

Ho'ohana Aku, a Ho'ōla Aku:

A Legal Primer for Traditional and Customary Rights in Hawai'i

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I. INTRODUCTION

He ali'i ka 'āina; he kauwā ke kanaka.

The land is a chief; man is its servant.

Land has no need for man, but
man needs the land and works it for a livelihood.¹

Aloha mai kākou!

This primer provides an introduction to Hawai'i law governing traditional and customary Native Hawaiian rights for those wanting to better understand the overall legal and cultural landscape. While it cannot resolve all questions regarding traditional and customary rights in these islands, it is designed to summarize major Hawai'i laws and issues, and direct those with additional questions to available resources, legal or otherwise. Although this primer is intended to provide helpful information, it is not a substitute for and does not provide individualized legal advice. If you have legal questions, please consult an attorney who specializes in this area.

Part II overviews the current legal framework, beginning with a discussion of communal land tenure principles in ancient Hawai'i, as well as an examination of Western impacts on traditional and customary practices. After exploring legal foundations supporting the transition to a modern property rights regime, this part briefly notes the judicial recognition of ongoing gathering and access rights. Part II concludes by reviewing constitutional and statutory provisions that govern the protection and regulation of traditional and customary rights for subsistence, cultural, and religious purposes.

Part III focuses on judicial efforts to reconcile ancient and modern systems of land use, briefly describing court cases that have gradually begun to clarify the scope of traditional and customary gathering rights. To better understand how the interests of practitioners are balanced against the interests of landowners, this part first discusses the requirements for identifying or establishing traditional and customary rights, then provides a framework for understanding the government's obligation to protect and reasonably regulate such practices.

This Part also addresses more general rights of access involving two major categories: access rights to landlocked kuleana parcels, and access rights between two or more ahupua'a.

¹ MARY KAWENA PUKU'I, 'ŌLELO NO'EAU HAWAIIAN PROVERBS & POETICAL SAYINGS 62 (3d ed. 1983) [hereafter PUKU'I] (no. 531).

Discussion of the first category focuses on common law easements, and briefly describes court cases recognizing that kuleana owners possess express or implied interests in neighboring lands ensuring continued access to their kuleana. It also describes the second category of access rights by reviewing relevant statutory and constitutional provisions governing trails and rights-of-way over both government and private lands.

Part IV provides tools that may be available to the community or other groups seeking to ensure the protection of traditional and customary rights, including monitoring permit applications and proceedings, monitoring legislative proposals, citizen complaints regarding state and county agencies, public access preservation, conservation land trusts, and litigation.

In addition to original material and other cited works, this primer borrows liberally from the forthcoming book, *NATIVE HAWAIIAN LAW* (second edition of the *NATIVE HAWAIIAN RIGHTS HANDBOOK*) with the editors' blessing and approval. A number of resources and references are also included. A glossary explains some of the legal, scientific and cultural terms of art. Appendix A includes contact information for relevant legal resources, and county, state and federal agencies. Appendix B is a compact disc that provides ready access to significant legal resources, such as Hawai'i constitutional provisions, laws, administrative rules, and Hawai'i Supreme Court decisions.

Although independent review of applicable laws is always best, this primer will hopefully provide a better understanding of traditional and customary gathering and access rights, and direct the reader to additional resources to ensure that vital cultural practices are preserved for present and future generations. Ho'ohana aku, a ho'ola aku: Use it, and let it live!²

2 2 ORAL HISTORY INTERVIEWS: KA HANA LAWAI'A A MENA KO'A KAI 'EWALU 1200, 1225 (2003), quoted in Wayne Tanaka, Ho'ohana aku, a ho'ola aku: First Steps to Avoiding the Tragedy of the Commons in Hawai'i's Nearshore Fisheries, 10 *ASIAN-PAC. L. & POL'Y J.* 235, 235 & n.1 (2008) (citing Group Interview by Kepā Maly with Louis "Buzzy" Agard, Valentine Ako, John Dudoit, Eddie Nāmakani, E. Kāwika Kapahulehua, & Walter Keli'iokekai Paulo, Kūpuna (Oct. 27, 2003)).

II. LEGAL OVERVIEW AND FRAMEWORK

Hana ‘o ka ha‘ole!

The white man does it in earnest!

Hawaiians were generally easygoing and didn’t order people off their lands or regard them as trespassers. When the whites began to own lands people began to be arrested for trespassing and the lands were fenced in to keep Hawaiians out.³

Traditional and customary rights are rooted in the customs, practices, and privileges of the original and still primary Native Hawaiian social unit, the ‘ohana, or extended family. In ‘Ōlelo Hawai‘i, the mother tongue of these lands: ‘āina means land, or “that which feeds;” maka‘āinana are the common people who attend the land, or the “eyes of the land;” and, hoā‘āina are native tenants or “caretakers.” The cultural and spiritual identity of the Hawaiian people derives from their relationship with the ‘āina; because the land is part of their ‘ohana, traditional Hawaiian customs and practices emphasize respect and care for the ‘āina and surrounding resources. Accordingly, the traditional and customary practices of the Hawaiian people include gathering, hunting, and fishing in a manner that allows natural resources to reproduce and replenish themselves.

A. Traditional and Customary Rights in Ancient Hawai‘i

At the time of Western contact in about 1778, the Native Hawaiian people “lived in a highly organized, self-sufficient, subsistent society based on a system of communal land tenure with a highly sophisticated language, religion and culture.”⁴ Access along the shore, between adjacent ahupua‘a (loosely defined as watersheds), to the mountains and the sea, and to small areas of land cultivated or harvested by native tenants, were all necessary parts of early Hawaiian life. Gathering activities supplemented everyday food and medicinal supplies, while cultural and religious practices sustained the people in a variety of ways.

Prior to 1839, ancient Hawaiian custom and usage governed the islands. In the face of expanding foreign influence, King Kamehameha III sought to ensure the political existence of the kingdom by developing a system of codified laws that incorporated protections for ancient tradition, practice and usage. These laws survived later political transformations and continue to

³ PUKU‘I, *supra* note 1, at 55 (no. 455).

⁴ 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (Joint Resolution of Congress acknowledging the 100th anniversary of the overthrow of the Kingdom of Hawai‘i and offering an apology to Native Hawaiians).

apply as background principles of private property law in the State of Hawai'i.

This section begins by examining two basic examples of ancient Hawaiian custom and usage: the trail system and traditional gathering practices.

1. A System of Trails and Access

Foot travel along trails was the only means of transportation over land for early Hawaiians. Trails ran primarily in two directions. Vertical trails within an ahupua'a running from the sea to the mountains provided ahupua'a residents with access inland to tend to their lo'i kalo (wetland taro terraces) or other cultivated crops, as well as for hunting, gathering, and religious purposes. Horizontal trails running through more than one ahupua'a primarily along the shoreline, served as thoroughfares for people traveling from one ahupua'a to another. The alahele (pathway) or alaloa (long road) trails ran along the shoreline, circling each major island. Use of Hawai'i's trails was open to all classes of people; where possible, the ali'i (chiefs) appear to have preferred travel by canoe, rather than by foot.⁵



There are no detailed rules and regulations governing the use of trails in Hawai'i's written history. Thus, any restrictions placed on trail use were an extension of the kapu system (legal prohibitions sanctioned by religious belief and enforced by the king) or general restrictions defined by the Hawaiian culture—such as the prohibition on outdoor night activity during certain moon phases and the kapu moe, a kapu requiring prostration in the presence of chiefs. The lack of rules and regulations may also be attributed to a sixteenth century edict issued by Kūali'i, ruler of the island of O'ahu, which provided that old men and women could sleep in safety along O'ahu highways. This law was later adopted by Kamehameha I in the Māmalahoe, the “life-giving law” that, among other things, “[l]et the old men, the old women, and the children sleep [in safety] on the highway” throughout the islands.⁶

5 RUSSELL A. APPLE, TRAILS: FROM STEPPINGSTONES TO KERBSTONES 1 (Bernice P. Museum Special Publ'n No. 53, 1965).

6 SAMUEL MANAIAKALANI KAMAKAU, KA PO'E KAHIKO: THE PEOPLE OF OLD 14-15 (Dorothy B. Barrère ed., Mary Kawena Puku'i trans., Bernice P. Bishop Museum Special Publ'n No. 51, 1964).

