COMMENT

CHARTING THE BOUNDARIES OF HAWAIʻI'S EXTENSIVE PUBLIC TRUST DOCTRINE POST-*WAIĀHOLE DITCH*

BY

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Hawaiʻi's public trust doctrine is unique in its breadth, its origins, and its constitutional basis. Perhaps the most expansive in the United States, the Hawaiʻi public trust doctrine extends to water, land, air, minerals, natural beauty, and Native Hawaiian cultural practices. Although the majority of Hawaiʻi's public trust cases concern water issues, the Hawaiʻi supreme court has also applied the public trust doctrine in several important land cases. Significantly, the court has applied the doctrine to land extensions created during volcanic eruptions and, most recently, to Mauna Kea, a mountain peak controversially used for both modern astronomy and Native Hawaiian cultural practices. I survey several public trust cases, beginning with Waiāhole Ditch—a water case widely regarded as the cornerstone of Hawaiʻi's modern public trust doctrine—and ending with the Hawaiʻi supreme court's 2018 decision in Mauna Kea II.

A survey of the case law reveals that the expansive nature of Hawaiʻi's public trust doctrine has not always led to greater protections for all trust resources, as courts have ruled that the doctrine requires a balancing between protection and maximum beneficial use. Applying this balancing test, court opinions have, in some cases, resulted in greater protections for Native Hawaiian rights

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to trust resources. In other cases, however, court applications of the balancing test have resulted in resource allocations that harm native interests. In light of the dichotomous results, this Comment recommends that Hawai'i agencies like the Department of Land and Natural Resources implement inclusive, participatory processes to ensure that Native Hawaiian concerns are fully considered before taking actions affecting trust resources.

I. INTRODUCTION

Hawaiʻi's public trust doctrine is perhaps the most expansive in the country. Unique in its breadth and constitutional basis, the Hawaiʻi public trust doctrine also sets itself apart from that of other states in terms of its origins. Unlike other states, the Hawaiʻi legislature and judiciary have rarely pointed to Justinian or Roman law as the origins for the public trust doctrine.[1] Instead, Hawaiʻi's public trust origins lie in Hawaiian history and traditional Native Hawaiian land use practices. This deep connection to history and culture have significantly influenced the development of public trust purposes, both in the state constitution and in state case law.

The majority of Hawaiʻi public trust cases concern water issues. Hawaiʻi's expansive public water trust is grounded largely on the Hawaiʻi supreme court's landmark *In re Water Use Permit Applications* (*Waiāhole Ditch*)[2] decision, which has served as a basis for many subsequent public trust decisions.[3] *Waiāhole Ditch* is a cornerstone of the Hawaiʻi public trust doctrine. Thus, any examination of Hawaiʻi public trust case law must begin by surveying *Waiāhole Ditch* and subsequent water cases. However, Hawaiʻi public trust case law also pertains to resources other than water—most notably, lands. The Hawaiʻi supreme court has applied the public trust doctrine to land extensions created during volcanic eruptions[4] and, most recently, to Mauna Kea, a mountain peak not adjacent to any bodies of water but which is a site of Native Hawaiian religious practices.[5]

Woven throughout all of Hawaiʻi's public trust cases are notions of Native Hawaiian traditional and cultural rights, which are protected under the Constitution of the State of Hawaiʻi.[6] The inclusion of Native

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[1] In re Water Use Permit Applications (*Waiāhole Ditch*), 9 P.3d 409, 449 (Haw. 2000). *See also* DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 3–4 (2d ed. 1997) ("It is often stated that the Public Trust Doctrine dates back to the sixth century Institutes of Justinian and the accompanying Digest, which collectively formed Roman civil law, codified under the reign of the Roman Emperor Justinian between 529 and 534 A.D.").

[2] *See generally Waiāhole Ditch*, 9 P.3d 409 ("[I]f the public trust doctrine 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.").

[3] MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 199, 202 (2d ed. 2015).

[4] *See* Kobayashi v. Zimring, 566 P.2d 725, 735 (Haw. 1977) (declaring that Hawaiʻi public lands are "held in public trust by the government for the benefit, use and enjoyment of all the people").

[5] *See* In re Conservation District Use Application HA-3568, 431 P.3d 752, 773–74 (Haw. 2018) [hereinafter *Mauna Kea II*] (holding that the state constitution clearly extends the public trust doctrine to all public natural resources, including lands, scenic beauty, and Native Hawaiian rights).

[6] *See* HAW. CONST. art. XII, § 7 ("The State . . . shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778."); *id.* art. XII, § 4 (declaring that public lands ceded to the federal

Hawaiian rights as a trust purpose leaves space for expanding Hawai‘i’s public trust: because traditional Hawaiian and cultural practices incorporate all aspects of Hawai‘i’s natural resources—including freshwater, marine, land, air, and wildlife resources—recognizing native rights under Hawai‘i’s public trust doctrine must necessarily mean extending the trust to all of Hawai‘i’s natural resources. However, extending the public trust doctrine does not necessarily lead to greater protections for all resources, as courts have ruled that the public trust doctrine requires a balancing between protection on the one hand, and maximum beneficial use on the other.[7] Thus, the trust’s objective is not to maximize protection, but instead to achieve the most equitable and beneficial allocation of resources. As the case law demonstrates, this approach has left space for commercial uses of public resources.

This Comment traces the unique history of Hawai‘i’s public trust doctrine and contemplates the trust’s future. Section II examines the doctrine’s roots in Hawaiian history and in Native Hawaiian land use practices. Section III surveys some of Hawai‘i’s many public water trust cases, including the landmark *Waiāhole Ditch* decision, which established much of the groundwork for subsequent judicial interpretation of the public trust doctrine. Section IV surveys land trust cases, including two very recent decisions, *Ching v. Case* (*Pōhakuloa*)[8] and *Matter of Conservation District Use Application HA-3568 (Mauna Kea II)*,[9] the former decided in 2018 and the latter decided in 2019. Finally, Section V notes that the public trust doctrine requires the state and its agencies to consider Native Hawaiian rights when determining allocation of trust resources, and concludes by arguing that this requirement is best served by including and embracing native voices in administrative proceedings, rather than resorting to judicial solutions.

II. BACKGROUND

In one sense, Hawai‘i’s public trust doctrine originated in a late twentieth century court decision.[10] But, in another sense, the doctrine’s roots are much deeper and are grounded in Hawaiian history and in traditional Native Hawaiian land use practices. When applying the public trust doctrine, Hawai‘i courts often begin by examining the unique

government during the 1898 annexation of Hawai‘i “shall be held by the State as a public trust for native Hawaiians and the general public”).

7 *See infra* text accompanying notes 63–85 (discussing the *Waiāhole Ditch* decision and its interpretation of the Public Trust Doctrine).

8 449 P.3d 1146 (Haw. 2019).

9 431 P.3d 752 (Haw. 2018).

10 *See* King v. Oahu Ry. & Land Co. (*Oahu Railway*), 11 Haw. 717, 723–25 (Haw. 1899) (holding, in Hawai‘i’s first public trust doctrine case, that lands under navigable waters are held in trust for public uses).

history of private land ownership in the state.[11] Because courts also tend to draw connections between the modern public trust doctrine and traditional Native Hawaiian views toward land, water, and other resources, understanding these connections is necessary before examining the case law.[12]

A. Ahupuaʻa System

Private land-ownership was non-existent in Hawaiʻi's pre-contact period.[13] Instead, the *mōʻī* (king) of any given island was responsible for administering the land, which he parceled out into *ahupuaʻa*, areas stemming from a central point in the uplands and fanning out to the sea along the natural boundaries of the watershed.[14] Under the leadership of the mōʻī, the *aliʻi* (chiefs) and *konohiki* (overseers) would administer the ahupuaʻa, and the *makaʻāinana* (common people) would tend the land.[15] Each ahupuaʻa contained the resources needed to sustain the community, including access to freshwater, upland timber, lowland farms, and fisheries along the coast.[16] Under this system, in which the common people maintained access to the resources of their respective ahupuaʻa, all resources remained available for public use.[17]

For most of Hawaiʻi's history, no single king ruled over all of Hawaiʻi's lands. Instead, multiple kings controlled individual islands or island groupings.[18] But at the turn of the nineteenth century, King Kamehameha I became the first monarch to bring all eight major Hawaiian islands under his sovereign rule.[19] Even with all islands under his control, the land did not belong privately to the king, but rather "belonged to the chiefs and the people in common, of whom Kamehameha I. was the head, and had the management of the landed property."[20]

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11 *See, e.g.*, Kobayashi v. Zimring, 566 P.2d 725, 729–33 (Haw. 1977) (providing an account of the major early developments in Hawaiian land ownership, including the establishment in 1846 of the Land Commission and the Great Mahele of 1848, wherein land was redivided across the kingdom).

12 *See, e.g.*, *Waiāhole Ditch*, 9 P.3d 409, 449–50 (Haw. 2000) (finding the public trust encompasses Native Hawaiian traditional cultural practices).

13 HAWAII DEP'T OF COM. AND CONSUMER AFFS., LAND IN HAWAIʻI 1 (2004) [hereinafter LAND IN HAWAIʻI].

14 *Ahupuaʻa*, HAWAII HISTORY, https://perma.cc/AZE6-4NST (last visited Nov. 2, 2021).

15 *Id.*

16 *Id.*

17 *Id.*

18 RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 23–24, 27 (1948).

19 *Id.* at 23–27.

20 HAW. CONST. OF 1840, *in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 10–12 (1842); *See Ke Kumukānāwai o ka Makahiki 1840*, 1 KA HOʻOLINA: J. HAW. LANGUAGE SOURCES 34, 35, 41 (2002) (explaining that the Constitution of 1840 was Hawaiʻi's first detailed constitution and providing a reproduction of the constitution in both English and Native Hawaiian).

B. Western Contact and Māhele

Following western contact in the late eighteenth century, conflicts arose between natives, who held to their traditional public land use system, and foreigners, who often sought to claim private land rights without the king's consent.[21] In the 1840s, under pressure from foreign residents who sought fee title to Hawai'i lands, King Kamehameha III[22] instituted reforms of the traditional land use system.[23] Known as the Great Māhele (Great Division), the scheme allocated approximately one third of lands to the king, one third to the chiefs, and one third to the government for future allocation to commoners.[24] The Kuleana Act,[25] which established fee simple ownership of land, followed shortly thereafter.[26]

Under the reforms, Hawai'i established a Board of Commissioners to Quiet Land Title (commonly known as the Land Commission), the purpose of which was to investigate and ascertain or reject all private land claims.[27] Upon ascertaining a land claim, the commission would make an award and, after receiving payment, the Minister of Interior would issue a Royal Patent for the land.[28] Under this new system, public land rights diminished as individuals gained private title to lands.[29] However, in granting private land ownership, the king expressly reserved his sovereign prerogatives to encourage and enforce the use of lands for the common good.[30] Water in particular, as one of the "most important usufruct of lands," could not be transferred to an awardee of land, and ownership of water in natural watercourses was reserved for the people for their common good.[31]

Although intended to provide secure land title to Native Hawaiians, the Māhele and Kuleana acts were a catastrophe for most.[32] The Kuleana

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[21] *See* DAVIANNA PŌMAIKA'I MCGREGOR & MELODY KAPILIALOHA MACKENZIE, MO'OLELO EA O NĀ: HAWAI'I HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAI'I 175–76 (2014) (describing conflict between the traditional subsistence economy and the free market system in Hawai'i after the death of Kamehameha I).

