University of Hawai'i Law Review

Volume 19 / No. 1 / Spring 1997

ARTICLES

COMMENTS

CASENOTES

RECENT DEVELOPMENTS

Exhibit G-13 p. 1 of 23

Hawai`i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources

I. INTRODUCTION

Imagine a vast, abundant koa forest owned by the State. Within this forest, several birds, plants, and animals rely on this habitat to survive. One day, a nearby inhabitant realizes that the forest's wood would be perfect to build tables, chairs, and other artifacts for his house.

In deciding whether or not to cut down the trees, that individual will weigh the benefits he will receive from cutting down the trees against any costs or detriments that may arise from this action. So long as his benefits outweigh his costs, that individual will determine that it is in his best interests to cut down the trees.[1] In this analysis, on the positive side is the benefit he receives from the use of the wood for furniture in his house. The cost is the depletion of the forest. However, the negative impact is shared by society as a whole, such that the individual cost of cutting down trees appears minimal to that individual. Since the benefit outweighs the individual cost, that person will go to the forest and chop down whatever trees he needs.

Now, suppose this inhabitant is no longer the only one with an interest in the forest. Slowly, more and more people begin cutting down trees - some for their own use, but some to sell to others. For each individual, the same cost-benefit analysis[2] would favor cutting down the necessary trees. The high benefit to each individual of cutting down the trees would outweigh the individual social cost of depleting the forest, since this social cost is shared among all members of the public.

A significant problem arises when the number of trees being chopped down exceeds the ability of the forest to replenish itself. At this point, the cumulative effect of destroying the forest, with its plants and animals, severely outweighs the individual benefits achieved from the use of the wood. However, no individual will have enough of a personal stake in the preservation of the forest to warrant action to stop its destruction. Each individual will assume that his own contribution to the depletion of the forest is so minimal as to pose no significant effect. Since the detriment is shared throughout society, each individual tree cutter will not recognize the

[1] This is an example of the cost-benefit analysis. For a detailed explanation of the cost-benefit analysis, *see* STEVEN E. LANDSBURG, PRICE THEORY AND APPLICATIONS 106-13 (1988). The basic premise behind this theory is that an action should be taken so long as the benefits of the action equal or exceed the costs of that action. *Id.* at 112. When dealing with the issue of how much of a good should be produced, the marginal benefit must be weighed against the marginal cost. *Id.* The marginal benefit is the benefit obtained from producing one more of that good, while the marginal cost is the cost of one more of that good. *Id.* at 107-8. So long as the marginal benefit to be gained from one more item exceeds or at least equals the marginal cost of that one more item, that item should be produced. *Id.* at 112.

[2] *Id.*

cumulative repercussions and will continue to cut down the trees for personal gain.

The above situation is an illustration of the tragedy of the commons.[3] Now suppose this forest land is owned by many individuals and is the only habitat of its kind in the world. Assume further that these private landowners contend that they have the right to cut down whatever trees are on their land regardless of the social repercussions. What can be done to stop the complete destruction of this natural resource under private ownership?

The above scenarios illustrate two distinct issues concerning the use of natural resources. First, does the public have a right to utilize State-owned natural resources for their own benefit, and if so, what are the limits of this right? Second, may a private owner utilize resources on his own land even when it threatens the existence of a resource?

Article XI, section 1 of the Hawai'i Constitution[4] addresses these two issues. Pursuant to this section, all public natural resources fall within the public trust doctrine. Under this doctrine, the public has the right to reasonably utilize public natural resources for its own benefit, although not to the extent that the use threatens the existence of that natural resource.[5] In

[3] The tragedy of the commons is based on the theory that individual users of common natural resources, despite doing the best they can, are prone to produce outcomes that, in the long run, are detrimental to all, such as pollution or natural resource depletion. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 39 (2d ed. 1994).

An example of the development of the tragedy of the commons is as follows. Consider a pasture open for all herdsmen to use. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 34 (1992) (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968)). Each herdsmen will attempt to keep as many cattle as possible on this pasture. *Id.* This arrangement may work well for centuries, so long as wars and disease keep the amount of man and animals capable of utilizing the pasture below the capacity of the land to replenish itself. *Id.* However, once social stability is finally obtained, tragedy will arise. *Id.* Each individual herdsman, acting rationally, will seek to maximize his profits from the pasture. *Id.* at 35. Since the negative effects of overgrazing the pasture are shared by all the herdsmen, a rational herdsman will conclude that the sensible choice is to add another animal to his herd in order to maximize his own immediate profits. *Id.* However, every herdsman will also come to the same conclusion, resulting in the overuse of the pasture. *Id.* The tragedy is that "[e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited. . . . Freedom in a commons brings ruin to all." *Id.*

[4] HAW. CONST. art. XI, § 1 reads:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

Id.

[5] *See infra* notes 124-31 and accompanying text.

regard to privately owned natural resources, the public trust doctrine generally does not apply.[6] Thus, the right to use these natural resources lies almost exclusively with the private owner. However, even when the public trust doctrine is not applicable to a parcel of land, a private owner's use of that land is still subject to limitations.[7] Pursuant to the Hawai'i Constitution, the State has the duty to protect and conserve all natural resources.[8] As such, the State may regulate, under its police power, a private owner's use of natural resources on his land when reasonably necessary to conserve or protect that resource.[9] Therefore, the State's power to regulate to conserve or protect a resource extends over all land, whether public or private.[10]

Part II of this article discusses the public trust doctrine and its application to public natural resources. This section examines the origin of the public trust doctrine, the principles underlying this doctrine, and its evolution in the United States. In addition, it defines the scope of the public trust doctrine in Hawai'i by analyzing article XI, section 1 of the Hawai'i Constitution, and illustrates how the history of Hawai'i as well as the expansion of the public trust doctrine in other states supports this scope.

Part III focuses on the private ownership of natural resources, and the restrictions that a private owner may face in the use of his land. It discusses the application of the public trust doctrine to private ownership, followed by an analysis of the Hawai'i Constitution and why the protection and conservation of privately-owned natural resources does not constitute an unconstitutional taking.

Finally, part IV discusses how Article XI, section 1 should be applied in Hawai'i, and the factors the State should consider in implementing its duties under this constitutional provision.

II. THE PUBLIC TRUST DOCTRINE IN HAWAI'I: ITS APPLICATION TO PUBLIC NATURAL RESOURCES

The scope of the public trust doctrine in Hawai'i is set forth in the Hawai'i Constitution, Article XI, section 1, provision 2, which states that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[11] Before analyzing what exactly the above provision means, it is first necessary to look at the origin of the public trust doctrine, its basic principles and

[6] To determine when the public trust doctrine applies to private land, *see infra* notes 26-27 and accompanying text.

[7] *See infra* pp. 206-15.

[8] *See supra* note 4.

[9] *See infra* notes 211-15 and accompanying text.

[10] *Id.*

[11] HAW. CONST. art. XI, § 1.

importance, and how it has evolved and expanded throughout the rest of the United States.

A. Origin of the Public Trust Doctrine

The public trust doctrine originated in the Roman Empire in 533 A.D. and was later formally adopted by England as part of its common law.[12] This doctrine recognizes that the public has community rights to certain basic natural resources, such as the air, running water, the sea, and the shores of the sea.[13]

Under the seventeenth and eighteenth century English common law, public trust resources were subject to two different ownership interests.[14] The first is

[12] *See* David C. Slade, *Public Trust Doctrine - 101*, *in* THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES 55, 58-60 (1991) [hereinafter *Public Trust 101*]. In 528 A.D., Emperor Justinian of the Roman Empire ordered a commission to codify Roman common law. *Id.* at 59. From this commission, two handbooks emerged and were published in 533 A.D., the Digest and the Institutes. *Id.* The Institutes was a handbook dedicated for the use of law students. *Id.* Within the Institutes, a provision emerged recognizing that the public has community rights to certain natural resources. *Id.* (For the text of this provision, see infra note 13). This principle would later evolve into the public trust doctrine as known in both England and the United States. *Id.*

The English formally adopted this Roman civil law following the passage of their Magna Carta. *Id.* at 60. It was this Roman civil law that later was brought by the English colonies to America in the early 1600s. *Id.* Queen Elizabeth I of England adopted this public trust concept for two reasons. First, the public trust doctrine could be used as a means to enlarge England's treasury by claiming prima facie ownership of the shoreline up to the high water mark, even over lands previously granted to private parties. Richard J. Lazarus, *Changing Conception of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 635 (1986). Second, the Queen considered property ownership rights along the shoreline as an impediment to the English naval power and thus national security. *Id.* at 635 n.19.

[13] *Public Trust 101*, *supra* note 12, at 59. The Institutes states the following:

> By the law of nature these things are common to all mankind — the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.

Id. (footnote omitted). In addition, the Digest recognizes that:

> The right of fishing in the sea from the shore belongs to all men. . . . Everyone has a right to build on the shore, or by piles, upon the sea, and retain the ownership of the construction so long as it lasts, but when it falls into ruins, the soil reverts into its former status as *res communis*.

Id. at 60 (footnote omitted).

[14] JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 6 (1994) [hereinafter ARCHER]. "[P]ublic trust land is vested with two titles, one dominant and the other subservient, a concept necessary to understand in order to apply the Public Trust Doctrine." *Public Trust 101*, *supra* note 12, at 63.

the private property interest in the land, called the *jus privatum*.[15] The Crown had prima facie title to this.[16] However, this *jus privatum* interest was transferable, and thus the Crown could convey trust land to private ownership.[17] Nonetheless, regardless of whether the land was in the hands of the government or private owners, this *jus privatum* interest was subject to the *jus publicum* interest, which was held by the public.[18] This *jus publicum* interest is "simply described as the bundle of rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes."[19]

In English common law, the public trust doctrine applied to all tidal waters and the land beneath them, from the ordinary high water mark waterward.[20] Within these areas, the public had the right to use the lands for the traditional purposes of navigation, commerce, and fishing.[21]

[15] The *jus privatum* interest is the subservient title in public trust lands and must yield to the dominant title. *Public Trust 101*, *supra* note 12, at 63; ARCHER, *supra* note 14, at 6-7.

[16] The Crown held prima facie title to coastal waters and the land beneath them as a result of its sovereignty. ARCHER, *supra* note 14, at 6.

[17] *Id.* at 6-7.

[18] The *jus publicum* interest is the dominant title in public trust lands. *Public Trust 101*, *supra* note 12, at 63. As such, the *jus privatum* subservient interest must yield to this paramount *jus publicum* dominant interest. ARCHER, *supra* note 14, at 7. Therefore, although the King could grant public trust lands into private ownership,

> his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void.

Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 458 (1892) (citing People v. New York and Staten Island Ferry Co., 68 N.Y. 71, 76 (N.Y. year unknown)).

[19] *Public Trust 101*, *supra* note 12, at 63.

[20] Shively v. Bowlby, 152 U.S. 1, 11 (1892).

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects.

Id.

[21] ARCHER, *supra* note 14, at 7. The public has "the common right to use these public trust lands and resources for certain traditional purposes necessary to individual survival and livelihood, including navigation, commerce, and fishing." *Id.*; *see also Shively*, 152 U.S. at 11.

