

# NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY RIGHTS

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## **I. Introduction: The State’s Obligation to Protect Traditional and Customary Rights**

Under Hawai‘i law, the State and its agencies are obligated to preserve and protect the exercise of traditional and customary Native Hawaiian rights. Hawai‘i courts have made clear that traditional and customary practices for subsistence, cultural, and religious purposes “must be protected to the extent feasible” under the Hawai‘i Constitution. Gathering and access rights are the two most basic examples of traditional and customary practices protected under State law. This summary will focus on these two concepts.

## **II. Basic Principles: A Brief History**

The owner of land in Hawai‘i acquires title that is uniquely subject to the rights of native tenants. Modern Hawai‘i property law, which evolved from the Māhele and subsequent legislation, incorporates elements of English common law, western property law, and Hawaiian custom and usage. As a result, concepts of property under Hawai‘i law differ from those of the western legal paradigm. Western property law recognizes certain absolute rights of property ownership, including the rights to exclude others from the land, transfer the land, as well as to use and possess the land. In contrast, Hawai‘i property law protects the exercise of traditional and customary rights and thus limits the owner’s right of exclusion.

At the time of western contact in 1778, Native Hawaiians “lived in a highly organized, self-sufficient, subsistent society based on a system of communal land tenure with a highly sophisticated language, religion and culture.”<sup>1</sup> Access from one area to another—along the shore, between adjacent ahupua‘a (land divisions), to the mountains and the sea, and to small plots of land cultivated or harvested by native tenants—was a necessary part of life. Gathering activities supplemented the peoples’ everyday food and medicinal supplies, provided materials for building, and fulfilled various other cultural and religious purposes. Gathering activities were primarily dependent upon access rights within, and sometimes between, ahupua‘a.

To ensure the political existence of the Hawaiian Kingdom in the face of expanding foreign influence, King Kamehameha III, Kūiākeaouli, developed a system of codified laws, which incorporated protections for ancient Hawaiian custom and usage. The Māhele, a process that took place between 1845 and 1855, transformed Hawai‘i’s traditional land tenure system to a property regime that incorporated western concepts of private property rights. All land grant awards during the Māhele were intended to be made subject to the rights of native tenants, through either an explicit or implicit “kuleana reservation.”

## II. Applicable Constitutional Provisions, Statutes, Cases, and Rules

Traditional and customary rights are deeply rooted in Hawai'i law.

### A. Article XII, section 7 of the Hawai'i Constitution

In November 1978, Hawai'i voters approved Article XII, section 7 of the Hawai'i Constitution, which reaffirmed "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights."<sup>2</sup> The constitutional convention delegates explained that "in reaffirming these rights . . . enforcement by the courts of these rights is guaranteed."<sup>3</sup>

### B. Section 1-1, Hawai'i Revised Statutes

Hawai'i has long recognized ancient custom and usage as an integral part of the law. Hawai'i Revised Statutes (HRS) Section 1-1 codifies the Hawaiian usage exception and states that the common law of England is the common law of the State, "except as otherwise expressly provided by the Constitution of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage.*"<sup>4</sup> The Hawai'i Supreme Court has used section 1-1 as a basis for protecting traditional and customary gathering rights.<sup>5</sup>

### C. Section 7-1, Hawai'i Revised Statutes

HRS Section 7-1 specifically protects the right to gather, although that right is limited to the enumerated items, including materials primarily used for constructing a house or starting a fire. It protects the rights of persons who lawfully occupy a kuleana parcel or are lawful tenants of an ahupua'a to, among other things, gather "firewood, house timber, aho cord, thatch or ti leaf" for private, non-commercial use, as well as their rights to "drinking water, and running water, and the right of way."<sup>6</sup> The language of section 7-1 has remained essentially unchanged since 1851 and originates in the Kuleana Act of 1850.

### D. Judicial Clarification of Traditional and Customary Rights

In a line of cases beginning just four years after Hawai'i's voters approved article XII, section 7 of the Hawai'i Constitution, the Hawai'i Supreme Court repeatedly reaffirmed traditional and customary rights and practices. *Kalipi v. Hawaiian Trust Co., Ltd.* held that HRS section 7-1 specifically protects the right to gather, although that right is limited to the enumerated items, including materials primarily used for constructing a house or starting a fire.<sup>7</sup> *Pele Defense Fund v. Paty* held that HRS section 1-1 offers broader protection for the exercise of traditional and customary rights; it extends those rights to the gathering of materials that are otherwise essential to the tenants' lifestyle, such as medicinal plants, and may even protect limited upland subsistence farming as practiced by early Hawaiians. Also, article XII, section 7 of the Hawai'i Constitution protects gathering rights exercised beyond the boundaries of the ahupua'a of residence.<sup>8</sup> *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission (PASH/Kobanaiki)* held that the state does not have the "unfettered discretion to regulate the rights of ahupua'a tenants out of existence[;]" however, the State can permit private property owners to exclude persons "pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner" or on private property that is "fully developed."<sup>9</sup> Additional cases are discussed below in Part III.