[22] Kauikeaouli (Kamehameha III) was the third ruler of the Hawaiian Kingdom, following his father, Kamehameha the Great, and his older brother Liholiho. JEAN IWATA CACHOLA, KAMEHAMEHA III: KAUIKEAOULI 1, 4, 16 (1995). Under Kauikeaouli's reign, many Native Hawaiian traditions gave way to modernization and Western ways. *Id.* at 46, 54, 57–58, 86–87.

[23] Kobayashi v. Zimring, 566 P.2d 725, 729 (Haw. 1977).

[24] LAND IN HAWAI'I, *supra* note 13, at 2.

[25] *See* CACHOLA, *supra* note 22, at 94 (meaning "responsibility" in Hawaiian, the term "kuleana" also became the term for land that people cared for and on which they lived).

[26] LAND IN HAWAI'I, *supra* note 13, at 2–3.

[27] *Zimring*, 566 P.2d at 730.

[28] *Id.*

[29] *Id.* at 729.

[30] McBryde Sugar Co., Ltd. v. Robinson, 504 P.2d 1330, 1337–38 (Haw. 1973).

[31] *See id.* at 1338 ("We believe that the right to water is one of the most important usufruct of lands, and it appears clear to us . . . the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants.").

[32] CACHOLA, *supra* note 22, at 87, 94–97.

Act required claims for government land to be filed within two years of enactment.[33] Lacking money and knowledge of Western administrative systems, most Native Hawaiians made no claims, and the government eventually auctioned off most of the land to non-natives.[34] In all, native residents ended up with less than one percent of the total land set aside for the common people.[35] The government considered this historical backdrop when Hawaiʻi became a state in 1959, and later when it introduced amendments to Hawaiʻi's state constitution in 1978.[36]

C. Ceded Lands and Admission Act

The 1893 overthrow of the Hawaiian Kingdom led to a Congressional Joint Resolution of Annexation in 1898,[37] at which point Hawaiʻi became a territory of the United States.[38] Upon annexation, all real property classified as crown lands or government lands was ceded to the federal government.[39] Congress, recognizing the special nature of these "ceded lands," exempted them from general laws governing federal lands and directed instead that the lands should be held in trust for the benefit of Hawaiʻi's people.[40]

Upon Hawaiʻi's admission to the Union in 1959, the federal government returned ceded lands to the state.[41] The terms of admission "considered the plight of the Hawaiian people," as evidenced by section 5(f) of the Admission Act, which directs the state to hold ceded lands in trust for five purposes: 1) to support public education, 2) to better the conditions of Native Hawaiians, 3) to develop farm and home ownership, 4) to make public improvements, and 5) to provide lands for public use.[42] Despite the express trust created under section 5(f), the state's trust

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[33] Maivân Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 262 (1989).

[34] Jocelyn B. Garovoy, *Ua Koe Ke Kuleana O Na Kanaka (Reserving the Rights of Native Tenants): Integrating Kulenana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENV'T L. REV. 523, 529 (2005).

[35] CACHOLA, *supra* note 22, at 95.

[36] *State Constitution*, LEGIS. REFERENCE BUREAU, https://perma.cc/6XH5-4MWW (last visited Nov. 7, 2021).

[37] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898).

[38] *See, e.g.*, *Pōhakuloa*, 449 P.3d 1146, 1174 (Haw. 2019) (discussing history of "ceded land").

[39] *Id.*

[40] *Id.*; *see History: The Establishment of OHA*, OFF. OF HAWAIIAN AFFS., https://perma.cc/7NDU-ES3D (last visited Nov. 2, 2021) (noting that ceded lands totaled 1.8 million acres at the time of annexation in 1898).

[41] Haw. Admission Act of 1959, Pub. L. No. 86-3, § 5(b), 73 Stat. 4, 5 (1959); *see Pōhakuloa*, 449 P.3d at 1174 (detailing the transfer of ceded lands back to the state of Hawaiʻi).

[42] *History*, OFF. OF HAWAIIAN AFFS., https://perma.cc/RM3A-TKV9 (last visited Jan. 10, 2022); Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6.

obligations went largely ignored until the 1978 Constitutional Convention.[43]

D. Hawai'i State Constitution

Hawai'i's 1978 Constitutional Convention was considered "a sweeping victory for Native Hawaiian rights."[44] The Convention resulted in thirty-four amendments and over 1,000 individual changes to the state's constitution, including the designation of Hawaiian language as an official language of the state and a requirement that public schools include Hawaiian education in their curriculum.[45] The changes also included multiple amendments designed to protect public trust resources.

Article XI, section 1 offers broad public trust protections for all of Hawai'i's natural resources:

> 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.[46]

The amendments also made further provisions for specific resources, including trust protections for water, ceded lands, and education. Regarding water resources, "[t]he State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people."[47] Regarding ceded lands, the constitution establishes that such lands "shall be held by the State as a public trust for native Hawaiians and the general public."[48] Finally, regarding education, the constitution establishes that all property of the University of Hawai'i "shall be held in public trust for [the school's] purposes."[49]

E. Common Law

In 1899, nearly eighty years before recognizing constitutional public trust protections, Hawai'i courts articulated the public trust doctrine as

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[43] *See* Dan Nakaso, *Should Hawaii Rewrite Its Constitution—Again?*, TIME (Oct. 30, 2008), https://perma.cc/YQK9-DBSK (explaining, in part, that only public workers' right to strike and problems with state legislative voting districts were addressed prior to the 1978 Constitutional Convention).

[44] *Id.*

[45] *Id.*

[46] HAW. CONST. art. XI, § 1.

[47] *Id.* § 7.

[48] *Id.* at art. XII, § 4.

[49] *Id.* at art. X, § 5.

a common law, applying it to navigable waters.[50] In *King v. Oahu Railway*, which relied on the landmark United States Supreme Court case *Illinois Central Railroad v. Illinois*,[51] the Hawaiʻi supreme court held that "[t]he people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use," and that the lands under navigable waters around Hawaiʻi "are held in trust for the public uses of navigation."[52] Several years later, in 1905, the court applied the public trust doctrine to shorelines, ruling in *Territory v. Kerr*[53] that all land grants including the shoreline are subject to the *jus publicum*,[54] and that beachfront property owners may enjoy littoral rights provided they do not interfere with public rights.[55]

Hawaiʻi's public trust protections at common law, in combination with constitutional protections, have grown over the years into what is possibly the most expansive public trust doctrine in the country. Although the majority of Hawaiʻi's public trust case law concerns water resources, significant land-use cases have also appeared in recent years. Woven throughout out all public trust cases are protections for Native Hawaiian traditional and cultural practices.

III. WATERS

Native Hawaiians have traditionally viewed fresh water as the most precious of all resources.[56] But in recent years, this precious resource has been in decline.[57] Most of Hawaiʻi procures its fresh water from extensive underground aquifers.[58] Unfortunately, water levels in these aquifers are gradually receding, and the Hawaiʻi Board of Water Supply predicts that demand for water on Oʻahu may exceed supply within the next hundred years.[59] Because of Hawaiʻi's remote location in the middle of the Pacific, the state has no means of obtaining reliable backup reserves.[60] With these

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50 King v. Oahu Ry. (*Oahu Railway*), 11 Haw. 717, 725 (Haw. 1899).

51 146 U.S. 387 (1892).

52 *Oahu Railway*, 11 Haw. At 725.

53 16 Haw. 363 (Haw. 1905).

54 *See* BLUMM & WOOD, *supra* note 3, at 11 (citing DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 1 (2d ed. 1997)) (explaining that the *jus publicum* refers to "the public's right to use and enjoy trust lands and waters for" public purposes, like commerce, navigation, bathing, and fishing, while the *jus privatum* refers to private property rights in trust lands).

55 *Kerr*, 16 Haw. at 376.

56 *See generally*, *Water*, HAW. HIST., https://perma.cc/53N3-NCKY (last visited Nov. 2, 2021) (explaining that water has long been a symbol of abundance and prosperity to Native Hawaiian people, in part because Hawaiian agriculture centers around taro, a crop cultivated using large quantities of fresh water).

57 Larry Kobayashi, *What is the Current State of Fresh Water Supplies in Honolulu and Oahu: Will We Have Enough Water for the Future?*, HAW. FIRST WATER (Sept. 13, 2004), https://perma.cc/5MJ8-3A96.

58 *Id.*

59 *Id.*

60 *Id.*

dire circumstances in mind, it is not surprising that water is a common arena for dispute and that most of Hawai‘i’s public trust case law revolves around water.

Hawai‘i’s expansive public water trust is grounded largely on the supreme court’s *Waiāhole Ditch* decision. Because the landmark *Waiāhole Ditch* case has served as a basis for many subsequent public trust decisions, it is the starting point for any examination of public trust case law in Hawai‘i. Although *Waiāhole Ditch* gave rise to many subsequent water trust decisions, this Comment surveys just two: *In re Wai‘ola o Moloka‘i, Inc.*[61] and *Kaua‘i Springs, Inc. v. Planning Commission of the City of Kaua‘i*.[62]

A. Waiāhole Ditch

In the landmark *Waiāhole Ditch* decision, the Hawai‘i supreme court attempted to resolve conflicts related to the diversion of fresh water from windward O‘ahu streams.[63] The Waiāhole Water Company began diverting water in 1913 in order to support a leeward sugar cane plantation.[64] After the plantation shut down in the 1990s, the state continued to divert water to support other leeward agriculture and development projects.[65] A group of windward small family farmers and other interested parties argued for the return of diverted water flows to windward streams in order to restore native stream ecosystems and to protect traditional Native Hawaiian practices like taro farming.[66]

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61 83 P.3d 664 (Haw. 2004).

62 324 P.3d 951 (Haw. 2014).

63 *Waiāhole Ditch*, 9 P.3d 409, 447 (Haw. 2000). The water diversions at issue actually came from windward O‘ahu groundwaters. *Id.* at 423. However, windward streams also were depleted due to the interconnected nature of Hawai‘i’s freshwater systems. *Id.* The Court noted that “[m]odern science and technology have discredited the surface-ground dichotomy.” *Id.* at 447. For a simple explanation of Hawai‘i’s interconnected freshwater systems, see, *Hawaii’s Water Cycle*, BD. WATER SUPPLY, https://perma.cc/TSP4-62KK (last visited Oct. 22, 2021) (illustrating Hawai‘i’s water cycle).

64 *Waiāhole Ditch*, 9 P.3d at 423. Water diversion was necessary due to the lack of rainfall on O‘ahu’s leeward side. *Id.* at 422. O‘ahu’s windward side faces trade winds, while its leeward side remains sheltered from the winds by hills and mountains. *See What Do Leeward and Windward Mean?*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., https://perma.cc/N3P4-AK6G (last updated Feb. 26, 2021) (describing Hawai‘i’s windward and leeward winds). Because trade winds pick up moist air as they blow across the ocean, O‘ahu’s windward side receives the majority of the island’s rain, while its leeward side stays dry and sunny most of the time. *Id.*

65 *See Waiāhole Ditch*, 9 P.3d at 423–24, 429 (explaining that “the plantation ceased operations in 1995. . . . the sugar industry in O’ahu came to a close” in the early 1990s, and that the Waiāhole Irrigation Company agreed to continue to supply the ditch system with water).