B. The Basic Principles and Importance of the Public Trust Doctrine

Under the public trust doctrine, the state holds all public trust lands for the benefit of the people.[22] The state has a duty to ensure that these lands are utilized in a manner benefitting the public, and to prevent any use substantially impairing this trust.[23]

This doctrine is a very unique and powerful property management tool for several reasons.[24] First, it gives a state the power to regulate uses on public trust lands as well as to protect its fundamental rights in the property.[25]

Second, if public trust lands are conveyed into private ownership, that private owner will also be subject to the above trust principles.[26] The state will remain obligated to promote the public's interest in the land or at least prevent

[22] ARCHER, *supra* note 14, at 3. Public trust lands are "subject to a 'public trust' for the benefit of all their citizens with respect to certain rights of usage, particularly uses related to maritime commerce, navigation, and fishing . . . ." *Id.*

[23] *Id.* at 3-4.

[24] *Id.* at 3. "An additional and powerful source of authority that can be used in conjunction with the police power for more effective management of coastal areas is found in the public trust doctrine." *Id.*

[25] *Id.* at 4.

> [B]ecause the public trust doctrine is fundamentally a property - or ownership - based doctrine, a state's authority under the public trust doctrine is not limited to the power to regulate but also includes the power to protect the state's fundamental rights in its property, and the rights of all members of the public to use such property, even when the property has been conveyed into private ownership.

Id.; DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LAND, WATERS AND LIVING RESOURCES OF THE COASTAL STATES 225 (1990) [hereinafter SLADE].

[26] *See* ARCHER, *supra* note 14, at 4. "[A]ll lawful grants of [public trust] lands by a state to private owners . . . must be used by their private owners so as to promote the public interest and so as not to interfere unduly with the public's several rights under the public trust doctrine." *Id. See also* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), where the Court stated:

> The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 453; *see also* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 721 (Cal. 1983). "[P]arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." *Id.*; Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 633 (Miss. 1967).

any use of the land that unreasonably interferes with the public's rights under this doctrine.[27]

Third, a state regulation upon public trust land is less likely to be an unconstitutional taking[28] than a similar regulation upon non-trust lands.[29] The reason is that public trust property rights have been held subject to the public trust from the inception of private title.[30] Therefore, a private owner has no distinct investment-backed expectation[31] that he may utilize his private property in a manner inconsistent or harmful to the public's interest in the property.[32] As such, nothing has been taken when the state, as trustee, acts pursuant to public trust rights to regulate a particular use on privately-owned land.[33]

[27] *See* ARCHER, *supra* note 14, at 4. "[A]ll lawful grants of [public trust] lands by a state to private owners have been made subject to that trust and to the state's obligation to protect the public interest from any use that would substantially impair the trust." *Id.*; *see also Illinois Central*, 146 U.S. at 453-454, which states:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

Id.; *see also Treuting*, 199 So. 2d at 633; Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

[28] The takings clause states that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.

[29] ARCHER, *supra* note 14, at 4. The public trust doctrine is "less vulnerable to a challenge by a private property owner based upon the takings clause of the United States Constitution when a state has exercised its rights and obligations as a trustee over public trust land to restrict (or even prohibit) the activities of private landowners." *Id.*

[30] *Id.* at 78.

> A state's assertion or reassertion of the state's public trust property interests, unlike state regulatory action based solely upon the state's traditional police power, should not be vulnerable to takings challenges. Public trust property rights have been held by the government trustee in trust or subject to the trust from the outset and therefore nothing has been taken when the trustee acts pursuant to such rights.

Id.

[31] *See* Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978) (stating that a relevant consideration in deciding whether a taking has occurred is the extent to which the regulation has interfered with the private owner's distinct investment-backed expectations).

[32] ARCHER, *supra* note 14, at 78.

[33] *Id.*

Fourth, the public trust doctrine originated out of common law,[34] and thus possesses the inherent common law capacity to grow and adapt in response to changing social conditions and public needs.[35] A state is thus not forced to continue to favor outdated uses, but instead may develop this doctrine to remain sufficiently flexible to change in response to modern needs.[36]

Finally, the public trust doctrine is based on the notion of a legally enforceable trust,[37] which is analogous to the laws of private and charitable trusts.[38] Because little has been said in the courts defining the precise scope of the public trust doctrine in the United States, the laws of private and charitable trusts may be useful to provide insight in determining the rights a state has and the duties a state must observe as trustee.[39]

C. The Evolution of the Public Trust Doctrine in the United States

The English common law found its way to America as a result of English colonization.[40] The public trust doctrine itself first formally appeared in the United States in the Massachusetts Bay Colony's Ordinances of 1641 and 1647.[41] These ordinances extended shore owners' property lines closer to the

[34] *Id.* at 4.

[35] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972). The court stated: "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet the changing conditions and needs of the public it was intended to benefit." *Id. See also* ARCHER, *supra* note 14, at 4; SLADE, *supra* note 25, at 225.

[36] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." *Id.*

[37] *Public Trust 101*, *supra* note 12, at 64.

> The [public] "trust" referred to is a real trust in the legal sense of the word. . . . [T]here are trust assets: navigable waters, the lands beneath these waters, the living resources therein, and the public property interests in these trust assets. There is a clear and definite beneficiary: the public. There are trustees: the State legislatures, which often delegate their trust powers and duties to State coastal commissions, land commissions, or similar State agencies. There is a clear purpose for the trust: to preserve and continuously assure the public's ability to fully use and enjoy public trust lands, waters and resources for certain public uses.

Id.

[38] ARCHER, *supra* note 14, at 4-5.

[39] ARCHER, *supra* note 14, at 4-5; *see also* SLADE, *supra* note 25, at 225-226.

[40] ARCHER, *supra* note 14, at 5.

[41] *Id.* "Under these ordinances, the colony granted title extending to the low watermark to owners of land adjoining tidally influenced waters and granted title to the high watermark to owners of land adjoining 'great ponds' over ten acres in size." *Id.*

water.[42] The purpose of these extensions was to stimulate commerce in the area by encouraging private owners to build wharfs.[43] However, the ordinances also expressly reserved a right for the public to use and enter these newly conveyed areas for the purposes of fishing and navigation.[44] Thus, even though these private owners gained more land to build wharfs, the public gained the right to use these wharfs.[45]

Traditionally, the public trust doctrine extended from the ordinary high water mark waterward,[46] with the protected public uses being navigation, commerce and fishing.[47] However, after the American Revolution, American courts were faced with the decision of either rejecting the old English common law or adopting it into their body of case law.[48] The courts and many state legislatures chose the second option.[49] Thus, either by judicial decisions, "common law reception" acts, or constitutional provisions, the states adopted the English common law which had been governing the American colonies prior to the Revolution.[50] As a result, with this adoption of the English common law, the public trust doctrine gained a firm foothold in the American legal system.[51]

---

[42] For those private owners of land adjoining "tidally influenced waters," their property line was extended to the low watermark. *Id.* For those private owners of land adjoining ponds over ten acres in size, their property line was extended to the high watermark. *Id.*

[43] *Id.*

[44] *Id.* at 6.

[45] *Id.* at 5-6.

[46] In re Sanborn, 57 Haw. 585, 593, 562 P.2d 771, 776 (1977) ("[L]and below high water mark is held in public trust by the State . . . ."); Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 632 (Miss. 1967) ("At common law the title to all lands under the tidal waters below high water mark belonged to the crown, and were held by the king in trust for the use of his subjects."); Lusardi v. Curtis Point Property Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981) ("The public trust doctrine is premised on the common rights of all the State's citizens to use and enjoy the tidal land seaward of the mean high water mark.").

[47] Shively v. Bowlby, 152 U.S. 1, 11 (1894) (The public trust's "natural and primary uses are public in their nature, for highways of navigation and commerce . . . and for the purpose of fishing . . . ."); City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 365 (Cal. 1980) ("[E]arly cases expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing . . . ."); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 52 (N.J. 1972) ("The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principle transportation arteries of early days, and for fishing, an important source of food.").

[48] ARCHER, *supra* note 14, at 6.

[49] *Id.*

[50] *Id.*

[51] *Id.*

Since the public trust doctrine is based on common law, it has the capacity to adapt to changing political and social needs.[52] "American courts [thus had] the discretion to emphasize those facets of the doctrine that they favored and the justification to ignore those that they did not."[53] American courts essentially maintained the basic policies and principles underlying the public trust doctrine.[54] However, recognizing the geographical, political, and social differences between England and the United States, the public trust's protected areas and appropriate uses have changed from the traditional English scope.[55]

Geographically, a significant difference between England and the United States is that England has no great inland rivers and water bodies.[56] As such, the United States has logically extended this doctrine to protect these water resources as well, thus bringing the public trust inland beyond the traditional limits that England recognized.[57]

The first expansion of the public trust doctrine beyond its traditional area occurred prior to the American Revolution, when the Massachusetts Bay Colony's Ordinances of 1641 and 1647 extended the trust to cover great ponds over 10 acres in size.[58] Then, following the Revolution, the Northwest Ordinance[59] extended the public trust to the nation's great internal waterways - such as the Mississippi and St. Lawrence Rivers.[60] Both the Massachusetts

---

[52] ARCHER, *supra* note 14, at 4; *see also* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.").

[53] ARCHER, *supra* note 14, at 7.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 19.

[57] *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) (holding that the public trust doctrine extends to the fresh water in the Great Lakes).

The scope of the public trust doctrine has traditionally turned on whether the water is navigable. In England, the existence of tidal waters was considered as being the legal test of whether this navigability requirement was met. *Id.* at 435. As such, limiting the public trust doctrine to only those waters which were subject to the "ebb and flow of the tide" served its purpose in England. *Id.* at 436. However, in the United States, this "tidal water" test is not applicable. *Id.* at 435. For example, "[s]ome of our rivers are navigable for great distances above the flow of the tide" and are still important for our nation's commerce. *Id.* In addition, the Great Lakes are not affected by the tide, but yet extensive commerce is conducted upon these waters. *Id.* Therefore, such lands should be "held by the same right in the one case as in the other, and subject to the same trusts and limitations." *Id.* at 437.

[58] ARCHER, *supra* note 14, at 5.

[59] Northwest Ordinance of 1787, 1 Stat. 50 (1789).

[60] ARCHER, *supra* note 14, at 6.

Bay Colony's Ordinances of 1641 and 1647 and the Northwest Ordinance gave notice of the public trust doctrine's dynamic nature in the United States by significantly expanding it beyond its traditional scope.[61]

Then, in 1892, the United States Supreme Court expanded the public trust doctrine to include all navigable freshwaters in *Illinois Cent. R.R. Co. v. Illinois*.[62] A century later, in *Phillips Petroleum Co. v. Mississippi*, [63] the Supreme Court held that the public trust doctrine applies to all tidal waters, regardless of navigability.[64] Together, these two cases extended the public trust doctrine to all tidal waters[65] as well as those freshwaters which are navigable-in-fact.[66]

Politically, unlike England, the United States government is based on a federal system.[67] Certain powers are delegated to the individual states, while others are delegated to the federal government.[68] One power each state possesses is the ability to create and regulate property rights within its borders.[69] This converts the public trust doctrine into essentially a state doctrine,[70] where each state has the power to define the scope of this public trust within its borders.[71] Under the Equal Footing Doctrine, upon becoming a part of the United States, each state is given the same rights as the original thirteen states which were governed by English common law.[72] Thus, upon entry into the Union, each state's public trust doctrine was limited to the lands

[61] *Id.*

[62] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). The U.S. Supreme Court stated: "[T]here is no reason or principle for the assertion of dominion or sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by freshwaters of these lakes." *Id.* at 435. The public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable freshwaters as to waters moved by the tide." *Id.* at 436.

