



trust | water

The Public Trust Doctrine
Hawaii's Precious Water

The state is mandated by law to maintain the purity and the flow of Hawaii's water.

Hawai'i Constitution Article XI, Section 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... and shall promote the development and utilization of these resources... in a manner consistent with their conservation"

"All public natural resources are held in trust by the State for the benefit of the people."



History of the Public Trust Doctrine

The Public Trust Doctrine traces its origins to ancient Roman law and English common law and is one of the oldest, most deeply rooted concepts in the entire body of law. The Romans believed there were different kinds of property. Some belonged to the state, some to the gods, some belonged to individuals, and some were common property. Common property included the sea, the seashore, the harbors and all navigable rivers. In 1776, a new United States adopted all English common law including tradition and usage. The English had a twist on the Roman notion of common property. The English king, for the benefit of the people, held navigable rivers, the ocean, and seashore in trust. As each state joined the Union, English common law was adopted and the Public Trust Doctrine became common law in all the states. The individual states, not the federal government, took over the role of the English king.

trust

“The waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use.”

History of Hawaii's Public Trust Doctrine

Long before Hawai'i became a territory and state, the Hawaiian Kingdom held land in trust for the common good. In granting land ownership interests during the Great Mahele (1848-1850), the Hawaiian Kingdom expressly reserved its sovereign rights to encourage and even to enforce the use and enjoyment of lands for the common good. In maintaining this sovereign right, a public trust was declared upon all the waters of the Kingdom. The public interest in the waters of the Kingdom necessitated retention of authority and the associated duty to maintain the purity and flow of Hawaii's water for future generations. Because of the historic importance of this public trust from the time of the Hawaiian Kingdom, our state has inherited and continues this principle of trust for the public good.

The Public Trust Doctrine Today

Today, the Public Trust Doctrine is a judicially created body of law that protects Hawaii's natural resources. It sets limits and attempts to draw boundaries. The Public Trust Doctrine remains perhaps the most powerful and useful body of principles in our legal system related to the management of natural resources.



What does the Public Trust Doctrine protect?

The Hawaiian Kingdom held Hawaii's rivers, streams, seashore, and ocean in trust for all its citizens. When Hawaii became a territory and then a state, this public trust followed. U.S. courts have expanded the physical scope of the trust property to include wetlands and dry sand areas. The California Mono Lake legal decision expanded the Public Trust Doctrine to include: "The preservation of lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life." Since all ground water is rainfall dependent with short intermittent surface water running off steep slopes and into the ocean in little more than a day, Hawaii's people have long understood the impacts of water use and the need to protect each island's naturally limited water base.

In 1978, Hawaii's Supreme Court expanded the high tidal water line to the high wash of waves, noting that the public trust responsibilities of the state were so powerful that they could and did trump legislation that was inconsistent with these responsibilities. That same year, Hawaii's citizens elevated the Public Trust Doctrine to a constitutional mandate by voting it a part of the Hawaii Constitution (Article XI, Section I).

flow

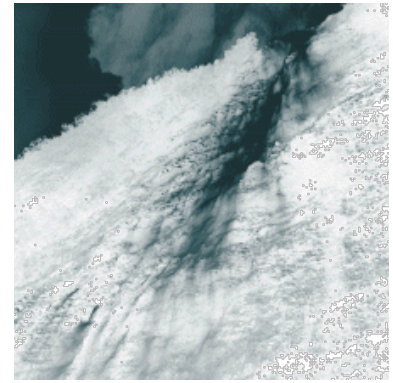
"The special public interests in trust resources demand that this court observe certain qualifications of its standard review." "The public trust, however, is a state constitutional doctrine." "As with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawaii rests with the courts of this state."

Hawaii's Supreme Court, Waiahole 2000

The Waiahole Ditch Combined Contested Case Legal Decision

In 1913, construction began on the Waiahole Ditch to divert water from windward streams to irrigate the vast sugarcane fields on O'ahu's central plain. Although sugar operations ended more than a decade ago, diversion of windward water continued to feed new central O'ahu development. Windward farmers, Hawaiian activists, community groups, and Hawaii's Thousand Friends brought a "contested case" before the State Commission on Water Resource Management seeking to return water to windward streams and the Kane'ohe Bay estuary. Testimony revealed that Waiahole Stream was once noted for its abundant native fish populations, but by 1990 only one *o'opu* species could be found.

In the contested case, Hawaii's Thousand Friends took the lead in arguing the Public Trust Doctrine and that all streams are natural public resources held by the state in trust and must be protected for the common good. Kane'ohe Bay is clearly a public trust resource whose estuary is threatened by reduced stream water flow. In its 1997 Findings of Fact, Conclusions of Law, and Decision and Order, the Commission on Water Resource Management found, "Hawaii's Constitution specifically recognizes that Hawaii's natural resources are held in a public trust," and it "expressly extended the application of the public trust doctrine from navigable water ways to Hawaii's fresh waters" and that "any person



seeking to use fresh water, a public trust natural resource, by removing it from its naturally occurring location, has the burden of showing that the removal will not cause serious damage or destroy the resource." While the Water Commission upheld the Public Trust Doctrine, it did not allocate adequate water to maintain Waiahole Stream's ecosystems. Hawaii's Thousand Friends and other plaintiffs appealed the case to the Hawai'i Supreme Court.

The Historic Hawai'i Supreme Court Waiahole Ditch Decision

In 2000, the Hawai'i Supreme Court issued its decision, historic both in Hawai'i and the country. The Court embraced the Public Trust Doctrine, rejecting the arguments that public streams served as convenient reservoirs for off stream private use and that "privately owned" waters were excluded from the public trust, saying, "[t]he public trust doctrine applies to all water resources without exception or distinction." The Court also for the first time announced the principles of a "State Water Resources Trust."

pure

**"Under the public trust,
the state has both the authority
and duty to preserve the rights
of present and future generations
in the waters of the state."**

Hawai'i Supreme Court, Waiahole 2000

Duties of the State under the State Water Resources Trust

In Waiahole, the state's Supreme Court declared that under the public trust, the state has the authority and duty "to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses." As commonly interpreted, the trust protects public waters and submerged lands against irrevocable transfers to private parties. "The object is not to maximize consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources with full recognition that resource protection also constitutes 'use.'" This mandated protection now requires the state to take the initiative in planning and providing for appropriate in-stream flows, taking the public trust into account in the planning and allocation of water resources. The state has also been charged with the duty to catalog existing uses but not automatically "grandfather" them.

Precautionary Principle

The Court also embraced a precautionary principle by affirming the Water Commission's finding that "where there are present or potential threats of serious damage [to natural resources], lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. In addition, where uncertainty exists [the State's] duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."



Acknowledgments

The Public Trust Doctrine Hawaii's Precious Water
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Published by Hawaii's Thousand Friends
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305 Hahani Street, # 282 Kailua, Hawaii 96734

Design and Printing:
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Editing:
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Waterfall Photo: Jan Becket