2. Gathering in Upland to Lowland Areas

Access rights were essential for gathering activities in early Hawai‘i.⁷ Hawaiians gathered both cultivated and non-cultivated items, depending upon availability in their particular ahupua‘a. In the uplands above the plains and in the lower forests, Hawaiians usually cultivated plants such as kalo (taro), ‘uala (sweet potato), ‘ōlena (turmeric), ‘ohe (bamboo), olonā (an endemic plant used for cordage), wauke (paper mulberry), and ‘awa (giant pepper). These items supplemented the tenants’ lifestyle at home. Other plants, such as ‘ōhi‘a lehua (used for images, spears and mallets) and ‘awapuhi (ginger) were gathered growing in the wild. These items had medicinal, ornamental, practical, aesthetic, and ceremonial uses. In Hawai‘i’s streams, Hawaiians would gather ‘o‘opu (goby), ‘ōpae (shrimp), and hīhīwai or wī (snails) for food. Hunting of feral pigs was also considered a form of gathering. Along the seashore and in the ocean, Hawaiians would gather items such as limu (seaweed), ‘opihi (limpets), wana (sea urchin), and other marine products to support their daily diet. Hawaiians also gathered their primary source of protein—i‘a (fish)—in areas ranging from coral reefs to deep water.

Although early Hawaiians may have cultivated only small areas compared to the total acreage on each major island, they were able to utilize much greater land areas through gathering. Tenant farmers supplemented their subsistence lifestyle with plants and animals that either did not grow or could not be supported on or near the tenant’s house lot or cultivated plot of land. They also gathered items for medicinal and religious purposes. During times of famine, gathering helped the people to survive. When crops or sea life had diminished significantly due to drought or other adverse climate conditions, gathering or foraging for food became the primary means of survival. When called upon by the resident chief, ahupua‘a tenants would retrieve large products from the land for communal purposes, such as a tree for a canoe or rafters for a hālau (meeting house).

Restrictions on gathering practices were also an extension of the kapu system, which not only held religious significance, but also served as an efficient means of conserving resources. For instance, with regard to makai gathering practices, there was a kapu placed during spawning season on deep-water fishes such as aku (ocean bonito) and ‘ōpelu (mackerel). Because these fish bear their young in the open ocean, they were susceptible to overfishing—as compared with the manini (tang), uhu (parrotfish), palani (surgeonfish), and kala (unicornfish) in protected tidal pool areas. The resident chiefs could impose kapu regulating the size, type, and number of items gathered, as well as the manner in which they were gathered—subject to being overruled by a higher-ranking chief.

7 E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKU‘I, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT* (Bernice P. Bishop Museum Bulletin No. 233, 1972), and MARGARET TITCOMB, *NATIVE USE OF FISH IN HAWAII* 4 (2d ed. 1972).

The earliest attempt to establish uniform gathering practices on all islands emerged with the codification of laws beginning in 1839. Many of these early laws were a carry-over from the kapu system. In the laws of 1839, gathering practices were established for both the uplands and the sea.⁸ The law allowed a tenant the use of the ahupua'a to gather items, subject to several reservations. First, the konohiki was allowed to reserve for exclusive use one kind of tree that was non-cultivated and growing in the wild. A tenant who took a tree of the type reserved by the konohiki was required by law to split the haul equally with the konohiki. A second reservation was imposed by Kamehameha III and prohibited the taking of sandalwood until such time as the decree was lifted. A third reservation prohibited tenants (and, presumably, the konohiki as well) from taking any tree that was so large a man could not place his arms completely around it, unless the tree was taken to make a canoe or paddles. Finally, the native 'o'o and mamo birds were reserved exclusively for the king.

B. Western Impacts on Traditional and Customary Rights

This section briefly discusses western influences on traditional and customary practices, then describes the political motivations behind transforming Hawai'i's ancient communal land tenure system to a private property regime. It also provides a more detailed analysis of gathering and access rights under state law as interpreted by Hawai'i courts.

1. Social, Political and Economic Transformations

The introduction of goats and pigs by Captain Cook in 1778 had a devastating impact on native ecosystems and crops. These animals facilitated the invasion of aggressive weeds and aided in the dispersal of disruptive alien plants. Sheep introduced by the British in the 1790s soon damaged the native forests of Mauna Kea and Hualalai, while failing as an economic enterprise. In 1794, Captain George Vancouver gifted King Kamehameha with a second small herd of cattle (the first small herd died and/or were eaten), and encouraged the king to place this second herd under a kapu lasting until 1830—the kapu also protected sheep, along with other European animals introduced to the wild. The flourishing cattle herd destroyed native crops, ate the thatching on houses, and sometimes hurt or killed people. These and other animals introduced into the wild also caused significant erosion. While native plants disappeared, non-native species planted as cattle feed began to dominate the landscape.

Another major change to Hawaiians' subsistence economy took place in the early 1800s, following the discovery of sandalwood as an exportable crop to Asia. Native tenants were sent

⁸ See, e.g., An Act to Regulate the Taxes (June 7, 1839), ch. III, §§ 8 (Free and prohibited fishing grounds), 20 (Tabooed articles on the mountains); 1842 KING. HAW. LAWS 18, 25-27 & 35, reprinted in THE FUNDAMENTAL LAW OF HAWAII 12, 21-23 (Free and prohibited fishing grounds), 32-33 (Tabooed articles on the mountains) (Lorrin A. Thurston ed., 1904).

into the uplands to harvest and transport the sandalwood to the trading ships. Increasing foreign demand for sandalwood eventually forced many tenants to neglect their own fields.

Following the introduction of horses in 1803, many ancient trails were enlarged to accommodate travel by horse and, later, vehicular traffic—both modifications were accompanied by adverse environmental impacts. In 1839, the Hawaiian government later imposed a labor tax requiring all able-bodied men to work three days a week on government roads.

The introduction of sugar, then pineapple (which eventually became Hawai'i's major cultivated export crops), also had transformational impacts on these islands. Many ahupua'a were cleared to provide the large tracts of lands required for these crops, destroying native tenants' planting sites as well as uncultivated areas rich in plants and herbs used by Hawaiians. Massive ditch systems were developed to irrigate these crops by diverting water from wet Windward communities to arid Central and Leeward plains. In addition to the development of ground water wells, the commodification of water that resulted from these irrigation systems created conflicts between Native Hawaiians and plantation interests.

2. The Māhele: A Revised Model for Land Use in Hawai'i

Before 1820, foreigners who acquired land in Hawai'i conformed to the islands' traditions and customs regarding property; however, these conditions eventually changed and foreigners began to violate Hawaiian custom by denying the government's ability to dispossess them of land and transfer it to others. For example, British Consul Richard Charlton claimed a valuable piece of land based upon a purported 299-year lease obtained from the husband of dowager Queen Ka'ahumanu (whose retainers had continued to occupy parts of the land since 1826). In 1840, Kamehameha III rejected Charlton's claim for a variety of reasons including absence of legitimate authority to make the grant. Following further adverse decisions by the king and the Hawaiian courts, and under threat of violence from a British warship, the sovereignty of the islands was overthrown for a period of more than five months in 1843—until restored by British Rear Admiral Richard Thomas.

In an attempt to ensure the political survival of the kingdom, King Kamehameha III continued the process of transforming Hawai'i's ancient communal land tenure system to a modern property regime incorporating western concepts of private property rights. The king established a Board of Commissioners to Quiet Land Titles (Land Commission) in 1845, designed to settle all claims by dividing the land between the king, the chiefs, and the people. The Land Commission began its work by recognizing that the king, the konohiki and the hoā'aina all held vested interests in the land. "[T]he people's lands were secured to them by the Constitution and laws of the kingdom,

and no power [could] convey them away, not even that of royalty itself.”⁹ Thus, the land division, or Māhele, which took place from around 1845 to 1855, was expressly qualified by the fact that all lands of the king, government and chiefs were given subject to the rights of native tenants.¹⁰

C. Reaffirming Traditional and Customary Rights

E ho'ā'o no i pau kuhihewa.

*Try it and rid yourself of illusions.*¹¹

When creating private interests in land, laws were also adopted that prohibited the government and the konohiki from disposing of or selling undeveloped or vacant land in a manner that would leave native tenants destitute.¹² Although the courts were authorized to rely upon principles of common law adopted in other jurisdictions, they could do so only where such interpretations would not conflict with native usage or kingdom law. Decisions of the Land Commission were also required to be consistent with native customs. As a result, traditional and customary rights survived the transition from communal land tenure to a western system of private property rights.