[63] 484 U.S. 469 (1988).

[64] *Id.* at 484. "[O]ur cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence . . . ." *Id.*

[65] *Id.*

[66] *See supra* note 62.

[67] ARCHER, *supra* note 14, at 7.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 14.

[71] *Id.* at 12-13.

[72] *Id.* at 9. The equal footing doctrine originated out of the Northwest Ordinance of 1787. *Id.* "The equal footing doctrine dictates that each new state, upon entering the Union, has the same sovereignty and jurisdiction over all territory within its limits as was enjoyed by the thirteen original states, which in turn had inherited all sovereign rights of the English Crown." *Id.*

influenced by tidal waters.[73] However, once entered into the Union, each individual state has the power to define the limits of the lands that they hold in trust.[74] A state may expand upon, or even restrict, the scope of the public trust doctrine to reflect its present needs.[75] Thus, its precise scope can and does differ from state to state.[76]

The evolution of the public trust doctrine in the United States has resulted in the states no longer limiting the public trust doctrine to protecting only water-related areas and the land beneath them.[77] The public trust doctrine has also been applied to protect sand and gravel located in water beds,[78] marine life,[79] as well as privately owned dry sand beaches.[80]

[73] Shively v. Bowlby, 152 U.S. 1, 57 (1894).

> At common law, the title and dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders . . . . The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Id.

[74] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988). "[I]t has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.*

[75] ARCHER, *supra* note 14, at 19-20 (recognizing that states have the power to narrow or expand its public trust lands).

[76] *Id.* at 14.

[77] *See, e.g.*, Wade v. Kramer, 459 N.E.2d 1025 (Ill. App. Ct. 1984) (expanding public trust to protect archaeological remains); Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (stating that the air is protected by the public trust doctrine); Conveyance of 1.2 Acres of Bangor Memorial Park v. Borough of Bangor, 567 A.2d 750 (Pa. Commw. Ct. 1989) (expanding of the public trust to protect a forest reservation).

[78] Warren Sand & Gravel Co. v. Commonwealth Dept. of Envtl. Resources, 341 A.2d 556 (Pa. Commw. Ct. 1975). In this case, Warren Sand & Gravel Co. had been issued permits for several years to dredge sand and gravel from the Allegheny River. *Id.* at 558. However, upon applying for a new permit, the state placed conditions on the amount of sand and gravel that could be dredged. *Id.* The court upheld these new conditions, holding that sand and gravel are natural resources that cannot vest in private ownership, but rather are resources that belong to the public. *Id.* at 560.

[79] New Jersey Dept. of Envtl. Protection v. Jersey Cent. Power & Light Co., 308 A.2d 671 (N.J. Super. Ct. Law Div. 1973). A power plant released cold water into a nearby creek, resulting in the death of 500,000 fish. *Id.* at 672. The court held that marine animals are protected by the public trust doctrine. *Id.* at 673. As such, the State, as trustee over these fish for the benefit of the public, had the power and duty to bring suit against the power company to recover damages for the market value of the destroyed fish. *Id.* at 674.

[80] *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984). The court held: "[T]oday, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary." *Id.* at 365.

In addition, recognizing the public trust doctrine's sufficient flexibility to conform to society's changing needs and demands and the irrationality of limiting such a powerful management tool to only water-related lands, several states have begun expanding this doctrine inland to provide protection to non-water related resources.[81] For example, the public trust doctrine has been applied by several states to protect the following: the air,[82] parks,[83] natural forests,[84] archaeological remains,[85] solid wastes,[86] lava extensions,[87] a historic

[81] *See* ARCHER, *supra* note 14, at 20-22.

[82] *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that air is protected by the public trust doctrine); *see also* LA. CONST. art. IX, § 1:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

Id.

[83] Big Sur Properties v. Mott, 132 Cal. Rptr. 835 (Cal. App. Ct. 1976). Private land was dedicated to the State of California to be used as a public park. *Id.* at 102. The court stated that once land is dedicated as a public park, it becomes part of the public trust doctrine and must be utilized in a manner consistent with the public use to which it was dedicated. *Id.* at 104; Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist. v. Borough of Bangor, 567 A.2d 750 (Pa. Commw. Ct. 1989) (holding that 1.2 acres of public parkland is protected by the public trust doctrine, thus prohibiting the use of the land for the construction of a new elementary school).

[84] Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 121 (Mass. 1966) (applying the public trust doctrine to protect the Greylock State Reservation from any inconsistent public uses).

[85] Wade v. Kramer, 459 N.E.2d 1025 (Ill. App. Ct. 1984). The court recognized that State-owned archaeological remains are held in trust by the State for the benefit of its citizens. *Id.* at 1027.

[86] *See In re* American Waste and Pollution Control Co., 642 So. 2d 1258 (La. 1994). The court recognized that waste disposal sites are part of the public trust doctrine, as set forth in the Louisiana Constitution ("The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."). *Id.* at 1262 (citing LA. CONST. art. XI, § 1). As such, the Louisiana Department of Environmental Quality (DEQ), as a representative of the State, has a duty under this trust to be 'diligent, fair, and faithful to protecting the public interest in the state's resources." *Id.* The court held that DEQ failed in this duty by erroneously issuing a permit for waste disposal by not listing any basic findings and for not properly evaluating the possible environmental risks involved. *Id.* at 1266.

[87] State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977). The issue in this case was who should gain title of lava extensions - the former owner of the land, the nearby owners, or the public in general. *Id.* at 120, 566 P.2d at 734. The court held that lava extensions should be governed under the principles of the public trust doctrine. *Id.* at 121, 566 P.2d at 735. "Rather than allowing only a few of the many lava victims the windfall of lava extensions, this court believes that equity and sound public policy demand that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee." *Id.*

battlefield,[88] public libraries,[89] wildlife,[90] and, most expansively, "all natural resources."[91]

In addition, the uses allowed on public trust lands have also increased significantly beyond just commerce, navigation, and fishing.[92] As society and

[88] Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 594-595 (Pa. 1973) (recognizing that the State is a trustee over its public natural resources, including, in this case, a historic battlefield).

[89] Save the Welwood Murray Memorial Library Comm. v. City Council of the City of Palm Springs, 263 Cal. Rptr. 896, 904 (Cal. App. Ct. 1989).

> A public trust is created when property is held by a public entity for the benefit of the general public. Here, title to the library property is held by City to be used by City for the benefit of the general public as a public library. Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act.

Id. (citations omitted).

[90] *See* State v. McHugh, 630 So. 2d 1259, 1264 (La. 1994) ("There can be no doubt that the state's interest in safeguarding the wildlife and fisheries for the benefit of the people is compelling."). The "public trust doctrine requir[es] the state to protect, conserve and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people." *Id.* at 1265; *see also* In re Steuart Transp. Co., 495 F. Supp. 38, 40 (D. Va. 1980). The court allowed both state and federal governments to recover damages from migratory waterfowl killed in oil spill. The court stated: "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing the people." *See also* Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924) ("The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein."); Owsichek v. State Guide Licensing & Control Bd., 763 P.2d 488, 496 (9th Cir. 1988); Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984) (recognizing that wildlife are held by the State in trust for the benefit of its citizens).

[91] *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that the public trust doctrine protects all natural resources in the state); *see also* LA. CONST. art. IX, § 1.

> The natural resources of the state, including air and water, and the healthful, scenic, historic and esthetic quality of the environment should be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

Id.; *see also* PA. CONST. art. I, § 27.

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Id.

[92] City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362 (Cal. 1980). Although early cases expressed the scope of the public's right in tidelands as

technology have evolved, thereby changing our society's needs and demands, the public's use of trust lands has grown to incorporate these changes.[93] Such expansion has been necessary to ensure the public's continued use and enjoyment of trust resources.[94] This flexibility allows a state to favor whatever use is most beneficial to society at that time, without being burdened with favoring uses that have become outdated.[95] This dynamic nature of the public trust doctrine explains why it has been able to survive for over 1500 years.[96] "Strip away the inherent flexibility of the doctrine, and it would slowly wither."[97]

For example, public recreational uses have recently been protected by this doctrine.[98] The following uses are just a few that have been recognized as

encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study.

Id. at 365; Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("The public uses . . . are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."); Kootenai Envt'l Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1088 (Idaho 1983) ("More recent cases have held that the trust includes a broader range of public uses than were recognized in earlier cases."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972) ("Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses . . . .").

[93] ARCHER, *supra* note 14, at 23. "[S]ince the adoption of the public trust doctrine in the United States, many state courts have responded to changing public needs and demands by expanding the list of uses that are protected by the public trust doctrine." *Id.*

[94] *Public Trust 101*, *supra* note 12, at 62. "[T]he public's use of trust lands and waters has necessarily changed. Over the centuries the Public Trust Doctrine has kept pace with the changing times, assuring the public's continued use and enjoyment of these lands and waters." *Id.*

[95] Dist. of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984); *Marks*, 491 P.2d at 380 ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983) ("The trust is a dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses.").

[96] *Public Trust 101*, *supra* note 12, at 62.

[97] *Id.*

[98] *See, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972). "Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses." *Id.* at 55. The New Jersey Supreme court further recognized the importance in this day and age to allow the public recreational use of public trust lands. *Id.* at 53.

> Remaining tidal resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent. All of these factors mandate more precise attention to the doctrine. *Id.* (citations omitted). We have no difficulty finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.

Id. at 54; *see also* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088. The Idaho court stated that "it is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, hunt and swim." *Id.*

protected by the public trust doctrine: bathing,[99] swimming,[100] boating,[101] rowing,[102] canoeing,[103] skating,[104] sailing,[105] hunting,[106] waterskiing,[107] pushing

[99] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (recognizing bathing as one of the recreational activities protected by the public trust doctrine); Tucci lzhauer, 336 N.Y.S.2d 721, 723 (1972) (the public has the right to utilize the foreshore for bathing); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (the public trust doctrine has been held to include the right to bathe); Muench v. Public Serv. Comm'n, 53 N.W.2d 514, 520 (Wis. 1952).

[100] Kootenai Envtl. Alliance, Inc., 671 P.2d at 1088 ("[I]t is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, hunt and *swim*.") (emphasis added); *Borough of Neptune City*, 294 A.2d at 54 (recognizing swimming as one of the recreational activities protected by the public trust doctrine); City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (The court "recognized the rights of both residents and nonresidents to the free use of navigable waters for recreational purposes, such as boating, fishing, *swimming*, skating, and the enjoyment of scenic beauty as being incidents of navigation.") (emphasis added); *Marks*, 491 P.2d at 380; State v. Public Serv. Comm'n, 81 N.W.2d 71, 73 (Wis. 1957).

[101] *See Tucci*, 336 N.Y.S.2d at 723 ("The foreshore . . . is subject to the right of the public . . . to use it for fishing, bathing, *boating* and other lawful purposes . . . .") (emphasis added); *see also Public Serv. Comm'n*, 81 N.W.2d at 73 (stating that boating is a public use that has been recognized as a purpose of the public trust).