### III. Practical Application

#### A. Analytical Framework for Agency Action

Agencies responsible for protecting traditional and customary Native Hawaiian rights must conduct detailed inquiries to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way. In *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission*, the Hawai‘i Supreme Court articulated an analytical framework to assist state agencies in balancing the State’s obligation to protect traditional and customary practices against private property (as well as competing public) interests, by requiring specific findings and conclusions about:

- (1) the identity and scope of “valued cultural, historical, or natural resources” in the relevant area, including the extent to which traditional and customary native Hawaiian rights are exercised in the relevant area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.<sup>10</sup>

Resources and practice outside the area at issue (including both the immediate vicinity as well as other areas), must also be identified and considered.<sup>11</sup>

Agencies may not delegate the state’s constitutional responsibility to others by, for example, directing a permit applicant to independently attempt to protect traditional and customary rights. Instead, agencies must actively research and consider the cultural, historical and natural resources of a subject property as they relate to Native Hawaiian rights when determining what restrictions should be placed on land or water use. An agency’s failure to condition permitted uses upon protection of natural resources that are the basis of traditional and customary Native Hawaiian gathering practices will constitute sufficient grounds for invalidating the agency’s decision to grant the underlying permit.

#### B. Review of Cultural Impact Statements

Because Native Hawaiian cultural resources have been lost or destroyed, the Hawai‘i Legislature added a cultural impact assessment (CIA) requirement for proposed projects subject to the environmental review process.<sup>12</sup> As such, Environmental Assessments and Environmental Impact Statements completed after April 6, 2000, must include an assessment of the “impacts to local cultural practices” together with “measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects,” among other requirements. CIAs can be a useful way for agencies charged with reviewing and accepting environmental assessments to fulfill their obligation to protect Native Hawaiian traditional and customary practices.

In February 2012, the State Department of Health’s Office of Environmental Quality Control (OEQC) – now the Environmental Review Program (ERP) – published an updated Guide to the Implementation and Practice of the Hawai‘i Environmental Policy Act (Guidebook) containing specific guidelines along with a specific methodology and content protocol for assessing

cultural impacts that may be associated with proposed projects or actions.<sup>13</sup> For example, the CIA should survey a geographical area greater than the area of proposed development and reference historical data dating back to the initial presence of the group whose cultural practices are being assessed; individuals and organizations knowledgeable about the cultural resources, practices, and beliefs within the area of potential impact should be contacted; and, ethnographic and other culturally related documentary research may be conducted. The Guidebook can provide useful guidance for agencies when reviewing and determining the adequacy of a CIA as part of the larger environmental assessment.

### **C. Cultural Practitioners Have A Constitutional Right To Participate in Contested Case Hearings Involving Proposed Uses That May Affect Their Practices**

The Hawai'i Supreme Court recognized that the Board of Land and Natural Resources (BLNR) violated its affirmative obligations under article XII, section 7 of the Hawai'i Constitution, when it issued a permit for the construction of a telescope on Mauna Kea before resolving requests from Native Hawaiian cultural practitioners to hold a contested case hearing on the application.<sup>14</sup> The court stated that "a contested case hearing was required as a matter of constitutional due process."<sup>15</sup>

### **D. Burdens of Proof**

In the water law context, the Hawai'i Supreme Court has explained that permit applicants bear the ultimate burden of demonstrating that a water use will not harm traditional and customary Native Hawaiian practices.<sup>16</sup> Thus, "simply pointing to an empty record and claiming no impact to Indigenous rights will no longer suffice; permit applicants bear an affirmative burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices."<sup>17</sup> Accordingly, the Court has reversed agency decisions that "impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice."<sup>18</sup> By concluding that "no evidence was presented" about adverse impacts on Native Hawaiian practices, for example, an agency erroneously shifts its burden to protect traditional and customary Native Hawaiian rights.<sup>19</sup>

