Hawaii public trust doctrine (remainder of case is omitted)

[9 P.3d 409]

IN THE SUPREME COURT OF THE STATE OF HAWAII

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In the Matter of the Water Use Permit Applications,

Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waihole Ditch Combined Contested Case Hearing

NO. 21309

APPEAL FROM THE COMMISSION ON WATER RESOURCE MANAGEMENT

(CASE NO. CCH-OA95-1)

AUGUST 22, 2000

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MOON, C.J., LEVINSON, NAKAYAMA, RAMIL, JJ. AND
CIRCUIT JUDGE IBARRA, IN PLACE OF KLEIN, J. RECUSED

OPINION OF THE COURT BY NAKAYAMA, J.

[ONLY SECTION *IIIB PUBLIC TRUST DOCTRINE* IS COPIED BELOW]

B. THE PUBLIC TRUST DOCTRINE

Substantial controversy arises from the Commission's discussion of the "public trust doctrine" in its decision. Before addressing the parties' arguments, we survey the historical development of the doctrine in this jurisdiction.

1. History and Development

The United States Supreme Court advanced the seminal modern expression of the public trust doctrine in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892).[(25)] The case arose from a disputed conveyance of land submerged under the navigable waters of Lake Michigan by the state legislature to private interests. The Court characterized the state's interest in such lands as

> title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Id. at 452 (emphasis added). "The control of the state for purposes of the trust," the Court continued,

> can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters

> remaining. . . . The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

Id. at 453-54 (emphases added).[(26)] Because the wholesale surrender of state authority over the lands in question was "not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the uses of the public," id. at 453, the disputed grant was "necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time," id. at 455.

This court endorsed the public trust doctrine in King v. Oahu Railway & Land Co., 11 Haw. 717 (1899). Quoting extensively from Illinois Central, we agreed 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. The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation." Id. at 725 (citation omitted). Later decisions confirmed our embrace of the public trust doctrine. See County of Hawaii v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973) ("Land below the high water mark . . . is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." (citation and internal quotation marks omitted)), cert. denied, 419 U.S. 872 (1974); In re Sanborn, 57 Haw. 585, 593-94, 562 P.2d 771, 776 (1977) (observing that any purported land court registration of lands below the high water mark was ineffective under the public trust doctrine); State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) (holding that lava extensions "vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people.").

In McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, aff'd on reh'g, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962 (1974), we contemplated the public interest in water resources. Consulting the prior laws and practices of this jurisdiction, we observed that, in granting land ownership interests in the Mhele,[(27)] the Hawaiian Kingdom expressly reserved its sovereign prerogatives "[t]o encourage and even to enforce the usufruct of lands for the common good." See id. at 184-86, 504 P.2d at 1337-39 (quoting Principles Adopted By The Board of Commissioners To Quiet Land Titles In Their Adjudication Of Claims Presented To Them, 2 Statute Laws of His Majesty Kamehameha III (SLH) 81, 85 (1847), reprinted in 2 Revised Laws of Hawaii (RLH) 2124, 2128 (1925) [hereinafter Land Commission Principles]). "The right to water," we explained,

> is one of the most important usufruct of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants.
>
> Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses and rivers remained in the people of Hawaii for their common good.

Id. at 186-87, 504 P.2d 1338-39 (footnote omitted) (emphases added). In Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982), we elaborated on our McBryde decision, comparing the retained sovereign "prerogatives, powers and duties" concerning water to a "public trust":

> [W]e believe that by [the sovereign reservation], a public trust was imposed upon all the waters of the kingdom. That is, we find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant 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. This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.

Id. at 674, 658 P.2d at 310 (emphases added).

In the footnote accompanying this passage, we added:

> The State unquestionably has the power to accomplish much of this through its police powers. Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908). We believe however that the king's reservation of his sovereign prerogatives respecting water constituted much more than restatement of police powers, rather we find that it retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited the creation of certain private interests in waters. See, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); Maloney, Ausness & Morris, A Model Water Code, []at 81 (1972).

Id. at 674 n.31, 658 P.2d at 310 n.31 (emphasis added). The trust over the water resources of this state, we observed, was "akin to the title held by all states in navigable waterways which was recognized in [Illinois Central]." Robinson, 65 Haw. at 674, 658 P.2d at 310. Insofar as the two trusts differ in origin[(28)] and concern, however, we recognized that "the extent of the state's trust obligation of course would not be identical to that which applies to navigable waterways." Id. at 675, 658 P.2d at 310.

In 1978, this state added several provisions to its constitution specifically relating to water resources. Article XI, section 1 of the Hawaii Constitution states:

> CONSERVATION AND DEVELOPMENT OF RESOURCES
>
> 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, 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.

(Emphases added.) Article XI, section 7 further provides:

> WATER RESOURCES
>
> Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
>
> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use polices; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

(Emphasis added.) In 1987, pursuant to the constitutional mandate of article XI, section 7, the legislature enacted the State Water Code, HRS chapter 174C.

2. Relationship to the State Water Code

Several parties, most notably LURF, contend that the Commission erred by relying upon the public trust doctrine as a legal authority in addition to the State Water Code. According to LURF, the Code "subsumes and supplants whatever common law doctrine of public trust may previously have existed in Hawaii." By invoking the public trust, LURF argues, the Commission improperly expanded its statutory powers, upsetting the Code's "balance of interests."

The public trust in the water resources of this state, like the navigable waters trust, has its genesis in the common law. See generally HRS § 1-1 (1993); Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawaii 81, 89-90, 979 P.2d 1107, 1115-16 (1999) (recognizing that "[t]he common law . . . includes the entire wealth of received tradition and usage"). The legislature may, subject to the constitution, modify or abrogate common law rules by statute. See Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973). Statutes in derogation of the common law,

however, must be strictly construed. Burns Int'l Sec. Servs., Inc. v. Department of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983). "Where it does not appear there was legislative purpose in superseding the common law, the common law will be followed." Id.; see also Watson v. Brown, 67 Haw. 252, 256, 686 P.2d 12, 15 (1984) (holding that a statutory remedy is "merely cumulative and does not abolish an existing common law remedy unless so declared in express terms or by necessary implication"). The Code does not evince any legislative intent to abolish the common law public trust doctrine. To the contrary, as discussed in Part III.D.2., infra, the legislature appears to have engrafted the doctrine wholesale in the Code.