9 Kekiēkie v. Dennis, 1 Haw. 42, 43 (1851), cited in Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH/Kohanaiki), 79 Hawai'i 425, 443, 903 P.2d 1246, 1264 (1995), cert. denied, 517 U.S. 1163 (1996).

10 Misinterpretations of an early decision by the Kingdom of Hawai'i's Supreme Court cast a troubling shadow over traditional and customary rights for more than a century. In *Oni v. Meek*, 2 Haw. 87 (1858), a native tenant asserted the right to pasture horses on lands leased by the defendant from the konohiki Haalelea. Meek seized (and sold) two of Oni's horses for allegedly trespassing in the ahupua'a of Honouliuli on land covered by one of the defendant's three leases with Haalelea. The *ho'āina* Oni asserted three alternative grounds for his lawsuit seeking to recover the value of his horses: *contract*, *statute*, and *custom*. It is unclear from the record whether Oni resided in the ahupua'a as a kuleana tenant or otherwise. In any event, the Supreme Court rejected all three of Oni's claims. The court's decision was mistakenly read by some as having eliminated all traditional and customary rights not specifically enumerated in section 7 of the 1850 Kuleana Act. Properly understood, however, *Oni* did not foreclose the viability of future claims involving traditional and customary practices beyond pasturing horses in the ahupua'a of Honouliuli.

Notwithstanding contrary interpretations of the decision in *Oni v. Meek*, the Supreme Court for the Kingdom of Hawai'i subsequently recognized the existence of gathering and access rights in *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879). The court specifically acknowledged that the land ran from the seaside to the highlands, “thus affording the chief and his people a fishery residence at the warm seaside, together with products of the high lands . . . and the right of way to the same . . . and all the varied products of the intermediate land as might be suitable to the soil and the climate of the different altitudes from sea soil to mountainside or top.” 4 Haw. at 241.

11 PUKU'I, supra note 1, at 35 (no. 283).

12 Joint Resolutions on the Subject of Rights in Lands and the Leasing, Purchasing and Dividing of the Same (Nov. 7, 1846), 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 70-72, cited in PASH/Kohanaiki, 79 Hawai'i at 445, 903 P.2d at 1266.

1. The Kuleana Reservation in Property Deeds

All land grant awards during the Māhele were intended to be made subject always to the rights of native tenants, through either an explicit or implicit “kuleana reservation” substantially similar, if not equivalent to: “koe nae ke kuleana o na kanaka (koe na'e ke kuleana o nā kānaka).”¹³ The highest courts for the Kingdom of Hawai'i, Territory of Hawai'i and State of Hawai'i each continued to recognize kuleana reservations.¹⁴

2. Hawai'i Revised Statutes section 7-1

The Kuleana Act of 1850 was designed to ensure and provide native tenants residing in an ahupua'a with the opportunity to obtain fee simple title to the lands upon which they resided and cultivated their crops. In this context, the term “kuleana” refers to a plot including lands that the hoā'aina actually cultivated along with a house lot of not more than one-quarter acre. Kamehameha III insisted upon including a provision in the law to protect the claims of native tenants to gather “firewood, house timber, aho cord, thatch or ti leaf” for private, non-commercial use, as well as their rights to “drinking water, and running water, and the right of way.” One year later, the provision was amended to delete language limiting such rights based upon “need,” as well as language requiring notification of and consent from the konohiki.



Although the other provisions have all since been repealed, the provision added by the king has remained essentially unchanged since 1851 and is currently codified as Hawai'i Revised Statutes (H.R.S.) section 7-1. According to the Hawai'i Supreme Court, this provision applies to any person who lawfully occupies a kuleana parcel or is a lawful tenant of an ahupua'a. Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 9, 656 P.2d 745, 750 (1982).

3. Hawai'i Revised Statutes section 1-1

The Hawaiian kingdom was governed until 1839 by a system of usage. Less than a decade later, the Act that created the Land Commission specifically directed that body to perform its

13 PAUL F. NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND TERMS 55 (1995).

14 See, e.g., Kukiiahu v. Gill, 1 Haw. 54 (1851); In re Territory (Kakaako), 30 Haw. 666 (1928); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

duties “in accordance with . . . native usages in regard to landed tenures.” Likewise, judges were required to take ancient Hawaiian usage into account and were prohibited from issuing decisions that conflicted with the laws and customs of the kingdom. These provisions in the kingdom’s Civil Code were in effect until passage of the Act to Reorganize the Judiciary Department in 1892, which replaced them with a provision now referred to as H.R.S. section 1-1. The original provision referenced “established Hawaiian national usage” but the current statute now provides an exception to the adoption of English and American common law for “established Hawaiian usage[.]”

In Kalipi, the Hawai'i Supreme Court held that the reference to Hawaiian usage in section 1-1 insures the continuance of a “range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in section 7-1 . . . so long as no actual harm is done thereby.” Kalipi, 66 Haw. at 10, 656 P.2d at 751. The court subsequently clarified that traditional and customary rights do not depend on land ownership. See Pele Defense Fund v. Paty (“Pele I”), 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), cert. denied, 507 U.S. 918 (1993). In each of these cases, the court expressly noted that “[t]he precise nature and scope of the rights retained by [section] 1-1 would, of course, depend upon the particular circumstances of each case.” Pele I, 73 Haw. at 619, 837 P.2d at 1271; Kalipi, 66 Haw. at 12, 656 P.2d at 752.¹⁵

4. Hawai'i Constitution Article XII, Section 7

In November 1978, state voters approved an amendment to the Hawai'i Constitution reaffirming “all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights.” Haw. Const. art. XII, § 7. The convention delegates explained that “in reaffirming these rights . . . badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.” The delegates further described these rights as “an integral part of the ancient Hawaiian civilization . . . retained by its descendants” and explained that they “did not intend to remove or eliminate . . . any rights of native Hawaiians . . . but rather . . . intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access or gathering.”¹⁶

15 The highest courts of the kingdom, territory and State of Hawai'i, the Supreme Court of the Republic of Hawai'i and the U.S. Supreme Court have also recognized the continuing vitality of traditional and customary rights. See David M. Forman, The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence, 30 U. HAW. L. REV. 319, 320-21 & nn.1-2 & 7-11 (2008).

16 STAND. COMM. REP. NO. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637 (1980), quoted in Kalipi, 66 Haw. at 5, 656 P.2d at 748.

III. RECONCILING TRADITIONAL AND MODERN LAND USE SYSTEMS

Ko luna pohaku no ke ka‘a i lalo, ‘a‘ole hiki i ko lalo pohaku he ka‘a.

A stone that is high up can roll down, but a stone that is down cannot roll.

When a chief is overthrown his followers move on,
but the people who have lived on the land from the days
of their ancestors continue to live on it.¹⁷

Hawai‘i’s courts have embraced the call for judicial guidance by the 1978 constitutional convention delegates. In a line of cases beginning just four years after Hawai‘i’s voters approved article XII, section 7 of the Hawai‘i constitution, the Hawai‘i Supreme Court has repeatedly reaffirmed traditional and customary rights.

A. Judicial Clarification of Traditional and Customary Rights

As recognized by the Hawai‘i Supreme Court, H.R.S. section 7-1 specifically protects the right to gather, although that right is limited to the items enumerated in the statute, including materials primarily used for constructing a house or starting a fire. H.R.S. section 1-1 offers broader protection for the exercise of traditional and customary practices; it extends those rights to the gathering of materials that are otherwise essential to a tenants’ lifestyle, such as medicinal plants, and may even protect limited upland subsistence farming as practiced by early Native Hawaiians. In addition, Hawai‘i courts have interpreted article XII, section 7 of the Hawai‘i Constitution to protect gathering rights exercised beyond the boundaries of the ahupua‘a of residence, and have held that “legitimate traditional and customary practices must be protected to the extent feasible in accordance with article XII, section 7.” The state does not have the “unfettered discretion to regulate the rights of ahupua‘a tenants out of existence[;]” however, the state can permit private property owners to exclude persons “pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner” or on private property that is “fully developed.”