Arguably, the burden of proof should also be allocated to the applicant and the agency in the context of other administrative agency proceedings, consistent with the Hawai'i Supreme Court's opinions in *Kukui (Molokai)*, *Wai'ola*, and *Kauai Springs*. It is a basic principle of administrative law that "the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion."<sup>20</sup> Hawai'i Administrative Rule (HAR) § 13-1-35(k) (2009) employs equivalent language in the context of procedural rulings in hearings on applications for a Conservation District Use Permit (CDUP).<sup>21</sup> Although hearings officers have discretion to determine hearing procedures under HAR § 13-1-32(b) and (c), it is an abuse of discretion to require Native Hawaiian practitioners to submit testimony simultaneously with the project applicant.<sup>22</sup> The Hawai'i Supreme Court further recognized that CDUP applicants also bear the burden of demonstrating that proposed land uses are consistent with the criteria in HAR § 13-5-30(c)(1) to (8).<sup>23</sup>

*In re TMT* failed to address allegations that the BLNR erroneously shifted the burden of proof to practitioners on these substantive questions.<sup>24</sup> The Court instead appears to have

subsumed this point of error under its discussion of whether the agency discharged its duties under *Ka Pa'akai*.<sup>25</sup> However, the Court deleted a footnote from its original October 30, 2018 opinion, which previously asserted the “burden of proof is not at issue because *Ka Pa'akai* concerns procedural requirements placed on agencies in order to protect Native Hawaiian rights.”<sup>26</sup> The (now deleted) footnote erroneously suggested that the burden of proof shifts to practitioners in the land use context as well as the criminal context based on *PASH/Kohanaiki* and *Pele I*.<sup>27</sup> *PASH/Kohanaiki* in fact eased the way for Native Hawaiian practitioners to participate in administrative proceedings and protect their rights, while criticizing the applicant and the agency for their “cultural insensitivity” to “issues relating to subsistence, cultural, and religious practices of native Hawaiians.”<sup>28</sup> The *PASH/Kohanaiki* Court then provided the agency with some specific, although not necessarily exhaustive, guidelines for evaluating challenges to the legitimacy of practitioners’ claims.<sup>29</sup>

By comparison, the Hawai‘i Supreme Court held in the criminal context that “it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected.”<sup>30</sup> Reasonably-exercised, constitutionally-protected Native Hawaiian rights qualify as a privilege when defending against criminal trespass charges. To establish that such conduct is protected, a defendant must: (1) be Native Hawaiian within the guidelines set out in *PASH/Kohanaiki*;<sup>31</sup> (2) prove that the conduct is a protected traditional and customary practice; and (3) prove that the exercise of the right occurred on undeveloped or “less than fully developed property.” At that point, the court applies a “totality of the circumstances” test to balance the defendant’s right to perform the traditional and customary practice against the State’s competing interests.<sup>32</sup>

Two unpublished Intermediate Court of Appeals (ICA) memorandum opinions<sup>33</sup> should be considered regarding the applicable burden of proof. First, a criminal case; then, a civil case. In *State v. Palama*,<sup>34</sup> the ICA affirmed dismissal of criminal trespass charges involving a Native Hawaiian who asserted a traditional and customary right to hunt pigs on private property owned by the Robinson family in Hanapēpē, Kaua‘i. Acknowledging the absence of any Hawai‘i appellate cases directly addressing the asserted constitutional right, the court expressly limited its holding to “the narrow circumstances and the particular record in this case” which involved uncontroverted kama‘āina and expert testimony establishing pig hunting as a traditional and customary practice.<sup>35</sup>

In *Pele Defense Fund v. Department of Land and Natural Resources et al. (Pele III)*,<sup>36</sup> the ICA held that Native Hawaiian practitioners failed to establish a constitutionally protected traditional and customary right to hunt pigs in the Ka‘ū Forest Reserve.<sup>37</sup> Without addressing the water rights cases described above, the court instead relied upon the criminal decisions (*Hanapi* and *Pratt*).<sup>38</sup> This notwithstanding express recognition by the Department of Land and Natural Resources (DLNR) that pig hunting is considered by many to be a cultural practice, and despite acknowledged “uncertainty” based on conflicting expert testimony whether pig hunting is a traditional cultural and/or subsistence practice.<sup>39</sup> In light of these considerations, DLNR chose a preferred site for fencing and removal of feral and introduced pigs based on the site’s:

remote location and minimized impact on hunting to major hunting areas . . . and . . . because “few hunters currently access [the specific portion of the Reserve] due to the remoteness of the site[.]” Moreover, 80% of the Reserve will still be available and open for hunting use. DLNR determined that any affect to the hunters will be “mitigated by increasing access to large portions of the Reserve still available for hunting and by involving hunters in ungulate removal activities.”<sup>40</sup>

