

# INDIGENIZING WATER LAW IN THE 21ST CENTURY: *NA MOKU AUPUNI O KO'OLAU HUI*, A NATIVE HAWAIIAN CASE STUDY

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## INTRODUCTION: THE CONTEMPORARY LANDSCAPE OF WATER LAW IN HAWAII

The evolution of water law in the State of Hawaii has been informed by the Public Trust Doctrine (PTD), a common law principle that designates the state as trustee over certain natural resources, particularly water, for the benefit of the public good.<sup>1</sup> However, as early as 1930, the Hawaii Supreme Court recognized that Hawaii's system of water rights is "based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water."<sup>2</sup> Analogous to Native Hawaiians' traditional land tenure system, which embraced the principle that "water, . . . like sunlight, as a source of life to land and man, [is] the possession of no man,"<sup>3</sup> the PTD seeks to safeguard and manage water resources in a manner consistent with the public interest.

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<sup>1</sup> Keala C. Ede, *He Kanawai Pono no ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In re Water Use Permit Applications*, 29 *ECOLOGY L.Q.* 283, 288 (2002).

<sup>2</sup> *Terr. of Haw. v. Gay*, 31 Haw. 376, 395 (1930).

<sup>3</sup> EDWARD D. BEECHERT, *WORKING IN HAWAII: A LABOR HISTORY* 4 (U. of Haw. Press 1995).

Much like traditional Hawaiian society required that the king look to the welfare of all,<sup>4</sup> the PTD “invokes not just state authority but a duty on the part of government to protect public rights” and confers upon state agencies “an affirmative obligation to come forward and to take on the burden of asserting and implementing the public trust.”<sup>5</sup> However, the reality of Hawaii’s growing economy combined with the scarce and finite commodity of freshwater has spawned instances of gross non-compliance with the PTD, as evidenced by the current controversy involving *Na Moku Aupuni O Ko’olau Hui (Na Moku)*.

This note will examine the history and evolution of water law in Hawaii through the lens of a current controversy that threatens to extinguish the taro farming interests of a Native Hawaiian community on East Maui, whose residents are the direct descendents of the original inhabitants of this area. *Na Moku Aupuni O Ko’olau Hui (Na Moku)*, a Native Hawaiian nonprofit organization representing East Maui taro farmers, endeavors to prevent Alexander & Baldwin (A&B), one of Hawaii’s oldest agricultural barons and land developers, from continuing to divert more than sixty billion gallons of water annually from natural flowing streams that Hawaii’s indigenous people traditionally used for farming and cultural gathering practices.<sup>6</sup> These diversions amount to a plundering of Hawaii’s water resources for the paltry fee of a fifth of a cent per thousand gallons.<sup>7</sup> This controversy pits the interests of a small Native Hawaiian farming community against one of the most powerful economic forces in the State of Hawaii and highlights the extent to which Hawaii’s Board of Land and Natural Resources (BLNR) and Commission on Water Resource Management (CWRM) have disregarded their public trust responsibilities.

Contravening the Hawaii Supreme Court’s landmark *Waiāhole*<sup>8</sup> decision, which required the state to regard water as a common resource to be held in trust for public rather than private interests, the State of Hawaii, through BLNR, has permitted A&B to divert sixty billion gallons

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<sup>4</sup> NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (Melody Kapilialoha MacKenzie ed., Native Hawaiian Legal Corp. 1991) (noting that the power invested in the king was channeled through him by the gods and his authority over land and natural resources was akin to that of a trustee).

<sup>5</sup> Denise E. Antolini, *Water Rights and Responsibilities in the Twenty-First Century: A Foreword to the Proceedings of the 2001 Symposium on Managing Hawai‘i’s Public Trust Doctrine*, 24 U. Haw. L. Rev. 1, 5 (2001).

<sup>6</sup> Timothy Hurley, *Maui Water-Lease Auction Halted*, THE HONOLULU ADVERTISER, Sept. 19, 2003, at 1B.

<sup>7</sup> *In Lush Hawaii, Some See “Train-Wreck Scenario” as Early Warning of Growing World Water Crisis*, U.S. WATER NEWS ONLINE, May 2002, <http://www.uswaternews.com/archives/arcpolicy/2inlus5.html> [hereinafter U.S. WATER NEWS ONLINE].

<sup>8</sup> *In re Water Use Permit Applications (Waiāhole)*, 9 P.3d 409, 425–26 (Haw. 2000).

of water annually.<sup>9</sup> A&B's diversions have adversely impacted communities that previously relied on those natural flowing streams to maintain a way of life steeped in traditional farming and cultural gathering practices.<sup>10</sup> Charged a paltry annual fee of \$160,000,<sup>11</sup> A&B's Maui ditch system diverts daily as much water as the entire island population of Oahu consumes in a day.<sup>12</sup> These diversions, according to U.S. Geological Survey agents, exclude the "unreported" millions of gallons of underground water pumped daily from A&B's private wells.<sup>13</sup> Additionally, as A&B transitions from a sugar producer to a major developer of luxury properties, their monopoly over Maui's scarce water resources will allow for further exploitation of the state's rapidly growing economy.<sup>14</sup> This monopoly is reflected in the composition of the CWRM itself, which despite its primary role as enforcer of the Hawaii State Water Code and custodian of the PTD<sup>15</sup> dubiously seats an A&B vice president.<sup>16</sup>

This note focuses on the extent to which Native Hawaiian water rights have been undermined despite legal and judicial pronouncements that both embrace and expand upon the Public Trust Doctrine. Major Hawaii case law and provisions in both Article XI of Hawaii's State Constitution and the 1987 State Water Code underscore the paramount notion that "decisions must be made in a manner that is consistent with the public interest."<sup>17</sup> An examination of the *Na Moku* controversy spotlights contemporary challenges facing Native Hawaiians who realize that while the letter of the law provides significant protection of their water interests, its application by state agencies and commissions leaves something to be desired. That something, unfortunately, is water.