1. Based Upon Residence in an Ahupua‘a

Lawful residents of an ahupua‘a may, for the purpose of practicing Native Hawaiian customs and traditions, enter undeveloped lands within that ahupua‘a to gather the items listed in H.R.S. section 7-1. Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982). William Kalipi owned a lo‘i kalo in the ahupua‘a of Manawai and an adjoining house lot in the ahupua‘a of ‘Ohi‘a on the

¹⁷ PUKU‘I, supra note 1, at 198 (no. 1833).

island of Moloka'i; he filed suit after being denied unrestricted gathering rights in both ahupua'a. Kalipi had sought to gather certain items for subsistence and medicinal purposes.

The Hawai'i Supreme Court held that gathering rights are protected by three sources in Hawai'i law: H.R.S. sections 7-1 and 1-1, and article XII, section 7 of the Hawai'i Constitution. The court held that residents of an ahupua'a may—for the purpose of practicing Native Hawaiian customs and traditions—enter undeveloped lands within the ahupua'a to gather the items enumerated in H.R.S. section 7-1: “firewood, house-timber, aho cord, thatch, or ki leaf.” The court also ruled that pursuant to article XII, section 7, courts are obligated “to preserve and enforce such traditional rights.” It further determined that H.R.S. section 1-1 ensures the continuation of Native Hawaiian customs and traditions not specifically enumerated in H.R.S. section 7-1, which may have been practiced in certain ahupua'a “so long as no actual harm is done thereby.” Kalipi, 66 Haw. at 10, 656 P.2d at 751.

Although the court ultimately ruled against Kalipi, the case is important because it was the first in which the Hawai'i Supreme Court recognized the modern legal bases of traditional and customary rights: H.R.S. sections 7-1 and 1-1, and article XII, section 7 of the Hawai'i Constitution.¹⁸

In summary, the court ruled that:

- (1) mere ownership of property within an ahupua'a is not sufficient to justify the exercise of traditional and customary rights in that ahupua'a;
- (2) H.R.S. section 7-1 permits only ho'a'aina (native tenants) to gather in the ahupua'a where they live;
- (3) H.R.S. section 7-1 permits only ho'a'aina to gather the items enumerated in that statute;
- (4) H.R.S. section 7-1 permits only ho'a'aina to enter undeveloped (rather than fully developed) lands for the purpose of exercising traditional and customary rights;
- (5) the interests of the property owner and ho'a'aina must be balanced; and
- (6) H.R.S. section 1-1 protects other traditional and customary practices that have continued without harm to property owners.

2. Exercised Beyond the Boundaries of the Ahupua'a of Residence

Native Hawaiian rights protected by H.R.S. section 1-1 and article XII, section 7 of the Hawai'i Constitution may extend beyond the ahupua'a in which a Native Hawaiian practitioner

¹⁸ Despite ruling against the plaintiff under the particular facts of this case, the court rejected the defendant's argument that *Territory v. Liliuokalani*, 14 Haw. 88 (1902), eliminated the possibility of establishing a claim of traditional gathering rights based upon a kuleana reservation. Instead, the court left open the question whether ahupua'a residents retained traditional and customary rights pursuant to reservations traced back to the original land grants.

resides if those rights have been traditionally and customarily exercised in that manner. Pele I, 73 Haw. at 620, 837 P.2d at 1272.

Pele Defense Fund is a nonprofit membership organization formed to perpetuate Hawaiian religion and culture; the organization challenged the state's decision to exchange "ceded" land (including lands within the Wao Kele o Puna Natural Area Reserve) for privately owned land on the island of Hawai'i. Pele Defense Fund claimed that Native Hawaiians had historically gathered on the state lands involved and, after the land swap, its Native Hawaiian members seeking to exercise their traditional and customary rights for subsistence, cultural, and religious purposes were denied access to the undeveloped and now privately-owned land in the neighboring ahupua'a.

Unlike Kalipi, where the claimed gathering rights were based on land ownership within the ahupua'a, the plaintiffs in Pele I asserted such rights based on actual practice. Native Hawaiian residents of neighboring ahupua'a submitted evidence to support their claims concerning the "traditional access and gathering patterns of native Hawaiians in the Puna region" and the continuation of the practice of "accessing the [Puna Forest Reserve] as a common area for gathering and hunting by tenants of the Puna district." The Hawai'i Supreme Court held that under article XII, section 7, traditional and customary rights could be exercised for subsistence, cultural, and religious purposes on undeveloped lands beyond the ahupua'a of residence, provided that "such rights have been customarily and traditionally exercised in this manner." Pele I, 73 Haw. at 620, 837 P.2d at 1272.

In determining whether rights have been customarily and traditionally exercised, the court looked to kama'aina (native-born) testimony and affidavits describing the history and traditional practices of Native Hawaiians living in that geographic area. The court noted that the plaintiff had presented kama'aina evidence, testimony from its members, and affidavits tending to show that "the traditional and customary rights associated with tenancy in an ahupua'a extended beyond the boundaries of the ahupua'a." Pele I, 73 Haw. at 620-21, 837 P.2d at 1272.

In summary, the court held:

- (1) ho'a'aina can gather beyond the ahupua'a in which they live, where such rights have been customarily and traditionally exercised in this manner;
- (2) ho'a'aina can gather what is needed for traditional and customary Hawaiian subsistence, cultural and religious purposes;
- (3) ho'a'aina may enter undeveloped lands to reasonably exercise their traditional and customary practices; and
- (4) the interests of the property owner and ho'a'aina must be balanced.

When the case went back down to the circuit court in Pele Defense Fund v. Estate of James Campbell, Civ. No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002), the Third Circuit Court ruled in favor of the Native Hawaiian plaintiffs. Because the plaintiffs based their claims on actual practice rather than land ownership, the court held that plaintiffs' gathering activities were traditional and customary activities related to subsistence, culture and religion that had been practiced by Native Hawaiians in the Puna area prior to November 25, 1892,¹⁹ and were not limited to the ahupua'a of residence or by common law concepts related to tenancy or land ownership. In addition, the trial court recognized the Native Hawaiian plaintiffs' access rights to Hawaiian trails running through the private landowner's property, based on the exercise of traditional and customary practices beyond the boundaries of the ahupua'a where the plaintiffs resided.

3. Exercised on Less Than Fully Developed Land

For the purpose of practicing traditional and customary rights, practitioners may gather anywhere that those rights have been traditionally and customarily exercised in that manner—on land that is less than “fully developed.” Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (“PASH/Kohanaiki”), 79 Hawai'i 425, 903 P.2d 1246 (1995), cert. denied, 517 U.S. 1163 (1996).²⁰

Developer Nansay Hawaii (Nansay) submitted an application to the Hawai'i County Planning Commission for a special management area permit (SMAP) to develop a resort complex within the shoreline management area in the ahupua'a of Kohanaiki, on the island of Hawai'i. The nonprofit organization Public Access Shoreline Hawai'i (PASH) filed a request for a contested case hearing²¹ with the planning commission, seeking to oppose the developer's application. The planning commission denied PASH's requests for a public hearing on the proposed development and issued the permit. PASH filed suit. The trial court struck down the permit and directed the planning commission to hold a contested case hearing in which PASH would be allowed to participate. On appeal, the Hawai'i Intermediate Court of Appeals (ICA) affirmed the trial court's decision ordering a contested case hearing. Nansay asked the Hawai'i Supreme Court to review the ICA's decision.

19 In State v. Zimring, 58 Haw. 106, 115 n.11, 566 P.2d 725, 732 n.11 (1977), the court observed that “November 25, 1892 is the date by which ancient Hawaiian usage must have been established in practice.”

20 Native Hawaiian practitioners Marcel Keanaina, Malani Pai and Angel Pilago, were key participants in the case. Their rights and practices were central to the outcome (although the Hawai'i Supreme Court did not directly address the rights that these particular practitioners asserted). For this reason, we have chosen to use the place name “Kohanaiki” in the short form of the case name.

21 A “contested case hearing” is a quasi-judicial proceeding before an agency that is similar to a civil trial in court; the purpose of such hearings is to protect the legal rights of persons who will be affected by the agency's decision. M. CASEY JARMAN, MAKING YOUR VOICE COUNT: A CITIZEN GUIDE TO CONTESTED CASE HEARINGS 5 (WILLIAM S. RICHARDSON SCHOOL OF LAW, ENVIRONMENTAL LAW PROGRAM 2002).