In other words, application of the criminal cases was unnecessary to the court's penultimate conclusion based on the state's right to *reasonably* regulate traditional and customary rights—more specifically, by preserving the Native ecosystem and watershed while reasonably accommodating even “uncertain” traditional and customary rights.<sup>41</sup>

#### IV. Impacts on Native Hawaiian Practices and Culture

For Native Hawaiians, traditional and customary practices are inextricably intertwined with ‘āina (land). Native Hawaiians’ cultural and spiritual identity derives from their relationship with ‘āina: ‘āina is part of their ‘ohana, and accordingly, traditional Hawaiian customs and practices emphasize respect and care for ‘āina and surrounding resources. Native practitioners continually reaffirm their knowledge of ‘āina and its resources through the exercise of traditional and customary gathering, hunting, and fishing practices for subsistence, cultural, and religious purposes.

In addition to deleting a footnote concerning the burden of proof from its original *In re TMT* opinion, the Court modified another footnote regarding contemporary Native Hawaiian cultural practices. The (since amended) footnote threatened to undermine Native Hawaiian rights as part of a living culture, by validating an artificial and oppressive distinction between “traditional” (i.e., valid) versus “contemporary” (i.e., invalid) practices, contrary to legal and cultural understandings that Native Hawaiian practices must be allowed to evolve in contemporary times consistent with the purpose and spirit of the original traditional practice. For example, *Palama v. Sheehan* rejected an attempt to restrict use of an ancient trail to horses and pedestrians based on practices in existence around the time of the original 1850 grant, relying instead on a prior landowner's enlargement of the trail in 1910 to accommodate vehicular access.<sup>42</sup> In *Pele II*, the trial court held on remand that hunting and gathering activities conducted in accordance with Hawaiian norms and values extant from 300-1400 A.D. were customary and traditional notwithstanding “changes in the items that they gather, as well as how they gather it,” in addition to carrying guns to hunt in addition to knives and hunting dogs.<sup>43</sup> Moreover, *PASH/Kohanaiki* recognizes that traditional and customary rights practices remain intact despite arguable abandonment of a particular site where there is a wish to continue those practices, although these rights may be subject to regulation in the public interest.<sup>44</sup> Thus, the Court amended its *In re TMT* opinion to conclude that BLNR:

appropriately took into account contemporary (as well as customary and traditional) Native Hawaiian cultural practices, finding and concluding that none were taking place within the TMT Project site or its immediate vicinity, aside from the recent construction of ahu to protest the TMT Project itself, which was not found to be a reasonable exercise of cultural rights. Further, although BLNR defined the “relevant area” in its *Ka Pa‘akai* analysis as the TMT Observatory site and Access Way, the Board's findings also identified and considered the effect of the project upon cultural practices in the vicinity of the “relevant area” and in other areas of Mauna Kea, including the summit region, as *Ka Pa‘akai* requires. See 94 Hawai‘i at 49, 7 P.3d at 1086 (“faulting the agency for failing to address ‘possible native Hawaiian rights or cultural resources outside [the area at issue]’”).<sup>45</sup>

The area at issue in *Ka Pa‘akai* involved almost 200 acres covered by a Resource Management Plan lying within a larger “petition area” totaling 1,009.086 acres that the petitioner sought to reclassify as an Urban District.<sup>46</sup> The relevant practices in *Ka Pa‘akai* included walking the trails of the ancestors

down the coastline from Mahai‘ula, Makalawena and Kukio—i.e., extending to the limits of the 1,000 acre petition area and beyond.<sup>47</sup> In this context, it is difficult to reconcile the Court’s conclusion in *In re TMT* that the BLNR was not required to address the third *Ka Pa‘akai* requirement by issuing findings regarding feasible action to reasonably protect Native Hawaiian traditional practices only a half mile away from the TMT Project<sup>48</sup> or as close as 225, 1300 or 1600 feet from the TMT Observatory and Access Way.<sup>49</sup>