Part I of this note explores traditional Native Hawaiian concepts of water that conflict with accepted Western notions of owning and privatizing natural resources and their early manifestations in Hawaii's legal and political landscape. Part II examines the Public Trust Doctrine's profound influence on the evolution of water law and water resource management in the State of Hawaii, particularly highlighting Hawaii's

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<sup>9</sup> Hurley, *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. WATER NEWS ONLINE, *supra* note 7.

<sup>12</sup> Gary T. Kubota, *Judge Delays Maui Water Diversion Lease: Taro Farmers Claim Victory, but Some Say Sugar Cane Growers Are Adversely Affected*, HONOLULU STAR-BULLETIN, Sept. 19, 2003, available at <http://starbulletin.com/2003/09/19/news/story6.html>.

<sup>13</sup> U.S. WATER NEWS ONLINE, *supra* note 7.

<sup>14</sup> *Id.*

<sup>15</sup> Charley F. Ice et al., *Hawaii Commission on Water Resource Management and the Water Code: Protecting the Public Trust*, WATER RESOURCES IMPACT, Mar. 2005, at 13.

<sup>16</sup> U.S. WATER NEWS ONLINE, *supra* note 7 (noting the Hawaii's previous Governor Benjamin Cayetano appointed an A&B Vice-President, who is now serving a second term set to end in 2009, amidst a chorus of angry protests over conflicts of interest).

<sup>17</sup> Ice et al., *supra* note 15, at 14; HAW. CONST. art XI, §§ 1, 7.

1987 State Water Code. Part III critically assesses four judicial determinations that continue to guide the adjudication of water rights claims within the state as it applies to Native Hawaiians: *McBryde Sugar Co. v. Robinson*, *Reppun v. Board of Water Supply*, *Robinson v. Ariyoshi*, and *In re Water Use Permit Applications (Waiāhole)*.<sup>18</sup> Part IV traces the history of the current *Na Moku* controversy, mapping out developments from its inception and highlighting recent administrative and judicial decisions that will significantly impact its ultimate resolution. Finally, Part V is a conclusion that contemplates the future viability of Native Hawaiian water rights claims given Hawaii's contemporary judicial, political, and economic landscape; the state of which has been reflected in the court's treatment of a small group of East Maui taro farmers desperate for a watershed of justice.

## I. NATIVE HAWAIIAN UNDERSTANDINGS OF WATER

Traditional Native Hawaiian conceptions of water conflict with the accepted Western practices of owning and privatizing natural resources. Native Hawaiians subscribe to the idea that people and communities act as stewards of the environment and its resources, all of which are imbued with cultural, spiritual, and ceremonial meaning. Ancient Hawaiian land divisions, also known as *ahupua'a*, celebrated this natural resource ethic by providing for a complex natural resource management system that included watersheds based on communal responsibility.<sup>19</sup> Native Hawaiians maintained *ahupua'a* by preserving a "highly desirable balance" between themselves and their environment through the practice of "*aloha* (respect), *laulima* (cooperation), and *malama* (stewardship)."<sup>20</sup> The commitment to and responsibility for stewardship flowed from the *na Akua* (gods) to the *ali'i nui* (ruling chiefs), who supervised the cultivation and use of Hawaiian lands and waters by *maka'ainana* (people of the land or commoners), who were organized in the main social units called '*ohana* (family or kin groups).<sup>21</sup>

Both the "spiritual and nutritional center of Hawaiian culture" revolved around the cultivation of taro, a starchy root plant, dependent upon nutrient rich wetland environments irrigated by sophisticated '*auwai* (ditch or canal) systems to facilitate "steady flows of cool, fresh

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<sup>18</sup> *McBryde Sugar Co. v. Robinson*, 54 Haw. 174 (1973); *Reppun v. Board of Water Supply*, 65 Haw. 531 (1982); *Robinson v. Ariyoshi*, 65 Haw. 641 (1982); *In re Water Use Permit Applications (Waiāhole)*, 94 Haw. 97 (2000).

<sup>19</sup> Jason K. Levy and Joseph Chernisky, *Understanding the Ahupua'a Model, Part I: Introduction and Overview*, WATER RESOURCES IMPACT, Mar. 2005, at 20.

<sup>20</sup> *Id.*

<sup>21</sup> Elizabeth Ann Ho'oipo Kala'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 85 (1996).

water.”<sup>22</sup> The cooperative and organized efforts necessary to sustain the complex tasks of “planting, watering, tending, and harvesting taro shaped relationships between individuals, families, and communities”<sup>23</sup> and highlighted the efficacy of the interdependent ethic Native Hawaiians had fostered and cultivated for centuries. Indeed, water’s cultural significance is aptly captured in the very word that contemporary Hawaiian communities now look to for the preservation of their traditional rights. *Kanawai*, the Hawaiian word for “law,” literally translates into “belonging to the waters.”<sup>24</sup> Significantly, some Native Hawaiian scholars believe that the word *kanawai* is “based in the regulation of water,” as the “very first laws or rules of any consequence that the ancient Hawaiians ever had are said to have been those relating to water.”<sup>25</sup>

These indigenous conceptions and inherent aversions to notions of “private” property were preserved in writing as early as 1840. The Kingdom of Hawaii’s First Constitution acknowledged that while the King may have *controlled* all property, “[i]t *belonged* to the Chiefs and the people in common.”<sup>26</sup> Indeed, the 1850 Kuleana Act advanced public resource protection through its specific guarantee that the “people shall . . . have a right to drinking water, and running water.”<sup>27</sup> Almost fifty years later, *King v. Oahu Railway & Land Co.* reaffirmed that principle, holding that “[t]he people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use.”<sup>28</sup> Over the years, the state has extended the PTD to complement indigenous understandings of natural resources, illustrating PTD’s potential to bolster Native Hawaiian efforts to assert and preserve their indigenous rights to natural resources, especially water.

