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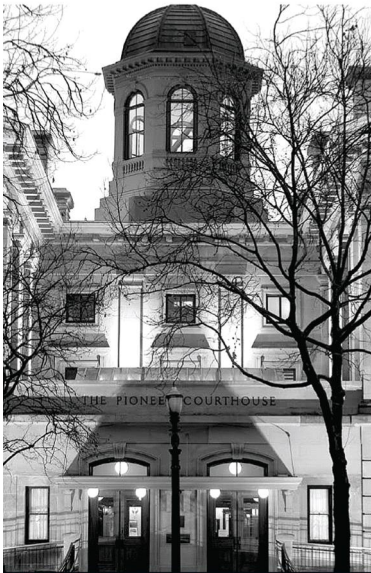
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**STATE OF HAWAII**

**LAND USE COMMISSION**

Hearing held on May 12, 2022

Commencing at 9:17 a.m.

Held at

Hilton Garden Inn Kauai Wailua Bay

Conservatory Room

3-5920 Kuhio Highway

Kapaa, Hawaii 96746

IX. **CALL TO ORDER**

X. **PUBLIC TRUST PRESENTATION**

by Chair Jonathan S. Scheuer, Ph.D.

XI. **ADJOURNMENT**



**DEPOSITION AND TRIAL**



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**BEFORE :**

1 **APPEARANCES :**

2

3 **COMMISSIONERS PRESENT :**

4 Jonathan Scheuer, Chair

5 Dan Giovanni

6 Lee Ohigashi

7 Edmund Aczon

8 Nancy Cabral

9 Gary Okuda

10 Kuike Kamakea-Ohelo

11

12 **STAFF PRESENT :**

13 Daniel Orodener, Executive Officer

14 Scott Derrickson, Chief Planner

15 Riley Hakoda, Staff Planner

16 Martina Segura, Staff Planner

17 Natasha Quinones, Chief Clerk

18 Ariana Kwan, Administrative Assistant

19 Linda Chow, Esq. Deputy Attorney General

20

21

22 **PUBLIC TESTIMONY :**

23 Felicia Cowden, Council Member, County of Kauai

24

25

1           **CHAIRMAN SCHEUER:** Finally, any decisions  
2 that are made that compromise that use (inaudible)  
3 require a process with the highest levels of  
4 openness, diligence, and foresight possible  
5 (inaudible).

6           Because this is being recorded, just maybe  
7 half a minute to introduce myself (inaudible)  
8 watching this afterwards (inaudible).

9           My name is Jonathan Scheuer. I was part  
10 of (indiscernible) on the island of Oahu. My  
11 parents (indiscernible) Hawaii in 1950, and I'm the  
12 youngest of four children.

13           I've had the incredible honor and pleasure  
14 of living and working in Hawaii for my professional  
15 life, including particularly in the Native Hawaiian  
16 community, and I'm about to finish eight years of  
17 service to Hawaii on boards and commissions, three  
18 years on the Oahu Island Burial Council and now  
19 eight years on the LUC with the fourth -- in the  
20 fourth year as chair, and it's been an incredible  
21 honor.

22           So the four points that I said I want to  
23 get to, first, is there's three independent legal  
24 origins of the public trust in Hawaii, so I want to  
25 talk about each of those and why it matters that

1 there's three separate independent origins of the  
2 trust.

3           Then I want to talk, secondly, about how  
4 our understanding of the public trust has evolved a  
5 bit, particularly by using water as an example of  
6 how our understanding has evolved over the years.

7           Third, just briefly go over some key  
8 guidance from the courts to boards and commissions  
9 on how they should manage their public trust duties.  
10 And finally, just some personal observations and  
11 thoughts about the challenges ahead, so the Land Use  
12 Commission and other boards and commissions can have  
13 this clear.

14           This picture is a picture of Emperor  
15 Justinian, a Roman emperor who actually codified  
16 Roman law. So the first origin of the Public Trust  
17 Doctrine in Hawaii -- and this is not in priority  
18 order -- comes to us from Roman law through English  
19 and American common law into Hawaii law. We have an  
20 independent origin in Hawaii Kingdom law. And then  
21 we also have particular state constitutional  
22 provisions that set up the public trust doctrine.

23           So first, how did the public trust arise  
24 in Roman law make its way into English law and  
25 American common law and all the way to Hawaii?

1           And it's just a brief preface. There are  
2 people in this room who know more about these  
3 particular things and who actually trained attorneys  
4 more than I am. Hopefully, the point of this talk  
5 will be more of a synthesis of a bunch of disparate  
6 things that bring them together rather than trying  
7 to say, oh, I know all about any particular thing in  
8 depth.

9           All of these issues that I raise have  
10 books and legal articles and lots of scholarship and  
11 legal rulings around them, so I'm just trying to  
12 take an overview of them to see how they all fit  
13 together.

14           So how did this come to Hawaii? Often,  
15 legal scholars attribute the first legal  
16 incorporation of the public trust Doctrine into the  
17 Justinian Code.

18           Emperor Justinian, when he codified Roman  
19 law, one of the provisions was, "By the law of  
20 nature these things are common to mankind - the air,  
21 running water, the sea, and consequently, the shores  
22 of the sea. No one, therefore, is forbidden to  
23 approach the seashore, provided that he respects the  
24 habitations, monuments, and buildings which are not,  
25 like the sea, subject only to the law of nations."

1 In other words, there's some resources  
2 that everybody needs for their existence that's so  
3 important it does not make sense for there to be  
4 private property.

5 Jumping ahead a few hundred years with the  
6 Roman occupation of Britain. This makes its way,  
7 eventually, into the first bits of English common  
8 law and then the Magna Carta in 1215.

9 One of the -- there's an interesting  
10 practice of putting fish traps and fish weirs in  
11 various streams around Britain in order to capture a  
12 fish, but this impeded navigation of those various  
13 streams. And so one of the provisions had fought  
14 over by (indiscernible) the Magna Carta and imposed  
15 on the crown said, "All fish weirs shall be removed  
16 from the Thames, the Medway, and throughout the  
17 whole of England, except on the seacoast."

18 In other words, even though these private  
19 lords has certain rights to go fishing and to gather  
20 fish from these streams, there was this underlying  
21 idea that something is so public, the ability of the  
22 public to transverse these streams, that this could  
23 actually be -- these private practices could be  
24 removed in respect of the public trust practices.

25 Ignoring a very long and complex history

1 of American juris prudence on this, one case that  
2 gets cited all the time is the case of the Illinois  
3 Central Railroad versus the State of Illinois.  
4 Early on, the legislature of Illinois granted a huge  
5 grant of coastal lands to the Illinois Central  
6 Railroad, saying, "Here, we're giving these to you  
7 in the City of Chicago, for the development of port  
8 and railroad facilities."

9           And then later, they tried to take some of  
10 them back. And what the court essentially ruled,  
11 the U.S. Supreme Court, was that the original grant  
12 was invalid because the state, even the legislature,  
13 didn't have that ability to simply wholesale give  
14 away the public trust interest in that coastal area  
15 to a private entity.

16           And the court ruled "It is the settled law  
17 of this country that lands covered by tide waters  
18 belong to the respective states with the consequent  
19 right to use or dispose of any portion thereof, when  
20 that can be done without substantial impairment of  
21 the interest of the public in the waters, and  
22 subject always to the paramount right of congress to  
23 control their navigation."

24           And in 1892, the year before the  
25 overthrow, the legislature of Hawaii expressly

1 adopted English common law to be the law -- part of  
2 the law of Hawaii, and this survives to this day as  
3 Hawaii Revised Statutes, Chapter 1, Section 1. "The  
4 common law of England, as ascertained by English and  
5 American decisions, is declared to be the common law  
6 of the State of Hawaii in all cases, except as  
7 otherwise expressly provided by the Constitution or  
8 laws of the United States, or by the laws of the  
9 State, or fixed by Hawaiian judicial precedent, or  
10 established by Hawaiian usage."

11           So how do we get from Emperor Justinian  
12 all the way to Hawaii? That's how.

13           Second, how did the public trust arise in  
14 Hawaiian Kingdom Law? So right in various  
15 traditions, Hawaii and Hawaiians and all the things  
16 in Hawaii are genealogically related to each other.