In any event, the *In re TMT* Court recognized traditional and customary practices including “solstice and equinox observations on Pu‘u Wēkiu, burial blessings, depositing of piko (umbilical cord) near Lake Waiau as well as collection of water for use in healing and ritual practices, the giving of offerings and prayers at the ahu lele (sacrificial alter or stand), behind the visitor center adjacent to Hale Pōhaku, monitoring or observing the adze quarry, or observing stars, constellations, and the heavens.”<sup>50</sup>

The Court issued its most recent decision mentioning traditional and customary practices in August 2019. In *Ching v. Case*,<sup>51</sup> the cultural practices asserted by plaintiffs Clarence Ching and Mary Maxine Kahaulelio included, respectively, walking along ancestral trails located within the Pōhakuloa Training Area and other traditional and customary practices including song, dance, and chant about the area, celebrating the land and the flora and fauna that grow upon it, and honoring the current and historical significance of the area, in addition to cultural ceremonies at Pōhakuloa comparable to going to church.<sup>52</sup> Ching asserted that his spiritual and traditional practices were negatively affected by witnessing blank ammunition and other trash and military debris; Kahaulelio testified that this destruction of the land made her feel “angry” and “hurt.”<sup>53</sup>

Relying on *Kelly v. 1250 Oceanside Partners*,<sup>54</sup> *Kauai Springs*,<sup>55</sup> and Justice Pollack’s concurring opinion in *In re TMT*,<sup>56</sup> the Court unanimously held that the State has an ongoing trust obligation to ensure third-party compliance with permit provisions designed to protect trust property.<sup>57</sup> The State breached this obligation:

by failing to conduct regular monitoring and inspections that were reasonable in frequency and scope to examine the condition of the leased PTA land; by failing to ensure that the terms of the lease that impact the condition of the leased PTA land were being followed; and by failing to take prompt and appropriate follow-up steps when it was made aware of evidence that the lease may have been violated with respect to protecting the condition of the leased PTA land.<sup>58</sup>

Accordingly, the Court affirmed a trial court order concluding that BLNR breached its trust obligations by failing to mālama ‘āina (care for the land)<sup>59</sup> at Pōhakuloa on Hawai‘i Island leased to the U.S. military for training activities including live ammunition fire.<sup>60</sup> BLNR must, therefore, submit and (upon approval by the lower court) execute a plan that includes regular monitoring and inspections, detailed reports, and a procedure providing reasonable transparency to the Plaintiffs and the general public.<sup>61</sup>

Despite dramatic social, economic, and political change over the past two centuries, the Hawai‘i Constitution, along with statutory and case law, continues to protect traditional and customary rights. Without such protection, important natural and cultural resources could be lost or destroyed. Therefore, the State and its agencies must carefully consider these practices when making

decisions that could affect the exercise of traditional and customary rights.

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<sup>1</sup> 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (Joint Resolution of Congress acknowledging the 100th anniversary of the overthrow of the Kingdom of Hawaii and offering an apology to Native Hawaiians).

<sup>2</sup> Haw. Const. art. XII, § 7 (1978).

<sup>3</sup> STAND. COMM. REP. NO. 57, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637 (1980); *see also id.* at 637 (seeking “badly needed judicial guidance” and the “enforcement by the courts of these rights”).

<sup>4</sup> HRS § 1-1 (2005) (emphasis added).

<sup>5</sup> Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Planning Comm'n (*PASH/Kobanaiki*), 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied*, 517 U.S. 1163 (1996).

<sup>6</sup> HRS § 7-1 (2005).

<sup>7</sup> Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982).

<sup>8</sup> Pele Def. Fund v. Paty (Pele I), 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), *cert. denied*, 507 U.S. 918 (1993). On remand, the lower court held that the Native Hawaiian plaintiffs' gathering activities were traditional and customary activities related to subsistence, culture, and religion that had been practiced in the Puna area prior to November 25, 1892 (the date by which ancient usage must have been established). Pele Def. Fund v. Estate of James Campbell (Pele II), Civ. No. 89-089, 2002 WL 34205861 (Haw. 3d Cir. Aug. 26, 2002) (Conclusions of Law (COL) Nos. 19, 26 & 38). The Third Circuit further explained that these activities were not limited to the ahupua'a of residence, or by common law concepts related to tenancy or land ownership. *Id.* (COL Nos. 23-28). Among other things, the court also recognized the plaintiffs' access rights to Hawaiian trails running through the private landowner's property, based on the exercise of traditional and customary practices beyond the boundaries of the ahupua'a where the plaintiffs resided. *Id.* (COL Nos. 25-28).