As LURF points out, statutes establishing comprehensive regulatory schemes form an exception to the rule of strict construction. See Department of Transp. v. Transportation Comm'n, 330 N.W.2d 159, 164-65 (Wis. 1983); Norman J. Singer, 3 Sutherland Statutory Construction § 61.03, at 190 (rev. 5th ed. 1999). The Code certainly displaces common law rules of water use where effective. See Koolau Agric. Co., Ltd. v. Commission on Water Resource Management, 83 Hawaii 484, 491, 927 P.2d 1367, 1374 (1996) ("In [water management areas], the permitting provisions of the Code prevail; water rights in non-designated areas are governed by the common law."). The further suggestion that such a statute could extinguish the public trust, however, contradicts the doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate. See Illinois Central, 146 U.S. at 453-54. This court has held that the doctrine would invalidate such measures, sanctioned by statute but violative of the public trust, as: the use of delegated eminent domain powers by a private party to condemn a public harbor, see Oahu Railway, supra; the land court's registration of tidelands below the high water mark, see Sanborn, supra; and a sale of lava extensions that did not promote a "valid public purpose," see Zimring, supra. Regarding water resources in particular, history and precedent have established the public trust as an inherent attribute of sovereign authority that the government "ought not, and ergo, . . . cannot surrender." See McBryde, 54 Haw. at 186, 504 P.2d at 1338 (quoting Land Commission Principles); cf. Illinois Central, 146 U.S. at 455 ("[S]uch property is held by the State, by virtue of its sovereignty, in trust for the public.").

Most importantly, the people of this state have elevated the public trust doctrine to the level of a constitutional mandate. In interpreting constitutional provisions:

> "[W]e have long recognized that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent." Hirono v. Peabody, 81 Hawaii 230, 232, 915 P.2d 704, 706 (1996) (citation omitted). "This intent is to be found in the instrument itself." State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981).
>
> As we recently reiterated in State of Hawaii, ex rel. Bronster v. Yoshina, 84 Hawaii 179, 932 P.2d 316 (1997), "[t]he general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." Id.[at 186], 932 P.2d at 323 (quoting Blair[v. Cayetano], 73 Haw. [536,] 543, 836 P.2d [1066,] 1070 [(1992)] (citation omitted)). "In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them." Pray v. Judicial Selection Commn, 75 Haw. 333, 342, 861 P.2d 723, 727 (1993) (citation, internal quotation marks, brackets, and ellipses omitted).
>
> Moreover, "a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it[.]" Carter v. Gear, 16 Haw. 242, 244 (1904), affirmed, 197 U.S. 348, 25 S.Ct. 491, 49 L.Ed. 787 (1905).

Hawaii State AFL-CIO v. Yoshina, 84 Hawaii 374, 376, 935 P.2d 89, 91 (1997).

Article XI, section 1 of the Hawaii Constitution mandates that, "[f]or the benefit of present and future generations, the State and its political subdivisions shall protect and conserve . . . all natural resources, including . . . water . . . and shall promote the development and utilization of these resources . . . in a manner consistent with their conservation" and further declares that "[a]ll public natural resources are held in trust for the benefit of the people." (Emphases added.) Article XI, section 7 reiterates the State's "obligation to protect, control and

regulate the use of Hawaii's water resources for the benefit of its people." (Emphases added.) The plain reading of these provisions manifests the framers' intent to incorporate the notion of the public trust into our constitution. The intensive deliberations on the subject in the convention record substantiate this interpretation. See Debates in Committee of the Whole on Conservation, Control and Development of Resources [hereinafter Debates], in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 855-81 (1980) [hereinafter Proceedings].[(29)] We therefore hold that article XI, section 1 and article XI, section 7[(30)] adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii. See Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976) ("There can be no question that the [constitution] declares and creates a public trust of public natural resources for the benefit of all people (including future generations as yet unborn) . . . ."); State v. Bleck, 338 N.W.2d 492, 497 (Wis. 1983) (grounding the public trust doctrine in the state constitution); Save Ourselves v. Louisiana Env't Control Comm'n, 452 So.2d 1152, 1154 (La. 1984) (recognizing a public trust based on the state constitution); Owsicheck v. State, Guide Licensing and Control Bd., 763 P.2d 488, 493-96 (Alaska 1988) (holding that the constitutional "common use" clause adopted common law trust principles in relation to fish, wildlife, and water resources).

Other state courts, without the benefit of such constitutional provisions, have decided that the public trust doctrine exists independently of any statutory protections supplied by the legislature. See, e.g., National Audubon Soc'y v. Superior Ct. Of Alpine Cty., 658 P.2d 709, 728 n.27 (Cal.) ("Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts . . . ."), cert. denied, 464 U.S. 977 (1983); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983) ("[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."). This view is all the more compelling here, in light of our state's constitutional public trust mandate. See San Carlos Apache Tribe v. Superior Court ex rel. Maricopa County, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power . . . . The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings."). To the extent that other courts have held otherwise, their decisions are neither controlling nor, for the reasons stated above, applicable in this state. See, e.g., R.D. Merrill Co. v. State of Wash. Pollution Control Hearings Bd., 969 P.2d 458 (Wash. 1999).

The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible "outer limits," and justify its existence. To this end, although we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.

3. The State Water Resources Trust

Having established the public trust doctrine's independent validity, we must define its basic parameters with respect to the water resources of this state. In so doing, we address: 1) the "scope" of the trust, or the resources it encompasses; and 2) the "substance" of the trust, including the purposes or uses it upholds and the powers and duties it confers on the state.

a. Scope of the Trust

The public trust doctrine has varied in scope over time and across jurisdictions. In its ancient form, the public trust included "the air, running water, the sea, and consequently the shores of the sea." J. Inst. 2.1.1. Under the English common law, the trust covered tidal waters and lands. See Shively v. Bowlby, 152 U.S. 1, 11 (1892). Courts in the United States have commonly understood the trust as extending to all navigable waters and the lands beneath them irrespective of tidality. See Illinois Central, supra; Phillips Petroleum, 484 U.S. 469 (1988) (confirming that the public trust still applies to tidal waters, whether navigable or not). In Hawaii, this court has recognized, based on founding principles of law in this jurisdiction, a distinct public trust encompassing all the water resources of the state. See Robinson, 65 Haw. at 674, 658 P.2d at 310. The Hawaii Constitution declares that "all public resources are held in trust by the state for the benefit of its people," Haw. Const. art. XI, § 1, and

establishes a public trust obligation "to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people," Haw. Const. art. XI, § 7.