Even today, water continues to shape “work roles, political allegiances, human relationships, and legal obligations” within the Native Hawaiian community.<sup>29</sup> The cultivation of taro, which is vitally dependent on water, maintains its “spiritual, cultural, political, and economic dimension” and has infused the contemporary Hawaiian cultural renaissance movement with an impetus for Natives to return the land.<sup>30</sup> This intersection of water, culture, and traditional farming has the potential to

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<sup>22</sup> *Id.* at 86–87.

<sup>23</sup> *Id.* at 87.

<sup>24</sup> *Id.*

<sup>25</sup> Shaundra A.K. Liu, *Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders*, 25 U. HAW. L. REV. 85, 85 n.7 (2002).

<sup>26</sup> Ede, *supra* note 1, at 288 (emphasis added).

<sup>27</sup> *Id.* at 304.

<sup>28</sup> *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 725 (1899).

<sup>29</sup> Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 355 (2001).

<sup>30</sup> *Id.*

“revive a communal practice that brings together the Native Hawaiian community for taro farming, camaraderie, and conversation” as well as to “support the community’s goal of self-sufficiency by expanding agriculture and protecting the community’s integrity and lifestyle.”<sup>31</sup>

## II. HAWAII’S PUBLIC TRUST DOCTRINE

This section will examine the Public Trust Doctrine’s (PTD) profound influence in shaping the laws and statutes governing water rights and water resource management in the State of Hawaii, particularly as related to the 1987 State Water Code. Originally articulated by the Roman Empire in 533 A.D., and later incorporated into English common law,<sup>32</sup> PTD originally stood for the proposition that, “some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes.”<sup>33</sup> American jurisprudence adopted the PTD in 1892, with the landmark holding of *Illinois Central Railroad Co. v. Illinois*.<sup>34</sup> The PTD enjoys even broader application in Hawaii’s jurisdiction, encompassing “all fresh water, including ground water” and requiring the state “to account for domestic and native uses in administering the water trust.”<sup>35</sup>

The PTD’s codification in Hawaii’s Constitution underscores its significance in Hawaii’s judicial and legislative landscape. Article XI of Hawaii’s State Constitution requires the State to “conserve and protect” Hawaii’s natural resources, including water, and further obligates it to “protect, control, and regulate the use of Hawaii’s water resources for the benefit of its people.”<sup>36</sup> The 1987 State Water Code, a product of these constitutional mandates, further defines the scope of the Public Trust Doctrine and provides for the establishment of the Commission on Water Resource Management (CWRM), whose duty is both to promote “maximum beneficial use” of water and to steward water for the benefit of the public.<sup>37</sup> Significantly, the Water Code “explicitly recognizes the pre-eminence of the public trust doctrine and acts of Hawaii Kingdom Law, excluding some private property rights.”<sup>38</sup> The complex and progressive

<sup>31</sup> *Id.* at 356 (citing Curt Sanburn, *Waiahole: The Triumph of Community*, HONOLULU WEEKLY, Jan. 25, 1995, at 4).

<sup>32</sup> Kent D. Morihara, *Hawai‘i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 181 (1997).

<sup>33</sup> Ede, *supra* note 1, at 286 (quoting Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351–52 (1998)).

<sup>34</sup> 146 U.S. 387, 436–37 (1892); Ede, *supra* note 1, at 286.

<sup>35</sup> Ede, *supra* note 1, at 285.

<sup>36</sup> HAW. CONST. art. XI, §§ 1, 7.

<sup>37</sup> Douglas W. MacDougal, *Private Hopes and Public Values in the “Reasonable Beneficial Use” of Hawai‘i’s Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, 1 (1996).

<sup>38</sup> Ice et al., *supra* note 15, at 13.

system of water law in Hawaii speaks to its expansive reach and its potential to serve as a progressive model for other jurisdictions.

The Water Code's promising potential, however, is often thwarted by the broad latitude vested in the six-member Water Commission "to develop rules and procedures" aimed to advance the "protect[ion], control, and regulat[ion] . . . of Hawaii's surface and ground water resources."<sup>39</sup> Conferred with state-wide jurisdiction, the CWRM "hear[s] dispute[s] and make[s] final decisions regarding water resource protection, water permits, constitutionally protected water rights, designation of water management areas, and allocation of water to meet competing needs where there is insufficient water."<sup>40</sup> The CWRM's authority in this area becomes problematic when the execution of its responsibilities is unduly influenced by private interests that seek to usurp reasonable and beneficial public uses of Hawaii's limited water resources, particularly concerning the designation of ground water management areas and the establishment of instream flow standards. Further complications stem from the fact that the CWRM's jurisdictional authority and obligation to regulate water use is limited to "water management areas." This designation is obtained only after water withdrawals and diversions have reached acute levels and have wreaked havoc on the surrounding natural environment and communities reliant upon the health of their local water supply.<sup>41</sup>