<sup>9</sup> *PASH/Kobanaiki*, 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied*, 517 U.S. 1163 (1996). The *PASH/Kobanaiki* court left unresolved the definition of private property that is less than “fully developed.” *Id.* at 450, 903 P.2d at 1271 (“choos[ing] not to scrutinize the various gradations in property that fall between the terms ‘undeveloped’ and ‘fully developed’” but also “refus[ing] the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications”). It is clear that traditional and customary rights may be exercised on private property that is undeveloped or “not yet fully developed.” *Id.* at 451, 903 P.2d at 1272. Less clear, however, is the point at which land becomes “fully developed” so as to preclude the exercise of traditional and customary rights on the property. *See, e.g.*, State v. Hanapi, 89 Hawai'i 177, 186-87, 970 P.2d 485, 494-95 (1998) (holding that it is “always ‘inconsistent’ to permit the practice of traditional and customary native Hawaiian rights” on “lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure”) (emphasis in original); *id.* at 187 n.10, 970 P.2d at 495 n.10 (suggesting that “[t]here may be other examples of ‘fully developed’ property . . . where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights”). A “study group” of stakeholders, convened by the state Office of Planning at the request of the Hawai'i Legislature following the *PASH/Kobanaiki* decision, produced a list of factors differentiating undeveloped and “not fully developed” land from “fully developed” property. The study group determined that factors characterizing “fully developed” property include the following: all necessary discretionary permits have been issued, there is “substantial investment in infrastructure on or improvements to the property,” and the property owner's expectations of excluding practitioners of traditional and customary rights are high, while the Native Hawaiian practitioner's expectations of exercising those rights on the property are low. PASH/KOHANAIIKI STUDY GROUP, OFFICE OF STATE PLANNING, ON NATIVE HAWAIIAN TRADITIONAL AND CUSTOMARY PRACTICES FOLLOWING THE OPINION OF THE SUPREME COURT OF THE STATE OF HAWAII IN *PUBLIC ACCESS SHORELINE HAWAII V. HAWAII COUNTY PLANNING COMMISSION* 29 (1998).