We need not define the full extent of article XI, section 1's reference to "all public resources" at this juncture. For the purposes of this case, however, we reaffirm that, under article XI, sections 1 and 7 and the sovereign reservation, the public trust doctrine applies to all water resources without exception or distinction. KSBE and Castle advocate for the exclusion of ground waters from the public trust. Their arguments, first, contradict the clear import of the constitutional provisions, which do not differentiate between categories of water in mandating the protection and regulation of water resources for the common good.[(31)] The convention's records confirm that the framers understood "water resources" as "includ[ing] ground water, surface water and all other water." Debates, in 2 Proceedings, at 861 (statement by Delegate Fukunaga).

We are also unpersuaded by the contention of KSBE and Castle that the sovereign reservation does not extend to ground waters. Their argument rests almost entirely on one decision, City Mill Co., Ltd. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929). Discussing the effect of the Mhele, the City Mill court observed that "'all mineral or metallic mines' were reserved to the Hawaiian government, but there was no reservation whatever of the subterranean waters." Id. at 934. Nowhere in the opinion, however, does the court address the reservation of sovereign prerogatives and its surrounding historical and legal context. This fatal oversight, common to other cases subsequently invalidated by this court, discounts the precedential value of City Mill concerning the public trust. See Robinson, 65 Haw. at 667-68 & n.25, 658 P.2d at 306 & n.25.[(32)]

KSBE and Castle also repeat the observation in several decisions, including City Mill, that "[t]here was no ancient law or usage in Hawaii relating to artesian waters. The first artesian well ever drilled in these islands was bored in 1879." Id. at 938; see also Territory v. Gay, 31 Haw. 376, 403 (1930). Even if true, this point sheds little light on our analysis. First, according to the former, now defunct ground water categories employed in those cases, see infra note 93, the dike-impounded "percolating" waters in question would not qualify as "artesian" water. Moreover, assuming that the ancient Hawaiians had no custom with respect to "ground water," at least in terms of water actually drawn from under the surface by artificial wells or tunnels,[(33)] it does not follow that the sovereign reservation must exclude such water. Indeed, if the precise extent of ancient usage always determined the effect of the reservation, diversions impairing the "natural flow" of surface streams and transfers of water outside watershed boundaries would still be largely prohibited. See McBryde, 54 Haw. 191-98, 504 P.2d at 1341-44 (interpreting law of kingdom as a codification of natural flow riparianism). But see Reppun v. Board of Water Supply, 65 Haw. 531, 552-54, 656 P.2d 57, 71-72 (1982) (modifying the natural flow rule to one of reasonable use), cert. denied, 471 U.S. 1014 (1985). This argument would hardly assist Castle, which uses water diverted from windward streams and transported to distant leeward lands.

Even more fundamentally, just as ancient Hawaiian usage reflected the perspectives of that era, the common law distinctions between ground and surface water developed without regard to the manner in which "both categories represent no more than a single integrated source of water with each element dependent upon the other for its existence." Id. at 555, 656 P.2d at 73. Modern science and technology have discredited the surface-ground dichotomy. See id. (describing the "modern scientific approach" of acknowledging "the unity of the hydrological cycle"); A. Dan Tarlock, Law of Water Rights and Resources § 4:5 (2000). Few cases highlight more plainly its diminished meaning and utility than the present one, involving surface streams depleted by ground water diversions and underground aquifers recharged by surface water applications. In determining the scope of the sovereign reservation, therefore, we see little sense in adhering to artificial distinctions neither recognized by the ancient system nor borne out in the present practical realities of this state.

Water is no less an essential "usufruct of lands" when found below, rather than above, the ground. In view of the ultimate value of water to the ancient Hawaiians, it is inescapable that the sovereign reservation was intended to guarantee public rights to all water, regardless of its immediate source. Whatever practices the ancients may have observed in their time, therefore, we must conclude that the reserved trust encompasses any usage developed in ours, including the "ground water" uses proposed by the parties in the instant case. The public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances. See, e.g., Reppun, 65 Haw. at 553, 656 P.2d at 72 (acknowledging that "the continued satisfaction of the framers' intent requires that the [riparian] doctrine be permitted to evolve in accordance with

changing needs and circumstances"); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J.) (extending the trust to privately owned beaches, in recognition of the "increasing demand for our State's beaches and the dynamic nature of the public trust doctrine"), cert. denied, 469 U.S. 821, 365 (1984); People ex rel. Baker v. Mack, 97 Cal. Rptr. 448, 451-53 (Cal. Ct. App. 1971) (expanding the "narrow and outmoded" definition of "navigability" in recognition of modern recreational uses); cf. Phillips Petroleum, 484 U.S. at 483 (noting, with respect to the tidelands trust, that "there is no universal and uniform law on the subject; but . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy" (quoting Shively, 152 U.S. at 26) (ellipsis in original)).

In sum, given the vital importance of all waters to the public welfare, we decline to carve out a ground water exception to the water resources trust. Based on the plain language of our constitution and a reasoned modern view of the sovereign reservation, we confirm that the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.

b. Substance of the Trust

The public trust is a dual concept of sovereign right and responsibility. See Robinson, 65 Haw. at 674, 658 P.2d at 310 (describing the trust as "a retention of authority and the imposition of a concomitant duty" (emphases added)); see also Reppun, 65 Haw. at 547-48 & n.14, 656 P.2d at 68-69 & n.14 (explaining the correlation of "right" and "duty" underlying the ancient Hawaiian system). Previous decisions have thoroughly reviewed the sovereign authority of the state under the trust. McBryde, 54 Haw. at 180-87, 504 P.2d at 1335-1339; Robinson, 65 Haw. at 667-77, 658 P.2d at 305-312; Reppun, 65 Haw. at 539-548, 656 P.2d at 63-69. The arguments in the present appeal focus on the state's trust duties. In its decision, the Commission stated that, under the public trust doctrine, "the State's first duty is to protect the fresh water resources (surface and ground) which are part of the public trust res," a duty which it further described as "a categorical imperative and the precondition to all subsequent considerations." COLs at 11. The public trust, the Commission also ruled, subjects offstream water uses to a "heightened level of scrutiny." Id. at 10.