66 *Id.* at 469. *See, e.g.*, Brittany P. Anderson, *The Past is Present: Kalo Farming on Hawai‘i Island*, KE OLA MAG., https://perma.cc/LGK9-TPQW (last visited Nov. 2, 2021) (explaining taro farming). Taro, or *kalo*, was the staple food of Native Hawaiian people, who considered the plant sacred. *Id.* In Hawaiian mythology, taro is the respected elder brother of mankind, who cares for his human siblings by providing sustenance. *Id.* Today, Native

Leeward developers, on the other hand, sought to continue diversions to leeward lands in order to irrigate golf courses, housing developments, and agricultural projects.[67] This dispute between small-family taro farmers and large-scale agricultural and development interests went before the Commission on Water Resource Management in a contested case hearing of "unprecedented size, duration, and complexity."[68]

In its 1997 final decision, the commission found a public trust obligation to establish instream flow standards for windward streams, having discovered through preliminary experiments that higher volume instream flows were better able to support stream ecosystems.[69] In allocating the ditch's 27 million gallons per day (mgd) total flow, the commission directed 14.03 mgd to leeward development uses and 12.97 mgd to windward streams.[70] However, 6.97 mgd of the allotment to windward streams were designated as "supplemental flows" that could be diverted to leeward off stream uses.[71] Unsatisfied with the nature of the allocations, both parties appealed and the case went to the Hawaiʻi supreme court.[72]

The supreme court took up the appeal on numerous grounds, but its opinion is most notable for its expansive interpretation of the public trust doctrine, holding in part 1) that the Hawaiʻi public trust applies to all of the state's water sources, without drawing a distinction between surface and groundwater,[73] and 2) that the state water resources trust embodies the dual mandate of protection, on the one hand, and "maximum reasonable and beneficial use" on the other.[74] *Waiāhole Ditch*'s precedent remains significant in Hawaiʻi public trust law today, as the opinion also marks the first time the Hawaiʻi supreme court clearly delineated the scope of Hawaiʻi's public water trust.

Hawaiians continue to view taro as more than simply a food, but also as a connection to nature, spirituality, and human origins. *Id.* Wetland varieties of taro, like those grown in windward Oʻahu, require irrigation systems and a constant flow of water. *Id.*

[67] *Public Trust Doctrine*, HAWAII'S THOUSAND FRIENDS, https://perma.cc/86CG-NBZ9 (last visited Nov. 2, 2021).

[68] *See Waiāhole Ditch*, 9 P.3d at 422, 425 (explaining that opening statements and presentation of evidence spanned fifty-two hearing days and that the commission received written testimony from 161 witnesses, the majority of whom also testified orally).

[69] *Id.* at 425–26. Although additional long-term studies were necessary for setting exact instream flow standards, the precautionary principle required the Commission to err toward protecting stream levels in the meantime. *Id.* at 426. Thus, rather than set conclusive in-stream flow requirements, the court established interim flow standards that it planned to revise periodically as more scientific knowledge became available. *Id.*

[70] *Id.* at 430.

[71] *Id.* The court further divided supplemental flows into a 5.39 mgd "buffer" and a 1.58 mgd "proposed reserve," which were intended to aid scientists in studying stream levels: As supplemental flow waters became permitted for leeward off stream uses and windward stream flow levels were reduced, scientists would be able to study the impact of the reductions on stream ecosystems. *Id.* at 429.

[72] *Id.* at 430.

[73] *Id.* at 445.

[74] *Id.* at 451.

1. Defining the Scope, Purpose, and Substance of the Public Water Trust

Defining the scope of the trust, the court declared that "the public trust doctrine applies to all water resources without exception or distinction."[75] Public trust applications to water have their basis in article XI, sections 1 and 7 of the state constitution, which expressly proclaim that the state has a duty to protect water resources for the benefit of Hawai'i's people.[76] Thus, the state has a constitutional duty to responsibly manage all water resources.[77] This duty extends to ground and surface waters alike, as both constitute "a single integrated source of water."[78]

Defining the trust's purpose and its substance, the court looked to the state constitution and determined that the state is required to "protect" public natural resources *and* to encourage their "use and development."[79] To do so, the state must balance "protection" on the one hand, and "maximum reasonable and beneficial use" on the other.[80] Hence, the objective of the public trust is not to maximize either protection or consumptive use, but instead is to achieve the most equitable and beneficial allocation of water resources.[81]

The court also acknowledged an "increasing number of public trust uses of waters," and pointed to three in particular: First, the trust encompasses domestic use (e.g., drinking water), which constitutes "the highest use[] of water resources." [82] Second, the trust encompasses Native

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[75] *Id.* at 445 ("We need not define the full extent of article XI, section 1's reference to 'all public resources' at this juncture.").

[76] *Id.*; *see* HAW. CONST. art. XI, §§ 1, 7 ("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 . . . water" and "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.").

[77] *Waiāhole Ditch*, 9 P.3d at 453.

[78] *Id.* at 447 (quoting *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 73 (Haw. 1982)).

[79] *Id.* at 450–51; *see* HAW. CONST. art. XI, § 1 ("[T]he State . . . shall conserve and protect Hawaii's…natural resources…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.").

[80] *Waiāhole Ditch*, 9 P.3d at 451. *Cf. Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cty.* (*Mono Lake*), 658 P.2d 709, 727 (Cal. 1983) (Discussing California's similar public trust requirement in that protection of the public benefit and supporting economic development must be balanced concerning water rights). The basis for these requirements stems mainly from the plain language of the Constitution, which says that the State "shall conserve and protect" Hawaii'i's resources and that it "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." HAW. CONST. art. XI, § 1. Legislative history lends further support, suggesting that the Constitution's framers intended to define "conservation" as "the *protection*, *improvement and use* of natural resources according to principles that will assure their *highest economic or social benefits*." (emphases added). Stand. Comm. 77, Proc. of the Const. Convention of Haw. of 1978, at 685–86 (1980).

[81] *Waiahole Ditch*, 9 P.3d at 452.

[82] *Id.* at 448–49. Hawai'i's protections for domestic water use have their basis in the "founding principles of the ancient Hawaiian system" and the Kuleana Acts. *Id.* at 449, 451.

Hawaiian traditional and cultural practices.[83] Third, the trust encompasses "the maintenance of waters in their natural state."[84] Explaining that the Water Commission had "more work" to do in order to "realize its constitutionally and statutorily mandated purpose," the court remanded the case to the commission for additional findings regarding instream flow standards and practical measures for mitigating the effect of off-stream uses on windward streams.[85]

2. Agency and Lower Court Decisions Following Remand

In its categorical embrace of the public trust doctrine, as well as its explanation of the trust's scope, purpose, and substance, *Waiāhole Ditch* has become a cornerstone of Hawaiʻi public trust law.[86] However, the supreme court's decision did not settle the matter of water diversions from windward Oʻahu. Following the supreme court's decision, the case continued to bounce back and forth between the commission and the courts. In 2006, the commission issued a decision allocating waters between windward and leeward parties in roughly equal proportions and granted water use permits to two developers, Campbell Estates and Puʻu Makakilo, Inc.[87] The Hawaiʻi Intermediate Court of Appeals later upheld most of the commission's decision, though it disagreed with granting a permit to the now defunct Puʻu Makakilo Golf Course.[88] Eventually, the 0.75 mgd golf course allocation instead went to windward streams, which

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Prior to the Māhele, the law assured native ahupuaʻa tenants an "'equal proportion' of water." *Id.* at 449. During the transition to a western system of private land ownership, the intent of the Hawaiʻi public trust was to preserve this early right to water. *Id.* Thus, when the Kingdom granted individuals fee simple title to land under the Kuleana Acts, it expressly guaranteed that the people "have a right to drinking water, and running water." *Id.* Today, this right extends beyond native ahupuaʻa tenants and extends to the general public. *Id.*

[83] *See id.* at 449, 452 (explaining that, although water resources are now held in trust for the general public, early guarantees to water rights "originated out of concern for the rights of native tenants in particular").

[84] *See id.* at 448–49 (explaining that, in other words, allowing water to run freely downstream without collecting or diverting it is not a "waste," but rather is an established "use").

[85] *Id.* at 501.

[86] *See id.* at 442–47 ("Most importantly, the people of this state have elevated the public trust doctrine to the level of a constitutional mandate."); BLUMM & WOOD, *supra* note 3, at 199 n.1 ("*Waiāhole Ditch* is a landmark public trust opinion that has had an influential effect on the modern development of public trust law."); *see also* Teresa Dawson, *Court's Waiahole Decision 'Inspiring,' Says Public Trust Expert Jan Stevens*, ENV'T HAW. (Feb. 2002), https://perma.cc/827G-8JZF ("[T]he Hawai'i Supreme Court opinion has been the keynote in unifying the traditional native law with the common law and with state constitutional and statutory law.").

[87] Ken Kobayashi, *Court Rebuffs Waiahole Water Challenges*, HONOLULU STAR ADVERTISER (Oct. 15, 2010), https://perma.cc/8CBS-NZ75.

[88] *In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amends., and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing, No. 28108, Case No. CCH-OA95-1, at 2–3 (Haw. Ct. App. 2010).

received total water allocations of over 15 mgd.[89] Although *Waiāhole Ditch* did not lead to complete restoration of windward streams, some taro farmers reported satisfaction with the significant increases to windward instream levels,[90] and the case established foundational principals that were later applied in subsequent public trust cases, including two cases surveyed here, *Wai'ola o Moloka'i* and *Kaua'i Springs*.

B. In re *Wai'ola o Moloka'i*

Moloka'i, at thirty-eight miles long and ten miles wide, is Hawai'i's fifth-largest island.[91] Although sixty-two percent of the island's population is Native Hawaiian,[92] a handful of off-island owners control the majority of Moloka'i lands.[93] The island's largest land-owner, Moloka'i Ranch, controls roughly one-third of the island, or approximately 50,000 acres.[94] The island's water resources are also under the control of just a handful of entities, one of which is Wai'ola o Moloka'i, Inc., a Moloka'i Ranch subsidy.[95] By 1998, Wai'ola o Moloka'i (MR-Wai'ola) supplied water to roughly one-sixth of the island's population.[96]

Because Moloka'i Ranch and MR-Wai'ola do not own any potable groundwater sources on Moloka'i, they purchase water from other entities, including the County of Maui and the Department of Hawaiian Homelands (DHHL),[97] which operate wells out of Kamiloloa aquifer.[98] Kamiloloa sits adjacent to Kualapu'u, one of Moloka'i's sixteen aquifer systems.[99] Pursuant to the Hawaiian Homes Commission Act,[100] DHHL

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89 Regina Gregory, *Waiahole Ditch Water Restoratio*n, ECOTIPPING POINTS PROJECT (July 2018), https://perma.cc/UNH7-U9XD.

90 *See id.* ("Famous taro farmer Charlie Reppun is pleased with the outcome. The increase was indeed substantial, he says. All his fields are flooded, whereas before he had to rotate among them. Especially beneficial for growing taro is the decrease in water temperature. . . . Equally important is the benefit to fish in the stream and estuary.").

91 Wade Graham, *Why Molokai, With All Its Wonders, Is the Least Developed of Hawai'i's Islands*, SMITHSONIAN MAG. (Aug. 30, 2019) https://perma.cc/W28G-YNH7.

92 LILI'UOKALANI TRUST, COMMUNITY PROFILE: MOLOKA'I 1(last updated July 11, 2018).

93 *See* Graham, *supra* note 91 (noting that the Moloka'I islands have "long been mostly controlled by outsiders.").

