Kūkulu Waiwai: Water as a Public Trust

I KULEANA LIKE AI KĀKOU! EMBRACING COLLECTIVE RESPONSIBILITY

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What’s the first word that comes to mind when you think of wai? Please enter your response in the chat box! Send it to “Everyone” (The icon should be ~the middle/bottom of your zoom screen)
Roadmap for today’s session

- Role and significance of water in Pre-European contact Hawai‘i
- Legal and cultural frameworks for water resource management in Hawai‘i today
- What does this all mean for members of state and county boards and commissions and other officials?
- Will do my best to save time for Q&A at the end

Kānaka Maoli worldview

- Creation story details the genesis of life in Hawai‘i: Papa & Wākea gave birth to the islands
- After all of the Hawaiian Islands were born, Wākea had a child with Ho‘ohōkūkalani. He was stillborn, but a kalo plant grew from his grave
- Wākea & Ho‘ohōkūkalani had a second child: the first Kanaka Maoli
- This relationship is a kuleana to care for our natural and cultural resources as a public trust for present and future generations
From wai to kānāwai

In ‘Ōlelo Hawai‘i:

- Wai = fresh water
- Waiwai means wealth
- Kānāwai is the law
- Both wealth and the law are defined by fresh water

Ola i ka wai: water is life

- Provided drinking water
- Enabled kalo cultivation
- Recharged ground water
- Supported estuaries & fisheries
- For Kānaka Maoli, this was just common sense!
- Supported a population ≈ Hawai‘i’s current population
Kānāwai: law developed around water

- Kānāwai = relating to water
- Fresh water was a kinolau of Akua Kāne
- Could not be reduced to physical ownership
- Resource managed for the good of the larger community

Kingdom of Hawaiʻi 1840 Constitution

Declared that the land, along with its resources, “was not [the King’s] private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of landed property.”
Gifts from the west

- 1778: beginning of the end; physical & cultural genocide
- Native Hawaiians decimated by disease: population of \( \approx 1 \) million collapsed to < 40,000 within 1st century of contact
- Foreign demands for goods fueled political instability

The impacts of sugar plantations

[Images of sugar plantations and associated impacts]
From kalo to sugar and “hard crackers”

DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION.—A letter by S.D. Hakuole, of Kula, Maui arrived at our office, she was declaring that the land of Wailuku is being lost due to the cultivation of sugarcane. Furthermore, she states the current condition of once cultivated taro patches being dried up by the foreigners, where they are now planting sugarcane. Also, she fears that Hawaiians of that place will no longer be able to eat poi, and that there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people. Although, let it be known that the Hawaiian people were accustomed to eating poi.

Hawai‘i’s Democratic Revolution of 1954
Re-emergence of Public Trust principles

_McBryde Sugar Co. v. Robinson (1973)_

1978 Constitutional Convention

- 1978 Constitutional Convention facilitated progressive changes in education, workers’ rights, natural resource protection, & other areas
- State Constitution amended to protect and preserve Native Hawaiian culture and practices
- Established the framework for water law and management in Hawai‘i today
What’s the first word that comes to mind when you think of wai?

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(The icon should be ~ the middle/bottom of your zoom screen)

Water law in Hawai‘i today

- Constitution of the State of Hawai‘i
- Water Code: Hawai‘i Revised Statutes Chapter 174C
- Hawai‘i Admin. Rules Chapters 13-167 to 13-171
- Court decisions interpreting the laws listed above
Hawaiʻi Constitution, article XI, section 1

The State and its political subdivisions must

- “[C]onserve and protect Hawaiʻi’s natural beauty and all natural resources . . .”
- “[P]romote 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.”
Kelly v. 1250 Oceanside, 111 Haw. 205 (2006)

“[T]he plain language of article XI, section 1 mandates that the County does have an obligation to conserve and protect the state’s natural resources” under the public trust.

Hawai‘i Constitution, article XI, section 7

“The State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.”
Waiāhole I, 94 Haw. 97 (2000)

“article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i”

Public trust doctrine

- Imposes a dual mandate of
  1. protection
  2. maximum reasonable & beneficial use

- Establishes an “affirmative duty to take the public trust into account in planning and allocation of water resources, and to protect public trust uses whenever feasible”
Article XI, section 7 also lays the groundwork for the Water Commission & Code

- Commission is comprised of 7 members, all of whom need “substantial experience in the area of water resource management”

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawai‘i’s water resources.
Hawaiʻi Constitution, article XI, section 9

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

Hawaiʻi Constitution, article XII, section 7

“The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes”
Time for a poll!