In Illinois Central, the United States Supreme Court described the state's interest in its navigable waters as "title," not in a proprietary sense, but "title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." 146 U.S. at 452 (emphases added). The trust, in the Court's simplest terms, "requires the government of the State to preserve such waters for the use of the public." Id. at 453 (emphasis added).

Based on this formulation, other courts have sought to further define the requirements of the public trust doctrine. The rules developed in order to protect public water bodies and submerged lands for public access and use, however, see, e.g., State v. Public Serv. Comm'n, 81 N.W.2d 71, 74 (Wis. 1957) (prohibiting substantial destruction of navigable waters through land reclamation); People ex rel. Webb v. California Fish Co., 138 P. 79, 88 (Cal. 1913) (holding that a grantee of submerged lands gains "naked title," subject to the "public easement" in the waters above), do not readily apply in the context of water resources valued for consumptive purposes, where competing uses are more often mutually exclusive. This court recognized as much in Robinson, stating that "[t]he extent of the state's trust obligation over all waters of course would not be identical to that which applies to navigable waters." 65 Haw. at 675, 658 P.2d at 310. Keeping this distinction in mind, we consider the substance of the water resources trust of this state, specifically, the purposes protected by the trust and the powers and duties conferred on the state thereunder.

i. Purposes of the Trust

In other states, the "purposes" or "uses" of the public trust have evolved with changing public values and needs. The trust traditionally preserved public rights of navigation, commerce, and fishing. See Illinois Central, 146 U.S. at 452. Courts have further identified a wide range of recreational uses, including bathing, swimming, boating, and scenic viewing, as protected trust purposes. See, e.g., Neptune City v. Avon-By-The-Sea, 294 A.2d 47, 54-55 (N.J. 1972).

As a logical extension from the increasing number of public trust uses of waters in their natural state, courts have recognized the distinct public interest in resource protection. As explained by the California Supreme Court:

> [O]ne of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- is the preservation of those 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, and which favorably affect the scenery and climate of the area.

National Audubon, 658 P.2d at 719 (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)) (emphasis added). Thus, with respect to the lake ecosystem involved in that case, the court held that the public trust protected values described as "recreational and ecological -- the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds." Id.

This court has likewise acknowledged resource protection, with its numerous derivative public uses, benefits, and values, as an important underlying purpose of the reserved water resources trust. See Robinson, 65 Haw. at 674-76, 658 P.2d at 310-11 (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state). The people of our state have validated resource "protection" by express constitutional decree. See Haw. Const. art. XI, §§ 1 & 7. We thus hold that the maintenance of waters in their natural state constitutes a distinct "use" under the water resources trust. This disposes of any portrayal of retention of waters in their natural state as "waste." See Reppun, 65 Haw. at 560 n.20, 656 P.2d at 76 n.20 (citing article XI, section 1 as an acknowledgment of the public interest in "a free-flowing stream for its own sake").

Whether under riparian or prior appropriation systems, common law or statute, states have uniformly recognized domestic uses, particularly drinking, as among the highest uses of water resources. See, e.g., Restatement (Second) of Torts § 850A cmt. c (1979) [hereinafter Restatement (Second)] (preference for domestic, or "natural," uses under riparian law); Cal. Water Code § 1254 (West 1971) ("domestic use is the highest use"); Minn. Stat. Ann. § 103G.261(a)(1) (West 1997) (domestic use given first priority). This jurisdiction presents no exception. In granting individuals fee simple title to land in the Kuleana Act, the kingdom expressly guaranteed: "The people shall . . . have a right to drinking water, and running water . . . ." Enactment of Further Principles of 1850 § 7, Laws of 1850 at 202 (codified at HRS § 7-1 (1993)). See also McBryde, 54 Haw. at 191-98, 504 P.2d at 1341-44 (comparing section 7 of the Kuleana act with authority in other jurisdictions recognizing riparian rights to water for domestic uses); Carter v. Territory, 24 Haw. 47, 66 (1917) (granting priority to domestic use based on riparian principles and section 7 of the Kuleana Act). And although this provision and others, including the reservation of sovereign prerogatives, evidently originated out of concern for the rights of native tenants in particular, we have no doubt that they apply today, in a broader sense, to the vital domestic uses of the general public. Accordingly, we recognize domestic water use as a purpose of the state water resources trust. Cf. Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) (holding that the public trust "applies with equal impact upon the control of drinking water reserves").

In acknowledging the general public's need for water, however, we do not lose sight of the trust's "original intent." As noted above, review of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property. Before the Mhele, the law "Respecting Water for Irrigation" assured native tenants "their equal proportion" of water. See Laws of 1942, in Fundamental Laws of Hawaii 29 (1904). Subsequently, the aforementioned Kuleana Act provision ensured tenants' rights to essential incidents of land beyond their own kuleana, including water, in recognition that "a little bit of land even with allodial title, if they be cut off from all other privileges would be of very little value," 3B Privy Council Records 713 (1850). See also Reppun, 65 Haw. 549-50, 656 P.2d at 69-70 (analogizing riparian rights under section 7 of the Kuleana Act to water rights of Indian reservations in Winters v. United States, 207 U.S. 564 (1908)); cf. Peck v. Bailey, 8 Haw. 658, 661 (1867) (recognizing "appurtenant rights" to water based on "immemorial usage").[(34)] In line with this history and our prior precedent, see Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982); Public Access Shoreline Hawaii v. Hawaii Planning Comm'n, 79 Hawaii 425, 438-447, 903 P.2d 1246, 1259-68 (1995), cert. denied, 517 U.S. 1163 (1996) [hereinafter PASH], and constitutional mandate, see Haw. Const. art. XII, § 7, we continue to uphold the exercise of Native

Hawaiian and traditional and customary rights as a public trust purpose.[(35)] See generally Elizabeth Ann Hooipo Klaenaauao Pa Martin et al., Cultures in Conflict in Hawaii: The Law and Politics of Native Hawaiian Water Rights, 18 U. Haw. L. Rev. 71, 147-79 (1996) (surveying various rights).

