

Overview of Native Hawaiian Traditional and Customary Hawaiian Rights and the Public Trust

by Hans Wilhelm and Malia Akutagawa

Key Points of Law

Article XII, Section 7 of the Hawai'i State Constitution

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

Case Law:

In re Application of Ashford (1968)



"In this jurisdiction, it has long been the rule, based on necessity, to allow reputation evidence by kamaaina witnesses in land disputes."

A shoreline boundary dispute. The court considers the location of the makai (seaward) boundaries of a beachfront parcel in Kainalu, East Moloka'i with a royal patent issued that describes the property as running "ma ke kai" (along the sea). Ashford, the landowner, utilizes a licensed land surveyor employing U.S. geodetic survey techniques to provide expert evidence that in the long-run would characterize the beach as his own private beach. The court certifies a kama'aina (native born person) of Kainalu as an expert to interpret the meaning of "ma ke kai" according to the traditionally known location of the shoreline boundary founded on indigenous place-based knowledge of palena (geographical boundaries known to kama'aina with knowledge passed down inter-generationally).

The court finds:

"Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. . . . It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof."

Kama'aina witnesses may testify to the location of seashore boundaries dividing private land and public beaches according to reputation and ancient Hawaiian tradition, custom and usage.

HRS § 7-1

“Where landlords have obtained, or may hereafter obtain allodial titles to their lands, **the people on each of their lands shall not be deprived of the right to take firewood, house timber, ‘aho cord, thatch, or kī leaf, from the land upon which they live, for their own private use, but they shall not have a right to take such articles to sell for profit.** The people shall also have a right to drinking water, and running water, and the right of way. **The springs of water, running water, and roads shall be free to all,** on lands granted in fee simple; provided that this shall not be applicable wells and watercourses which individuals have made for their own use.

Kalipi (1982)

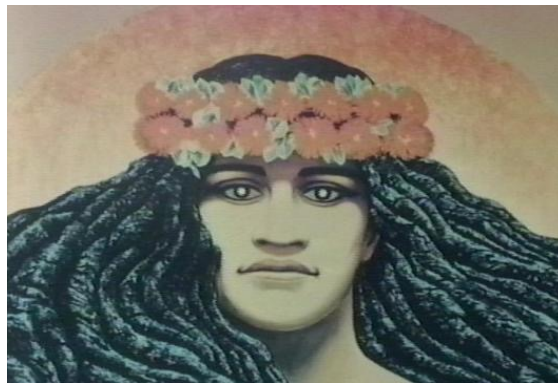
William Kalipi owned a kalo field in the ahupua‘a of Manawai and an adjoining house lot located in the ahupua‘a of ‘Ōhi‘a on the island of Moloka‘i. He filed suit against the owners of the ahupua‘a of Manawai and ‘Ōhi‘a after he was denied kuleana gathering rights in both ahupua‘a. Kalipi sought to gather certain items under HRS 7-1 for subsistence and medicinal purposes.



The Supreme Court determined that in order to assert a right to gather under HRS 7-1, three conditions must be satisfied:

(1) The tenant must physically reside within the ahupua‘a from which the item is gathered; (2) the right to gather can only be exercised upon undeveloped lands within the ahupua‘a; and (3) the right must be exercised for the purpose of practicing Native Hawaiian customs and traditions.

Pele Defense Fund (1992)



Native Hawaiian residents living in the Puna region of the Big island asserted gathering rights claims to certain ahupua‘a outside of their physical residence.

The court held that Native Hawaiian rights protected by section 1-1 of the HRS and article XII, section 7 of the Hawaii State Constitution may extend beyond the ahupua‘a in which a Native practitioner resides if those rights have been traditionally and customarily exercised in that manner.

The date by which Hawaiian usage must have been established is fixed at November 25, 1892.

Key Points of Law

Hawai'i Revised Statute, Section 1-1:

Common Law of the State; exceptions:

Hawaiian Usage: The Hawai'i Supreme Court determined that for the purposes of establishing custom and usage, the Hawaiian custom must have been established in practice by November 25th, 1892. **In plain terms, if the custom existed prior to this date it is considered customary, protected, and an exception to the common law of the State.**



Public Access Shoreline Hawaii (PASH) (1995)

A public interest group with Native Hawaiian cultural practitioners appeals the Hawai'i County Planning Commission's denial of standing in a contested case hearing involving a special management area (SMA) permit application to develop a condominium in a shoreline area.

Hawaiians have unique and distinguishable rights from the general public that qualify them for standing in administrative hearings.

Protecting Hawaiian rights is not a taking of private property in Hawai'i because not all the "bundles of sticks are included" (namely, the right to alienate and exclude others from one's property.)

