takings, the government does not acknowledge any obligation to provide compensation.[126] The compensation requirement is triggered when the effect of government action is "so onerous that its effect is tantamount to a direct appropriation or ouster."[127] For example, if the government causes private property to flood, it must pay compensation.[128] If a municipal ordinance requires the owners of apartment buildings to allow the fixture of cable television equipment, compensation is required.[129] If the government requires the owner of a private marina to allow public boating under the government's navigation power, compensation is required.[130] If environmental regulations require an owner to leave their property "economically idle," compensation is required.[131] And the same rules apply, at least theoretically, when a court so alters "background principles" of Hawai'i property law in a way that overturns long-established expectations.[132]

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[124] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

[125] *See, e.g.*, United States v. Cress, 243 U.S. 316, 318–19, 328 (1917) (citing United States v. Lynah, 188 U.S. 445, 470 (1903)) (finding that the character of the government's invasion may constitute a taking, even when it does not directly appropriate the title to property).

[126] *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019); Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) (rejecting the argument that no taking was possible because defendant had not exercised eminent domain power and was acting pursuant to the state's regulatory power).

[127] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

[128] *See, e.g.*, *Cress*, 243 U.S. at 328 ("Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the [Fif]th Amendment.") (quoting *Lynah*, 188 U.S. at 470).

[129] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 n.16, 441 (1982) (finding that even a de minimis permanent physical occupation is a compensable taking).

[130] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 165–66, 180 (1979).

[131] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–19 (1992).

[132] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 560 U.S.

CONCLUSION

Allow me to conclude with this: although it is good to remember *PASH*'s famous dictum "that the western concept of exclusivity is not universally applicable in Hawaii," we must also not forget that in the one court that ultimately matters—the U.S. Supreme Court—the western concept of constitutional property rights—including the paramount right to exclude—is universally applicable. *PASH* fans, take note.

702, 713 (2010) (plurality opinion).

PASH and the Evolution of Native Hawaiian Rights Protection

Simeon R. Acoba, Jr.*

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* Associate Justice, Hawai'i Supreme Court (Ret.). The views expressed are those of the author as a contributor to the University of Hawai'i Law Review Symposium: "25 Years of *PASH*" and do not represent his views in any other capacity. The author is appreciative of the guidance of Kaulu Lu'uwai and Ellen Ashford in this project and for the technical assistance of the University of Hawai'i Law Review members.

INTRODUCTION

Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (*PASH*)[1] was central to the development of protections for all rights, customarily and traditionally exercised by Native Hawaiians. The discussion that follows considers the judicial treatment of these exercised rights under the Hawai'i Constitution, article XII, section 7. The subjects include (1) the early court treatment of exercised rights; (2) a proposed reconsideration of the totality of circumstances test that was added as an element of exercised rights; (3) the enforcement of exercised rights; (4) exercised rights and the public trusts in ceded lands, article XII, section 4 and in natural resources, article XI, section 1; (5) multiple legal approaches in support of exercised rights and additionally, in that regard (a) the proposed right to a claim for breach of the public trust in resources, (b) the responsibility of agencies to account for constitutional rights affected by agency actions, (c) the procedural due process guarantee of a protective hearing; and (6) the expansion of standing to bring suit and declaratory actions.

While not chronologically arranged, the order of the subjects roughly reflects three phases: the Hawai'i Supreme Court's undertaking of the definition of customarily and traditionally exercised rights, protection and enforcement of exercised rights, the engagement of exercised rights in the ceded land and natural resource public trusts, and the expansion of protective and facilitative legal approaches.

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[1] 79 Hawai'i 425, 903 P.2d 1246 (1995). *PASH* was authored by Justice Robert Klein who also wrote other landmark decisions concerning Native Hawaiian rights. *See, e.g.*, State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998), Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992).

I. THE EARLY COURT TREATMENT OF ARTICLE XII, SECTION 7 EXERCISED RIGHTS

PASH confirmed the protection of Native Hawaiian rights under the Hawai'i Constitution in a contemporary context. After *PASH*, *State v. Hanapi*, added to the elements that characterize an exercise right.[2] *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, State of Hawai'i* [sic] followed with the design of a three-part framework for enforcing those rights.[3] Arguably, the elements have remained stable until the introduction of the totality of circumstances test in *State v. Pratt*.[4]

A. The PASH *and* Hanapi *Criteria*

Article XII, section 7 provides as follows:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[5]

PASH provided guidance for future cases by (1) reiterating that traditional and customary Native Hawaiian rights are judicially protected under article XII, section 7,[6] and (2) establishing that the government may regulate such rights, but "must protect the reasonable exercise of customary or traditional rights" "to the extent feasible."[7] In *PASH*, Nansay, had been granted a Special Management Area permit by the Hawai'i County Planning Commission (HPC) to develop a resort community and residential homes on the island of Hawai'i.[8] The supreme court held that plaintiff, PASH, and its members had demonstrated that traditional and customary rights were exercised on apparently undeveloped lands within the permitted area.[9] Accordingly, PASH and its members were entitled to have their Native Hawaiian claims considered by the HPC.[10]

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[2] 89 Hawai'i 177, 970 P.2d 485 (1998).

[3] 94 Hawai'i 31, 970 P.2d 485 (2000).

[4] 127 Hawai'i 206, 277 P.3d 300 (2012).

[5] HAW. CONST. art. XII, § 7.

[6] 79 Hawai'i at 442, 903 P.2d at 1263 (1995).

[7] *Id.* at 451, 903 P.2d at 1272.

[8] *Id.* at 429, 903 P.2d at 1250.

[9] *Id.* at 434, 903 P.2d at 1255.

[10] *Id.* at 452, 903 P.2d at 1273. *PASH* also held with respect to the law of property that (1) the exercise of section 7 rights on land is not extinguished merely because the rights are

The judiciary's obligation to protect Native Hawaiian rights under the constitution had been pronounced earlier in *Kalipi v. Hawaiian Trust Co., Ltd.*[11] In that case, the defendant had entered undeveloped land owned by others to gather agricultural products for use in traditional Native Hawaiian practices, as had long been his and his family's practice.[12] Although the question did not appear to be raised by the parties, Chief Justice William S. Richardson, on behalf of the court, announced the enduring principle that the potential conflict between traditional Native Hawaiian rights and contending societal interests, in that case the western system of land tenure, was subject to "the court's obligation to preserve and enforce such traditional rights" under article XII, section 7.[13]

In *Pele Defense Fund v. Paty*, Pele Defense Fund (PDF), representing its Native Hawaiian members, sued in part to obtain entry to a historic "common gathering area" located on privately owned property.[14] The trial court granted summary judgment against PDF. The supreme court held that although the members "resided in ahupua'a abutting" the gathering area,[15] the reference to "*all* rights customarily and traditionally" in article XII, section 7, "may extend [the rights] beyond the ahupua'a in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in [that] manner."[16] Summary judgment against PDF was vacated and the case was remanded.[17]

Subsequently, in *Hanapi* the defendant raised his exercise of Native Hawaiian rights for gathering produce and for religious purposes as a defense to a charge of trespassing on a neighbor's land.[18] The supreme court held that the burden was on the defendant to demonstrate that the

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"inconsistent with the western doctrine of property," (2) the State "retain[ed] the ability to reconcile competing interests under" section 7, (3) access to undeveloped land for the exercise of rights is "guaranteed" and although the State may regulate the development of land, "customary and traditional practices must be protected to the extent feasible." *Id.* at 442, 447, 451, 903 P.2d at 1263, 1268, 1272.

[11] 66 Haw. 1, 656 P.2d 745 (1982).

[12] *Id.* at 3–4, 656 P.2d at 747–48.

[13] *Id.* at 5, 656 P.2d at 748 (citing Stand. Comm. Rep. No. 57, *reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 637 (1980)) ("[I]n reaffirming these rights in the Constitution, Your Committee feels that badly needed judicial guidance is provided[,] and enforcement by the courts of these rights is guaranteed").

[14] 73 Haw. 578, 617, 837 P.2d 1247, 1270 (1992).

[15] *Id.* at 616, 837 P.2d at 1269.

[16] *Id.* at 619–20, 837 P.2d at 1271–72 (citations omitted).

[17] *Id.* at 621, 837 P.2d at 1272.

[18] State v. Hanapi, 89 Hawai'i 177, 181, 970 P.2d 485, 489 (1998).

right was protected.[19] Generally, three factors at a minimum were essential to qualify for protection of activities on land in that case: (1) that the person was a "Native Hawaiian";[20] (2) that the "claimed right [was] . . . a customary or traditional Native Hawaiian practice,"[21] although it need not be "specifically enumerated in the Constitution or statutes"; and (3) that the activity took place "on undeveloped or 'less than fully developed property'."[22] Activities on "fully developed" property, however, are "*always* inconsistent" with protected exercise.[23] As a corollary to these elements, an "adequate [evidentiary] foundation" must be established, linking "the claimed right to a firmly rooted traditional or customary native Hawaiian practice" in order to prove the existence of a practice.[24]

B. The Balancing of Interests

PASH's formulation of protection for the reasonable exercise of rights to the extent feasible and *Hanapi*'s three-part test constitute a general four-part description of protected rights: that the claimant was Native Hawaiian, that the claimed right was rooted in traditional and customary Native Hawaiian practice, that such practice was protected to the extent feasible, and that the exercise of such a right or practice had been reasonable. *PASH* and *Kalipi* had also referred to a "balance of interest and harms" in assessing the impact of exercised rights on Western private property rights.[25]

However, there did not appear to be an explicit general statement that exercised rights were to be balanced against opposing interests, as partly implied by the constitutional direction that exercised rights were "subject to the right of the State to regulate such rights," in article XII, section 7. Relying on similar statements in the cases regarding balancing interests, the *Pratt* court concluded that the "cases . . . balance the protections afforded native Hawaiians in the State, while also considering countervailing

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[19] *Id.* at 184, 970 P.2d at 492.

[20] *Id.* at 186, 970 P.2d at 494. Native Hawaiians are the persons described in article XII, section 7 as "descendants of native Hawaiians who inhabited the islands prior to 1778, and who assert otherwise valid customary and traditional Hawaiian rights . . . *regardless of their blood quantum*." *Id.* (citing Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (*PASH*), 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995)) (internal quotations ommitted).

[21] *Id.* (citing *PASH*, 79 Hawai'i at 438, 903 P.2d at 1271).

[22] *Id.* at 186, 970 P.2d at 494 (citing *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271).

[23] *Id.*

[24] *Id.* at 187, 970 P.2d at 495.

[25] *See, e.g.*, *PASH*, 79 Hawai'i at 442, 903 P.2d at 1263.

interests."[26] The *Pratt* decision applied a "balancing of interests" approach, in effect, expressly subjecting article XII, section 7 to a balancing test.[27]

Pratt had been criminally charged with having been in a part of Nā Pali State Park, on the island of Kaua'i, that was closed to the public.[28] He admitted to having been in the closed area in a written stipulation filed with the trial court,[29] but asserted that he was "constitutionally privileged" to do so pursuant to "a native Hawaiian practice."[30] On certiorari to the supreme court, a majority of the court applied a balancing test *and* a totality of the circumstances test,[31] holding that the State's interest in "maintaining the park for public use and preserving the environment" outweighed Pratt's "failure to engage in his native Hawaiian practice within the limits of the law."[32] Accordingly, his activities were not constitutionally protected.[33]

The concurring and dissenting opinion in *Pratt* maintained that Pratt's written stipulation was constitutionally invalid because the court had failed to engage Pratt in a personal colloquy to ascertain whether he understood that entering into the stipulation waived his right to have the prosecution prove an element of the crime beyond a reasonable doubt.[34] Although this error in the conviction was not raised by Pratt, the dissent maintained the error should result in a remand of the case for a new trial under the plain error rule. That rule permits an appellate court *sua sponte* to take "notice" of a legal error not raised by the defendant in a criminal case.[35]

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[26] State v. Pratt, 127 Hawai'i 206, 215, 277 P.3d 300, 309 (2012).

[27] *Id.* at 218, 277 P.3d at 312.

[28] *Id.* at 207–08, 277 P.3d at 301–02.

[29] *Id.* at 210–211, 277 P.3d at 304–05.

[30] *Id.* at 208, 277 P.3d at 302.

[31] *Id.* at 218, 277 P.3d at 312 ("In applying the totality of the circumstances test to the facts of this case, the balancing of interests weighs in favor of permitting the park to regulate Pratt's activity, his argument of privilege notwithstanding.").

[32] *Id.* at 218, 277 P.3d at 312.

[33] *Id.*

[34] *Id.* at 225–28, 277 P.3d at 319–22 (Acoba, J. joined by McKenna, J., concurring in part and dissenting in part); *see* State v. Murray, 116 Hawai'i 3, 21, 169 P.3d 955, 973 (2007) (to ensure a defendant's rights under the Hawai'i constitution, the trial court is required to engage the defendant in an on the record colloquy to ensure he has knowingly and voluntarily waived the right to have the prosecution prove each element of a crime beyond a reasonable doubt).

[35] *Pratt*, 127 Hawai'i at 226–27, 277 P.3d at 320–21. The majority noted that *Murray* was not decided at the time of Pratt's trial. *Id.* at 212, 277 P.3d at 307. The dissent responded that *Murray* was decided while Pratt's case was pending on appeal before the ICA and had not been subsequently raised in the application for certiorari to the court. *Id.* at 226, 277 P.3d at 320. Further, the nature of plain error is that the court may *sua sponte* notice plain error

The majority rejected the application of the plain error doctrine on the basis that Pratt had chosen to stipulate to the violation for the "tactical" purpose[36] of having the court reach the question of whether his Native Hawaiian practice claim constitutionally would override the park regulation.[37]

II. *PRATT*'S TOTALITY OF CIRCUMSTANCES TEST

In addition to adopting a balancing test with respect to article XII, section 7, the majority applied the "totality of the circumstances" test. This test was added because "the constitutional provision . . . applies in several contexts and because [the majority] cannot anticipate which factors may be relevant in all contexts. . . ."[38] The totality test apparently is to be applied before the balancing test.[39]

Arguably, either test is usually the penultimate analytical step before a primary conclusion. Neither the stacking of these tests nor the totality of circumstances test appears to have been adopted in the exercised rights cases. Analytically, facts in and of themselves are not relevant unless referable to a pertinent standard or issue. The question is whether a test "establishes rational criteria that allow the court to apply the law governing the constitutional [provision] to the facts of a particular case."[40]

The four criteria discussed *supra,* derived from *PASH* and *Hanapi*, are constitutionally grounded and subject to a balancing test. In employing the balancing test "the court must identify the respective interests of the [parties] and balance those interests to determine which is of greater

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infringing on constitutional rights. *Id.* at 226–27, 277 P.3d at 320–21.

[36] This could present a dilemma for counsel and highlights a possible consequence of using a court case as a vehicle to advance a cause. The significant question posed by the defendant was placed in a contrived legal setting. More importantly, the rejection of the plain error doctrine allowed a party to fashion the posture of a case in order to obtain the trial court's ruling on the asserted privilege. Ultimately, the defendant failed in persuading the Intermediate Court of Appeals on appeal, *see id.* at 212, 277 P.3d at 306, and the majority of the supreme court on certiorari, *id.* at 218, 277 P.3d at 312, to treat his occupation of a public park as a permissible exercise of Native Hawaiian rights.

[37] *Id.* at 212–13, 277 P.3d at 306–07. The majority's view of the tactical move was subsequently reversed in *State v. Ui.* 142 Hawai'i 287, 418 P.3d 628 (2018). In *Ui*, the majority held that trial strategy would not obviate the need for a *Murray* colloquy. 142 Hawai'i at 294–96, 418 P.3d at 635–37.

[38] *Pratt,* 127 Hawai'i at 217–18, 277 P.3d at 311–12.

[39] *Id.* at 218, 277 P.3d at 312.

[40] *Id.* at 230, 277 P.3d at 324 (Acoba, J. joined by McKenna, J., concurring in part and dissenting in part).

weight."[41] Hence, "[t]hese [criteria] . . . are to be applied in every case, and whether they have been met is necessarily dependent on the facts of the particular case."[42] The court is thus limited in what it should consider in applying a balancing test.[43] Additionally, applying the totality of circumstances test "risks expanding the scope of analysis to include extraneous matters that may adversely affect the integrity of the test outcome."[44] The risk may be that "using the improper legal test yields an incorrect result."[45]

The *Pratt* totality of circumstances test was not raised or applied by the Hawai'i Supreme Court in the subsequent case of *State v. Armitage*.[46] In *Armitage*, the majority vacated the criminal convictions of the petitioners and remanded the case for failure to allege the requisite criminal state of mind for the offense of entering the Kaho'olawe Island Reserve without authorization.[47] Because of the likelihood of retrial on remand of the case, the majority did discuss, among other issues, Petitioners' claim that they were privileged to engage in activities on the island as part of their traditional and customary Native Hawaiian practice.[48]

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[41] *Id.* at 229, 277 P.3d at 323 (Acoba, J. joined by McKenna, J., concurring in part and dissenting in part).

[42] *Id.*

[43] *Cf.* State v. Kazanas, 138 Hawai'i 23, 39, 375 P.3d 1261, 1277 (2016) (stating that as opposed to a totality of circumstances test, the test from *Rhode Island v. Innis*, 446 U.S. 291 (1980), "set limits on what courts should consider in determining whether a police officer 'should have known [his or her words or actions] were reasonably likely to elicit an incriminating response.'") (quoting *Innis*, 446 U.S. at 302). In *Kazanas*, the court clarified that under *Innis* and prior Hawai'i cases, the question of whether, "interrogation" of a person in police custody had taken place rested on whether the officer should have known "that their words and actions [were] reasonably likely to elicit an incriminating statement[,]" and not on a totality of circumstances test. *Id.* at 35, 375 P.3d at 1273.

[44] *Pratt*, 127 Hawai'i at 229, 277 P.3d at 323 (Acoba, J. joined by McKenna, J., concurring in part and dissenting in part); *see also Kazanas*, 138 Hawai'i at 39, 375 P.3d at 1277 ("[A] 'totality of the circumstances' review [is seen] as sweeping in any circumstance, without limitation, for the court's consideration.").

[45] *Kazanas*, 138 Hawai'i at 40, 375 P.3d at 1278.

[46] 132 Hawai'i 36, 319 P.3d 1044 (2014).

[47] *Id.* at 50, 63, 319 P.3d at 1058, 1071. Chief Justice Recktenwald filed a concurring and dissenting opinion joined by Justice Nakayama, primarily dissenting to the state of mind holding. *Id.* at 63, 319 P.3d at 1071 (Recktenwald, J., concurring in part and dissenting in part).

[48] *Id.* at 40, 58, 319 P.3d at 1048, 1066. The majority in *Armitage* assumed arguendo, that Petitioners could establish they were engaged in a traditional and customary practice. *Id.* at 54, 319 P.3d at 1062. The Petitioners' defense of native Hawaiian practice then was evaluated "by balancing the State's interest in regulating Petitioners' activity with

The *Armitage* court employed the balancing test but did not apply the "totality of circumstances" test. Neither *PASH* nor *Ka Pa'akai* alluded to the use of such a test. It may be beneficial under the circumstances to reexamine the use of the totality of circumstances test, in order to avoid the risk of "using [an] improper legal test [that would] yield an incorrect result."[49]

III. THE ENFORCEMENT OF EXERCISED RIGHTS

A. The Ka Pa'akai *Framework*

Ka Pa'akai fashioned the enforcement mechanism for the agency obligations imposed by *PASH*. Incorporating the precepts in *PASH*, *Ka Pa'akai* maintained that an affirmative duty was imposed on "the State and its agencies to preserve and protect the reasonable exercise of traditional and customary and native Hawaiian rights. . . ."[50]

The three-part framework in *Ka Pa'akai* assesses government adherence to article XII, section 7 and the *PASH* requirements.[51] Specific findings of fact and conclusions of law are necessary to support the components of the framework.[52] Administrative agencies are prohibited from delegating the function of protecting exercised rights to private entities.[53] The supreme court's syllogistic premise for constructing the framework was straightforward:

Petitioners' interest in visiting Kaho'olawe." *Id.* The majority ruled that the balance weighed in favor of the State's interest in protecting the health and safety of individuals traveling to Kaho'olawe and against the Petitioners inasmuch as the Petitioners had failed to avail themselves of procedures for lawful entry onto the island. *Id.* at 55, 319 P.3d at 1063. In reaching its decision the majority did not apply a totality of circumstances test or require that such a test be applied on remand if the case were retried. *See id.*

[49] *See Kazanas*, 138 Hawai'i at 40, 375 P.3d at 1278. In an unpublished opinion, the totality of circumstances test was applied by the Intermediate Court of Appeals. *State of Hawai'i v. Palama*, No. CAAP–12–0000434, 2015 WL 8566696136 at *12 (Haw. Ct. App. Dec. 11, 2015) ("[I]n view of the totality of the circumstances established in this case, the circuit court did not err in balancing the respective interests of Palama and the State.").

[50] Ka Pa'akai O Ka 'Aina v. Land Use Comm'n [sic], 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000) (citing Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (*PASH*), 79 Hawai'i 425, 437, 903 P.2d 1246, 1258 (1995)).

[51] *Id.* at 46, 7 P.3d at 1083.

[52] *Id.* at 47, 7 P.3d at 1084.

[53] *Id.* at 52, 7 P.3d at 1089.

> In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for native Hawaiian rights to be enforceable, an appropriate analytical framework for enforcement is needed.[54]

The framework was also intended "to accommodate the competing interests of protecting native Hawaiian culture and rights on the one hand, and economic development and security, on the other."[55] The framework requires agencies to conduct an inquiry into "(1) the identity and scope of . . . 'cultural, historical or natural resources' . . . including the extent to which . . . native Hawaiian rights [were] exercised . . . ; (2) the extent to which [such rights] will be affected or impaired by the proposed action; and (3) the feasible action . . . to reasonably protect [such rights]".[56]

Ka Pa'akai involved the petition of developer Ka'ūpūlehu Development to the Land Use Commission (LUC) to reclassify conservation land to "Urban District" for the development of a resort and single-family homes.[57] The LUC assigned the developer the task of coordinating the development with the protection of Native Hawaiian rights.[58] The court subjected LUC's findings and conclusions to the three-part framework and held that the findings and conclusions were "insufficient" for the court to ascertain whether the LUC had "discharged its duty to protect" such rights "to the extent feasible."[59] The case was remanded to the LUC for relevant application of the three-part framework.[60] Further, the court determined that the LUC had violated its duty to protect exercised rights because it allowed the developer "to direct the manner in which . . . native Hawaiian practices would be preserved and protected" before rendering its own findings and conclusions as to the development's impact on the practices.[61] The LUC had "delegated a non-delegable duty and thereby acted in excess of its authority."[62]

Ka Pa'akai's framework constituted a major advancement in the protection of exercised rights. *PASH* had confirmed the constitutional protection afforded to exercised rights and bound the State to the protection of such rights. As previously noted, Chief Justice Richardson had earlier

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[54] *Id.* at 46, 7 P.3d at 1083.
[55] *Id.*
[56] *Id.* at 47, 7 P.3d at 1084.
[57] *Id.* at 35–36, 7 P.3d at 1072–73.
[58] *Id.* at 36, 7 P.3d at 1073.
[59] *Id.* at 48, 7 P.3d at 1085.
[60] *Id.* at 53, 7 P.3d at 1090.
[61] *Id.* at 52, 7 P.3d at 1089.
[62] *Id.*

announced in *Kalipi v. Hawaiian Tr. Co., Ltd.* "the court's obligation to preserve and enforce such traditional rights" under Hawai'i's Constitution.[63] The need for an enforcement mechanism to "effectuate" this obligation seemed apparent to the *Ka Pa'akai* court.[64] The court posited that such rights would be meaningless unless enforceable.[65] Consequently, the court adopted the role of guardian of such rights for itself, as Chief Justice Richardson had forecasted in *Kalipi*.

The court aligned itself with the view, expressed at the 1978 constitutional convention by the drafters of article XII, section 7, that by "reaffirming these rights in the Constitution . . . badly needed judicial guidance is provided and enforcement by the courts of these rights is *guaranteed*."[66] The court seemingly assumed the role ascribed to it by the drafters, a logical extension of the *Kalipi* and *PASH* decisions.

Conceivably, parts of the enforcement framework or a similar formula could have been adopted by the executive branch through the promulgation of agency policies and rules or prescribed by the legislative branch in statutes. The court thus implicitly acknowledged the legislature's concurrent role in prescribing protections for Native Hawaiian rights.[67]

B. Findings of Fact and Conclusions of Law

In *Ka Pa'akai*, the supreme court did not decide the merits of the Native Hawaiian rights claim.[68] Because the merits determination had been made at the administrative agency level by the LUC and appealed to the circuit court, the supreme court's review on certiorari of the circuit court's decision was a secondary review.[69] On secondary review the appellate court determines whether the circuit court's decision was right or wrong applying standards set out in Hawai'i Revised Statutes (HRS) section 91-14(g) of the Hawai'i Administrative Procedures Act (HAPA).[70]

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[63] 66 Haw. 1, 4–5, 656 P.2d 745, 748 (1982).

[64] 94 Hawai'i 31, 46–47, 7 P.3d 1068, 1083–84 (2000).

[65] *Id.* at 46, 7 P.3d at 1083.

[66] *Id.* at 50, 7 P.3d at 1087 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992)) (emphasis added).

[67] *See id.* at 47, n.28, 7 P.3d at 1084, n.28 (noting that the 2000 Hawai'i State legislature's passage of House Bill No. 2895, finding in part that environmental impact statements should identify "effects on Hawai'i's culture, and *traditional and customary rights*" supplied "strong support for the framework" adopted in *Ka Pa'akai*).

[68] *Id.* at 34–35, 7 P.3d at 1071–72.

[69] *Id.* at 34–41, 7 P.3d at 1071–91.

[70] *Id.* at 40, 7 P.3d at 1077.

Under HRS section 91-14(g)(5), the standard of review for an agency's findings of fact is whether the finding is clearly erroneous—that is, whether the finding lacks the support of substantial evidence in the record.[71] Conclusions of law are reviewed for whether they are affected by a legal error.[72] A trial court's findings of fact are reviewed under a clearly erroneous standard.[73] A finding is clearly erroneous if it lacks substantial evidence in the record to support it or if there is substantial evidence to support the finding, but the appellate court nevertheless is left with a definite and firm conviction that a mistake was made.[74] The trial court's conclusions of law are freely reviewable by the appellate court as to whether a conclusion is right or wrong. Questions of constitutional law, as to which the court exercises its own judgment, are reviewed under a right or wrong standard.[75]

Ka Pa'akai's mandate for findings of fact and conclusions of law is pivotal in the outcome of cases. As noted in *Ka Pa'akai*, the supreme court

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[71] HRS § 91-14(g)(5) states as follows:

> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> . . .
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]

HAW. REV. STAT. § 91-14(g)(5) (Westlaw 2021).

[72] *Id.* Pursuant to "HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4)." Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114, 121, 424 P.3d 469, 476 (2018). Subsections (1), (2), and (4) state the grounds for a "wrong" conclusion of law as follows:

> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
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> . . .
>
> (4) Affected by other error of law[.]

HAW. REV. STAT. § 91-14(g)(1), (2), (4).

[73] Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 220, 140 P.3d 985, 1000 (2006).

[74] *Id.* (quoting Kienker v. Bauer, 110 Hawai'i 97, 105, 129 P.3d 1125, 1133 (2006)).

[75] *Id.* at 221, 140 P.3d at 1001 (quoting Freitas v. Admin. Dir. Of the Courts, 108 Hawai'i 31, 37, 116 P.3d 673, 679 (2005)).

ruled the administrative findings were insufficient to discharge the LUC's duty to protect rights, remanding the case for further findings and conclusions.[76]

In *In re Conservation District Use Application HA-3568* (*Mauna Kea II*), the majority, applying *Ka Pa'akai*, concluded that the Board of Land and Natural Resources' (BLNR) finding that Native Hawaiian cultural practices had not taken place at the proposed thirty-meter telescope (TMT) observatory site and access road was determinative.[77] The court therefore rejected the article XII, section 7 claim by Native Hawaiian cultural practitioners who opposed the TMT construction.[78] Indeed, because BLNR found that "Native Hawaiian rights were not found to have been exercised in the relevant area . . . the third requirement [in *Ka Pa'akai*] was not required to be addressed."[79]

Although *Ka Pa'akai* involved an administrative proceeding, the requirement for findings and conclusions would appear to extend to court proceedings, if not already required, in the ordinary course of judge trials. In *Ching v. Case*, the trial court's findings and conclusions were instrumental in the supreme court's affirmance of the trial court's decision that BLNR's failure to monitor the military's use of ceded lands was a breach of trust.[80] The *Ching* findings were made by a trial court rather than an administrative agency, but a similar fact standard of clearly erroneous would apply on appellate review.

The heightened importance of findings of fact is apparent. The findings must be well crafted by the parties in their proposed findings or by the agency or trial court in order to address Native Hawaiian rights. Just as the findings in *Ching* were central to the conclusion that BLNR had breached its public trust duty,[81] the key findings in *Mauna Kea II* were crucial in leading to the legal conclusion that there had not been a breach of BLNR's duty of protection under *Ka Pa'akai*.[82]

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[76] Ka Pa'akai O Ka 'Aina v. Land Use Comm'n [sic], 94 Hawai'i 31, 53, 7 P.3d 1068, 1090 (2000).

[77] 143 Hawai'i 379, 396, 431 P.3d 752, 769 (2018).

[78] *See id.*

[79] *Id.* at 397, 431 P.3d at 770; *see also Kelly*, 111 Hawai'i at 234, 140 P.3d at 1014 (concluding that the court was not required to apply *Ka Pa'akai* because the plaintiff "failed to sustain its burden of showing both the County [of Hawai'i] and the [State Department of Health] had breached [their] public trust duties" under article XI section 1 of the Hawai'i Constitution).

[80] 145 Hawai'i 148, 449 P.3d 1146 (2019).

[81] *Id.* at 178, 449 P.3d at 1176.

[82] 143 Hawai'i at 395–98, 431 P.3d at 768–71.