LURF asserts that the public trust in Hawaii encompasses private use of resources for "economic development," citing, inter alia, Territory v. Liliuokalani, 14 Haw. 88 (1902) (grants of tidal lands to private individuals), Haalelea v. Montgomery, 2 Haw. 62 (1858) (konohiki fishing rights), and the Admissions Act, Act of Mar. 18, 1959, Pub. L. 83-3, 73 Stat. 4, § 5(f) (designating "development of farm and home ownership" as one of the purposes of the state ceded lands trust). While these examples generally demonstrate that the public trust may allow grants of private interests in trust resources under certain circumstances, they in no way establish private commercial use as among the public purposes protected by the trust.

Although its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction. See, e.g., HRS § 7-1 (codifying law of kingdom providing, inter alia, that "[t]he springs of water, running water, and roads shall be free to all"); Illinois Central, 146 U.S. at 456 (observing that the trust's limitation on private rights "follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested"); see generally Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711 (1986) (discussing the history and underlying policies of the concept of "inherently public property"). In considering a similar argument, the California Supreme Court stated:

> Since the public trust doctrine does not prevent the state from choosing between trust uses, the Attorney General of California, seeking to maximize state power under the trust, argues for a broad concept of trust uses. In his view, "trust uses" encompass all public uses, so that in practical effect the doctrine would impose no restrictions on the state's ability to allocate trust property. We know of no authority which supports this view of the public trust, except perhaps the dissenting opinion in Illinois Central . . . . The tideland cases make this point clear; . . . no one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use.
>
> Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

National Audubon, 658 P.2d at 723-24 (citations omitted).

We hold that, while the state water resources trust acknowledges that private use for "economic development" may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected "trust purpose." We thus eschew LURF's view of the trust, in which the "'public interest' advanced by the trust is the sum of competing private interests" and the "rhetorical distinction between 'public trust' and 'private gain' is a false dichotomy." To the contrary, if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time. See Robinson, 65 Haw. at 677, 658 P.2d at 312 ("[U]nderlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.").

ii. Powers and Duties of the State under the Trust

This court has described the public trust relating to water resources as the authority and duty "to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses." Id. at 674, 658 P.2d at 310 (emphases added). Similarly, article XI, section 1 of the Hawaii Constitution requires the state both to "protect" natural resources and to promote their "use and development." The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.

The mandate of "protection" coincides with the traditional notion of the public trust developed with respect to navigable and tidal waters. As commonly understood, the trust protects public waters and submerged lands against irrevocable transfer to private parties, see, e.g., Illinois Central, supra, or "substantial impairment," whether for private or public purposes, see, e.g., State v. Public Serv. Comm'n, supra. In this jurisdiction, our decisions in McBryde and its progeny and the plain meaning and history of the term "protection"[(36)] in article XI, section 1 and article XI, section 7 establish that the state has a comparable duty to ensure the continued availability and existence of its water resources for present and future generations.

In this jurisdiction, the water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state. Post-Mhele water rights decisions ignored this duty, treating public water resources as a commodity reducible to absolute private ownership, such that "no limitation . . . existed or was supposed to exist to [the owner's] power to use the . . . waters as he saw fit," Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680 (1904). See Reppun, 65 Haw. at 539-48, 656 P.2d at 63-69. Based on founding principles of the ancient Hawaiian system and present necessity, this court subsequently reasserted the dormant public interest in the equitable and maximum beneficial allocation of water resources. See id.; Robinson, 65 Haw. at 673-77, 658 P.2d 310-12.

This state has adopted such principles in its constitution. The second clause of article XI, section 1 provides that the state "shall promote the development and utilization of [water] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." (Emphasis added.) The framers deemed it necessary to define "conservation" and agreed on the following: "the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits." See Stand. Comm. Rep. No. 77, in 1978 Proceedings, at 685-86 (emphases added). The second clause of article XI, section 1 thus resembles laws in other states mandating the maximum beneficial or highest and best use of water resources. See, e.g., Cal. Const. art. X, § 2; N.M. Const. art. 16, § 3; N.D. Cent. Code § 61-04-01.1.1 (Supp. 1999). Unlike many of the traditional water rights systems governed by such provisions, however, article XI, section 1's mandate of "conservation"-minded use recognizes "protection" as a valid purpose consonant with assuring the "highest economic and social benefits" of the resource. See Owen L. Anderson et al., Prior Appropriation, in 2 Waters and Water Rights § 12.03(c)(2), at 114 (Robert E. Beck ed., 1991) [hereinafter Water Rights] (noting early proscriptions against "nonuse" as "the perceived biggest waste of all"). But see id. § 13.05(a) (explaining the modern trend towards providing for instream flows and uses). In short, the object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes "use."

As the foregoing discussion suggests, the conventional notion of the public trust fashioned in the context of navigable and tidal waters offers only a partial picture of the water resources trust of this state. With this understanding, we turn to the leading decision applying the public trust to water resources, National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal.), cert. denied, 464 U.S. 977 (1983), otherwise known as the "Mono Lake" case.

In National Audubon, the California Supreme Court confronted two legal systems "on a collision course": the public trust and appropriative rights. See id. at 711-12. The public water utility of the City of Los Angeles had obtained permits to appropriate, for domestic purposes, nearly the entire flow of four of the five streams flowing into Mono Lake, the second largest lake in California. The diversions had resulted in a precipitous decline in the level of the lake, thereby imperilling the lake's scenic beauty and ecological values. Seeking an "accommodation" between the public trust and appropriative rights, the court initially held that the state's "[continuing supervisory control] prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." Id. at 727. The court acknowledged that, "[a]s a matter of current and historical necessity," the state may permit an appropriator to take water from flowing streams, "even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream." Id. The court nonetheless maintained that, in so doing, "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust." Id. at 728 (citation omitted).

Many of the parties, primarily those advocating offstream uses, attempt to distinguish the Mono Lake case from the present one. The two cases indeed differ in important respects. First, National Audubon involved diversions for a public purpose, the domestic uses of the City of Los Angeles. No comparable offstream public needs are advanced here.[(37)] Second, the National Audubon court sought to assert the public trust against a water rights system equating nonconsumptive use with "waste." See, e.g., In re Waters of Long Valley, 599 P.2d 656, 664 (Cal. 1979) (noting that article X, section 2 of the California constitution "prevents waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea"). Our common law riparian system does not share such a view; moreover, the mandate of "conservation"-minded use subsumed in our state's water resources trust contemplates "protection" of waters in their natural state as a beneficial use. Finally, unlike California, this state bears an additional duty under Article XII, section 7 of its constitution to protect traditional and customary Native Hawaiian rights. If one must distinguish the two cases, therefore, National Audubon appears to provide less, rather than more, protection than arguably justified in this case.

