

AN ADMINISTRATOR'S VIEW OF HAWAII'S PUBLIC TRUST DOCTRINE

By Colin Kippen

Whatever constitutional or common law rights Hawaiians may have to practice their traditional and customary ways pales in comparison to the need to have resources available upon which those practices may occur. The simple fact is that without the existence of a resource upon which to practice, there can be no practice. *Waiahole* is a seminal case not only because it defines the protection of traditional and customary activities by Hawaiians with respect to water as a public trust purpose, but because it articulates a methodology by which existing or proposed diversions of life-giving streams may be analyzed, critiqued, and where such activities are not in the public interest, to have them reversed or rejected. This paper defines the scope, breadth, and meaning of *Waiahole* and its relationship to the *PASH* and *Kapa'akai* cases. It concludes with a few practical suggestions on ways in which trustees of this public trust may improve their compliance with the constitutional and legal requirements set forth in *Waiahole*.

What is the Public Trust Doctrine and how does it work?

The Hawaii Supreme Court's *Waiahole* decision articulated the Public Trust Doctrine as the standard by which the State must manage the distribution and allocation of all surface and ground waters. The Court held that the "essential feature of the public trust (is) the right of the people to have the water protected for their use." *Waiahole* at p. 146.

The characterization of the State's responsibility as that of a trustee means that the state must act with the diligence and care of a fiduciary in assuring that . . . "those bona fide trust purposes such as . . . "traditional and customary Hawaiian rights, wildlife, maintenance of ecological balance and scenic beauty, and the preservation and enhancement of the water for various uses in the public interest" are protected when deciding what constitutes a "maximum beneficial use." *Waiahole* at p. 146. In other words, the State must protect the allocation of water by protecting the stream, the life within it, and the rights of Hawaiians to practice their traditions and customs before it determines what the "maximum reasonable and beneficial use" consists.

Paramount in deciding these issues is the role of the State in making these determinations. The State must act . . . "as a trustee and not simply (as) good business manager." *Waiahole* at p. 143. "It 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. *Waiahole* at p.143.

The State must take an active and affirmative role in water management and must consider the cumulative impact of existing and proposed diversions on trust purposes. The State must implement reasonable measures to mitigate this impact, including the use of alternative sources to meet future needs. These decisions must be made from a global, long-term perspective with a . . . " level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our State." *Waiahole* at p.143.

The burden of proof is on the applicant to demonstrate the effect the withdrawal will have on public in-stream values, on the traditional and customary rights of Hawaiians, on the natural flow of the stream, and on stream biota. The applicant must also justify the amount of water it is requesting and

prove that other sources of water available are insufficient to meet the applicant's demands. The applicant is responsible for producing the information necessary to support its claim including scientific, economic, or other data. The State as trustee is empowered to revisit prior diversions and allocations, and must adopt a "higher level of scrutiny" for reviewing proposed offstream commercial uses. *Waiahole* at p. 142.

The State must adopt precautionary principles to protect fresh water resources where scientific evidence is preliminary or the results of studies are inconclusive. "...[W]here 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." *Waiahole* at p. 154-55.

What is the connection between the public trust doctrine and the assertion and exercise of Native Hawaiian Rights?

Hawaiian rights are broadly defined in Article 12, Section 7 of the Hawaii Constitution, Hawaii Revised Statutes Section 1-1, and Hawaii Revised Statutes Section 7-1. These provisions commonly refer to the right of Hawaiians to exercise their traditional and customary rights for subsistence, cultural, and religious purposes, subject to the right of the State to regulate such rights. Since the protection of traditional and customary rights of Hawaiians was one of the core values upon which the *Waiahole* decision turned, I will concentrate my analysis in this section on that aspect of the case.

While most of the case law interpreting the exercise of traditional and customary rights has concerned gathering and access, other native rights exist as well. The Water Code specifically protects traditional and customary rights of Hawaiians as provided in section 174 C-101 part c and part d as follows:

(c) Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.

The State Supreme Court's opinion in *Waiahole* is the latest in a string of cases protecting the exercise of traditional and customary rights by Native Hawaiians.

The first and most significant case is our State Supreme Court's 1995 decision in *PASH v. Hawaii County Planning Commission*, 79 Hawaii 425, 903 P.2nd 1246 (1995) cert. denied, 517 U.S. 1163 (1996). *PASH* involved a challenge by Public Access Shoreline Hawaii (PASH) and Angel Pilago to an application filed by Nansay Corporation to the Hawaii Planning Commission for a Special Management Area (SMA) permit for a 450 acre development in the shoreline area of Kohanaiki on

Hawaii Island. Both PASH and Pilago requested a contested case hearing and the Hawaii Planning Commission (HPC) denied the request on the grounds that they did not have standing. The HPC then approved Nansay's permit application. PASH and Pilago sought review of HPC's decision by the Circuit Court which subsequently ruled in their favor. Nansay appealed to the Intermediate Court of Appeals (ICA) and the State Supreme Court after the ICA affirmed the Circuit Court's opinion.