17           And the tradition around the origin of  
18 Kalo or Taro, Papa and Lakaya (phonetic), had a  
19 first child Ho'ohokukalani, who was stillborn. The  
20 parents buried that child and in the spot where the  
21 child was buried, from that spot the first Kalo  
22 plant grew.

23           They had a second child which was Haloa,  
24 or the first human. That legend speaks to many  
25 things, including the duty of humans, as the younger



1 sibling of Kala, to take care of it, but also points  
2 to what appears throughout Hawaiian mythology the  
3 idea that what we now call "resources" are actually  
4 physical embodiments of the gods.

5           They are deities with whom we share the  
6 world and with whom our leaders help manage those  
7 resources but not as their own private property but  
8 really for everybody's benefit.

9           I have two long quotes. I wanted to  
10 include this because Commissioner Okuda, during our  
11 conversation yesterday, mentioned knowing Kawena  
12 Pukui as a child. And there's a quote from Handy in  
13 Handy and Pukui's book "Native Planters in Old  
14 Hawaii," where they specifically talk about this.  
15 It's a long quote. I put it on two slides.

16           Pukui says, "Inalienable title to water  
17 rights in relation to land use" -- so it should say  
18 "was" -- "a conception that had no place in the  
19 Hawaiian way of thinking. Water, whether for  
20 irrigation, for drinking, or other domestic  
21 purposes, was something that 'belonged' to Kane-i-  
22 ka-wai-ola (Procreator-in-the-water-of-life), and  
23 came through the meteorological agency of Lono-makua  
24 the Rain-provider. "The paramount chief, born on  
25 the soil and hence firstborn of the maka'ainana of

1 moku (island or district), was a medium in whom was  
2 vested power and authority. But this investment was  
3 instrumental in providing only a channeling of power  
4 and authority, not a vested right. But this was not  
5 equivalent to our European concept of 'divine  
6 right.' "The ali'i nui, in old Hawaiian thinking  
7 and practice, did not exercise personal dominion,  
8 but channeled dominion. In other words, he was a  
9 trustee. The instances in which an ali'i nui was  
10 rejected and even killed because of abuse of his  
11 role are sufficient proof that it was not personal  
12 authority but trusteeship that established right  
13 (pono)."

14 I didn't have to include the last  
15 sentence, but I thought it's a useful reminder to us  
16 as Land Use Commissioners of what can happen if we  
17 make bad decisions.

18 Legal understanding and really what was a  
19 religious as well as a legal understanding of the  
20 world was incorporated into the very first laws of  
21 the Kingdom of Hawaii. In the 1840 constitution it  
22 states, "The land, along with its resources, 'was  
23 not the King's private property. It belonged to the  
24 Chiefs and the people in common, of whom the King  
25 was the head and had the management of landed

1 property.'" So this idea that certain resources  
2 were not privately held but were really held as  
3 trust was there.

4 And then in the Kuleana Act, in 1850, when  
5 the legislature and the King, witnessing massive  
6 depopulation of the islands, were trying to figure  
7 out what to do.

8 And I don't have it in this slideshow, but  
9 I have -- there was a great survey of the  
10 missionaries in the 1840s across Hawaii that was  
11 done by the American Board of Foreign Missions. And  
12 one of the recurring themes that happens from the  
13 missionaries when they're asked what's causing the  
14 depopulation of the islands and what do you think we  
15 can do is like -- on quite a few of them it's like,  
16 "I think the problem is you don't have private  
17 property."

18 And it sounds a little egregious, but I'm  
19 actually not making that up. That's exactly what  
20 they say, and they say, you know, if we had private  
21 property and land, maybe Hawaiians would be more  
22 motivated to make money and improve their lot, and  
23 they would survive (indiscernible).

24 And so partly with that sort of historical  
25 understanding, the legislature takes this monumental

1 move to privatize some resources, some land, and  
2 some rights in land rather than have it held in  
3 trust. But really clear exceptions are made, which  
4 we now understand to be including the traditional  
5 customary rights of native Hawaiians which exists on  
6 all undeveloped private property, less than fully  
7 developed private property, as well as on water.

8           And specifically, the Kuleana Act, "The  
9 springs of water, running water, and rights of way  
10 shall be free to all, on all lands granted in fee  
11 simple; provided that this shall not be applicable  
12 to wells and watercourses, which individuals have  
13 made for their own use."

14           In other words, at that particular time,  
15 there wasn't like large-scale commercial  
16 agriculture. It was like if you had a house and you  
17 put a well on it or if you had like a little stream  
18 diversion. We're not saying that we're taking that  
19 away from you, but otherwise, all this water, all  
20 these streams, all this groundwater are free to all.

21           So that is how that comes into Hawaii law,  
22 that really ancient tradition of a public trust.  
23 How did it arrive into the state constitution?  
24 There's some very specific provisions that were  
25 included in the 1978 Constitutional Convention,

1 Article XI, Section 1: "All public natural  
2 resources are held in trust by the State for the  
3 benefit of the people." Unambiguous.

4 We often hear -- before this board and  
5 before other boards and commissions, some people  
6 say, "Well, the Public Trust Doctrine is a  
7 constitutional provision in Hawaii." It is more  
8 than a constitutional provision, though it is  
9 absolutely in the constitution.

10 In addition to that, in Article XI,  
11 Section 7, which creates -- calls for the creation  
12 of the Water Code, "The State has an obligation to  
13 protect, control and regulate the use of the  
14 Hawaii's water resources for the benefit of its  
15 people."

16 And then also, the traditional and  
17 customary rights of native Hawaiians which are  
18 related to property rights are also included. "The  
19 State reaffirms and shall protect all rights,  
20 customarily and traditionally exercised for  
21 subsistence, cultural and religious purposes and  
22 possessed by ahupua'a tenants who are descendants of  
23 Native Hawaiians who inhabited the Hawaiian Islands  
24 prior to 1778, subject to the right of the State to  
25 regulate such rights."

1 And this is a report from the committee  
2 that recommended the final language of the provision  
3 that called for the creation of the water code. As  
4 they -- the committee and the Constitutional  
5 Convention in 1978 reported to the whole body. Why  
6 did we write it this way?

7 It says, "Accordingly, your committee  
8 concluded that the Constitution should specify that  
9 the State holds the water resources in trust, with  
10 the responsibilities of a trustee to actively  
11 protect, control and regulate the development of  
12 water resources in the State. This concept implies  
13 not only the power to protect the resources but the  
14 responsibility to do so long before any crisis  
15 develops."

16 So we're almost done with part one. Why  
17 does it matter? Why does it matter that we have  
18 three independent sources of the public trust in  
19 Hawaii? I'll give two particular examples.

20 This is language directly form the  
21 Waiahole Water case, which I'll talk a little bit  
22 more about later. But direct quote from the Supreme  
23 Court, "The Code and its implementing agency, in  
24 this case, the Water Commission, do not override the  
25 Public Trust Doctrine or render it superfluous.

1 Even with the enactment and any future development  
2 of the Water Code, the doctrine continues to inform  
3 the Code's interpretation, define its permissible  
4 'outer limits,' and justify its existence."

5 In other words, even if the legislature  
6 got rid of the Water Code or, as Peter Young once  
7 proposed, devolve all the powers of the county, the  
8 Public Trust Doctrine wouldn't go away because the  
9 law was changed.

10 A more recent example -- and I'm quoting  
11 the Senior Senator from Hawaii and U.S. Senator from  
12 Hawaii, in February of 2020, right before the world  
13 imploding through the COVID. She and a number of  
14 other elected officials published a beat, an opinion  
15 piece and civil beat called something like "Coming  
16 Together to Solve Hawaii's Housing Crisis."

17 And so on February 5th of 2020, no  
18 committees have met at the legislature yet,  
19 basically. And they say, oh, by the way, "With  
20 input from the counties, laws will be changed to  
21 reduce regulatory barriers in the Land Use  
22 Commission and State Historic Preservation Division  
23 to accelerate housing development."

24 Now, a lot of things happened the next  
25 month of March 2020, including the pandemic. But

1 the point of my putting this up is that every year  
2 I've been on the Land Use Commission and every,  
3 every year before that, people tried to get rid of  
4 the LUC in various ways or reduce our powers.