[102] *Muench*, 53 N.W.2d at 520 (recognizing that rowing, canoeing, and skating are public purposes to which public trust waters may be utilized).

[103] *Id.*

[104] *Id.*

[105] *Public Serv. Comm'n*, 81 N.W.2d 71 at 73. "Early decisions frequently spoke of navigation, often in a commercial sense, as the purpose of the trust, but all public uses of water have from time to time been recognized, including pleasure boating, *sailing*, fishing, swimming, hunting, skating and enjoyment of scenic beauty." *Id.* (emphasis added). *See also Muench*, 53 N.W.2d at 520 (recognizing sailing as one of the public purposes to which public trust waters may be utilized).

[106] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (stating that hunting is a right that has been recognized by the public trust); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc. 671 P.2d 1085, 1088 (Idaho 1983) ("[I]t is now held that the trust protects varied public recreational uses in navigable waters, such as the right to fish, *hunt* and swim.") (emphasis added); *Public Serv. Comm'n*, 81 N.W.2d at 73 (stating that hunting is a public use that has been treated as a purpose of the public trust); *Muench*, 53 N.W.2d at 520 (recognizing hunting as a valid public use).

[107] State v. Village of Lake Delton, 286 N.W.2d 622, 636 (Wis. Ct. App. 1979). An ordinance was enacted restricting a portion of a lake to be used for waterskiing exhibitions. *Id.*

a baby stroller along a public trust beach,[108] tourism,[109] and whatever "is consistent with and necessary for the complete and innocent enjoyment" of trust lands.[110]

In environmental and natural resource protection, a strong potential for the use of the public trust doctrine exists, although such use represents a significant change in the public trust doctrine's original focus.[111] However, given society's increasing interest and need for a management tool to conserve natural resources and protect the environment, it is a logical extension of the doctrine.[112] By using the public trust concept, the state is

at 625. Petitioners contended that this violates the public trust doctrine, since it forbids other public uses in the restricted area, such as fishing and swimming. *Id.* The court held that waterskiing is a valid public purpose, and thus restricting a portion of the lake only for waterskiing exhibitions does not violate the public trust doctrine. *Id.* at 636. "Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis." *Id.* at 632. In this case, since waterskiing exhibitions require an exclusive area, such a restriction on other public uses is valid. *Id.* at 633.

[108] Tucci v. Salzhauer, 336 N.Y.S.2d 721, 724 (1972) (stating that the Special Term was incorrect in deciding that a baby stroller has no right of access to public trust beaches because it is a vehicle).

[109] Treuting v. Bridge & Park Comm'n of City of Biloxi, 199 So. 2d 627 (Miss. 1967). This case involves a project enacted to significantly increase the land area of Deer Island. *Id.* at 631. The project entailed building golf courses, beaches, parks, schools, churches, as well as residential, commerce, and resort developments. *Id.* The court held that this development was consistent with the state's duties under the public trust doctrine, due to the various public interests and uses involved. *Id.* at 634. In doing so, the court noted that one of the public purposes that this project would achieve and protect is the accommodation and expansion of tourism in that area. *Id.* at 633.

[110] Tucci, 336 N.Y.S.2d at 724; *see also* Town of Brookhaven v. Smith, 80 N.E. 665, 670 (N.Y. 1907) (stating that the citizens of the community are allowed a right of access to public trust lands to do "whatever is needed for the complete and innocent enjoyment of that right.").

[111] ARCHER, *supra* note 14, at 26 states the following:

> The shift in thinking from permitting certain uses on public trust lands to affirmatively protecting natural resources and uses on public trust property is a significant change in the public trust doctrine's traditional focus. Originally, the doctrine permitted members of the public to use public trust resources or the purposes of navigation and to have access for fishing and fowling. The doctrine opened trust lands for exploitation or use by all members of the public - not just by those who owned the land. Fishing, commerce, and navigation were "protected" because they provided critical necessities of life at the time of the doctrine's inception. There is little evidence that the original purpose of the doctrine was to preserve trust resources, for example, by assuring that there would always be fish in the waters for fishing or that the waters would be kept unpolluted.

Id.

[112] People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).

> [T]here has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment. The public has become increasingly concerned with dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources.

given the power to accomplish this objective.[113] Several states have already recognized this increasing need and demand for protection by expanding public trust rights to include both the power to restrict environmental harms as well as to preserve trust areas.[114] It has even been used to protect the scenic beauty of public trust lands and waters.[115]

D. The Scope of the Public Trust Doctrine in Hawai`i

What lands and uses are protected by the public trust doctrine differ from state to state,[116] since each individual state has the power to define the scope of the land that they hold in trust.[117] However, the general principle underlying the public trust doctrine is that the state has a duty to ensure that land is dealt with in the best interests of the public for all lands part of the trust.[118] While the traditional limitation to water-related areas may have served the political, geographical, and social needs in 17th and 18th century England, this

Id.

Since the public trust doctrine has the power to mold itself to meet the changing conditions and needs of the public, this doctrine has the ability to recognize this increasing interest to affirmatively protect the environment and conserve our natural resources. *Id.*

[113] ARCHER, *supra* note 14, at 27. "[T]o the extent courts have integrated the doctrine by requiring states as trustees to protect the natural resources held subject to the public trust, state agencies and coastal managers will be in a position to use the public trust doctrine as a tool in coastal resource protection and management." *Id.*

[114] *See* SLADE, *supra* note 25, at 133; *see also* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971), where the court states that "[t]here is a growing public recognition that one of the most important public uses . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Id.*; *see also* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 718 (Cal. 1983); People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976); Bortz Coal Co. v. Commonwealth, 279 A.2d 388, 391 (Pa. Commw. Ct. 1971).

[115] *National Audubon Soc'y*, 658 P.2d at 719; Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1096 (Idaho 1983); State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979); City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (recognizing "the rights of both residents and nonresidents to the free use of navigable waters for recreation purposes, such as boating, fishing, swimming, skating, and the *enjoyment of scenic beauty* as being incidents of navigation.") (emphasis added); City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957); State v. Public Service Comm'n, 81 N.W.2d 71, 73 (Wis. 1957) (stating that the enjoyment of scenic beauty is a public use that has been recognized as a purpose of the public trust doctrine).

[116] ARCHER, *supra* note 14, at 14.

[117] *Id.* at 8, 19-20; Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) ("[I]t has long been established that the individual States have the authority to define the limits of the lands held in public trust.").

[118] *See supra* notes 22-23 and accompanying text.

limitation is not practical in Hawai`i.[119] Such a limitation would prevent the doctrine from realizing its full potential.[120] Society's changing needs and demands require the expansion of this doctrine.[121] Instead, all public natural resources should be protected by this doctrine.[122] Today, as the result of many generations of neglect, a property management tool is now required that has the capability to maintain a balance between the right of present generations to benefit from natural resources and the right of these natural resources to be conserved for use by future generations.[123] This tool is the public trust doctrine.

1. Hawai`i Constitution, article XI, section 1, provision 2

Hawai`i has defined the scope of its public trust doctrine in its Constitution. Article XI, section 1, provision 2 of the Hawai`i Constitution states that "*[a]ll public natural resources* are held in trust by the State for the benefit of the people."[124] Thus, in Hawai`i, the public trust doctrine covers all public natural resources.

The first issue to examine is who should benefit from this doctrine. Looking at the language of Article XI, section 1,[125] it is clear that the doctrine's purpose is to benefit the State citizens of both present as well as future generations. This doctrine entails two purposes: to allow the present generation the right

[119] *See supra* pp. 189-91.

[120] As the public's interest in resources and its associated public uses have expanded over the years, the need to expand the protected public trust areas and uses has correspondingly increased. As such, to limit the doctrine's scope to only its traditional range would not allow the doctrine to fulfill its common law potential to adapt to these changes. Recognizing this increasing need, several states have already expanded this doctrine to protect several non-water related resources. *See supra* notes 81-91 and accompanying text.

[121] *Id.*

[122] The application of the public trust doctrine to all public natural resources has been formally recognized in the Hawai`i Constitution. Article XI, § 1 states that "[a]ll public natural resources are held in trust by the State for the benefit of the people."

[123] This balancing between use and conservation is recognized in the Hawai`i Constitution. It states, in relevant part, that the "State . . . shall promote the development and utilization of [natural] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." HAW. CONST. art. XI, § 1.

[124] *Id.* (emphasis added).

[125] It states, in relevant part: "*For the benefit of present and future generations*, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources . . . ." HAW. CONST. art. XI, § 1 (emphasis added).

to enjoy natural resources and to protect and conserve these resources for future generations.[126]

Second, what duties does the State have as trustee? Besides its responsibility to ensure that present generations may use and benefit from public natural resources, the State must also regulate such use to conserve and protect these resources.[127] In enforcing these duties, the State should be aware that if the State grants too much to one interest, the other will suffer. For example, consider the first part of the hypothetical situation presented at the beginning of this paper.[128] If the State allows the public to cut down trees without limitation, the forest would be depleted faster than it could replenish itself.[129] The result would be the total destruction of the forest, leaving nothing for future generations to enjoy.[130] At the other extreme, however, if the State prohibits the cutting down of trees, this would ensure the forest's future survival, but the State would be failing in its duty to allow present generations beneficial use of the resource.[131] Thus, the State must achieve a delicate balance between the two interests of conservation and use so that they can both coexist. In the hypothetical example, the State should allow the present use of the forest, but regulate its use so that the forest will have sufficient time to replenish.

What are "public natural resources?" They consist of all government-owned natural resources.[132] Obvious examples are State parks and forests. However, they also encompass those lands which have formerly been held by the State.[133] Once property is part of the public trust doctrine, the State's trust duties will still exist even when the land is conveyed into private ownership.[134] That private owner will thereby be obligated to recognize the public's

[126] *Id.* This provision states, in relevant part: "For the benefit of present and future generations, the State and its political subdivisions . . . shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ." *Id.* Therefore, it recognizes the state's duty to allow the present generations use of natural resources, but also recognizes the corresponding duty to ensure that such use allows the resource to be conserved for the benefit of future generations. *See id.*

[127] *See id.*

[128] *See supra* pp. 180-81.

[129] *Id.*

[130] Such a result would violate the State's duty under the Hawai`i Constitution, which states: "For the benefit of future generations, the State . . . shall conserve and protect . . . all natural resources, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ." HAW. CONST. art. XI, § 1.

[131] *Id.*

[132] For example, public property has been defined as "[p]roperty belonging to the state or a political subdivision thereof, such as a county, city, town, and the like, used exclusively for a public purpose." BALLENTINE'S LAW DICTIONARY 1023 (3d ed. 1969).

[133] *See supra* notes 26-27 and accompanying text.

[134] *Id.*

continued interest in that land.[135] Thus, the public trust doctrine in Hawai`i encompasses all natural resources which are or have been in the possession of the State. For these areas, the public has the right to utilize these natural resources.[136]

What must next be determined is to what extent may the public utilize public natural resources. Only those uses which are feasible and reasonable for that area and situation should be allowed.[137] For example, in a beach or park area, reasonable recreational uses such as sunbathing, picnicking, and skating should be recognized.[138] In a State-owned cemetery, on the other hand, the above uses would not be appropriate. However, the right to visit the cemetery would be protected, as well as the right to have a well-maintained site to preserve the scenic beauty and serenity of the area.[139] Likewise, in a beach area, such activities as swimming,[140] fishing,[141] and other similar uses[142] should be protected. However, all uses should be subject to reasonable restrictions to ensure that they do not pose a substantial harm to the conservation of natural resources.[143] For example, considering the koa forest

[135] *Id.*

[136] For a further discussion of how private owners may be affected by the public trust doctrine, *see infra* part III.