Despite these differences, we recognize that the dichotomy between the public trust and appropriative system in California roughly approximates the dual nature of the public trust in the water resources of this state. Consequently, National Audubon provides useful guidance on the manner in which this state may balance the potentially conflicting mandates of the trust. Drawing from this source and others, we seek to define the trust's essential parameters in light of this state's legal and practical requirements and its historical and present circumstances. To this end, we hold that the state water resources trust embodies the following fundamental principles:

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. See Robinson, 65 Haw. at 674, 658 P.2d at 310; see also State v. Central Vt. Ry., 571 A.2d 1128, 1132 (Vt. 1989) ("[T]he state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power."), cert. denied, 495 U.S. 931 (1990). The continuing authority of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes. See Robinson, 65 Haw. at 677, 658 P.2d at 312; see also National Audubon, 658 P.2d at 727; Kootenai, 671 P.2d at 1094 ("[T]he public trust doctrine takes precedent even over vested water rights."); cf. Karam v. Department of Envtl. Protection, 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998) ("[T]he sovereign never waives its right to regulate the use of public trust property."), aff'd, 723 A.2d 943, cert. denied, __ U.S. __, 120 S.Ct. 51 (1999).[(38)] This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust. See National Audubon, 658 P.2d at 728.

The state also bears 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[[(39)]]." Id. (emphasis added). Preliminarily, we note that this duty may not readily translate into substantive results.[(40)] The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, including agriculture, see generally Haw. Const. art. XI, § 3.[(41)] Therefore, apart from the question of historical practice,[(42)] reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values. See National Audubon, 658 P.2d at 727. As discussed above, by conditioning use and development on resource "conservation," article XI, section 1 does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state. In the words of another court, "[t]he result . . . is a controlled development of resources rather than no development." Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. Ct. 1973), aff'd, 323 A.2d 407 (1974), aff'd, 361 A.2d 263 (Pa. 1976).

We have indicated a preference for accommodating both instream and offstream uses where feasible. See Reppun, 65 Haw. at 552-54, 556-63 & n.20, 656 P.2d at 71-72, 73-78 & n.20 (allowing ground water diversions short of "actual harm" to surface uses); Robinson, 65 Haw. at 674, 658 P.2d at 310 (describing the trust as "authority to assure the continued existence and beneficial application of the resource for the common good" (emphasis added)). In times of greater scarcity, however, the state will confront difficult choices that may not lend themselves to formulaic solutions. Given the diverse and not necessarily complementary range of water

uses, even among public trust uses alone, we consider it neither feasible nor prudent to designate absolute priorities between broad categories of uses under the water resources trust. Contrary to the Commission's conclusion that the trust establishes resource protection as "a categorical imperative and the precondition to all subsequent considerations," we hold that the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law. See Robinson, 65 Haw. at 677, 658 P.2d at 312; see also Save Ourselves, 452 So.2d at 1152 (reading the constitution to establish a "rule of reasonableness" requiring the balancing of environmental costs and benefits against economic, social, and other factors).

Having recognized the necessity of a balancing process, we do not suggest that the state's public trust duties amount to nothing more than a restatement of its prerogatives, see Robinson, 65 Haw. at 674 n.31, 658 P.2d at 310 n.31, nor do we ascribe to the constitutional framers the intent to enact laws devoid of any real substance and effect, see supra notes 29, 36 & 40. Rather, we observe that the constitutional requirements of "protection" and "conservation," the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the "zero-sum" game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment. See, e.g., Zimring, 58 Haw. at 121, 566 P.2d at 735 ("[T]he State as trustee has the duty to protect and maintain the trust [resource] and regulate its use. Presumptively, this duty is to be implemented by devoting the [resource] to actual public uses, e.g., recreation."). Thus, insofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or "default" condition, we affirm the Commission's conclusion that it effectively prescribes a "higher level of scrutiny" for private commercial uses such as those proposed in this case.[(43)] In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust. Cf. Macron, Inc. v. Commonwealth Dep't of Envtl. Resources, 462 A.2d 969, 971 (Pa. Cmwlth. Ct. 1983) (maintaining that, given the "special concerns involved in this area of the law," i.e., the public trust, the petitioner and the agency had the duty to justify the permit); Commonwealth Dep't of Envtl. Resources v. Commonwealth Pub. Util. Comm'n, 335 A.2d 860, 865 (Pa. Cmwlth. Ct. 1975) (holding that, once adverse impact to the constitutional public trust is raised, "the applicant's burden is intensified," and the agency and reviewing court "must be satisfied that the [relevant constitutional test] is met"); Superior Public Rights, Inc. v. State Dep't of Natural Resources, 263 N.W.2d 290, 294 (Mich. Ct. App. 1977) (deciding, in the absence of direction from the relevant statutes or rules, that party applying for use of public trust lands for private commercial purposes bore the burden of proof); cf. Robinson, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8 (noting that, under the common law, "[t]he burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking the transfer").

The constitution designates the Commission as the primary guardian of public rights under the trust. Haw. Const. art. XI, section 7. As such, the Commission must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process. Save Ourselves, 452 So.2d at 1157 (citing Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1119 (D.C. Cir. 1971); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965))); see also Debates, in 2 Proceedings, at 857 (statement by Delegate Fukunaga) ("Thus, under [article XI, section 7], the State must take an active and affirmative role in water management."). Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources. See, e.g., Save Ourselves, 452 So.2d at 1157-58; Payne, 312 A.2d at 94; Kootenai, 671 P.2d at 1092-93; Hamilton v. Diamond, 349 N.Y.S.2d 146, 148-49 (N.Y. App. Div. 1973), appeal denied, 34 N.Y.2d 516 (1974). The trust also requires planning and decisionmaking from a global, long-term perspective. See United Plainsmen Ass'n v. North Dakota State Water Comm'n, 247 N.W.2d 457, 462-64 (N.D. 1976). In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

c. Standard of Review under the Trust

Finally, the special public interests in trust resources demand that this court observe certain qualifications of its standard of review, see Part II, supra. As in other cases, agency decisions affecting public trust resources carry a presumption of validity. The presumption is particularly significant where the appellant challenges a substantive decision within the agency's expertise as "clearly erroneous," HRS § 91-14(g)(5), "arbitrary," "capricious," or an "abuse of discretion," HRS § 91-14(g)(6). See Save Ourselves, 452 So.2d at 1159.