5 Just because they might change the statute  
6 that governs the LUC does not get away from the  
7 State and the LUC's public trust responsibilities.  
8 It might make it much harder for us to render and  
9 fulfill those responsibilities, but it doesn't  
10 eliminate them because of these independent sources  
11 of law.

12 Okay. One-quarter done, and actually, I  
13 think that was the longest part.

14 Just to illustrate a few more things, I  
15 want to talk a little bit about how the public trust  
16 has evolved regarding water in Hawaii. And this is  
17 an area where I have practiced. Not as an attorney  
18 but as an advocate in front of the Water Commission  
19 for about -- it's approaching now, I believe, about  
20 a quarter century.

21 So this is crazy, right? But despite the  
22 fact that -- oh, my -- the first Constitution said,  
23 hey, all these public resources are held in trust,  
24 and despite the kuleana that said water is to be  
25 held in trust, the plantations arise soon after.



1 Sugar plantations, the large ranches, later  
2 pineapple.

3           And there are stories in Hawaiian language  
4 newspapers from around Hawaii. This is one from  
5 Nawaiaha, which because I don't have two screens,  
6 I'm not able to read the English language  
7 translation right in front of me. But basically it  
8 says, you know, hey, I'm reporting from Maui, and  
9 all the natives in this area, they have no more poi.  
10 They were forced to eat hard crackers, Saloon  
11 Pilots, crackers that hurt the mouth but do not  
12 satisfy the hunger of the Native Hawaiian people.

13           So we start to go through this weird  
14 transition. The Black Letter law says, hey, it's a  
15 public trust. Nobody owns it. The King holds it in  
16 trust. The government holds it in trust for  
17 everybody's benefit. But people start to divert it.

18           And then, actually, there are Supreme  
19 Court decisions sometimes made by Supreme Court  
20 Justices during the (indiscernible) and the Republic  
21 and the Territory, justices who are not just like  
22 family members or friends with the plantation. They  
23 were actually stockholders in the plantations, and  
24 they start to make all these decisions that treat  
25 water more and more like private property that can

1 be bought and sold.

2 This is exacerbated, of course, with the  
3 overthrow in 1893, the subsequent Republic of  
4 Hawaii, and then the Annexation of Hawaii to the  
5 United States. And this understanding -- this  
6 evolved understanding that water in Hawaii, oh,  
7 yeah, it is private property, it can be bought and  
8 sold; if you buy former Kala lands and you transfer  
9 that water to upland, that's okay; you can buy and  
10 sell those rights with other people, that continues  
11 until -- on this land.

12 On the left side of this island in the  
13 early 1970s a fight, which had been going on for  
14 decades between the McBryde Plantation and the Gay  
15 and Robinson Plantation, makes its way first to  
16 Circuit Court for a final adjudication of water  
17 rights to the Hanapepe River.

18 The Circuit Court says, okay, here's how  
19 much McBryde owns, here's how much Robinson owns.  
20 Hey, the State owns some land in this area. They  
21 also own this many gallons per day of rights to the  
22 Hanapepe River, a decision I'm sure they regretted.

23 They appealed the decision to the Hawaii  
24 Supreme Court, which was now headed by Justice  
25 William S. Richardson, a Native Hawaiian, and they

1 used that opportunity to overrule all these previous  
2 decisions that had ignored the original laws in the  
3 state.

4           And so one of the key points of the  
5 McBryde decision -- and this litigation goes on for,  
6 you know, 15 more years, so recognize there's  
7 complexities here, but key in this decision is,  
8 "Thus by the Mahele and subsequent Land Commission  
9 Award and issuance of Royal Patent right to water  
10 was not intended to be, could not be, and was not  
11 transferred to the awardee, and the ownership of  
12 water in natural watercourses, streams and rivers  
13 remained in the people of Hawaii for their common  
14 good."

15           So they kind of reset the clock and said,  
16 okay, you know what? It's not actually private  
17 property. There's this public trust that exists.  
18 So we understood there's a public trust, kind of  
19 evolved away from that, but it's now been evolving  
20 towards a more traditional understanding again.

21           And really, so that's State Constitutional  
22 provisions are put into place to clarify and put in  
23 place a method for managing this public trust  
24 resource. So the provision that all public natural  
25 resources are held in trust and the creation of the

1 law or code are response to the McBryde decision.

2           It actually takes, though, nine years for  
3 the Water Code to be passed. The Constitutional  
4 amendments are adopted by Hawaii's voters in 1978.  
5 But not until 1987 is the Code passed, and it's  
6 because people were beefing at the legislature,  
7 largely plantations and large landowner interests on  
8 one side and Native Hawaiians, environmentalists on  
9 the other side, over how this Code should operate.

10           And one of the biggest compromises in the  
11 Code was this statement of a dual mandate. And it's  
12 on a couple slides because it's a long provision.  
13 They direct this new Water Commission, "The State  
14 Code shall be liberally interpreted to obtain  
15 maximum beneficial use of the waters of the State  
16 for purposes such as domestic uses, aquaculture  
17 uses, irrigation and other agricultural uses, power  
18 development, and commercial and industrial uses.  
19 "However, adequate provision shall be made for the  
20 protection of traditional and customary Hawaiian  
21 rights, the protection and procreation of fish and  
22 wildlife, the maintenance of proper ecological  
23 balance and scenic beauty, and the preservation and  
24 enhancement of waters of the State for municipal  
25 uses, public recreation, public water supply,

1 agriculture, and navigation. Such objectives are  
2 declared to be in the public interest."

3           So you got to do all of that all at the  
4 same time. And one of the things that this and  
5 other compromises in the Code did, essentially, was  
6 it made a huge space for judicial interpretation of  
7 what exactly does this mean, what is the right way  
8 to fulfill our public trust duties, given this legal  
9 instrument, the Water Code.

10           And the first big modern case in water law  
11 in Hawaii since the Code was passed was the Waiahole  
12 water case, which pitted windward farmers, a small  
13 neighborhood board, community associations against  
14 -- and some environmental groups against the big  
15 five, the U.S. Military, and two state agencies.  
16 And when the Hawaii Supreme Court eventually ruled  
17 after a contested case proceeding in front of the  
18 Water Commission. This is not exhaustive. I wrote  
19 my doctoral dissertation on Waiahole because I could  
20 drone on about it for a long, long time, but some  
21 key findings: All water is held in trust in Hawaii  
22 without exception or distinction.

23           So it's not just surface water. It's  
24 surface and ground. It's not just water on public  
25 property. It's water everywhere.

1           Because one of the bizarre rulings from  
2 the courts during the territorial period was that  
3 somehow if you allowed water to flow mauka to makai,  
4 it was wasted. They overruled that. And they said  
5 that obviously that has an important cultural and  
6 ecological use. They clarified that clearly the  
7 State is the trustee of the water resources trust.

8           The precautionary principle applies. And  
9 so the Water Commission -- one thing the Water  
10 Commission has done in their conclusions of law for  
11 the Waiahole case was they said they adopted this  
12 principle called "the precautionary principle,"  
13 which says that when scientific evidence is  
14 uncertain or inconclusive, the trustee still has an  
15 obligation to make a decision and to make the  
16 decision that is most likely to protect the  
17 resource.

18           So you would err on the side of protecting  
19 the resource. If like I'm not sure if we're going  
20 to take all this water out of the stream, is it  
21 going to harm the stream or not? People in the  
22 Waiahole case were arguing like, "Well, yeah, you  
23 know, there's no proof that it's going to harm the  
24 stream, so you can take it."

25           And so the Commission actually said,

1 "Actually, the principle is to be precautionary."

2 And the Supreme Court ratified that part of the  
3 Commission's decision, so that is correct.

4 And then they included language that has  
5 been included in many court decisions to this day.  
6 There's a level of openness, diligence, and  
7 foresight necessary for a State agency to include  
8 when making these kinds of decisions.

9 So -- see, I told you it was getting  
10 shorter. That was part two.

11 Part three. And this is not exhaustive,  
12 and there's excellent training that can both be  
13 given by our own Deputies Attorney General as well  
14 as the training given by Ka Huli Ao Center for  
15 Excellence in Native Hawaiian Law, as well as other  
16 training on what the duties are of boards and  
17 commissions that the courts have in trust, but I'm  
18 just going to talk about a few cases.