[137] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (holding that the public must be given reasonable access and use of privately-owned dry sand areas). In deciding to what extent the public may utilize a particular natural resource, "the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved." *Id.* "The test is whether those means are reasonably satisfactory so that the public's right to use . . . can be satisfied." *Id.* Deciding what uses are reasonable "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

[138] *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 53 (N.J. 1972) (recognizing the importance of allowing the public recreational use of public trust lands). "Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses." *Id.* at 55. *See also* State v. Superior Court of Placer County, 625 P.2d 256, 259 (Cal. 1981) (picnicking is a recreational use that is recognized by the public trust).

[139] State v. Public Serv. Comm'n, 81 N.W.2d 71, 73 (Wis. 1957) (stating that the enjoyment of scenic beauty is a public use that has been recognized as protected by the public trust doctrine).

[140] *See supra* note 100.

[141] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972) (stating that one of the original purposes of the public trust doctrine was to protect the right to fish).

[142] *See supra* notes 99, 101-10 and accompanying text.

[143] The public trust doctrine has been used to affirmatively conserve natural resources. *See supra* notes 113-15 and accompanying text. Therefore, although the public has the right to use public natural resources, the State also has the power and duty under the public trust doctrine to place reasonable restrictions on such use in order to protect these resources.

In Hawai`i, the Hawai`i Constitution recognizes the State's power to place such reasonable restrictions on the public's use of public trust resources in order to conserve natural resources. It states: "[T]he State . . . shall promote the development and utilization of [all natural] resources in a manner consistent with their conservation . . ." HAW. CONST. art. XI, § 1. Therefore, while recognizing the public's right to use natural resources, it also places a duty upon the State to ensure that such use does not threaten the conservation of any such resource.

hypothetical case,[144] the State may regulate the cutting down of the trees on its lands to ensure that the forests will have time to replenish.

Another consideration is what should the State do when there are competing public interests in the land, all of which are protected by the public trust doctrine? For example, suppose some members of the public want to utilize a lake for waterskiing, and another group for fishing. In such a case, the State has the right to divide the area to allow one activity and exclude the other.[145] For example, the State could prohibit waterskiing altogether in those areas that are known to be prime fishing spots, and in return allow waterskiing in those least favored fishing areas. The basic objective should be to ensure that both public uses are recognized as much as possible given the situation and circumstances.[146] However, what should be done if the competing public trust uses are incompatible, such that one use could not be undertaken without the complete destruction of the other use? For example, suppose one public organization wants to convert a small public tract of land into a park, which another wishes to use for a public library. Both uses are protected by the public trust doctrine.[147] However, neither interest could be recognized without destroying the other public interest in that property. In such a case, the State must balance the competing public interests along with any other interest in deciding which of the two interests should be recognized.[148] In the above hypothetical, for instance, the suitability of a library or a park with the nearby surroundings would be a significant factor. Given an equal public interest in the two, if no other public libraries are nearby, while several parks exist in the vicinity, then the balance should turn on using the tract of land for library use, and vice versa.

[144] *See supra* pp. 180-81

[145] *See* State v. Village of Lake Delton, 286 N.W.2d 622 (Wis. Ct. App. 1979) (upholding an ordinance setting aside a portion of a lake to be used for waterskiing exhibitions, thereby excluding all other public uses, such as fishing in that area). In this case, the court stated: "[N]o single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all." *Id.* at 632.

[146] *Id.* (recognizing that in determining what public uses are to be allowed in particular public trust areas, the different public "uses must be balanced and accommodated on a case by case basis").

[147] *See supra* notes 83, 89 and accompanying text.

[148] ARCHER, *supra* note 14, at 28.

Overall, in terms of utilizing resources, not only does the public trust doctrine guarantee the public the right to benefit from public natural resources, it also is a strong tool to ensure that resources that have been open to the public will remain so.[149] The strength of this doctrine mainly lies in the duty it places on the State to conserve and protect natural resources.[150] While recognizing the public's right to utilize natural resources, the State also has the power and duty under the public trust doctrine to conserve and protect these resources.[151] The State has an obligation to insure that individuals do not utilize public natural resources in a manner that threatens their conservation.[152] This role is one that the State must undertake diligently, fairly, and faithfully under its trust duties.[153] The State's "role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the [State]."[154]

2. *Hawai`i's unique history supports the application of the public trust doctrine to protect public natural resources*

The history of Hawai`i itself also supports the application of the public trust doctrine to protect and conserve the State's natural resources. While the concept of private ownership has always been central to Western culture, this "concept of private ownership had no place in early Hawaiian thought."[155] Prior to Western contact, Hawai`i had a unique land tenure system.[156] Several separate kingdoms existed, where each island or section of an island was ruled by an ali`i `ai moku or by a mo`i, the high chief.[157] The basic land division was the ahupua`a, varying in size from 100 to 100,000 acres.[158] Each ahupua`a

[149] The public trust doctrine ensures that all resources and lands that are a part of this public trust must be utilized in a manner benefitting the public. ARCHER, *supra* note 14, at 3-4. Therefore, the public's right to benefit from public trust resources can never be terminated. *See id.*

[150] *See supra* notes 124-31 and accompanying text.

[151] *Id.*

[152] "[T]he State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ." HAW. CONST. art. XI, § 1.

[153] Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

[154] *Id.*

[155] NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK].

[156] *Id.* at 3.

[157] *Id.*

[158] *Id.*

was an economically self-sufficient unit extending from the mountains to the sea, and was controlled by an ali`i `ai ahupua`a (ahupua`a chief) or by a konohiki (land agent).[159]

The high chief, or mo`i, acted as a trustee over both the people and all natural resources.[160] The chief did not have any absolute ownership of the land.[161] Although he had control over the land, he held this control subject to the ahupua`a residents' cooperation.[162] In return for their labor on the land to support the chiefs and high priests, the common residents (maka`ainana) were allowed to liberally travel within the ahupua`a to gather whatever natural resources they needed for subsistence purposes.[163] The maka`ainana were thus free to travel to the mountains for fuel, canoe timber, mountain birds and plants, as well as to the sea for fish.[164] In addition, the mo`i also acted as trustee over the land and its resources.[165] The chief was responsible for ensuring the conservation of these natural resources on behalf of the gods.[166] Thus, although the maka`ainana were granted liberal access within the ahupua`a to utilize its natural resources, such use was subject to regulations and rules to ensure the ultimate conservation of these resources.[167]

Similarly, the chiefs of each ahupua`a governed subject to the rights of the maka`ainana.[168] While the ahupua`a chief was responsible for the productivity of his land, such productivity was dependant on having sufficient labor from the maka`ainana.[169] However, if the ahupua`a chief did not allow the maka`ainana sufficient rights, the maka`ainana were free to move to another ahupua`a, leaving the chief with no one to tend his lands.[170] Due to this

[159] *Id.*

[160] The chief was "regulated by an intricate system of rules designed to conserve natural resources and provide for all ahupua`a residents." *Id.* at 4. As such, the chief was bound to hold these lands as trustee for the benefit of both natural resources and the people. *Id.*

[161] *Id.* (citing HAWAI`I STATE DEPT. OF BUDGET AND FINANCE (HAWAI`I INSTITUTE FOR MANAGEMENT AND ANALYSIS IN GOVERNMENT), LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979)).

[162] *Id.*

[163] *Id.* "Within the boundaries of the ahupua`a, the maka`ainana . . . had . . . the right to hunt, gather wild plants and herbs, fish off-shore, and use parcels of land for taro cultivation together with sufficient water for irrigation." *Id.*

[164] In re Boundaries of Pulehunui, 4 Haw. 231 (1879).

[165] "In relation to land and natural resources, [the chief] was analogous to a trustee." *Id.* (citing E.S. HANDY & E.G. HANDY, NATIVE PLANTERS IN OLD HAWAII 53 (1972)).

[166] *Id.* at 4.

[167] Basically, an intricate system of rules were created in order to ensure both that the ahupua`a residents would be provided with adequate natural resources as well as that the natural resources would be conserved. *Id.*

[168] *Id.*

[169] *Id.*

[170] HANDBOOK, *supra* note 155, at 4.

dependence on the labor of the people, the ahupua'a chief was, in effect, required to hold these natural resources, as trustee, for the benefit of the public.[171]

Therefore, in the ancient Hawaiian land tenure system, all lands, from the mountain to the sea, were held subject to two interests: the interest of the public to benefit from natural resources, and the interest in conserving these natural resources for the benefit of future generations. In return for their labor, the people had the right to utilize natural resources within the ahupua'a.[172] In addition, the high chief, mo'i, had the duty to conserve and protect these natural resources on behalf of the gods.[173] Today, these same two duties - to allow the public use of natural resources and to conserve and protect these natural resources - have been explicitly incorporated into the Hawai'i Constitution.[174] The State, as sovereign, has taken over these responsibilities of the ancient high chiefs.

3. *The expansion of the public trust doctrine in other states supports its application to public natural resources in Hawai'i*

The expansion of the public trust doctrine in several other states over the last century supports its application in Hawai'i to protect public natural resources. For example, several states have used the public trust doctrine to protect many types of natural resources, such as air,[175] parklands,[176] archaeological remains,[177] and wildlife.[178] The Louisiana Supreme Court has even extended the public trust doctrine to include all natural resources, whether publicly or privately owned.[179] Support for this holding was found in the Louisiana Constitution.[180] In *Save Ourselves v. Louisiana Envtl. Control*

[171] The mo'i "was a trustee of all the people within an island (moku) or some other larger district. The konohiki also maintained a similar tentative position . . . ." *Id.* (citing HAWAI'I STATE DEPT. OF BUDGET AND FINANCE (HAWAI'I INSTITUTE FOR MANAGEMENT AND ANALYSIS IN GOVERNMENT), LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979)).

[172] *See id.*

[173] *Id.*

[174] HAW. CONST. art. XI, § 1 states, in relevant part: "[T]he state . . . shall conserve and protect . . . all natural resources . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ."

[175] *See supra* note 82.

[176] *See supra* note 83.

[177] *See supra* note 85.

[178] *See supra* note 90.

[179] *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that the public trust doctrine protects all of the state's natural resources).

[180] LA. CONST. art. VI § 1 (1921) ("The natural resources of the state shall be protected, conserved and replenished"); *see also* LA. CONST. art. IX, § 1 (1974).

Commission,[181] the Louisiana court stated that, under the public trust doctrine, the State and its agencies have an affirmative duty to protect, conserve, and replenish all of its natural resources.[182] This requires them to "act with diligence, fairness and faithfulness to protect this particular public interest in the resources."[183] "[T]he rights of the public must receive active and affirmative protection at the hands of the [State actor]."[184]

In California, the public trust doctrine has been used as a tool to affirmatively protect the environment.[185] For example, the California courts have held that the public trust doctrine includes the preservation of public trust lands and waters in their natural state,[186] the protection of ecology,[187] and the protection of indigenous flora and fauna.[188] It has even been recognized that if this protectionist trend continues, the doctrine could someday apply to all private land.[189]

Therefore, the application of Hawai'i's public trust doctrine to protect all public natural resources is consistent with how it has been expanded in several other states in the United States.