IV. EXERCISED RIGHTS AND THE TRUST PROVISIONS IN ARTICLE XII, SECTION 4 AND ARTICLE XI, SECTION 1 AND TRUST DUTIES

PASH's confirmation of the government's obligation to protect Native Hawaiian rights would seem to extend to the ceded lands trust provisions in article XII, section 4. The government's role as trustee under section 4 is elucidated in *Pele Defense Fund* and in *Ching*. The connection of Native Hawaiian rights to article XI, section 1, adopted in *In re Water Use Permit Applications* (*Waiāhole I*), is manifested in a public purpose attachment to the public trust water resource.[83] The possibility of a public purpose formulation as to other natural resources is considered below in the discussion of the majority and concurring in part opinions in *Mauna Kea II*. *Ching* may be seen as establishing the current constitutional standard for trustee conduct under both article XII, section 4 and article XI, section 1.

A. Exercised Rights and the Ceded Land Trust Provision in Article XII, Section 4

In *Pele Defense Fund v. Paty*, the State exchanged ceded lands that were held in trust for the benefit of Native Hawaiians and the general public with a private estate.[84] Pele Defense Fund (PDF) claimed that, among other allegations, "the exchange constitute[d] a breach of the [ceded lands] trust[85] created under section 5(f) of the [Hawai'i] Admission Act and of article XII, section 4 of the [Hawai'i] Constitution."[86]

The supreme court held that PDF, whose members were beneficiaries of the trust, could sue the State for breach of trust "where the agency charged

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[83] 94 Hawai'i 97, 9 P.3d 409 (2000).

[84] 73 Haw. 578, 584, 837 P.2d 1247, 1253 (1992).

[85] Ceded lands are lands that were transferred in 1898 by the Republic of Hawai'i to the United States upon annexation, following the overthrow of the Hawaiian Monarchy. *Id.* at 585, 837 P.2d at 1254. Upon admission to the United States in 1959, the lands were transferred to the State of Hawai'i subject to the trust provisions of section 5(f) of the Admission Act. *Id.*

[86] *Id.* at 584, 837 P.2d at 1253. Article XII, section 4 provides as follows:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

HAW. CONST. art. XII, § 4.

with the administration of a trust held for the benefit of native Hawaiians . . . has purportedly disposed of trust assets in violation of trust provisions. . . ."[87] Noting that "[a]rticle XII, § 4 imposes a fiduciary duty [on the State] to hold ceded lands in accordance with section 5(f)" the court maintained that "actions of state officials acting in their official capacities, should not be invulnerable to constitutional scrutiny."[88] Accordingly, PDF established that "the [State] courts must be available . . . to avert such a purported breach of public trust."[89]

In *Ching*, plaintiffs, who were Native Hawaiian beneficiaries, brought a breach of trust claim against the Department of Land and Natural Resources (DLNR) under the ceded land trust provision of article XII, section 4.[90] Additionally, the beneficiaries alleged a violation of the public resource trust provisions of article XI, section 1.[91]

Certain ceded lands held in trust by the State, known as the Pōhakuloa Training Area (PTA), had been leased by DLNR to the United States military upon certain conditions.[92] Plaintiffs' complaint alleged, inter alia, "the possibility that the land . . . was littered with unexploded ordnance[,]" and that the State had breached its trust duties in failing to monitor the United States' compliance with the lease.[93]

Citing in part to the Restatement (Third) of Trusts, section 90 cmt. b (2007), *Ching* held that the failure to "reasonably monitor" the use of trust property was in itself a breach of trust "irrespective" of whether the actions of the military violated its lease with DLNR.[94] The court stated that the State had "a duty to make reasonable efforts to monitor third-parties' compliance with the terms of agreements designed to protect trust

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[87] 73 Haw. at 605–06, 837 P.2d at 1264.

[88] *Id.* at 605, 837 P.2d at 1264.

[89] *Id.*

[90] 145 Hawai'i 148, 155, 449 P.3d 1146, 1153 (2019).

[91] *Id.* Article XI, section 1 provides as follows:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

HAW. CONST. art. XI, § 1.

[92] *Ching*, 145 Hawai'i at 152, 449 P.3d at 1150.

[93] *Id.* at 155, 449 P.3d at 1153.

[94] *Id.* at 170–171, 449 P.3d at 1168–69.

property."[95] Article XI, section 1 required DLNR to "*ensure that the prescribed measures are actually being implemented.*"[96]

The court focused on the trust duties of the BLNR, rather than on the United States' compliance with the lease. Also, the court decided that the trial court was correct in concluding that the United States was not a necessary and therefore indispensable party to the suit.[97] The United States could have intervened as a party in *Ching* but apparently chose not to do so, leaving the way open for the trial court to proceed.[98]

The *Ching* decision raises the related question of whether the protection of Native Hawaiian rights was covered by article XI, section 1 or article XII, section 4. Understandably, the case focused on the constitutional trust provisions and the State's duties as a trustee common to both provisions.[99]

The complaint alleged that Ching "engage[d] in native Hawaiian cultural practices," such as "walking . . . on hiking trails" and "participat[ing] in other 'traditional and customary services' within the PTA. . . ."[100] It does not appear that a natural resource public trust *purpose* was advanced for Ching's activities under article XI, section 1, like that recognized in *Waiāhole I* for Native Hawaiian rights in water resources.[101] The breach of trust in *Ching* was tied to DLNR's failure to monitor compliance with the lease in order to protect trust land held for the benefit of Native Hawaiians and the general public.[102] The protection of exercised rights, then, appears closely connected to the protection afforded the ceded land trust under article XII, section 4.

Apparently, the parties in *Ching* did not raise a violation of article XII, section 7. Conceivably, that provision could have been treated as an additional constitutional affirmation of Native Hawaiian rights and would have extended to Ching's cultural practices in the PTA. In *PDF*, a claim

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[95] *Id.* at 177–78, 449 P.3d at 1175–76.

[96] *Id.* at 178, 449 P.3d at 1176 (quoting Kelly v. Oceanside Partners, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006)).

[97] *Id.* at 172, 449 P.3d at 1170; *cf.* Pele Def. Fund v. Paty, 73 Haw. 578, 613, 837 P.2d 1247, 1268 (1992) (where PDF's failure to appeal the "lower court's conclusion of law ruling that the State is an indispensable party to the breach of trust claims" effectively waived its article XII, section 4 breach of trust claim).

[98] *See Ching*, 145 Hawai'i at 172, 449 P.3d at 1170.

[99] *Id.* at 170, 449 P.3d at 1168 ("It is undisputed that the leased PTA land at issue in this case is trust land within the meaning of these constitutional provisions.").

[100] *Id.* at 155, 449 P.3d at 1153.

[101] *See In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 9 P.3d 409 (2000).

[102] *See Ching*, 145 Hawai'i at 152, 449 P.3d at 1150.

was made under article XII, section 4 for the challenged exchange of ceded lands but a separate claim asserting gathering rights was brought under article XII, section 7.[103] The nature of the "public trust for native Hawaiians" in section 4 may engender future elaboration or among other alternatives, could be construed as additionally incorporating the law of article XII, section 7. The public trust purpose approach in *Waiāhole I* tied to article XI, section 1 offers another avenue of protection as discussed below.

B. The Public Trust Purpose in Article XI, Section 1

1. Waiāhole I and the Public Trust Purpose

In pinpointing purposes of the public trust in water resources under article XI, section 1, *Waiāhole I* identified the exercise of Native Hawaiian rights as a public trust purpose of the water resource.[104] Relying on the historical importance of water in Native Hawaiian society, article XII, section 7, and case precedent including *PASH*, the supreme court majority maintained that the protection of exercised rights attached to the public trust in water.[105] This proposition was later advanced in *In re Wai'ola O Moloka'i, Inc.*,[106] and cited in the concurrence in part in *Mauna Kea I*.[107]

In *Wai'ola*, the applicants, Wai'ola and Moloka'i Ranch Ltd., were granted permits by the Commission on Water Resource Management for construction of a well and for water use.[108] The court held, *inter alia*, that the Commission erred in concluding that "no evidence was presented that the drilling of the well would affect the exercise of traditional and customary native Hawaiian rights."[109]

The court relied in part on the statement in *Waiāhole I* that rendered the exercise of Native Hawaiian rights a "public trust purpose" of the water resource.[110] Because the protection of exercised rights was a public trust

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[103] Pele Def. Fund v. Paty, 73 Haw. 578, 613, 837 P.2d 1247, 1268 (1992).

[104] *Waiāhole I*, 94 Hawai'i at 136–37, 9 P.2d at 448–49.

[105] *Id.* at 137, 9 P.3d at 449.

[106] 103 Hawai'i 401, 83 P.3d 664 (2004).

[107] 136 Hawai'i 376, 387 n.7, 363 P.3d 224, 235 n.7 (2015) (Pollack, J., concurring) (citing *Waiāhole I*, 94 Hawai'i at 137, 9 P.2d at 449).

[108] 103 Hawai'i at 407–409, 83 P.3d 670–72.

[109] *Id.* at 442, 83 P.3d at 705 (quoting the Commission's COL No. 24).

[110] *Id.* at 430–31, 83 P.3d at 693–94 (citing *Waiāhole I*, 94 Hawai'i at 137, 9 P.3d at 449 ("[U]pholding the exercise of native Hawaiian and traditional and customary rights as a public trust purpose.")).

purpose under *Waiāhole I*, the burden was on the opposing party, i.e., an "applicant for a water use permit," to affirmatively "establish[] that the proposed [permit] use will not interfere with any public trust purposes."[111] The *Mauna Kea I* concurrence also cited history and precedent in noting that the court "continue[s] to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose."[112]

There is no express constitutional basis for exercised rights in water resources. Plainly, where the constitution encompasses provisions requiring fiduciary public trusts duties, the constitution expressly states so.[113] Protection for exercised rights falls explicitly under article XII, section 7, independent of a stated public trust reliance. The derivation of a public trust purpose in *Waiāhole I* was a judicial construct from various sources. This was apparent in that the majority made clear that this purpose was not to be considered a replacement for other protections.[114] However, the public purpose paradigm expanded the exercised rights embodied in article XII, section 7.

2. Mauna Kea II *and the Public Trust Purpose*

Native Hawaiian ancestral ties to natural features and resources have been raised in exercised rights cases.[115] It is not surprising then, that natural resource protection claims and exercised rights claims have coincided in some cases. Hence, exercised rights may benefit from resource trust provisions to the extent they are implicated in or aligned with resource rights.

The Native Hawaiian cultural practitioners in *Mauna Kea II* relied in part on the *Waiāhole I* public trust purpose rationale, contending that use of the TMT proposed site and access road on Mauna Kea by Native Hawaiians was analogous to the public trust purpose component in the *Waiāhole I* case.[116] Consequently, the practitioners asserted that their exercised rights

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[111] *Id.* at 441–42, 83 P.3d at 704–05.

[112] 136 Hawai'i at 387 n.7, 363 P.3d at 235 n.7 (Pollack, J., concurring).

[113] *See, e.g.*, HAW. CONST. art. XII, § 4 (ceded lands held in trust by the State for the benefit of Native Hawaiians and the general public).

[114] *Waiāhole I*, 94 Hawai'i at 137 n.35, 9 P.3d at 449 n. 35 ("Our holding with respect to the public trust does not supplant any other protections of these rights already existing.").

[115] *See, e.g., In re* Conservation Dist. Use Application HA-3658 (*Mauna Kea II*), 143 Hawai'i 379, 384, 431 P.3d 752, 757 (2018) ("Some Native Hawaiians . . . consider Mauna Kea . . . to be an ancestor, a living family member and progenitor of Hawaiians.").

[116] *Id.* at 401–02, 431 P.3d at 774–75.

were entitled to the *Waiāhole I* presumption in favor of public use, as opposed to the TMT users' private use of the subject site.[117]

Similar to its response in rejecting the exercised rights claim brought under article XII, section 7, the majority denied practitioners' claim, reiterating that "there was no actual evidence of use of the TMT Observatory site and Access Way area by Native Hawaiian practitioners."[118] Evidently balancing the lack of use by Native Hawaiians on one hand and the educational and economic benefits of the TMT project on the other, the majority decided the project itself was consistent with conservation of the resource and furthered the self-sufficiency of the State, the benchmarks under article XI, section 1.[119]

While the lack of interference with exercised rights may have obviated the majority's need to apply the presumption in favor of public use, it is not clear whether the presumption was considered in the balancing test. The concurrence argued that factors relied on by the majority such as "grants, scholarships, career training" and "sublease rents" did not bear on whether the resource use for the TMT was "public in nature."[120] According to the concurrence, since similar items could be aligned with any resource use, the majority's approach "threaten[ed] to make the presumption [in favor of public use] meaningless."[121]

The *Mauna Kea II* majority acknowledged that balancing under article XI section 1 "must begin with a presumption in favor of public use, access and enjoyment" as set forth in *Waiāhole I*.[122] The majority, however, disavowed the "wholesale adopt[ion] . . . [of] public trust principles as applied to the state water resources trust. . . . [in *Waiāhole I*] and its progeny."[123] Interestingly, the majority did not reject out of hand a public trust *purpose* claim to *land*. Additionally, as noted, the majority did acknowledge that the presumption in favor of public use derived from *Waiāhole I* applied in the balancing analysis under article XI, section 1.[124]

Correlatively, this may imply that the presumption would apply to all resources covered by article XI, section 1. Inasmuch as a public trust purpose of exercised rights in the conservation land resource was not

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[117] *Id.*

[118] *Id.* at 402, 431 P.3d at 775.

[119] *Id.*

[120] *Id.* at 416, 431 P.3d at 778 (Pollack, J., concurring).

[121] *Id.* (Pollack, J. concurring).

[122] *Id.* at 401–02, 431 P.3d at 774–75 (citing *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 137, 9 P.3d 409, 449 (2000)).

[123] *Id.* at 401 n.24, 431 P.3d at 774 n.24.

[124] *Id.* at 401–402, 431 P.3d at 774–75.

discussed, it is uncertain whether such a purpose would be recognized in the future. However, the presumption in favor of public use is one precept—as opposed to the other factors—that expressly survived the majority's pivot away from *Waiāhole I*.

The majority also did not address the concurrence's modified version of the factors from *Waiāhole I* and its progeny that might be extended to non-water resources.[125]

The concurrence had maintained that a general framework based on the *Waiāhole I* water resources case should govern the use of the resources enumerated in article XI, section 1.[126] According to the concurrence, "[o]ur caselaw setting forth public trust principles governing water resources provides a uniform standard that may easily be applied to other natural resources."[127] This approach appeared to have been precast in the earlier decision of *Kauai Springs, Inc. v. Plan. Commission of the County of Kaua'i*.[128] *Kauai Springs* contained a "checklist for the guidance of government agencies whose actions may involve public trust considerations."[129] Thus,"[w]hile the checklist involved . . . permits for the use of water resources, the factors listed . . . appeared to be applicable as well to other public trust areas."[130]

Were the factors modeled on *Waiāhole I*[131] adopted by the court in *Mauna Kea II*, that multifactorial test would likely govern natural resource use. Adoption of that test posed the possibility of added "public trust

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[125] *Id.* at 401 n.25, 431 P.3d at 774 n.25 (declining to "address Justice Pollack's suggested analytical framework for addressing whether an agency is in compliance with its public trust obligations").

[126] *Id.* at 410, 431 P.3d at 783 (Pollack, J. concurring).

[127] *Id.* (Pollack, J. concurring).

[128] 133 Hawai'i 141, 324 P.3d 951 (2014).

[129] Simeon R. Acoba, *Four Major Hawai'i Judicial Developments in the Last 50 Years*, 23 HAW. B.J. 11, 16 (2019).

[130] *Id.*

[131] The list from *Kauai Springs* included the following factors: "[t]he agency [has a] duty and authority [] to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use," "[t]he agency must determine whether [a] proposed use is consistent with the trust purposes[,]" "[t]he agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection[,]" "the agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water [,]" "if the requested use is private or commercial, the agency should apply a high level of scrutiny [,]" and "[t]he agency should evaluate the proposed use under a 'reasonable and beneficial use' standard, which requires examination of the proposed use in relation to other public and private uses. *Id.* at 18 n.39 (citing *Kauai Springs*, 133 Hawai'i at 172–73, 324 P.3d at 982–83).

purposes" of exercised rights in non-water natural resources, like that already integrated in the water resource. This assumes that, as in *Waiāhole I*, a supportive basis would exist to justify the "purpose" status for exercised rights in the resource involved.

3. *The* Waiāhole I *Dissent*

In light of *Mauna Kea II*, the *Waiāhole I* dissent may have gained renewed significance.[132] By emphasizing the balancing test and largely eschewing the multifactorial approach of *Waiāhole I*, the *Mauna Kea II* majority may trend closer to the *Waiāhole I* dissent.[133] The dissent had maintained that article XI section 1 required a balancing of conservation and resource utilization and "did not mandate that such balancing . . . favors particular uses."[134] In the dissent's view, the directive in article XI, section 7 that "[t]he legislature shall provide for a water resource agency which, as provided by law, shall . . . establish criteria for water use priorities,"[135] mandated a legislative ordering of priorities in resource use.

Thus, the dissent maintained that article XI, section 7 left to the legislature, rather than to the court, the discretion to decide such priorities. The legislature is "charged with the responsibility of making laws, that determines public policy, and . . . should set water use priorities 'as provided by law.'"[136]According to the dissent, the "State's public trust obligation, as enshrined in the Hawai'i Constitution and as incorporated into the [Water] Code,[137] does not mandate . . . native Hawaiian rights be accorded 'superior claim[]'" status.[138]

4. *The Limits of the* Waiāhole I*'s Multifactorial Test and Future Demarcations of the Public Trust Doctrine Following* Mauna Kea II

Waiāhole I is a judicially fashioned rubric for public water resource management. In that respect, *Waiāhole I* prescribed a presumption in favor of the public use of water resources and other factors to be considered in

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[132] *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 191–98, 9 P.3d 409, 503–10 (2000) (Ramil, J. dissenting).

[133] *Id.* at 191, 9 P.3d at 503.

[134] *Id.* at 192, 9 P.3d at 504.

[135] *Id.* at 196, 9 P.3d at 508.

[136] *Id.* (Ramil, J. dissenting).

[137] The Water Code referred to in the dissent is HAW. REV. STAT. chapter 174C (1993); *see Waiāhole I*, 94 Hawai'i at 195, 9 P.3d at 507.

[138] *Waiāhole I*, 94 Hawai'i at 195, 9 P.3d at 507 (Ramil, J., dissenting).

augmenting the presumption. While understandably focused on the public nature of the resources, the factors weigh against private use. *Waiāhole I* directed that the agency "must not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision[-]making process."[139] Instructing that government's involvement must be brought to bear in a particular manner may embody policy choices made in the judicial arena, outside of the legislative process.[140]

In requiring adherence by administrative agencies and by the courts to its multifactorial model, *Waiāhole I*'s mode of decision-making could be considered more prescriptive than adjudicative.[141] Arguably, in defining the common law public trust principles to be applied by the agencies, the *Waiāhole I* majority may have assumed a role that could have been left to the legislature and its enactment of the Water Code, a course the majority itself seemed to recognize.[142] The *Mauna Kea II* majority's substantial turn away from *Waiāhole I* and its progeny may suggest that there will not be a return to another formulaic approach in the near future.

The alternate path suggested by the *Waiāhole I* dissent would be available through public policies, legislatively or administratively adopted.[143] This course is not foreclosed and is perennially open. The advantages of the statutory and rule-making processes appear evident, allowing for broad public input, the presentation of diverse views, and the opportunity for wide-ranging policy debate. On the other hand, court decisions are limited by the legal issues presented, by the interests of the parties, and by available remedies. Accordingly, the decisions may not encompass public policy issues that are beyond the court's purview.

Admittedly, the historical impetus in the advancement of exercised rights has been a judicial one, owing much to the constitutional imperative of article XII, section 7. The court's role as the guardian of such rights has

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[139] *See id.* at 143, 9 P.3d at 455.

[140] *See* Acoba, *supra* note 130, at 18 ("[T]he expanded influence of private individuals and groups in affecting public policy outside of the legislative process [through court cases] may pose policy choices in the judicial arena under the broad aegis of environmental and natural resource protection. . . .").

[141] *See Waiāhole I*, 94 Hawai'i at 191, 9 P.3d at 503 (Ramil, J., dissenting).

[142] *Id.* at 133, 9 P.3d at 445 ("[A]lthough we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.").

[143] *See Waiāhole I*, 94 Hawai'i at 191, 9 P.3d at 503 (Ramil, J., dissenting).

been pivotal and presumably the court would guard against the erosion of exercised rights. But while stare decisis is a venerable principle of case law, it is not necessarily an immutable one. Of course, both legislative and judicial approaches may be viewed as supplementing protection of exercised rights.

In declining to follow wholesale *Waiāhole I*'s multifactorial approach to resource protection under article XI, section 1, the *Mauna Kea II* majority possibly could limit *Waiāhole I*'s public trust purpose paradigm to water resources, and forego any extension of public purpose exercised rights to other natural resources.[144] A blanket policy against public trust purposes seems unlikely, however, in light of the *Mauna Kea II* majority's retention of the presumption in favor of the public's use, access, and enjoyment of natural resources.[145]

What is plain is that the "dimensions" of the public trust principles for article XI, section 1 "remain to be further demarcated."[146] Judicially, the dominant theme of resource protection appears to focus on balancing conservation and State self-sufficiency in line with the text of the constitutional provisions and applicable statutes.[147] This approach may presage less of an emphasis on public trust purposes.

C. The State's Trustee Duties

Ching, as had *Waiāhole I*, merged the common law of trust with the constitutional trust provisions.[148] The supreme court held that the public trust in natural resources under article XI, section 1 impressed upon the State a duty that was "analogous to the common law duty of a trustee"[149] and article XII, section 4 "imposes a similar duty regarding" ceded lands.[150] In reaffirming that the State was subject to trust duties, the court reinforced the proposition that common law trust obligations are inherent in the trust provisions of the Hawai'i Constitution.[151] By utilizing the Restatement of Trusts in defining the State's trust duties, the court established that contemporary trustee legal standards would apply to the State on an

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144 *See Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (2018).

145 *See id.* at 401–02, 431 P.3d at 774–75 (citing *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454).

146 *Id.* at 401, n.24, 431 P.3d at 774, n.24.

147 *See id.* at 400, 431 P.3d at 773 (citing HAW. CONST. art. XI, § 1).

148 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019).

149 *Id.*

150 *Id.*

151 *Id.*

ongoing basis.[152] Further, under *Ka Pa'akai*, the State could not delegate its duties to third parties, such as the United States,[153] when charged with an affirmative duty to protect traditional and customary Native Hawaiian rights.[154] Hence, in the future, the Restatement will serve as a reference for evaluating trustee conduct under the Hawai'i Constitution, including conduct affecting traditional and customary practices.[155]

V. MULTIPLE LEGAL APPROACHES IN SUPPORT OF EXERCISED RIGHTS

The search for compatible bases for protection of exercised rights has spawned multiple legal approaches. Subject matter jurisdiction should exist in the courts for any violation of a constitutional right, including that of article XII, section 7.[156] In administrative agency proceedings, procedural due process under article I, section 5, would guarantee claimants hearings for vindication of exercised rights.[157] Examples of various theories follow. Additionally, discussed are: (A) the potential recognition of a breach of trust claim for members of the public affected by the threat of injury to the public trust in natural resources;[158] (B) the responsibility of agencies to observe constitutional rights implicated in agency decisions;[159] and (C) the right to procedural due process protection.[160]

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[152] *Id.* at 170–71, 449 P.3d at 1168–1169.

[153] *Id.* at 180–81, 449 P.3d at 1178–79.

[154] *Id.* at 171–78, 449 P.3d at 1169–76.

[155] *See id.* at 170, 449 P.3d at 1168.

[156] *See generally* HAW. CONST. art. XII, § 7.

[157] Article I, section 5 provides as follows:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

HAW. CONST. art. I, § 5.

[158] *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (*Nā Wai 'Ehā*), 128 Hawai'i 228, 262, 287 P.3d 129, 163 (2012) (Acoba, J. concurring).

[159] Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 136 Hawai'i 376, 399–03, 363 P.3d 224, 247–51 (2015) (Pollack, J., concurring).

[160] *In re* Application of Maui Elec. Co., Ltd. (*Maui Electric*), 141 Hawai'i 249, 264, 408 P.3d 1, 16 (2017).

A. *Jurisdiction over Violations of Article XII, Section 7*

The generic right to sue in court for a violation of article XII, section 7 itself has been confirmed.[161] In *Kalipi v. Hawaiian Trust,* the plaintiff filed suit to enforce gathering rights under HRS section 7-1.[162] The supreme court exercised jurisdiction and decided the case on the merits, noting that it was obligated to enforce the protection of Native Hawaiian rights under article XII, section 7.[163]

As related previously, in *PDF v. Paty*, the Native Hawaiian members of PDF sued in court to obtain access to ahupua'a lands for the purpose of engaging in traditional and customary practices as allowed by article XII, section 7.[164] The supreme court upheld the right to proceed under the article and remanded the case for trial.[165]

B. *Constitutional Due Process Right to a Hearing*

In *Pele Defense Fund v. Puna Geothermal Venture* (*Puna Geothermal*), the court held that where the claimant "seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled[,]" constitutional due process requires that the claimant be afforded a hearing.[166] A contested case hearing before an agency, as warranted under HRS section 91-14, was required.[167]

Reciprocally, according to *Puna Geothermal*, "as a matter of constitutional due process, an agency hearing is also required as a matter of constitutional due process where the *issuance* of a permit implicating an applicant's property rights adversely affects the constitutionally protected

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[161] *See* Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Kalipi v. Hawaiian Tr. Co., 66 Haw. 1, 656 P.2d 745 (1982).

[162] 66 Haw. 1, 656 P.2d 745.

[163] Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 209, 317 P.3d 27, 43 (2013) (Acoba, J., joined by Pollack, J., concurring) (citing *Kalipi*, 66 Haw. at 5, 656 P.2d at 748).

[164] 73 Haw. at 591, 837 P.2d at 1256 (1992).

[165] *Id.* at 621, 837 P.2d at 1272; *cf. id.* at 605, 837 P.2d at 1264 (1992) (noting that under article XII, section 4, courts must be open to suits by ceded land trust beneficiaries for breach of trust by government officials who would otherwise be "invulnerable"); *Ching v. Case*, 145 Hawai'i 148, 449 P.3d 1146 (2019) (holding that Native Hawaiian beneficiaries were entitled to relief against DLNR under trust provisions in article Xl, section 1 and article XII, section 4 for failure to monitor damage to ceded lands under lease to the United States military).

[166] 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994).

[167] *Id.* at 71, 881 P.2d at 1217.

rights of other interested persons who have followed the agency's rules governing participation in contested cases."[168]

Separate opinions also assert the constitutional right to a hearing for the threatened violation of exercised rights.[169]

C. Discussions of Multiple Theories

The concurrence in *Nā Wai 'Ehā* asserted that the protection of Native Hawaiian rights against the diversion of water could rest on several separate grounds: (1) specific provisions pertaining to Native Hawaiian rights under the State's Water Code HRS Chapter 174C and article XII, section 7 of the Hawai'i Constitution; (2) the adverse effect on such rights under the Code and article XI, section 1 of the Hawai'i Constitution resulting from the applicants' permit applications in the agency proceeding under the reasoning of *Puna Geothermal*;[170] and (3) potential claims by members of the public for violation of the public trust doctrine under article XI, sections 1 of the Hawai'i Constitution.[171] Under the concurrence's view, Native Hawaiians, as members of the public, might raise a breach of the resource trust that coincided with the violation of exercised rights.[172]

Subsequently, in *Kilakila 'O Haleakalā v. Board of Land & Natural Resources*, the concurrence again raised grounds similar to those enumerated in the *Nā Wai 'Ehā* concurrence: article XII, section 7 as a basis for protecting Native Hawaiian rights; the rationale in *Puna Geothermal* as affording a due process hearing; and article XI, section 1, as providing for a resource breach of trust claim by members of the public that

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[168] *Id.* at 68, 881 P.2d at 1214.

[169] *See* Kaleikini v. Thielen, 124 Hawai'i 1, 30–31, 237 P.3d 1067, 1096–97 (2010) (Acoba, J., concurring) (noting that "[i]n light of article XII, section 7, native Hawaiians, whose customary practices demand that iwi [(burial remains)] stay in place, have a right to a contested case hearing [as a matter of constitutional due process] where those practices are adversely affected."). Kilakila 'O Haleakalā v. Bd. of Land & Nat. Resources, 131 Hawai'i 193, 210–11, 317 P.3d 27, 44–45 (2013) (Acoba, J., joined by Pollack, J., concurring) (citing *Puna Geothermal*, 77 Hawai'i at 68, 881 P.2d at 1214) (Kilakila 'O Haleakala (KOH) was entitled to a contested case hearing prior to the issuance of a conservation district use permit because, under *Puna Geothermal*, KOH had as equal of a right to a hearing as the permit applicant did, in light of the permit's adverse impact on KOH's practices under article XII, section 7).

[170] *See generally*, 77 Hawai'i 64, 881 P.2d 1210 (1994).

[171] 128 Hawai'i 228, 262–64, 287 P.3d 129, 163–65 (2012) (Acoba, J., concurring).

[172] *Id.* (Acoba, J., concurring).

could coincide with exercised rights.[173] These grounds provided the basis to vacate and remand the applicant's permit for construction on conservation land.[174]

In *Mauna Kea I*, two justices concurred in a renewed and thorough explication of "several safeguards that combine to preserve" "Native Hawaiian customs and traditions . . . implicated by a proposed [government] action."[175]

Separately, in *Mauna Kea I*, a third justice joined in the proposition that "an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution[,]"[176] such as the protection of Hawaiian rights.[177]

In *In re Maui Elec. Co.* (*Maui Electric*), a majority of the supreme court held that the right to a clean and healthful environment under article XI, section 9 is a property interest protected by the prohibition against the deprivation of property without due process in article I, section 5 of the Hawai'i Constitution.[178] While *Maui Electric* did not involve exercised rights, the precedent created should guarantee a procedural due process hearing for the protection of exercised rights.