The CWRM designates "water management areas" when "it can be reasonably determined 'that water resources in an area may be threatened by existing or proposed withdrawals or diversions of water.'"<sup>42</sup> To warrant such groundwater designations, total withdrawals from the aquifer, including both actual and sanctioned future uses, must reach "90% of its sustainable yield"—a high threshold that appears to depart from the PTD's comprehensive water management ethic.<sup>43</sup> Only after an area receives water management designation does the CWRM's authority to regulate via water use permits commence.<sup>44</sup> A positive consideration, however, is that CWRM's water use permit-issuing process requires that applicants demonstrate that water use "1) can be accommodated by the available water; 2) is a reasonable-beneficial use which will not interfere with an existing legal use; 3) is consistent with both the public interest

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<sup>39</sup> Martin et al., *supra* note 21, at 109.

<sup>40</sup> *Id.* at 111.

<sup>41</sup> MOSES HAIA, *Protecting and Preserving Native Hawaiian Water Rights*, E ALU LIKE MAI I KA PONO: COMING TOGETHER FOR JUSTICE 47, 55 (Moses Kalei Nahonoapi'ilani Haia et al. eds., Sept. 2004), available at <http://www.hawaii.edu/elp/publications/faculty/Jarman/Alu-LikeWorkbook.pdf> [hereinafter HAIA].

<sup>42</sup> Martin et al., *supra* note 21, at 113 (quoting Haw. Rev. Stat. § 174C-41(a) (1993)).

<sup>43</sup> *Id.*

<sup>44</sup> HAIA, *supra* note 41, at 55.

and state and county general plans and land use policies; and 4) will not interfere with the rights of the Department of Hawaiian Home Lands ('DHHL')."<sup>45</sup>

This promising permit-issuing process, however, is frustrated by the fact that standards for identifying "reasonable and beneficial" uses have yet to be developed in any meaningful detail. "Reasonable-beneficial" use, the only standard directing the CWRM, is broadly defined in the Water Code as "the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the State and County land use plans and the public interest."<sup>46</sup> Without supplying more exacting and express guidelines, the Water Code leaves the door wide open to abuse and unduly influenced determinations, for example, determinations influenced by politically sophisticated private developers. The CWRM may "expand or limit its scope of inquiry, and the applicant's burden of proof" through its interpretation of "three overlapping components: amount of use, manner of use, and purpose of use."<sup>47</sup> Compounded by minimal public or Native Hawaiian input in determining adequate prioritization and reservation systems, the CWRM process falls glaringly short of the Water Code's original aspirations—an integrated water management system based on a "comprehensive, open, community-based review" designed to "best protect[ ] water resources and community interests in them."<sup>48</sup>

The same challenges are apparent in CWRM's efforts to establish instream flow standards, which endeavor to "protect, enhance, and reestablish, where practicable, beneficial instream uses of water."<sup>49</sup> These standards designate the quantity, flow, or depth of water that "must be present at a specific location in a stream system at certain specified times of the year to protect beneficial instream uses."<sup>50</sup> Ill-equipped to develop individual instream flow standards for all of Hawaii's streams given budgetary, organizational, and technical constraints, the CWRM's best effort to date has been to adopt "blanket interim instream flow standards for all streams, under which 'status quo' flow must be maintained."<sup>51</sup>

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<sup>45</sup> Martin et al., *supra* note 21, at 113–15.

<sup>46</sup> MacDougal, *supra* note 36, at 4 (1996) (citing Act 45, 14th Leg., Reg. Sess., 1987 Haw. Sess. Laws 74 (codified in HAW. REV. STAT. § 174C-3 (1993))).

<sup>47</sup> *Id.*

<sup>48</sup> Martin et al., *supra* note 21, at 129.

<sup>49</sup> *Id.* at 130 (citing Haw. Rev. Stat. § 174C-5(3) (1993)).

<sup>50</sup> HAIA, *supra* note 41, at 52.

<sup>51</sup> Martin et al., *supra* note 21, at 130 (citing Haw. Admin. R. §§ 13-169-44 to 49.1) (defining status quo flow as "that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted off stream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard.").



The major windfall for water diverters, whether such water diversions are legal or the source of illegal adverse environmental impact, derives from the fact that “all existing out-of-stream uses are treated as ‘reasonable and beneficial.’”<sup>52</sup> This treatment of out-of-stream is ironic, considering that deficiencies in the status quo prompted environmental and Native Hawaiian community activists to press for the very stream management system charged with developing instream flow standards. This gross contravention of the Water Code is also at odds with Hawaii’s common law prohibitions against out of watershed diversion and the traditional Hawaiian water law principle that “no ditch was permitted to divert more than half of the water in the stream.”<sup>53</sup>

Why is execution of the PTD, which the courts have deemed inherent in the Water Code and the state agencies charged to enforce it, critical to preservation of Native Hawaiian water rights? Because “the fundamental purpose of the Water Code is protection and management of water resources in the ‘public interest’” and “H.R.S. §174C-2(c) declares that ‘the protection of traditional and customary Hawaiian rights [is] . . . in the public interest.’”<sup>54</sup> In fact, Part IX of the Water Code expressly addresses the protection of Native Hawaiian water rights. Thus, the state’s discharge of the Water Code may impact, positively or negatively, Native Hawaiian traditions and customs; including subsistence and religious practices, as well as the “ready accessibility of sufficient supplies of water” for the development of Hawaiian homelands.<sup>55</sup> The scope of the Water Code in this area is expansive and specifically provides for the protection of stream flows that host aquatic animals and plants integral to traditional gathering practices.<sup>56</sup> Although water-use permits issued by the CWRM and the BLNR ideally should not interfere with habitats inte-

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<sup>52</sup> *Id.* at 130–32.