III. THE LIMITATIONS ON A PRIVATE LANDOWNER'S USE OF HIS LAND

A private landowner, by obtaining title to his property, may contend that he has the right to do whatever he wants to the natural resources on his

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

Id.

[181] 452 So. 2d 1152, 1154 (La. 1984).

[182] *Id.*

[183] *Id.* at 1157.

[184] *Id.*

[185] *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). The court stated that the public trust doctrine should be used for "the preservation of those lands in their natural state . . . ." *Id.*

[186] California v. Superior Court of Lake County (Lyon), 625 P.2d 239, 250-251 (Cal. 1981) (stating that a permissible public use protected by the public trust doctrine is the right to preserve public trust lands in their natural state); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (stating that "one of the most important uses . . . is the preservation of those lands in their natural state . . . .").

[187] City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 364-365 (Cal. 1980) (recognizing the need to protect those areas which can be used as ecological units for scientific study).

[188] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (recognizing the need to preserve those environments which provide food and habitat for birds and marine life).

[189] DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 130 (1993).

property, regardless of the repercussions. He may also contend that the public generally does not have the right to enter and utilize the natural resources on his property, as such a right is held only by the private landowner and to whomever else he may convey this right.

While a private landowner's right to utilize his resources and exclude others is recognized, these rights are subject to reasonable limitations. For instance, in Hawai`i, this western concept of exclusivity is not completely applicable.[190] Under *Public Access Shoreline Hawai`i v. Hawai`i County Planning Commission*,[191] native Hawaiians have the right to enter non-fully developed land, whether privately owned or not, to exercise their reasonable customary and traditional gathering rights.[192] Therefore, in Hawai`i, a private landowner's right to exclude others is no longer absolute against the reasonable gathering rights of native Hawaiians.

However, in addition to native Hawaiian gathering rights, a private landowner's use of his land is subject to other restrictions.[193] One such restriction arises out of the public trust doctrine, while the other arises from the State's police power enabling it to regulate an owner's use of his land in order to conserve or protect natural resources.[194] Both will be separately discussed in the following sections.

A. The Public Trust Doctrine's Application to Private Landowners

A private landowner will be subject to the public trust doctrine if his land was formerly owned by the State.[195] In Hawai`i, the public trust doctrine applies to all public natural resources.[196] Once land is part of this public trust, the State can never convey away its interest in trust property in such a way that leaves it entirely in the control of a private party.[197] The State may only

[190] *See* Public Access Shoreline Hawai`i v. Hawai`i County Planning Comm'n, 79 Hawai`i 425, 446, 903 P.2d 1246, 1268 (Hawai`i 1995), where the Hawai`i Supreme Court stated: "Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai`i."

[191] *Id.*

[192] *Id.* at 451, 903 P.2d at 1272.

[193] *See supra* note 4.

[194] *See id.*

[195] *See supra* note 26-27 and accompanying text.

[196] HAW. CONST. art. XI, § 1 states, in relevant part, "All public natural resources are held in trust by the State for the benefit of the people."

[197] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453-454 (1892). "The State can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties . . . ." *Id.* at 453. "So with trusts connected with public property . . . they cannot be placed entirely beyond the direction and control of the State." *Id.* at 454.

convey such land to a private party if that conveyance will not impair the public's interest in that land.[198] In addition, if it is later found that the private owner is utilizing his land in a manner that is in derogation of the public trust, then the State may resume control over that land to ensure usage that is consistent with the public's needs.[199]

Several cases support the view that, once land is part of the public trust, a private owner is still bound to utilize the land in a manner consistent with the public's interest in the land. For example, the Mississippi Supreme Court upheld a conveyance of public trust lands to a private corporation only after the court determined that the corporation's use of the land would not hinder the public trust use of navigation, but would actually improve the public trust's uses of navigation, boating, and fishing.[200] It has also been held that any conveyance of public trust land whose purpose and effect was to solely benefit a private interest would be deemed void as violating the state's public trust duties.[201] In addition, recognizing the increasing demand for public beaches and the dynamic nature of the public trust doctrine, the New Jersey Supreme Court held that the public must be allowed reasonable access and use of privately-owned dry sand areas.[202]

Applying the above principles to Hawai`i, once a natural resource is owned by the State, it is part of the public trust doctrine, and therefore must be utilized in a manner consistent with the public's interest in that resource.[203] If

[198] *See supra* note 26-27 and accompanying text.

[199] *Illinois Cent.*, 146 U.S. at 455. The Court acknowledges that when dealing with public trust lands that have been granted into private ownership, "[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." *Id.* "[T]he power to resume the trust whenever the State judges best is, we think, incontrovertible." *Id.* "[T]here always remains with the State the right to revoke those [private owner's] powers and exercise them in a more direct manner, and one more conformable to [the public's] wishes." *Id.* at 453-454.

[200] Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 632 (Miss. 1967). The State of Mississippi conveyed 12.58 acres of land to the Park Commission for the construction of the Deer Island project. *Id.* at 631. This project would convert 27% of the land area of Deer Island for such public uses as golf courses, beaches, parks, schools, churches, and other similar facilities. *Id.* Another 20% would be converted for utility purposes such as utility easements, sewage plants, fire stations, and water reservoirs. *Id.* The remaining land would be converted to residential, commercial, and resort development. *Id.*

[201] People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 779-80 (Ill. 1976) (stating that none of the previous cases decided by the Illinois Supreme Court has ever upheld "a grant of public trust lands where the primary purpose of the grant was to benefit a private interest."); *see also* State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979) (recognizing that any "[e]fforts to serve or advance purely private interests to the detriment of the public interests protected by the trust are invalid.").

[202] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

[203] *See supra* notes 22-23 and accompanying text.

this land is later conveyed to private ownership, that owner will be subject to the trust principles, and may not utilize the resources in derogation of the public's interest in that land.[204]

For example, if the State conveyed away some of its public beaches to a private owner, that private owner would not be allowed to restrict access to that beach.[205] Instead, the private owner would own that beach subject to the public's interest in that beach such as for swimming,[206] boating,[207] and other public uses.[208] In addition, that private owner would also be subject to restrictions regarding actions occurring on his land, if such use poses a threat to any natural resource.[209] For instance, the State could regulate the private beach owner from any type of construction on the beach that would threaten the beach itself.

B. Hawai'i Constitution, article XI, section 1, provision 1

1. The State's duty to conserve and protect all natural resources

If a private owner's land has not previously been owned by the State, the public trust doctrine will not be applicable.[210] However, a private owner's use of his land is still subject to restrictions. All land, whether private or public, is subject to reasonable regulation to conserve and protect our natural resources under the State's police power.[211] This power is articulated in the Hawai'i Constitution, Article XI, section 1, provision 1. It states the following:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[212]

[204] *See supra* notes 26-27, 195, 197-99 and accompanying text.

[205] *Matthews*, 471 A.2d at 365 (holding that the public must be allowed reasonable access to private beach areas).

[206] *See supra* note 100.

[207] *See supra* note 101.

[208] *See supra* notes 99, 102-10 and accompanying text.

[209] *See supra* notes 113-15 and accompanying text.

[210] *See* discussion part III.A.

[211] ARCHER, *supra* note 14, at 3. A state's basic authority to regulate is derived from the "police power." *Id.* "The police power consists of those prerogatives of sovereignty and legislative power which are necessary for the protection of the health, safety, and welfare of state citizens and which the state did not surrender to the federal government when the United States Constitution was adopted." *Id.* This "police power is a broad and valuable basis for the exercise of state regulatory authority (whether by state or by agency regulations) that will rarely be invalidated (if challenged in the courts) so long as it is rationally related to a legitimate state goal and does not unduly burden interstate commerce." *Id.*

[212] HAW. CONST. art. XI, § 1.

While the above language does not create a trust, per se, it clearly creates an affirmative duty upon the State to conserve and protect all natural resources within its jurisdiction.[213] Therefore, a private landowner's use of natural resources on his land may be regulated, and sometimes even prohibited, when such action is needed to protect any natural resource. The mandatory language in the above provision is consistent with the policy slowly emerging in several states that recognizes the increasing need and demand for environmental and natural resource protection.[214] "The public has become increasingly concerned with the dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources."[215] As the abundance of natural resources diminishes, the need to regulate the use of such resources by private landowners correspondingly increases.

2. Reasonable regulations to conserve and protect natural resources are not an unconstitutional taking

If the State does act pursuant to this constitutional provision, a private owner may argue that any such regulation would be an unconstitutional taking of his property in violation of the Fifth Amendment.[216] Nevertheless, a state may regulate, as part of its police power, the use of private natural resources when such regulation is necessary to conserve and protect a natural

[213] *See id.*

[214] *See* People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (stating that "there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment); National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983) (recognizing the growing public interest in preserving lands in their natural state).

[215] *People ex rel. Scott*, 360 N.E.2d at 780.

[216] U.S. CONST. amend. V. The Fifth Amendment states, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 244 (1896). The Fourteenth Amendment states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

resource.[217] Most regulations do not amount to a taking because property may be regulated to a certain extent.[218] However, if the regulation "goes too far it will be recognized as a taking."[219]

In *Goldblatt v. Town of Hempstead*,[220] the United States Supreme Court set forth a two-part test to determine whether there has been a valid exercise of police power, and thus, no unconstitutional taking.[221] First, the State must have a legitimate public interest to impose the regulation.[222] The conservation and protection of natural resources to ensure its availability for future generations is clearly a legitimate interest.[223] For example, in *Agins v. City of Tiburon*,[224] the U.S. Supreme Court stated that open spaces are necessary to conserve and protect natural resources and to prevent harm to the ecology and the environment.[225] In addition, in *Sporhase v. Nebraska ex rel. Douglas*,[226] the Court upheld, under the police power, a regulation which required private landowners to obtain a permit to withdraw ground water from their own well.[227]

The second part of the *Goldblatt* test requires that the means chosen must be reasonably necessary for the accomplishment of the purpose, and must not be unduly oppressive upon individuals.[228] To determine this, one must look at

[217] *See, e.g., infra* notes 224-27, 247, 249-62 and accompanying text.

[218] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[219] *Id.*

[220] Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (upholding a prohibition on further excavation below the water table as a valid exercise of the police power).

[221] *See id.* at 594-95 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

[222] *Id.*

[223] The duty the Hawai'i Constitution places upon the State to conserve natural resources exemplifies the legitimacy of the interest in conservation. It states, in relevant part, that "the State . . . shall conserve and protect . . . all natural resources, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation." HAW. CONST. art. XI, § 1.

[224] Agins v. City of Tiburon, 447 U.S. 255 (1980). Appellants acquired five acres of unimproved land for residential development. *Id.* at 257. Thereafter, the city enacted two ordinances, placing appellants' property into a zoning district which allowed only one-family dwellings, accessory buildings, and open space uses. *Id.* As a result, the appellants could only build between one and five single-family residences within their tract of land. *Id.* Appellants brought suit, claiming that this amounted to an unconstitutional taking of their land. *Id.* at 258. The Court held that no such taking occurred. *Id.* at 262-63.