1. Resource Public Trust Claim Under the Nā Wai 'Ehā Concurrence

The concurrence in *Nā Wai 'Ehā* maintained that Native Hawaiians may assert a claim as members of the public generally for breach of the natural resource trust under article XI, section 1, as it coincided with their exercised rights.[179] While the claim would proceed as issuing from a member of the public, it could also encompass the practice of Native Hawaiian traditions and customs inasmuch as such traditions and customs may be uniquely aligned with natural resources.[180]

In *Nā Wai 'Ehā*, the concurrence maintained that "a public trust claim" under article XI, section 1 "raised by members of the public who are

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[173] 131 Hawai'i at 206, 317 P.3d at 40 (Acoba, J., concurring).

[174] *Id.*

[175] 136 Hawai'i 376, 415, 363 P.3d 224, 263 (2015) (Pollack, J. joined by Wilson, J., concurring) (discussing rights under article XII, section 7, the public trust doctrine under article XI, section 1, and due process under article I, section 5).

[176] *Id.* at 413–15, 363 P.3d at 261–63.

[177] *Id.* at 414, 363 P.3d at 262 (citing e.g., Ka Pa'akai O Ka'Aina v. Land Use Comm'n [sic], 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000) (Pollack, J. joined by McKenna, J. and Wilson, J., concurring)).

[178] 141 Hawai'i 249, 408 P.3d 1 (2017).

[179] 128 Hawai'i 228, 279, 287 P.3d 129, 180 (2012) (Acoba, J., concurring).

[180] *Id.*

affected by potential harm to the public trust should be cognizable. . . ."[181] and further explained that "*Waiāhole I* express[ly] approv[ed] of [*National*] *Audubon* [*Society v. Superior Court* (*Audubon*)]," which in turn held that "any member of the general public has standing to raise a claim of harm to the public trust[.]"[182] By its nature, a claim for protection of the public trust made on behalf of the general public would not "require a showing that plaintiffs have suffered injury in fact."[183] In *Nā Wai 'Ehā*, "several plaintiffs [were] . . . native Hawaiian and . . . claim[ed] . . . [the need for] more water from the Nā Wai 'Ehā [river] system in order to grow taro and to exercise their native Hawaiian rights."[184] The concurrence stated the following with respect to this circumstance:

> While independent grounds based in HRS Chapter 174C and article XII, section 7 exist for invoking jurisdiction over such claims . . . native Hawaiians are also cloaked with the rights of the public in general in the public trust [in article XI, section 1].[185]

For example, Native Hawaiians may raise a public trust claim in their capacity as members of the public in place of a public trust purpose where a purpose is not recognized. The claim may also serve as an alternative basis for exercise protections where circumstances may make that avenue more practical. Also, the eventual recognition of an individual public trust claim may be beneficial to the enforcement of the public trust in general.[186]

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[181] *Id.* at 263–64, 287 P.3d at 164–65.

[182] *Id.* at 282, 287 P.3d at 183 (quoting Nat. Audubon Society v. Superior Court, 33 Cal. 3d 419 n.11, 658 P.2d 709 n.11 (1983)) (citations omitted).

[183] *Id.*

[184] *Id.* at 279, 287 P.3d at 180 (Acoba, J. concurring).

[185] *Id.* (citing *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 136, 9 P.3d 409, 448 (2000), ("[E]xercise of [n]ative Hawaiian and traditional and customary water rights [is] a public trust purpose.") (alterations in original).

[186] Marie Kyle, *The 'Four Great Waters' Case: An Important Expansion of Waiāhole Ditch and the Public Trust Doctrine*, 17 UNIV. OF DENVER WATER L. REV. 21, 38 (2013) (the concurrence "makes explicit what the Four Great Waters majority implies in its analysis: because judicial review of decisions involving public trust resources is an essential component of the doctrine and is necessary to protect basic public trust principles, all individuals injured by harm to those resources should be able to defend their interests in court").

2. *Agency Responsibility for Protection of Constitutional Rights*

A general affirmative duty imposed on government agencies to vigilantly protect constitutional rights implicated in administrative proceedings was pronounced by a three-justice concurrence in *Mauna Kea I*.[187] With respect to exercised rights, *PASH* and *Ka Pa'akai* are the precursors of that proposition.[188] *PASH* had held that in an agency proceeding to approve of a resort and residential development exercised rights that would be affected must be considered.[189] Pursuant to article XII, section 7, the State, and thus the agency, was "obligated to protect customary and traditional rights to the extent feasible."[190]

Ka Pa'akai had held in a similar proceeding that article XII, section 7 "places an affirmative duty on the State and its agencies to preserve and protect" exercised rights in the discharge of their obligations.[191] Further, *Ka Pa'akai* instructed that "state agencies such as the [Land Use Commission] may not act without independently considering the effect of their actions on Hawaiian traditions and practices."[192]

In *Hui Kako'o Aina Ho'opulapula v. Board of Land and Natural Resources*, the separate opinion noted that under "article XII, section 7 and *PASH* . . . [the BLNR] had a duty to inquire and determine 'if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities for preserving them."[193] In *Kilakila 'O Haleakalā v. Board of Land & Natural Resources*, the concurrence reiterated that "agencies such as the [Land Use Commission] may not act without independently considering the effect of their actions on Native Hawaiian traditions and practices."[194]

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[187] 136 Hawai'i 376, 401–02, 363 P.3d 224, 249–50 (2015) (Pollack, J. joined by McKenna, J. and Wilson, J., concurring).

[188] *See* Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995); *Ka Pa'akai*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

[189] 79 Hawai'i at 435–36, 903 P.2d at 1256–57.

[190] *Id.* at 437, 903 P.2d at 1258.

[191] 94 Hawai'i at 45, 7 P.3d at 1082.

[192] *Id.* at 46, 7 P.3d at 1083.

[193] 112 Hawai'i 28, 56–57, 143 P.3d 1230, 1258–59 (2006) (Acoba J., joined by Judge Del Rosario, concurring in part and dissenting in part) (quoting *PASH*, 79 Hawai'i at 253–54, 903 P.2d at 1320–21), *abrogated on other grounds by* Tax Found. of Haw. v. State, 144 Hawai'i 175, 439 P.3d 127 (2019).

[194] 131 Hawai'i 193, 208–09, 317 P.3d 27, 42–43 (2013) (Acoba, J. joined by Pollack, J., concurring) (citing *Ka Pa'akai*, 94 Hawai'i at 46, 7 P.3d at 1083).

The duty of government entities to account for constitutional rights, such as exercised rights, was elucidated by the concurrence in *Mauna Kea I*.[195] In *Mauna Kea I*, the BLNR "was asked to perform its statutory duty to consider an application for a permit to build on conservation land."[196] The Board's department was aware that "the proposed use of the conservation land implicate[d] the constitutional rights of . . . Native Hawaiians[s]. . . ."[197] The concurrence held that "to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution" and thus "uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision."[198]

The proposition and language of this agency mandate could prove more influential than as presented. Broadly interpreted, this holding could impliedly extend the reach of article XII, section 7 to "host" proceedings where the effect of an agency's actions may substantially affect section 7 rights but only incidentally or collaterally impact the agency's primary decision. The question of whether exercised rights advocates may intervene in administrative proceedings to raise protection of such rights could be the subject of future exploration.

Moreover, while this proposition arose in the context of claimed exercised rights on the summit area of Mauna Kea, it seemingly would require government agencies to uphold and enforce *other* "rights guaranteed by the Hawai'i Constitution" that may be implicated by a particular decision. Thus, the enhanced protection of exercised rights may extend to "rights" beyond those associated with Native Hawaiian traditional and customary practices.

The *Mauna Kea I* concurrence then, may have relevance for advocates of constitutional rights, for government agencies, and for private entities regulated by government statutes and rules. The principle that agencies are charged with the protection of constitutional rights "implicated" in their decisions may cast agencies in a broader role. Consequently, the concurrence may have an impact in future cases, beyond the protection of exercised rights.

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[195] 136 Hawai'i 376, 399–415, 363 P.3d 224, 247–263 (2015) (Pollack, J., concurring).

[196] *Id.* at 414, 363 P.3d at 262 (Pollack, J., concurring) (citing HAW. REV. STAT. § 183C-6 (2011)).

[197] *Id.* at 414–15, 363 P.3d at 262–63.

[198] *Id.*

On the other hand, and understandably, the concurrence indicated that parameters attach to its holding. For example, the holding could be limited to situations where "the agency becomes 'the representative of the public interest' when acting as the primary public trustee of natural resources[.]'"[199] The parameters of an agency's primary public trustee role will have to be identified in future cases.

3. The Due Process Hearing Guarantee of Protection

In *Maui Electric*, the supreme court utilized the "benefits" formulation of "property" in the due process clause of the Hawai'i Constitution, article I, section 5.[200] The benefits formulation with respect to exercised rights had been confirmed in *Puna Geothermal*.[201] The formulation was more broadly examined in *Maui Electric*.[202]

The petitioner in *Maui Electric* had sought to intervene in a Public Utilities Commission (PUC) hearing to oppose approval of a contract in which Maui Electric would purchase energy produced from gas and petroleum and would assess the costs to the utility's customers.[203] The petitioner claimed, among other matters, that approval would result in a violation of its right to a clean and healthful environment guaranteed in article XI, section 9.[204]

The PUC denied the petitioner's motion to intervene.[205] On appeal, the supreme court held that under HRS section 91-14, the petitioner was entitled to appeal from the denial because the proceeding was a contested

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[199] *Id.* at 414 n.16, 363 P.3d at 262 n.16. (quoting Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So.2d 1152, 1157 (La.1984)).

[200] 141 Hawai'i 249, 408 P.3d 1 (2017). Article I, section 5 provides that, "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5.

[201] 77 Hawai'i 64, 881 P.2d 1210 (1994).

[202] *See Maui Electric*, 141 Hawai'i at 260, 408 P.3d at 12.

[203] *Id.* at 256, 408 P.3d at 6.

[204] *Id.* at 260–61, 408 P.3d at 12–13. Article XI, section 9 provides as follows:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

HAW. CONST. art. XI, § 9.

[205] *Maui Electric*, 141 Hawai'i at 255, 408 P.3d at 7.

case "required by law."[206] Although no agency rule or statute afforded the petitioner the right to a hearing, the term "law" included constitutional due process.[207] Based on prior cases, "a property interest exists wherever there is a 'legitimate claim of entitlement' that 'stems from an independent source of state law—rules or understandings—that secure certain benefits'."[208] The majority held that article XI, section 9 created a legitimate claim of entitlement to a clean and healthful environment that constituted "property" protected by the due process clause in article I, section 5 of the Hawai'i Constitution.[209] The petitioner, then, was entitled to a hearing to defend its property interest in a clean and healthful environment.[210] Under procedural due process, the petitioner must be provided "an 'opportunity to be heard at a meaningful time and in a meaningful manner[.]'"[211]

Similarly, article XII, section 7 is a source in state law that grants to Native Hawaiians the benefit of reaffirmation and protection of traditional and customary rights (exercised rights).[212] As a result, Native Hawaiians have a "legitimate claim of entitlement" to the protection of exercised rights by virtue of section 7.[213] By definition then, the claim constitutes "property" within the prohibition in article I, section 5 against "depriv[ation] of . . . property without due process of law."[214] Accordingly, Native Hawaiians may not be deprived of exercised rights without the protection of

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[206] *Id.* at 264, 408 P.3d at 16.

[207] *Id.* at 258, 408 P.3d at 10.

[208] *Id.* at 263–64, 408 P.3d at 15–16 (quoting *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (*Nā Wai 'Ehā*), 128 Hawai'i 228, 241, 287 P.3d 129, 142 (2012) (quoting Int'l Bhd. of Painters & Allied Trades v. Befitel, 104 Hawai'i 275, 283, 88 P.3d 647, 655 (2004))).

[209] *Id.* at 264, 408 P.3d at 16. *See generally id.* at 259, n.15, 408 P.3d at 11, n.15 (referencing article I, section 5 of the Hawai'i Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law").

[210] *Id.* at 269, 408 P.3d at 21.

[211] *Id.* (quoting Freitas v. Admin. Dir. of Cts., 108 Hawai'i 31, 44, 116 P.3d 673, 686 (2005)).

[212] HAW. CONST. art. XII, § 7.

[213] *See Maui Electric*, 141 Hawai'i at 263–64, 408 P.3d at 15–16 ("As stated, a property interest exists wherever there is a 'legitimate claim of entitlement' that stems from an independent source of state law. . . . Thus, where a source of state law—such as [portions of the state Constitution]—grants any party a substantive right to a benefit [] that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created.").

[214] HAW. CONST. art. I, § 5; *see Maui Electric*, 141 Hawai'i at 263–64, 408 P.3d at 15–16.

a due process hearing.[215] For example, the petitioner in *Maui Electric* was granted a hearing under the due process clause in article I, section 5 to protect its constitutional right to a clean and healthful environment under article XI, section 9.[216] Likewise, Native Hawaiians would be entitled to an agency hearing, pursuant to the due process clause in article I, section 5 if their exercised rights under article XII, section 7 were threatened.[217]

Furthermore, the majority in *Maui Electric* solidified the primacy of the due process procedure by holding that the right to a hearing existed separate from and independent of any other statutory basis for participation or intervention in an agency hearing.[218] In doing so, the majority rejected the dissent's view that the petitioner should have sought a declaratory judgment to challenge the agency's order under the private right of action enforcement clause of article XI, section 9.[219]

Although not concerned with exercised rights, *Maui Electric* conclusively established that any threatened deprivation of rights is subject to the procedural due process protection of a hearing at a meaningful time and in a meaningful manner.[220] Accordingly, in the absence of a statute or rule that provides for an agency hearing, the due process clause would afford entitled parties, such as Native Hawaiians, the right to an agency hearing to protect their constitutional rights.[221]

VI. STANDING

Standing "focus[es] on the party seeking a forum rather than on the issues he wants adjudicated."[222] For the courts, "standing . . . is a prudential doctrine in which . . . courts are directed to 'weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of

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[215] *See Maui Electric*, 141 Hawai'i at 258, 408 P.3d at 10 ("In order for a [ ] . . . hearing to be 'required by law, it may be required by . . . [ ] constitutional due process.'") (citing Kilakila 'O Haleakalā v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 200, 317 P.3d 27, 34 (2013) (quoting Kaleikini v. Thielen, 124 Hawai'i 1, 16–17, 237 P.3d 1067, 1082–83 (2010))).

[216] *Id.* at 271, 408 P.3d at 23.

[217] *Id.* at 264, 408 P.3d at 13.

[218] *Id.* at 267, 408 P.3d at 19.

[219] *Id.* at 267, 408 P.3d at 19. *See generally id.* at 271–78, 408 P.3d at 23–30 (Recktenwald, C.J., dissenting).

[220] *Id.* at 269–70, 408 P.3d at 21–22.

[221] *See id.*

[222] Life of the Land v. Land Use Comm'n of State of Haw., 63 Haw. 166, 172, 623 P.2d 431, 438 (1981).

government.'"[223] However, the gist of the inquiry is whether the plaintiff has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of . . . (the court's) jurisdiction. . . ."[224] The court recognizes that, "[c]omplexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice."[225] In that regard, the judiciary's "touchstone remains the needs of justice."[226]

In *Asato v. Procurement Policy Board* (*Asato*) and in *Tax Foundation*, the supreme court apparently rejected the common law injury in fact test as a general condition of establishing standing, where the "aggrieved person" standard or the "injury in fact" test does not expressly apply.[227] The "aggrieved person" status is mandated in HRS section 91-14 pertaining to administrative proceedings. The "common law three-part 'injury in fact' test for standing . . . requires a showing that (1) the plaintiff has suffered an actual or threatened injury as a result of the defendant's actions, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for the plaintiff's injury."[228]

Instead, the court relied on the language of the rule or statute to supply any standing requirements or considers the "needs of justice."[229] This is a substantial change in the law and unburdens access to the courts. While not directly concerned with exercised rights, the precedent set by the two cases augments the protection of Native Hawaiian rights by facilitating access to the courts in declaratory actions on the administrative law and on the civil law level.[230]

A. *Standing to Bring Suit*

In *PDF*, the supreme court held that PDF could "bring suit on behalf of its native Hawaiian members under Article XII, section 7."[231] The court

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[223] Tax Found. of Haw. v. State 144 Hawai'i 175, 199–200, 439 P.3d 127, 151–52 (2019) (quoting *Life of the Land*, 63 Haw. at 172, 623 P.2d at 438) .

[224] *Life of the Land*, 63 Haw. at 172, 623 P.2d at 438

[225] *Id.* at 174 n.8, 623 P.2d at 439 n.8 (quoting E. Diamond Head Ass'n v. Zoning Bd. of Appeals, 52 Haw. 518, 523 n.5, 479 P.2d 796, 799 n.5 (1971)).

[226] *Id.* at 176, 623 P.2d at 441.

[227] 132 Hawai'i 333, 341, 322 P.3d 228, 236 (2014); *Tax Found.*, 144 Hawai'i at 188–89, 439 P.3d at 140–41.

[228] *Tax Found.*, 144 Hawai'i at 189, 439 P.3d at 141.

[229] *Id.* at 203, 439 P.3d 155.

[230] *See Asato*, 132 Hawai'i at 333, 322 P.3d at 228; *Tax Found.*, 144 Hawai'i at 175, 439 P.3d at 127.

[231] 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992).

acknowledged that the plaintiffs were required to demonstrate a "sufficient personal stake in the outcome of the litigation" by satisfying the three-part 'injury in fact' test."[232] It noted, however, that "standing barriers should be lowered when the 'needs of justice' would be served.. . . ."[233] Distinguishing the *Kalipi* requirement that a practitioner reside in the ahupua'a involved, the court held that standing could be established by a Native Hawaiian practitioner if the exercised rights had been traditionally and customarily practiced beyond the ahupua'a in which the practitioner resided.[234]

B. Standing and the "Person Aggrieved" Standard under HRS 91-14

Under the Hawai'i Administrative Procedures Act, section HRS 91-14, the party appealing from a contested case decision to a court must be a "person aggrieved" to establish standing to appeal.[235] A person aggrieved is one who has suffered an injury in fact, which as noted before, consists of three elements: 1) an actual or threatened injury, which 2) is traceable to the challenged action, and 3) is likely to be remedied by favorable judicial action.[236] Although "HRS chapter 91 does not define the term 'person aggrieved,' . . . 'person aggrieved' appears to be essentially synonymous with someone who has suffered 'injury in fact.'"[237]

In *PASH*, the supreme court determined that PASH had standing to seek judicial review of a decision of the HPC under HPC Rule 4-6(h).[238] The court focused on whether "PASH has demonstrated that its interests were injured."[239] PASH had "[t]hrough unrefuted testimony . . . sufficiently demonstrated that its members as native Hawaiian[s] . . . exercised such rights as were customarily and traditionally exercised" on the undeveloped

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[232] *Id.* at 614–15, 837 P.2d at 1268–69 (citing Akau v. Olohana Corp., 65 Haw. 383, 389, 652 P.2d 1130, 1135 (1982)).

[233] *Id.* at 615, 837 P.2d at 1269 (citing *Life of the Land*, 63 Haw. 166, 176, 623 P.2d 623 431, 441 (1981)).

[234] *Id.* at 620–21, 837 P.2d at 1271–72.

[235] HAW. REV. STAT. § 91-14.

[236] Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995) (citing Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 70, 881 P.2d 1210, 1216 (1994)).

[237] AlohaCare v. Ito, 126 Hawai'i 326, 342, 271 P.3d 631, 637 (2012) (citing E & J Lounge Operating Co. v. Liquor Comm'n of the City and Cnty. of Honolulu, 118 Hawai'i 320, 345 n.35, 189 P.3d 432, 457 n.35 (2008)) (citation and some quotation marks omitted).

[238] 79 Hawai'i at 434, 903 P.2d at 1255 (directing review under HRS 91-14 as a "person aggrieved").

[239] *Id.*

lands involved.[240] Accordingly, the court concluded PASH had "an interest in a proceeding for the approval" of a permit for development of such lands.[241]

The court noted that injury would be demonstrated through the three-part injury in fact test.[242] In a rejoinder to the agency's dismissal of PASH's standing, the court maintained that "a member of the public has standing to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action."[243]

In *Ka Pa'akai*, the court reiterated that standing under HRS section 91-14, must satisfy the injury in fact test set forth in *PASH*.[244] Nevertheless, a court "should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the 'needs of justice' would be best served by allowing a plaintiff to bring claims before the court."[245]

C. The "Needs of Justice" Standard

PASH, *PDF*, and *Ka Pa'akai* concerned standing requirements under the injury in fact test.[246] *PASH* and *Ka Pa'akai* were subject to the "aggrieved party" requirement expressly set forth in HRS section 91-14.[247] *PDF* was traditionally subjected to the injury in fact test. It would appear that in all of the cases the court qualified the application of injury in fact in the context of the public concern for Native Hawaiian rights.[248] Thus, the "needs of

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[240] *Id.* (quotation marks omitted).

[241] *Id.*

[242] *Id.* (citing Pele Defense Fund v. Puna Geothermal Venture (*Puna Geothermal*), 77 Hawai'i 64, 69, 881 P.2d 1210, 1215 (1994)).

[243] *Id.* at 434 n.15, 903 P.2d at 1255 n.15 (citing Akau v. Olohana Corp., 65 Haw. 383, 389, 652 P.2d 1130, 1135 (1982)).

[244] 94 Hawai'i 31, 42, 7 P.3d 1068, 1079 (2000).

[245] *Id.* (citing Pele Def. Fund v. Paty (*PDF*), 73 Haw. 578, 614–15, 837 P.2d 1247, 1268–69 (1992)).

[246] As written previously, the three-part injury in fact test requires a showing that (1) plaintiff has suffered an actual or threatened injury as a result of the defendant's conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for the plaintiff's injury.

[247] HAW. REV. STAT. § 91-14.

[248] *See, e.g.*, *Ka Pa'akai*, 94 Hawai'i at 42, 7 P.3d at 1079 (citing *PDF*, 73 Haw. at 614, 837 P.2d at 1268).

justice" standard would lend itself to a case-by-case resolution based on the facts, as exemplified by the statements in these cases.

D. Standing and Declaratory Actions

1. Asato *and the Judicial Declaration under HRS § 91-7*

In the absence of language requiring it, injury in fact is not a condition to standing in court declaratory actions challenging the validity of administrative rules. In *Asato v. Procurement Policy Board*, the plaintiff filed a declaratory action in court under HRS section 91-7.[249] That statute provided in part that "[a]ny interested person may obtain a judicial declaration as to the validity of an agency rule . . . by bringing an action against the agency in the circuit court. . . ."[250] Referring to the ordinary meaning of the term "interested person," the *Asato* majority held that "[any] 'interested person' [is one who is, without restriction,] 'affected' by, or 'involved' with applicability of 'an agency ruling.'"[251] The person asserting a HRS section 91-7 claim, thus, need not establish standing by proof of the injury in fact test.[252] *Asato* rejected that test inasmuch as it was not required by the terms of the statute, HRS section 91-7, or by the legislative history of the statute.[253] The court held that an interested party would be one who by definition had an interest in the issue at hand, and who thereby achieved standing.[254] Thus, for example, a court challenge to an administrative rule adversely affecting an exercise right may be mounted by an interested person rather than one who would be required to demonstrate an injury in fact.[255]

Tax Foundation of Hawai'i v. State of Hawai'i confirmed that in *Asato*, the court "clarified the confusion . . . regarding whether the three-part 'injury in fact' test applies to declaratory judgment lawsuits brought pursuant to HRS § 91-7" and "held that a person seeking a judicial declaration under HRS § 91-7 need not satisfy the three-part 'injury in fact' test to qualify as an 'interested person' with standing under the statute."[256]

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[249] 132 Hawai'i 333, 322 P.3d 228 (2014).

[250] HAW. REV. STAT. § 91-7 (Westlaw 2021).

[251] 132 Hawai'i at 339, 341–44, 322 P.3d at 234, 236–38.

[252] *Id.* at 344, 322 P.3d at 239.

[253] *Id.*

[254] *Id.* at 341, 322 P.3d at 236.

[255] *See id.*

[256] 144 Hawai'i 175, 195, 439 P.3d 127, 147 (2019).

2. Tax Foundation *and the Declaratory Judgment Statute, HRS § 632-1, et seq.*

In *Tax Foundation*, the Foundation filed a class action on behalf of the City and County of Honolulu (Honolulu County) taxpayers against the State of Hawai'i.[257] The suit sought, among other matters, recovery of the State's retention of a percentage of a surcharge on state general excise and use taxes collected by the State for the benefit of Honolulu County.[258] In that section of the opinion designated as "Part II," a three-justice majority joined in holding that the Foundation had standing to bring a complaint for declaratory judgment under HRS section 632-1.[259] The Declaratory Judgment statute, HRS chapter 632, broadly encompasses disputes and provides in relevant part that:

> In cases of actual controversy, courts of record . . . shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. . . .[260]

The *Part Two* majority in *Tax Foundation*, observed that "a party seeking declaratory relief under HRS § 632-1 need not have to satisfy the three-part 'injury in fact' test to have standing."[261] According to *Part Two*, the appropriate "standing requirements [were] prescribed by the legislature through the language of Hawai'i Revised Statutes § 632-1."[262] The majority noted that "the plain language of HRS § 632-1 does not require satisfaction of a three-part 'injury in fact' test"[263] in addition "to standing requirements [already] set out by the legislature through the language of the statute."[264] To require otherwise would restrict standing in contravention of the declared policy of the statute stated in HRS section 632-6, of "making the courts more serviceable to the people."[265]

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[257] *Id.* at 181, 439 P.3d at 133.
[258] *Id.*
[259] *Id.* at 188, 439 P.3d at 140.
[260] HAW. REV. STAT. § 632-1(a) (Westlaw 2021).
[261] 144 Haw. at 189, 439 P.3d at 141.
[262] *Id.* (internal quotations omitted).
[263] *Id.* at 201, 439 P.3d at 153.
[264] *Id.* at 202, 439 P.3d at 154.
[265] *Id.* at 201, 439 P.3d at 153.

The majority's increased acceptance of declaratory judgment actions further removed a barrier to judicial review.[266] As stated in *Tax Foundation*, "HRS § 632-1(b) would seemingly allow for declaratory relief in civil cases where there is an 'actual controversy' *or* 'antagonistic claims' between contending parties."[267] Notably, in *Ching*, the court held that the plaintiffs' allegation that "the State has already breached its duty as a trustee by failing to monitor compliance with the provisions of the lease," was apparently sufficient to present a controversy for resolution under HRS section 632-1(b) "irrespective of whether the United States actually complied with the lease terms."[268] Additionally, the statute provides that the "fact that an actual or threatened controversy is susceptible of relief through . . . [another remedy] . . . shall not debar a party from . . . obtaining a declaratory judgment in any case where the other essentials to such relief are present."[269]

The intent of the legislature to "render such proceedings of real value" and to "afford greater relief," indicates that the availability of another specific remedy would not necessarily preclude a party from seeking relief under the declaratory judgment statute.[270] *Tax Foundation* may signal that the injury in fact test will not likely be employed in the absence of statutory language prescribing the test as a precondition for the filing of an action.

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[266] *Id.* at 202, 439 P.3d at 154.

[267] *Id.* at 200, 439 P.3d at 152.

[268] Ching v. Case, 145 Hawai'i 148, 174, 449 P.3d 1146, 1172 (2019). HAW. REV. STAT. section 632-1(b) states that:

> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial . . . by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

[269] HAW. REV. STAT. § 632-1(b). The legislative history regarding this provision indicates "'the purpose of this bill [amending the predecessor of HRS section 632-1] is to expand the proceedings for declaratory judgments to a scope that will render such proceedings of real value[.]' S. STAND. COM. REP. No. 235, in the 1945 Senate Journal at 656." Dejetley v. Kaho'ohalahala, 122 Hawai'i 251, 268, 226 P.3d 421, 438 (2010). The "committee noted that 'the present chapter of the Revised Laws of Hawai'i 1945 on declaratory judgments has been so narrowly construed that the bar generally hesitates to use it.'" The intent of the legislature then was that "'[t]his bill . . . will *afford greater relief* by declaratory judgment than the present law.' H. STAND. COM. REP. No. 76, *in* 1945 House Journal, at 566." *Id.*

[270] *Id.* at 268–69, 226 P.3d at 438–39.

Instead, standing will rest on requirements stated in the subject statute or may rest on the less stringent standard of the "needs of justice."[271]

3. AlohaCare *and the HRS § 91-8 Agency Declaratory Order*

HRS section 91-8 is similar to HRS section 91-7 and states in relevant part that "[a]ny interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency."[272]

In *AlohaCare*, which was decided before *Asato*, the majority held that the term "interested person" referred to "an aggrieved person" who was required to satisfy the three-part injury in fact test.[273] The majority had determined, inter alia, that AlohaCare was a "person aggrieved" and thus declined to "resolve whether, as asserted by the dissent, AlohaCare had standing to appeal the [d]ecision as an 'interested person.'"[274]

The dissent maintained "an 'interested' person, who may judicially appeal a declaratory order issued by an agency under . . . [HRS] § 91-8 (1993), is one who is affected by or involved with any statute, rule, or order under that administrative agency's jurisdiction."[275] Similar to HRS section 91-7, HRS section 91-8 did not refer expressly to an injury in fact as a standing condition for appealing an agency decision under HRS section 91-8.[276]

As was decided in *Asato* and confirmed by *Tax Foundation*, "interested person" standing applied while the injury in fact test did not apply.[277] The "interested person" term in HRS section 91-7, is used in judicial actions concerning the validity of agency rules.[278] The same term in HRS section 91-8 is used with respect to agency declaratory rulings.[279] It would appear consistent with the plain language of both statutes to ascribe the same meaning to the same terms.[280] Thus, arguably an injury in fact requirement

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[271] 144 Hawai'i at 202, 439 P.3d at 154 (2019).

[272] HAW. REV. STAT. § 91-8.