94 In re Wai'ola O Moloka'i, Inc. (*Wai'ola o Moloka'i*), 83 P.3d 664, 673 (Haw. 2004) ; *but see* Sarah Jacobs, *You Can Buy a Third of a Hawaiian Island for $260 Million — But There's a Catch*, BUS. INSIDER (Sept. 21, 2017), https://perma.cc/VZ8M-X6VW (explaining that, as of 2017, Moloka'i Ranch has been up for sale).

95 *Wai'ola o Moloka'i*, 83 P.3d at 673.

96 *Id.*

97 *Id.* Established under the Hawaiian Homes Commission Act of 1920, the Department of Hawaiian Home Lands is responsible for administering the State's land trust for Native Hawaiians, known as Hawaiian Home Lands. The trust administers over 200,000 acres of public lands as homesteads for Native Hawaiian people. *See About the Department of Hawaiian Home Lands*, DEP'T OF HAWAIIAN HOME LANDS, https://perma.cc/7JJF-849J (last visited Nov. 3, 2021) (explaining the history and purpose of the department).

98 *Wai'ola o Moloka'i*, 83 P.3d at 673–74.

99 *Id.* at 674.

100 Hawaiian Homes Commission Act of 1920, Pub. L. No. 34, 42 Stat. 108, 108 (1921).

has a reservation of 2.905 mgd of water in the Kualapuʻu aquifer, which it pumps and distributes for domestic and agricultural purposes.[101]

1. MR-Waiʻola's Request for a Water Use Permit

Seeking to revitalize the island's economy, Molokaʻi Ranch created a development plan premised on incorporating the company's agricultural and ranching activities with low-impact tourism and light industry.[102] To effectuate this plan, MR-Waiʻola required increased access to groundwater.[103] Accordingly, it applied for a water use permit to pump approximately 1.25 mgd from the Kamiloloa aquifer system.[104]

In 1998, the Commission on Water Resource Management partially approved MR-Waiʻola's request and issued an "'interim water use permit' . . . for the reasonable-beneficial use of 655,928 gpd [gallons per day]," to be withdrawn from Molokaʻi's Kamiloloa aquifer system.[105] Shortly thereafter, DHHL petitioned for a contested case hearing on MR-Waiʻola's permit application.[106] DHHL argued that the proposed use would interfere with its own existing wells in the adjacent Kualapuʻu aquifer, and that MR-Waiʻola's use would adversely affect the quality and quantity of waters used to support Hawaiian homelands on Molokaʻi.[107] The commission granted a contested case hearing in which the Office of Hawaiian Affairs and Molokaʻi residents intervened on the side of DHHL.[108]

In the hearing, the commission considered whether MR-Waiʻola's proposed use was consistent with section 174C-49(a) of the State Water Code, which requires a permit applicant to establish its proposed use "[i]s consistent with the public interest," and that the use will not interfere with the rights of DHHL.[109] The commission determined that the values set forth in the water code encompassed those in the public trust doctrine.[110] Acknowledging this connection to the public trust, the commission recognized "its public trust responsibilities over all waters of the State," though ultimately found that MR-Waiʻola's proposed use did not violate any trust obligations.[111] The commission disagreed with

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101 *Waiʻola o Molokaʻi*, 83 P.3d at 675.

102 *Id.* at 673.

103 *Id.* at 674.

104 *Id.* Of the requested 1.25 mgd allotment, MR-Waiʻola asked for 200,000 to 220,000 gallons per day (gpd) to meet its current water needs, and an additional 1,000,000 gpd to meet its future development needs over fifteen to twenty years. *Id.*

105 *Id.* at 678.

106 *Id.* at 677.

107 *Id.* at 677, 681.

108 *Id.* at 670, 677.

109 *Id.* at 677–78, 681; *see* HAW. REV. STAT. ANN. § 174C-49(a) (2016).

110 *Waiʻola o Molokaʻi*, 83 P.3d at 680. In particular, the Code requires the state and its agencies to consider a wide variety of public interests when granting permits, including protection of waters and the environment, scenic beauty, fish and wildlife, and Native Hawaiian traditional and customary practices. *See* HAW. REV. STAT. ANN. §174C-2(c) (2016).

111 *Waiʻola o Molokaʻi*, 83 P.3d at 680.

DHHL's argument that MR-Waiʻola's proposed use of the Kamiloloa aquifer system would interfere with DHHL's existing wells located in the adjacent Kualapuʻu aquifer system.[112] Instead, the commission concluded that "DHHL's 'reservations' were aquifer-specific and that . . . MR-Waiʻola's [proposed water use in one aquifer w]ould not interfere with DHHL's reservation" rights in an adjacent aquifer.[113] The commission ultimately ruled that MR-Waiʻola had satisfied all requirements for a permit granting 655,928 gpd in the Kamiloloa aquifer system.[114]

2. The Hawai'i Supreme Court's Decision

DHHL and the intervenors argued to the Hawaiʻi supreme court that the commission failed in its public trust duties "to set aside adequate reservations of water to meet DHHL's current and future needs and to insure [sic] that other users do not interfere with DHHL's reservations of water, all of which takes priority over other government and private interests."[115] The commission countered that it adequately fulfilled its public trust duties because it evaluated available water quantities and competing interests and made the decision to allow a permit for only 655,928 gpd, or *one-half* of the amount of water that MR-Wailola originally requested.[116] Reviewing the arguments, the supreme court drew several conclusions.

First, the court recognized that water reservations constitute a public trust purpose pursuant to *Waiāhole Ditch*[117] and to article XI, sections 1 and 7 of the state constitution.[118] Because the Hawaiʻi Water Code requires the state to reserve sufficient water for domestic and agricultural activities on land leased to Native Hawaiians, DHHL's water reservations "are entitled to the full panoply of constitutional protections afforded the other public trust purposes enunciated . . . in *Waiāhole*."[119] Accordingly, the commission had a duty to protect the availability of water resources and to balance competing interests before granting MR-Waiʻola's permit.[120]

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112 *Id.*

113 *Id.* at 686. The commission supported its "aquifer-specific" determination with two case studies, the McNulty Model and the United States Geological Survey (USGS) Model. *Id.* at 679–80. The McNulty model predicted that "pumping 1.25 mgd from the Kamiloloa aquifer" would result in minimal water-level declines to the adjacent Kualapuʻu aquifer. *Id.* The USGS model also predicted that resulting water-level declines in Kualapuʻu would be minimal and "likely to be less than normal seasonal fluctuations of the groundwater level." *Id.* at 680.

114 *Id.* at 678.

115 *Id.* at 691.

116 *Id.*

117 *Id.* at 693.

118 *Id.* at 694.

119 *Id.*

120 *Id.*

Second, the court found that the commission fulfilled its public trust duty "to protect DHHL's existing legal uses in [the] Kualapuʻu" aquifer.[121] Under the *Waiāhole Ditch* balancing test, the commission properly addressed the potential impact of MR-Waiʻola's proposed use on DHHL's existing wells for two reasons.[122] First, the commission considered two case studies in reaching its decision, both of which predicted that pumping MR-Waiʻola's requested 1.25 mgd of water would not have significant impacts on waters in DHHL's existing Kualapuʻu wells.[123] Second, the commission granted a permit for only half of the amount of water Waiʻola requested, making it even less likely that DHHL would face water-level declines in its wells.[124]

Finally, the court concluded that the commission failed to hold MR-Waiʻola to its burden under HRS 174C-49(a)(7),[125] which requires permit applicants to show affirmatively that a proposed use "[w]ill not interfere with the rights of the department of Hawaiian home lands."[126] In this case, MR-Waiʻola itself presented no evidence to show that its proposed use would not interfere with DHHL's water reservations.[127] The commission was obligated to hold MR-Waiʻola to its burden to provide evidence, which it failed to do.[128] Accordingly, the court vacated and remanded the case back to the commission to establish additional findings of fact and conclusions of law.[129] Whether the commission came to a decision upon remand is unclear. As the ranch's owners halted all operations and placed Molokaʻi Ranch up for sale in 2017, the case's status remains uncertain.[130] The vague outcomes in this case stand in stark contrast to the results of a subsequent case, *Kauai Springs, Inc. v.*

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121 *Id.* at 695.

122 *See id.* (noting that *Waiāhole* does not preclude economic development or commercial water uses, but instead requires a balancing between economic development and protection of public trust resources).

123 *Id.* at 695–96.

124 *Id.* at 696.

125 *Id.* at 695.

126 HAW. REV. STAT. ANN. §174C-49(a)(7) (2016).

127 *Waiʻola o Molokaʻi*, 83 P.3d at 695. The commission automatically concluded that MR–Waiʻola had met its burden because DHHL possessed an aquifer-specific reservation in the Kualapuʻu aquifer, and because MR–Waiʻola's use was in a separate aquifer. *Id.* However, "the aquifer-specific nature of DHHL's reservation" did not relieve MR–Waiʻola of its burden under HRS § 174C-49(a)(7). *Id.*

128 *Id.*

129 *Id.*

130 "In recent decades . . . a small but vocal group of Molokai residents has . . . successfully block[ed] proposals for hotels . . . golf courses," and other forms of development. Graham, *supra* note 91. In 2008, a standoff between activists and Molokaʻi Ranch over a proposed residential development resulted in the closure of all the ranch's operations, including a lodge, golf course, and cattle operations. *Id.*; *Molokai Ranch Sale has Community Talking Public, Private Options*, KHON2 (Feb. 2, 2019), https://perma.cc/88SL-XE7N. The ranch has been up for sale since 2017, with an asking price of $260 million. *Id.* Although some residents hoped for a state buy-out of the property, Molokaʻi Ranch remained on the market as late as 2019. *See id.* (discussing the plan for the state to buy the property).

Planning Commission of the County of Kaua'i,[131] in which decisions by the courts and local water commission led to the unequivocal shutdown of a for-profit company operating off the sale of public water resources.[132]

C. Kaua'i Springs

Kaua'i Springs, Inc. was a water bottling and distribution company that operated out of an agricultural district in Koloa on the south shore of Kaua'i.[133] In the early 2000s, the company's owners, the Satterfields, leased the Koloa property from Makana Properties, LLC in order to begin their business.[134] In 2003, the County of Kauai issued Kaua'i Springs zoning and building permits for the construction of a "bottled water processing facility."[135] In 2004, the Department of Health issued a four-year permit authorizing the company to operate as a "bottled water manufacturer," and Kaua'i Springs subsequently began operating its bottling and distribution facility.[136]

In what appeared to be the first attempt to bottle and sell Hawai'i's freshwater resources, Kaua'i Springs purchased water from landowners above an underground spring several miles away.[137] Water from the spring flowed through a gravity-fed system to a private tank into which Kaua'i Springs installed a tap, connecting the tank to an underground line feeding the water bottling facility.[138] The tank also fed other neighboring properties, with excess waters from the tank flowing into the nearby Waihohonu stream.[139] After pumping the water, Kaua'i Springs would purify the water, bottle it into five-gallon containers, and deliver the bottles to local customers.[140]

In 2005, the County Planning Department discovered that Kaua'i Springs was operating in violation of the Comprehensive Zoning Ordinance for the County of Kaua'i, which specifies that "the use of the Property 'for Industrial processing and packaging purposes is not generally permitted within the Agriculture District.'"[141] In 2006, the Planning Department issued a cease and desist letter to the property

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131 (*Kaua'i Springs*) 324 P.3d 951 (Haw. 2014).

132 *Id.* at 956, 991.

133 *Id.* at 956.

134 Caleb Loehrer, *Left High and Dry in Koloa*, GARDEN ISLAND (May 19, 2019), https://perma.cc/B62W-T4WD; *Kaua'i Springs*, 324 P.3d at 956.