<sup>53</sup> *Id.* at 133 (citing Emma Metcalf Nakuina, *Ancient Hawaiian Water Rights and Some of the Customs Pertaining to Them*, THURM’S HAWAIIAN ANNUAL 79 (1984)).

<sup>54</sup> HAIA, *supra* note 41, at 51 (quoting Haw. Rev. Stat. § 174C-2(c)).

<sup>55</sup> *Id.*

<sup>56</sup> Hawaiian streams have only five native species of fishes (which are collectively referred to as ‘o‘opu and well-known for climbing large waterfalls), two species of crustacean (referred to as ‘opae or “small shrimp”), and three species of mollusk (commonly known as river opihī or limpets). The Water Code, itself, specifically lists the gathering of ‘opae and ‘o‘opu, as well as limu (seaweed) and hihīwai (freshwater snails) as protected practices. Additionally, the State of Hawaii’s Department of Land and Natural Resources Division of Aquatic Resources provides that:

Maintaining the natural patterns of water flow in streams is the single most important requirement for protection of native Hawaiian stream animals. These natural flows will keep the river mouth open and provide the gateway for our precious native stream animals to complete their life cycle. Hawaiian native stream life, like the native Hawaiian people who depended on the streams, embody the connection of *Mauka* (mountain) to *Makai* (ocean) that defines the Hawaiian ecosystem.

Hawaiian Streams: The Mauka (mountain) to Makai (sea) Connection, <http://www.hawaii.gov/dlnr/dar/streams/index.htm> (last visited Apr. 8, 2008).

gral to sustaining Native Hawaiian cultural practices, “status quo” in-stream flow standards and the vague “reasonable-beneficial” standard clearly undermine this objective.<sup>57</sup>

Appurtenant water rights, however, constitute another viable legal alternative available to Native Hawaiians who seek to assert their water rights. In Hawaii, an appurtenant water right affords an individual “the right to use that amount of water from a water source (usually a stream) which was used at the time of the *mahele* on *kuleana* and taro lands for the cultivation of taro and other traditional crops and for domestic uses on that same land.”<sup>58</sup> Pursuant to Article XI, Section 7 of the Hawaii State Constitution, which requires that the CWRM protect appurtenant water rights:

The Water Code provides that appurtenant water rights of *kuleana* [cultivated lands awarded to commoners during the *Great Mahele*] and taro lands can not be lost or otherwise affected by a failure to apply for or to receive a water use permit from the Water Commission. In other words, as long as there has been no attempt to separate the right from the land, the right still exists whether the Commission has issued a permit for use of water and whether the water is presently being used or has not been used since the *mahele*.<sup>59</sup>

### III. HAWAII’S LEADING WATER LAW CASES

Four judicial determinations continue to guide the adjudication of water rights claims within the state of Hawaii *McBryde Sugar Co. v. Robinson*,<sup>60</sup> *Reppun v. Board of Water Supply*,<sup>61</sup> *Robinson v. Ariyoshi*,<sup>62</sup> and *In re Water Use Permit Applications (Waiāhole)*.<sup>63</sup> The evolution of water law in the State of Hawaii, as traced by these judicial announcements, provides for an expansion of the PTD and judicial recognition of

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<sup>57</sup> Ice et al., *supra* note 15, at 15.

<sup>58</sup> HAIA, *supra* note 41, at 53.

<sup>59</sup> *Id.*; Acquiescing to pressure from Americans and Europeans seeking to replace Native Hawaiian land tenure principles with a system that embraced western conceptions of private property, more conducive to large-scale agriculture, King Kamehameha III divided Hawaii’s land “among the Kingdom, high-ranking chiefs, and the territorial government, in what is known as Ka Mahele (literally, ‘The Division’).” Jocelyn B. Garovoy, “*Ua Koe Ke Kuleana O Na Kanaka*” (*Reserving the Rights of Native Tenants*): *Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 Harv. Envtl. L. Rev. 523, 526 (2005); NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 4, at 307.

<sup>60</sup> *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (1973).

<sup>61</sup> *Reppun v. Board of Water Supply*, 656 P.2d 57 (Haw. 1982).

<sup>62</sup> *Robinson v. Ariyoshi*, 658 P.2d 287 (Haw. 1982).

<sup>63</sup> *In re Water Use Permit Applications (Waiāhole)*, 9 P.3d 409 (Haw. 2000).

Native Hawaiians' traditional and customary rights as a valid public trust purpose.