[225] *Id.* at 261 & nn.7-8.

[226] 458 U.S. 941 (1982).

[227] *Id.* at 946. "[T]he statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. . . . [T]he State's interest in preserving its waters was well within its police power." *Id.*

[228] Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962) (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

the particular facts of each case.[229] This requirement is met so long as the State, before enacting a regulation, weighs the environmental costs and benefits of the regulation along with any economic, social or other pertinent factors, and comes up with a reasonable solution.[230] The State should attempt to enact a regulation which balances both the private owner's interest in utilizing the resource and the State's interest in protecting that resource.[231] However, the stronger the threat to a natural resource, the stronger the State's power to regulate, or if so needed, to even prohibit an owner's use that harms this resource.[232] "[A]ll property owners must implicitly accept the possibility of substantial governmental restrictions under the states' police powers."[233] This is because "all property is held in subordination to the right of its reasonable regulation by the government clearly necessary to preserve the health, safety or morals of the people."[234]

The primary test courts have used to determine whether a taking has occurred is the extent of diminution in the property's value.[235] If it goes too far, it will be found to be a taking.[236] Specifically, if a regulation deprives an owner of all economically viable use of his land, then it will be a taking.[237] However, so long as the property owner is left with some reasonably

[229] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The court stated that the issue of whether there has been a taking depends largely "upon the particular circumstances [in that] case." *Id.* (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

[230] Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1994) ("This is a rule of reasonableness . . . which requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.").

[231] *See* HAW. CONST. art. XI, § 1 (recognizing both the right of the people to develop and utilize natural resources along with the duty of the state to ensure that such use is "consistent with their conservation and in furtherance of the self-sufficiency of the State.").

[232] The reason for this is that the stronger the threat to the natural resource, the more the balancing test will correspondingly weigh in favor of more regulation, and even possible restriction, in order to conserve that resource.

[233] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 457 (1992).

[234] Bortz Coal Co. v. Commonwealth, 279 A.2d 388, 394 (Pa. Commw. Ct. 1971).

[235] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[236] *Id.* at 415.

[237] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). The Court stated that "regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation) . . . ." *Id.* In determining this, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978).

beneficial use of his land, then it is a valid exercise of police power.[238] Another factor that courts consider is the extent that the regulation interferes with a private owner's distinct investment-backed expectations.[239]

Therefore, so long as the State regulation strikes a balance allowing the State to conserve and protect its natural resources while still permitting the owner reasonable use of the resources, then the regulation will not be an unconstitutional taking. For example, suppose the State places a regulation on the number of koa trees a private owner may cut down in a given year. So long as the private owner may still gain reasonable profit from the trees, no taking would occur. In that case, the owner is left with reasonably beneficial use, and is not thereby deprived of all economically viable use of his property. In fact, by ensuring the koa forest will have time to replenish itself, the private owner's benefits may even be greater over the long term.

However, even if it is found that a regulation would deprive an owner of all economical use of his land, or would interfere with distinct investment-backed expectations, a regulation will still be justified as a proper exercise of police power if it falls within the nuisance exception.[240] Under this exception, a State may regulate, and even completely restrict, a private owner's use of his land if it imposes "sufficiently serious burdens" upon the neighbors or to the public in general.[241] In order to fall within this nuisance exception, however, the injury must be incurred upon the public and not just upon an individual.[242]

For example, in *Keystone Bituminous Coal v. DeBenedictis,*[243] the U.S. Supreme Court upheld an act and regulation which required that 50% of the coal beneath certain structures be kept in place in order to provide surface

[238] *Penn Cent.*, 438 U.S. at 136, 138. The Grand Central Terminal was designated as a landmark. *Id.* at 115. In order to protect this landmark, the State denied a permit to build an office building on top of this terminal. *Id.* at 116-17. The Supreme Court upheld this regulation against a takings challenge, on the basis that the claimant still had reasonably beneficial use of the property, since the regulation did not interfere with any of the terminal's present uses. *Id.* at 136, 138.

[239] *Id.* at 124.

[240] *See* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1031-32 (1992) (stating that even if a regulation deprives the owner of all beneficial uses of his land, nothing is taken when a "background principle of nuisance" exists.); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

> The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 492 n.20.

[241] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 466 (1992).

[242] *Id.* at 467.

[243] 480 U.S. 470 (1987).

support.[244] The Court held that this was a valid exercise of police power in order to prevent activities that amounted to a nuisance.[245] When an individual uses his land in such a way as to cause a nuisance or harm to others, then the State has not taken anything and has acted well within its police power to enjoin such activity.[246]

In several cases, the courts have found that activities which result in the harm or destruction to a natural resource or the environment meet this nuisance requirement, thereby justifying a State's regulation or restriction on such activities.[247]

Therefore, implicit within private property ownership is the principle that a private owner may not use his land in such a way as to cause injury to the community or the public.[248] An example of a situation in which most of a private owner's economically beneficial use of his property was deprived but was still upheld as a valid exercise of the police power is *Miller v. Schoene.*[249] This case involved a Virginia Act which required the cutting down of all red cedar trees within two miles of any apple orchard where the cedar trees had a disease called cedar rust.[250] The purpose of this act was to protect the apple

[244] *Id.*

[245] *Id.* at 492.

[246] *Id.* at 492 n 20.

[247] *See, e.g.*, Lawton v. Steele, 152 U.S. 133 (1894). The plaintiffs were fishermen, and the defendant was the state game and fish protector. Pursuant to his power, by statute, to protect and preserve the fish, the defendant seized the plaintiffs' fishing nets and destroyed them. The Court upheld the defendant's actions as being necessary in order to abate a nuisance. *Id.* at 140. The Court stated that since the nets were being used in a manner detrimental to the public's interest in protecting and preserving the fish, "it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them." *Id.* at 139-40.

See also Miotke v. City of Spokane, 678 P.2d 803 (Wash. 1984). The Washington Supreme Court held that the discharge of raw sewage into the Spokane River in violation of a waste discharge permit gives rise to an action for public nuisance, since it affects "the rights of all members of the community living along the shores . . . ." *Id.* at 817. As such, the court awarded these nearby waterfront property owners over $200,000 in damages. *Id.* at 805.

See also Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327 (D.P.R. 1978). The court held that a maritime oil spill, causing pollution of the ocean and substantial damage to the flora and fauna in that area, was a nuisance, giving rise to a cause of action for both the abatement of the nuisance and the recovery of damages by the body politic. *Id.* at 1337. The court found that the damages that can be recovered from the defendants just for the replacement cost of the destroyed marine animals alone amounted to over 5 million dollars. *Id.* at 1344.

[248] *See* Mugler v. Kansas, 123 U.S. 623, 665 (1887) (stating that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

[249] Miller v. Schoene, 276 U.S. 272 (1928).

[250] *Id.* at 277.

orchards from being completely destroyed.[251] The court upheld this act, noting that the public interest in preserving the apple orchards outweighed an individual's property interest that directly posed a threat to these apple orchards.[252] Similarly, in several other instances, the courts have upheld various state regulations whose purpose was to conserve some valuable natural resource.[253]

In Hawai`i, several cases have also recognized this interest in conserving and protecting natural resources. For example, in *Robinson v. Ariyoshi*,[254] the Hawai`i Supreme court upheld a State regulation of private owners' use of water at Hanapepe River.[255] In upholding the regulation, the court noted the increasing scarcity of the waters at Hanapepe River[256] as well as the State's duty to conserve and protect Hawai`i's natural resources under Article XI, section 1.[257] The court stated that a person's right to the use of water can no longer be treated as though it is an absolute and exclusive right.[258]

In *Maeda v. Amemiya*,[259] the Hawai`i Supreme Court upheld a statute restricting the catching of nehu (tuna) to only those commercial fishermen

[251] *Id.*

[252] *Id.* at 280.

[253] *See, e.g.*, Puyallup Tribe v. Dept. of Game of Washington, 433 U.S. 165 (1977) (upholding a state's regulation on the amount of steelhead trout an Indian tribe may catch each year as a valid exercise of the police power in the interest of conserving an important natural resource); *see also* Walls v. Midland Carbon Co., 254 U.S. 300 (1920) (upholding a statute effectively prohibiting a company from producing a carbon black ink as a valid exercise of the police power in the interest of conserving and protecting the supply of natural gas in the state); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982) (recognizing that "a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens . . . is at the core of its police power"); Maeda v. Amemiya, 60 Haw. 662, 594 P.2d 136 (1979) (upholding restrictions on the catching of nehu (tuna) in order to protect and conserve that fish).

[254] 65 Haw. 641, 658 P.2d 287 (1982).

[255] *Id.*

[256] *Id.* at 676, 658 P.2d at 311.

[257] *Id.* at 677 n.34, 658 P.2d at 311 n.34.

[258] *Id.* at 677, 658 P.2d at 311.

However, if an individual's right to use the water is vested, then the State cannot remove this right without paying just compensation. Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985). In 1930, the Supreme Court of the Territory of Hawai`i held that the commmon law of riparian ownership did not apply to Hawai`i. *Id.* at 1473. In reliance to this determination, the private owners proceeded with their development, incurring millions of dollars in expenses. *Id.* at 1473-1474. The Ninth Circuit Court held that these private owners had thereby acquired a vested right to use the water. *Id.* at 1473-1474. Thus, when the Supreme Court of Hawai`i later held that the common law of riparian ownership no longer applied in Hawai`i and that no one had the right to use these waters, this amounted to a taking of these private owners' vested rights in the water. *Id.* at 1474.

[259] 60 Haw. 662, 594 P.2d 136 (1979).

who obtained a license and to noncommercial fishermen who caught nehu for home consumption or for bait purposes using nets no longer than fifty feet.[260] The court upheld this statute due to the State's legitimate interest in the conservation of fish.[261] The "[p]rotection of wildlife of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection."[262]

Therefore, pursuant to the Hawai`i Constitution, article XI, section 1, provision 1, the State has the duty to conserve and protect all of its natural resources.[263] A private owner's use of his land may be regulated as a valid exercise of police power so long as the interest in conservation or protection is legitimate, and as long as the private owner is granted reasonable use of the resource. However, the stronger the threat to a natural resource, the stronger the State's power to regulate an owner's use that harms this resource.[264] Arguably, a private owner's use of the resource may be completely banned if the resource can only be properly conserved or protected for future generations by the complete prohibition of the activity.

IV. How Article XI, Section 1 of the Hawai`i Constitution Should Be Applied in Hawai`i

Pursuant to the Hawai`i Constitution, Article XI, section 1, provision 2, the public trust doctrine applies to all public natural resources.[265] As such, those natural resources that have formerly or are presently held by the State will be subject to reasonable use by the public.[266] However, the main potential of Article XI, section 1 lies in the affirmative State duty, whether through the public trust doctrine or through its police power, to protect and conserve all natural resources in the State.[267] There are two possible ways this Constitutional provision can be effectively applied in Hawai`i to protect our natural resources.

[260] *Id.*

[261] *Id.* at 672, 594 P.2d at 142.

[262] *Id.* at 674, 594 P.2d at 144 (quoting Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 391 (1978)).