135 *Kaua'i Springs*, 324 P.3d at 956.

136 *Id.*

137 *Id.* at 956, 961.

138 *Id.* at 956–57.

139 *Id.*

140 *Id.* at 957.

141 *Id.* (quoting KAUAI, HAW., CODE § 8–7.2 (1972)); *see*, KAUAI, HAW., CODE § 8–19.1 (1987) ("No person shall undertake any construction or development or carry on any activity or use, for which a zoning permit is required by this Chapter, or obtain a building permit for construction, development, activity or use regulated by this Chapter, without first obtaining the required zoning permit."); KAUAI, HAW., CODE § 8–7.2 (1987) (specifying the uses and structures permitted in agriculture districts).

owners.[142] Later that year, Kauaʻi Springs submitted an application to the Planning Department requesting permits "for a water harvesting and bottling operation."[143] The Planning Department accepted the application and held four public hearings on the issue.[144] Throughout the hearing process, the department called for input from various state and local agencies.[145] One agency, the Office of Hawaiian Affairs, submitted a letter stating it was concerned with the application "because it involves the use of an important public trust resource—fresh water—for personal financial gain."[146] In 2007, the Planning Commission voted 6-1 to deny the permits and ordered Kauaʻi Springs to shut down its operations.[147]

1. Lower Court Rulings

Kauaʻi Springs appealed, and the circuit court reversed in part and vacated in part the Planning Commission's decision.[148] The circuit court concluded the record showed no evidence that Kauaʻi Springs' use would affect public trust resources, and that the "[c]ommission did not identify any other outstanding regulatory processes that it claimed must have been fulfilled in order to satisfy any duty under the public trust that it may have had."[149] The court ruled in favor of Kauaʻi Springs, holding that the Planning Commission exceeded its authority and abused its discretion.[150]

In its subsequent challenge to the circuit court's decision, the Planning Commission questioned whether the commission had public trust obligations to evaluate Kauaʻi Springs' water use.[151] The intermediate court of appeals determined that Kauaʻi Springs' "proposed use of the [p]roperty directly affects a public trust resource" and that the Planning Commission was required to consider the public trust in deciding whether to approve Kauaʻi Springs' permit applications.[152] The court of appeals consequently vacated the circuit court's ruling and remanded the case to the Planning Commission.[153]

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142 *Kauaʻi Springs*, 324 P.3d 951, 957 (Haw. 2014).
143 *Id.*
144 *Id.*
145 *Id.* at 957–58.
146 *Id.* at 961.
147 *Id.* at 962, 964.
148 *Id.* at 964.
149 Kauaʻi Springs v. Planning Comm'n (*Kauaʻi Springs Int. App.*), 312 P.3d 283, 291, 297–98 (Haw. Ct. App. 2013) .
150 *Kauaʻi Springs*, 324 P.3d 951, 967 (Haw. 2014).
151 *Id.*
152 *Kauaʻi Springs Int. App.*, 312 P.3d at 303.
153 *Id.* at 286, 310.

2. The Hawai'i Supreme Court's Decision

On appeal from Kaua'i Springs, the Hawai'i supreme court reviewed the Planning Commission's decision.[154] The court concluded that the commission had authority under the public trust doctrine to investigate Kaua'i Springs' right to pump water for commercial use, and that the public trust doctrine imposed an affirmative duty on Kaua'i Springs to demonstrate such a right.[155] Drawing heavily from *Waiāhole Ditch*, the court distilled several general principles that state agencies must consider when evaluating permits for use of public resources: First, the authority of the state and its agencies "precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes" and "empowers the state to revisit prior diversions and allocations."[156] Second, the state has an affirmative duty "to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[157] Third, the state "must weigh competing public and private water uses on a case-by-case basis."[158]

Drawing from *Wai'ola o Moloka'i*, the court also established that a permit applicant is obligated to affirmatively demonstrate that a proposed use will not significantly affect a protected use.[159] Thus, the state and its agencies may not grant a permit for use of public waters unless the applicant affirmatively shows that the proposed use does not conflict with established trust uses of water.[160] In this case, because the commission clearly had the authority to require Kaua'i Springs to affirmatively demonstrate its right to use water, the Planning Commission's findings of fact and conclusions of law were not erroneous.[161] However, the court remanded the case to the commission for clarification on its reasoning, explaining that "clarity and completeness" are especially important when an agency is acting "as a public trustee."[162]

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154 *Kaua'i Springs*, 324 P.3d at 956, 973.

155 *Id.* at 984.

156 *Id.* at 982 (quoting *Waiāhole Ditch*, 9 P.3d 409, 453 (Haw. 2000)).

157 *Id.* (quoting *Waiāhole Ditch*, 9 P.3d at 453).

158 *Id.* (quoting *Waiāhole Ditch*, 9 P.3d at 454).

159 *Id.* at 984; Protected uses, as articulated in *Waiāhole* and *Wai'ola o Moloka'i*, include 1) drinking water and other domestic water uses, 2) use of water in the exercise of Native Hawaiian traditional and customary rights, 3) the maintenance of waters in their natural state, and 4) reservations of water as articulated in the State Water Code. *See Waiāhole Ditch*, 9 P.3d at 448–50 (articulating uses for water that are protected by the Hawaiian water resources trust); *Wai'ola o Moloka'i*, 83 P.3d 664, 694 (Haw. 2004) (articulating uses for water that are protected by the Hawaiian water resources trust).

160 *Kauai Springs*, 324 P.3d at 984.

161 *Id.* at 985, 991.

162 *Id.* at 991.

3. The Planning Commission's Decision on Remand

After more than a decade of legal battles, Kauaʻi Springs shut down operations in 2019.[163] Following the supreme court's remand in 2014, the Satterfields spent almost five years arguing with the Planning Commission over permits.[164] Finally, in 2018, the Planning Department denied the permits in a unanimous 6-0 vote.[165] The commission again ordered Kauai Springs to close its doors, and this time added a $10,000 fine.[166]

IV. LANDS

Although Hawaiʻi public trust case law pertains largely to freshwater resources, strong statements from the courts, in combination with public trust language in the state constitution, suggest that the Hawaiʻi public trust may extend to a large array of natural resources, including lands.[167] The Hawaiʻi supreme court first addressed the state's public lands trust in *State by Kobayashi v. Zimring*,[168] a 1977 case concerning land extensions created during volcanic eruptions.[169] Although the public land trust went largely unaddressed in the courts for decades following *Zimring*, Hawaiʻi courts have recently issued multiple public trust lands cases, including *Pōhakuloa*, decided in 2019,[170] and *Mauna Kea II*, decided in 2018.[171] This Comment examines each in turn.

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163 Loehrer, *supra* note 134.

164 *Id.*

165 *Id.* Commission Vice Chair Glenda Nogami Streufert indicated that the primary thrust of the commission's deliberations was the public trust and its potential impact on present and future generations. *Id.* And Commissioner Kimo Keawe stated:

> The resources that we have — the land and the water — we need to make sure that the decisions that we make are not for a few; the decisions we make are for the public in general and to protect that trust that has been entrusted to us for future generations.

Id.

166 *Id.* Although the Satterfields dismantled their business, in May 2019 their lawyers filed an appeal with the Planning Commission, contesting the fine and requesting that the commission reconsider the case. *Id.*

167 *See, e.g.*, *Mauna Kea II*, 431 P.3d 752, 773 (Haw. 2018) (holding that the public trust applied to a mountain summit not adjacent to any bodies of water); HAW. CONST. art. XI, § 1 ("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.").

168 566 P.2d 725 (Haw. 1977).

169 *Id.* at 727.

170 *Pōhakuloa*, 449 P.3d 1146, 1150 (Haw. 2019) (concerning lands leased to the federal government for military training grounds).

171 *Mauna Kea II*, 431 P.3d at 757 (concerning a disagreement between scientists and Native Hawaiians over the fate of Hawaiʻi's tallest mountain).

A. Lava Extensions

In 1955, Kīlauea Volcano erupted for the first time since 1840, destroying twenty-one homes and covering 3,900 acres of land in Puna on Hawai'i's Big Island.[172] One lava flow spread to the coastal town of Kehena, and upon reaching the ocean, formed a new lava delta extending 365 meters into the sea.[173] In *Zimring*, the Hawai'i supreme court considered whether lava extensions to property at Kehena belonged to the adjacent property owners or if the extensions instead belonged to the public.[174] Applying public trust principles, the court concluded that the 1955 Kehena lava extensions and all future lava extensions belong to the public and are held in trust by the state.[175]

In *Zimring*, the state sued to quiet title against the Zimrings and their predecessors to approximately 7.9 acres of new shoreline land formed in the 1955 Puna eruption.[176] In 1960, the Zimrings acquired deeds to two adjacent properties, both of which were located "along high water mark" at Kehena in Puna, and both of which had been conveyed twice previously, in 1944 and 1959.[177] After acquiring "the deeds, the Zimrings entered upon the [adjacent] lava extensions and made improvements" to the land, "including bulldozing and planting trees and shrubs."[178] In 1968, the state formally demanded that the Zimrings vacate the lava extension and cease any further activities upon the disputed land, then filed suit to quiet title.[179]

The circuit court ruled in favor of the Zimrings, concluding that the state failed to prove title in the disputed land.[180] The court reasoned that traditional usage prior to 1892[181] gave littoral landowners title to land created along the seashore by volcanic eruptions.[182] The state appealed, arguing the government had satisfied its burden to establish title to the land because all private ownership in Hawai'i derives from Land Commission Awards, Royal Patents, or other documents of title, "and that absent such documents, title belongs to the sovereign."[183] The state claimed that, because the newly created property had no land grant, it could not be privately owned.[184] On appeal, the Hawai'i supreme court

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172 *Kīlauea 1955 Lower East Rift Zone Eruption in Lower Puna*, U. S. GEOLOGICAL SURV., https://perma.cc/W5FS-E6SL (last visited Nov. 3, 2021).

173 *Id.*

174 *Zimring*, 566 P.2d 725, 734 (Haw. 1977).

175 *Id.* at 735.

176 *Id.* at 727.

177 *Id.* at 728.

178 *Id.*

179 *Id.*

180 *Id.* at 729.

181 Hawai'i's independence from the United States ended in 1892, as the overthrow occurred the following year. Mileka Lincoln, *Hundreds Mark 126 Years Since Overthrow of Hawaiian Kingdom*, HAW. NEWS NOW (Jan. 17, 2019), https://perma.cc/UB2P-CCJW.

182 *Zimring*, 566 P.2d at 729.

183 *Id.*

184 *Id.* at 731.

based its analysis and conclusions on the origins of private land title in Hawaiʻi.[185]

1. Historical Land Grants and Traditional Usage

During the Māhele, the government divided all Hawaiʻi lands and parceled them among the king, chiefs, and commoners, who received Land Commission Awards certifying title to their private property.[186] After the Māhele, whenever the government sold public lands (as it sometimes did to obtain revenues for public expenditures), it issued documents called grants, or Royal Patent Grants, that certified private title to the land.[187] Based on this system of land awards and grants, the court declared the basic premise in Hawaiʻi property law is "that land in its original state is public land and if not awarded or granted, such land remains in the public domain."[188] Thus, to establish private title to land, claimants generally had to show that they or a predecessor acquired a Land Commission Award, Royal Patent Grant, or other government grant for the land in question.[189] Because the lava extension adjacent to the Zimrings' property was created in 1955—long after the government stopped issuing land grants—there could be no grant for it.[190]

Although the Zimrings were unable to establish title via a land grant, the court indicated that the Zimrings alternatively could establish private title by demonstrating the existence of a pre-1892 Hawaiian usage.[191] In other words, the Zimrings could establish title by showing the existence of a historical custom of awarding lava extensions to private landowners.[192] The circuit court concluded there was enough evidence to establish a traditional usage, though conceded that the evidence was slight.[193] The Hawaiʻi supreme court disagreed, concluding there was too little evidence to establish a traditional usage.[194] Unable to identify either a land grant or traditional usage, the court next turned to examining general common law doctrines.