After finding that the plaintiffs had standing to participate in the contested case action, the court addressed PASH's assertion that the proposed development would infringe upon Hawaiians exercise of traditional and customary gathering activities of 'opae in the anchialline ponds located on Nansay's property. The Supreme Court upheld the right of Hawaiians to engage in their traditional and customary gathering activities and opined that the government has an affirmative duty to protect the reasonable exercise of traditional and customary rights of Hawaiians on land less than fully developed.

An essential feature of this holding is the Supreme Court's view that the county planning commission has a duty to inquire as to the exercise of traditional and customary rights practiced by Hawaiians on lands for which county approvals are sought and the impact proposed county action (such as approving a permit allowing development) will have on such practices. The Court stated: "[T]he State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." *PASH* at p. 450 n.43.

PASH was followed five years later by *Ka Pa'akai O Ka Aina v. Land Use Commission*, 94 Hawaii 31, 7 P.3rd 1068 (2000), a challenge by Hawaiian practitioners, among others, to the Land Use Commission's (LUC) decision to reclassify over 1000 acres of land in the ahupua'a of Ka'upulehu on Hawaii island from a Conservation to an Urban District designation. The issue on appeal was whether the LUC had met its duty to protect the traditional and customary practices asserted by native Hawaiians by approving the land reclassification.

The court found that the LUC had not fulfilled its statutory duties because it had not reviewed and analyzed the "1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; 2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist." *Kapa 'akai*, slip op. at p.15. The court vacated the LUC's decision to reclassify the land and remanded the matter for further proceedings.

Kapa 'akai is also instructive for another reason. Ka'upulehu Development Company (KD) attempted to justify the LUC's decision to reclassify the land by arguing that its Resource Management Plan would be sufficient to assure identification and protection of cultural and religious practices of Hawaiians. The court rejected this delegation in strong terms stating:

"This wholesale delegation of responsibility for the preservation and protection on native Hawaiian rights to KD, a private entity, however, was improper and missed the point. These issues must be addressed before the land is reclassified" and further, "...we hold that, insofar as the LUC allowed KD to direct the manner in which customary and traditional native Hawaiian practices would be preserved and protected by the proposed development - - the LUC failed to satisfy its statutory and

constitutional obligations. In delegating its duty to protect native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority.” *Kapa ‘akai*, slip op. at p.19.

After *PASH*, *Kapa ‘akai*, and *Waiahole*, governmental entities will be required to not only define the traditional and customary rights affected by any proposed action but also to render findings on the impacts and mitigation necessary to lessen the impact on the exercise of these rights by Hawaiians.

What are some strategies available to water managers to effectively implement the requirements of the public trust doctrine?

Water managers must view themselves as trustees and not just as project managers.

At its core, successful implementation of the public trust doctrine demands a change in the perspective of water managers, planners, and government officials to view themselves not merely as project managers vested with little discretion expected to accommodate all requests for water but instead for them to ...“reaffirm . . .that use of the precious water resources of our state must ultimately proceed with due regard for certain enduring public rights.” *Waiahole*, fn 108. Stated another way, government officials must heed the Court’s characterization that they are trustees responsible for managing the water in the public trust and therefore must act accordingly.

Trustees of the water in the public trust must have the time, funds, and inclination to learn about the water resources they manage.

It goes without saying that the *Waiahole* decision may have caught county and state planners and decisionmakers unprepared to immediately fulfill their duties as trustees in managing the water resources of our state. The *Waiahole* court assumes that fundamental guiding principles will drive planning and that the collection and evaluation of relevant data will inform the decisions that are made. Unfortunately, agency budgets may be inadequate to allow for the studies necessary to establish in-stream flow standards or to inform decisions about pending water allocations. While funds may be in short supply, there are a number of strategies which may be implemented:

1. Review existing expenditures and, if necessary, seek an appropriation of additional funds to develop necessary scientific information. Argue the cost of non-compliance with the public trust doctrine (delays, litigation, reversal by judicial decision etc.) as a reason to justify reallocations or additional funding. As part of the review process, a management audit to determine CWRM’s ability to successfully meet the mandates of *Waiahole* should be considered. A review of the functions of each part of the COWRM structure as it relates to meeting the responsibilities enunciated by the *Waiahole* court should also be considered.
2. Recall that the burden of proof is on the applicant to produce information in support of its application for water. Staff should determine the kinds of information needed to evaluate a given request and establish protocols for the production of that information. Staff should assess the feasibility of transferring

costs to applicants in those situations where legislative authorization does not now exist and should consider legislative amendments to enable this to occur.