Hawai‘i Water Code, HRS ch. 174C

- Commission has dual mandates to promote “reasonable-beneficial use,” and protect the public’s interest in the resources
- Regulates ground water through Sustainable Yields, and well construction and pump installation permits
- Manages surface water through Interim Instream Flow Standards; some permits as well
- Issues Water Use Permits in designated Water Management Areas only
Water Code: designation

- Designation is a legal process under the Water Code that identifies areas where water resources are currently or may become threatened.
- Designation imposes additional permitting requirements on almost all consumptive uses of water.
- Initially conceived as a way to phase-in water management; was a political compromise to appease Maui County and enable passage of the Water Code.
- Ground or Surface Water Management Areas may be designated.

![Water Management Areas Diagram](image)
4. Water as a Public Trust
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**Native Hawaiian Law Training**  
**June 2022**

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**Water Code: ground v. surface water**

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**Stream protection: IFS/IIFS**

- Commission manages surface water through Instream Flow Standards (“IFSs”) and Interim Instream Flow Standards (“IIFSs”)
- An IFS is the amount of stream flow required in a particular stream to protect beneficial instream uses (e.g., fish, wildlife, recreational, scenic, aesthetic, Native Hawaiian rights)
- IIFSs were required to have been set by 1988; Commission adopted the status quo
- Historically, almost all IIFSs based on any actual science were established through litigation; now, the Commission is being more proactive
Instream needs & offstream uses

- **Fish/Wildlife Habitat**
  - Stream Channellizations
  - Native Vegetation
  - Invertebrates
  - Diverse Species
  - Recruitment
  - Abundance
  - Diversity
  - Distribution
  - Other

- **Recreation**
  - Swimming
  - Nature Study
  - Fishing
  - Boating
  - Parks
  - Other

- **Ecosystem Maintenance**
  - Estuaries
  - Wetlands
  - Nearshore Waters
  - Natural Area Reserves
  - National Parks
  - Other Protected Areas
  - Other

- **Aesthetics**
  - Scenic Views
  - Waterfalls
  - Tourism
  - Other

- **Non-Stream Uses**
  - Diversions
  - Domestic/Municipal Use
  - Agriculture
  - Industrial
  - Present vs. Potential Use
  - Economic Impacts
  - Other

**Hydrology**
- Median Flow
- Base Flow
- Pre-Diversion Flow Estimates
- Groundwater Interaction
- Surface-Water Use
- Ground-Water Use
- Other

**Navigation**
- Boating
- Other

**Hydropower**
- Present Use
- Potential Use
- Other

**Water Quality**
- 303(d) Impaired Waters
- Total Maximum Daily Loads
- Land Use
- Other

**Conveyance of Water**
- Multiple Diversions on a Single Stream
- Other

**Hawaiian Rights**
- Traditional and Customary Rights
- Ta'au Cultivation
- Aponement Rights
- Cultural Values
- Other

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**Ground water & sustainable yields**

- Just as IFS/IIFS implement Stream Protection & Management, **Sustainable Yields** are the Commission’s principal mechanism to ensure adequate management of ground water supplies.

- A “sustainable yield” is the maximum amount of water that may be taken from an aquifer over a given period of time while still maintaining the integrity of that water source.
4. Water as a Public Trust
Native Hawaiian rights: T & C

- The “traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians . . . shall not be abridged or denied by this chapter.” Such rights include growing kalo and gathering resources in the streams & marine areas for subsistence, cultural & religious purposes.

Appurtenant rights

- Water Code recognizes the “appurtenant water rights of kuleana and taro lands”
Appurtenant rights: a contradiction

- Highest level of protection. “Appurtenant rights are preserved”

- Appurtenant rights may be severed if attempts are made to transfer or reserve these rights

Native Hawaiian rights: DHHL reservations

- The Commission must “incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands”
Time for another poll!
Hawai‘i Constitution, article XI, section 1

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’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.

Kelly v. 1250 Oceanside, 111 Haw. 205 (2006)

- Community groups sued the County of Hawai‘i and DOH for violating the public trust doctrine by failing to prevent 1250 Oceanside from violating water quality standards
- The Circuit Court agreed & the developer appealed
- Supreme Court decision is complex. Most relevant to our training, the Court held: (1) the County had an affirmative duty under PT to protect coastal waters from polluted runoff’ (2) DOH’s PT duties included ensuring conditions were actually implemented
What does this mean for you?