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185 *Id.* at 729–32.
186 *Id.* at 730–31.
187 *Id.* at 731.
188 *Id.*
189 *Id.*
190 *Id.* at 732.
191 *Id.* at 731. The court identified only two lava flows between 1846 (when private land ownership originated) and 1892 (when the Hawaiian Kingdom was overthrown). *Id.* at 732. Based on the two flows, the circuit court determined that the traditional usage was always to give shoreline lava extensions to adjacent landowners. *Id.*
192 *Id.*
193 *Id.*
194 *Id.*

2. Accretion and Avulsion

Surveying common law, the court determined the only potentially applicable doctrines to be those of accretion and avulsion.[195] "Accretion" refers to the gradual increase of littoral land due to soil deposits from natural forces like rivers, streams, or tidal waters.[196] Under common law, accretions belong to the contiguous landowner.[197] The Zimrings contended that, under the accretion doctrine, title to lava extensions should go to abutting land owners.[198] However, the court disagreed, finding the accretion doctrine "not directly on point."[199] The court explained that, even if the accretion doctrine applied in this case, the rule did not necessarily require giving title to the abutting landowners because a landowner's desire to preserve littoral access "must sometimes defer to other interests and considerations."[200]

Because the Zimrings could neither establish title under the common law doctrine of accretion nor under a land grant or traditional usage, the court concluded that the lava extension abutting the Zimrings' property was public land when created.[201] With no evidence of the landowner's title to the newly formed land, title passed to the state from the federal government at the time of the Admission Act.[202] The court based its reasoning largely on the origin and development of private land in Hawai'i, stating, "[i]t was long ago acknowledged that the people of Hawaii are the original owners of all Hawaiian land."[203] The court also expressed ideas of equity and anti-monopolistic sentiment, noting that, "[g]iven the paucity of land in our island state and the concentration of private ownership in relatively few citizens, a policy enriching only a few would be unwise."[204] In balancing competing interests, the court acknowledged the harm to landowners desiring to retain the beach-front

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195 *Id.* at 734.

196 *Id.*

197 *Id.* "Avulsion," on the other hand, refers to sudden shifts of land. *Id.* When land is lost by avulsion, preexisting legal boundaries remain in place. *Id.*

198 *Id.*

199 *Id.* The court does not elaborate on this point but presumably reached its conclusion because accretion generally refers to gradual accumulations rather than the sudden creation of large areas of new land.

200 *Id.*

201 *Id.* at 739.

202 *Id.* at 736.

203 *Id.* at 729.

204 *Id.* at 735. Though the court did not elaborate on the dangers of concentrating private land ownership in the hands of only a few, it likely had in mind Hawai'i's long-term struggles with distributing land equitably. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984) ("Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners.").

character of their properties but decided the balance favored the public as the original owners of all Hawaiian land.[205]

As a case of first impression, *Zimring* set important precedents for the Hawaiʻi public lands trust. *Zimring* was the first case to establish that Hawaiʻi public lands are "held in public trust by the government for the benefit, use and enjoyment of all the people."[206] Following the court's 1977 decision, a 1978 constitutional convention reaffirmed the concept of the public trust doctrine in amendments to the state constitution.[207] The 1978 constitutional amendments have formed the core of most, if not all, subsequent public trust cases,[208] including the *Pōhakuloa* and *Mauna Kea* cases concerning the administration and use of public lands.[209]

B. Pōhakuloa

In 1964, the State of Hawaiʻi Department of Land and Natural Resources (DLNR) agreed to lease three tracts of land in North Kona, Hawaiʻi Island to the United States for military purposes.[210] The United States used the land to develop the Army's approximately 134,000-acre Pōhakuloa Training Area (PTA),[211] the largest military installation in the state.[212] The PTA is considered "a vitally important training area" for the

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205 *Zimring*, 566 P.2d at 734. Mindful of the ongoing effects its decision was likely to have, the court's foresight was well considered, as Kīlauea remains one of the most active volcanoes in the world. *See* Denise Chow, *Hawaii's Kilauea is One of the World's Most Active Volcanoes but Less Deadly Than Others*, NBC NEWS (May 17, 2018), https://perma.cc/4DRB-38X4 (explaining that Kīlauea is one of the most active volcanoes in the world); *Kīlauea*, U.S. GEOLOGICAL SURV., https://perma.cc/XR7V-6DCH (explaining that Kīlauea has erupted thirty-four times since 1952) (last visited Nov. 3, 2021). Most recently, in 2018, the volcano experienced its most destructive eruption phase in recorded history. Robin George Andrews, *America's Most Hazardous Volcano Erupted This Year. Then It Erupted and Erupted*, N.Y. TIMES (Dec. 12, 2018), https://perma.cc/JS7V-2E46 (noting that the eruptions produced 320,000 Olympic swimming pools' worth of lava and destroyed 700 homes). The eruptions, which lasted several months, added approximately 875 acres of new land to the Big Island, all of which now belongs to the State. *See 2018 Eruption and Summit Collapse*, NAT'L PARK SERV., https://perma.cc/ZNH5-YGT9 (last visited Nov. 4, 2021) (discussing the addition of 875 acres of land to the island following two months of lava flow in the Lower East Rift Zone).

206 *Zimring*, 566 P.2d at 735.

207 Mauna Kea Anaina HOU v. Bd. of Land & Nat. Res. (*Mauna Kea I*), 363 P.3d 224, 252 (Haw. 2015)(Pollack, J., concurring); The Hawaiʻi Constitution states that resources shall be held in the public trust for the benefit of the people. HAW. CONST. art. X, § 5; *Id.* art. XI, §§ 1, 7; *Id.* art. XII, § 4

208 *See, e.g.*, *Waiāhole Ditch*, 9 P.3d 409, 443–44 (Haw. 2000) (holding that fresh water is a public trust resource pursuant to Article XI, sections 1 and 7).

209 *See Mauna Kea I*, 363 P.3d at 255 (Pollack, J., concurring) ("The public trust doctrine under the Hawaiʻi Constitution, and the principles that it embodies, applies to the conservation land . . . involved in this case."); *Mauna Kea II*, 431 P.3d 752, 773 (Haw. 2018) (relying on Hawaiʻi Constitution Article XI, § 1 to interpret public trust doctrine).

210 *Pōhakuloa*, 449 P.3d 1146, 1150 (Haw. 2019).

211 *Id.*

212 Jonathan Sprague, *Pohakuloa Training Area*, U.S. FISH & WILDLIFE SERV., https://perma.cc/E6JM-SFTS (last visited Nov. 4, 2021).

United States military presence in the Pacific.[213] The PTA also sits entirely on ceded lands owned by the state as part of the public lands trust.[214] The area is home to one of the rarest ecosystems in the world—a tropical, sub-alpine, dryland ecosystem—as well as dozens of threatened and endangered species, including numerous plants and birds,[215] and Hawai'i's only land mammal, the endangered Hawaiian hoary bat.[216] Native Hawaiian practitioners also use the land for cultural practices and celebrate the area for its historical and cultural significance, and for its many native species of plants and animals.[217]

Under a lease with the state, the federal government acquired a sixty-five year lease for the 22,900-acre tract of land at issue, as well as unrestricted control of the premises.[218] The agreement also subjected the United States to several duties and obligations meant to protect the area from contamination or other long-term damage.[219] Provisions included, among others, requiring the United States to take reasonable measures to move and deactivate ammunition used in training exercises; prevent unnecessary destruction of plants, wildlife, geological features, and natural resources; avoid contamination of ground and surface waters; and dispose of trash and other waste materials resulting from the military's operations.[220] Despite the obligations, the military demonstrated a seeming lack of care for the property. Native Hawaiian practitioners who used the area for cultural activities witnessed blank ammunition and other military debris strewn about the PTA lands, which they claimed negatively affected their spiritual practices and made them "feel 'angry' and 'hurt.'"[221]

In 2014, Native Hawaiian practitioners requested access to government records from the Board of Land and Natural Resources (BLNR).[222] They asked the BLNR to provide all government records showing the United States' compliance or non-compliance with its obligations under the lease, including inspection and monitoring reports.[223] The BLNR responded that its PTA file did not contain any records directly pertaining to the practitioners' request.[224] Shortly thereafter, the practitioners filed a complaint in circuit court, alleging

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213 *Id.*

214 *Pōhakuloa*, 449 P.3d at 1160 ("The public trust lands are state-owned lands held for the use and benefit of the people of the State of Hawai'i, and the State is the trustee of such lands.").

215 Sprague, *supra* note 212.

216 David Jacobs, *Distribution and Abundance of the Endangered Hawaiian Hoary Bat*, 48 PAC. SCI. 193, 197 (1994); *Wildlife*, HAW. DEP'T OF LANDS & NAT. RES., https://perma.cc/9563-NBTP (last visited Nov. 4, 2021).

217 *Pōhakuloa*, 449 P.3d at 1160.

218 *Id.* at 1150.

219 *Id.*

220 *Id.* at 1150 n.3, 1151 n.4.

221 *Id.* at 1159.

222 *Id.* at 1152.

223 *Id.*

224 *Id.*

that the state—which holds ceded lands in trust under Article XII, section 4 and Article XI, section 1 of the Constitution of the State of Hawaiʻi—breached its "duty 'to protect and maintain the public trust lands' in the PTA."[225]

1. The Circuit Court's Decision

The Hawaiʻi First Circuit Court determined that the state had breached its trust duties by failing, first, to periodically inspect and monitor the public trust lands at issue; second, to ensure the terms of the lease were being followed with regard to protecting the condition of PTA lands; and third, to take reasonable follow-up measures with the federal government after being made aware that terms of the lease may have been violated.[226] The circuit court relied on overwhelming evidence of lease violations which the DLNR failed to address.[227] Chief among its observations, the court noted that the DLNR's file contained records of only three inspections of PTA lands over the entire course of the lease, all of which failed to address any non-compliance issues.[228] The court noted that the DLNR did not have a written policy regarding the inspections of leased premises, nor did it have a written procedure to ensure the military's compliance with all terms of the lease.[229]

The court also identified several reports the DLNR received from third parties, including a 2013 environmental impact statement (EIS) from the Army.[230] The EIS indicated that "explosives and other chemicals" used in PTA activities had caused soil contamination, which posed significant risk to the land itself, to practitioners' cultural interest in the land, and "to public health, safety, and welfare."[231] The court also identified reports from designated cultural monitors,[232] who observed military debris scattered across the land, including spent shell casings, unexploded ordnance, stationary targets, junk cars, and even an old tank.[233] Numerous federal reports issued by the cultural monitors recommended that the military establish a clean-up process.[234] Despite

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225 *Id.* at 1152–53.

226 *Id.* at 1162.

227 *Id.* at 1177–80.

228 *Id.* at 1158, 1178 (explaining that one inspection in 1984 lasted "no more than one day," another in 1994 was "virtually nonexistent," and a third in 2014 made no mention as to whether the United States was in compliance or non-compliance with its lease despite noting that the PTA lands "were in unsatisfactory condition.").