3.

Seek funding partnerships with other public or private entities who may be affected by any future decision. COWRM and the counties may be unable to bear the cost of financing data collection on their own but joint funding may be a means to raise capital and achieve matching funds from federal or other nonprofit entities. A voluntary commitment to assist in funding may be possible even though specific statutory authority to mandate cost sharing does not exist. If voluntary funding arrangements do occur, assure that agency independence is preserved (ie. “he who pays the piper calls the tune”) and that the scope of the study funded addresses the scope and quality of information necessary to meet the trust responsibilities defined by the *Waiahole* court.

4.

Get out of the office and inspect the streams and watercourses affected by any decision your agency may render. Use this as an opportunity to define who the stakeholders are and to consult with them about the effect of past, present, or future diversions. Also use this opportunity to learn about the traditional and customary practices and the effect your decisions have had or may have in the future on the exercise of these rights by Hawaiians.

5.

Become sensitized to the possibility that previous offstream diversions of water prior to the implementation of the water code may violate the ‘public trust’ doctrine, especially if those existing diversions are ratified, approved, acquiesced in or adopted by COWRM without adequately considering the facts, circumstances, and policies implicated by the continued diversion.

Seek out opportunities to consult and collaborate with others.

My staff at OHA spend a great deal of their time consulting with federal, state, and county officials regarding projects or undertakings which may affect Hawaiian interests. Working together with others saves time and money and leads to collaborative solutions which foster respect and understanding for those traditional and customary Hawaiian rights and interests we advocate for. While there are sometimes situations where it would be inappropriate for us to comment or consult because we are not the real party in interest or a person with individual standing to comment, there may still be a benefit for your agencies to seek consultation as those real parties in interest may be defined, located, and contacted through such efforts.

Waiahole discusses the need for coordinated planning amongst the COWRM and the counties, especially in those situations where more land is planned and zoned for development than there is water available. For example, the court noted this problem for the City and County of Honolulu stating: “the existing water is already insufficient to accommodate the land uses planned and zoned by the City.” *Waiahole* at p. 188. The court clarified that ... “whether the City accepts it or not, this shortfall will compel the Commission to prioritize among proposed uses in making ultimate choices among them.” *Waiahole* at p. 188.

In order to preserve the prerogatives of county planning and zoning and the notions of home rule involved therein, the implication for county planners is clear: they... “must, as a matter of sound planning policy, actively develop integrated water use plans addressing the contingencies arising from the limitations in supply.” *Waiahole* at p. 188.

As previously stated, county planners must assess their existing zoning and plans and prioritize how and where development will occur given various assumptions as to the availability of water. The suggestions and strategies in the previous section may be applicable as ways to collaborate and build partnerships across the state.

The policies and decision matrix set forth by the Waiahole court require an evaluation of existing water diversions in order to assure protection of the public’s interest in this precious resource.

Waiahole stands for the proposition that ... “existing uses are not automatically grandfathered under the constitution and the Code, especially in relation to public trust uses” *Waiahole* at p.149. Further, ...“the Code also obligates the Commission to ensure that it does not ‘abridge or deny’ traditional and customary rights of Native Hawaiians”. . . including . . . “preserving appurtenant rights(brackets and citations omitted.)” *Waiahole* at p.153. Therefore, public-trust-water-managers must look first to those public trust uses in need of protection before considering the continued approval of existing diversions of public trust water resources.

Summary.

Waiahole makes it the duty of government to *malama ‘aina* by viewing water as a precious resource to be managed as a public trust. It mandates protection of natural watercourses, the life within it, and the rights of Hawaiians to practice their traditions and customs before determining what constitutes the “maximum reasonable and beneficial use.” It imposes the burden of proof on an applicant desiring water, on the government to identify and establish instream flow standards, and, in the absence of clear and definitive data, requires that precautionary principles trigger to protect harm to the watercourse or to the resource itself. It eschews a belief that prior diversions are beyond review and imposes a burden on government decisionmakers to ask hard questions and to make their decisions based upon data, information, and the need to protect bona fide trust purposes.

Waiahole is only recently decided and there will undoubtedly be realignments and adjustments in the manner in which COWRM, the counties, the community, and the private users react to it. Let us work together in the spirit of cooperation to assure that this precious resource is protected and to breathe life into the principles of *malama ‘aina* residing within this doctrine.