In 1973, *McBryde Sugar Co. v. Robinson*<sup>64</sup> announced that the Hawaiian Kingdom's sovereign authority was retained "to encourage and even enforce the usufruct of lands for the common good," with the right to water being among the most important usufruct, or legal right to use and enjoy the resources of another's property; a legal right "reserved for the people of Hawaii for their common good."<sup>65</sup> Specifically, *McBryde* held that "the State owned all waters of the river, subject only to appurtenant and riparian rights" and that "waters could not be diverted outside the river's watershed."<sup>66</sup> Relying upon English common law and deferring to traditional Hawaiian usages, the *McBryde* court ruled that "riparian lands (property along streams) carry rights to use water flowing within the stream as long as such use does not prejudice the riparian rights of other lands."<sup>67</sup> This ruling thereby designated riparian rights as superior to other water usages, including water diversions from watersheds of origin.<sup>68</sup>

In *Reppun v. Board of Water Supply*,<sup>69</sup> a subsequent case that affirmed the riparian doctrine of *McBryde*, the court delved further to analogize Hawaiian riparian rights to federally reserved water rights enjoyed by Indian reservations as preserved by the *Winters* Doctrine.<sup>70</sup> The *Winters* Doctrine, derived from *Winters v. United States*, 207 U.S. 564 (1908), requires that the federal government set aside sufficient water to fulfill the purposes for which Indian reservations were established. The *Winters* Doctrine provides for tribally reserved water rights.<sup>71</sup> Courts generally agree that the purpose of reservations was to create an agricultural based society that would clear the way for westward expansion. *Winters* sought to preserve for Indians the right to continue pre-existing practices, such as fishing, by reserving sufficient water to continue such aboriginal practices. Native Americans' unique government-to-government relationship with the U.S. Government, which confers upon them a sovereign authority to self-govern,<sup>72</sup> tends to establish clear differences

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<sup>64</sup> *McBryde*, 504 P.2d at 1330.

<sup>65</sup> Ede, *supra* note 1, at 289.

<sup>66</sup> Eric. K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 48 n.156 (1996).

<sup>67</sup> Martin, *supra* note 21, at 100–01.

<sup>68</sup> *Id.*

<sup>69</sup> *Reppun v. Board of Water Supply*, 656 P.2d 57 (Haw. 1982).

<sup>70</sup> Martin et al., *supra* note 21, at 103.

<sup>71</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>72</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (giving an example of the unique government-to-government relationship that over 500 federally recognized tribes have with the U.S. government, which recognizes a tribe's sovereign right to govern tribal members and land within tribal boundaries).

between the legal and political landscapes of Native Americans and Native Hawaiians. However, as two indigenous communities struggling to secure native water rights and to enforce water management codes in the face of formidable legal and political impediments, Native Americans and Native Hawaiians share significant commonalities. Members of both groups believe that people and communities act as stewards of the environment and its resources, which possess cultural, spiritual, and ceremonial meaning. In fact, some scholars have analogized the doctrine of federally reserved water rights articulated in *Winters* with the application of the Public Trust Doctrine (PTD), which obligates the State of Hawaii to protect Native Hawaiians' traditional and customary water uses.<sup>73</sup>

In furtherance of the Hawaii Supreme Court's revolutionary water law holdings in *McBryde* and *Reppun, Robinson v. Ariyoshi* explicitly obligated the State "to assure the continued existence and beneficial application of the resource (i.e., water) for the common good" and "necessarily limited the creation of certain private interests in waters."<sup>74</sup> Although *Robinson* does not absolutely prohibit the transfer of water out of the watershed of origin,<sup>75</sup> these conveyances are permissible only if they refrain from injuring the water rights of others. Given that the §174C-2 of the Water Code itself establishes that, "the protection of traditional and customary Hawaiian rights . . . [are] in the public interest," and that applications for water-use permits are conditioned on their "consisten[cy] with the public interest,"<sup>76</sup> the burden to establish that uses will neither abridge nor deny traditional and customary Hawaiian rights rests with the prospective diverter.<sup>77</sup> Native Hawaiian traditions and customary practices, in conjunction with the appurtenant rights and public trust obligations that emanate from Hawaii's Constitution are implicated in the issue of watershed transfers and are thus subject to PTD protections.

*Waiāhole* expanded upon the issue of out-of-watershed diversion in a case concerning the daily diversion of approximately twenty-seven million gallons of fresh surface water and dike-impounded ground water from east to west Oahu. Initiated in 1916, Waiāhole Water Company Ltd., a subsidiary of O'ahu Sugar Company (OSC), employed a sophisticated ditch system for the purpose of irrigating OSC's sugar cane fields.<sup>78</sup> The diversions caused a deleterious impact, destroying "aquatic estuaries, native wildlife, and plant species and threatened the traditional life of indigenous Hawaiian communities in the valleys" who had grown

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<sup>73</sup> Ede, *supra* note 1, at 311.

<sup>74</sup> *Robinson v. Ariyoshi*, 658 P.2d 287, 310 (Haw. 1982); Ede, *supra* note 1, at 290.

<sup>75</sup> *Ariyoshi*, 658 P.2d at 287.

<sup>76</sup> HAW. STATE WATER CODE, ch. 174C, § 49(a) (2004).

<sup>77</sup> Ice et al., *supra* note 15, at 15.

<sup>78</sup> Yamamoto & Lyman, *supra* note 29, at 352.

reliant upon sufficient stream flow levels.<sup>79</sup> These harms went largely unnoticed until 1992, when the Hawaii Commission on Water Resource Management (CWRM) designated these windward aquifers as “ground water management areas”—“effectively requiring existing users of Waiāhole Ditch water to apply for water use permits within one year of that date.”<sup>80</sup> Following OSC’s plans to cease operations, various leeward (western) interests vied to reserve these ditch waters and increase in-stream flow standards—a conflict that prompted CWRM to investigate the issue and order that the Waiāhole Irrigation Company to “release all but 8 mgd [million gallons per day] back into the windward streams.”<sup>81</sup> Following contentious hearings and deliberations, the CWRM released its final decision in December 1997, which merely increased leeward water allocations by 3.79 mgd and reaffirmed the State’s public trust responsibility to protect all fresh water resources, including ground water surface water, and all other water, for the public’s common good.<sup>82</sup>