[273] 126 Hawai'i 326, 342–43, 271 P.3d 621, 637–38 (2012).

[274] *Id.* at 344, 271 P.3d at 639 (citation omitted).

[275] *Id.* at 353–54, 271 P.3d at 648–49 (Acoba, J., concurring and dissenting).

[276] *Id.*

[277] Tax Found. of Haw. v. State, 144 Hawai'i 175, 195, 439 P.3d 127, 147 (2019).

[278] *Id.* at 194–95, 439 P.3d 146–47.

[279] *AlohaCare*, 126 Hawai'i at 338, 271 P.3d at 633.

[280] *See* HAW. REV. STAT. §§ 91-7, 91-8.

should not apply to a petitioner under HRS section 91-8 as it did not for the petitioner under HRS section 91-7 in *Asato*.[281]

E. The Future of the Standing Requirement

PASH, *PDF*, and other exercise rights cases have qualified the injury in fact requirement with the "needs of justice" standard in recognition of the public interest in the protection of Native Hawaiian rights.[282] Declaratory actions in the administrative law area and under HRS chapter 632 provide another facilitative path for judicial review, following *Asato*'s[283] and *Tax Foundation*'s[284] abandonment of general common law injury in fact standing in declaratory actions.

CONCLUSION

PASH and the cases that defined, applied, and enforced Native Hawaiian rights under article XII, section 7 fostered principles that have endured. Those principles have defined the judicial course of Native Hawaiian rights over the last two and a half decades. The principles have largely remained intact and serve as a stable foundation for the future.

The intersection of Native Hawaiian rights with the ceded land trust and with the natural resources trust provisions has expanded the sources of such rights. The viability of the connection with those sources, however, may rest on the dominant view of public trust principles as it develops in the future.

The preservation and enforcement of Native Hawaiian rights have seemingly been a judicial undertaking. The article XII, section 7 drafters' view that protection would be "guaranteed" by the courts for all exercised rights if the rights were referenced in the constitution appears prescient.

The caselaw has spawned multiple legal approaches in support of exercised rights. The expansion of legal doctrine in other spheres may benefit the development of exercised rights in the future, as with respect to the following:

1) The proposed recognition of a general right accorded individuals to sue for the protection of the public trust in natural resources;

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[281] *See* Asato v. Procurement Policy Bd., 132 Hawai'i 333, 322 P.3d 228 (2014).

[282] *See* Life of the Land v. Land Use Comm'n., 63 Haw. 166, 176, 623 P.2d 431, 441 (1981).

[283] 132 Hawai'i at 333, 322 P.3d at 228.

[284] 144 Hawai'i 175, 188, 439 P.3d 127, 140 (2019).

2) The procedural due process hearing guarantee which would protect exercised rights as "property";
3) The general agency responsibility for protection of constitutional rights in administrative proceedings; and
4) The access to agencies and courts for declaratory relief, unburdened by common law injury in fact standing requirements.

Undoubtedly, Native Hawaiian rights decisions have reflected and have brought about social change. The law concerning exercised rights has evolved as constitutional principle and new conditions are resolved, continuing *PASH*'s effort to effectuate traditional and customary Native Hawaiian practices and values in the contemporaneous legal environment.

A Litigator's Approach to Issues Concerning Exercise and Protection of Native Hawaiian Traditional and Customary Rights

William K. Meheula III, Esq.

I. INTRODUCTION AND ROADMAP

This comment focuses on considerations litigators in Chapter 91 administrative and judicial proceedings must be prepared to analyze when pursuing or defending a claim involving impacts to Native Hawaiian traditional and customary rights and the natural and cultural resources that support these practices.

II. BACKGROUND

The exercise and protection of Native Hawaiian traditional and customary rights (hereinafter "T&C rights") are based on a mixture of Hawaiian custom and usage, English common law, and Hawai'i statutory and constitutional provisions.[1]

A. What are T&C Rights?

William S. Richardson School of Law Professors David M. Forman and Susan K. Serrano describe T&C rights as:

> Gathering practices traditionally and customarily exercised by Hawaiians have continued to the present, perpetuated through 'ohana (extended families or kin groups), primarily in rural areas. Thus, members of hula hālau still gather "ferns, maile [(twining shrub)], and lauhala [(Pandanus leaf)] necessary to make their ceremonies pono, proper." Practitioners of lā'au lapa'au (herbal medicine) still gather the plants and herbs necessary for their practice. Fishermen, hunters, gatherers, kalo planters, and farmers still access and use the natural or cultural resources of an area for subsistence purposes.
>
> For Native Hawaiians, traditional and customary practices are inextricably intertwined with the 'āina (land). Native Hawaiians' cultural and spiritual identity derives from their relationship with the 'āina: the 'āina is part of their

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[1] David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW: A TREATISE 776 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat, eds., 2015) [hereinafter TREATISE]. See TREATISE, for an expansive discussion of the sources of traditional and customary rights.

> ʻohana, and accordingly, traditional Hawaiian customs and practices emphasize respect and care for the ʻāina and surrounding resources. Native practitioners continually reaffirm their knowledge of the ʻāina and its resources through the exercise of traditional and customary gathering, hunting, and fishing practices for subsistence, cultural, and religious purposes.[2]

Simply stated, these practices are essential to the cultural survival of Native Hawaiians today. When Hawaiʻi courts have discussed specific T&C rights, they have recognized a number of practices including the gathering of salt, ʻopihi, limu, kūpeʻe (edible marine shells), Pele's tears (lava formations made from drops of smooth pāhoehoe lava), and hāʻukeʻuke (edible sea urchins) as well as caring for iwi kūpuna (native Hawaiian burial sites).[3]

Exercised in a pono manner, traditional and customary practices "strengthen the practitioner's relationship with the ʻāina and ensure the wise use and conservation of scarce natural and cultural resources."[4] Significantly, the exercise of T&C rights is neither intrusive nor obnoxious and is expected to be conducted with "honor and respect for traditional ʻohana cultural values and customs in the harvesting of natural resources and the sharing of what is gathering with family and neighbors."[5]

B. Legal Doctrine Evolution

During the time of the Hawaiian Kingdom, Hawaiʻi law recognized Hawaiian customary practices.[6] In the time after the Hawaiian Kingdom, the recognition of T&C rights by the legal system in Hawaiʻi evolved following statehood in 1959. As Chief Justice William S. Richardson explained:

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[2] *Id.* at 791 (internal footnotes omitted).

[3] *See* Ka Paʻakai O Kaʻ Aina [sic] v. Land Use Comm'n, 94 Hawai'i 31, 43 nn.19–21, 7 P.3d 1068, 1080 nn. 19–21 (2000); Kaleikini v. Thielen, 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010).

[4] TREATISE, *supra* note 1, at 835 n.110 ("One must gather, hunt, and fish in a manner that allows the natural resources to reproduce and replenish themselves." (quoting Davianna Pōmaikaʻi McGregor, *An Introduction to the Hoaʻāina and Their Rights*, 30 HAWAIIAN J. HIST. 1, 18 (1996))).

[5] *Id.* at 791.

[6] *See* Pub. Access Shoreline v. Hawai'i Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i at 437 n.21, 903 P.3d at 1258 n.21.

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of our Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases–and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[7]

At the point of statehood in 1959, the Admissions Act, among other things, transferred the former Government and Crown Lands i.e., Hawai'i's ceded lands[8] to the State of Hawai'i to be held with income and proceeds for one or more of five trust purposes that included the betterment of the conditions of Native Hawaiians, as defined by the Hawaiian Homes Commission Act.[9]

By the time of the Hawai'i Constitutional Convention in 1978, delegates expressed concern that "past and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities . . . preclude native Hawaiians from following subsistence practices traditionally used by their ancestors."[10] The delegates also declared that "the large landowners, who basically are 10 to 12 corporations and estates and who own almost 90 percent of all private lands, have intruded upon, interfered with and refused to recognize such rights."[11] Notably, the delegates understood that "[s]ustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition and heritage,

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[7] Melody Kapilialoha MacKenzie, *Ka Lama Kū o ka No'eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6–7 (2010) (quoting Chief Justice Richardson).

[8] Pele Def. Fund v. Paty, 73 Hawai'i 578, 585, 837 P.2d 1247, 1254 (1992) ("Hawaii's ceded lands are lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893. Upon annexation in 1898, the Republic of Hawaii ceded these lands to the United States. In 1959, when Hawaii was admitted into the Union, the ceded lands were transferred to the newly created state, subject to the trust provisions set forth in § 5(f) of the Admission Act.").

[9] Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4, 6.

[10] STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 639 (1980).

[11] COMM. WHOLE REP. NO. 12, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 1016 (1980).

with such practices forming the basis of Hawaiian identity and value systems."[12]

Aimed at "preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State[,]"[13] the delegates introduced and the State of Hawai'i ultimately amended Hawai'i's Constitution to, among other things, add a provision that is a key legal underpinning of T&C rights: article XII, section 7, which proclaims:

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

Notably, to guarantee that the "courts or legislature would not be constrained in their actions[,]" the delegates intentionally removed "specific categories of rights" and aimed at encompassing "all rights of native Hawaiians, such as access and gathering."[14]

Today, T&C rights are recognized property interests protected by the due process clause of article I, section 5 of the Hawai'i Constitution.[15] In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), the Hawai'i Supreme Court affirmed the State of Hawai'i's obligation to protect the reasonable exercise of T&C rights to the extent feasible.[16] The analytical framework for such protection was later set forth in *Ka Pa'akai O Ka'Aina* [sic] *v. Land Use Comm'n*.[17]

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[12] *Id.*

[13] *Id.*

[14] STAND. COMM. REP. NO. 57, *reprinted in* 1 Proceedings of the Constitutional Convention of 1978, at 640 (1980).

[15] *In re* Contested Case Hearing re Conservation Dist. Use Application HA-3568 (Conservation District), 143 Hawai'i 379, 395, 431 P.3d 752, 768 (2018) (citing Flores v. Bd. of Land and Nat. Res., 143 Hawai'i 114, 126, 424 P.3d 469, 481 (2018)).

[16] Pub. Access Shoreline v. Hawai'i Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.3d 1246 (1995).

[17] 94 Hawai'i 31, 7 P.3d 1068 (*Ka Pa'akai*) (2000) (discussed in part III(D), infra).

III. IMPORTANT ISSUES FOR LITIGATORS IN CHAPTER 91 PROCEEDINGS

A. Burden of Proof

An understanding of who bears the burden of proof is paramount. In the context of an administrative contested case where protection of the exercise of T&C rights may arise, the permit applicant bears the burden of proof that it meets all requirements for the permit it seeks. Indeed, section 91-10(5) of the Hawai'i Revised Statutes states: "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion."

B. Physical Scope of the Project

Litigators should also consider and understand the physical scope of the project or proposed action in connection with potential impacts to Native Hawaiian traditional and customary rights and the natural and cultural resources that support these practices. The cases highlighted below illustrate examples of the range of potential impacts asserted depending on the scope of the project or proposed action.

For example, in *Ka Pa'akai* the Hawai'i Supreme Court examined the actions of the Land Use Commission in determining whether to reclassify more than 1,000 acres in Ka'ūpūlehu from conservation to urban use for development of a luxury home community and golf course.[18] In that case, the community group, Ka Pa'akai, contended that its T&C rights (use of ancient coastal trails, fishing, gathering salt, 'opihi, limu, kūpe'e (edible marine shells), Pele's tears (lava formations made from drops of smooth pāhoehoe lava), and hā'uke'uke (edible sea urchins)) in the petition area would be adversely affected.[19]

In *In re Water Use Permit Applications* (*Waiāhole I*), the Hawai'i Supreme Court examined actions of the Commission on Water Resource Management (CWRM) with respect to fresh water resources diverted via the Waiāhole Ditch.[20] A coalition of interests representing windward O'ahu native Hawaiian families and family farmers asserted that not enough diverted water had been restored by CWRM to windward O'ahu to support, among other things, their T&C rights such as kalo cultivation and to preserve the resources upon which these practices depend.[21]

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[18] *Id.*

[19] *Id.* at 43, 7 P.3d at 1080.

[20] 94 Hawai'i 97, 9 P.3d 409 (2000).

[21] *Id.* at 157, 9 P.3d at 157, n.63.

In *In re Conservation District Use Application HA-3568* (*Mauna Kea II*), the Hawai'i Supreme Court reviewed the actions of the Board of Land and Natural Resources (BLNR) with respect to the issuance of a conservation district use permit for construction of the Thirty Meter Telescope (TMT) at Mauna Kea's summit.[22] There, native Hawaiian cultural practitioners asserted, among other things, that the TMT project will have significant negative effects on their T&C practices on Mauna Kea.[23]

Litigators can gather information concerning the physical scope of the project or proposed action from documents such as the permit application, the permitting agency's report and recommendation, and from any available project development plans.

C. Is the Project Area Fully Developed Land?

Litigators should also consider the existing physical condition of the project area. In particular, one should take note as to what degree the project area may be fully developed.

In *Kalipi v. Hawaiian Trust Co.*, the Hawai'i Supreme Court determined that the right to gather can only be exercised upon undeveloped lands.[24] This requirement was not based on existing statutory language, but the court reasoned it was appropriate given that gathering on developed land would conflict with Western concepts of property law as well as the "traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture."[25] This requirement was reconfirmed by the Hawai'i Supreme Court in *PASH*.[26] However, the *PASH* court declined to analyze the degrees of property use that fall between undeveloped and fully developed.[27]

In *State v. Hanapi*, the Hawai'i Supreme Court clarified *PASH* and stated that:

> [I]f property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, [] it is *always* "inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property. In

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[22] 143 Hawai'i 379, 431 P.3d 752 (2018).

[23] *Id.*

[24] 66 Haw. 1, 7–8, 656 P.2d 745, 749 (1982).

[25] *Id.* at 8–9, 656 P.2d at 750.

[26] 79 Hawai'i at 450, 903 P.2d at 1271.

[27] *Id.*

> accordance with *PASH*, however, we reserve the question as to the status of native Hawaiian rights on property that is "less than fully developed."[28]

In footnote 10, the Hawai'i Supreme Court further elaborated:

> We cite property used for residential purposes as an example of "fully developed" property. There may be other examples of "fully developed" property as well where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights.[29]

At bottom, litigators should understand Chief Justice Richardson's rationale in *Kalipi* for acknowledging T&C rights only as to less than "fully developed" lands and the balance he sought, which was reaffirmed in *PASH* and *Hanapi*:

> The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the ahupuaa [sic], including fully developed property, to gather the enumerated items. In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. *See Pacific Ins. Co., Ltd. v. Oregon Ins. Co.*, 53 Haw. 208, 490 P.2d 899 (1971) (departure from express language permitted to avoid absurd and unjust result and is clearly inconsistent with purpose of the Act). Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.[30]

Chief Justice Richardson may have been concerned that without the predictability of the less than "fully developed" requirement, the State's protection of T&C rights would be subject to a judicial taking claim. Later, *PASH*, which involved undeveloped land, noted:

> Under the judicial taking theory, when a judicial decision alters property rights, the decision may amount to an unconstitutional taking of property. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235, 41 L. Ed. 979, 17 S. Ct. 581 (1897); *see also Hughes v. Washington*, 389 U.S. 290, 296-98, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967) (Stewart, J., concurring) (suggesting that a state supreme court's decision—that the state owned accreted land built up by the ocean—amounted to a sudden, unpredictable, and unforeseeable change in state property law, which amounted to an unconstitutional judicial taking). However, the judicial taking theory is "by no

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[28] 89 Hawai'i 177, 186–87, 970 P.2d 485, 494–95 (1998) (footnotes omitted).

[29] *Id.* at 187 n.10, 970 P.2d at 495 n.10.

[30] *Kalipi*, 66 Haw. at 8–9, 656 P.2d at 750.

> means a settled issue of law." *Corporation of the Presiding Bishop v. Hodel*, *aff'd*, 265 U.S. App. D.C. 226, 830 F.2d 374, 381 (D.C. Cir. 1987) (declining to decide the question whether a judicial taking occurred), *affirming* 637 F. Supp. 1398 (D.D.C. 1986); *see also Hodel*, 637 F. Supp. at 1407 (rejecting a takings claim based on a decision by the High Court of American Samoa). Assuming, without deciding, that the theory is viable, a judicial decision would only constitute an unconstitutional taking of private property if it "involve[d] retroactive alteration of state law such as would constitute an unconstitutional taking of private property." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 337 n.2, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973) (Stewart, J., dissenting).

Litigators can gather information concerning the existing physical condition of the project area from documents such as the permit application, the permitting agency's report and/or recommendation, and from any available project development plans.

D. Ka Pa'akai Analysis

Litigators must also consider the decision-making body's affirmative duty to preserve and protect T&C rights to the extent feasible. In *Ka Pa'akai*, the Hawai'i Supreme Court held that article 12, section 7:

> [P]laces an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies "the power to protect these rights and to prevent any interference with the exercise of these rights."[31]

These duties cannot be delegated.[32] In *Ka Pa'akai*, the Land Use Commission (LUC) erred by charging the applicant/developer with "blanket authority to 'preserve and protect any gathering and access rights of native Hawaiians' without identifying those rights or providing any specificity as to the locations on which native Hawaiians could be expected to exercise them."[33]

In order for native Hawaiian rights to be enforceable, an analytical framework that endeavors to "accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and

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[31] 94 Hawai'i 31, 45, 7 P.3d, 1068, 1082 (2000).

[32] *Id.* at 50–51, 7 P.3d at 1087–88.

[33] *Id.* at 49, 7 P.3d at 1086.

economic development and security, on the other"[34] has been adopted by the Hawai'i Supreme Court and includes:

> (A) [T]he identity and scope of valued cultural, historical, or natural resources *in the petition area*, including the extent to which traditional and customary Native Hawaiian rights are exercised in the petition area;
>
> (B) [T]he extent to which those resources, including traditional and customary native rights will be affected or impaired by the proposed action; and
>
> (C) [T]he feasible action, if any, to be taken by the LUC to reasonably protect Native Hawaiian rights if they are found to exist.[35]

This analysis must be included as part of the decision-making body's ultimate decision and typically is included as specific findings of fact and conclusions of law.[36]

Of particular note is that in *Ka Pa'akai*, the LUC erred by failing to address valued cultural and historical or natural resources beyond the 235-acre "resource area" located within the approximately 1,000 acres of conservation lands sought to be reclassified.[37] In *Mauna Kea II*, the Hawai'i Supreme Court found that BLNR properly discharged its duties under *Ka Pa'akai* and as to the first prong of the analysis, held that:

> BLNR appropriately took into account contemporary (as well as customary and traditional) Native Hawaiian cultural practices, finding and concluding that none were taking place within the TMT Project site *or its immediate vicinity*, aside from the recent construction of ahu to protest the TMT Project itself, which was not found to be a reasonable exercise of cultural rights.

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[34] *Id.* at 46, 7 P.3d at 1083.

[35] *Id.* at 47, 7 P.3d at 1084 (emphasis added).

[36] *Id.* at 48–49, 7 P.3d at 1085–86. Haw. Rev. Stat. § 91-14(g)(5) states that:

> (g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> . . .
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]

[37] *Ka Pa'akai*, 94 Hawai'i at 49, 7 P.3d at 1086.

> Further, although the BLNR defined the "relevant area" in its *Ka Pa'akai* analysis as the TMT Observatory site and Access Way, the Board's findings also identified and considered the effect of the project upon cultural practices in the vicinity of the "relevant area" and in other areas of Mauna Kea, including the summit region, as *Ka Pa'akai* requires. *See* 94 Hawai'i at 49, 7 P.3d at 1086 (faulting the agency for failing to address "possible native Hawaiian rights or cultural resources outside [the area at issue]").[38]

Litigators can gather information concerning this analysis from the commission of a *Ka Pa'akai* report following public notice invitations for members of the Native Hawaiian community to come forward to be interviewed on these subjects and the permitting agency's report and/or recommendation as well as any other testimony offered by members of the public, intervening parties, kama'āina witnesses, i.e., persons "familiar from childhood with any locality" and expert witnesses.

E. Is the Project or Permit Concerning Ceded Lands?

A property's status as ceded lands carries with it distinct considerations including most prominently, common law fiduciary duties as trustee by the State of Hawai'i. Hawai'i's ceded lands are lands previously classified as Government or Crown lands prior to the overthrow of the Hawaiian monarchy in 1893.[39] Upon annexation in 1898, the Republic of Hawai'i ceded these lands to the United States.[40] In 1959, when Hawai'i was admitted into the Union, the ceded lands were transferred to the newly created state, subject to the trust provisions set forth in section 5(f) of the Admission Act.[41] Section 5(f) states:

> The lands granted to the State of Hawaii by subsection (b) of this section . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust
>
> [1] for the support of the public schools and other public educational institutions,

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[38] *In re* Conservation Dist. Use Application HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res. (*Mauna Kea II*), 143 Hawai'i 329 n.16, 431 P.3d 752 n.16 (2018) (emphasis added).

[39] *See* Pele Def. Fund v. Paty, 73 Haw. 578, 585, 837 P.2d 1247, 1254 (1992) (quoting Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959)).

[40] *Id.*

[41] An Act to Provide for the Admission of the State of Hawai'i into the Union, PUB. L. NO. 86-3, 73 STAT. 4 (1959).

> [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible,
>
> [4] for the making of public improvements, and
>
> [5] for the provision of lands for public use.
>
> Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State shall provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[42]

The State of Hawai'i later added Hawai'i Constitution, article XII, section 4 to formally recognize the public lands trust, which states:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, *shall be held by the State as a public trust for native Hawaiians and the general public.*[43]

The State of Hawai'i's Department of Land and Natural Resources, which is led by BLNR, is the agency charged with the administration of public lands, including those subject to the § 5(f) trust.[44]

In *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court discussed, among other things, the nature of article XII, section 4 in the context of a community group's argument that a recent exchange by the State of ceded lands constituted a breach of trust under § 5(f) of the Admissions Act and article XII, section 4. The Court held that article XII, section 4 "imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) provisions, and the citizens of the state must have a means to mandate compliance."[45] Thus, the Hawai'i Supreme Court held that "PDF, whose members are beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions governing the public lands trust."[46]

In *Ching v. Case*, the Hawai'i Supreme Court revisited the trust duties of the State vis-à-vis ceded lands and examined the degree the State must monitor leased ceded lands and lessee compliance with lease terms.[47] This

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[42] *Id.* § 5(f).

[43] *See* HAW. REV. STAT. § 171-3 (emphasis added).

[44] *Id.*

[45] *Pele Def. Fund*, 73 Haw. at 605, 837 P.2d at 1264.

[46] *Id.* at 606, 837 P.2d at 1264.

[47] 145 Hawai'i 148, 152, 449 P.3d 1146, 1150 (2019).

case concerned ceded land leased to the United States federal government for military training purposes, subject to certain lease conditions intended to protect against long-term damage or contamination of the land.[48] The Hawai'i Supreme Court explained that:

> As trustee, the State must take an active role in preserving trust property and may not passively allow it to fall into ruin . . . It is self-evident that an obligation to reasonably monitor trust property to ensure it is not harmed is a necessary component of this general duty, as is a duty to investigate upon being made aware of evidence of possible damage. This obligation inherently includes a duty to make reasonable efforts to monitor third-parties' compliance with the terms of agreements designed to protect trust property.[49]

The Hawai'i Supreme Court also clarified that "while overlap may occur, the State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty."[50] In footnote 49, the Hawai'i Supreme Court declared:

> The State's duty of care is especially heightened in the context of ceded land held in trust for the benefit of native Hawaiians and the general public under *article XII, section 4*. This court has approvingly quoted the following in considering the ceded land trust:
>
> > The native Hawaiian people continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices and institutions. The health and well-being of the native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land. 'Aina [sic], or land, is of crucial importance to the native Hawaiian people—to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. 'Aina [sic] is a living and vital part of the native Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The 'aina [sic] is part of their 'ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

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[48] *Id.*

[49] *Id.* at 177–78, 449 P.3d at 1175–76.

[50] *Id.* at 178, 449 P.3d at 1176.

> *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 121 Hawai'i 324, 333, 219 P.3d 1111, 1120 (2009) (alterations omitted) (quoting Office of *Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008)).[51]

Indeed, the State cannot "delegate its public trust duty to reasonably monitor [leased ceded lands] to protect and preserve trust property" because "the State may not delegate its constitutional duties to third-parties."[52] The Hawai'i Supreme Court has proclaimed that "[a]n affirmative duty of the State to protect and preserve constitutional rights is by its very nature non-delegable."[53] Ultimately, the Hawai'i Supreme Court found that the Circuit Court did not err in finding that the State breached its trust duties: (1) "by failing to conduct regular monitoring and inspections that were reasonable in frequency and scope to examine the condition of the leased land"; (2) "by failing to ensure that the terms of the lease that impact the condition of the leased land were being followed"; and (3) "by failing to take prompt and appropriate follow-up steps when it was made aware of evidence that the lease may have been violated with respect to protecting the condition of the leased land."[54]

Litigators can gather information concerning the legal status of the project lands by consulting a title report if available and the permitting agency's report and/or recommendation.

F. Does the Project or Permit Action Affect Any article XI § 1 Public Resource?

The State of Hawai'i also has public trust obligations with respect to the State's natural resources. Hawai'i Constitution article XI, section 1 states:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and *all natural resources, including land, water, air, minerals and energy sources*, and shall *promote the development* and utilization of these resources in a manner *consistent with their conservation and in furtherance of the self-sufficiency* of the State. *All public natural resources are held in trust by the State for the benefit of the people*.[55]

In *Waiāhole I*, the Hawai'i Supreme Court explained that "[a]rticle XI, section 1 and article XI, section 7 adopt the public trust doctrine as a

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[51] *Id.* at 177 n.49, 449 P.3d at 1175 n.49 (emphasis added).

[52] *Id.* at 180, 449 P.3d at 1178.

[53] *Id.* at 180–81, 449 P.3d at 1178–79.

[54] *Id.* at 182, 449 P.3d at 1180.

[55] HAW. CONST. art. XI, § 1 (emphasis added) (formatting adjusted).

fundamental principle of constitutional law in Hawaii."[56] Thus, "the public trust doctrine exists independently of any statutory protections supplied by the legislature."[57] This constitutional obligation extends to the subdivisions of the State of Hawai'i.

The Hawai'i Supreme Court has expounded upon this constitutional provision in several landmark cases that are discussed below.

With respect to water resources, the *Waiāhole I* Court described the public trust duty as "the authority and duty 'to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.'"[58] This duty is reflected in article XI, section 1 of the Hawai'i Constitution, which requires the State and its political subdivisions to "protect" and "promote" the State's water resources.[59]

In *Kelly v. 1250 Oceanside Partners*, the natural resources at stake were the coastal waters adjacent to a master planned private development project.[60] The Hawai'i Supreme Court ruled that pursuant to article XI, section 1, the County of Hawai'i as a political subdivision of the State had an obligation to conserve and protect the State's natural resources.[61] The Court rejected the State Department of Health's argument that its public trust duties are undertaken in its absolute discretion, stating:

> As this court in *Waiahole I* [sic] noted, "The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager." *Id.* at 143, 9 P.3d at 456. As guardian of the water quality in this state, DOH then "must not relegate itself to the role of a 'mere umpire' . . . but instead must take the initiative in considering, protecting, and advancing public rights in the resource at *every stage* of the planning and decision-making process." *Id.* (emphasis added). Thus, "the state may compromise public rights in the

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[56] 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000).

[57] *Id.*

[58] *Id.* at 138, 9 P.3d at 450 (quoting Robinson v. Ariyoshi, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982)).

[59] The duty to protect includes the duty to "ensure the continued availability and existence of its water resources for present and future generations." *Waiāhole I*, at 139, 9 P.3d at 451. The duty to promote incorporates the duty to promote "the development and utilization of [water] resources *in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State." HAW. CONST. art. XI, § 1 (emphasis added). As recognized by the majority of the Hawai'i Supreme Court in *Wai'ola* [sic], "maximizing the water resource's social and economic benefits includes the protection of the resource in its natural state." 103 Hawai'i at 430, 83 P.3d at 693.

[60] 111 Hawai'i 205, 209–11, 140 P.3d 985, 989–91.

[61] *Id.* at 226, 140 P.3d at 1006.

> resource *pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.*" *Id.* (emphasis added). Such a duty requires DOH to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources. This duty is consistent with the constitutional mandate under article XI, section 1 and the duties imposed upon DOH by HRS chapters 342D and 342E.[62]

In *Mauna Kea II*, the Hawai'i Supreme Court examined BLNR's decision authorizing the grant of a conservation district use permit on the Mauna Kea Summit for the construction of the TMT.[63] One of the many issues presented was whether the TMT project violated article XI, section 1 and public trust principles. The Hawai'i Supreme Court declared that "conservation district lands owned by the State, such as the lands in the summit area of Mauna Kea, are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1."[64] The Court went on to state:

> The plain language of Article XI, Section 1. . . . requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the other in a manner consistent with their conservation. The balancing must be "consistent with . . . conservation [of these resources] and in furtherance of the self-sufficiency of the State." We have also stated Article XI, Section 1, requires the state both to "protect" natural resources and to promote their "use and development," consistent with the conservation of the natural resources [and] indicated that any balancing between public and private purposes must begin with a presumption in favor of public use, access and enjoyment.[65]

In its *de novo* review of whether article XI, section 1's requirements had been met, the Hawai'i Supreme Court found that with respect to the requirements of conservation and protection of public natural resources, it was undisputed that the TMT will not cause substantial adverse impact to geologic sites. It will be decommissioned at a time certain (either fifty years or the end of the lease), whereafter the land must be restored. BLNR also imposed CDUP conditions, designed to help protect the land in the area,

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[62] *Id.* at 1011, 140 P.3d at 231.

[63] 143 Hawai'i 379, 431 P.3d 752 (2018).

[64] *Id.* at 400, 431 P.3d at 773.