19 The Ka'upulehu, or the Ka Pa'akai case,  
20 the Kauai Springs case from this island -- apologies  
21 for my computer having flipped the okina to an  
22 apostrophe -- Mauna Kea, the recent Lana'ians for  
23 Sensible Growth case, which some of us lived  
24 through, and a very recent case from March of this  
25 year regarding a PC decision on the Island of Maui

1 Public Utilities Commission.

2           So in Ka Pa'akai o Ka'Aina, as I know,  
3 most people in this room very well know the Land Use  
4 Commission was approving a district boundary  
5 amendment in the Kaupulehu area for the development  
6 of a resort hotel. Petitioners from the area,  
7 including those who gathered salt, hence, the name  
8 Ka Pa'akai, were concerned about the impact of the  
9 development on their traditional and customary  
10 practices, including their crossing over the  
11 property, their ability to gather salt, gather fish  
12 and other items from the shoreline.

13           The Land Use Commission accepted the  
14 finding from the petitioner that said, "You know  
15 what? It's okay. We will work with these  
16 practitioners after -- as the development commences  
17 to protect their rights." And the -- it was  
18 appealed, and Hawaii (indiscernible) said -- Mr.  
19 McCormick said, "First of all, you cannot delegate  
20 that. You can't hand that off to the developer.  
21 That is -- as a public trust trustee, essentially,  
22 you have the duty to make sure you do certain  
23 things."

24           And they laid out certain things. And a  
25 three- part Ka Pa'akai test is to first identify the



1 valued cultural, historical, or natural resources  
2 and the extent to which traditional practices are  
3 exercised in relationship to them; the extent to  
4 which the resources and rights will be affected or  
5 impaired by those resources -- sorry for the typo -  
6 and the feasible action to be taken to protect those  
7 rights.

8           Now, Professor Malia Akutagawa of the  
9 University of Hawaii at Manoa and a Molokai  
10 homesteader and leader has her Pidgin version of  
11 this, which is "What get? What going happen? What  
12 you going do?" Which is a lot easier to remember as  
13 the three-part test.

14           What is in the area? What's going to  
15 happen if you approve this? What are you going to  
16 do about it? How are you going to mitigate it? And  
17 then the fourth part, really, is "No can hand em  
18 off." You cannot say, "Hey, developer, you go take  
19 care of this afterwards." You have this duty to do  
20 it.

21           So certainly, for the Land Use Commission,  
22 but also applying to the Water Commission, these  
23 Kapa'akai duties are part of how you fulfill your  
24 public trust duties and other boards and  
25 commissions.

1 Now, the Kauai Springs case, on this  
2 island as well, was a very interesting case. There  
3 was a private water bottler who wanted to expand  
4 their facilities from an old plantation spring, and  
5 they were bottling water and selling it commercially  
6 around the island. And they wanted to expand their  
7 operations, but they needed certain permits from the  
8 County Planning Commission.

9 Now, the County Planning Commission was  
10 like -- and got some public testimony, and they're  
11 like, huh, I think we might have some public trust  
12 duties here. So they wrote to the Water Commission,  
13 and they say, "Hey, Water Commission, how do we  
14 evaluate the impact on the resource from this  
15 bottling plant?"

16 And the Water Commission and the -- I  
17 think it was a one- or two-page letter that said,  
18 "You know what? It's not a designated water  
19 management area. We don't issue any permits for it,  
20 so you know, we can't help you here."

21 The Planning Commission said, "Okay. Then  
22 I guess we're doing it on our own because we really  
23 do think we have these duties." And they said, on  
24 the basis of not having sufficient information from  
25 the applicant on the impact of the -- on the public

1 trust of this bottling operation, which would be  
2 expanded via these permits. They denied it.

3 It went to the Hawaii Supreme Court, and  
4 the Hawaii Supreme Court actually upheld the Kauai  
5 County Planning Commission.

6 So there's -- I'm going to kind of whip  
7 through these. It's in three pages of the Supreme  
8 Court decision, but it's a really beautiful and  
9 thorough and clear step-by-step what do you got to  
10 do.

11 First of all, the agency -- they're  
12 talking about the Planning Commission, but this  
13 really applies to whatever agency is making the  
14 decision. Their duty is to assure the waters of our  
15 state are maintained as pure and put to reasonable  
16 and beneficial use.

17 First thing you got to do: is the  
18 proposed use consistent with the public trust  
19 purposes? And the four public trust purposes that  
20 the courts have laid out are water left in its  
21 natural state; water use in the exercise of  
22 traditional and customary Native Hawaiian practices;  
23 the domestic needs of the general public; and water  
24 reserved for or used by (indiscernible).

25 So those four uses presumptively, yeah,

1 you allow those. Uses other than those four? Then  
2 you have to apply a higher level of scrutiny. You  
3 have to take each proposal on a case-by-case basis,  
4 recognizing there's no vested rights to the use of  
5 water. If the requested use is not one of those  
6 public trust uses, is private or commercial, they  
7 have to apply the high level of scrutiny, and they  
8 have to evaluate the proposed use under a reasonable  
9 and beneficial use standard. "Reasonable"  
10 frequently being described as an efficient and  
11 beneficial is in line with other county and state  
12 policies and priorities. And then they have to look  
13 at that versus other priorities.

14 And finally, applicants -- applicants, not  
15 the state, not the agency, the applicant have the  
16 burden to prove that their use should be allowed in  
17 light of the overall trust purposes.

18 Applicants have to demonstrate their  
19 actual needs, not their desires, their actual needs  
20 and why it's right to drain water from a public  
21 trust resource for a private commercial use.

22 They have to demonstrate that there's no  
23 practicable alternative to what they're proposing.  
24 And if there is a reasonable allegation of harm  
25 against the public trust purposes, they have to do

1 one of two things: either demonstrate there is no  
2 harm, or that the right use -- there is harm, but  
3 nevertheless, the use is reasonable and beneficial.

4 And if that is the case, then they have to  
5 implement reasonable measures to mitigate both their  
6 individual impacts and their cumulative impacts on  
7 the resource, if the resource -- if the use is going  
8 to be approved.

9 So key lessons from Kauai Springs: First,  
10 just don't say, "Oh, yeah, you know, not designated,  
11 we're not going to do anything." Like, you can't  
12 walk away from your public trust duties even if your  
13 laws and your practices aren't accustomed to dealing  
14 with them.

15 Second, just a briefer version of what I  
16 just went over. First thing: Is it public trust  
17 use or not public trust use? If it's a non-public  
18 trust use, you got to do a higher level of scrutiny.

19 Is it reasonable and beneficial? Are you  
20 fulfilling actual needs? Is there an absence of  
21 practicable alternatives? And is there a reasonable  
22 allegation of public trust purposes? And I'll talk  
23 a little bit more about this later because the  
24 recent court cases dealt with this.

25 If the uses are inconsistent but they're

1 reasonable and beneficial, you have to impose  
2 mitigation in order to -- not just that individual's  
3 impact, but the cumulative impacts on the proposed  
4 use if you're going to approve it.

5 I'm now going to talk about Mauna Kea with  
6 the great awareness and sensitivity that to my right  
7 is somebody who is deeply, deeply, deeply involved  
8 in the Mauna Kea case.

9 The biggest lesson, the biggest outcome  
10 that everybody remembers from the Mauna Kea case is  
11 that the -- Mauna Kea One. The Board of Land and  
12 Natural Resources approved the permit and then held  
13 a contested case. And they said, (indiscernible)  
14 you got to do it the other way. You got to actually  
15 have that high level of diligence and scrutiny prior  
16 to the decision-making.

17 There were a number of other very  
18 important findings in the concurring decision. This  
19 long quote basically expands on and interprets Ka  
20 Pa'akai test. Basically, you have an affirmative  
21 obligation to look -- to look at what's being  
22 proposed and what's in the area, and how those  
23 proposed uses are going to be impacting in order to  
24 protect -- basically, have a presumption in favor of  
25 protecting those uses.

1 This gets at what a reasonable allegation  
2 is. "When an individual Native Hawaiian descent  
3 asserts that a traditionally exercised cultural,  
4 religious, or gathering practice in an undeveloped  
5 or not fully developed area would be curtailed by  
6 the proposed project. The State or agency is  
7 obligated to address this adverse impact in its  
8 findings."