The Hawai‘i Supreme Court emphasized that county and state agencies are obligated to “protect customary and traditional rights to the extent feasible under the Hawai‘i Constitution and relevant statutes.” The court determined that the Coastal Zone Management Act requires the Hawai‘i County Planning Commission “to give the cultural interests asserted by PASH ‘full consideration.’” Also, “both the CZMA and article XII, section 7 of the Hawai‘i Constitution (read in conjunction with HRS [section] 1-1), obligate the HPC to ‘preserve and protect’ native Hawaiian rights to the extent feasible when issuing a SMA permit.” PASH/Kohanaiki, 79 Hawai‘i at 452, 903 P.2d at 1273.

The court declared that the “western concept of exclusivity is not universally applicable in Hawai‘i[,]” and concluded that H.R.S. section 1-1 “represents the codification of custom *as it applies in our State.*” PASH/Kohanaiki, 79 Hawai‘i at 447, 903 P.2d at 1268. The court further clarified that no minimum Hawaiian ancestry blood quantum is required of those who assert valid traditional and customary rights, but left open the question of whether non-Hawaiian members of an ‘ohana may claim those rights.

Regarding the exercise of traditional and customary rights on developed and undeveloped lands, the court chose not to analyze the various degrees of property use “that fall between the terms ‘undeveloped’ and ‘fully developed.’” The Hawai‘i Supreme Court suggested, however, that “once land has reached the point of ‘full development’ it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property.”²² PASH/Kohanaiki, 79 Hawai‘i at 451, 903 P.2d at 1272. The court ruled that access is guaranteed only in connection with undeveloped lands, and preservation of those lands is not required. However, the government does not have the “unfettered discretion to regulate the rights of ahupua‘a tenants out of existence.” PASH/Kohanaiki, 79 Hawai‘i at 451, 903 P.2d at 1272.

22 In a later decision, the court clarified that “fully developed” property includes “lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure” and it is “*always* ‘inconsistent’ to permit the practice of traditional and customary native Hawaiian rights on such property.” *State v. Hanapi*, 89 Hawai‘i 177, 186-87, 970 P.2d 485, 494-95 (1998) (emphasis in original). However, the court reserved judgment regarding the question whether such rights may continue to be practiced on land that is “less than fully developed.” Earlier, a “study group” of stakeholders—convened by the state Office of Planning at the request of the Hawai‘i legislature following the PASH/Kohanaiki decision—produced a list of factors that distinguish undeveloped and “not fully developed” land from “fully developed” property. The study group determined that factors characterizing “fully developed” property include the following:

- all necessary discretionary permits have been issued;
- there is “substantial investment in infrastructure on or improvements to the property”; and
- the property owner’s expectations of excluding practitioners of traditional and customary rights are high, while the Native Hawaiian practitioner’s expectations of exercising those rights on the property are low.

PASH/KOHANAIIKI STUDY GROUP, OFFICE OF STATE PLANNING, ON NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY PRACTICES FOLLOWING THE OPINION OF THE SUPREME COURT OF THE STATE OF HAWAII‘I IN PUBLIC ACCESS SHORELINE HAWAII V. HAWAII COUNTY PLANNING COMMISSION 29 (1998).

The court also addressed whether practitioners must prove that traditional and customary practices have been continuously exercised. The court ruled that “the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest.” PASH/Kohanaiki, 79 Hawai'i at 450, 903 P.2d at 1271. PASH/Kohanaiki is an important case because it strongly reaffirmed the validity of traditional and customary rights.

In summary, PASH/Kohanaiki stands for the following:

- (1) ho'a'aina can gather anywhere that such rights have been customarily and traditionally exercised in that manner;
- (2) ho'a'aina can gather what is needed for traditional and customary subsistence, cultural and religious purposes;
- (3) ho'a'aina can gather on land that is less than fully developed;
- (4) the government cannot regulate traditional and customary rights out of existence;
- (5) the interests of the property owner and ho'a'aina must be balanced; and
- (6) the balance weighs in favor of the property owner against ho'a'aina who exercise otherwise valid customary rights in an unreasonable manner.

4. The Obligations of State Agencies to Protect Such Rights

Agencies responsible for protecting traditional and customary Native Hawaiian rights must conduct detailed inquiries into the impacts on those rights to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way. Agencies must make these inquiries independent of the developer or applicant.

In Ka Pa'akai O Ka 'Aina v. Land Use Commission (Ka Pa'akai), 94 Hawai'i 31, 7 P.3d 1068 (2000), a coalition of Native Hawaiian community organizations (named Ka Pa'akai O Ka 'Aina) challenged an administrative decision by the Hawai'i Land Use Commission (LUC) to reclassify from conservation to urban use, nearly 1,010 acres of land in the ahupua'a of Ka'upulehu on the island of Hawai'i. The reclassification would have allowed petitioner Kaupulehu Development to proceed with plans for a luxury development project including upscale homes, a golf course, and other amenities. Ka Pa'akai argued that its Native Hawaiian members would be adversely affected by the LUC's decision because the proposed development would infringe upon the exercise of their traditional and customary rights.

The Hawai'i Supreme Court agreed, noting that “[a]rticle XII, section 7 of the Hawai'i Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians *to the extent feasible* when granting a petition for reclassification

of district boundaries.” Ka Pa'akai, 94 Hawai'i at 46, 7 P.3d at 1083.²³ The court held that the LUC did not provide a sufficient basis to determine “whether [the agency] fulfilled its obligation to preserve and protect traditional and customary rights of native Hawaiians” and, therefore, the LUC “failed to satisfy its statutory and constitutional obligations.”

The court then vacated the LUC's grant of the developer's application for a land use boundary reclassification and remanded the case to the LUC for specific findings and conclusions regarding:

- (A) 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;
- (B) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (C) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

(hereafter, the “Ka Pa'akai framework”). Importantly, the court articulated this analytical framework “to effectuate the State's obligation to protect native Hawaiian traditional and customary practices while reasonably accommodating competing private [property] interests.” The framework provides specific guidance to state and county agencies in considering land use and development projects and is discussed in greater detail below.

In summary, the court ruled:

- (1) the state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible;
- (2) agencies are obligated to make an assessment, independent of the developer or applicant, of impacts on customary and traditional practices of Native Hawaiians; and
- (3) the independent assessment must include the three factors (A, B, and C) listed above, otherwise known as the “Ka Pa'akai framework.”

5. Additional Cases Reaffirming the Traditional Gathering Rights of Ahupua'a Tenants

A series of water rights decisions by the Hawai'i Supreme Court also recognized and

²³ The Court acknowledged a variety of traditional and customary rights asserted by the plaintiffs, including the gathering of sea salt, limu, kūpe'e, Pele's tears, and hā'uke'uke. It also recognized the “special religious significance” of the 1800–1801 lava flow in the ahupua'a of Ka'ūpūlehu, on the island of Hawai'i. Ka Pa'akai, 94 Hawai'i at 43, 7 P.3d at 1080.

reaffirmed traditional and customary rights. For example, in In re Waiāhole Combined Contested Case Hearing (Waiāhole I), 94 Hawai'i 97, 137, 9 P.3d 409, 449 (2000), the Hawai'i Supreme Court upheld the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose (which has priority over private commercial uses). Therefore, the Commission on Water Resource Management ("Commission") must "ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians." Waiāhole I, 94 Hawai'i at 153, 9 P.3d at 465 (citing H.R.S. §§ 174C-63, 101(c)).

In In re Wai'ola o Moloka'i, Inc. (Wai'ola), 103 Hawai'i 401, 409, 83 P.3d 664, 672 (2004), the court held that the Commission failed to adequately protect natural resources traditionally and customarily gathered by Native Hawaiians—specifically, several species of fish (e.g., mullet, āholehole, and milkfish) and limu (e.g., ogo, manuaea, 'ele'ele, and huluhuluwaena). The court also held that the permit applicant bears the burden to "demonstrate affirmatively" that the proposed project would not affect Native Hawaiians' rights. In In re Kukui (Moloka'i), Inc., 116 Hawai'i 481, 486, 174 P.3d 320, 325 (2007), the court held that the Commission "impermissibly shifted the burden of proving harm" to individuals claiming a right to traditionally and customarily gather crab, fish, limu, and octopus on Moloka'i. Instead, the burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices rests with the applicant. Finally, in In re 'Āao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (Nā Wai Ehā), 128 Hawai'i 228, 248-49, 287 P.3d 129, 149-50 (2012), the court held that the Commission failed to analyze the effect of reduced stream flow on Native Hawaiian traditional and customary practices such as kalo cultivation and other gathering rights, and failed to assess the feasibility of protecting those practices. For more information on water use and management, see D. KAPUĀĀLA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAII (2009).