[65] *Id.* at 400–01, 431 P.3d at 773–74 (citations and footnotes omitted).

including "requiring the permanent decommissioning of three telescopes as soon as possible and two additional telescopes by December 31, 2033."[66]

With respect to the development of utilization of the land consistent with its conservation and in furtherance of the self-sufficiency of the State, with a presumption in favor of public use, access, and enjoyment, the Hawai'i Supreme Court concluded:

> As discussed earlier, however, there was no actual evidence of use of the TMT Observatory site and Access Way area by Native Hawaiian practitioners. Furthermore, in general, astronomy and Native Hawaiian uses on Mauna Kea have co-existed for many years and the TMT Project will not curtail or restrict Native Hawaiian uses. In addition, the TMT is an advanced world-class telescope designed to investigate and answer some of the most fundamental questions regarding our universe, including the formation of stars and galaxies after the Big Bang and how the universe evolved to its present form. Native Hawaiians will also be included in other direct benefits from the TMT. Use of the land by TMT will result in a substantial community benefits package, which has already provided over $2.5 million for grants and scholarships for STEM education benefitting Hawai'i students. The package also includes an additional commitment to provide $1 million annually for this program. The TMT Project will also result in a workforce pipeline program that will lead to a pool of local workers trained in science, engineering, and technical positions available for employment in well paid occupations. TIO will pay sublease rent to the University, the first telescope developer on Mauna Kea to do so, which will be used for the management of Mauna Kea through the Mauna Kea Special Management Fund, administered by OMKM. Thus, use of the land by TMT is consistent with conservation and in furtherance of the self-sufficiency of the State.[67]

Importantly, the Hawai'i Supreme Court noted that the Admission Act section 5(f) and Hawai'i Constitution provisions article XII, section 4, article XVI, section 7, and article X, section 5, although not at issue in the case, may play a part in further defining public trust principles under article XI, section 1 with regard to conservation district lands owned by the State.[68]

Litigators can gather information concerning these protected natural resources by consulting any available project plans, the permit application, and the permitting agency's report and/or recommendation.

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[66] *Id.* at 401, 431 P.3d at 774.

[67] *Id.* at 402, 431 P.3d at 775.

[68] *Id.* at 401 n.24, 431 P.3d at 774 n.24.

G. Standing

Litigators should also consider whether standing has been sufficiently established. According to section 91-14 of the Hawai'i Revised Statutes, a "person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review."

In *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court examined challenges to the State of Hawai'i's actions with respect to ceded lands.[69] As to whether the plaintiff, Pele Defense Fund (PDF), could bring suit on behalf of its native Hawaiian members to enforce the terms of the section 5(f) trust and under article XII, section 7, the Hawai'i Supreme Court explained that judicially imposed standing barriers should be lowered when the "needs of justice" would be served by allowing the plaintiff's claims to proceed:

> It is undisputed that the rights of native Hawaiians are a matter of great public concern in Hawaii. This court has repeatedly demonstrated its fundamental policy that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court. . . .
>
> As discussed earlier in this opinion, the needs of justice can be served only by recognizing plaintiffs that have a sufficient personal stake in the outcome of the litigation. This is measured by the three-part "injury in fact" test set out in *Akau*, and followed in *Hawaii's Thousand Friends. Akau, 65* Haw. at 389, 652 P.2d at 1134-35 (citations omitted); *Hawaii's Thousand Friends,* 70 Haw. at 283, 768 P.2d at 1299. Applying this test to PDF's article XII, § 7 claim, we find that PDF has adequately alleged that: (1) its members include native Hawaiians who are being injured by their exclusion from the undeveloped areas of the land now held by Campbell and True; (2) the injuries are traceable to the alleged violation of their "*Kalipi* rights;" and (3) injunctive relief is likely to remedy the injuries by requiring defendants to allow native Hawaiians access to undeveloped areas of the exchanged lands. Therefore, we hold that PDF, a non-profit corporation whose stated purpose is to perpetuate Hawaiian religion and culture, has standing to assert a violation of article XII, § 7 on behalf of its members.[70]

In *PASH*, the Hawai'i Supreme Court reviewed the decision of the Commission with respect to a Special Management Area (SMA) use permit application for a resort development.[71] Public testimony was taken on the application, but the Commission denied the plaintiff's, Public Access

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[69] 73 Haw. 578, 837 P.2d 1247 (1992).

[70] *Id.* at 614–16, 837 P.2d at 1268–69.

[71] 79 Hawai'i 425, 429, 903 P.3d 1246, 1250 (1995).

Shoreline Hawaii (PASH), request to participate in a contested case on grounds that PASH did not have standing as its interests were not clearly distinguishable from the general public.[72] After denying the request for a contested case, the Commission granted the permit to the applicant.[73]

On appeal, PASH sought review of the denial of its contested case request as well as the decision to issue the permit.[74] As to the Commission's decision to deny standing to PASH to participate in a contested case, the Hawai'i Supreme Court squarely rejected the Commission's "restrictive interpretation of standing requirements."[75] In footnote 15, the *PASH* court explained:

> We stated in *Akau* that "a member of the public has standing to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action." *Akau*, 65 Haw. at 388–89, 652 P.2d at 1134. The necessary elements of an "injury in fact" include: 1) an *actual or threatened* injury, which 2) is traceable to the challenged action, and 3) is likely to be remedied by favorable judicial action. *See Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216; *accord Pele Defense Fund v. Paty* [*Pele*], 73 Haw. 578, 615, 837 P.2d 1247, 1257–58 (1992), cert. denied, 507 U.S. 918, 122 L. Ed. 2d 671, 113 S. Ct. 1277 (1993). In other words, individuals or groups requesting contested case hearing procedures on a SMA permit application before the HPC must demonstrate that they will be "directly and immediately affected by the Commission's decision." HPC Rule 4-2(6)(B). However, standing requirements are not met where a petitioner merely asserts "value preferences," which are not proper issues in judicial (or quasi-judicial) proceedings. *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216. Although the HPC Rules do not expressly require petitioners to detail the nature of their asserted interests in writing until *after* the HPC has determined whether a contested case hearing is required, *see* HPC Rules 4-6(b) and (c), a petitioner who is denied standing without having had an adequate opportunity to identify the nature of his or her interest may supplement the record pursuant to HRS § 91-14(e).
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> The cultural insensitivity demonstrated by Nansay and the HPC in this case -- particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public—emphasizes the

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[72] *Id.* at 434, 903 P.2d at 1255.

[73] *Id.* at 429–30, 903 P.2d at 1250–51.

[74] *Id.* at 430, 903 P.2d at 1251.

[75] *Id.* at 434, 434 n.15, 903 P.3d at 1255, 1255 n.15.

> need to avoid "'foreclosing challenges to administrative determinations through restrictive applications of standing requirements.'" *Mahuiki*, 65 Haw. at 512, 516, 654 P.2d at 878, 880 (quoting *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981)).[76]

Thus, the court held that PASH had sufficiently demonstrated standing to participate in a contested case:

> Through unrefuted testimony, PASH sufficiently demonstrated that its members, as "native Hawaiian[s] who [have] exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands, [have] an interest in a proceeding for the approval of [a SMA permit] for the development of lands within the ahupua'a which are [sic] clearly distinguishable from that of the general public." *Id.* at 8. Although we hold that PASH sufficiently demonstrated standing to participate in a contested case, at least for the purposes of the instant appeal, we observe that "[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved" in the contested case hearing held on remand. HRS § 91-9(c).[77]

In *Kaleikini v. Thielen*, the Hawai'i Supreme Court addressed BLNR's obligation to hold contested case hearings.[78] Paulette Kaleikini followed the procedural requirements of Hawai'i Administrative Rules section 13-300-52 to request a contested case hearing to review the O'ahu Island Burial Council's (OIBC) decision to relocate iwi found at Ward Village Shops.[79] She claimed that the OIBC's determination adversely affected her because she was a recognized cultural descendant of the ancestors and a possible lineal descendant of the iwi found at the site.[80] She argued, among other things, that she was entitled to a contested case hearing because her constitutional rights under article XII, section 7 were adversely affected by the iwi's relocation.[81] The DLNR denied Kaleikini's request for a contested case and Kaleikini appealed to the circuit court where her appeal was dismissed for lack of subject matter jurisdiction on the grounds that she had not participated in a contested case hearing, a prerequisite to judicial review under Hawai'i Revised Statutes section 91-14.[82]

Upon review by the Hawai'i Supreme Court, the case was decided on its merits, even though moot.[83] The Hawai'i Supreme Court analyzed whether

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[76] *Id.*

[77] *Id.* at 434–35, 903 P.2d at 1255–56.

[78] 124 Hawai'i 1, 237 P.3d 1067 (2010).

[79] *Id.* at 6, 20, 237 P.3d at 1072, 1086.

[80] *Id.* at 6–7, 237 P.3d at 1072–73.

[81] *Id.* at 7, 237 P.3d at 1073.

[82] *Id.*

[83] The court, pointing to the legislative history of Hawai'i's burial laws and the

Kaleikini had been properly denied a contested case hearing by examining the requirements of section 91-14 of Hawai'i Revised Statutes:

> (1) the proceeding that resulted in the unfavorable agency action had been a "contested case" hearing—that is, a hearing that (a) was "required by law" and (b) determined the "rights, duties, and privileges of specific parties";
>
> (2) the agency's action represented "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief;
>
> (3) the claimant had followed the applicable agency rules; and
>
> (4) the claimant's legal interests had been injured—that is, the claimant had standing to appeal.[84]

The Court held that Kaleikini had met all of the above requirements and that the circuit court had erred in dismissing her appeal.[85] With respect to subsection (4) above, the court concluded that Kaleikini had standing to appeal under the requirements of section 91-14 of Hawai'i Revised Statutes because Kaleikini's legal interests:

> [S]tem from her cultural and religious beliefs regarding the protection of iwi. The [administrative rule] at issue here specifically provided standing to "cultural descendant[s]," such as Kaleikini. Additionally, the Hawai'i constitution—article XII, section 7—protects such rights. Throughout the instant litigation, Kaleikini has averred that her cultural and religious beliefs require her to ensure that the iwi [are] left undisturbed and that the OIBC's decision, allowing GGP to disinter the iwi, has caused her cultural and religious injury. As such, we believe Kaleikini has alleged sufficient facts upon which this court can determine she has standing.[86]

In *Mauna Kea Anaina Hou v. Board of Land & Natural Resources*, however, the appellee never disputed the appellants' standing to assert article XII, section 7 rights and to file an appeal.[87]

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legislative findings on the vulnerability of Native Hawaiian burials, concluded that the case fell under the public interest exception to the mootness doctrine. *Id.* at 12–13, 237 P.3d at 1078–79; *see* Melody Kapilialoha MacKenzie, *Ke Ala Pono—The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447, 462–67 (2011) (discussing the *Kaleikini v. Thielen* case and the public interest exception to the mootness doctrine).

[84] *Kaleikini*, 124 Hawai'i at 17, 237 P.3d at 1083 (quoting Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995)).

[85] *Id.* at 17–27, 237 P.3d at 1083–1093.

[86] *Id.*

[87] 136 Hawai'i 376, 390 n.10, 363 P.3d 224, 238 n.10 (2015). Section 91-7(a) of the

As to standing under section 91-7 of Hawai'i Revised Statutes, the Hawai'i Supreme Court in *Asato v. Procurement Policy Board* set forth the "interested person" standard.[88] There, the court expressly rejected the assertion that an "interested person" is limited only to those "who can show an actual or threatened injury."[89] Thus, the "injury in fact" standard[90] does not apply when determining standing under section 91-7.[91] Rather, an "interested person" is "[one who is, without restriction] 'affected' by or 'involved' with the validity of an agency rule," i.e., one "who has interests that "may have been adversely affected."[92] In *Asato*, the plaintiff was an "interested person" because "as a taxpayer challenging a specific public bidding procedure, he may be affected by the validity of a regulation that allegedly allowed an illegal expenditure of public funds."[93] The court further explained that "where the legislative history of HRS § 91-7 indicates that no actual case or controversy is required . . . the legislature obviously intended to liberalize standing requirements," and the "injury in fact" standard could not be applied.[94] The court held that by using the phrase "interested person," the legislature intended to capture a "broader platform" of persons, and concluded that "standing requirements should not be barriers to justice."[95]

Hawai'i Revised Statutes states:

(a) *Any interested person* may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

[88] 132 Hawai'i 333, 322 P.3d 228 (2014).

[89] *Id.* at 342–43, 322 P.3d at 237–38.

[90] To satisfy the "injury in fact" test, plaintiffs must demonstrate that: "(1) [they have] suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for a plaintiff's injury." Bush v. Watson, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996).

[91] *Asato*, 132 Hawai'i at 342, 322 P.3d at 237.

[92] *Id.* at 343, 322 P.3d at 238.

[93] *Id.*; *see also* Babson v. Nago, 134 Hawai'i 114, 334 P.3d 777 (2014) (one must only establish that "he *may be affected* by the State's alleged adoption of rules" to be an "interested party").

[94] *Asato*, 132 Hawai'i at 344, 322 P.3d at 239.

[95] *Id.*

Finding a New Path: A Practical Look at *PASH*, the Public Trust, and Western Property Law

Mark M. Murakami*

INTRODUCTION

In his symposium article,[1] retired Hawai'i Supreme Court Associate Justice Simeon R. Acoba, Jr. recounts the development of Hawai'i's constitutional law relating to the exercise of various rights held by the native peoples, particularly the court's *PASH* decision,[2] which this symposium celebrates.[3] He further expounds on the Hawai'i Supreme Court's employment of the public trust doctrine to regulate business and governmental activities that implicate natural resources. This comment is primarily motivated by a sense that the Hawai'i Supreme Court's *PASH* doctrine and employment of the public trust are not guided by a compelling need to protect discrete minorities from infringements on their liberty or property rights by the majority. Rather, they are reflections of the court majority's preferences about how the law *should* be in light of Hawai'i's history.

However, by shifting its focus from the usual principle of protecting minority rights from majoritarian influences, the court has unnecessarily untethered itself from its more limited role in our political system and entered an arena it is not institutionally equipped to control. This comment is a modest attempt to urge restraint in the use of constitutional provisions to accomplish policy aims best achieved by the legislative and the executive

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* Director, Damon Key Leong Kupchak Hastert, Honolulu, Hawai'i. J.D., William S. Richardson School of Law, University of Hawai'i (1999); B.S., U.S. Coast Guard Academy (1992). During law school, the author served as Articles Editor for the University of Hawai'i Law Review, volume 21. This essay reflects the author's academic views and does not reflect the position of his firm or his firm's clients.

[1] Simeon R. Acoba, Jr., PASH *and the Evolution of Native Hawaiian Rights Protection*, 43 U. HAW. L. REV. 550 (2021).

[2] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied sub nom.*, *Nansay Haw. v. Pub. Access Shoreline Haw.*, 517 U.S. 1163 (1996) (*PASH*)).

[3] As an initial matter, while various federal and state statutes, and these cases themselves, attempt to break those peoples into subsets based on "quantum" of native blood or upon ancestral ties to a particular district of land, in this essay I use the term "Hawaiian" more generally to refer to those indigenous peoples, and their descendants, residing in the Hawaiian islands prior to 1778.

branches. It is not intended as a deep scholarly analysis, but is an attempt to examine this subject with a very practical eye.

I begin with a summary of the foundational property law principles supporting Hawai'i's legal system to demonstrate that Hawaiian cultural values can co-exist and are compatible with what the Hawai'i Supreme Court in *PASH* characterized as a "western" property law system. I next analyze the practical problems rising from the Hawai'i Supreme Court's public trust jurisprudence. Finally, I conclude that by advancing what might be worthy policy goals through the limited lens of constitutional litigation poses political risk to the judiciary, which is counter-productive to the proper functioning of our legal system.

I. PRINCIPLES OF PROPERTY LAW IN THE KINGDOM AND SUCCESSOR GOVERNMENTS

In *PASH*, the Supreme Court concluded that "the western concept of exclusivity is not universally applicable in Hawaii."[4] But a careful review of the contemporaneous records of how Hawai'i adopted its system of property starting during the Kingdom era reveals a more nuanced story. During the mid-1800s, the Kingdom of Hawai'i transitioned from a feudal system of property into an organized legal system with written laws—including a constitution—and a judiciary with the power of appellate review.[5] The Kingdom very quickly adopted and enforced "western" legal principles, including the enshrinement of due process of law and the protection of individual property as foundational principles.[6] In terms of real property, the nineteenth century ushered in an adoption of written, lender-recognized, and court-enforced principles of title.

A. Great Māhele of 1848

Before the Great Māhele of 1848, all land in the Kingdom was "owned" by the sovereign.[7] The Māhele allowed for the initial subdivision of lands in

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[4] *PASH*, 79 Hawai'i 425, 903 P.2d at 1268.

[5] Kamehameha III adopted the first constitution which created the first Chief Justice and an independent judiciary. W. Frear, *The Evolution of the Hawaiian Judiciary*, PAPERS OF THE HAWAIIAN HISTORICAL SOCIETY, No. 7 at 8-9 (1894), available at: https://evols.library.manoa.hawaii.edu/bitstream/10524/966/OP07.pdf.

[6] *See, e.g.* Jane L. Silverman, *Imposition of a Western Judicial System in the Hawaiian Monarchy*, 16 HAWAIIAN J. HIST. 48, 54 (1982). *See also* II.C.

[7] *See* Allan F. Smith, *Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law*, 7 U. HAW. L. REV. 1, 2 (1985) ("Kamehameha I (1758? –1819) by conquest became monarch of all the islands and, by conquest, the owner of all land.").

the Kingdom and the transfer of title of the lands from the sovereign to the King, lesser chiefs, and individuals.[8] The Māhele has been criticized as leading to the disenfranchisement of Hawaiians, but ultimately, it was a forward-thinking—and probably necessary—process that allowed the Kingdom to transition from a subsistence economy to an international trading hub. A concentrated form of ownership leaves individuals and businesses vulnerable to conquest. With a nod to Robert Frost, boundaries and communal recognition of property rights do tend to decrease conflict, but islands are only so big, leading to the need for new lands (read: conquest) to avoid fratricide. Archaeologist Patrick Kirch has tracked the anthropological roots of the ancient Hawaiian civilization and advanced the theory that land division in Polynesia—and perhaps even the migration to Hawai'i itself—was driven by a growing population and a finite land mass to divide amongst a ruler's descendants.[9] As Hawai'i transitioned into a trading economy, it bore the brunt of waves of epidemics causing widespread population losses.[10] As such, orderly or equitable land division amongst the ruling class was likely less of a motivator for the Great Māhele than was facilitating commerce in light of increased interactions with seafaring nations visiting Hawai'i and protecting the King and his family's rights to the land. It also protected wide swaths of land from loss or conquest during a time when various world powers were vying for control of Hawai'i, which eventually led to the annexation of Hawai'i by the United States in 1899.[11]

The impact of the Great Māhele on ownership of land by Hawaiians has been the subject of much study. Most scholarship attributes the modern lack of ownership of land by Hawaiians to losses brought about by the Māhele, but as Professor Donavan Preza has shown by tracking the ownership of land that resulted from the Māhele, any loss of land ownership may be more appropriately attributed to the change in governance over the Hawaiian islands and not from the Māhele itself.[12] After studying the Royal Patents

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[8] *See generally* JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958).

[9] PATRICK KIRCH, A SHARK GOING INLAND IS MY CHIEF: THE ISLAND CIVILIZATION OF ANCIENT HAWAI'I (1st ed. 2012).

[10] I also think that the human destruction caused by the waves of smallpox and other infectious diseases decimated the native population in the 1800s. GAVAN DAWS, HONOLULU THE FIRST CENTURY: THE STORY OF THE TOWN TO 1876 (2006).

[11] *See* Chinen, *supra* note 8, at 15 (As shown by the Privy Council records, "the king and the chiefs realized that the economy of the Islands could not advance under the old feudal system of land tenure.").

[12] Donovan C. Preza, The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848 (May 2010) (M.A. thesis, University of

and Land Commission awards, Preza concluded that large tracts of land were obtained by non-Hawaiians—not from their new owners (Hawaiian tenants) as the popular trope posits—but directly from the Kingdom government itself:

Table 7. Five Largest Purchases of Government Land

RPG #	**Acres**	**Year**	**Awardees**
2769	37,888	1861	J.P. Parker
2791	181,296	1861	C.C. Harris
2944	61,038	1864	James Sinclair
3146	46,500	1875	C.R. Bishop
3343	24,000	1882	Spreckles[13]

Unlike the earlier scholarly works he reviewed, Preza concluded that the real estate transactions themselves show Hawaiian land dispossession resulted from the overthrow of Hawaiian governance and not from the Māhele of 1848.[14] To the extent the Māhele facilitated those transactions to the detriment (then and now) of the Hawaiian people, it should remain a discussion point. But a land-rich, cash-poor fledgling government's decision to sell land after the Māhele for funds to operate and develop is rational. Preza's work is insightful and should serve as a launching point for future inquiry into the role of the Māhele in title and the history of property and gathering rights in Hawai'i.

B. Real Estate Title is Paramount

The Great Māhele instituted and introduced the concept of formal legal title to real property in Hawai'i,[15] even though the Māhele itself did not directly create or protect title to property, or the property rights which come

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Hawai'i) (relying on scholarly works interpreting the Māhele and the dispossession of lands, such as: JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958); JON J. CHINEN, ORIGINAL LAND TITLES IN HAWAII (1961); JON J. CHINEN, THEY CRIED FOR HELP: THE HAWAIIAN LAND REVOLUTION OF THE 1840S & 1850S (2002); LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002); ROBERT H. STAUFFER, KAHANA, HOW THE LAND WAS LOST (2003); JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2007)).

[13] Preza, *supra* note 12, at 154. The names of the Awardees are not unfamiliar to the history of Hawai'i.

[14] *Id.* at 173.

[15] *See In re* Kamakana, 58 Haw. 632, 638, 574 P.2d 1346, 1349 (1978).

with recognition of title. In *Kenoa v. Meek*, the Kingdom Supreme Court concluded:

> The Mahele itself does not give a title. It is a division, and of great value because, if confirmed by the Board of Land Commission, a complete title is obtained. But it was open to examination, and if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed that Board of Land Commission, their award gave a complete title. By the Mahele, His Majesty the King consented that Pahoa should have the land, subject to the award of the Land Commission.[16]

Consequently, after the Māhele, the process to document property rights in land was set forth in the Land Commission Act.[17] Once titles and attendant property rights were confirmed by the Land Commission, the Kingdom's courts were very firm in protecting these newly-recognized rights.[18] After all, property rights only have value if recognized by the community and protected and enforced by the courts. Since owning property is valuable, third party recognition of such ownership is crucial.[19] With historical retrospection, there was a harshness to judicial enforcement of laws that favored written instruments against Hawaiians, especially if those instruments were written in English.[20] But with the advent of formal legal

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[16] 6 Haw. 63, 67 (Haw. Kingdom 1871).

[17] An Act to Organize the Executive Departments, Of the Board of Commissioners to Quiet Land Titles, art. IV, ch. 7, pt. 1, 1845 Stat. Laws of His Majesty King Kamehameha III 107. *See also* McBryde Sugar Co. v. Robinson, 54 Haw. 174, 184–85, 504 P.2d 1330, 1337–38 (1973) ("By the m[ā]hele or Great M[ā]hele, Kamehameha III in 1848 proclaimed that he was sharing the lands in the Hawaiian Kingdom with his people. It is generally recognized that the m[ā]hele did not transfer title to parcels of land which had been m[ā]heled. The Land Commission Act has implemented the m[ā]hele. This Act created the Board of Land Commission, often called the Land Commission, to quiet land titles and it defines the authority and function of the Land Commission. The object of the law [w]as [to] have the commission make 'investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired' in the Hawaiian Kingdom. The awards of the commission were to be deemed final and binding upon all parties unless appealed.").

[18] *See* Davis v. Brewer, 3 Haw. 359, 361 (Haw. Kingdom 1872) ("All the presumptions are in favor of a patent. It is the highest evidence of title, and can only be impeached in equity on a clear showing of fraud or mistake in the issuing of it. There is no hardship in requiring a patentee to explain how his patent on its face conflicts with an award by the Land Commission, in the false averment that it is based on a Land Award issued to him which was in fact issued to another person.").

[19] *Davis*, 3 Haw. at 361 ("The executive authority may be misled into giving to one man a patent of another's land, and clerical mistakes are always possible, but it cannot revoke its own acts, and must leave to the Courts to decide on their validity and effect.").

[20] *See* Kaopua v. Keelikolani, 5 Haw. 675, 685 (Haw. Kingdom 1875) ("But a Court

title to real property, came the ability to mortgage that land to secure loans which could provide capital for the construction of homes and the development of businesses. But mortgages can lead to enforcement of those contracts resulting in dispossession of the mortgaged lands. The dispossession took place in court, by way of judicial foreclosure, but also without judicial process on the courthouse steps. The nonjudicial foreclosure process was codified.[21] It is a fair criticism that the nonjudicial foreclosure statute was a tool in the involuntary dispossession of land from Hawaiians. Indeed, in his well-researched book, KAHANA: HOW THE LAND WAS LOST, Dr. Robert Stauffer, manager of the Hawaiian Language Legacy program, documented the link between the statute and the dispossession of Hawaiians who obtained their lands after the Māhele.[22] Ultimately, except in instances of fraud or duress, the defaulted loan likely had the primary role in the eventual foreclosure and not the incidental rights of ownership, i.e. the power to mortgage or alienate.

C. Government Insured Title Through Torrens

Eventually, Hawai'i adopted a "Torrens" type of land registration after annexation, where the government cemented its assurances in valid, enforceable title, and the corresponding confidence that property owners had in that title. [23] Hawai'i's Land Court system guarantees the validity of any land title registered in the system. Any interest in real estate that is not reflected on the certificate of title is not recognized or enforceable.[24] By

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cannot go on concluding that people do not understand the consequences of their own acts, and relieving them against the consequences of their own ignorance and stupidity, more especially when, as in this case, they would be obliged by doing so to inflict a wrong on third parties."). While brutal in tone compared to modern day court opinions, the Kingdom Supreme Court was mindful of the issue of the unrepaid loan and did enforce the mortgages.

[21] Silva v. Lopez, 5 Haw. 262, 264 (Haw. Kingdom 1884) ("The proceedings upon sale of mortgaged property without suit are established by Chap. XXXIII. of the Acts of 1874. The Act provides that when a power of sale is contained in a mortgage, upon breach of the condition the mortgagee may give notice of his intention to foreclose by publication for three weeks before advertising the mortgaged property for sale. . . .").

[22] STAUFFER, *supra* note 12, at 99.

[23] *In re* Estate of Campbell, 66 Haw. 354, 358, 662 P.2d 206, 208 (1983) ("Named for Sir Richard Torrens, a nineteenth century reformer of Australian land laws and the originator of the scheme, the Torrens title system was initially adopted and implemented in Hawaii in 1903 with the establishment of the Court of Land Registration.") (citations omitted).

[24] HAW. REV. STAT. § 501-71 (2020); *In re* Campbell, 130 Hawai'i 183, 188, 307 P.3d 163, 168 (Ct. App. 2013) ("Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in [section 5041]. It shall be conclusive upon and against all persons, including the Territory, whether mentioned by name in the application, notice or citation, or included in the general description 'to all

recording property interest in Land Court, the State of Hawai'i actually guarantees the title on the certificates of title such that if there is a defect in title, a landowner is entitled to compensation from the State in contract and tort.[25]

D. Due Process and Other Property Rights

In a related development that further recognized the centrality of "property," the Constitution of 1852 protected individuals from being deprived of property without due process.[26] The Kingdom Supreme Court recognized the due process rights of the Kingdom's subjects and protected minority rights and individual liberties, even when doing so restricted the power of the government. In *King v. Kekaula*, a criminal nuisance conviction for obstruction of a roadway was set aside for the government's failure to strictly comply with the road dedication statute.[27] "The laws scrupulously guard the vested rights of property."[28] The court also recognized due process and even invalidated laws that did not provide for such right. In *Wing Wo Chan & Co. v. The Hawaiian Government*,[29] the court held that the government could not proceed *in rem* against contraband alcohol but had to proceed *in personam* against the owner of the contraband, and if a law did not provide pre-deprivation or pre-seizure notice and a right to a hearing, then that law was unconstitutional. In another case, the court restrained the government from exercising one of its most basic attributes of sovereignty, the power to take property by eminent domain, when strict compliance with the condemnation statute was not followed.[30] In yet another case, the Kingdom Supreme Court recognized the Crown's waiver of sovereign immunity to allow for property damage

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whom it may concern.").

[25] HAW. REV. STAT. § 501-212 (2021).

[26] *See* KINGDOM OF HAWAII CONSTITUTION June 14, 1852, art. 10 ("No person shall be compelled, in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law.").

[27] King v. Kekaula, 3 Haw. 378 (Haw. Kingdom 1872) (overturning a conviction because particulars of road condemnation statute not complied with).

[28] *Id.* at 379.

[29] 7 Haw. 498 (Haw. Kingdom 1888).

[30] *In re* Widening of Fort St., 6 Haw. 638, 646–47 (Haw. Kingdom 1887) ("The Constitution provides that no person shall be deprived of 'property without due process of law,' and it is undoubted law that when a statute confers upon the Government or other parties the right to take another's property for public purposes, every form and particular required by such statute must be complied with.").

claims arising from the tortious acts of government officials.[31] As one final example, the Kingdom also provided protections to new landowners with mortgages, where the Kingdom Supreme Court used its powers in equity to strictly enforce the particulars of the nonjudicial foreclosure statute.[32]

II. 1978 CONSTITUTIONAL CONVENTION

With that historical backdrop, any discussion of the development of the public trust doctrine and Hawaiian rights must, of course, consider the 1978 Constitutional Convention (1978 Convention). The 1978 Convention ushered in several structural changes to the government of Hawai'i, including the creation of the Office of Hawaiian Affairs.[33] The 1978 Convention further charged the Legislature to create the Commission on Water Resources Management. But of most relevance here, the 1978 Convention also added article XII, section 7, which recognized what we now know as traditional and customary rights:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[34]

The 1978 Convention also provided for a replacement of article 11, section 1, and recognized that all *public* natural resources are held in trust by the State and the counties "[f]or the benefit of present and future generations."