9 So the agency has to act as a factfinder  
10 to evaluate the evidence as a party. And to fulfill  
11 this duty, to permit such findings be made, the  
12 agency is obligated to conduct a contested case  
13 hearing before the legal rights of the parties are  
14 decided.

15 So it really clarified, in my mind, at  
16 least, in a way that had not been done before, that  
17 traditional and customary rights are property  
18 rights, and people, because they're property rights,  
19 they're entitled to the due process of a contested  
20 case hearing, which is the vast majority of hearings  
21 that this commission does.

22 And finally, they said, "The role of an  
23 agency is not merely to be a passive actor or a  
24 neutral umpire, and its duties are not simply  
25 fulfilled by providing a level playing field."

1 Right? They have a duty, as the trustee, to take  
2 that active role in trying to protect these public  
3 trust resources and the uses associated with them.  
4 And you can't hand it off.

5 This is the (indiscernible) Lanai. If you  
6 can see the little silver squiggle, it's very faint  
7 on the screen, that's a new predator-proof fence  
8 that they're putting in to protect an Oahu colony at  
9 the summit of Lanaihale, which is really nice.

10 But -- so the Lana'ians For Sensible  
11 Growth is this incredibly painful 30-year saga that  
12 the Land Use Commission went through over a 1990  
13 docket where we approved water use for golf course  
14 use at Manele Bay and wrote a horribly-worded  
15 condition, Condition 10, which meant different  
16 things to different people and, in my opinion,  
17 probably different things to the different  
18 commissioners who voted in favor of it at the time.

19 And it's been litigated for three decades.  
20 And finally, the final Supreme Court decision came  
21 down in 2020, after a third contested case hearing  
22 in front of this body.

23 There was -- and it's such a contentious  
24 case, interestingly, there was a majority opinion  
25 which was three members, but only as to the decision



1 that the Commission made. There was a two-party  
2 consenting and non-concurring decision from two of  
3 the justices who said -- who agreed with what we did  
4 and agreed with how we made the decision, and then  
5 there was one justice who disagreed with the entire  
6 position. And so there were three separate  
7 opinions.

8           So just to give you quotes from a couple  
9 of them. One of the things that the majority  
10 opinion recognized was that the Land Use Commission  
11 found that "no party had raised a reasonable  
12 allegation of harm against that or any other public  
13 trust use of water."

14           So one of the reason -- one of the  
15 triggers when you go through that steps is like, "Is  
16 there an allegation of harm?" We actually asked  
17 during the -- during the third hearing, and I'm  
18 like, "Are you saying that there's harm to the  
19 resource?" "Oh, I'm not saying there's harm to the  
20 resource." Okay. So you're not saying that there's  
21 harm to the resource. You don't have to necessarily  
22 go through those extra steps.

23           And the concurring and dissenting opinion  
24 said, "Based on the record in this case, the Resort  
25 has complied with the Water Commission requirements

1 in Condition 10, established to protect the Public  
2 trust, and no threat of harm to the public trust has  
3 been shown."

4 So they at least agree to us -- with us in  
5 that degree. Like, you have to at least show some  
6 reasonable allegation of harm before you start to go  
7 into those things.

8 And then, finally, a case just from this  
9 year, March of '22, there's a new solar project  
10 being proposed in Kehei, one of our favorite  
11 neighborhoods at the Land Use Commission. And it  
12 was approved by the Public Utilities Commissions and  
13 then was appealed to the Hawaii Supreme Court.

14 And just one of the key findings -- it's  
15 really a minor case in many ways, but one of the  
16 things, they cited to Lanai'ians for sensible  
17 Growth, and they -- they gave a little bit of extra  
18 guidance on what a reasonable threat is. It doesn't  
19 mean that you have to prove that there's a threat.

20 So to be really clear, like as has  
21 happened in cases we've talked about like in Olowalu  
22 where an established Native Hawaiian practitioner, a  
23 fisherman, came and said, "You know what? I'm super  
24 concerned that this development is going to impact  
25 my traditional and customary practices in this area.

1 Plus, they never talk to me."

2 That probably constitutes a reasonable  
3 allegation of harm. You don't have to come in with  
4 studies or experts to say that there's a reasonable  
5 allegation of harm, but all the parties in this  
6 particular case said, "Well, we think there's harm."

7 And so it's probably in my mind similar to  
8 the way we treat standing. Standing is not always  
9 granted to a party, but it is liberally granted. So  
10 somebody makes an allegation of harm, unless it's  
11 just completely off, you take it as a reasonable  
12 allegation of harm.

13 Last part. What are some of the  
14 challenges ahead? Four things I want to talk about  
15 as we try and navigate this already complex dynamic  
16 of fulfilling our duties and protecting the public  
17 trust while doing so.

18 We're dealing with climate change,  
19 changing demographics in Hawaii, changing community  
20 standards, and the challenges around coordination,  
21 cooperation among state agents (indiscernible),  
22 questions that I don't necessarily have answers to.  
23 But so you have these duties to protect traditional  
24 and customary practices is in the public trust  
25 interest. How do we protect a shoreline that's

1 going to be inundated?

2 The shoreline that we're protecting and  
3 we're making decision about will be in a different  
4 place in 50 years, 20 years maybe, definitely in a  
5 hundred years, sometimes 10 years, perhaps, with  
6 erosion.

7 We set aside important agricultural land.  
8 Quite a bit of it, it's on an old plantation model.  
9 It may not have water available to it. That's a  
10 clear consensus provision of climate scientists.

11 We set aside and we protect areas from  
12 development, so to protect cultural resources. But  
13 what if this area, just by climate change alone, is  
14 going to change in such a way that those resources  
15 aren't going to exist?

16 We also have changing demographics in  
17 Hawaii, which sometimes we're blamed as being the  
18 cause of. If you look at statistics for Hawaii's  
19 population change in the last few years and  
20 consistently, in some ways, over the last decades,  
21 in the last few years our population has been  
22 shrinking, not growing. But also, people born and  
23 raised here are moving away. And people from  
24 elsewhere are moving in.

25 So there's not full replacement as those

1 who are older among us pass away and young people  
2 are born, but there's also this demographic change  
3 that's happening.

4           The accusation against the Land Use  
5 Commission is that we're too tight on protecting  
6 resources and not putting land into the urban  
7 district, and that drives up housing prices, and  
8 that's what's driving this change.

9           I actually disagree with that contention,  
10 but that change does -- I disagree with that  
11 intention -- contention for many reasons, including,  
12 but particularly for the fact that because Hawaii is  
13 awesome, there is an endless supply of people who  
14 want to live in Hawaii at every price point, from  
15 our brothers and sisters who live on the streets to  
16 the one percent of the one percent.

17           And I don't think that there's an actual  
18 practical way you can build your way out of an  
19 endless demand and have any meaningful impact on  
20 prices. So there has to be another solution.

21           How do we address that? And how do we  
22 deal with the impact that, as the population of  
23 Hawaii changes, the people who fought, in some cases  
24 for like their entire lives, to like have some say  
25 over water in their communities or have some say

1 over where the shoreline goes or some say over the  
2 protection of resources? When they move away and  
3 new people move in, what do we do when that  
4 constituency changes that we're really -- our job is  
5 to fulfill?

6 At the same time, right, we have this  
7 reinvigoration around Hawaii that we've seen for the  
8 last, now, 40, 50 years, particularly in the Native  
9 Hawaiian community but throughout rural Hawaii.

10 Changing Community Standards. We saw at  
11 this Commission in the Pulelehua case where people  
12 are like unwilling to accept affordable housing with  
13 the set percentages. They want way, way more.  
14 They're like, we're not going to just build housing  
15 for the market. We want to make sure that housing  
16 is affordable to local people, and they also have  
17 very, very clear standards about what the level of  
18 community engagement should be.

19 Don't just hold a hearing and say you're  
20 good, right? They want to really sit down with the  
21 people who are proposing these things and have  
22 meaningful, long-term, thoughtful, binding  
23 engagement.

24 And what we've seen in Mauna Kea and  
25 Honokohau (Maui), and Kawela, Molokai on stream

1 restoration, even over my lengthening but relatively  
2 brief lifetime, compromise was like a waiahole.  
3 Folks were stoked. Hey, we got half the water back,  
4 right? Half the water that was taken by this  
5 system, we're getting back in our communities.