B. *Enforcing Traditional and Customary Rights*

It is important to recognize that many of the decisions detailed above were the direct result of practitioners who stepped forward to ensure that the government fulfills its obligations. This section describes the requirements for identifying or establishing traditional and customary rights, then provides a more detailed explanation of the Ka Pa'akai framework that sets forth the government's duty to protect these Native Hawaiian rights to the extent feasible, without regulating traditional and customary practices out of existence.

1. **Burdens of Proof**

As explained above, permit applicants bear the ultimate burden of demonstrating that their proposed use will not harm traditional and customary Native Hawaiian practices in the water law context. Thus, "simply pointing to an empty record and claiming no impact to indigenous rights will no longer suffice; permit applicants bear an affirmative burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices."²⁴ Arguably, the burden of proof should be similarly allocated in other civil contexts including, but not necessarily limited to, applications for permission to develop land.

In the criminal context, the person claiming the exercise of the Native Hawaiian right must demonstrate that the right is protected. Hanapi, 89 Hawai'i at 184, 970 P.2d at 492. Reasonably exercised, constitutionally protected Native Hawaiian rights qualify as a privilege in defending against criminal trespass charges. To establish that conduct is protected, a defendant must: (i) be Native Hawaiian; (ii) prove that the conduct is a protected customary and traditional practice; and (iii) establish that the exercise of the right occurred on undeveloped or "less than fully developed property."

a. *Factors Establishing Constitutionally Protected Native Hawaiian Rights*

Constitutionally protected Native Hawaiian rights, "reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes." State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998), recon. denied, 1999 Haw. LEXIS 34 (Haw. Feb. 8, 1999). Defendant Alapa'i Hanapi resided in the ahupua'a of 'Aha'ino on the island of Moloka'i, on property adjoining two fishponds, Kihaloko and Waihilahila. Attorney Gary Galihier purchased the land next to Hanapi's property and proceeded to grade and fill the area near the ponds in apparent violation of U.S. Army Corps of Engineers (Army Corps) regulations governing wetlands. The Army Corps agreed

²⁴ D. Kapua'ala Sproat, Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law, 33 U. HAW. L. REV. 537, 576 (2011).

that Galiher should conduct a voluntary, unsupervised restoration of the property, subject to the advice and oversight of a consultant archaeologist.

Hanapī viewed Galiher's actions as “the desecration of [a] traditional ancestral cultural site” and believed that it was his right and obligation as a Native Hawaiian tenant to perform religious and traditional ceremonies for the purpose of healing the land. Hanapī twice entered Galiher's property to observe and monitor the restoration. On a third visit, Galiher's on-site project supervisor ordered Hanapī off the property; when Hanapī refused to leave, he was arrested and charged with second-degree criminal trespass.

At trial, Hanapī represented himself and attempted to assert a defense of privilege based upon his constitutional rights as a Native Hawaiian. Ultimately, the district court rejected Hanapī's claims and convicted him of criminal trespass. On appeal, the Hawai'i Supreme Court affirmed Hanapī's conviction. The court determined that “for a defendant to establish that his or her conduct is constitutionally protected as a native Hawaiian right, he or she must show, at minimum,” three factors:

- (1) Defendant must qualify as a “native Hawaiian,” as defined in PASH/Kohanaiki—that is, a descendant of Native Hawaiians who inhabited the islands prior to 1778, regardless of blood quantum; however, the Court set aside the question of whether non-Native Hawaiian members of an 'ohana, or descendants of [non-Native Hawaiian] citizens of the Kingdom of Hawaii who were not inhabitants of the Hawaiian islands prior to 1778, may legitimately assert such rights.
- (2) Defendant must “establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice”—that is, through expert or kama'āina witness testimony, connect the claimed right to a firmly rooted traditional or customary native Hawaiian practice (e.g., by providing an “explanation of the history or origin of the claimed right,” or a description of the “ceremonies” involved).
- (3) Defendant must prove that “the exercise of the right occurred on undeveloped or less than fully developed property,” where “fully developed” property includes, but is not limited to, “lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure.”

Hanapi, 89 Hawai'i at 186-87, 970 P.2d at 494-95.

b. Judicial Standards for Balancing Native Hawaiian Practitioners' Interests Against the State's Interests in Regulating Such Practices

Once a practitioner satisfies the three Hanapi factors, the court will balance the practitioner's

rights against the State’s interests to determine whether the claimed right qualifies as a defense of privilege to a criminal trespass charge. In State v. Pratt, 127 Hawai‘i 206, 277 P.3d 300, reconsideration granted, 127 Hawai‘i 233, 277 P.3d 327 (2012), the Hawai‘i Supreme Court confirmed that the three Hanapi factors are the minimum that a defendant must satisfy when claiming that his or her exercise of a Native Hawaiian right is constitutionally protected and exempt from prosecution. Defendant Lloyd Pratt, a Native Hawaiian who temporarily resided in Kalalau valley on the island of Kaua‘i, traveled into the valley on multiple occasions to clean heiau, cultivate native plants, and clear brush as well as garbage. He was cited three times for violating Hawai‘i Administrative Rules (H.A.R.) section 13-146-4 when he was found in a closed area of the valley.

The district court held (and the State conceded) that Pratt satisfied the three factors outlined in Hanapi, but required an additional balancing of a Native Hawaiian practitioner’s rights against the State’s interest in protecting the area. The State argued that its interest in keeping Kalalau a wilderness area—by limiting traffic and length of stay—preserved park resources and protected public safety and welfare. The court ruled that Pratt’s right to perform traditional and customary practices was outweighed by the State’s competing interests and convicted Pratt of criminal trespass. Pratt, 127 Hawai‘i at 218, 277 P.2d at 312.

On appeal, the Hawai‘i Supreme Court agreed. It adopted a “totality of the circumstances” test to balance the practitioner’s interest against the State’s interest in regulating the practitioner’s activity. The court then held that the balancing of interests weighed in favor of allowing the State to regulate Pratt’s activity.

2. Analytical Framework for State Agency Actions

Agencies responsible for protecting traditional and customary Native Hawaiian rights must complete the analysis outlined in Ka Pa‘akai to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way. As discussed above, the framework introduced in Ka Pa‘akai assists state and county agencies in balancing their obligations to protect traditional and customary practices against private property (as well as competing public) interests, by requiring specific findings and conclusions about:

- (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 agency to reasonably protect native Hawaiian rights if they are found to exist.

This means that agencies may not delegate this constitutional responsibility to others by, for example, directing the applicant to independently attempt to protect traditional and customary rights.

Instead, agencies must actively research and consider the cultural, historical and natural resources of a subject property as they relate to Native Hawaiian rights, when determining what restrictions should be placed on land or water use. For example, in the Kukui and Wai‘ola cases discussed in section III.A.5. above, the court invalidated permits issued by the State Water Commission for new wells or expanded ground water pumping, based on Native Hawaiian practitioners’ concern that less fresh water flowing from coastal springs (as a result of the increased well pumpage) would negatively impact limu (seaweed), pāpa‘i (crab), i‘a (fish), ula (lobster), he‘e (octopus) and other resources necessary for their subsistence purposes.

An agency’s failure to condition permitted uses upon protection of Native Hawaiian traditional and customary practices is sufficient grounds for invalidating that agency’s decision to grant the underlying permit.

3. Environmental Review: Cultural Impact Assessments

Recognizing the fact that important Native Hawaiian cultural resources had been lost or destroyed in the past, the Hawai‘i State Legislature added a cultural impact assessment (CIA) requirement for proposed projects subject to the environmental review process. Act 50, § 1, 2000 Haw. Sess. Laws 93, 93 (codified as amended at H.R.S. § 343-2 (2005)). As a result, Environmental Assessments and Environmental Impact Statements (described in section IV.A.1 below) completed after April 6, 2000, must include an assessment of the impacts to community cultural practices together with “measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects[,]” among other requirements. See H.R.S. § 343-2.