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- <sup>10</sup> *Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n*, 94 Hawai‘i 31, 35, 47 & 52-53, 7 P.3d 1068, 1072, 1084 & 1089-90 (2000).
- <sup>11</sup> *Id.* at 49, 7 P.3d at 1086, *cited in* *In the Matter of Contested Case Hrg. re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve (In re TMT)*, 143 Hawai‘i 379, 396 n.16, 431 P.3d 752, 769 n.16 (as amended Nov. 30, 2018).
- <sup>12</sup> Act 50, § 1, 2000 Haw. Sess. Laws 93, 93 (codified as amended at HRS § 343-2 (2005)).
- <sup>13</sup> See [https://files.hawaii.gov/dbedt/erp/OEQC\\_Guidance/2012-GUIDE-to-the-Implementation-and-Practice-of-the-HEPA.pdf](https://files.hawaii.gov/dbedt/erp/OEQC_Guidance/2012-GUIDE-to-the-Implementation-and-Practice-of-the-HEPA.pdf).
- <sup>14</sup> See generally *Mauna Kea Anaina Hou v. Bd. of Land and Nat. Res. (Mauna Kea)*, 136 Hawai‘i 376, 363 P.3d 224 (2015); *id.* at 413-15, 363 P.3d at 261-63 (concurring opinion by Justice Pollack, joined by Justice Wilson, and joined by Justice McKenna as to Part IV, entitled “Constitutional Responsibilities of an Agency”).
- <sup>15</sup> *Id.* at 390, 363 P.3d at 238; *but see Flores v. Bd. of Land and Nat. Res.*, 143 Hawai‘i 114, 424 P.3d 469 (2018) (holding that the BLNR was not required to hold a contested case hearing on the approval of the state’s sublease of public lands, despite the objecting Native Hawaiian practitioner’s substantial interests under Article XII, § 7, because any risk of erroneous deprivation was adequately safeguarded by allowing the objector to fully participate in the contested case hearing on remand from the Mauna Kea case).
- <sup>16</sup> See *In re Kukui (Molokai), Inc.*, 116 Hawai‘i 481, 509, 174 P.3d 320, 348 (2007); *In re Wai‘ola o Molokai, Inc.*, 103 Hawai‘i 401, 442, 83 P.3d 664, 705 (2004) (holding that the agency “erroneously placed the burden” on Native Hawaiian intervenors “to establish that the [applicant’s] proposed use would abridge or deny their traditional and customary gathering rights” and “the absence of evidence that the proposed use would affect native Hawaiians’ rights was insufficient to meet the burden imposed upon . . . [the applicant] by the public trust doctrine, the Hawai‘i Constitution, and the [State Water] Code”).
- <sup>17</sup> D. Kapua‘ala Sproat, *Where Justice Flows Like Water: The Moon Court’s Role in Illuminating Hawai‘i Water Law*, 33 U.H. LAW REV. 537, 576 (2011).
- <sup>18</sup> *Kukui (Molokai)*, 116 Hawai‘i at 486, 174 P.3d at 325; *accord Kauai Springs, Inc. v. Planning Comm’n*, 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014) (citing *Kukui (Molokai)*); *id.* at 179 n.45, 324 P.3d at 989 n.45 (concluding that the Intermediate Court of Appeals “improperly shifted the burden [from the applicant] to the Planning Commission to disprove harm to the public trust resource”).
- <sup>19</sup> *Kukui (Molokai)*, 116 Hawai‘i at 509, 174 P.3d at 348.
- <sup>20</sup> HRS § 91-10(5).
- <sup>21</sup> *In re TMT*, 143 Hawai‘i at 408, 431 P.3d at 781 (citing Hawai‘i Administrative Rule (HAR) § 13-1-35(k) (2009)).
- <sup>22</sup> *Id.* at 408, 431 P.3d at 781 (upholding the hearings officer’s decision absent any allegation that her ruling resulted in any actual prejudice).
- <sup>23</sup> *Id.* at 402-03, 431 P.3d at 775-76.
- <sup>24</sup> See *id.* at 388, 431 P.3d at 761 (omitting reference to this claim in its categorization and summary of alleged points of error).
- <sup>25</sup> 143 Hawai‘i at 395-98, 431 P.3d at 768-71.
- <sup>26</sup> *In re TMT*, slip op. at 34 n.15 (Haw. Oct. 30, 2018) (*In re TMT* slip op.); *In re TMT*, Order Granting in Part and Denying in Part Motion for Reconsideration, SCOT-17-0000777 (Haw. Nov. 29, 2018).
- <sup>27</sup> *In re TMT* slip op. at 34-35 n.15. Pele I had nothing to do with Native Hawaiian practitioners participating in a contested case proceeding before an agency with an affirmative duty to protect their rights; instead, that case was a civil rights action brought by Native Hawaiian plaintiffs asserting federal and state breach of trust claims among other constitutional and statutory violations.
- <sup>28</sup> 79 Hawai‘i at 434 n.15, 903 P.2d at 1255 n.15.
- <sup>29</sup> *Id.* at 438, 903 P.2d at 1259.
- <sup>30</sup> *State v. Hanapi*, 89 Hawai‘i 177, 184, 970 P.2d 485, 492 (1998).
- <sup>31</sup> The court in *PASH/Kohanaiki* left open the question whether non-Native Hawaiian members of an ‘ohana, or descendants of non-Native Hawaiian citizens of the Kingdom of Hawaii who were not inhabitants of the

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Hawaiian Islands prior to 1778 may legitimately assert traditional and customary rights. *PASH/Kobanaiki*, 79 Hawai‘i at 449 n.41, 903 P.2d at 1270 n.41, *cited in* Hanapi, 89 Hawai‘i at 186 n.8, 970 P.2d at 494 n.8.

<sup>32</sup> State v. Pratt, 127 Hawai‘i 206, 216-18, 277 P.3d 300, 310-12 (2012).

<sup>33</sup> Pursuant to Hawai‘i Rules of Appellate Procedure (HRAP) Rule 35, unpublished memorandum opinions published on or after July 1, 2008 “are not precedent, but may be cited for persuasive value[.]” HRAP Rule 35(c)(2).

<sup>34</sup> 136 Hawai‘i 543, 364 P.3d 251 (Ct. App. 2015) (mem. op.).

<sup>35</sup> *Id.* at \*8 & n.17 (citing a Standing Committee Report from the 1978 constitutional convention referencing “subsistence gathering and hunting activities that consumed but did not deplete the natural resources, wild animals and birds of the ahupua‘a”); *see also id.* at \*12 & n.24 (observing that the constitutional and statutory protections afforded to traditional and customary practices would be frustrated if private landowners were permitted to grant or deny access under HRS § 183D-26, as distinguished from the regulatory processes that cultural practitioners failed to avail themselves of in *Pratt*, 127 Hawai‘i at 218, 277 P.3d at 312, concerning a camping permit/curatorship or authorization to enter, and State v. Armitage, 132 Hawai‘i 36, 55, 319 P.3d 1044, 1063 (2014), involving a claim to access the Kaho‘olawe Island Reserve).