6 And Kawela and Honokohau are like, no, we  
7 actually want a hundred percent back. That's the  
8 level that we think the law requires, and that's the  
9 level that we need.

10 Mauna Kea, despite Mauna Kea One and then  
11 Mauna Kea Two, what -- thousands of keakea  
12 (phonetic) made it clear, it's like, we actually  
13 have a standard we're going to hold to on this  
14 mountain, which is, we're not going to allow another  
15 telescope to be built.

16 So when we sit in these boards and  
17 commissions, our process in many ways, we're set up  
18 for times when we thought that there can be  
19 compromises where every side gets some, and it's all  
20 good. And there's just this shift that's happening  
21 that I'm seeing across Hawaii where there's at least  
22 some folks who are like, yeah, our idea of  
23 compromise is maybe we'll let you keep a little bit  
24 for what you basically need. The rest we get back.

25 Finally, Coordination and Cooperation. I

1 talked a little bit about the Water Commission.  
2 They only fully fulfill their public trust duties in  
3 many ways and designated water management areas and  
4 other places that don't have the administrative  
5 tools to do so.

6           This impacts us because when they come --  
7 somebody comes to us with a land use district  
8 boundary change and their full analysis of impacts  
9 on water are, well, you know, the sustainable yield  
10 is ten, and we're only using eight. Well, good. We  
11 lack our support from our sister agency to really  
12 know whether the decision we're making, which will  
13 actually create that water demand, is going to fully  
14 protect public interest in water.

15           In our Kanahale case, which is up to the  
16 Supreme Court, our sister agency, the Board of Land  
17 and Natural Resources, which, you know, deals with  
18 their own incredible docket and their incredibly  
19 tough decisions, but you know, we have a hospital in  
20 the Conservation District. We have lots of  
21 telescopes in the Conservation District. A number  
22 of Conservation District use permits that are issued  
23 for things that don't typically fit people's general  
24 idea of conservation can set up both possibilities  
25 for collaboration as well as conflict between our



1 commissions.

2           And the counties, as this Commission has  
3 been really clear on during my eight years, we no  
4 longer see special permits. At least, I believe  
5 we've said this clearly as a way to permit  
6 landfills, that it's a permanent change in the  
7 exclusory district boundary amendment process. But  
8 if that happens at the county level now, like, oh,  
9 yeah, special permits are fine, we end up in this  
10 sort of endless loop of going back and forth between  
11 the county and us on these special use permits  
12 things.

13           So there's opportunities for collaboration  
14 and cooperation, but there's also tremendous  
15 opportunities for disconnect as we all try to  
16 collectively navigate through these obligations  
17 under the public trust.

18           Just to highlight the language in the  
19 Mauna Kea case and reflect a little bit on my  
20 practice in front of the Water Commission. A lot of  
21 Water Commissioners are like, oh, we don't like to  
22 guess at cases. It's so formal. It's so tough, you  
23 know. I don't get to just talk story with the  
24 parties.

25           But what I've seen on this Commission is

1 that because contested cases are a default, people  
2 have rights. They get heard. And many times,  
3 people have come to us and they're like, I didn't  
4 like your decision, but I felt it was fair. Right?

5 I've had developers come to us who have  
6 denied and say, yeah, you know what? I get it.  
7 I've had community members come to us who we've  
8 denied, and they're like, yeah, you know, I wish you  
9 had stuck it to them, but like, I get it. You guys  
10 made a real decision, and we felt heard.

11 So I think that process, that quasi-  
12 judicial process really is one of the ways that we  
13 go forward. And the more that BLNR, the Water  
14 Commission, the counties adopt that as a default  
15 process rather than as an occasional process, we'll  
16 start to move a little better.

17 What are the implications and conclusions  
18 of all of this? First of all, the Public Trust  
19 Doctrine exists beyond potential legislative  
20 changes. Just if legislature changes something  
21 about it, it's not going to get rid of these  
22 responsibilities that exist.

23 Our understanding continues to evolve in a  
24 particular direction. The trust is pretty expansive  
25 and the duties are pretty clear. The constraints on

1 the Public Trust Doctrine, like you need to make a  
2 reasonable allegation of harm, exists, but they're  
3 fairly small. The duties on the trustees, us, who  
4 make these decisions, are pretty clear in what the  
5 standards are that we're supposed to follow.

6 And these emerging changes around climate,  
7 around changing demographics, around changing  
8 community standards and their ability to cooperate  
9 and collaborate with our sister agencies are going  
10 to make life even more challenging.

11 That's it. Mahalo. Happy to have a good  
12 discussion. I'll stop sharing screen now.

13 Do folks want to take a recess before we  
14 go into it? Yes. I went a while. Let's take a  
15 ten-minute recess. It is 9:53 a.m. We will  
16 reconvene at 10:03.

17 **(Recess taken from 9:53 - 10:04 a.m.)**

18 **CHAIRMAN SCHEUER:** It's 10:04. I  
19 neglected to ask for public testimony, and I  
20 understand that Councilmember Felicia Cowden would  
21 like to provide public testimony on today's agenda  
22 item. I think you've testified before, so I'm going  
23 to swear you in, and then you can state your name  
24 and address for the record and testify.

25 Do you swear or affirm the testimony

1 you're about to give is the truth?

2 **COUNCILMEMBER COWDEN:** I do.

3 **CHAIRMAN SCHEUER:** Okay. Please state  
4 your name and address for the record and then speak.

5 **COUNCILMEMBER COWDEN:** Felicia Cowden,  
6 4191 Haleiwa Road, Haleiwa, Hawaii. I just wanted  
7 to make a simple statement of appreciation and  
8 gratitude for both Jonathan's time as Chair and for  
9 the Land Use Commission.

10 As a County Councilmember, I have  
11 confidence in your organization. I feel relieved  
12 when things are going to be going before the Land  
13 Use Commission. I have focused more in the past  
14 four years, though I have participated for a couple  
15 of decades, but this group has done a particularly  
16 extraordinary job.

17 I'm very confident in Dan, our own person  
18 from Kauai. But I have very much valued what you  
19 just shared for the Public Trust Doctrine, and I  
20 thank the group for really giving that focus,  
21 because it is so important -- I just can't even  
22 state how important it is to have your organization  
23 do the kind of robust review of what happens just to  
24 keep our land and water in good shape. We need it  
25 to continue.

1 I get a little discouraged if I'm hearing  
2 it might be a threat. So thank you. I just want to  
3 say that. And great job. Great job, Jonathan.

4 **CHAIRMAN SCHEUER:** Thank you very much,  
5 Councilmember.

6 Commissioners, are there any questions for  
7 the witness?

8 Mahalo nui for your testimony.

9 I think now the Commission will enter into  
10 discussion and questions.

11 Commissioner Okuda.

12 **COMMISSIONER OKUDA:** Thank you, Mr. Chair.  
13 Sorry. I can't keep my mouth shut.

14 I thought this was an excellent  
15 presentation. If I can just make a couple of  
16 observations. I think the importance of this  
17 presentation is -- and this is not to say we should  
18 ignore what we hear at seminars, by other people who  
19 might be more learned than us or anything like that.

20 But I think the importance of this  
21 presentation is to show that the Public Trust  
22 Doctrine in Hawaii has a legal and historical basis,  
23 as you pointed out, separate from the Public Trust  
24 Doctrine as it is laid out in federal or state cases  
25 on the mainland.

1 And it really comes down in my view to the  
2 fact that, historically and legally, the source of  
3 land title in Hawaii is historically different. And  
4 if I can just spend a minute.

5 You know, this is not a revolutionary  
6 Hawaiian legal theory or anything like that because,  
7 look, in my view, the Queen was wrongfully  
8 overthrown in 1893 by American business interests.  
9 But the overthrow of the Queen, I believe, did  
10 nothing to change the legal system in Hawaii,  
11 because before the overthrow of the Queen, it's  
12 basically an American common law system, common law  
13 being judge-made rules.

14 And after the overthrow, it continued  
15 being an American common law-based system. And  
16 Deputy AG Chow can correct me, but you know, in the  
17 American common law real property system, you only  
18 get what your grantor gave you.

19 In other words, if I owned -- if I -- I  
20 can write a deed -- and I used this example once in  
21 a quiet title case. I can write a deed saying, I,  
22 Gary Okuda, convey to Jonathan Scheuer all my right,  
23 title, and interest in Iolani Palace, and that deed  
24 can be recorded at the Bureau of Conveyance and --  
25 but does Jonathan get Iolani Palace? No, because I

1 didn't own Iolani Palace.