In August 2000, the Hawai’i Supreme Court issued its *Waiāhole* ruling, which enumerated three valid public trust purposes: the protection of water resources, the protection of domestic uses, and the protection of Native Hawaiian and traditional and customary uses—the last valid trust use based in and supported by Hawaii state law.<sup>83</sup> PTD, as interpreted by the *Waiāhole* Court, created “a dual mandate for the State, requiring it to balance resource protection against maximum reasonable and beneficial use of water.”<sup>84</sup> Unlike other state constitutions and statutes that emphasize maximum reasonable and beneficial uses, Hawaii’s PTD strives to achieve the “most equitable, reasonable, and beneficial allocation of state water resources, while bearing in mind that resource protection also constitutes a valid trust use.”<sup>85</sup> Although PTD does not absolutely prohibit off-stream diversions for the commercial development and private use of water resources, the burden of providing justification for such use rests with the party seeking a diversion, since “any balancing of public and private uses [must] begin with a presumption in favor of public uses, access, and enjoyment.”<sup>86</sup> When making balancing determinations, the CWRM must first ascertain the amount of water needed for trust use, followed by an exact account of the water that re-

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<sup>79</sup> *Id.*

<sup>80</sup> *In re Water Use Permit Applications (Waiāhole)*, 9 P.3d 409, 423 (Haw. 2000).

<sup>81</sup> *Id.* at 424; Ede, *supra* note 1, at 293.

<sup>82</sup> Ede, *supra* note 1, at 294–95.

<sup>83</sup> *Waiāhole*, 9 P.3d at 449.

<sup>84</sup> Ede, *supra* note 1, at 296.

<sup>85</sup> *Id.* at 297.

<sup>86</sup> Ede, *supra* note 1, at 297–98.

mains for potential commercial development—a balance that places the highest priority on state trust obligations.<sup>87</sup>

*Waiāhole*'s particular legal significance was that it "reconceptualized the [public trust] doctrine in terms of indigenous people's rights."<sup>88</sup> Recognizing the PTD as a "residual aspect of Hawaiian Kingdom law ensuring the rights of 'the people' to water," the *Waiāhole* court charged that "we do not lose sight of the trust's original intent."<sup>89</sup> This intent, the "preservation of the rights of native tenants during the transition to a western system of private property," necessitates that the State maintain "the exercise of Native Hawaiian rights as a public trust purpose"—a pledge that the *Waiāhole* court vowed to keep.<sup>90</sup>

#### IV. NA MOKU CASE STUDY

The East Maui diversions at the center of the *Na Moku* controversy were initiated over 120 years ago through renewable watershed leases that were reviewed by appropriate predecessor agencies to the Board of Land and Natural Resources (BLNR) and then the BLNR itself until 1987, when Hawaii's State Water Code took effect and charged the CWRM with setting water allocations.<sup>91</sup> For 120 years, the State allowed A&B and its subsidiary, East Maui Irrigation Company (EMI), to divert water for agricultural, domestic, and other purposes from East Maui reserves and communities, to Central and Upcountry Maui.<sup>92</sup>

Over the past forty years, East Maui taro farmers have petitioned, pursuant to constitutional mandates provided for by PTD, for the return of water to their streams.<sup>93</sup> Significantly, the East Maui diversions at issue in the *Na Moku* controversy occur over "non-designated" water management areas,<sup>94</sup> triggering the application of HRS 171-58(c) of the Water Code, which charges the BLNR, not the CWRM, with jurisdiction to oversee water use and stream diversions.<sup>95</sup> The BLNR's authority,

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<sup>87</sup> *Id.* at 306.

<sup>88</sup> Yamamoto & Lyman, *supra* note 29, at 358.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Teresa Dawson, *Board Talk: East Maui Water Dispute Heats up with Hearing Officer's Recommendation*, 13 ENV'T HAW. 9 (Jan. 2003).

<sup>92</sup> *Maui Tomorrow v. State of Hawai'i*, 110 P.3d 517, 521 (Haw. 2006).

<sup>93</sup> Edwin Tanji, *Maui Taro Growers Triumph in Water Dispute*, Pacific Islands Report, Sept. 19, 2003, at <http://www.sidsnet.org/archive/other-newswire/2003/msg00676.html>.

<sup>94</sup> *Maui Tomorrow*, 110 P.3d at 523.

<sup>95</sup> Haw. Rev. Stat. §171-58(c) (1991) (stating, "Minerals and water rights . . . (c) Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law; provided that any disposition by lease shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposi-

however, is subject to the limits articulated in *Robinson v. Ariyoshi*, which permits such transfers “only when it can be demonstrated that to do so would *not* be injurious to others with rights to water.”<sup>96</sup> During the course of a twenty-year review process, the BLNR issued annual revocable permits to A&B and EMI for the continued diversion of East Maui water.<sup>97</sup> In May 2001, A&B and EMI increased the ante by filing an application with the BLNR that sought a thirty-year water lease and requested continued issuance of their yearly revocable permits in the interim.<sup>98</sup> Additionally, A&B and EMI asserted “grandfathered” exemptions from environmental assessment (EA) or environmental impact statement (EIS) requirements.<sup>99</sup> Had *Na Moku* not vigorously opposed the request, the BLNR would have likely acquiesced.