229 *Id.* at 1158–59.

230 *Id.* at 1159–61.

231 *Id.* at 1161.

232 *Id.* at 1158 (explaining that "a Programmatic Agreement between state and federal agencies permitted 'cultural monitors' to be involved with inspections").

233 *Id.*

234 *See id.* at 1160 (noting that one report expressed a fear that, if the debris remained on the land, it would "be rendered unusable forever [and] one-eighth of our island will become unavailable for use by any of our future generations").

these recommendations, the state did not follow up on any of the third-party reports it received.[235]

Because the state failed to take adequate measures to protect public trust lands, the court issued an injunction barring the state from extending its PTA lease or entering into a new lease until it could ensure compliance with the existing lease.[236] The court also issued an order directing the state to fulfill its obligations regarding the leased lands.[237] To ensure compliance, the court required the state to develop a written plan establishing on-site inspections and agency protocols to handle any future breaches of the lease.[238] The state challenged the circuit court's ruling, appealing the case to the Hawai'i supreme court.[239]

2. The Hawai'i Supreme Court's Decision

Before the Hawai'i supreme court, the state argued that the circuit court failed to consider the state's cooperative agreements with third-parties in determining whether it had violated public trust obligations.[240] The state argued that it had delegated its duties to third parties, including federal agencies, and that it relied on ancillary documents—like environmental reports and cultural monitoring reports—to monitor the PTA.[241] The Hawai'i supreme court declared the state's argument to be "'squarely counter' to [its] precedent indicating that the State may not delegate its constitutional duties to [other] parties."[242] Although the court noted that it generally is not a breach of duty for the state to rely *in part* on reports prepared by third parties, the state's actions "were clearly inadequate," as the ancillary reports were infrequent, and some reports indicated that the United States was in breach of its lease.[243]

The court also made clear that the state's duties to PTA lands derive partially from the property's designation as ceded lands, which form part of the trust res pursuant to article XII, section 4 of the state constitution.[244] In order to mitigate the risk of damage to the trust res, the state is obligated to take an active role in monitoring third-party use of public trust lands.[245] However, at Pōhakuloa, the state failed to actively

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235 *Id.* at 1180.

236 *Id.* at 1162.

237 *Id.*

238 *Id.*

239 *Id.* at 1167.

240 *Id.*

241 *See id.* at 1178 ("These documents included a copy of the United States training regulations and procedures from 1970, an environmental assessment for a training exercise in 1982, a 1984 archeological survey report, a 2002 Integrated Natural Resources Management Plan, a 2004 environmental impact statement, and a 2004-2010 'Programmatic Agreement' to provide additional protection to cultural sites.").

242 *Id.*

243 *Id.* at 1179.

244 *Id.* at 1173 n.46, 1174; *see* HAW. CONST. art. XII, § 4 (stating that ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public").

245 *Pōhakuloa*, 449 P.3d at 1150.

monitor trust lands, "leaving trust beneficiaries powerless to prevent irreparable harm before it occur[ed]."[246] The court thus affirmed the circuit court's findings that the state breached its trust duties by failing to 1) monitor the public trust lands, 2) ensure the terms of the lease were being followed, and 3) take reasonable follow-up measures with the federal government.[247] Although the court later applied the same public trust principles in the recent *Mauna Kea* cases, it notably reached a very different conclusion.

C. Mauna Kea

In 2018, the Hawaiʻi supreme court approved a permit for the construction and operation of a giant telescope on the summit of Mauna Kea, a dormant volcano on the island of Hawaiʻi.[248] The Thirty Meter Telescope (TMT) "would be the largest ever contemplated in the Northern Hemisphere."[249] Scientists consider Mauna Kea the ideal place to build TMT due to the mountain's cold, dry, and stable climate—characteristics important for capturing sharp images and for seeing "much fainter and more distant objects than [is] possible with existing telescopes."[250] TMT proponents argue that construction of "the 'next generation' large telescope w[ill] facilitate cutting-edge scientific research"[251] and will aid in "answer[ing] fundamental questions about the universe."[252] Opponents of TMT include Native Hawaiians, who argue that decades of telescope construction on Mauna Kea have polluted its summit, and that construction of TMT will further desecrate the mountain, which is a sacred place in Native Hawaiian culture.[253]

For early Polynesians, the "highest points of land were the most sacred."[254] Mauna Kea, as the highest mountain in all of Polynesia, was

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246 *Id.*

247 *Id.* at 1162. In explaining the state's affirmative duties, the court used the term *mālama ʻāina*, which expresses the Hawaiian value of "caring for the land." *Id.* at 1180. Although the court required the state to take a more active role in caring for the lands of Pōhakuloa, it remains unclear what remedial steps, if any, the state has taken since the ruling. In 2020, the Army announced that it was preparing an environmental impact statement as part of its plans for seeking renewal of its lease, which is set to end in 2029. *See*, Kevin Knodell, *Army Wants to Retain Access to Big Island Training Area*, HONOLULU CIV. BEAT (Sept. 30, 2020), https://perma.cc/UZT9-PSHQ.

248 *Mauna Kea II*, 431 P.3d 752, 757 (Haw. 2018); *Mauna Kea*, NAT'L. GEOGRAPHIC, https://perma.cc/M9WC-ZVVL (last visited Nov. 7, 2021).

249 Dennis Overbye, *Hawaiian Supreme Court Approves Giant Telescope on Mauna Kea*, N. Y. TIMES (Oct. 30, 2018), https://perma.cc/QPJ8-VDHP.

250 *The Facts About TMT on Maunakea*, THIRTY METER TELESCOPE, https://perma.cc/KA2E-GJCJ (last visited Oct. 23, 2021).

251 *Mauna Kea I*, 363 P.3d, 224, 227–28 (Haw. 2015).

252 THIRTY METER TELESCOPE, *supra* note 250.

253 *Mauna Kea I*, 363 P.3d at 228.

254 UNIV. OF HAW. BD. OF REGENTS, MAUNA KEA SCIENCE RESERVE MASTER PLAN, at I - 1 (2000).

the most sacred of all.[255] In Hawaiian mythology, Mauna Kea is the meeting place of *Wākea* (Sky Father) and *Papa* (Earth Mother), who came together to create the Hawaiian people.[256] The summit area in particular is a *wao akua* (place where gods reside),[257] and is the dwelling place of the snow goddess *Poli'ahu* and the deities *Lilinoe* and *Waiau*.[258] In pre-contact Hawai', the summit, as a realm of gods, was forbidden "to all but the high-ranking chiefs and priests."[259] Today, Native Hawaiian people continue to use Mauna Kea as a site for worship and spiritual contemplation.[260]

1. Development for Astronomical Uses

The summit of Mauna Kea is comprised of ceded land held by the state and managed by the DLNR and its board.[261] In 1968, the BLNR entered a sixty-five-year general lease with the University of Hawai'i for the development and operation of the Mauna Kea Science Reserve (MKSR).[262] Soon after entering the lease, the University began to establish astronomical observatories on Mauna Kea, constructing a total of thirteen telescopes as of 2021.[263]

The BLNR determined that, over the years, construction of the observatories and subsequent access roads has had a significant adverse impact on natural resources, including soils and slope stability.[264] Alleged mismanagement led to a program audit in 1998, which "concluded that 'little was done' to protect" Mauna Kea's natural resources since MKSR began constructing telescopes in 1968.[265] The audit, in turn, led the

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255 *Id.*

256 MAUNA KEA VISITOR INFORMATION STATION, CULTURE, ASTRONOMY AND NATURAL HISTORY, https://perma.cc/8PL3-XNLH; SACRED LANDSCAPE, KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, https://perma.cc/DCZ6-RVNW.

257 *In re* Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, 431 P.3d 752, 757 (Haw. 2018).

258 *Mauna Kea II*, 431 P.3d 752, 758 (Haw. 2018); *The Myths and Legends of Poli'ahu: The Goddess of Snow*, HAW. LIFE VACATIONS (Jan. 15, 2018), https://perma.cc/LP2D-WDXF.

259 *Mauna Kea II*, 431 P.3d at 758.

260 *See Indigenous Religious Traditions: Mauna Kea*, COLO. COLL., https://perma.cc/5YMC-XXLL (last visited Jan. 18, 2022) ("Modern Native Hawaiians continue to regard Mauna Kea with reverence and many cultural and religious practices are still performed there.").

261 MAUNA KEA SCIENCE RESERVE MASTER PLAN, *supra* note 254, at VIII - 13, XII - 3.

262 *Mauna Kea II*, 431 P.3d at 758.

263 *Id.*; *Maunakea*, OFF. OF HAWAIIAN AFFS., https://perma.cc/8WZ3-BMP8 (last visited Nov. 4, 2021).

264 *In re* Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, BLNR-CC-16-002, at 22 (Bd. Land Nat. Res. Sept. 28,
2017) (findings of fact, conclusions of law and decision and order) [hereinafter Mauna Kea Contested Case Hearing].

265 Chad Blair, *OHA Sues State, UH Over 'Longstanding Mismanagement' of Mauna Kea*, HONOLULU CIV. BEAT (Nov. 8, 2017), https://perma.cc/B5DP-ATPP.

University of Hawaiʻi to adopt a new Master Plan in 2000.[266] Several of the Master Plan's goals echo public trust language from the state's constitution: The plan aims to "[p]reserve and manage cultural resources in a sustainable manner so that future generations may share in the understanding and knowledge of the mountain's archaeological and cultural sites."[267] The plan also envisions MKSR "as a Hawaiian place with significant and unique cultural, natural, educational . . . and recreational values."[268] However, despite the plan's lofty goals, accusations of mismanagement have persisted, and the University has expressed no interest in curbing the use of Mauna Kea for scientific research.[269]

In 2003, Caltech and the University of California, along with an international team including Japan, China, India, and Canada, collaborated to form an organization known as the Thirty Meter Telescope International Observatory (TIO).[270] The organization proposed to construct TMT at an estimated cost of $2 billion.[271] If constructed, TMT would "be three times as wide, with nine times more area, than the" world's current largest visible-light telescope.[272] The larger design is expected to allow for deeper and sharper images than all other existing telescopes.[273] Native Hawaiian groups opposed the project, arguing that TMT would further pollute and desecrate the mountain.[274]

In 2010, the University of Hawaiʻi, on behalf of TIO, submitted a Conservation District Use Application to the BLNR.[275] The BLNR subsequently held two public hearings on the University's application, at which various opponents requested the BLNR delay action on the permit until it could hold a contested case hearing.[276] Despite those objections, the BLNR voted to approve the permit at a public board meeting in 2011, and the agency granted a Conservation District Use Permit in 2013 without holding a contested case hearing.[277]

Native Hawaiian practitioners appealed the decision to Hawaiʻi's Third Circuit, which affirmed the BLNR's decision.[278] However, on appeal to the Hawaiʻi supreme court, the court held that the BLNR's approval of the permit before conducting a contested case hearing violated the

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266 *Mauna Kea II*, 431 P.3d at 759.

267 MAUNA KEA SCIENCE RESERVE MASTER PLAN, *supra* note 254, at II - 1.

268 *Id.*

269 *See OHA Files Lawsuit Against State for Mismanagement of Mauna Kea*, OFF. HAW. AFFS. (Nov. 8, 2017), https://perma.cc/GE7M-GJQG (explaining the University of Hawaiʻi's mismanagement of Mauna Kea).

270 *Mauna Kea II*, 431 P.3d at 759.