- What does having a public trust over water resources really mean?
- How do you fulfill your kuleana to protect and conserve water resources?
- And how does this fit in with other laws and policies that your agency is charged with implementing?

The Waiāhole Ditch

- System completed: May, 1916
- Capacity: 125,000,000 gallons per day
- Water: 114 million gallons of water per day for Waiāhole use
- Designed for 10 million gallons of water per day
- Elevations: Waialua at a elevation of 120 ft. and ends at an elevation of 400 ft. in Hauula Aloa.
What is the Public Trust over water?


- “[T]he public trust doctrine applies to all water resources without exception or distinction.”
- “In view of the ultimate value of water to the ancient Hawaiians, it is inescapable that the sovereign reservation was intended to guarantee public rights to all water, regardless of its immediate source.”
- “Protected “trust purposes” include resource protection, Native Hawaiian rights and practices, appurtenant rights & domestic water. *Waiʻala* added DHHL reservations
- Presumption in favor of trust purposes; burden on state and commercial users to justify proposed uses

Fulfilling your kuleana under the Public Trust


- Imposes “a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.”
- Establishes an “affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible.”
- Agencies “may compromise public rights in the resource pursuant only to a decision made with the high priority these rights command under the laws of our state.”
How does the PT work with other laws?

_Waiāhole, 94 Haw. 97 (2000)_

- The public trust provides independent authority to guide agencies in fulfilling their mandates
- Practically speaking, the public trust is a prism through which members of state and county agencies must examine their responsibilities under specific laws the agency is charged with enforcing
- Agencies must hold permit applicants to their burdens of proof & actively protect water resources
- Decisions must articulate a reason(s) in the context of the laws and policy the agency enforces

Got it?

- Everyone still with me?
- Time for a poll to confirm!
- Just in case, let’s look at how one county agency worked valiantly to fulfill its public trust duty to protect and conserve Hawai’i’s water resources
**Kauaʻi Springs, 133 Haw. 141 (2014)**

- Kauaʻi Springs operates a private water bottling business in Kōloa, Kauaʻi
- The facility is on land zoned for agriculture & needs permits
- KS buys water from Knudsen Trust taken from Kahili Mountain via tunnel & ditch
- Planning Comm’n held public hearings & sought input from Water Comm’n & PUC, which was inconclusive

**Kauaʻi Springs, cont.**

- Planning Comm’n ruled that KS failed to carry its burden of proof & denied the permit
- The Planning Comm’n did an admirable job of fulfilling its Public Trust duties, e.g., holding KS to its burden of proof
- KS appealed and the circuit court ruled in its favor
- On April 30, 2013, the ICA issued an opinion & in February 2014 the Supreme Court ruled
Kaua‘i Springs, cont.

- The Supreme Court affirmed the ICA’s decision to the extent it vacated the circuit court’s judgment & remanded to the Planning Commission
- Dealt with two major issues
- We will focus on the factors a government agency must consider in reviewing an application for the use of a public resource under Kelly

Six principles for agencies

- The Hawai‘i Supreme Court distilled six principles that agencies must apply to fulfill their mandates:
  
  (1) “The agency’s duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use[;]”
  
  (2) Agencies “must determine whether the proposed use is consistent with the trust purposes[;]”
  
  (3) Agencies need to “apply a presumption in favor of public use, access, enjoyment, and resource protection[;]”
Six principles, cont.

(4) Agencies must “evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water[;]”

(5) “If the requested use is private or commercial, the agency should apply a high level of scrutiny[;]” and

(6) Agencies must apply “a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.”

Four affirmative showings for applicants

➢ The Court also highlighted four affirmative showings that applicants must make to carry their burdens under the trust:

(1) “their actual needs and the propriety of draining water from public streams to satisfy those needs[;]”

(2) the absence of practicable alternatives, including alternate sources of water or making the proposed use more efficient;

(3) “no harm in fact” to public trust purposes “or that the requested use is nevertheless reasonable and beneficial[;]” &

(4) “if the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.”
Kauaʻi Springs, cont.

- What does this mean for you?
- Carefully examine your agency’s mandates and how they impact fresh water resources
- Use the public trust as a framework for your analysis: presumption in favor of public trust purposes, permit applicants bear the burden of proof, etc.
- Consider what impact your decision will have on traditional & customary Maoli practices

I kuleana like ai kākou!

Mahalo for embracing our collective responsibility to this incredibly special place, its culture, and first people!
Ola I Ka Wai water primer

- Available online at: https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/news/18470/WaterPrimer.pdf

Mahalo piha!

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