Indeed, after granting *Na Moku*’s request for a contested case hearing, challenging the legality of A&B’s proposed disposition of public lands and resources, the BLNR issued its official decision on January 2003, which appeared to defy logic and undercut the state’s public trust obligations.<sup>100</sup> The BLNR concluded that it could grant a lease allowing out-of-watershed transfers “[u]pon determination that it would be in the best interest of the State . . . [and] provided that such lease is issued in accordance with the procedures set forth in HRS Chapter 171 and provides that all diversions of stream water shall remain subject to the Interim Instream Flow Standards (‘IIFS’) set by CWRM.”<sup>101</sup> Curiously, however, the BLNR determined that it could grant a long-term lease absent data identifying “superior riparian and appurtenant rights to the same water.”<sup>102</sup> This finding was a gross contravention of the trust obligations articulated in the PTD, and a conclusion of law that the O’ahu’s First Circuit Court, in ruling on *Na Moku*’s agency appeal, deemed “fatally flawed” given its inconsistency “with the common law and with the suggestion that one could ever determine the best interest of the state absent data on what is ‘excess.’”<sup>103</sup>

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tion; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and environmental impact statement approvals, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.”).

<sup>96</sup> *Robinson v. Ariyoshi*, 658 P.2d 287, 287 (Haw. 1982) (emphasis added).

<sup>97</sup> Tanji, *supra* note 93.

<sup>98</sup> *See Maui Tomorrow*, 110 P.3d at 538.

<sup>99</sup> Kubota, *supra* note 12.

<sup>100</sup> *See Maui Tomorrow*, 110 P.3d at 522.

<sup>101</sup> *Id.*

<sup>102</sup> *See Case Highlights: Na Moku Aupuni O Ko’olau Hui*, [www.nhlchi.org/highlights2.htm](http://www.nhlchi.org/highlights2.htm) (last visited Apr. 8, 2008).

<sup>103</sup> *Maui Tomorrow*, 110 P.3d at 523.

Note that the CWRM exercises jurisdiction over the administration of the Water Code, which they are bound to uphold, pursuant to HRS §174C-7(a), including the power to adjudicate claims to appurtenant rights—an authority they share with circuit courts.<sup>104</sup> Significantly, the Water Code provides for the protection of traditional and customary practices of Native Hawaiians, and other reasonable and beneficial instream uses. These uses compel the CWRM to consider these Native Hawaiian interests along with other public interests when setting interim instream flow standards pursuant to HRS §174C-71;<sup>105</sup> standards to which the BLNR has publicly vowed to make their issuance of out-of-watershed leases subject to. Additionally, the State of Hawaii's duty to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible emanates from the Hawaii Constitution, pursuant to Article XII, Section 7, and the CWRM is the appropriate agency to determine minimum instream flow standards necessary to satisfy the State's duty and protect the traditional and customary rights of Native Hawaiians.<sup>106</sup>

Accordingly, *Na Moku's* request that the CWRM amend instream flow standards to allow for diversions sufficient for taro farming and gathering and the restoration of natural stream flows, except for the exercise of appurtenant rights, in an effort to restore instream natural habitat and biota and beneficial appurtenant and gathering uses, appears to be well within the scope and spirit of the Water Code's protection of "reasonable and beneficial" uses.

## CONCLUSION

Given that a host of statutory safeguards, legal articulations, and judicial determinations both endorse and advance the Public Trust Doctrine in the State of Hawaii, it would be difficult to imagine an administrative system that ignores, undermines, and at times scoffs at its affirmative obligation to safeguard and manage natural resources for the benefit of the public good. Nonetheless, Hawaii's Commission on Water

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<sup>104</sup> Haw. Rev. Stat. §174C-7 (2003) (stating, "**Commission on water resource management.** (a) There is established within the department a commission on water resource management consisting of seven members which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as otherwise specifically provided in this chapter.").

<sup>105</sup> Haw. Rev. Stat. §174C-71 (1988) (stating, "**Protection of instream uses.** The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall: (1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State.").

<sup>106</sup> See *Maui Tomorrow*, 110 P.3d at 517-21.



Resource Management (CWRM) and Board of Land and Natural Resources (BLNR) have managed to commit the unimaginable by neglecting the custodial duties they were originally entrusted with in regards to Hawaii's scare and finite water resources.

Alexander & Baldwin's (A&B's) ability to monopolize the depletion of Maui's water resources over the last 120 years, to the detriment and devastation of communities and habitats from which it diverted billions of gallons of water annually, hinged on CWRM's and BLNR's favorable disposition of A&B's renewable watershed leases. Although the BLNR invoked the proper statutory language to enter into leases authorizing A&B's out-of-watershed transfers, it relied on instream flow standards that failed to establish water levels sufficient to serve the state's best interest, let alone the levels necessary to sustain Native Hawaiian traditional and customary practices. This disposition underscores the profound institutional impediments that continue to deprive a marginalized group of Native Hawaiian taro farmers of their natural flowing water source.

As the BLNR and CWRM proceed with their deliberation over and treatment of the contested case hearing of *Na Moku*, it is imperative that they remain mindful of their charge to carry out the Water Code's original aspirationsa comprehensive, community-based water management system reflective of the state's affirmative duty to best protect water resources and the community interests in them. Critical to this public trust calculus is the privileged status afforded to Native Hawaiians and the exercise of their traditional and customary rights; a privilege articulated, recognized, and reaffirmed, in Hawaii's State Constitution, the 1987 State Water Code, and authoritative Hawaii case law. While the demands of a growing economy in the face of finite natural resources are more pronounced in an island community and has the potential to obfuscate what constitutes the "state's best interest" or the "public good," that which is lawful and just need not be devalued in such a calculation.