[263] HAW. CONST. art. XI, § 1 ("[T]he State . . . shall conserve and protect . . . all natural resources . . . .").

[264] *See supra* note 232 and accompanying text.

[265] "All public natural resources are held in trust by the State for the benefit of the people." HAW. CONST. art. XI, § 1.

[266] *See supra* notes 132-36 and accompanying text.

[267] This duty arises from HAW. CONST. art. XI, § 1, which states, in relevant part: "[T]he State . . . shall conserve and protect . . . all natural resources, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation . . . ."

A. Conjunction with and Revision of Existing Regulations and Statutes

Article XI, section 1 should be implemented in conjunction with existing regulations and statutes. For one, if a State action regulates the public's use of a public natural resource, such regulation will be consistent with the State's duties under Hawai'i's public trust doctrine to conserve and protect all public natural resources and will thus be less likely to be found a taking.[268] The provision also exemplifies the State's duty and ability under its police power to legitimately protect and conserve all of the natural resources within the State.[269]

In addition, Article XI, section 1 should be used in conjunction with Article XI, section 9,[270] which explicitly grants standing to Hawai'i citizens to bring suit for the protection and conservation of all natural resources.[271] Combined, these two sections provide a substantive and powerful authority under which natural resources may be protected and conserved.

Article XI, section 9 of the Hawai'i Constitution states:

> Each person has a right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any other party, public or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as provided by law.[272]

The significance of this constitutional provision is that it is self-executing.[273] Hawai'i is one of only two states that has a self-executing constitutional recognition of public rights with respect to natural resources.[274]

---

[268] *See supra* notes 28-33 and accompanying text.

[269] HAW. CONST. art. XI, § 1 states, in relevant part: "[T]he State . . . shall conserve and protect . . . all natural resources . . . ."

[270] HAW. CONST. art. XI, § 9.

[271] ARCHER, *supra* note 14, at 88 ("In Hawaii, citizens' rights are authorized explicitly by the Constitution.").

[272] HAW. CONST. art. XI, § 9.

[273] ARCHER, *supra* note 14, at 88.

[274] *See id.* The other state is Pennsylvania. *Id.* PA. CONST. art. I, § 27 states the following: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.
Id.
"More commonly, however, the state constitutional recognition of public rights with respect to the shore and other natural resources is not self-executing and must be carried into effect by legislation." ARCHER, *supra* note 14, at 88.

Self-executing means that no further legislation must be enacted before these rights can be enforced by the courts.[275] As such, this constitutional provision automatically creates a right for citizens to bring suit and also establishes affirmative State duties.[276]

Therefore, under Hawai'i Constitution's self-executing standing provision, citizens of Hawai'i are explicitly granted the standing to bring suit for the protection and conservation of natural resources. Thus, section 9's "citizen suit provision," along with section 1's requirement of the State to affirmatively protect and conserve all natural resources, provides a strong foundation for either the public to bring successful suits or the State to regulate for the protection of all natural resources.

In addition, the use of the above provisions along with existing statutes and regulations would, in effect, convert predominantly procedural environmental statutes into substantive requirements. For example, the Hawai'i Environmental Protection Act (HEPA)[277] is predominantly procedural, where it only requires a State agency or applicant to consider the effect its actions will have on the environment through an environmental assessment;[278] an Environmental Impact Statement (EIS) is only required for those actions that may have a significant effect on the environment.[279] However, courts have generally been unwilling to enforce any mitigation measures set forth in this statement.[280] With the use of Article XI, section 1, any mitigation measures set forth in the EIS should be legally enforceable, when such enforcement is required to conserve and protect the natural resource. Because the State and its agencies have an affirmative duty to conserve and protect the environment and natural resources,[281] they will correspondingly have a duty to enforce such agreements. Also, the Hawai'i Constitution's self-executing citizen enforcement provision allows any citizen to arguably bring suit when the responsible state agency has not implemented these mitigation measures.[282]

In addition, the State, recognizing its duties to affirmatively protect and conserve all natural resources pursuant to Hawai'i Constitution, art. XI, section 1, should revise its existing environmental regulations and statutes to incorporate these principles. By doing so, the State will gain substantial

---

[275] *Id.*

[276] *Id.*

[277] HAW. REV. STAT. Ch. 343 (1993).

[278] HAW. REV. STAT. § 343-5.

[279] HAW. REV. STAT. § 343-5(b),(c).

[280] *See supra* note 241, at 634.

[281] This duty arises out of the Hawai'i Constitution. It states that the State "shall conserve and protect . . . all natural resources . . . ." HAW. CONST. art. XI, § 1.

[282] HAW. CONST. art. XI, § 9. For the text of this provision, *see supra* part IV.A.

additional authority to enforce its provisions. Regulatory actions will be less prone to a takings challenge for two reasons. First, when dealing with public natural resources, the statute or regulation will be firmly grounded in public trust principles.[283] Second, for all natural resources, the provisions explicitly recognize the legitimate police power objectives of conserving and protecting natural resources.[284]

B. Comprehensive and Special Management Programs

Finally, the State legislature should implement comprehensive as well as special area management programs in those sections of Hawai'i that need the most protection.

Special area management programs should be implemented in those locations of particular concern, such as the protection of one particular resource.[285] A good example in Hawai'i is the Ala Wai Canal. It has suffered through many years of pollution. A special area management program would be beneficial to focus explicitly on improving the water quality within this canal.

In addition, comprehensive management areas should be implemented for those areas where there is a special interest in preserving the area as a whole, and not just one particular feature.[286] An example is Mauna Kea. It would be inefficient to implement one plan to protect Mauna Kea's endangered species, another for its historic sites, and yet another for its burial areas. Instead, one comprehensive management program would be beneficial, with the goal of conserving all of Mauna Kea for what it has to offer the public.[287]

Through the incorporation of public trust principles, these programs should withstand takings challenges.[288] However, in order to adequately fend off

[283] *See supra* notes 28-33 and accompanying text.

[284] *See supra* notes 212-15 and accompanying text.

[285] Several states have implemented such special area protection zones for those areas of particular ecological interest. ARCHER, *supra* note 14, at 90. For example, special aquatic preserve areas, state wilderness areas, and conservation and recreation areas have been created. *Id.* In each of these zones, the state directly owns and manages these areas, allowing little or no development in those areas to protect the special interest in that land. *Id.*

[286] The purpose of these comprehensive management areas would be to protect "all characteristics, process, and features of the whole system and not characteriz[ing] individually any one component." *Id.* at 91. It should also be ensured that the "biological, social, economic, and aesthetic values" of the area are protected and that "development occurring within [this area] is compatible with natural characteristics." *Id.*

[287] *See id.* at 125-26. "Rather than regulation to protect one endangered species, reduce the level of a certain pollutant, or champion one particular use, the goal under public trust legislation should be to preserve an entire area for all its inherent values." *Id.*

[288] *See supra* notes 28-33 and accompanying text. *See also supra* part III.B.2.

takings challenges, the management plan should contain certain elements. First, the plan should contain a clear expression of the State's duties and interests set forth in Article XI, section 1. Second, specific findings regarding the uniqueness and environmental significance of the public trust resources within or affected by that area must be set forth.[289] A declaration of policy should also exist to balance the competing interests in order to both enhance and preserve such resources.[290] Finally, the program should provide clear guidelines explaining how the development and implementation of this plan will be achieved.[291]

By implementing such a plan, so long as sufficient guidelines are delineated and so long as the governing body's actions are consistent with these guidelines and its own authority, the courts should defer to the agency's balancing process.[292] As such, the agency's management plan and implementation will likely be upheld against any challenges.[293]

C. Balancing of Factors

1. Public natural resources

Many factors should be considered to determine how public natural resources are to be utilized. The following is a list of some of the factors that the State should consider:

The State's actions should:

1) Favor and protect state-wide interests over local interests.[294]
2) Look at whether the trust resource is being used for a "purpose consistent with the resource's physical characteristics and natural state in the environment."[295]
3) Favor long-term over short-term benefits.[296]
4) Look to what would help conserve and protect Hawai'i's natural beauty and the natural resource itself.[297]

[289] ARCHER, *supra* note 14, at 127.

[290] *Id.*

[291] *Id.*

[292] *Id.* at 126.

[293] *Id.* at 127.

[294] *See id.* at 95.

[295] *See* Lazarus, *supra* note 12, at 642 n.66.

[296] *See* ARCHER, *supra* note 14, at 95.

[297] This duty arises out of the Hawai'i Constitution, which states, in relevant part, that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . ." HAW. CONST. art. XI, § 1.

5) Look at how the resource may be utilized to help further the self-sufficiency of the State.[298]
6) Protect public access to publicly owned areas of the natural resource.[299]
7) Recognize any recreational activities that the resource may offer.[300]
8) Consider what possible adverse impacts the activity will have on the natural resource.[301]
9) Identify the needs and goals of the people who frequently interact with the natural resource in the ecosystem.

By considering the above factors before allowing any use of public natural resources, the State will be fulfilling its duties as trustee.

2. Private natural resources

In regard to private natural resources, the State must weigh its interest in the conservation and protection of all natural resources with the private owner's interest in the use of the resource.[302] The State must find the delicate balance where the two conflicting interests may coexist.

However, if the interest in conservation and the interest in utilization are equal, the State should emphasize conservation. Although the opposite tends to occur in the current western property system, that trend should no longer continue. As stated previously, conservation and use are two conflicting interests. Granting too much protection for conservation will hinder the present use of the resource, while granting too liberal present use of the resource will result in a threat to the resource's conservation and may completely destroy the resource for future generations. However, although present use will be hindered by over-conservation, the resource will still remain in its natural state to be used by future generations. Thus, the danger of accidentally granting too much present use would have permanent and substantially greater repercussions to society than would over-conservation of the resource.

V. Conclusion

The concept of public needs and private ownership rights do not coincide. The more public rights are recognized, the more they infringe on private

[298] This duty also arises out of the Hawai'i Constitution, requiring the State and its political subdivisions to "promote the development and utilization of [natural] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." *Id.*

[299] *See* ARCHER, *supra* note 14, at 95.

[300] *See id.*

[301] *See id.*

[302] *See supra* notes 230-32 and accompanying text.

ownership rights; while the more protection private ownership rights receive, the less the public's interest in that land will be recognized. This "clash between public needs and private rights has made clear the need to reevaluate our traditional notions of private property . . . We as a society must change our entire way of thinking if we are to continue to enjoy the resources now available."[303]

Article XI, section 1 of the Hawai'i Constitution recognizes this dilemma. It recognizes the right to reasonably utilize natural resources, while also recognizing that the State must affirmatively take action to ensure that these resources remain available for future generations. As a result of the neglect of our natural resources by past generations, the need for such affirmative action becomes all the more dire.

If such protection is not taken today, there may be no resources to enjoy tomorrow.

Kent D. Morihara[304]

[303] Sarah E. Wilson, *Private Property and the Public Trust: A Theory for Preserving the Coastal Zone*, 4 U.C.L.A. J. ENVTL. L. & POL'Y, 57 at 58-9 (1984).

[304] Class of 1997, William S. Richardson School of Law.

The author wishes to acknowledge Prof. M. Casey Jarman for her valuable assistance and guidance with this paper. The author also wishes to acknowledge Peter Knapman for his suggestions and feedback.