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. See State v. Quitog, 85 Hawaii 128, 130 n.3, 938 P.2d 559, 561 n.3 (1997) (recognizing the Hawaii Supreme Court as the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution")).

> Judicial review of public trust dispensations complements the concept of a public trust. [The Arizona Supreme Court] said . . . , "The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager." Kadish v. Arizona State Land Dep't, 155 Ariz. 484, 487, 747 P.2d 1183, 1186 (1987), aff'd, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

Arizona Cent. for Law in Pub. Interest v. Hassel, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991), review dismissed, 837 P.2d 158 (Ariz. 1992) (brackets and citation omitted).

Nevertheless, as the Idaho Supreme Court elaborated:

> This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.

Kootenai, 671 P.2d at 1092 (emphasis added). See also Owsicheck, 763 P.2d at 494 (holding that grants of exclusive rights to harvest natural resources should be subjected to "close scrutiny"); Weden v. San Juan County, 958 P.2d 273, 283 (Wash. 1998) (observing that, even absent a constitutional mandate, "courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, as if they were measuring that legislation against constitutional protections" (citation and internal quotation marks omitted)).

FOOTNOTES

25. The doctrine traces its origins to the English common law and ancient Roman law. See Lynda L. Butler, The Commons Concept: A Historical Concept with Modern Relevance, 23 Wm. & Mary L. Rev. 835, 846-67 (1982).

26. Courts and commentators have identified up to three separate interests in trust resources: the jus privatum, or private property right, the jus regium, otherwise known as the police power, and the jus publicum, the public trust. See, e.g., id. at 456-58; Butler, supra, at 861-62.

27. The Mhele and the subsequent Kuleana Act instituted the concept of private property in the Hawaiian Kingdom. For an overview of its operation, see id. at 184-85, 504 P.2d at 1337-38; Jon J. Chinen, The Great Mahele (1958); Lilikal Kameeleihiwa, Native Lands and Foreign Desires (1992).

28. Regarding the navigable waters trust, the United States Supreme Court has explained:

> At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.

. . . .

> The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-74 (1988) (quoting Shively v. Bowlby, 152 U.S. 1, 57 (1894)).

29. The delegates discussed at length the proposal that produced the final version of article XI, section 7. Some notable comments include: "[T]he amendment and committee proposal go beyond the mere power to regulate--which is generally known as the police power of the State--and impose a duty upon the State to regulate and protect," id. at 857 (statement by Delegate Fukunaga); "[W]hat the amendment attempts to do, as I read it, is to define what "public trust" means . . . [;] it's an attempt to clarify and put it in the Constitution," id. at 859 (statement by Delegate Waihee); "[T]his amendment recognizes . . . that water is a resource in Hawaii that needs to be protected for the use of all people," id. at 860 (statement by Delegate De Soto); "[The amendment] maintains the intent of the committee to establish a public trust doctrine for the State of Hawaii to protect the total water resources for the benefit of the people of Hawaii," id. (statement by Delegate Hoe); "I urge the passage of this amendment establishing a state water agency to act as trustee of all the water resources of Hawaii for the benefit of the people," id. (statement by Delegate Chong); "[T]he committee proposal as amended would make the State of Hawaii the trustee of the water of Hawaii for the benefit of the people of Hawaii," id. at 866 (statement by Delegate Hornick); "[T]his trust concept means that you go for the benefit of the people, and that's different from just mere regulation," id. at 876 (statement by Delegate Hanaike). See also id. at 862-68 (rejecting a proposed amendment stating merely that "[t]he State shall regulate and control all water").

The delegates deleted an express reference to the "public trust" in article XI, section 7 because of "[s]ome confusion generated by the [thought that] . . . 'trust' implies ownership." Comm. Whole Rep. No. 18, in 1 Proceedings, at 1026. Public rights under the trust do not constitute state "ownership." See Illinois Central, 146 U.S. at 452; Robinson, 65 Haw. at 674, 658 P.2d at 310. In any event, the delegates explained that they had used "public trust" to describe "the duty of the State to actively and affirmatively protect, control and regulate water resources" and, in place of that term, "substituted language [that they] believe[d] fully convey[ed] the theory of 'public trust.'" Comm. Whole Rep. No. 18, in 1 Proceedings, at 1026 (emphasis added).

30. Because article XI, section 7 also mandates the creation of an agency to regulate water use "as provided by law," LURF and HFB argue that it is not self-executing. See State v. Rodrigues, 63 Haw. 412, 629 P.2d 1111 (1981) (holding that the creation of the independent grand jury counsel position in article I, section 11 was not self-executing). Whereas review of the history of article I, section 11 in Rodrigues evidenced the intent to require further legislative action, the same inquiry here reveals that the framers intended to invoke the public trust in article XI, section 7. See supra note 29. Article XI, section 7 is thus self-executing to the extent that it adopts the public trust doctrine. See Debates, in 2 Proceedings at 863 (statement by Delegate Waihee) ("What the [amendment] attempts to do is, first of all, create a fiduciary duty to regulate and control the water. The second thing that it does is establish a coordinating agency to regulate all water."); Haw. Const. art XVI § 16 ("The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit."); cf. Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976) ("No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own ipse dixit.").

31. With respect to article XI, section 1, KSBE contends that the provision's reference to "public natural resources" indicates an intent to exclude "privately owned" waters from the public trust. This argument misses the point; at least in the water resources context, we have maintained that, apart from any private rights that may exist in water, "there is, as there always has been, a superior public interest in this natural bounty." Robinson, 65 Haw. at 677, 658 P.2d at 312.