<sup>36</sup> 141 Hawai‘i 381, 409 P.3d 785 (Ct. App. 2018) (mem. op.).

<sup>37</sup> *Id.* at \*13.

<sup>38</sup> *Id.* at \*13-15.

<sup>39</sup> *Id.* at \*10-12; *see, e.g., id.* at \*12 (concluding that “removal of pigs from the management area” would not constitute a significant effect on the environment involving an irrevocable commitment to or loss or destruction of any natural or cultural resources, because DLNR’s Division of Forestry and Wildlife “balance[s] providing public hunting opportunities in the Reserve with the protection of native ecosystems and watersheds, and the Plan includes actions to substantially facilitate public hunting in the Reserve” while “[e]ffects to pig hunting will not be significant, and other subsistence resources produced in or by the Reserve would be substantially enhanced”).

<sup>40</sup> *Id.* at \*12.

<sup>41</sup> *Id.* at \*14-15.

<sup>42</sup> 50 Haw. 298, 302, 440 P.2d 95, 99 (1968); *see also* NATIVE HAWAIIAN LAW: A TREATISE 817 (Melody Kapilialoha MacKenzie et al., eds. 2015).

<sup>43</sup> 2002 WL 34205861 (FOF 50, 77 & COL 26).

<sup>44</sup> *PASH/Kobanaiki*, 79 Hawai‘i at 441 n.26 & 449-50, 903 P.2d at 1262 n.26 & 1270-71.

<sup>45</sup> 143 Hawai‘i at 396 n.16, 431 P.3d at 769 n.16 (quoting *Ka Pa‘akai*, 94 Hawai‘i at 49, 7 P.3d at 1086).

<sup>46</sup> *Ka Pa‘akai*, 94 Hawai‘i at 37 & 39, 7 P.3d at 1074 & 1076.

<sup>47</sup> *Id.* at 49 n.30, 7 P.3d at 1086 n.30.

<sup>48</sup> 143 Hawai‘i at 406, 431 P.3d at 779.

<sup>49</sup> *Id.* at 396, 7 P.3d at 769.

<sup>50</sup> *Id.* at 396, 431 P.3d at 769.

<sup>51</sup> Ching v. Case, 145 Hawai‘i 148, 449 P.3d 1146 (2019).

<sup>52</sup> *Id.* at 155, 161 & 162, 449 P.3d at 1153, 1158 & 1159.

<sup>53</sup> *Id.* at 161, 449 P.3d at 1159.

<sup>54</sup> Kelly v. Oceanside Partners, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006) (holding that state agency has a public trust duty to “not only issue permits after prescribed measures appears to be in compliance with state regulation [protecting coastal waters adjacent to a developer’s property from storm water pollution], but also to ensure that the prescribed measures are actually being implemented”), *cited in* Ching, 145 Hawai‘i at 170 & 178, 449 P.3d at 1168 & 1176.

<sup>55</sup> 133 Hawai‘i at 172, 324 P.3d at 982 (holding that the constitutional public trust duty of the state and its political subdivisions to “weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature”), *cited in* Ching, 145 Hawai‘i at 178, 449 P.3d at 1176.

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<sup>56</sup> 143 Hawai‘i at 416, 431 P.3d at 780 (opining that “although some congruence exists, BLNR’s and the University of Hawai‘i at Hilo’s public trust obligations are distinct from their obligations under HAR § 13-5-30(c)”), *cited in Ching*, 145 Hawai‘i at 178, 449 P.3d at 1176.

<sup>57</sup> *Id.* at 179, 449 P.3d at 1177 (citing *Kelly v. Oceanside Partners*).

<sup>58</sup> *Id.* at 182, 449 P.3d at 1180.

<sup>59</sup> *Id.* at 162 n.26, 449 P.3d at 1160 n.26.

<sup>60</sup> *Id.* at 186, 449 P.3d at 1184; *see also id.* at 176-82, 449 P.3d at 1174-80.

<sup>61</sup> The Court further ordered the trial court to convert other requirements into non-binding recommendations involving potential breaches by the United States, contested case procedures for Plaintiffs or other members of the public to contest the State’s management decisions concerning the PTA, and attempts to seek adequate funding for a comprehensive cleanup of the area. *Id.* at 186, 449 P.3d at 1184.