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[31] High v. Hawaiian Gov't, 8 Haw. 546, 547–548 (Haw. Kingdom 1892). The Kingdom Supreme Court held:

It is admitted that the Government, as such, cannot be sued by private parties without its consent; and the question upon this point is merely whether the consent given by Chapter 51 of the Laws of 1888 includes claims arising from torts, as well as contracts, or is limited to contracts.

The second section of said Chapter is as follows: "Whenever any citizen of this Kingdom, or other person, shall have a claim or claims against the Hawaiian Government which said government shall refuse or neglect to satisfy or adjust, it shall be competent for such person to bring and maintain a suit or suits against said government in any appropriate court of record of the Kingdom for the purpose of adjudicating such claim or claims."

Id.

[32] Silva v. Lopez, 5 Haw. 262, 263 (Haw. Kingdom 1884) ("To effect a valid sale under power, all the directions of the power must be complied with, says Wells, J., in Cranston vs. Crane, 97 Mass. 459 [(1867)], and this is unquestioned.") (alteration added).

[33] HAW. CONST. art. XII, § 5.

[34] HAW. CONST. art. XII, § 7.

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.[35]

This became known as the "public trust doctrine," even though it was different in kind from the long-standing public trust doctrine related to submerged lands to which a state holds title, and the public's right to navigate, fish, and engage in commerce on the waters.[36]

As I consider below, these provisions have been employed aggressively by the Hawai'i Supreme Court to position itself as the primary protector of Hawaiian rights and the environment.

III. *PASH* AND THE PUBLIC TRUST

With the scene set for understanding property law in Hawai'i and the 1978 Convention, I next turn to the court decisions enforcing Hawaiian rights in the modern era. This section is a critique of the enshrinement of Hawaiian and environmental property rights in court decisions rather than statutes or real estate title records. As shown by the federal legislation following the *Brown v. Board of Education*—for example, the Civil Rights Act of 1963, and the Voting Rights Act of 1965—legislation is often needed to fully establish constitutional rights, but more importantly to provide enforcement tools to vindicate, and practically protect, those rights.

Before continuing, it is crucial to note that a fundamental principle of appellate law is that if a court can make its decision based on the interpretation of a statute, it should, and maybe even must, avoid the constitutional question.[37] However, in the area of Hawaiian gathering rights and water rights, it seems the Hawai'i Supreme Court has reserved unto

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[35] HAW. CONST. art. XI, § 1.

[36] *See* Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261, 265 (2016). *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004).

[37] Rees v. Carlisle, 113 Hawai'i 446, 456, 153 P.3d 1131, 1141 (2007) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

itself decision making power in ways that may be counterproductive to the actual and practical protection of those rights.

A. The Supreme Court and Water Rights

This comment is about traditional and customary rights and *PASH*, but the Hawai'i Supreme Court's water rights jurisprudence post-1978 Convention strikes a similar analytic chord, and indeed was the initial area into which the court ventured. After the 1978 Convention mandated the adoption of a water code, the Legislature enacted the Water Code, chapter 174C of the Hawai'i Revised Statutes in 1987.[38] It also created an agency, headed by a commission to administer the Code.[39] The Hawai'i Supreme Court first reviewed a Water Code case in 1988. In *Ko'olau Agricultural Co. v. Commission on Water Resource Management*, an environmental group sought to compel the designation of water management areas pursuant to the Water Code.[40] The court held:

> The central feature of the Code is a water use permitting process to insure all of the substantive water rights established under the common law and the Hawai'i Constitution. HRS chapter 174C, Part IV. The Code is unique, however, in that the permitting process does not apply statewide. The legislature apparently interpreted the constitutional mandate "to protect, control, and regulate the use of Hawai'i's water resources" as requiring protection only of water resources that have become threatened.[41]

Since then, the Supreme Court has used its power to interpret the constitution to issue voluminous decisions about the Water Commission's contested case decisions, but locating an opinion that actually approves of a substantive decision of the Water Commission is difficult, and I have not found any.[42] In these decisions, the court seems to have for the most part

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[38] HAW. REV. STAT. ch. 174C.

[39] In adopting the Water Code, the Legislature declared several policies:

c) The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.

HAW. REV. STAT. § 174C(2)(c).

[40] 83 Hawai'i 484, 927 P.2d 1367 (1996).

[41] *Id.* at 490, 927 P.2d at 1373.

[42] *See, e.g.*, *In re* Water Use Permit Applications (*Waiahole I*), 94 Hawai'i 97, 9 P.3d 409 (2000); *In re* Water Use Permit Applications (*Waiahole II*), 105 Hawai'i 1, 93 P.3d 643

disregarded the avoidance doctrine,[43] as well as the historic deference courts pay to agency decision-making.[44] As such, it has arrogated power to the court and away from the Legislature and water agency. The court's approach to water law and water rights set the analytic stage for its similar analysis of traditional and customary rights in *PASH*.

B. The Supreme Court and Customary and Traditional Rights

Any discussion of Hawaiian gathering rights following the 1978 Convention must start before the *PASH* decision with a review of the court's decision in *Kalipi v. Hawaiian Trust Co*.[45] In that case, Kalipi brought a civil suit against a landowner asserting access and gathering rights in the landowner's undeveloped lands.[46] Kalipi was not a resident of the ahupua'a.[47] The court held that the gatherer did not have rights in the undeveloped lands of the landowner. It cited article XII, section 7 of the Hawai'i Constitution, and noted that the modern system of land tenure did not extinguish traditional rights.[48] The court noted that article XII was an "expression of policy which must guide our determinations."[49]

The court then turned to the statutory protections of gathering rights.[50] First, section 7-1 of the Hawai'i Revised Statutes provided gathering protections to the tenants of post-Māhele transferred lands.[51] The court then

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(2004); Kauai Springs, Inc. v. Planning Comm'n of the County of Kaua'i, 133 Hawai'i 141, 324 P.3d 951 (2014); *In re* Contested Case Hearing on the Water Use Permit Application Filed by Kukui Moloka'i Inc., 116 Hawaii'i 481, 174 P.3d 320 (2007).

[43] *See Rees*, 113 Hawai'i at 456, 153 P.3d at 1141 (noting the "fundamental and longstanding principle of judicial restraint" commanding courts to avoid constitutional issues if it can).

[44] Courts routinely defer to agency discretion and decision-making, particularly on matters requiring specialized knowledge. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 169 (Haw. 1987) (agency has primary jurisdiction); Haole v. State, 111 Hawai'i 144, 150, 140 P.3d 377, 383 (2006) ("Where an agency is statutorily responsible for carrying out the mandate of a statute which contains broad or ambiguous language, that agency's interpretation and application of the statute is generally accorded judicial deference on appellate review."). Hawai'i water law seems like just the sort of topic suited for specialized knowledge and expertise.

[45] 66 Haw. 1, 656 P.2d 745 (1982).

[46] *Id.* at 3, 656 P.2d at 747.

[47] *Id.*

[48] *Id.* at 4–5, 656 P.2d at 747–48.

[49] *Id.* at 5, 656 P.2d at 748.

[50] *Id.*

[51] *Id.* "The statute, in its current form, provides that: Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall

analyzed section 1-1 which adopted the common law of England and those laws established by "Hawaiian usage."[52] The court concluded that this usage exception to common law was "an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law."[53] The court relied on *Oni v. Meek*,[54] a case decided soon after the Great-Māhele, to consider the interplay between custom, including Hawaiian custom, and the Hawaiian usage exception.

Kalipi also asserted a right that was denoted not by statute but by the original real estate instruments and grants of title.[55] The court dismissed such claims noting that "traditional gathering rights do not accrue to persons . . . who do not live within the ahupua'a [sic] in which such rights are sought to asserted."[56] *Kalipi* was a civil lawsuit directly between a person asserting gathering rights and a landowner, similar to a quiet title lawsuit where the court noted the "policy" aims of article XII, but then scrubbed Kalipi's claims under statutes and real estate title.[57] The Hawai'i Supreme Court's jurisprudence since *Kalipi* has delinked gathering rights from statute and title in a way that muddied the waters for property owners and practitioners alike.

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n (PASH)*, the Hawai'i Supreme Court took advantage of a case about standing to make a full-throated assertion of the nature of traditional and customary rights, and their interaction with the concept of private property. The court recognized standing to intervene in a Special Management Area permit contested case hearing for persons exercising traditional, customary, and religious practices.[58] It is crucial to note that *PASH* was, at heart, a case about *standing*, and not a direct assertion by PASH of a right to access land

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not be deprived of the right to take firewood, housetimber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use." *Id.* (formatting altered) (citing HAW. REV. STAT. § 7-1 (1976)).

[52] *See id.* at 9, 656 P.2d at 750.

[53] *Id.* at 10, 656 P.2d at 750–51.

[54] 2 Haw. 87 (Haw. Kingdom 1858) (rejecting custom based access and pasturage claims hostile to post-Māhele statutory enactments regarding title).

[55] *See Kalipi*, 66 Haw. at 12–13, 656 P.2d at 752.

[56] *Id.* at 13, 656 P.2d at 752.

[57] *Id.* at 5–9, 656 P.2d 748–750.

[58] 79 Hawai'i 425, 434, 903 P.2d 1246, 1255 (1995).

owned by another, as in *Kalipi*. *PASH* recognized that practitioners of traditional and customary rights possessed standing to appear and demand a "contested case" (essentially an agency trial) and seek conditions or exactions in the discretionary permit process to protect their interests.[59] The court also expounded on the nature of those interests, concluding, likely in *dicta* in light of its remand order, that a person exercising those traditional and customary rights may do so on privately owned land, without the consent of the property owner. In so doing, the court rejected the landowner's argument that imposition of this easement-like right resulted in a taking without compensation, and concluded:

> Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i. In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property.
>
> Although this premise clearly conflicts with common "understandings of property" and could theoretically lead to disruption, the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances. In any event, we reiterate that the State retains the ability to reconcile competing interests under article XII, section 7. We stress that unreasonable or non-traditional uses are not permitted under today's ruling.
>
> There should be little difficulty accommodating the customary and traditional Hawaiian rights asserted in the instant case with Nansay's avowed purposes. A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the continued viability of Hawaiian land tenure ideals in the modern world.[60]

There are three important points to note in the above passage. First, the court tied the gathering right to the original land patent and not article XII, section 7. In doing so, the court was plainly attempting to paint traditional and customary rights as "background principles" of Hawai'i's property and nuisance law under the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, which is deemed an exception to the usual rules of regulatory takings.[61] However, this "limited property interest" finds scant

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[59] *Id.*

[60] *Id.* at 447, 903 P.2d at 1268 (citations and footnotes omitted).

[61] *See id.*; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

support in the real estate transition begun with the Great Māhele and documented by Land Commission awards. Jon J. Chinen, a long-time federal bankruptcy judge and leading scholar of land title in Hawai'i, noted:

> The Land Commission was required to render its decisions in accordance with the "principles established by the civil code of the kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy—primogeniture and rights of adoption."[62]

For a new system of real property interests, the post-Māhele written documents themselves, whether patent or award, should have captured the rights of others to access and gather.

Second, the court cited to the constitutional provision not as a source of the gathering right, but rather to note the State's power to regulate such rights and balance the competing interests in the property.[63] The court was plainly mindful that it was wading into federally protected rights.[64] The opinion even acknowledged that the *PASH* decision implicated a change in property law (by dismissing that it did in fact constitute a change) and then noted that a contested case condition protecting the gathering rights could be a regulatory taking under *Lucas*.[65] Quoting *Lucas*, the court held, "the government 'assuredly [can] . . . assert a permanent easement that [reflects] a pre-existing limitation upon the landowner's title.'"[66]

Finally, *PASH* noted that a community being developed in Hawai'i should be able to accommodate Hawaiian gathering rights calling it a "promising opportunity."[67] The court predicted that the spirit of cooperation would avoid most conflicts which its ruling might create.[68]

To reiterate: *PASH* is, at its core, a case about standing, and did not permit any exercise rights on any specific parcel of land, even though the court laid out in great detail the nature of traditional and customary rights, and the way these rights are exercised on private property. But it is fair to conclude that standing to intervene or participate in an administrative contested in Hawai'i case is a very low bar, and there are few if any major cases in which the court has rejected standing.[69] The court sent the case

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[62] JON J. CHINEN, THE GREAT MAHELE, HAWAII'S LAND DIVISION OF 1848 9 (1958).

[63] *See PASH*, 79 Hawai'i at 447, 903 P.2d at 1268.

[64] *See id.*

[65] *Id.* at 451–52, 903 P.2d at 1272–73.

[66] *Id.* at 452, 903 P.2d at 1273.

[67] *Id.* at 447, 903 P.2d at 1268.

[68] *Id.* at 450, 903 P.2d at 1271; *see also Kalipi*, 66 Haw. at 9, 656 P.2d at 750.

[69] *See, e.g.*, *In re* Maui Elec. Co., 141 Hawai'i 249, 270–71, 408 P.3d 1, 22–23 (2017) (finding that the petitioner possessed standing to assert rights and property interests in a "clean and healthy environment"); Kilakila 'O Haleakala v. Bd. of Land & Natural Res., 131

back to the Hawai'i County Planning Commission to allow PASH to intervene and present detailed evidence about its members rights on the land in question.[70] In freeing itself from the inherent limitations of *Kalipi*, section 7-1, and strict requirements for the assertion of gathering rights such as the requirement that the person asserting such right be a tenant of the ahupua'a, and specifically recite the items to be gathered, the court assuredly broadened the protections of Hawaiian rights.

In practice, however, disconnecting traditional and customary rights from section 7-1 and discerning the bounds of such rights has unfortunately become mostly an issue of criminal law. Since *PASH*, the Hawai'i Supreme Court has largely adjudicated Hawaiian traditional and cultural access rights in criminal cases. I offer two examples. In the first, *State v. Hanapi*, the court reviewed a criminal trespass conviction and the defendant's affirmative defense.[71] In that case, a person claiming to be exercising his gathering rights was charged with a criminal petty misdemeanor for trespass on privately-owned property.[72] The defendant, representing himself *pro se*, was allowed to present evidence about his right to gather on the property. The Supreme Court's opinion cited *PASH* and fit these type of claims of a constitutional right into the criminal law context, concluding: "although *PASH* did not discuss the precise nature of Hawai'i's 'limited property interest,' one limitation would be that constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes."[73] The court then addressed Hanapi's individual privilege to use the lands and outlined the three factors used to determine that privilege: the person must be Hawaiian,[74] must establish the claimed right is constitutionally protected as a customary or traditional Native Hawaiian practice (including not but not limited to article XII, section 7 and sections 1-1 and 7-1 rights), and must prove that the exercise of that right occurred on undeveloped or less than fully developed property.[75] In explaining this qualification to the rights recognized in *PASH*, the court held:

Hawai'i. 193, 205, 317 P.3d 27, 39 (2013) (concluding that there was standing to appeal based on Native Hawaiian traditional and customary practices and aesthetic and environmental interests).

[70] *See id.* at 452, 903 P.2d at 1273.

[71] 89 Hawai'i 177, 178, 970 P.2d 485, 486 (1998).

[72] *Id.*

[73] *Id.* at 184, 970 P.2d at 492.

[74] The *Hanapi* court declined to base its ruling on a blood quantum. *Id.* at 186, 970 P.2d at 494.

[75] *Id.*

> We also acknowledged that "[d]epending on the circumstances of each case, once land has reached the point of 'full development' it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property." Our intention in *PASH* was to examine the degree of development of the property, including its current uses, to determine whether the exercise of constitutionally protected native Hawaiian rights on the site would be inconsistent with modern reality. To clarify *PASH*, we hold that if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings,, [sic] improvements, and infrastructure, it is always "inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property. In accordance with *PASH*, however, we reserve the question as to the status of native Hawaiian rights on property that is "less than fully developed."[76]

Although the court carved out a very significant exception for which land is subject to *PASH*, it never explained the source of its conclusion that only property that is less that fully developed is exempt. Although a very pragmatic response (the rule was plainly responding to the uproar that had rippled through the landowner community after *PASH* was decided),[77] its analytic foundation has never been explained by the court to this day. A reasonable conclusion to be drawn is that by narrowing the types of land subject to claims of protected gathering rights, the court realized the implications of the sweeping *PASH* rule. But *Hanapi*'s jurisprudential step back away from the recognition of *PASH* rights in developed lands also highlights the shortcomings of *PASH*'s reasoning itself, and exposed that decision as one more opinion based in the court's policy preferences than one based in the rule of law.

Similarly, in *State v. Pratt*, the Hawai'i Supreme Court was faced with a conflict between the State's park regulations restricting access and a Hawaiian's traditional and cultural rights in that park.[78] A divided court affirmed the conviction since it found the park regulations rational and reasonable, and after reviewing the totality of the circumstances, the balancing of interests favored the regulation.[79] The well-crafted dissent, by fellow panelist Justice Acoba, would have vacated the conviction and ordered a new trial in order to address the fundamental problem with adjudicating property and use rights in criminal cases since *Pratt* bore much

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[76] *Id.* at 450, 903 P.2d at 1271 (footnote omitted).

[77] Following *PASH*, there were numerous community events and even a working group to provide some construct to address these issues. I attended one such event at Blanche Pope Elementary school during law school in 1997.

[78] 127 Hawai'i 206, 277 P.3d 300 (2012).

[79] *Id.* at 218, 277 P.3d at 312 ("In applying the totality of the circumstances test to the facts of this case, the balancing of interests weighs in favor of permitting the park to regulate Pratt's activity, his argument of privilege notwithstanding.").

of the burden of proof to establish his privilege or use right.[80] Criminal trespass cases are less than ideal vehicles for the development of this area of law. From a broader, strategic view, the court should consider restraint in this area.

IV. A RISKY PATH

As *PASH* and its progeny illustrate, the court should move very cautiously when it vests decision-making ability on what are largely policy matters in the courts, because by doing so it wrests authority from the Legislature. The judicial power is at its zenith when it is interpreting the constitution and resolving factual disputes, but such power, wielded by the only unelected branch should be sparingly used.

First, litigation is unwieldy policymaking. The development of an area of law through litigation is, by design, case-by-case and supposedly fact-specific. The practical world, however, requires as much definition as the government can provide, especially when we consider interests in real estate. Every landowner and practitioner should know who can do what and where, who is responsible to maintain and keep the properties safe, who will obtain insurance, and who is liable if someone gets hurt. These are important considerations at the ground level, but property rights are also crucial to the order of our community since so much of a family's wealth in Hawai'i comes from real property ownership and transfer. The benefit of statutory and regulatory treatment of an issue is the consistency and, on the ground, day-to-day presence. Courts, unlike agencies, often do not have the benefit of such presence and continuity, nor an ability to obtain stakeholder input or expert consultants. A court decision is only as good as three Justices of the Supreme Court agree to maintain it.

Second, the Legislature is the ultimate political arm of the government. It does not have to fight fair. As an example, over the past fifteen years, a class action lawsuit has been up and down to the Hawai'i Supreme Court several times.[81] In that case, *Nelson v. Hawaiian Homes Commission*, beneficiaries of the Department of Hawaiian Home Lands sought damages for violations of trust and constitutional duties. A circuit court judge found the Legislature had not appropriated enough funds to fulfill the constitutional mandate of the Department of Hawaiian Home Lands.[82]

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[80] *Id.* at 218–19, 277 P.3d at 312–13.

[81] Nelson v. Hawaiian Homes Comm'n, 141 Hawai'i 411, 413–18, 412 P.3d 917, 919–24 (2018).

[82] Chad Blair, *Judge: State Must Fund Hawaiian Home Lands*, HONOLULU CIV. BEAT (Mar. 2, 2016), https://www.civilbeat.org/2016/03/judge-state-must-fund-hawaiian-home-

In 2016 and 2017, as a direct result of the *Nelson* litigation, several bills were introduced in the Legislature that aggressively pushed back against the judiciary and even judges. The Legislature introduced bills to (1) amend the constitutional provisions regarding the appointment of judges changing from appointed to elected judges;[83] (2) shift judicial retention power from the Judicial Selection Commission to the Senate;[84] and, most personally, (3) to reduce individual judges retirement benefits.[85]

Third, because the court is interpreting the constitution itself, the only way to change that law is by constitutional amendment. Such amendment is not a simple process and requires approval of a majority of both legislative houses and then approval by over 50 percent of the voters.[86] Indeed, using 2020 numbers, amendment is a process which would require 289,584 voters to agree (50 percent of the registered voters (plus one) who cast a ballot in 2020).[87] So, three Justices of the Hawai'i Supreme Court can commit Hawai'i to a law that requires almost three hundred thousand voters to overturn. To be sure, Hawai'i's judiciary has a merit-based appointment system which should be seen as a bulwark against majoritarian tyranny since its judges, unlike many other states, are appointed and not directly elected. But, three Justices, even the most qualified ones, may not reflect the public will as much as a duly elected legislature and we should be cautious about structuring government and our constitution in a way that transfers so much power to so few persons.

Fourth, the court should not use land use discretionary permit contested case standing as the vehicle to adjudicate the bounds of Hawaiian rights. Unlike the detailed, specific rights in HRS sections 1-1 and 7-1, *PASH* required court cases to develop the bounds of such rights. Narrowing *PASH* rights away from developed lands was a huge shift. Doctrinally, however, if

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lands/.

[83] S.B. 673, 29th Leg., Reg. Sess. (Haw. 2017) (providing that S.B. 673 would "amend the constitution to have retention decisions of the Judicial Selection Commission subject to senate consent. . . . The legislature believes that to promote transparency in the judicial retention process, the senate should have the power to consent to or reverse the decision of the judicial selection commission regarding the retention of a justice or judge").

[84] S.B. 328, 29th Leg., Reg. Sess. (Haw. 2017) (providing that the purpose of this bill "is to propose an amendment to article VI, section 3, of the Constitution of the State of Hawai'i to amend the timeframe to renew the term of office of a justice or judge and require the consent of the senate for a justice or judge to renew a term of office").

[85] S.B. 249, 29th Leg., Reg. Sess. (Haw. 2017).

[86] HAW. CONST. art. XVII, §3.

[87] Hawai'i Office of Elections Registration and Turnout Statistics, *available at* https://elections.hawaii.gov/resources/registration-voter-turnout-statistics/. According to the Office of Elections, in Hawai'i's 2020 general election, of the 832,466 registered voters in Hawai'i, 579,165 voted.

PASH rights are indeed rights to access and conduct an activity on the land of the other, then it is at least akin to a use right, license, or easement and—if not abandoned or adversely possessed—should exist in perpetuity regardless of the state of development.

Finally, while the U.S. Supreme Court declined to review *PASH*, the access imposed by *PASH* and its progeny remains vulnerable to attack under the U.S. Constitution's Fifth and Fourteenth Amendments. State law has wide latitude to define, redefine, and regulate property, but the U.S. Supreme Court has recognized certain fundamental, essential rights inherent in the notion of "private property," most notably the right to exclude others.[88] Recently, in *Cedar Point Nursery v. Hassid*, the Court reviewed a California labor regulation permitting union organizers to access agricultural employers' lands for the purposes of meeting with employees.[89] In invalidating the ordinance as a categorical physical taking even though the invasions were not permanent, the Court confirmed that the right to exclude was one of the most "treasured rights" of property ownership.[90] The Court also rejected the state's ability to define away the right to exclude others through the invocation of background principles of state law.[91] In the wake of *Cedar Point*, it is unclear whether any state regulation—including limitations imposed under state constitutions or by state courts—that requires landowners to open their lands to third parties has any support in the Fifth and Fourteenth Amendments.

V. ANOTHER WAY

To be clear, the culture of Hawai'i is important and should be protected by the government. The judiciary should be open to all persons to resolve disputes. But the judiciary should not make policy. My criticism of *PASH* and the cases that adhere to its analytical method is that the Hawai'i Supreme Court made policy and did not heed the importance of real property rights or title. For over 170 years, Hawai'i recognized fee simple title, adverse possession, and easements, mostly adhering to "western" models and implementations. The Great Māhele and the resulting recognition of rights to property allowed the Kingdom of Hawai'i to flourish economically. Hawai'i's economic success over the last 160 years can be linked directly to the abilities to own, sell, mortgage, develop, and convey land.

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[88] Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)

[89] No. 20-107, 2021 WL 2557070 (U.S. June 23, 2021) at *3.

[90] *Id.* at *5.

[91] *Id.* at *8.

A. Legislation Protects Hawaiian Interests

As we consider the plight of Hawaiians and the Hawaiian culture, it is helpful to remember that there have been many steps taken to protect and preserve that culture. The Legislature and counties have codified an intense, arduous, and exhaustive process for the development of land. Large real estate developments seeking discretionary land use permits are required to study the environmental impacts of those developments.[92] Government agencies are similarly required to study the impacts of their use of government lands with regard to historic preservation, to archaeological sites, and to study potential impacts on Hawaiian cultural resources.[93] The Hawaiian renaissance of the 1970s, along with the environmental movement, has codified the land development process, including several different studies of the impacts of such development on Hawaiian cultural resources.[94] Hawaiian burial sites have protections with an administrative process and community input. Hawai'i has codified significant environmental resource conservation and protection measures.[95] The Legislature convenes annually and can change those laws without a lengthy court battle requiring attorneys, experts, and potential criminal exposure to the litigants. The Legislature has imbued state agencies and counties with the power of eminent domain, which can be used to condemn interests in real estate for public use.[96]

B. Executive Agencies and Hawaiian Organizations Own a Lot of Land

As a practical matter, undeveloped land in Hawai'i is owned by a very few owners. In 2019, the State of Hawai'i reported the top landowners are the State of Hawai'i, the federal government, and the Department of Hawaiian Home Lands.[97] Thus, a practitioner of Hawaiian traditional and customary rights has the existing constitutional right to petition their government for redress of a grievance or preferably just ask permission of the landowner (read: government) to conduct their practice. Hawai'i's

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[92] HAW. REV. STAT. ch. 343.

[93] *Id.*

[94] *See* HAW. REV. STAT. § 343-2 (2021) (defining "Environmental impact statement" as a document" which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, *and cultural practices of the community and State*. . . .") (emphasis added).

[95] HAW. REV. STAT. 6E; HAW. REV. STAT. § 226-25.

[96] HAW. REV. STAT. ch.101.

[97] DEPT. BUS. ECON. DEV. & TOURISM, STATE OF HAWAII DATA BOOK Table 6.07 (2019). The State's annual book separately tracks lands owned by the State, the federal government, the counties and the Department of Hawaiian Home Lands.

government has not shown itself to be hostile to the use of its facilities for religious purposes.[98] Indeed, recent conflicts over Hawaiian cultural rights were not on private lands but were on government-owned lands on Mauna Kea and Haleakalā.[99] While it may not be what Mr. Pratt wanted, the *Pratt* court acknowledged all the ways that the Department of Land and Natural Resources did accommodate traditional and cultural practices in Kalalau Valley.[100]

In short, if State land "owning" agencies were statutorily mandated to exercise their control over their undeveloped lands and facilitate cultural activities (by documenting, regulating, monitoring, and insuring those activities), large swaths of land would become open to Hawaiian gathering rights.

C. Custom Can Co-Exist with Western Property Law

There seems to be a sense, in *PASH* and in water rights cases, that Hawaiian principles are fundamentally incompatible with western property systems, but the Kingdom did model its legal system after English and American systems[101] and both English and American common law recognize custom as a source of rights to access another's property.[102] The "right" to enter upon another's property to either traverse the land or even

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[98] In a great example of using under-utilized government property for the benefit of the community, public school cafeterias and auditoriums can be rented for those purposes. HAW. CODE R. § 8-39-1 (2020).

[99] Trisha Watson, *Seeking Long-Delayed Justice On Mauna Kea*, HONOLULU CIV. BEAT (Aug. 28, 2019), https://www.civilbeat.org/2019/08/trisha-keaulani-watson-seeking-long-delayed-justice-on-mauna-kea/.

[100] *Pratt*, 127 Hawai'i at 218, 277 P.3d at 312 ("While Pratt has a strong interest in visiting Kalalau Valley, he did not attempt to visit in accordance with the laws of the State. Those laws serve important purposes, including maintaining the park for public use and preserving the environment of the park. The outcome of this case should not be seen as preventing Pratt from going to the Kalalau Valley; Pratt may go and stay overnight whenever he obtains the proper permit. He may also apply to the curatorship program to work together with the DLNR to take care of the heiau in the Kalalau Valley.").

[101] Gold Coast Neighborhood Ass'n v. State, 140 Hawai'i 437, 450, 403 P.3d 214, 227 (Haw. 2017) ("In 1892, Queen Lili'uokalani and the Kingdom of Hawai'i adopted the common law of England as the basis of its jurisprudence by legislation entitled 'Act to Reorganize the Judiciary Department.' See L. 1892, ch. 57, § 5; see also Damien P. Horigan, On the Reception of the Common Law in the Hawaiian Islands, III, 13 Haw. Bar. J. 87, 111-12 (1999)").

[102] *See* DAVID L. CALLIES, REGULATORY TAKINGS AFTER KNICK 63 (2020) (chronicling the development of the law of custom and how it fits in the land use regulation context).

hunt on it has been a core principle of American law since the colonial era.[103]

The State government has several roles, potentially conflicting ones, with regard to property rights. It is one of the largest landowners in Hawai'i; it is a land use regulator for coastal and conservation lands; has the constitutional duty to protect and regulate Hawaiian traditional, cultural, and religious practices; and it even guarantees title to land. If the State adopted a process by which it recognized or adjudicated claims of custom to provide access on even just its own lands and county lands, Hawaiian practitioners would gain access to thousands of acres statewide.

D. Where a Claim of Custom Fails, State Agencies Can Condemn

If those claims of custom fail, state agencies can condemn real estate to protect and nurture the practices essential to Hawaiian culture. Indeed, the State already does maintain an entire trail system and has to contend with the tort duties to those trail users.[104] But, if the State paid for, whether through negotiation or condemnation, easements to Hawaiian cultural sites, the State would then have a catalogue of those sites and could affirmatively manage access (and protect or insure against injuries arising from that access) in perpetuity. Using interests in real estate like licenses or easements provide for interests in land that can be documented, donated, or paid for, and through the documentation process, risks associated with the access can be understood and the liability risk insured or shifted appropriately.