2 So the real question on a lot of land title  
3 issues in Hawaii and the rights that people have is:  
4 what was the original source of title, and what did  
5 people get from the original source of title?

6 And the original source of title is  
7 Kamehameha, III, through the process of the Mahele.  
8 And I asked this question of one expert lawyer who  
9 oftentimes appears in front of us, who is giving a  
10 presentation at one of the planning officers, I  
11 think, convention, where he tried to show, oh, look  
12 at these federal court cases regarding water rights,  
13 mainly from the mainland.

14 Look at how the land -- the Public Trust  
15 Doctrine is applied on the mainland. And then he  
16 kind of like tried to bootstrap it, saying, well,  
17 because of these recent U.S. Supreme Court cases,  
18 maybe you can relitigate ownership of water in  
19 Hawaii.

20 And my question to him was, Well, the real  
21 question is what did the King convey out at the  
22 original time of the Mahele. And my question to him  
23 was, What is the evidence in the historic record  
24 that the King intended to convey ownership of water?  
25 And even he had to admit there's no evidence of

1 that.

2           And so what the King didn't convey out is  
3 retained by the King, retained by the successors to  
4 the King, which is the State of Hawaii. And because  
5 the constitution basically says that the sovereignty  
6 or the power of the state derives from its people is  
7 reserved back to the citizens of the State of  
8 Hawaii.

9           So my only point is the fact that, you  
10 know, as you point out, Chair, a lot of this, as far  
11 as the duties we have and what people claim they  
12 own, and just because you claim you own something  
13 doesn't mean you own it, we have to look back and  
14 see historically what property rights were, in fact,  
15 given out.

16           As I told this guy, yeah, it's true, the  
17 plantations -- when you look at these older Supreme  
18 Court cases, the cases look like the plantations say  
19 they own the water, but just because somebody says  
20 they own it doesn't mean they own it. It's what did  
21 the King actually convey out.

22           And again, it's not a radical proposition.  
23 This is a simple, English, American common law rule,  
24 which is you only get what your grantor gives you.  
25 And if your grantor never gave you, you don't get



1 it.

2 One more point. And I don't think our  
3 trust duties end with just the decision we make.  
4 Sometimes we have to defend our decision, okay? And  
5 I don't want to, you know, get people pissed about  
6 the politics, so I won't talk about, you know,  
7 recent events and other areas where people sometimes  
8 do the long-term, long-range thing, which is, okay,  
9 we'll fight the issue over this long-term because in  
10 the end, we'll get what we want, even if the law  
11 might be different.

12 But sometimes I think, you know, we got to  
13 defend our decisions in the courts if we make a  
14 decision that we believe is the proper exercise or  
15 public trust obligations. And I think one of our  
16 public trust obligations is the protection of  
17 agricultural land for bona fide agricultural uses.

18 You know, we got to be willing to defend  
19 that, you know, through the appellate court system.  
20 We really do. Because if we just make a decision  
21 and we don't defend our decision or we don't defend  
22 what we think is the proper exercise of the public  
23 trust, then essentially, it's like we never made the  
24 decision because the other side will -- is going to  
25 take the long view. They're going to appeal it,

1 appeal it, or they're going to, you know, just chip  
2 away at whatever we do, and in the end you get --  
3 you know, you get the results.

4 So I don't believe our public trust duties  
5 end when we just make the decision. We have to be  
6 ready to defend that decision in the court system  
7 and maybe sometimes we have to defend it publicly.

8 Because, you know, I think, Chair, you  
9 raised it yesterday, even though, you know, at the  
10 ending part of the meeting. Yeah, we got to really  
11 ask the question: Where are we going to be in  
12 Hawaii 30 to 50 years from now? And what do we have  
13 to do so our kids don't feel like they can't live  
14 here anymore because there's no future?

15 That's just my comment. Thank you, Chair.

16 **CHAIRMAN SCHEUER:** Thank you, Commissioner  
17 Okuda.

18 Commissioner Ohigashi?

19 **COMMISSIONER OHIGASHI:** Yeah. I -- I just  
20 had a (indiscernible) when I look at the (inaudible)  
21 from our climate change and its effects.

22 Where do you see the litigation going  
23 forward or the -- or the problems going forward in  
24 terms of utilizing the Public Trust Doctrine  
25 (indiscernible) issue climate change?

1           **CHAIRMAN SCHEUER:** You know, it's -- what  
2 do I see with the climate change happening? What  
3 direction? You know, I only had, like I say, the  
4 Henson preliminary thoughts and possibly entirely  
5 incorrect responses to where it might go.

6           **(Indiscernible speaking.)**

7           **CHAIRMAN SCHEUER:** You know, we dealt with  
8 something that I think we were really clear with as  
9 a commission, a disastrous attempt by OPSD to do a  
10 so-called five-year boundary review, which was  
11 instead an attempt to gut the Commission's powers  
12 and hand it over to the counties.

13           The five-year boundary review should  
14 probably be looking at where our shorelines are  
15 going to be and explicitly, like, trying to put  
16 particular, at least, policies in place for how we  
17 deal with that.

18           I mean, what is it going to mean when  
19 somebody like, yeah, I own a parcel. It's under  
20 water, but it's in the urban district, you know.  
21 The brighter and more thoughtful minds than me,  
22 which means you guys, will have to deal with that.

23           We have a real, real problem. There is  
24 already more land zoned, for instance, on Maui than  
25 we actually have ready water available to deliver to

1 it in the existing urban district. Climate change  
2 is going to exacerbate that.

3 What provisions does this Commission have  
4 to enforce its decisions? I think a more robust and  
5 nuance set of enforcement powers beyond simply  
6 reversion would help us deal with some of the things  
7 that come up, a better policy toolbox.

8 And in terms of the Public Trust Doctrine,  
9 Public Trust Doctrine, particularly as the  
10 precautionary principle applies to it, I think this  
11 Commission has made a really great step in  
12 implementing recent statutory change and requiring  
13 that sea level rise and carbon footprint be put into  
14 our district boundary amendment analyses.

15 But we're at the very start of that  
16 process, and I think the level of analysis that we  
17 should be looking for, while it's difficult, we  
18 should really push for a very, very robust sort of  
19 set of things to be examined, so that we're not  
20 putting things in -- into harm's way.

21 I don't know if that's fully responsive,  
22 Commissioner, to your question, but --

23 **COMMISSIONER OHIGASHI:** I understand it  
24 might be responsive (indiscernible).

25 **CHAIRMAN SCHEUER:** Commissioner Giovanni?

1           **COMMISSIONER GIOVANNI:** A couple things,  
2 but I want to start by asking my fellow  
3 commissioner, Commissioner Okuda, if I may, to  
4 expand to someone like me who does not have the  
5 legal training that you do, when you say "we must  
6 consider appealing to defend our decisions," who is  
7 the "we" in that? How does that work?

8           **COMMISSIONER OKUDA:** Thank you,  
9 Commissioner. When I used the word "we," I meant  
10 Land Use Commission. Okay. I -- we're not -- we're  
11 just human beings, so we're not perfect, and you  
12 know, we have our disagreements, and we definitely  
13 can make errors and -- you know, and this is -- the  
14 legal system is set up to basically correct those  
15 errors if we make it.

16           And I think, you know, whatever errors we  
17 make, you know, I don't see on this Commission that  
18 it's bad faith errors like somebody was being bribed  
19 or someone was trying to help their friend or  
20 anything like that. It's not the kind of errors  
21 that, you know, are documented in Gavan Daws' book  
22 "Land and Power in Hawaii" or anything like that.

23           But when I say -- use the word "we" about  
24 defending it, okay, you know, the legal system is  
25 human beings. Judges aren't, you know, omnipotent

1 or smarter than any of us, and people sometimes view  
2 things differently. If it's a situation where we  
3 make a decision -- when I say "we" -- and for some  
4 reason a decision is overturned at the next step, my  
5 point was we, as a Land Use Commission, should -- if  
6 it's an appropriate case that we consider  
7 appropriate, we should insist that the decision be  
8 defended against at the next step, okay?