The CIA requirement applies to major development projects proposed: on land classified as conservation or within the shoreline setback area (usually forty feet from the certified shoreline); within a historic site or district or the Waikiki Special District; that require zoning to be changed from agriculture, conservation, or preservation; that involve the use of state or county funds (subject to limited exceptions); as well as certain other specified uses. See H.R.S. § 343-5; H.A.R. §§ 11-200-5 to -8. In June 2004, the State Department of Health’s Office of Environmental Quality Control (OEQC) published a Guidebook for the Hawai‘i State Environmental Review Process (OEQC Guidebook)²⁵ containing specific guidelines for assessing cultural impacts that may be

²⁵ In 2012, OEQC updated its Guidebook. OEQC, Guide to the Implementation and Practice of the Hawaii Environmental Policy Act, 12 (2012 ed.), http://oeqc.doh.hawaii.gov/Shared%20Documents/Misc_Documents/

associated with proposed projects or actions. For example, a CIA should survey a geographical area greater than the area of proposed development, reference historical data dating back to the initial presence of the group whose cultural practices are being assessed, and may include “traditional cultural properties or other types of historic sites, both man made and natural, including submerged cultural resources, which support such cultural practices and beliefs.” More specifically, the developer should follow a detailed protocol:

- (1) Identify and consult with individuals and organizations with expertise concerning the types of cultural resources, practices, and beliefs found within the broad geographical area, e.g., district or ahupua'a;
- (2) Identify and consult with individuals and organizations with knowledge of the area potentially affected by the proposed action;
- (3) Receive information from or conduct ethnographic interviews and oral histories with persons having knowledge of the potentially affected area;
- (4) Conduct ethnographic, historical, anthropological, sociological, and other culturally related documentary research;
- (5) Identify and describe the cultural resources, practices and beliefs located within the potentially affected area; and
- (6) Assess the impact of the proposed action, alternatives to the proposed action, and mitigation measures, on the cultural resources, practices and beliefs identified.

OEQC, Guide to the Implementation and Practice of the Hawaii Environmental Policy Act, 12 (2012 ed.). Because of the detailed methodology and content protocol established in the Guidelines, cultural assessments may be an effective tool for protecting the exercise of traditional and customary rights that may be impacted by major development projects or other proposed actions subject to the environmental review process. The State Environmental Council is in the process of drafting administrative rules on these and other topics, which may help to clarify these issues.

C. *Judicial Clarification of Access Rights*

***Ho'ā ke ahi, kō'ala ke ola. O nā hale wale no ka i Honolulu;
o ka 'ai a me ka i'a i Nu'uano.***

*Light the fire for there is life-giving substance. Only the houses stand in Honolulu;
the vegetable food and meat are in Nu'uano.*

... In olden days, much of the taro lands were found in Nu'uano, which supplied Honolulu with *poi*, taro greens, *o'opu*, and freshwater shrimp. So it is said that only houses stand in Honolulu. Food comes from Nu'uano.²⁶

Access is necessary for the exercise of traditional and customary Native Hawaiian cultural practices for subsistence, cultural and religious purposes. This section summarizes the law on access rights in Hawai'i.

1. Preserving Access to a Landlocked Kuleana

By definition, kuleana are smaller plots of land within the larger ahupua'a that were occupied and cultivated by ho'a'ina. As a result, many kuleana are landlocked, meaning they are surrounded by lands that are owned by others and without direct access to major thoroughfares. The right of access to landlocked kuleana is well established in Hawai'i statutory and case law.

An easement for access (the right to cross another's land for access to and from a public road) to a kuleana may be created either expressly, or impliedly based on prior existing use, or by necessity (described more fully below). See, e.g., *Rogers v. Pedro*, 3 Haw. App. 136, 642 P.2d 549, cert. denied, 64 Haw. 689 (1982). Access to a kuleana will usually be by way of a historic or customary trail, which may have been modified later for vehicular traffic. Implicit in the cases decided by Hawai'i courts is that an easement for access may be enlarged or relocated to accommodate any reasonably foreseeable changes in the use of the kuleana parcel. Without evidence of historical use of a trail, a court may establish an easement to provide access to a landlocked kuleana parcel under H.R.S. section 7-1, which explicitly protects the right-of-way.

An owner's intent to dedicate a public right-of-way may be express, implied-in-fact, or implied-in-law. Intent is express if it is reflected in a deed, or by any other oral or written statement that is consistent with the law. Intent to dedicate a public-right-of-way may be implied-in-fact if the public has used the trail or right-of-way for a period of time that is less than the prescriptive period (a certain number of years according to statute), but the owner has consented to the public use. A court may find an implied-in-law dedication where the owner has merely acquiesced to use, but the public has used the property for longer than the statutory prescriptive period and has enjoyed substantial benefit from the use of the land. Implied-in-fact dedication focuses on the owner's intent, while the public's actual use of the trail or right-of-way is the focus of implied-in-law dedication.²⁷

²⁶ PUKU'I, supra note 1, at 109 (no. 1016).

²⁷ See, e.g., *Gion v. City of Santa Cruz*, 465 P.2d 50, 55-57 (Cal. 1970); *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. App. 1964); see also 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 84.01[5][b] (Robert G.

a. *Express grant of an easement*

During the Māhele, all awards of Government and Crown lands were subject to the rights of native tenants. Deeds executed to convey private interests in land usually contained the phrase “ua koe ke kuleana o na kanaka” or “reserving the rights of native tenants.”

A landowner can establish a right of access under H.R.S. section 7-1 if the parcel is landlocked and is a kuleana or other ancient tenancy whose origin is traceable to the Māhele. *Rogers*, 3 Haw. App. at 139, 642 P.2d at 551-52. In affirming a kuleana owner’s access rights, the Intermediate Court of Appeals held that the kuleana reservation contained in the plaintiff’s original grant expressly reserved an unrestricted right of access to the defendant’s landlocked kuleana. *Rogers*, 3 Haw. App. at 139, 642 P.2d at 552. Landowners who reside in a landlocked kuleana and wish to establish access rights should consider consulting with the Office of Hawaiian Affairs or attorneys who regularly practice in this area.

b. *Implied grant of an easement*

Even if an original land award did not expressly include a kuleana reservation, a landlocked kuleana owner has a right to access his or her parcel over the surrounding land by way of an easement based on necessity or prior use. An easement by necessity is created by implied grant or reservation,²⁸ and may be created either because of “strict” necessity—for example, where one of the parties is landlocked and the only access is over grantor’s land—or by “reasonable” necessity, as in a case where a way has been actually and continuously used and, although an alternate route is possible, it is very difficult or expensive. *Kalaukoa v. Keawe*, 9 Haw. 191, 194 (1893).²⁹

Even without evidence of a trail or roadway either on old maps or on the ground, ahupua’a tenants may still assert access rights to a landlocked kuleana parcel under H.R.S. section 7-1. Courts have the power to designate both the location and width of an access or right-of-way under such circumstances. Unfortunately, this is a time-consuming and expensive process, and many kuleana owners do not have the financial resources to pursue this type of court action.

Natelson ed., 2005); Michael Anthony Town & William Wai Lim Yuen, Public Access to Beaches in Hawaii: “A Social Necessity.” 10 HAW. B.J. 5, 16-18 & 25-28 (Spring 1973).

28 See the last paragraph in section III.C.1. above.

29 In *Haiku Plantations Association v. Lono*, 1 Haw. App. 263, 618 P.2d 312 (1980), the ICA concluded that the right of access to a particular landlocked kuleana parcel did not include the right to park vehicles along an easement through a privately owned subdivision when there was no evidence that vehicles historically parked on the right-of-way at issue.

2. Access Between Ahupua'a or Districts

State statutes protect access along trails running over government property, as well as public trails to the shoreline and forest areas. In addition, it is possible that access to ancient trails running over private property may be established by historic or customary use, implied dedication of a public right-of-way (see last paragraph in section III.C.1. above), or under the public trust doctrine.

a. Access rights on government lands

Native Hawaiians hold access rights to the mountains, seashore and other designated natural areas, in common with members of the general public. For example, "the right of public access to the sea, shorelines, and inland recreational areas, and transit along the shorelines" is guaranteed by H.R.S. section 115-1, which further "provide[s] for the acquisition of land for the purchase and maintenance of public rights-of-way and public transit corridors." Similarly, the state is required to establish rights-of-way across public lands to provide public access to beaches, game management areas, public hunting areas, and forests. H.R.S. § 171-26. In addition, Hawai'i's Coastal Zone Management Act requires the state to protect and preserve historic, scenic and open space resources, which includes providing and managing public access to shoreline areas for recreational purposes. H.R.S. § 205A-2(b) to (c).