32. We need not retread the ground covered thoughtfully and exhaustively by McBryde and its progeny. Nonetheless, several basic errors in the City Mill court's reasoning deserve mention. The court characterizes the Mhele as a simple transfer of property from the King, as "sole owner . . . of all the land in the islands," to individuals. Id. at 934. The first constitution of the kingdom, however, expressly proclaimed that the land "was not [the King's] private property. It belonged to the Chiefs and the people in common, of whom [the King] was

the head and had the management of landed property." Haw. Const. of 1840, reprinted in Fundamental Laws of Hawaii 3 (1904); see also Kameelehiwa, supra, at 10 ("In traditional Hawaii, *ina* [land] was not owned but was held in trust."); infra note 89. Moreover, the landscape of law and custom at the time of the Mhele compellingly demonstrates that, despite the transition to a private property regime, water remained a resource reserved to the community. See Reppun, 65 Haw. at 542-45, 656 P.2d at 65-67. All lands granted in the Mhele, even the King's retained private estate, passed into individual hands burdened with the reservation of this usufruct for the common good. See id.; see also Act of April 27, 1846, pt. I, ch. VII, art IV, § 7, 1 SLH 107, 109 (1845-46), reprinted in 2 RLH 2120, 2123 (statute creating the land commission) (mandating that the commission's decisions "be in accordance with the principles established by . . . native usages in regard to . . . water privileges"); Land Commission Principles, 1 SLH 81, 82, 2 RLH 2124, 2125-26 ("But even when such lord shall have received allodial title from the King . . . the rights of the tenants and sub-tenants must still remain unaffected . . . .").

In response to the argument that the Territory "owned" all the artesian water, the City Mill court concluded: "If by the land commission awards and the patents in confirmation thereof the awardees and patentees became the owners of the subjacent waters, courts would not be justified, simply because of the supposed necessity, in announcing such a radical alteration in their views of the law . . . ." Id. at 934-35. Beyond observing again that the public trust does not constitute "ownership," we disagree less with the foregoing logic than with its underlying premise. Having rectified the misconceptions concerning the origins of water rights in this jurisdiction in McBryde and its progeny, we reach the opposite conclusion that the City Mill court could not, by judicial fiat and ipse dixit, extinguish the public rights in water resources preserved by the sovereign reservation.

33. We note that the Commission's findings referenced testimony by an expert on Hawaiian custom regarding "evidence of the Hawaiians digging wells, like on the island of Kahoolawe." FOF 980. See also Richard H. Cox, Groundwater Technology in Hawaii, in Groundwater in Hawaii 16 (Faith Fujimura & Williamson B.C. Chang eds., 1981) (relating accounts of ancient Hawaiians excavating shallow wells). At a minimum, the historical record establishes that the ancient Hawaiians knew of the existence of water under the ground and made use of such water once it reached the surface. See David Malo, Hawaiian Antiquities 44 (2d ed. 1971) ("In Hawaii nei people drink either the water from heaven . . . or the water that comes from beneath the earth, which is (often) brackish."); E.S. Craighill Handy & Elizabeth G. Handy, Native Planters in Old Hawaii 61-67 (rev. ed. 1991) (documenting use of water from caves and from springs on land and under the sea).

34. The trust's protection of traditional and customary rights also extends to the appurtenant rights recognized in Peck.

35. Our holding with respect to the public trust does not supplant any other protections of these rights already existing.

36. In deleting a prior draft of article XI, section 1 merely stating that "[t]he legislature shall promote the conservation, development and utilization of . . . natural resources," and replacing it with the present language expressly mandating "protection," the committee noted:

> Much testimony was received expressing the opinion that the current language of Section 1 is contradictory and places insufficient weight on the preservation or protection end of the balance that is implied in the word "conservation." Your Committee agreed with this testimony and amended Section [1] to recognize this concern. . . . [T]he language of this section mandates that the State and its political subdivisions provide for the conservation and protection of natural beauty, as contrasted with the previous language which simply empowered the State to "conserve and develop its natural beauty."

Stand. Comm. Rep. No. 77, in 1 Proceedings, at 686 (emphases added). See also id. at 688 (explaining, with respect to a prior draft of article XI, section 7, that the "agency will also have the duty to protect groundwater resources, watersheds and natural stream environments because groundwater resources, watersheds and streams form the basis of our water resources system"); Debates, in 2 Proceedings, at 857 (statement by Delegate Hoe) ("[Article XI, section 7] strives to make clear that our obligations include the welfare of future generations and therefore in the use of our resources we must protect our natural resources against irreversible depletion, waste or destruction and safeguard the natural beauty of our State.").

37. We note that Waiawa Correctional Facility received a .15 mgd permit partially for "domestic" purposes, which no one challenges on appeal. D&O at 8-9. The recharge of leeward aquifers is an incidental effect of the permitted surface uses, the ultimate benefit of which remains in dispute. See FOF 915-23.

38. We agree with the National Audubon court that the few exceptions to the general rule against the abandonment of the public trust would not likely apply in the context of usufructuary water rights. See id. at 727 n.25.

39. Read narrowly, the term "feasible" could mean "capable of achievement," apart from any balancing of benefits and costs. See Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 718-19 (1980) (Marshall, J., dissenting). The National Audubon court apparently did not use "feasible" in this strict sense, and neither do we in this case.

40. But see Debates, in 2 Proceedings, at 866-67 (statement by Delegate Hornick) ("The public trust doctrine implies that the disposition and use of these resources must be done with procedural fairness, for purposes that are justifiable and with results that are consistent with the protection and perpetuation of the resource." (emphasis added)).

41. Article XI, section 3 states in relevant part: "The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing."

42. Although this court has held that the "natural flow" theory of riparianism best approximated the ancient Hawaiian system, we note that diversions of water out of watershed boundaries were allowed in certain cases, insofar as the available technology permitted. See Reppun 65 Haw. at 547, 656 P.2d at 68. The Commission raised several historical examples in its findings. FOF 968-70.

43. It is widely understood that the public trust assigns no priorities or presumptions in the balancing of public trust purposes. See National Audubon, 658 P.2d at 723; Jan S. Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L. Rev. 195, 223-225 (1980). Such balancing, nevertheless, must be reasonable, see, e.g., State v. Public Serv. Comm'n, 81 N.W.2d at 73-74 (noting that no one public use would be destroyed or greatly impaired and that the benefit to public use outweighed the harm), and must conform to article XI, section 1's mandate of "conservation." The Commission, in other words, must still ensure that all trust purposes are protected to the extent feasible.