The State cannot regulate Native Hawaiian rights out of existence.

Expanded Kalipi to include protection of Hawaiian Rights on less than fully developed lands.

Ka Pa'akai O Ka 'Āina (2000)

A Hawaiian coalition challenges the Ka'ūpulehu resort development on Hawai'i island, the reclassification of 1,000 acres of land from conservation to urban by the State LUC, and the agency's failure to protect customary and traditional practices there.

In order to affirmatively protect Native Hawaiian rights, State and County agencies reviewing permit, licensing, zoning applications, and other types of land use approvals must make an independent assessment of the following:

- (1) The identity and scope of valued cultural and historical or natural resources in the petition area including the extent to which traditional and customary Native Hawaiian rights are exercised in the petition area.
- (2) The extent to which those resources including traditional and customary Native rights will be affected or impaired by the proposed action; and
- (3) The feasible action if any taken by the State to reasonably protect Native Hawaiian rights if they are found to exist.



Key Points of Law

Article XI, Section 1 of the Hawai'i State Constitution:

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.

Article XI, Section 7 of the Hawai'i State Constitution:

"The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."

Protecting the Public Trust in Water, Ocean Resources, and Native Hawaiian Rights and Practices

McBryde (1973)



The Hawai'i Supreme Court re-examines water law in Hawai'i that had developed in the aftermath of the illegal overthrow and annexation by the U.S. of the Hawaiian Kingdom. Water jurisprudence during the U.S. Territory days characterized water as a commodity and the personal property of wealthy sugar barons. Water could be

acquired "prescriptively" as a kind of adverse possession and diverted out of their original watersheds. Sugar plantation interests often severed reserved water rights associated with traditional taro cultivation (appurtenant water) to apply water originating from agriculturally productive windward valleys, to dry leeward plains where sugar crops flourished.

By 1959, Hawai'i becomes the 50th State of the U.S. and the make-up of the State Supreme Court changes to reflect Native Hawaiian and local justices, as compared to U.S. mainland judges that dominated the bench during the Territorial period.

This case involved a water dispute between two sugar plantations on the island of Kaua'i. Rather than look to the body of water law developed during the Territorial period of Hawai'i, the Court turns to Hawaiian custom and usage and the King's sovereign prerogatives over the lands and waters of the Hawaiian Kingdom to arrive at its decision in this landmark case. The Court makes the following findings:

The Hawaiian Kingdom and the Principles Adopted by the Board of Commissioners to Quiet Land Titles, 1846 (hereinafter, the "Land Commission")

In the years that led up to the Mahele, the Land Commission was authorized to convey the king's private or feudal rights in the land, but not his **sovereign prerogatives** as head of the Hawaiian Kingdom.

One of these sovereign prerogatives included the power **"to encourage and even to enforce the usufruct of lands for the common good."**

All subsequent conveyances are subject to these sovereign prerogatives; namely here, the **right to use water [as] one of the most important usufructs of the land.**

Therefore, all of the waters flowing in natural water courses belong to the State in trusteeship for the people.

Key Points of Law

Precautionary Principle - A Standard for Managing Public Trust Resources (Waiāhole):

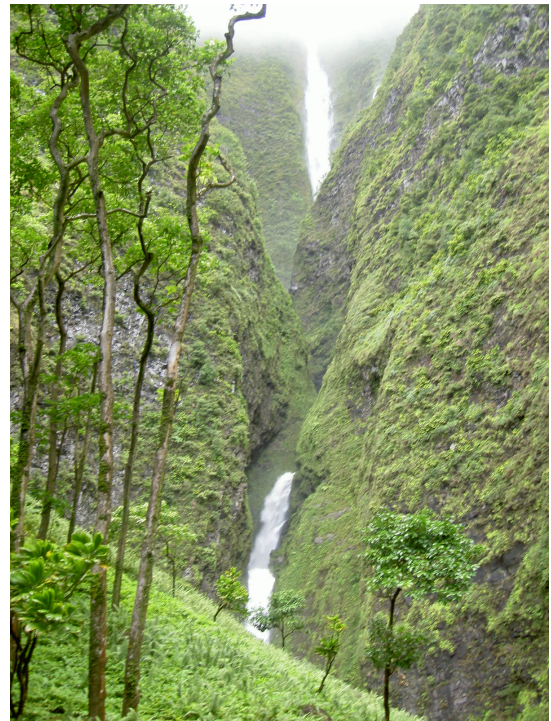
Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt “precautionary principles” in protecting the resource. That is, **where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation... In addition, where uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.**

Waiāhole (2000)

Waiāhole Ditch captures surface waters from Kahana to Kahalu’u, Windward O’ahu and diverts 27 million gallons per day (mgd) of water to central and leeward plains for sugar. Taro farmers petitioned return of waters to windward valleys to sustain traditional agriculture, restore streams and estuaries. Nearly 20 other parties (County, State, Feds, private interests in large-scale agriculture and urban development) filed water use permit (WUP) applications and sought continued diversions. Parties entered into contested case hearing before State Commission on Water Resource Management (CWRM).