E. Unfairness in Litigating Property Rights in Criminal Cases

I am not a criminal law practitioner, but both cases interpreting *PASH* rights have arisen from criminal trespass prosecutions. How are students of Hawaiian cultural practices supposed to learn and know what is and is not allowed without a documented place and manner for those practices? Registration and documentation of lawful places to practice would help.

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[103] Mark R. Sigmond, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 555–56 (2004) (tracing history of pre-1776 codification of rights to enter lands of another for hunting).

[104] The State of Hawai'i owns a lot of land and is exposed to tort liability arising from those lands. *See* Martha Neil, *$15.3M in Hiking Deaths of Gibson Dunn Partner and Cousin May be Hawaii's Biggest PI Settlement*, ABA J, (Mar. 20, 2012).

F. Government Regulation of Cultural and Religious Rights

All governments should tread very carefully when using their police powers in ways that impact the free exercise of religion. A 1978 Convention provision explicitly says that the government has the "right" to regulate Hawaiian religious practices:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[105]

The conversation about *PASH* rights usually says traditional and customary and not religious, but courts wading into the regulation of religious rights should be wary.[106]

CONCLUSION

PASH represents a principle that Hawaiians should be heard in the land development process. Several statutes provide for the ability to be heard and now, after several post-*PASH* court cases, persons asserting Hawaiian and environmental interests in development projects have the constitutional right to intervene in such proceedings. However, where *PASH* has muddied the waters is in the definition and bounds of *PASH* rights. As *Hanapi* and *Pratt* have shown, practitioners continue to practice such exercise rights under the threat of violating criminal law. This comment suggests that the court should give appropriate space to the Legislature and agencies to fulfill their mandates to preserve and protect Hawaiian cultural rights.

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[105] HAW. CONST. art. XII, § 7.

[106] *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 524 (1993) ("Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.").

Gifts From the Past for the Future: A Tribute to Justice Richard Pollack

Justice Todd W. Eddins*

"I ka wā ma mua, ka wā ma hope" punctuates Justice Richard Pollack's stirring ode to ʻōlelo Hawaiʻi in *Clarabal v. Department of Education*.[1] The Native Hawaiian proverb meaning "in the past, lies the future" applies to Justice Pollack's five-octave range repertoire of meticulously composed words.

At the risk of receiving the exasperated Pollack look, it is disclosed that Justice Richard Pollack called his opinions his "babies." Through passion and reason he raised unmistakable children. His creations tend to have genes that advance values unique to Hawaiʻi. They inherit common traits of fair treatment and respect. They descend from Hawaiʻi Supreme Court lineage steeped in robust state constitutionalism.

Clarabal ruled that the State was constitutionally required to make all reasonable efforts to provide Hawaiian language immersion education access for two Lānaʻi students.[2] Justice Pollack heartily interpreted article X, section 4 of the Hawaiʻi Constitution to attain its ambition of reviving ʻōlelo Hawaiʻi. He traced the genealogy of the "poetic, expressive" Native Hawaiian language.[3] He recounted that when King Kamehameha III established Hawaiʻi's centralized public education system in 1841, the curriculum was primarily taught in Native Hawaiian.[4] Justice Pollack marveled at the apparent record pace in human history in which an indigenous people mastered the written word and became literate in their native language.[5] He chronicled the sinister efforts after the 1893 overthrow of the Hawaiian monarchy to "eradicate knowledge of ʻōlelo Hawaiʻi in future generations."[6]

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* Associate Justice of the Hawaiʻi Supreme Court. J.D. William S. Richardson School of Law. B.A. College of William & Mary.

[1] 145 Hawaiʻi 69, 87, 446 P.3d 986, 1004 (2019).

[2] *Id.* at 71, 446 P.3d at 988.

[3] *Id.*

[4] *Id.* at 72, 446 P.3d at 989.

[5] "In 1822 . . . the Pīʻa pā, the first written primer on the Hawaiian language was published. The Hawaiian people quickly mastered the written word. Newspapers were published in ʻōlelo Hawaiʻi as early as 1834, and nearly three-quarters of the adult Hawaiian population were literate in their native language by 1853." *Id.* at 72, 446 P.3d at 989.

[6] *Id.* at 73, 446 P.3d at 990.

Justice Pollack celebrated the spoken word's "formation and perpetuation of a shared Hawaiian identity."[7] He glorified mankind's oral tradition with a rousing passage from Pulitzer Prize winning Kiowa author N. Scott Momaday:[8]

> Oral tradition is the other side of the miracle of language. As important as books are—as important as writing is, there is yet another, a fourth dimension of language which is just as important, and which, indeed, is older and more nearly universal than writing: the oral tradition, that is, the telling of stories, the recitation of epic poems, the singing of songs, the making of prayers, the chanting of magic and mystery, the exertion of the human voice upon the unknown—in short, the spoken word. In the history of the world nothing has been more powerful than that ancient and irresistible tradition vox humana.[9]

The Hawai'i Supreme Court has a rich tradition of federalism. Within eight years of statehood, it announced that the protection of individual rights would not be entrusted to one federal Supreme Court.[10] Richard Pollack prized the court's commitment to anchoring individual rights protections to the Hawai'i Constitution. He developed his state constitutional consciousness from twenty years as an indigent criminal defense attorney, including thirteen years (1987–2000) as Hawai'i's Public Defender.

Richard W. Pollack's 2012 Senate confirmation hearing portended a muscular outlook toward the Hawai'i Constitution. Pollack voiced a belief that the rights and protections of the state constitution were underexploited.[11] He invited litigators to untap the state constitution. Later, Hawai'i's most skilled attorneys RSVP'd. Constitutional visions were advanced.

Justice Pollack became an elegant and prolific exponent of the nation's youngest constitution. In our dual system of constitutions, state supreme

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[7] *Id.* at 71–72; 446 P.3d at 988–89.

[8] *Id.*

[9] *Id.* at 72, 446 P.3d at 989; N. SCOTT MOMADAY, MAN MADE OF WORDS 81 (1997).

[10] "As long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection." *State v. Texeira*, 50 Haw. 138, 142, n.2, 433 P.2d 593, 597, n.2 (1967).

[11] "Pollack said he feels that rights and protections afforded under the state Constitution which extend into such areas as the environment and traditional Native Hawaiian practices aren't asserted often enough and could be the basis for important legal rulings in the future." Jim Dooley, *Hawaii High Court Nominee Pollack Critical of U.S. Supreme Court Rulings*, HAW. REP. (June 22, 2012), http://www.hawaiireporter.com/hawaii-high-court-nominee-pollack-critical-of-u-s-supreme-court-rulings/.

court justices view their constitutions through the prism of state specific factors, values, and historical peculiarities. Justice Pollack was a super state constitutionalist. He unleashed the Hawai'i Constitution's sparkling tendrils.

I am thrilled to pen this commemorative piece. I disclaim it is a scholarly assessment of Justice Pollack's judicial output. His challenging, far-ranging opinions would take volumes to unwind. I merely aspire to talk story a bit about this good man and his fine work.

I. JUSTICE POLLACK'S BACKSTORY

Richard Pollack grew up in Los Angeles. His father was a lawyer "never afraid to stand up for what he believed."[12] His mother raised money for charities. Richard's younger brother Jeff—a heavyweight music and media consultant—and his sister, Marte, helped with their mother's efforts. At his senate confirmation hearing, Richard shared that the experience taught him how everyone has "a duty to try and heal a fractured world."[13]

Richard was a collegiate swimmer at the University of California, Santa Barbara. The forward-thinking Pollack specialized in the backstroke. At UCSB, Richard befriended students from Hawai'i. He roomed with a Kāne'ohe buddy for two years. Upon graduation, Richard moved to San Francisco; attending the University of California, Hastings College of Law. Richard again fell in with a Hawai'i crowd. Like his undergrad friends, Richard found Hawai'i-bred law students friendly, mellow, and outdoors oriented; qualities dovetailing with his outlook.

Following law school graduation, Richard travelled the world for nearly two years. Eventually, he visited a school friend living on Maui. He stayed. In 1980, Richard landed a job with a small Maui law office. He began his forty-year legal career. In his downtime, he enjoyed court watching. One fateful day, a public defender encouraged him to apply for a job. He did. And was quickly hired. Like most public defenders, Richard experienced the highs and lows of representing impecunious individuals. Notwithstanding a possible Pollack protest centered on fuzzy memory, old-timers report that Richard and an often indignant indigent heard "guilty" with regularity. So Richard developed a knack for appellate work.

Richard's most successful appeal was to a beautiful local girl. In a sign of the times, the coupling had sort of a supermodel Paulina Porizkova and gangly Cars front man Rick Ocasek vibe. When Valerie (aka Candy) agreed

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[12] Chad Blair, *'Public Hug Fest' for State High Court Nominee*, CIV. BEAT (June 23, 2012), https://www.civilbeat.org/2012/06/16141-public-hug-fest-for-state-high-court-nominee/.

[13] *Id.*

to marry him, Richard's persuasive powers were ever-lastingly certified. Richard became the supervising attorney of the Maui office. In short order, he headed the Office of the Public Defender's appellate division. Richard and Candy moved to O'ahu.

The Public Defenders' egg-heady appellate division has long sizzled as a boutique wing to the scrappy trial divisions. The gold standard quality demanded by Richard helped advance the Hawai'i Supreme Court's criminal law jurisprudence. Richard handled countless appellate cases. In one memorable victory, he argued the prosecuting attorney's refusal to give a race neutral explanation for a peremptory challenge of the only African American on the jury panel violated the right to a fair trial. Uncommonly, Richard agreed with the United States Supreme Court in an identical case decided four years earlier, *Batson v. Kentucky*.[14] In a serendipitous coincidence, Richard's case was entitled *State v. Batson*.[15]

Richard's legal and administrative talents led to his selection as the state's Public Defender in 1987. In addition to supervising dozens of quirky, public interest-spirited attorneys, Richard took care of the nuts and bolts and bureaucratic exertions that come with heading a state agency. Senior public defender alums describe the old Vineyard Boulevard office and its Union Mall annex as broom closets with exterior smells indistinct from a public restroom after a long weekend. In a Public Defender history-making administrative achievement, Richard secured funds to relocate the O'ahu office. Boxy DOS running computers with five-and-a-quarter-inch floppy disks and a well-stocked library were even part of the deal.

I spent the 1990s working for Richard Pollack in a strip mall outpost bordering Nimitz Highway. The "if these walls could talk, they better take the Fifth" office remains in its same location. The Office of the Public Defender's neighbors included bars, an adult store, a video store (with mostly adult content), and a vacuum cleaner outlet. Richard was always thinking—the location reduced the number of missed client appointments. It was a free-wheeling time featuring the ascendancy of grunge, hip-hop, the internet, the Bulls, Simpsons, and Clintons. As with every decade, bad hair and bad fashion were unobserved.

It seems counterintuitive that recent hires without trial experience would begin their public defender careers writing opening briefs highlighting trial error. But Richard demanded that new attorneys acquaint themselves with the law and (at least try to) demonstrate writing proficiency before entering the courtroom. So, rookies started in the appellate division. Each appellate

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[14] *See* 476 U.S. 79 (1986).

[15] 71 Haw. 300, 788 P.2d 841 (1990).

brief required the boss's imprimatur. Entering Richard's office to discuss a fledgling effort resembled a call to the principal's office. Slinking out of his office armed with red-marked, barely decipherable Richard scrawls was a head-spinning rite of passage for newly minted public defenders.

Richard embraced the ideals of Justice William Brennan, Jr.'s 1977 "extra-judicial mega dissent."[16] In a top ten most-cited law review article,[17] the former New Jersey Supreme Court justice gave a shout out to the Hawai'i Supreme Court. Justice Brennan showcased 1971[18] and 1974[19] decisions as praiseworthy exemplars of state constitutionalism. Public Defender Pollack took note. He demanded his attorneys present arguments under the Hawai'i Constitution's grander protections. The federal constitution shriveled in relevance.

Richard assembled an exceptional leadership team. He strengthened the neighbor island operations. He encouraged thinking outside the box. He endorsed a "just do it" mindset. Richard promoted case brainstorming. The office had a think tank atmosphere. The collective wisdom of bright minds instilled confidence to pursue justice in a challenging environment.

The encyclopedic Pollack was an enthusiastic recess and lunch break trial resource. From the seasoned attorney who felt kind of shame at not figuring it out, to the trial novice, everyone was comfortable asking Richard. The

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[16] *See* Daniel Gordon, *Brennan's State Constitutional Era Twenty Five Years Later – the History, the Present, and the State Constitutional Wall*, 73 TEMP. L. REV. 1031, 1034 (2000); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[17] The pithy fifteen-page article was adapted from a speech Justice Brennan delivered to the New Jersey State Bar Association on May 22, 1976. Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 764–65 (1998). In the most cited law review articles list, it ranks ninth; just after the William S. Richardson School of Law's Professor Charles R. Lawrence III, who authored *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012). Professor Lawrence's article is the only one in the top 15 written after Justice Brennan's 1977 piece. *Id.* Here, its citation is not primarily designed to maintain his ranking by offsetting the Justice Brennan citation.

[18] State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971) (declining to follow Harris v. New York, 401 U.S. 222 (1971) and instead holding that a suspect's statements taken without Miranda warnings are inadmissible for impeachment purposes).

[19] State v. Kaluna, 55 Haw. 361, 369, n.6, 520 P.2d 51, 58, n.6 (1974); Brennan, *supra* note 17 at 500 ("[W]here the state and federal constitutions are similarly or identically phrased. . . . the Supreme Court of Hawaii has observed: 'while this results in a divergence of meaning between words which are the same in both federal and state constitution, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law.'").

Hawai'i criminal law oeuvre had somehow compressed onto the tip of his tongue. Richard's speedy response to a harried trial lawyer calmed. Often, it was a difference-maker.

All stars, future hall of famers, and all timers of all sorts populated the office. Richard inspired a dedicated band of sisters and brothers. Aiding the disadvantaged in the "tough on crime" era created a bunker mentality camaraderie. The Office of the Public Defender routinely presented the only legislative testimony opposed to "lock 'em up" measures. It was the fearsome sounding law enforcement coalition aligned against Richard and a couple of public defenders. Richard's crystal bally, ahead of its time positions and counterarguments parried mass incarceration schemes with agitprop titles like "three strikes" and "truth in sentencing."

Public Defender Pollack helmed one of the nation's top indigent law firms. Richard nurtured a tight-knit 'ohana atmosphere. The office was literally a home away from home. Public defender offspring, including the Pollacks' three accomplished children, raced around the office. Each year, they excitedly suited up for a progressively demented Halloween party. There was an endless supply of public defender 'ohana milestone events. The office's professional quality musicians and dancers (including public defender first lady Candy) performed at baby lū'au, graduations, birthdays, farewells, and holiday parties. It was the best of times and the best of times.

Richard implemented first rate training programs. His brain trust developed manuals; touching every aspect of criminal defense representation. Before such a clunky term existed, Richard devoted efforts and resources to continuous legal education. His programs accelerated the professional growth of many of Hawai'i's finest lawyers.

The Public Defender seminar occurs annually at the Law School during the week preceding Memorial Day.[20] Last century, most legal training programs used generic cases. The PD seminar's real case mock trial exercises were innovative. Breaking down a VHS tape of a cringe-worthy effort with in-house and invited faculty was also cutting edge. Presenters dissected appellate cases. Guest speakers spoke. Best-selling evidentiary

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[20] 2020 marked the 50th anniversary of the establishment of Hawai'i's public defender system. In recent years, a Public Defender alumni party happened on the seminar's final day. In a cool custom, alums adorn their nametags with the Public Defender they served under. Richard is always delighted and proud to greet the Pollack attorneys. And the feeling is mutual. The cancelled MMXX alumni party, designed to double as a sendoff to Richard for his judicial service, was scheduled for the parking lot of the house that Richard built. Throwing a good party is a public defender ethos, so a cheery celebration will happen someday.

foundation author Edward Imwinkelreid even showed up one year. It is real, not PD folklore, that Richard triggered a revision to the 5th edition.

Richard has always taught. During his post-law school travels he taught science for about a year in Eldoret, Kenya, renowned for its world class long-distance runners. He taught daily at the public defender's office. "Ask Richard" was kind of an office tag line. For years, Richard taught courses on evidence, criminal procedure, and defense clinic at Richardson. In an apprentice-like profession, where real training happens on the job, he taught the same subjects within his courtroom. At my first judicial conference, Justice Pollack lectured. It was not the first time he advised: "There are not too many evidence rules that really matter, so master the ones that do." In his post-judicial life Professor Pollack has returned to teaching at the Law School.

During Hawai'i Supreme Court oral arguments, Justice Pollack's commentary served the normal aims of clarifying, whittling, and signaling. But importantly, his pinpoint missives taught. How to think about the law. How to effectively argue the law. How to refine the law. Many sharp minds whirled in "wait, what?" real time as they gaped at Justice Pollack in the House of Heavenly Kings.

A Pollack opinion teaches. It often infuses the reader with "ah-ha" moments. His cases explain complex legal concepts and precedent with clarity and purpose. They are stuffed with airtight research, analytical dexterity, technical detail, and relentless logic. They are salted with historic gestures and nods to local traditions. Justice Pollack's opinions often outline standards providing litigants, courts, and government agencies "how to" and "must do" guidance. They provide workable models shaping the contours of court and agency decision-making.

Long ago the Hawai'i Supreme Court rejected textualism.[21] An approach to legal interpretation starting and ending with the law's text was too narrow-minded for Hawai'i. To Justice Pollack, ostracizing legislative history to understand a law was nonsense. He delighted in mining royal history to interpret modern law. One fun specimen involved the destruction of a thirteen acre Hilo sweet potato crop by fifty trespassing cattle.[22] Justice

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[21] *See, e.g.*, Black Constr. Corp. v. Agsalud, 64 Haw. 274, 283–84, 639 P.2d 1088, 1094 (1982) (quoting United States. v. Am. Trucking Ass'n, 310 U.S. 534, 543–44 (1940); Train v. Colo. Pub. Int. Rsch. Grp., 426 U.S. 1, 10 (1976)) ("[W]hen aid to construction of the meaning of words, as used in the statute is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination. And when there is a plethora of material evidencing legislative purpose and intent, there is no reason for a court to seek refuge in 'strict construction,' 'plain meaning,' or 'the popular sense of the words.'").

[22] Yin v. Aguiar, 146 Hawai'i 254, 463 P.3d 911 (2020).

Pollack traced the current livestock trespass law: "When the 1841 Act was enacted, King Kamehameha III explained that . . . 'farmers were greatly annoyed, by having their vegetables destroyed' by unconfined cattle. To resolve this problem, King Kamehameha III made it 'illegal for beasts to roam at large, unless the cultivated grounds were enclosed by a fence.'"[23] So what happened in the case of the ravaged Hilo sweet potato crop? The court did what King Kamehameha III would do—hold the cattle owner liable. "For more than 175 years, Hawai'i law has held livestock owners liable under specified circumstances for damages caused by their trespassing livestock[.]"[24]

Justice Pollack participated in 425 published cases as an associate justice.[25] Traversing legal genres, he wrote 137 majority opinions, 7 concurring opinions and 10 dissenting opinions. I spotlight three areas showcasing Justice Richard Pollack's disposition to defend the public's interests. Justice Pollack protected: (1) the constitutional rights of individuals accused of crimes; (2) the public's right to access government proceedings and the justice system; and (3) the public trust doctrine.

II. CONSTITUTIONAL RIGHTS DEFENDER

Few disagree with Richard Pollack's decades long status as one of Hawai'i's most learned criminal law thinkers. He taught lawyers, law students, law clerks, and judges. "Ask Richard" migrated from public defender offices to the third floor chambers of Ka'ahumanu Hale to (one suspects) Ali'iōlani Hale.

By the time Justice Pollack joined the Supreme Court in 2012, the Court had already addressed many questions raised by the Hawai'i Constitution's parallel provisions to the federal constitution protecting the rights of criminal defendants.[26] But Justice Pollack nevertheless mobilized his criminal law chops to cement the Hawai'i Constitution's broad protections.

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[23] *Id.* at 261, 463 P.3d at 918 (brackets omitted) (quoting TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III, ch. XIV, at 94 (1842)).

[24] *Id.* at 271, 463 P.3d at 928.

[25] *See generally*, Litigation Analytics, *Hon. Richard W. Pollack*, WESTLAW https://1.next.westlaw.com/Analytics/Profiler?docSource=21b1695295994a0db1e858e5a093a029&pageNumber=1&transitionType=ListViewType&contextData=(sc.LegalLitigation)&docGUID=I1DA33E9E1DD211B2AB4F4F00020142D4&contentType=judge&view=profile#/judge/I1DA33E9E1DD211B2AB4F4F00020142D4/appealsReport (last visited Feb. 23, 2021).

[26] The Supreme Court of Hawai'i is free to give criminal defendants "broader protection under the Hawai'i Constitution than that given by the federal constitution." State v.

State v. Baker,[27] an involuntary confession case, is destined for placement in motions, briefs, case law, and commentary. A young man confessed to a vicious sexual assault and beating in a Kailua park restroom. DNA evidence excluded him and was also inconclusive. But a detective repeatedly lied to the eighth-grade-educated suspect, insisting law enforcement possessed incriminating DNA evidence. The detective also induced a confession using several other interrogation techniques.

Falsely confessing to a crime seems completely irrational. "Why confess to a crime, if you didn't do it?" asks the slam-dunking prosecuting attorney during closing argument. Each juror wonders the same thing shortly before agreeing to convict. Justice Pollack answered that "robust scholarship" and "new developments in social science" revealed that confessions arising from coercive interrogation techniques posed unacceptable risks of being untrue or misleading.[28] He recalled the "infamous case of the Central Park Five. . . ."[29] He observed: "[I]n light of the various studies and cases . . . we recognize that false claims of physical evidence result in an unsettling number of false or involuntary confessions."[30]

Wallace, 80 Hawai'i 382, 398, 910 P.2d 695, 711 (1996) (quoting State v. Hoey, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (1994)). It has not shied away from doing so. *See, e.g.*, State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); State v. Lessary, 75 Hawai'i 446, 865 P.2d 150 (1994) (concluding that double jeopardy protections offered by Hawai'i's state constitution are broader than those provided by the federal constitution); Hoey, 77 Hawai'i at 36, 881 P.2d at 523 (holding that the Hawai'i Constitution provides suspects in custodial interrogation broader protections than those offered by the federal constitution as interpreted by the majority in Davis v. United States, 512 U.S. 452 (1994)); State v. Lopez, 78 Hawai'i 433, 447, 896 P.2d 889, 903 (1995) (declining to adopt federal doctrine of "apparent authority" and holding that under the Hawai'i Constitution the individual consenting to a search must have actual authority to do so); State v. Heapy, 113 Hawai'i 283, 298, 151 P.3d 764, 779 (2007) (cleaned up) (observing that "[c]ompared to the Fourth Amendment, article I, section 7 of the Hawai'i Constitution guarantees persons in Hawai'i a more extensive right of privacy."). *See also* State v. Bowe, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994) (stating that "[w]hen the United States Supreme Court's interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protection as a matter of state constitutional law.").

[27] 147 Hawai'i 413, 465 P.3d 860 (2020).

[28] *Id.* at 432 n.28, 465 P.3d at 879 n.28. "Allowing our understanding of the factual nature of coercion to be dictated by outmoded and disproven theories of human psychology . . . would be an abdication of our constitutional duty to uphold a defendant's right against self-incrimination." *Id.*

[29] *Id.* at 431 n.26, 465 P.3d at 878 n.26.

[30] *Id.* at 431, 465 P.3d at 878. The Innocence Project has reported that 29% of wrongful conviction cases exonerated by DNA evidence involved false confession or admission statements. *DNA Exonerations in the United States*, INNOCENCE PROJECT,

Justice Pollack reasoned that falsehoods about incontrovertible physical evidence linking an accused to the crime is "an exceptionally coercive interrogation tactic and its use is a strong indicator that the suspect's statement was involuntary."[31] In what appears to be the first judicial declaration of its kind, Justice Pollack wrote: "In certain cases, lies about incontrovertible physical evidence may, standing alone, render the accused's subsequent confession involuntary."[32] The pronouncement departed from well-established custodial interrogation ground rules. Intrinsic factual deception, or lying to suspects about evidence tying them to the crime, had long been a judicially sanctioned staple of the interrogator playbook.[33] With *Baker*, the court effectively ended the ploy when the deception involved genetic material.

In addition to the phony DNA remarks, the detective also angled to induce a confession by using the "minimization" technique (downplaying the seriousness of conduct) and the "false friend" tactic (as seen on TV).[34] The detective confided to the defendant that women are "more promiscuous . . . when they're on alcohol . . . cause they lose their inhibitions."[35] He shared: "Guys are programmed to procreate."[36] In condemning the detective's tactics under principles of due process, Justice Pollack said a contrary view "would result in the tacit, indeed express,

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https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 21, 2021). For an untold number of wrongfully convicted individuals, however, DNA may as well mean "does not apply." "[J]ustice for an innocent prisoner should not depend on the off chance that the actual perpetrator left biological evidence at the crime scene that was found by the investigating officers and properly inventoried and preserved over time." Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1442 (2007).

[31] *Baker*, 147 Hawai'i at 432, 465 P.3d at 879.

[32] *Id.*

[33] "[E]xtrinsic falsehoods are falsehoods that incorporate considerations beyond the immediate facts of the alleged offense[,]" such as "assurances of divine salvation in the event of confession, promises of mental health treatment instead of imprisonment, and misrepresentations of legal principles. . . ." *Id.* at 423, 465 P.3d at 870. In *State v. Matsumoto*, the court extinguished the use of extrinsic falsehood interrogation ploys that deceive about polygraph results. 145 Hawai'i 313, 324, 452 P.3d 310, 327 (2019). "[F]alse polygraph results may psychologically prime an innocent suspect to make a confession." *Id.* at 323, 452 P.3d at 326. "[I]nculpatory statements elicited during a custodial interrogation from a suspect whom has previously been given falsified polygraph results in the interrogation process are coercive per se and are inadmissible at trial." *Id.* at 324, 452 P.3d at 327.

[34] *Baker*, 147 Hawai'i at 433, 465 P.3d at 880.

[35] *Id.* at 417, 465 P.3d at 864.

[36] *Id.* at 426, 465 P.3d at 873.

approval of discriminatory comments based on gender by a state actor during custodial interrogations, a position that we do not ascribe to."[37] *Baker* suggests that using racist comments or vile rhetoric to induce a confession is forbidden in Hawai'i's interrogation rooms.[38]

Justice Pollack got a chance to channel his inner Brennan with State v. Davis.[39] The court relied on Justice Brennan's concurrence in *Justices of Boston Municipal Court v. Lydon*[40] to hold that under the Hawai'i Constitution's double jeopardy clause, a reviewing court must address a defendant's express claim of evidence insufficiency before remanding for new trial based on a defective charge.[41]

Justice Pollack's criminal law opinions interpreting the state constitution[42] include *State v. Tetu*,[43] *State v. Tsujimura*,[44] and *Birano v. State*.[45] In *Tetu*, the court held that accessing a crime scene on private property, subject to appropriate time, place, and manner restrictions, was protected by Hawai'i's due process clause:

> Due process requires that a defendant be given a meaningful opportunity to present a complete defense and that discovery procedures provide the maximum possible amount of information and a level-playing field in the adversarial process. Thus, the due process clause of the Hawai'i Constitution provides a defendant with the right to access the crime scene in order to secure the promises that a fair trial affords.[46]

Tsujimura held that an accused has a prearrest right to silence under article I, section 10 of the Hawai'i Constitution.[47] The prosecution could not use the DUI defendant's failure to tell the investigating officer he had injuries, which made exiting his car difficult, as substantive proof of guilt.[48] In *Birano*, the prosecuting attorney failed to correct misleading testimony.[49] The court reasoned that a "constitutional duty to correct testimony is triggered even when a witness's testimony is, 'at best, misleading.'"[50] Justice Pollack warned prosecutors to "err on the side of caution in future

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[37] *Id.* at 427 n.18, 465 P.3d at 874 n.18.

[38] *See id.*

[39] *See* 133 Hawai'i 102, 112–13, 324 P.3d 912, 922–23 (2014).

[40] 466 U.S. 294 (1984) (Brennan, J., concurring).

[41] State v. Davis, 133 Hawai'i at 120, 324 P.3d at 930.

[42] *See infra* notes 44–52, 60–62.

[43] 139 Hawai'i 207, 226, 386 P.3d 844, 863 (2016).

[44] 140 Hawai'i 299, 309–11, 400 P.3d 500, 510–12 (2017).

[45] 143 Hawai'i 163, 181–93, 426 P.3d 387, 405–17 (2018).

[46] *Id.* at 220, 386 P.3d at 857.

[47] *Tsujimura*, 140 Hawai'i at 319, 400 P.3d at 520.

[48] *Id.* at 312–13, 400 P.3d at 513–14.

[49] *Birano*, 143 Hawai'i at 190, 426 P.3d at 414.

[50] *Id.* (quoting United States v. Dvorin, 817 F.3d 438, 452 (5th Cir. 2016)).

cases when faced with a government witness that they know may mislead the jury as to some material fact."[51]

Evidence cases crisscross the criminal and civil justice system divide. The evidence professor-justice authored several evidentiary rule opinions. His penultimate opinion addressed a Pollack legal peeve—the "opening the door" doctrine. *State v. Salavea*,[52] was his third case pounding the "opening the door" doctrine as never being adopted in Hawai'i.[53] Justice Pollack called it "fighting fire with fire."[54] He disfavored injection of inadmissible evidence to counter inadmissible evidence. He was also troubled by the doctrine's common misuse: "allow[ing] a party to adduce inadmissible evidence for the purpose of rebutting inferences raised by the introduction of *admissible* evidence."[55] To Justice Pollack, Hawaii Rules of Evidence 401 and 403 governed; not some mythical theory of curative admissibility. Counsel grievously mouthing "they opened the door" to justify introduction of inadmissible evidence must now don their thinking caps.