271 Overbye, *supra* note 249.

272 *The Science Behind the Thirty Meter Telescope*, THIRTY METER TELESCOPE, https://perma.cc/TS6P-U463 (last visited Nov. 4, 2021).

273 *Id.*

274 Overbye, *supra* note 249.

275 *Mauna Kea I*, 363 P.3d 224, 227 (Haw. 2015).

276 *Id.* at 227–28.

277 *Id.* at 228.

278 *Mauna Kea II*, 431 P.3d 752, 760 (Haw. 2018).

practitioners' due process rights by denying practitioners' "right 'to be heard at a meaningful time and in a meaningful manner.'"[279] The court sent the case back to the BLNR, which conducted contested case hearings in 2016 and 2017.[280] The BLNR once again approved the permit for TMT.[281] In 2018, the Hawai'i supreme court affirmed BLNR's authorization of the permit and green-lighted the project.[282] In their decisions, both the supreme court and the BLNR addressed Hawai'i's public trust doctrine to varying degrees.

2. Mauna Kea I

On first hearing the case, in *Mauna Kea Anaina HOU v. Board of Land and Natural Resources (Mauna Kea I)*,[283] the Hawai'i supreme court considered whether the BLNR's approval of the permit prior to holding a contested case hearing violated petitioners' due process rights under the state constitution.[284] The court's majority held that BLNR essentially "put the cart before the horse" by voting on the permit before holding a contested case hearing and, in so doing, violated the practitioners' procedural due process rights.[285] The court vacated the permit and remanded with orders to conduct a contested case hearing.[286]

3. BLNR Contested Case Hearing

On remand from the Hawai'i supreme court, the BLNR held contested case hearings beginning in 2016.[287] The following year, the agency issued its final decision, which concluded that, although the public trust doctrine applies to Mauna Kea, the construction of TMT would not violate public trust principles.[288] The agency acknowledged that, under the state constitution, Mauna Kea's public lands are "unquestionably" part of the public trust.[289] Thus, the BLNR must act as a trustee in managing those lands.[290] However, according to the agency, managing trust lands does not equate to "absolute preservation" of those lands.[291]

Instead of requiring absolute preservation of natural resources, the public trust doctrine required the agency to weigh environmental factors

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279 *Mauna Kea I*, 363 P.3d at 228 (quoting Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 773 P.2d 250, 261 (1989)).

280 *Mauna Kea II*, 431 P.3d at 760.

281 *Id.* (noting that five of seven board members signed the order granting a permit).

282 *Id.* at 782.

283 363 P.3d 224.

284 *Id.* at 227.

285 *Id.* at 229.

286 *Id.* at 247.

287 *Mauna Kea II*, 431 P.3d 752, 760 (Haw. 2018).

288 Mauna Kea Contested Case Hearing, *supra* note 264, at 288.

289 *Id.* at 238.

290 *Id.*

291 *Id.* at 240.

against social, economic, and other factors.[292] In this case, the agency considered several specific factors, including the unique quality of Mauna Kea's natural resources, the public nature of the project, and Native Hawaiian cultural practices, among others.[293] Regarding the unique quality of Mauna Kea's natural resources, the agency determined that the mountain's natural beauty would not be further degraded by the construction of TMT, and that using the mountain's clear air and dark skies for astronomy would further human knowledge and encourage interest in science.[294] Regarding the public nature of the project, the agency determined that construction of TMT would not constitute a private use because the project would promote knowledge and higher education in Hawai'i's public institutions and would help to "maintain Hawai'i's place as a world leader in scientific research."[295] Finally, regarding Native Hawaiian cultural practices, the agency determined that TMT would not violate native land uses, first, because evidence indicated that Native Hawaiian practitioners do not use the specific location site of TMT, and second, because Native Hawaiian practitioners have successfully co-existed with astronomy projects on Mauna Kea for many years.[296]

Weighing environmental, social, and economic factors, the agency determined that the balance between protection and maximum reasonable and beneficial use weighed in favor of TMT.[297] Based in part on its findings concerning the public trust doctrine, the agency approved the permit for TMT.[298] Native practitioners again appealed to the Hawai'i supreme court.[299]

4. Mauna Kea II

The Hawai'i supreme court examined whether construction of TMT would violate public trust principles under article XI, section 1 of the state constitution.[300] The court affirmed the BLNR's determination that the public trust doctrine applies to Mauna Kea, as the plain language of the constitution makes it clear that *all* public natural resources, including land, are held in trust for the benefit of the people.[301] However, the court

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292 *Id.* (citing *Waiāhole Ditch*, 9 P.3d 409, 453–55 (Haw. 2000)).

293 *Id.* at 239–40, 242–44, 254.

294 *Id.* at 239–41.

295 *Id.* at 241.

296 *Id.* at 251. *But see, e.g.*, *id.* at 117, 122 (chronicling testimony from Native Hawaiian practitioners who claimed that telescopes are not clean enough for the summit of Mauna Kea because the summit should be a *wao akua* ("realm of the gods") where only the gods and elements are, and that buildings and human activities should stay down in the *wao kanaka* ("realm of people")).

297 *Id.* at 238, 241–42.

298 *Id.* at 265.

299 *Mauna Kea II*, 431 P.3d 752 (Haw. 2018).

300 *Id.* at 761, 773.

301 *Id.* at 773–74.

again ruled that construction of TMT would not violate public trust principles.[302]

Balancing resource use against resource protection, the court reasoned, first, that TMT would not involve the irrevocable transfer of public resources to a private party because the telescope must be decommissioned at the end of its useful life or at the end of the lease; second, that permit conditions for TMT required MKSR to take active measures to help protect Mauna Kea's lands, including funding restoration projects and decommissioning some of MKSR's existing telescopes; and third, that Native practitioners' use of the land would not be significantly affected by TMT because the practitioners do not use the specific location site of TMT, and Native Hawaiian uses on Mauna Kea have successfully co-existed with MKSR's astronomy projects for many years.[303]

The court also indicated that using Mauna Kea to develop TMT would produce four significant benefits. First, TMT would be a world-class telescope that would aid in "answer[ing] some of the most fundamental questions regarding our universe."[304] Second, the TMT project committed to a substantial community benefits package that funds science, technology, engineering, and math education for Hawai'i students.[305] Third, the project committed to implementing a workforce pipeline program to aid in developing a highly qualified pool of local workers trained in science, engineering, and technical fields.[306] Finally, TIO would be the first telescope developer on Mauna Kea to make sublease payments to the University for use rights.[307] Determining that public benefits outweighed public harm, the court concluded that the balance favored TMT and that development of the project would not violate public trust principles.[308] The Hawai'i supreme court, therefore, affirmed the BLNR's decision to grant a permit for the construction of TMT.[309]

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302 *Id.* at 775.

303 *Id.* at 774–75.

304 *Id.* at 775.

305 *Id.*

306 *Id.*

307 *See id.* (noting that payments would go toward management of the mountain through the Mauna Kea Special Management Fund).

308 *Id.*

309 *Id.* at 782. Although the supreme court green-lighted the TMT project, construction has yet to begin. Blaze Lovell, *As TMT Works To Build On Mauna Kea, Two Telescopes Are Coming Down*, HONOLULU CIV. BEAT (Sept. 24, 2021), https://perma.cc/8W8T-J6C9. Beginning in July, 2019, large numbers of protesters made a last-ditch effort to stop the project by blocking the access road to the summit. Doris Elin Urrutia, *At Thirty Meter Telescope Protest, Native Hawaiian Elders Leave Mountain Over Coronavirus Threat*, SPACE (Apr. 2, 2020), https://perma.cc/KS96-FLQZ. Although the demonstrations paused indefinitely following the onset of the 2020 COVID-19 pandemic, the protests nonetheless succeeded in causing significant delays and creating uncertainty regarding the future of TMT. Timothy Hurley, *Start of TMT Construction May be Delayed 3 Years*, HONOLULU STAR ADVERTISER (July 30, 2020), https://perma.cc/GSS8-VN86. For more information on the protests at

5. Inclusive, Participatory Processes

Although the court ultimately issued an opinion that harmed native interests, the *Mauna Kea* cases make clear that the state and its agencies must make space for Native Hawaiian voices in their permitting procedures for allocating trust resources. In *Mauna Kea I*, the Hawaiʻi supreme court found that the state agency had violated protestors' due process rights by refusing them an adequate forum in which to express their concerns.[310] The agency ultimately granted (and the court approved) permits for telescope construction, but only after lengthy administrative proceedings and two rounds of judicial review.[311] *Mauna Kea I* and *II* establish that, going forward, the public trust framework requires administrative processes that include opportunities for meaningful public participation, and for participation from native communities in particular.

The state's public trust case law also makes clear that courts must consider Native Hawaiian rights as a factor in balancing protection and use of trust resources. The state and its agencies could seek to achieve this balance by making a point to include native voices in collaborative decision-making processes. By emphasizing the development of solutions that reflect an understanding of Native Hawaiian traditional and customary rights, the state may be able to attain the balanced outcomes prescribed by the public trust doctrine through its own administrative proceedings and thereby avoid costly court intervention.

V. CONCLUSION

Hawaiʻi's public trust cases derive much of their strength from constitutional language adopted during the state's 1978 Constitutional Convention. The constitutional language, in turn, was heavily informed by the strong Native Hawaiian activism that had gained traction in the 1970s. It is perhaps no surprise, then, that all six of the public trust cases surveyed here relied to some degree on Native Hawaiian history, values, and cultural practices in coming to their conclusions. All of the cases, for instance, acknowledged that the public trust encompasses Native Hawaiian traditional and customary rights, which the state and its agencies must take into consideration when allocating trust resources.

By incorporating Native Hawaiian values into the constitution and case law, the Hawaiʻi legislature and judiciary perhaps sought to rectify historical and ongoing injustices inflicted on native people. However, the case law indicates that the public trust doctrine cannot be relied upon to

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Mauna Kea, see Michelle Broder Van Dyke, *'A New Hawaiian Renaissance': How a Telescope Protest Became a Movement*, GUARDIAN (Aug. 17, 2019), https://perma.cc/BZ4C-EQHB (describing the protests and next steps).

310 *Mauna Kea I*, 363 P.3d 224, 228 (Haw. 2015).

311 *The Process*, MAUNAKEA & TMT, https://perma.cc/6YGP-TL8B (last visited Nov. 4, 2021) (explaining in detail the timeline of the TMT getting its permit).

protect Native Hawaiian interests or trust resources in all cases. The modern public trust doctrine, as first applied by the court in *Waiāhole Ditch*, requires a balancing of many factors, of which native traditional and customary rights are just one. In some cases, like *Waiāhole Ditch* and *Pōhakuloa*, this balancing test resulted in notably increased protections for resources used in native farming and other cultural practices. By contrast, in the *Mauna Kea* cases*,* the court balanced potential public benefits against potential harms to native people, concluding that the balance favored a construction project that would harm native interests.

Despite ultimately siding against native interests, the *Mauna Kea* cases indicate that the state and its agencies must make space for Native Hawaiian voices when granting permits for the use of trust resources. The BLNR's initial failures to give proper voice to Native Hawaiian concerns over Mauna Kea resulted in protracted legal proceedings and two rounds of judicial review by the state supreme court, suggesting that state agencies could better achieve the balanced outcomes prescribed under the public trust doctrine by implementing inclusive, participatory processes when making decisions related to trust resources. Administrative procedures that include opportunities for meaningful public participation would promote the ventilation and resolution of public concerns at an administrative level, and thus would help avoid judicial intervention and facilitate solutions that adequately reflect diverse perspectives.