CWRM decision: over half of 27 mgd is allocated to leeward users and for a “proposed agricultural reserve” and “non-permitted ground water buffer.” Windward streams are allocated the leftover amount.

Hawai’i Supreme Court overrules CWRM decision, remands to the agency to re-evaluate allocations in accordance with constitutionally mandated public trust obligations. Court orders CWRM to determine how much water must return to Windward streams to support native stream life, estuaries, and community uses.



The Court also makes the following findings:

- The State is obligated to protect, control and regulate the use of Hawai’i’s water resources for the benefit of its people as a public trust.
- Private commercial use is not a public trust purpose.
- Retention of waters in their natural state does not constitute waste. Rather, a public trust interest exists in maintaining a free-flowing stream for its own sake.
- CWRM “inevitably must weigh competing public and private water uses on a case-by-case basis” but any balancing must “begin with a presumption in favor of public use, access, and enjoyment.”
- Domestic uses and the exercise of Native Hawaiian and traditional and customary rights are public trust purposes.



Wai'ola o Moloka'i (2004)

Molokai Ranch - Wai'ola requested to construct a well and obtain a Water Use Permit for an additional 1.25 mgd from the Kamiloloa aquifer for current and future domestic, commercial, industrial, and municipal water needs. Department of Hawaiian Home Lands (DHHL) intervenes to protect its current uses and reservation for future uses in the adjacent Kualapu'u aquifer. Other intervenors: Hawaiian cultural practitioners claiming the proposed withdrawal would interfere with their traditional and customary rights of subsistence gathering of marine resources such as fish and limu (seaweed) along the Kamiloloa shoreline.

Water reservations for Native Hawaiian Homesteaders constitutes a public trust purpose. CWRM must not “divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers.”

Recognized Moloka'i's ground and surface water resources are interconnected. Ground water pumpage and use in one area has the potential to reduce water quality of wells and the discharge of freshwater into nearshore marine fisheries that support Native Hawaiian traditional and customary subsistence practices (e.g., gathering fish, limu, and other marine life).

State has an affirmative duty to protect Native Hawaiian traditional and customary rights.

Burden of proof rests on the permit applicant to demonstrate its use will not interfere with native Hawaiian rights and practices.

Kelly v. 1250 Oceanside Partners (2006)

Soil runoff caused by a developer's grading and grubbing activities on the land pollutes the pristine coastal waters of Kealakekua Bay on Hawai'i Island.

“[T]he plain language of Article XI, Section 1 [of the Hawai'i State Constitution] mandates that the County does have an obligation to conserve and protect the state's natural resources[,]” which includes protecting coastal waters from polluted runoff.

“The duties imposed upon the State are the duties of a trustee and not simply duties of a good business manager[;]”

[T]herefore, the agency was required “to not only issue permits after prescribed measures appear to be in compliance with [the appropriate] regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources.”

Burden Shifting

Criminal Defendants Asserting a Constitutional Privilege for the Protection of a Traditional and Customary Hawaiian Right have the Burden of Proof

State v. Hanapi (1998)

Hanapi was arrested for criminal trespass when he walked onto to private property to express to his neighbor his concern that the neighbor's land clearing activities was causing harm to an ancient fishpond and constituted a desecration of this cultural site. Hanapi stated he was present on his neighbor's property to conduct cultural and religious ceremonies to heal the land. The Hawai'i Supreme Court affirmed Hanapi's conviction for criminal trespass.

In a criminal trespass context, "it is the obligation of the person claiming the exercise of a Native Hawaiian right to demonstrate the right is protected."

In order for a criminal defendant to establish that his or her conduct is constitutionally protected as a Native Hawaiian right, the defendant must:

- (1) Prove that s/he is a Native Hawaiian (a descendant of the island inhabitants of Hawai'i prior to 1778)
- (2) Provide an adequate foundation through expert or kama'āina witness testimony connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice.
- (3) Show that the exercise of the claimed right occurred on undeveloped or less than fully developed land.