As anyone who has listened to a Pollack evidence lecture knows, Rules 401 and 403 matter the most—by far. In *State v. Kato*[56] and *State v. Texeira*,[57] the court dismantled the decades long "legitimate tendency" test to advance third party culpability evidence. The near insurmountable high-hurdle to present "wasn't me, was her" evidence was replaced—the same relevance and prejudice admissibility analysis as all other evidence substituted. Justice Pollack wrote: "[W]hen a defendant seeks to introduce third-party culpability evidence, the defendant must initially clear no higher hurdle than that set by Rule 401. . . . A defendant need not place the third party at or near the scene of the crime; it is sufficient for relevancy considerations that the defendant has provided direct or circumstantial evidence tending to show that the third person committed the crime."[58] The most elementary evidentiary rules now determine whether an accused advances evidence of another person's commission of the crime.

Justice Pollack demanded that defendants make fully informed decisions before surrendering constitutional rights. Waiving rights in superficial,

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[51] *Id.*

[52] 147 Hawai'i 564, 465 P.3d 1011 (2020).

[53] *See also*, State v. Miranda, 147 Hawai'i 171 n.14, 465 P.3d 618 n.14 (2020); State v. Lavoie, 145 Hawai'i 409, 424, 453 P.3d 229, 244 (2019).

[54] *Miranda*, 147 Hawai'i 171, 183 n.13, 465 P.3d 618, 630 n.13 (2020) (quoting State v. Fukusaku, 85 Hawai'i 462, 497, 946 P.2d 32, 67 (1997)).

[55] *Id.* at 183, 465 P.3d at 630 (emphasis added).

[56] 147 Hawai'i 478, 482, 465 P.3d 925, 929 (2020).

[57] 147 Hawai'i 513, 536 465 P.3d 960, 983 (2020).

[58] *Kato*, 147 Hawai'i at 493–94, 465 P.3d at 940–41.

perfunctory ways was disallowed. Justice Pollack tasked trial courts with carefully advising defendants of decision-making consequences. Courts were constitutionally bound to colloquy a defendant announcing an intention to leave the courtroom,[59] desiring a new attorney due to communication breakdown or irreconcilable differences,[60] stipulating to an element of the charge,[61] or asking to self-represent.[62]

The court imposed a first in the nation procedural requirement in *State v. Torres*.[63] With *Torres*, trial courts must explain to a testifying defendant the constitutional right *not* to testify immediately before the testimony. Previous decisions required Hawai'i courts to advise defendants of the right to testify and the right not to testify before trial. Later in the trial, before the close of the defense's case, the court repeated the advisements only if the defendant had not testified. The advisements are known as the *Tachibana*[64] colloquy. The eponymous case, often used as a verb (e.g. "to Tachibana," "Tachibana'd"), is possibly the most uttered case in Hawai'i courtrooms. It sparked its own cottage industry of cases.[65] In *Torres*, Justice Pollack explained that providing the *Tachibana* colloquy whether or not the defendant testified means: "[W]e are providing equal treatment to two fundamental constitutional rights that merit equivalent protection."[66]

Finally, given his pedigree as a circuit court criminal trial judge, Justice Pollack knew that within the adversarial system's fog there was no telling what trial event tipped each juror's guilty verdict decision. He recognized that a trial court's jury instructions,[67] evidentiary rulings,[68] and overall

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[59] *See* State v. Kaulia, 128 Hawai'i 479, 493, 291 P.3d 377, 391 (2013).

[60] *See* State v. Harter, 134 Hawai'i 308, 329, 340 P.3d 440, 461 (2014).

[61] *See* Grindling v. State, 144 Hawai'i 444, 452, 445 P.3d 25, 33 (2019); State v. Wilson, 144 Hawai'i 454, 445 P.3d 35 (2019); State v. Ui, 142 Hawai'i 287, 290, 418 P.3d 628, 631 (2018); State v. Souza, 142 Hawai'i 390, 398–99, 420 P.3d 321, 329–30 (2018).

[62] *See* State v. Phua, 135 Hawai'i 504, 512–13, 353 P.3d 1046, 1054–55 (2015).

[63] *See* 144 Hawai'i 282, 439 P.3d 234 (2019).

[64] *See* Tachibana v. State, 79 Hawai'i 226, 900 P.3d 1293 (1995).

[65] Justice Pollack has contributed: State v. Celestine, 142 Hawai'i 165, 169–71, 415 P.3d 907, 911–13 (2018); State v. Eduwensuyi, 141 Hawai'i 328, 337, 409 P.3d 732, 741 (2018); State v. Kim, 140 Hawai'i 421, 429–30, 402 P.3d 497, 505–06 (2017); State v. Monteil, 134 Hawai'i 361, 371–72, 341 P.3d 567, 577–78 (2014).

[66] *Torres*, 144 Hawai'i at 295, 439 P.3d at 247.

[67] Justice Pollack's opinions on criminal jury instructions include: State v. Lavoie, 145 Hawai'i 409, 429, 453 P.3d 229, 249 (2019); State v. Matsumoto, 145 Hawai'i 313, 331–32, 452 P.3d 310, 328–29 (2019); *State v. Bovee*, 139 Hawai'i 530, 533, 394 P.3d 760, 763 (2017); State v. Kaeo, 132 Hawai'i 451, 452, 323 P.3d 95, 96 (2014); State v. Adviento, 132 Hawai'i 123, 139, 319 P.3d 1131, 1147 (2014); State v. Getz, 131 Hawai'i 19, 26, 313 P.3d 708, 715 (2013).

[68] Justice Pollack's opinions on evidence include: State v. Lora, 147 Hawai'i 298, 308–09, 465 P.3d 745, 755–56 (2020); State v. Gallagher, 146 Hawai'i 462, 464, 463 P.3d 1119,

decisions[69] impacted trial outcomes. He knew that defense attorneys often struggled to flop over the low bar for constitutionally sufficient representation.[70] He also knew that in the pursuit of conviction, prosecuting attorneys sometimes crossed the line.[71]

III. PUBLIC ACCESS DEFENDER

Justice Pollack protected the public's interest to keep an eye on government decision-making. He resisted the closing of court and agency proceedings. He resisted the concealment of public records. Justice Pollack's third majority opinion, *Kanahele v. Maui County Council*,[72] foreshadowed his commitment to "all cards on the table" transparency. In *Kanahele*, the court ruled that Maui County councilmembers violated the Sunshine Law by distributing written memoranda among its members seeking voting commitments outside of a noticed meeting.[73]

1121 (2020); State v. Miranda, 147 Hawai'i 171, 184, 465 P.3d 618, 631 (2020); State v. Abrigo, 144 Haw. 491, 493–94, 445 P.3d 72, 74–75 (2019); State v. Lavoie, 145 Hawai'i 409, 453 P.3d 229 (2019); State v. Matsumoto, 145 Hawai'i 313, 329–30, 452 P.3d 310, 326–27 (2019); Batalona v. State, 142 Hawai'i 84, 103, 414 P.3d 136, 155 (2018); State v. Davis, 140 Hawai'i 252, 265, 400 P.3d 453, 466 (2017); State v. McDonnell, 141 Hawai'i 280, 298–99, 409 P.3d 684, 702–03 (2017) (Pollack, J., dissenting); State v. Kony, 138 Hawai'i 1, 13–14, 375 P.3d 1239, 1251–52 (2016); State v. Amiral, 132 Hawai'i 170, 178–79, 319 P.3d 1178, 1186–87 (2014).

[69] *See e.g.*, State v. Pitts, 146 Hawai'i 120, 456 P.3d 484 (2020); State v. Loher, 140 Hawai'i 205, 398 P.3d 794 (2017); State v. Chin, 135 Hawai'i 437, 447, 353 P.3d 979, 989 (2015); State v. Scott, 131 Hawai'i 333, 344, 319 P.3d 252, 263 (2013).

[70] Justice Pollack's opinions on ineffective assistance of counsel include: *State v. Salavea*, 147 Hawai'i 564, 576, 465 P.3d 1011, 1023 (2020); *State v. Uchima*, 147 Hawai'i 64, 77, 464 P.3d 852, 865 (2020); *State v. Wilson*, 144 Hawai'i 454, 460–61, 445 P.3d 35, 41–42 (2019); *Batalona v. State*, 142 Hawai'i 84, 103, 414 P.3d 136, 155 (2018); *Maddox v. State*, 141 Hawai'i 196, 204, 407 P.3d 152, 160 (2017).

[71] Justice Pollack's opinions on prosecutorial misconduct include: State v. Pitts, 146 Hawai'i 120, 136–37, 456 P.3d 484, 500–01 (2019); State v. Austin, 143 Hawai'i 18, 54, 422 P.3d 18, 54 (2018) (Pollack, J., concurring); State v. Underwood, 142 Hawai'i 317, 320–21, 418 P.3d 658, 661–62 (2018); *Birano v. State*, 143 Hawai'i 163, 190, 426 P.3d 387, 414 (2018); State v. McGhee, 140 Hawai'i 113, 115, 398 P.3d 702, 704 (2017); State v. Basham, 132 Hawai'i 97, 105–107, 319 P.3d 1105, 1113–15 (2014).

[72] 130 Hawai'i 228, 307 P.3d 1174 (2013).

[73] 130 Hawai'i 228, 307 P.3d 1174 (2013). In another Maui case, *Kilakila 'O Haleakala v. Board of Land*, Justice Pollack's outlook did not prevail. A contested case hearing occurred regarding a permit to construct a telescope on the summit of Haleakalā. While deliberations were ongoing, adjudication officers engaged in undisclosed ex parte communications with a party, who also had a meeting with the board chair. In dissent, Justice Pollack wrote: "Due process, as guaranteed by the Hawai'i Constitution, places upon BLNR the affirmative duty to disclose all substantive ex parte communications, procedural

In Ali'iōlani Hale, the former seat of government of the Kingdom of Hawai'i, Justice Pollack sat reverentially. He felt it. He sprinkled cases with Native Hawaiian history. In *Oahu Publications v. Ahn*,[74] a case strengthening the constitutional right to access court proceedings, Justice Pollack explored the long tradition of accessibility to courtrooms in Hawai'i's justice system. He explained that "the legal framework utilized by the ali'i transitioned from the kapu system to the use of public trials by jury during the 1820s."[75] Justice Pollack also described Queen Lili'uokalani's 1895 public show trial before a military tribunal on flimsy charges of misprision of treason as "crowded with curious spectators[,]" "open and well attended . . . and was covered in the daily press."[76]

"Just trust me" opacity was insupportable when it came to the public's right to know. *Oahu Publications* involved closed court proceedings in the prosecution of a State Department agent who shot and killed a Waikīkī fast-food restaurant patron.[77] The court ruled that the trial court erred when it closed proceedings to conduct a midtrial examination of jurors to investigate potential juror misconduct, and it also erred by sealing the court sessions' transcripts.[78] To guide courts in determining whether court closure satisfied the Hawai'i Constitution's counterpart to the first amendment, Justice Pollack erected one of his signature frameworks.[79] The case also ensured that article I, section 4 would not lockstep with the federal constitution.[80]

The court bolstered the public's right to challenge secret court proceedings and secreted records in *Grube v. Trader*.[81] There, Pollack ruled that retaining an attorney was not a precondition to enforce the constitutional right to access court proceedings and records.[82] The court also ruled that the circuit court disregarded the procedural and substantive requirements established in *Oahu Publications*.[83]

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ex parte communications that can influence the decisionmaking process of an agency adjudicator, and all ex parte communications received from or made to parties or interested persons." 138 Hawai'i 383, 426, 382 P.3d 195, 238 (2016) (Pollack, J., dissenting).

[74] 133 Hawai'i 482, 331 P.3d 460 (2014).

[75] *Id.* at 494–95, 331 P.3d at 472–73.

[76] *Id.* at 495, 331 P.3d at 473.

[77] *Id.* at 486, 331 P.3d at 464.

[78] *Id.* at 486, 331 P.3d at 464.

[79] *Id.* at 504–09, 331 P.3d at 482–87.

[80] *Id.* at 494, 331 P.3d at 472 (quoting Crosby v. State Dep't of Budget and Fin., Hawai'i 332, 340 n.9, 876 P.2d 1300 n.9 (1994)) ([B]ut "this court may find that the Hawai'i Constitution affords greater free speech protection than its federal counterpart[.]").

[81] 142 Hawai'i 412, 420 P.3d 343 (2018).

[82] *Id.* at 428–29, 420 P.3d at 359–60.

[83] *Id.* at 424, 420 P.3d at 355.

In *Peer News, LLC v. City and County of Honolulu*,[84] the court jettisoned the long-standing deliberative process privilege. The case involved a public records request for internal documents generated during the annual City and County of Honolulu budget process. Agencies deployed the "privilege" to uniformly shield pre-decisional, deliberative records from public disclosure. The Office of Information Practices blessed the sweeping privilege in a series of opinions dating to 1989.

Peer News reasoned that OIP (the entity designed to safeguard access to public records), manufactured a rationale to shield public records.[85] The deliberative process privilege was irreconcilable with the public records law's disclosure requirements. Justice Pollack stated it rendered Hawai'i's public records law a "dead letter, for one is hard pressed to imagine 'deliberations' or 'discussions' constituting the 'formation . . . of government policy' that are not pre-decisional and deliberative."[86]

Justice Pollack's opinions often deterred the kneecapping of access to the justice system. *A.A. v. B.B*[87] held that a former same-sex partner had standing to petition for joint custody of a child, even though the parties never married or entered into a civil union.[88] In *O'Grady v. State*,[89] the State lacked immunity from liability under the State Tort Liability Act when 150 tons of rocks fell on Māmalahoa Highway's Route 11, injuring a motorist. The court ruled that the State's inaction, by omitting a routine, coordinated rock fall mitigation system at the operational level, fell outside the discretionary function exception to the STLA.[90]

Justice Pollack's labor and employment law opinions also dissolved barriers.[91] *Adams v. CDM Media USA, Inc.*[92] was an age discrimination

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[84] 143 Hawai'i 472, 431 P.3d 1245 (2018).

[85] *Id.* at 475, 431 P.3d at 1248.

[86] *Id.* at 480, 431 P.3d at 1253.

[87] 139 Hawai'i 102, 384 P.3d 878 (2016).

[88] There was a presumption in favor of custody for any person who had de facto custody of the child in a stable and wholesome home and was a fit and proper person. *Id.* at 116, 384 P.3d at 892.

[89] 140 Hawai'i 36, 398 P.3d 625 (2017).

[90] *Id.* at 55–56, 398 P.3d at 644–45.

[91] *See e.g.* Nozawa v. Operating Eng'rs Local Union No. 3, 142 Hawai'i 331, 333, 418 P.3d 1187, 1189 (2018) (finding summary judgment improper because "Rule 56(e) of the Hawai'i Rules of Civil Procedure does not preclude an affidavit from being self-serving, nor does it require an affidavit to be corroborated by independent evidence"). In addition, unlike the employee's declarations in this case, an affidavit is conclusory if it expresses a conclusion without stating the underlying facts or reaches a conclusion that is not reasonably drawn from the underlying facts."); Van Ness v. State Dep't of Educ., 131 Hawai'i 545, 564, 319 P.3d 464, 483 (2014) (concluding that a high school employee's exposure to volcanic smog (vog) in his position as technology coordinator resulted in exacerbation of his

case. The court ruled that a hiring employer could not consider age, but could consider any reason relating to the applicant's ability to perform the work. The lower court, therefore, improperly granted summary judgment because the employer failed to satisfy its burden to articulate a legitimate, non-discriminatory reason rejecting the applicant.[93] In *Salera v. Caldwell*,[94] the court ruled that the political question doctrine did not prevent access to the justice system for City and County of Honolulu front-loader refuse collectors.[95] The civil service merit principles under article XVI, section 1 of the Hawai'i Constitution protected their positions from termination.[96]

Standing requirements sometimes thwart access to the justice system. In *In re Application of Maui Electric Co., Ltd*, the Sierra Club sought to participate in and appeal Public Utility Commission decisions involving the burning of fossil fuels at a Pu'unēnē sugar mill that doubled as a power plant.[97] Maui Electric argued that only a private right of action conferred standing to enforce environmental quality laws.[98] Maui Electric maintained that only persons living adjacent to the power plant could demonstrate a protectable property interest to litigate environmental issues arising from the burning of coal.[99]

Out of not so thin air, it seemed air had standing.[100] Justice Pollack explained atmospheric concentrations of greenhouse gases were transient. Air heeded no boundaries, so "those who are adversely affected by greenhouse gas emissions produced by the burning of fossil fuels may not necessarily be limited to those who live in areas adjacent to the source of

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preexisting asthma, which was thus causally connected to "incidents or conditions" of his employment and compensable under workers' compensation law); Minton v. Quintal, 131 Hawai'i 167, 188, 317 P.3d 1, 22 (2013) (holding in a tortious interference with prospective contractual relations case, "[t]he adverse effect of the City's ban on [the stagehands'] future employment opportunities was so prevalent and comprehensive that it implicated a liberty interest under article I, section 5 of the Hawai'i Constitution.").

[92] 135 Hawai'i 1, 346 P.3d 70 (2015).

[93] *Id.* at 5, 346 P.3d at 74; *see also*, BCI Coca-Cola Bottling Co. of Los Angeles v. Murakami, 145 Hawai'i. 38, 46, 445 P.3d 710, 718 (2019).

[94] 137 Hawai'i 409, 375 P.3d 188 (2016).

[95] *Id.* at 422–23, 375 P.3d at 201–02.

[96] *Id.* at 421, 375 P.3d at 200.

[97] 141 Hawai'i 249, 254, 408 P.3d 1, 6 (2017).

[98] *Id.* at 255, 408 P.3d at 7.

[99] *Id.* at 268, 408 P.3d at 20.

[100] Justice Douglas argued that trees should have standing—or so it has been framed. Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting). "Environmental objects" should be able "to sue for their own preservation." *Id.* at 741–42. Justice Douglas acknowledged, though, that a tree or river must be represented by "people who have a meaningful relationship to [the tree or] body of water." *Id.* at 743.

the emissions."[101] The court reasoned that the right to a clean and healthful environment under article XI, section 9 of the Hawai'i Constitution created a substantive environmental right.[102] As a substantive right, it was a protectable property interest under the due process clause.[103] Therefore, nothing stood in the way of the Sierra Club and its members' participation.[104]

IV. PUBLIC TRUST DOCTRINE DEFENDER

Richard Pollack started his career as a public defender. He bookended it as a public trust defender. Justice Pollack's decisions safeguarded the natural resource jewels essential to sustain Hawai'i's special way of life. In light of *Clarabal's* spirit, it does not feel like an overdramatization to say Richard Pollack viewed the Hawai'i Constitution's public trust provisions as existential. If land, water, air, and quality of life were not protected, then future generations would exist in a society barren of Hawai'i's resources, culture, and values—or would not exist at all.

Justice Pollack's instinct to protect Hawai'i's natural resources emerged in February 2014 with *Pila'a 400, LLC v. Board of Land & Natural Resources*,[105] and *Kauai Springs, Inc. v. Planning Commission of Kaua'i*.[106] In *Pila'a*, a massive mudflow from a developer's improperly filled hillside on the north shore of Kaua'i spilled into Pila'a Bay.[107] The bay was one of the "few remaining high value coral reef flats in the state that had largely escaped encroachment from development and stress from improper land

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[101] *Id.* at 268, 408 P.3d at 20.

[102] *Id.* at 260–61, 408 P.3d at 12–13.

[103] *Id.* at 261, 408 P.3d at 13.

[104] *Id.* at 271, 408 P.3d at 23. Justice Pollack's access to the justice system sensibilities were also on display when he joined Justice McKenna's controlling opinion in part two of *Tax Foundation of Hawai'i v. State*, 144 Hawai'i 175, 188, 439, P.3d 127, 140 (2019). In perhaps the most impactful standing case in years, the court held that "a party seeking declaratory relief under HRS § 632-1 need not satisfy the three-part 'injury in fact' test to have standing." *Id.* at 189, 439 P.3d at 141. The common law test was based on the "cases and controversies" limitation on federal court jurisdiction under Article III, Section 2 of the United States Constitution. *Id.* at 190, 439 P.3d at 142. The court clarified that "[i]n Hawai'i state courts, standing is a prudential consideration regarding the 'proper—and properly limited—role of courts in a democratic society' and is not an issue of subject matter jurisdiction, as it is in federal courts." *Id.* at 188, 439 P.3d at 140. Therefore, standing to bring declaratory relief claims was based only on the standing requirements of HRS Chapter 632. *Id.*

[105] 132 Hawai'i 247, 320 P.3d 912 (2014).

[106] 133 Hawai'i 141, 324 P.3d 951 (2014).

[107] *Pila'a 400, LLC*, 132 Hawai'i at 250–51, 320 P.3d at 915–16.

practices."[108] The sediment from the mudflow destroyed almost 3000 square meters of near-pristine coral reef flats.[109] The court reasoned that an agency was "constitutionally mandated to conserve and protect Hawai'i's natural resources."[110] It ruled that the Board of Land and Natural Resources (BLNR) had jurisdiction to institute an enforcement action in a contested case hearing.[111] The court also ruled that it was not required to engage in rulemaking to adopt a standardized methodology for valuation of damages to conservation lands.[112]

Two weeks after *Pila'a*, Justice Pollack sprung *Kauai Springs*; his first public trust doctrine opinion. The court stressed that an agency must take the initiative to protect resources at every stage of the planning and decision-making process.[113] It ruled that manufacturing a commercial beverage from public water originating in an underground spring 1,000 feet up Kāhili Mountain was impermissible.[114] Justice Pollack synthesized the groundbreaking *Waiāhole I*[115] case and other supreme court precedent.[116] He mapped a framework of principles, evidentiary standards, and requirements to guide an agency in fulfilling its affirmative constitutional obligations under the public trust doctrine.[117] The *Kauai Springs* blueprint now controls the evaluation of the impact of government action and inaction on public water resources.

In his concurrence in *Matter of Conservation District Use Application HA-3568 (Mauna Kea II),*[118] Justice Pollack advocated the expansion of the *Kauai Springs* framework to all public natural resources entrusted to the State. The court "should not establish artificial distinctions" because

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[108] *Id.* at 250, 320 P.3d at 915.

[109] *See id.* at 251, 320 P.3d at 916 (noting that "approximately 2,943 square meters of live coral were destroyed by the November 26, 2011 mudflow and subsequent sedimentation.").

[110] *Id.* at 250, 320 P.3d at 915.

[111] *Id.* at 264, 320 P.3d at 929.

[112] *Id.* at 249, 320 P3d at 914. Justice Pollack discussed the nature of administrative rulemaking, noting "[i]n the most general terms, the purpose of rule-making is to govern the future conduct of groups and individuals, not determining damages resulting from past conduct." *Id.* at 266, 320 P.3d at 931. As Justice Pollack later put it in another Hawai'i Administrative Procedures Act case, rulemaking was defined "as an agency statement of general or particular applicability" and "future effect." Green Party of Haw. v. Nago, 138 Hawai'i 228, 238, 378 P.3d 944, 954 (2016).

[113] Kauai Springs, Inc. v. Plan. Comm'n, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014).

[114] *See id.* at 181–82, 324 P.3d at 990–91 (deciding that the court of appeals erred in concluding that the Planning Commission's conclusions were wrong).

[115] *In re* Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000).

[116] *Kauai Springs*, 133 Hawai'i 141, 324 P.3d 951 (2014).

[117] *Id.* at 174–75, 324 P.3d at 984–85.

[118] 143 Hawai'i 379, 431 P.3d 752 (2018) (Pollack, J. concurring).

"neither the text nor the history of article XI, section 1 provides for differing levels of protection for individual natural resources, such as water as compared to land. . . ."[119] Justice Pollack quoted King Kamehameha III to authenticate land's fundamental importance to Hawai'i: "Ua mau ke ea o ka 'āina i ka pono"—"the life of the land is perpetuated in righteousness."[120] However, the court rejected extension of *Kauai Springs* to conservation land on the summit of Mauna Kea; described by Justice Pollack as "one of the most sacred areas in the state to Native Hawaiians."[121]

It rankled Justice Pollack that governmental agencies sat on the frontline of momentous public issues, yet neglected to meaningfully or competently consider the State's constitutional trust obligations.[122] He demanded that a government entity be held accountable as a fiduciary. Justice Pollack's opinion of the court in part IV of his concurrence in *Mauna Kea Anaina Hou v. Board of Land & Natural Resources (Mauna Kea I)*[123] held that "an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations."[124] Thus, a government entity, like the state's BLNR, must affirmatively effectuate the Hawai'i Constitution. "The Board's role as defender and enforcer of constitutional rights is invoked where, as here, an action or decision of the agency implicates certain constitutional rights and values."[125] Justice Pollack emphasized that "[a]n agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i

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[119] *Id.* at 410, 431 P.3d at 783.

[120] *Id.*

[121] *Id.*

[122] Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 413, 363 P.3d 224, 261 (2015) (opinion of the court as to part IV by Pollack, J.) ("[A]n agency is often in the position of deciding issues that affect multiple stakeholders and implicate constitutional rights and duties."); *see also* Kilakila 'O Haleakala v. Bd. of Land, 138 Hawai'i 383, 415, 382 P.3d 195, 227 (2016) (Pollack, J., dissenting) (An agency's hearings and decisions "commonly surpass, in importance and magnitude, [the issues] present in a typical court case"); Sierra Club v. D.R. Horton-Schuler Homes, LLC, 136 Hawai'i 505, 532, 364 P.3d 213, 240 (2015) (Pollack, J., dissenting) ("[A]gencies are often asked to decide issues that are of profound importance to the general public and that implicate constitutional rights and duties.").

[123] 136 Hawai'i 376, 413–15, 363 P.3d 224, 261–63. Justice Wilson joined Justice Pollack's concurrence in its entirety, and Justice McKenna joined part IV; thereby making it the court's opinion.

[124] *Id.* at 414, 363 P.3d at 262.

[125] *Id.* at 413–14 n.16, 363 P.3d at 261–62 n.16.

Constitution when such rights are implicated by an agency action or decision."[126]

The *Mauna Kea I* concurrence gained traction. *Mauna Kea II* reinforced it.[127] And it served as the precursor to *Ching v. Case*.[128] In *Ching*, the State leased nearly 23,000 acres of ceded lands to the United States for military purposes.[129] The three tracts of land were situated within the Pōhakuloa Training Area. The 1964 deal netted the State $1 per year for 65 years.[130] "Military rubbish," including munitions, unexploded ordinances, bazooka range debris, an old tank, and junked military vehicles, littered the land.[131]

The 2019 *Ching* case held for the first time that continually monitoring a third party's use of a public trust resource was an essential component of the State's affirmative constitutional trust obligations under article XII, section 4, and article XI, section 1 of the Hawai'i Constitution.[132] Justice Pollack declared that the State's public trust obligations existed independent of whether a third party violated the terms governing its use of the public trust resource.[133] Further, the obligation to continually monitor the use of the trust property was triggered even if there was no change in the resource's use.[134] Thus, to protect and preserve trust land for the benefit of Native Hawaiians, the general public, and future generations, the State had to pay attention.

Lāna'ians for Sensible Growth v. Land Use Commission,[135] an offshoot of *Ching*, was Justice Pollack's final public trust doctrine opinion. The case captured his abiding agitation with docile government agencies. Failing to act as a fiduciary was unacceptable. Justice Pollack reasoned that the State evaded its trustee responsibilities by permitting a hotel resort to self-report on the potability of water.[136] It meant that one of the world's richest persons could not water a golf course with public water resources—unless the water

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[126] *Id.* at 415, 363 P.3d at 263.

[127] "We also held [in *Mauna Kea I*] that a state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution." *In re* Conservation Dist. Use Application HA-3568 (Mauna Kea II), 143 Hawai'i 379, 387, 431 P.3d 752, 760; *see also In re* Gas Co., LLC, 147 Hawai'i 186, 207 465 P.3d 633, 654 (2020) ("As we reiterated in *Mauna Kea II*, a state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution.").

[128] *See* 145 Hawai'i 148, 449 P.3d 1146 (2019).

[129] *Id.* at 152, 449 P.3d at 1150.

[130] *Id.*

[131] *Id.* at 160, 449 P.3d at 1158.

[132] *See id.* at 177–78, 449 P.3d at 1175–76.

[133] *Id.* at 152, 449 P.3d at 1150.

[134] *See id.* at 177–78, 449 P.3d at 1175–76.

[135] 146 Hawai'i 496, 463 P.3d 1153 (2020).

[136] *Id.* at 507, 463 P.3d at 1164.

was ill-suited for drinking. It made clear that the State had a fiduciary duty to continually monitor the use of public trust resources because of its affirmative obligations under the public trust doctrine.[137]

Justice Pollack's instinct to conserve public trust resources extended to aquatic life in the State's coastal waters and submerged lands. Although not a public trust doctrine case, *Umberger v. DLNR*[138] protected the State's natural resources. The court invalidated a nominal fee permit authorizing the commercial harvesting of an unlimited number of fish and other aquatic life for placement in transparent tanks of water.[139] The court reasoned that aquarium collection used "land" under the Hawai'i Environmental Policy Act.[140] For profit aquarium collection was, therefore, subject to the environmental review procedures provided in HEPA.[141]

V. CONCLUSION

Richard Pollack taught a lot of people a lot of things. His actions and words elevated the quality of law practiced in Hawai'i. But most importantly, Richard's decency and spirit of curiosity enriched the many lives who entered his orbit.

Justice Richard Pollack defended the public's interests. Justice Pollack muscularized the Hawai'i Constitution. He held all three branches of government accountable for action and inaction that imperiled the values it reflected. He crafted standards to guide our relationships with each other, government, and Hawai'i's natural resources.

"Nānā i ke kumu." Look to the source.[142] The wisdom of Richard Pollack is an authentic gift to the present. In the past lies the future.

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[137] *Id.* at 504–05, 463 P.3d at 1161–62.

[138] 140 Hawai'i 500, 403 P.3d 277 (2017).

[139] *Id.* at 529, 403 P.3d 306.

[140] *Id.* at 520–23, 403 P.3d at 297–300.

[141] *Id.* at 525, 403 P.3d at 302.

[142] MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU (LOOK TO THE SOURCE): Vol. 1 (1972).