In addition to the "general" access rights described above, Native Hawaiians also have unique rights relating to the exercise of traditional and customary practices for subsistence, cultural and religious purposes. As detailed above in section II.C., these rights are derived from article XII, section 7 of the Hawai'i Constitution and H.R.S. sections 1-1 and 7-1. The right to use ancient trails running through public or private lands for access between ahupua'a is critical to the meaningful exercise of traditional and customary rights. One cannot gather if one cannot get to where the particular item may be found. Thus, among the "resources [that] are utilized for Hawaiian subsistence, religious, and cultural beliefs, customs, and practices" are "circulation networks includ[ing] trails and roads for lateral access and for mauka-to-makai access . . . [and those] affording access to the various resource zones within an ahupua'a."³⁰ These trails and roads facilitate access rights to sacred sites, mountain forests or shoreline areas, as well as entering or passing through private property in order to gather particular items for subsistence, religious or cultural purposes.

³⁰ Davianna McGregor, An Introduction to the Hoa'aina and Their Rights, 30 HAWAIIAN J. HIST. 1, 21-22 (1996).

i. Public Highways and Trails

“All roads, alleys, streets, ways, lanes, bikeways, bridges, and all other real property related interests in the State, opened, laid out, subdivided, consolidated, and acquired and built by the government” or “built by private parties and dedicated or surrendered to the public use,” are public highways. H.R.S. §§ 264-1(a), (c). Trails and other non-vehicular rights-of-way that satisfy the requirements of a public trail are also included. H.R.S. § 264-1(b). Although no cases to date have interpreted this subsection with respect to public trails, the statute suggests that an ancient trail may become “public” if:

- (1) it was a public right-of-way at the time the Highways Act of 1892³¹ was passed;
- (2) it was built by the government; or
- (3) it became a public right-of-way subsequent to the passage of either the 1892 Act, or H.R.S. section 264-1(b) in 1988.

A trail became a public right-of-way under the Highways Act of 1892 if it was dedicated or surrendered to the government. H.R.S. § 264-1(c). Usually, dedication was by deed from a private landowner to the government. H.R.S. § 264-1(c)(1). Surrender or abandonment of a trail occurred when the private landowner did not exercise any act of ownership over the trail for a period of five years after the passage of the Act in 1892. H.R.S. § 264-1(c)(2). The government can acquire a public right-of-way over privately owned land only through condemnation (the legal process the government uses to acquire private property for public use) or by the owner’s express or implied consent. In re Hawaiian Trust Co., 17 Haw. 523, 524-25 (1906).

ii. Nā Ala Hele: Statewide Trail and Access System

The Nā Ala Hele Statewide Trail and Access System (enacted in 1988, under H.R.S. Chapter 198D) is administered by the state Department of Land and Natural Resources (DLNR), which must:

- (1) inventory and classify all the existing trails located in the state, H.R.S. §§ 198D-3 and -4;
- (2) identify areas which have inadequate access, H.R.S. § 198D-5;
- (3) adopt rules to regulate the use of trails and accesses, H.R.S. § 198D-6; and
- (4) acquire additional trails and accesses in areas with inadequate access to enhance the state-wide trail and access system, H.R.S. § 198D-8.

31 This act defined public highways to include all existing trails as well as trails subsequently “opened, laid out, or built by the government” or by private parties who later dedicated or abandoned the trails to the public. The act authorized the state to claim trails that existed prior to 1892 pursuant to historical documentation as confirmed by a survey on the ground; creation of a cultural survey and management plan is also required, along with programs for trail restoration, maintenance and signage.

“Hawaiian cultural representatives or practitioners” must be appointed to the statewide and island advisory councils that assist DLNR in implementing the Nā Ala Hele program and also provide a venue for public input. H.A.R. §§ 13-130-4, -5. In addition, H.A.R. section 13-130-18 prohibits interference like blocking trails and accesses, making physical changes to a trail that impede use, threats against persons using trails, or other forms of intimidation.

DLNR maintains a website that provides maps and detailed information about Nā Ala Hele trails statewide; Appendix A includes the website and other contact information for Nā Ala Hele.³² Practitioners who experience difficulties with access relating to the exercise of their traditional and customary rights may consider seeking assistance from the Trails & Access Specialist located on their respective island.

b. Access rights over private property

There are at least three potential methods for securing access to ancient trails running over private property: historic or customary use, implied dedication of a public right-of-way, or the public trust doctrine.

i. Historic or Customary Use of Ancient Trails

As described above, practitioners can secure access to ancient trails based on historic or customary use under H.R.S. section 7-1. In Palama v. Sheehan, 50 Haw. 298, 301, 440 P.2d 95, 97-98 (1968), the court held that the defendants established access rights under H.R.S. section 7-1 because the previous owners of their property historically used a trail running through plaintiffs’ property. The trails provided access between the defendants’ taro patches, which were located mauka (inland) of the plaintiffs’ property, and their kuleana parcels at the seashore. The court held that defendants were entitled to a right-of-way across plaintiffs’ land by reason of necessity, because access via a more indirect route was prevented by flooding when it rained. The court also rejected an attempt to limit the defendants’ access to horse and pedestrian use, noting that the previous owner of plaintiffs’ property had enlarged the path in 1910 for vehicular access and that the present width of the easement did not unreasonably burden the land.³³

32 NĀ ALA HELE TRAIL & ACCESS SYSTEM, Homepage, <http://www.hawaiitrails.org/home.php> (last visited Nov. 7, 2011).

33 See also Bremer v. Weeks, 104 Hawai‘i 43, 64-65, 85 P.3d 150, 171-72 (2004) (the clearly marked trail on a 1908 survey map was sufficient to suggest that the trail was well defined, in existence for over ninety years and frequently traversed prior to 1908).

ii. Implied Dedication of Public Right-of-Way

Access along Hawaiian trails may also be protected through an implied dedication of a public right-of-way across private land. An implied dedication of a public-right-of-way is established when there is intention and an act of dedication by the property owner, and an acceptance by the public. The King v. Cornwell, 3 Haw. 154, 161 (1869). If public use is the only evidence of a dedication, then such use must be for the prescriptive period, which is now twenty (20) years, although it has changed over time. As described above, an owner's implied intent to dedicate a public right-of-way may be implied-in-fact or implied-in-law. See last paragraph of section III.C.1.

iii. Public Trust Doctrine

The public trust doctrine is another legal theory that may secure access along ancient trails. Under this doctrine, all public lands and interests in such lands are held in trust by a state or municipality for the benefit of the people and must be preserved and maintained for public purposes.³⁴ The public trust doctrine is well-recognized in Hawai'i law and has been applied to: (1) navigable waters; (2) shoreline lands below the upper reaches of the wash of waves; (3) lava extensions; and (4) water resources.³⁵

The public trust doctrine may independently establish public ownership of and the public's right to access along ancient trails. Like all Hawaiian kingdom lands prior to the creation of private property, trails were held by the king in trust for the people. In adopting a private property system, the sovereign retained interests in all ancient trails for the benefit of the public. Such "sovereign prerogatives" for the common good could not be conveyed away, including the power "[t]o encourage and even to enforce the usufruct [right of enjoyment] of lands" and "[t]o provide public thoroughfares and easements, by means of roads, bridges, streets, etc."³⁶

34 See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 477 (1970).

35 See King v. Oahu Ry. & Land Co., 11 Haw. 717, 723-25 (1899); County of Hawaii v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973), reh'g denied, 55 Haw. 677 (1973), cert. denied, 419 U.S. 872 (1974); State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977); Reppun v. Board of Water Supply, 65 Haw. 531, 544, 656 P.2d 57, 66-67 (1982), cert. denied, 471 U.S. 1014 (1985); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 186-87, 504 P.2d 1330, 1339, aff'd on reh'g, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962, cert. denied, 417 U.S. 976 (1974); In re Waiāhole Combined Contested Case Hearing, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000); In re Wai'ola o Moloka'i, 103 Hawai'i 401, 431, 83 P.3d 664, 694 (2004).

36 Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them (Aug. 20, 1846), 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 81, 85, reprinted in 2 REVISED LAWS OF HAWAII 2124, 2128 (1925).

Thus, the Principles adopted by the Land Commission in 1846 recognized that public trails and rights-of-way are specifically reserved to the government and may be deemed to be an important usage of lands for the common good. The public trust status attached to public trails, highways, and rights-of-way (as recognized by the Land Commission), continuing through the territorial period to the present. Although the Hawai'i Supreme Court has never specifically applied the public trust doctrine to trails, it would be a logical extension of existing public trust law.