State v. Pratt (2012)

Native Hawaiian defendant Pratt camped in Kalalau valley, Kaua'i for prolonged periods without obtaining a camping permit. He spent time cleaning heiau (traditional temples), growing taro and native plants, clearing brush, and taking out garbage. He was convicted for illegally camping without a permit. The State asserted its interests in keeping Kalalau valley a wilderness area (through limiting traffic and length of stay), preserving park resources, public safety, and welfare.

The Hawai'i Supreme Court upheld the conviction despite Pratt having satisfied the 3-Part Hanapi test because the exercise of the State's regulatory authority in this instance was reasonable.

Article XII, Section 7 of the Hawai'i State Constitution grants the State the right to reasonably regulate Native Hawaiian rights.

Pratt's right to perform traditional and customary practices in Kalalau State Park were outweighed by the State's compelling interest to maintain public health and safety. These are reasonable State concerns. The state's requirement for users to obtain a camping permit to utilize state park lands is a reasonable regulation.

The court conducts a balancing test between the constitutionally protected Native Hawaiian traditional and customary right and the State's authority to reasonably regulate such rights. It will consider the facts on a **case-by-case** basis and will take into consideration the **totality of the circumstances**.



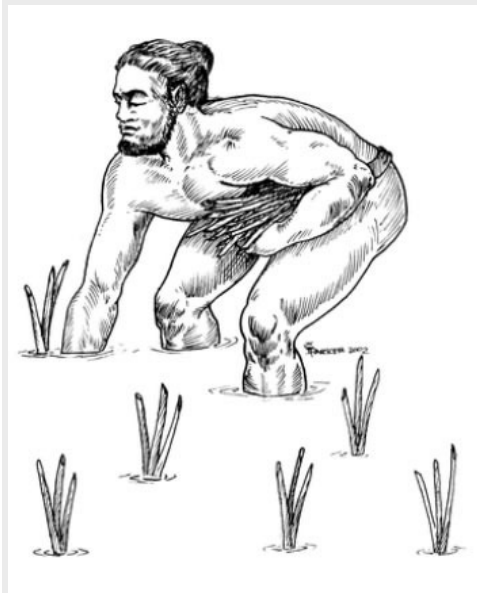


State v. Armitage (2014)

The petitioners asserted a Native Hawaiian privilege to access Kaho'olawe Reserve for the purpose of reestablishing the Reinstated Hawaiian Government, but failed to apply for authorization to enter the Reserve from the Kaho'olawe Island Reserve Commission (KIRC).

Haw. Admin. R. § 13-261-11 details the process for obtaining approval from KIRC for entrance into and activities within the reserve, by applicants seeking to exercise traditional and customary rights and practices.

The court held that “the balance weighs in favor of the State’s interest in protecting the health and safety of those individuals who travel to Kaho’olawe.”



State v. Palama (2015)

A Native Hawaiian pig hunter and taro farmer from Hanapēpē ahupua’a on the island of Kaua’i was cited for criminal trespass on private lands in Hanapēpē Valley when he went to hunt for pig with his dogs and a knife. The trial court dismissed the trespass charges against Palama and the Intermediate Court of Appeals (ICA) affirmed the decision. On appeal the State argued that its DLNR Game Mammal Hunting Regulations, HAR, Title 13, Ch. 123 for the island of Kaua’i informs hunters of public hunting grounds where pig hunting is allowed. Palama could have obtained a hunting license and hunted on public lands or acquired permission from the landowner to hunt on private lands in Hanapepe.

Palama satisfied the 3-Part Hanapi test. The ICA agreed with the trial court that the expert evidence and kama’āina testimony presented demonstrated that pig hunting is a Native Hawaiian traditional and customary right and practice. Pig hunting was determined to be a cultural practice of mālama ‘āina (caring for the land and resources) because it helped to keep the pig population down and deter pigs from destroying cultivated sweet potato and taro. The court also found that Palama exercised his hunting right in a reasonable manner.



The ICA agreed with Palama’s argument that the State was impermissibly delegating to private property owners an “absolute power to grant or deny Native Hawaiians their constitutional privileges.”

The court found that the State’s action would “operate as a summary extinguishment of Palama’s constitutionally protected right to hunt pig on the subject property — the ahupua’a of Hanapēpē for which Palama cared for his family’s kuleana land, grew taro, and hunted. Palama and his ‘ohana were clearly hoā’āina (ahupua’a tenants) of Hanapēpē. The court recognized these priority hoā’āina rights and found that the State’s regulatory authority to foreclose Palama from hunting in his ahupua’a and delegating its authority to a private landowner would effectively extinguish Palama’s rights or essentially “regulate” Palama’s “right out of existence” — a consequence the PASH court cautioned against.