9           Because as the Chair pointed out, when you  
10 look at the significant landmark cases which protect  
11 the Public Trust Doctrine in Hawaii, these are  
12 Supreme Court cases. These are cases where somebody  
13 lost at a lower level but said, it's important for  
14 purposes -- and I don't want to say just public  
15 policy.

16           I really think it's for purposes of future  
17 generations of determining what kind of community  
18 we're going to have in the future, that we got to go  
19 and take it to the highest level to make sure that  
20 the highest level sets the policy that's going to be  
21 followed statewide.

22           I'm really concerned when, for example,  
23 and we can get into it at some other hearing when  
24 it's properly agendized, but as a general principle,  
25 you know, I'm just a little bit concerned when a

1 single circuit judge is going to make a decisions  
2 would set statewide public policy, because if we  
3 don't go and appeal that decision, you know, it --  
4 it becomes now something that's paraded around at  
5 other hearings saying, look, look, look, this is the  
6 decision overturning Land Use Commission. Yeah,  
7 it's only a circuit judge, but hey, you know, yeah,  
8 it's precedent or it's persuasive.

9           And look, I've been guilty of that, too,  
10 in the court. I'll find something that says the  
11 other party is wrong, and I'll parade that around  
12 even if it's just a circuit court decision.

13           So you know, if the Hawaii Supreme Court  
14 -- or the Intermediate Court of Appeals says  
15 something and the Hawaii Supreme Court won't take  
16 certiorari on it; in other words, leaves the  
17 decision standing, if it's the highest appellate  
18 court says, hey, Land Use Commission, you're wrong,  
19 this is the rules, okay.

20           You know, we're bound to follow that  
21 highest precedent, and that's the rules, and it's  
22 going to apply statewide. But I think there's a  
23 real danger to democracy and to our public trust  
24 duties where we, by default, just let, you know, a  
25 lower-level judge, who we might all have the highest

1 respect for, but make a decision that now is going  
2 to have implications statewide.

3           Yeah, none of us like to do appeals or  
4 what-have-you, but sometimes to really protect what  
5 we're trying to do, we got to just go fight for it.  
6 I mean, I think that's the history the Chair  
7 explained in these cases. These cases didn't appear  
8 out of nowhere and, oh, wow, Supreme Court, the sky  
9 opened up, the beam of light came down just like in  
10 the movie, "The Verdict," and you know, justice is  
11 brought to the courtroom.

12           That's not how it happened. It was  
13 because people said, you know, enough of this.  
14 We're going to fight for the thing. We're going to  
15 fight for future generations. And so that's what  
16 I'm saying. We got to be willing at all levels to  
17 fight to make sure that if a rule is set up or we're  
18 told, this is the rule, for example, with --  
19 regarding to permitted activities within an  
20 agricultural district, then it's from the highest  
21 level. Highest level.

22           Sorry, Dan.

23           **CHAIRMAN SCHEUER:** And that was the answer  
24 to "what did you mean by 'we.'" Thank you. But it  
25 was a very beautiful and eloquent answer.



1           **COMMISSIONER GIOVANNI:** Actually, that's  
2 the answer I was looking for.

3           Chair, I want to thank you for your  
4 presentation today. I consider it a very  
5 informative, yet very brief, overview of the issues,  
6 and I look forward to visitation with you one-on-  
7 one, which we can sit for a full day, and you can  
8 educate me in some detail, because I need it,  
9 because it's so damn important. It really is.

10           You know, these are complex issues.  
11 They're often misunderstood. And they're generally  
12 misunderstood by the public at large. And it really  
13 under -- in my mind, it really underscores the  
14 critical role that boards and commissions play in  
15 the protection of the Public Trust Doctrine.

16           It's incumbent on us, as a Land Use  
17 Commission, to take it very seriously, understand  
18 it, and to breathe life into it in every docket that  
19 comes before us, every petition that comes before  
20 us.

21           It's incumbent on us. It's part of our  
22 job. And whether it be at the forefront in a  
23 contested case or in defending our decisions through  
24 some appellate process, appeal process, it's serious  
25 stuff, and I really appreciate it.

1 I got another comment, just because I want  
2 to emphasize what you said very briefly in your  
3 remarks just a moment ago about a limitation on our  
4 Commission to actually stand behind and make our  
5 decisions strong decisions, and that is enforcement.

6 We are -- our enforcement toolbox is  
7 pretty limited, very limited. And I feel that a  
8 number of problems with that. Number one, with our  
9 only recourse at our level being reversion, it's a  
10 pretty big and enormous step to take, especially if  
11 a development is already partially under way, and  
12 that's a problem.

13 We need other tools in our toolbox at our  
14 level. And I think it's also a contributing problem  
15 in our relationships with county planning groups  
16 because we make an order and then we lean on the  
17 counties to enforce the conditions of that order.

18 If I'm sitting at their end of the  
19 spectrum, looking at our conditions that we're  
20 placing on them, it's going to rub them the wrong  
21 way in many cases. We need a collaborative working  
22 relationship with the counties to get effective  
23 enforcement for conditions that are real and  
24 beneficial to everyone.

25 And so this whole area of enforcement, to

1 me, is one which might hopefully see some real  
2 development. So thank you. And I look forward to  
3 our conversation.

4 **CHAIRMAN SCHEUER:** Mahalo, Commissioner  
5 Giovanni.

6 If I may, I wanted to add a further  
7 response to Commissioner Ohigashi, a point I forgot  
8 to include and wanted to raise.

9 It is a subtle but important point, and I  
10 think we have seen this on this island as well as  
11 other islands in terms of the quality of the  
12 cultural impact assessments that we received, some  
13 which are cursory would be a generous compliment,  
14 some of which are really thoughtful and in-depth and  
15 meaningful engagement with practitioners.

16 One of the challenges for developers and  
17 for the agencies is how do you get meaningful input  
18 about a proposed project when certain practices it  
19 is not culturally appropriate to disclose or to  
20 generally disclose and make available in a public  
21 document, certainly things around burials, but also  
22 around the other resources.

23 And having sat on the developers' side, if  
24 you will, seeking a lot of these permits for the  
25 Department of Hawaiian Homelands, one of the things

1 we did to ensure that when we talk to people about  
2 potential impacts of additional water use, we would  
3 get real answers, was that the people we used to  
4 conduct those interviews were people who had lived,  
5 at a minimum, two decades on the island.

6           And so I don't know whether it is  
7 legislative change or a possible policy or guideline  
8 change within our rules, but you're going to get  
9 better answers on cultural impact assessments when  
10 they are done largely by people from that community.  
11 And then you're going to get Oahu-based or  
12 Continental-based firms who are sending out letters  
13 saying, please tell me about your cultural  
14 practices. And when they don't get a response, they  
15 conclude that there must be none.

16           So that's another -- that more thoughtful  
17 engagement could include some overlapping questions  
18 about "Do you see your practices changing in light  
19 of climate change? How are you addressing them now?  
20 How might this project limit or enhance your ability  
21 to address them in the future?"

22           **COMMISSIONER OHIGASHI:** I just want to  
23 make a comment about what Dan indicated. I agree  
24 that we need more -- that there's an enforcement  
25 deficit and difficult time getting people to comply.

1 But what I'm finding is that the difficulty -- the  
2 most difficult ones are the state and the counties.  
3 And we put all the conditions (indiscernible)  
4 landfills, expecting them to comply, and then  
5 they're going to come back and say, "We're not  
6 complying."

7 Or we put certain conditions on a school.  
8 And they come back and then the (indiscernible)  
9 well, we don't have to comply because we're going to  
10 give you a study. So you know, I -- enforcement is  
11 fine so long as part of the enforcement includes our  
12 own people who apparently appoint us.

13 **CHAIRMAN SCHEUER:** Commissioner Giovanni.

14 **COMMISSIONER GIOVANNI:** Bravo. I've been  
15 here a couple years now, and the entities that come  
16 before us are the biggest culprits in -- are the  
17 counties and the state agencies that don't like our  
18 decision or don't like our conditions and then  
19 choose to ignore them without consequence. It's  
20 evident. You can find it in whether it be landfills  
21 or schools.

22 **CHAIRMAN SCHEUER:** I think even yesterday  
23 we had a testifier from a state agency saying, we're  
24 objecting because we don't like the process. It's  
25 like, okay, well, sorry you don't like it.

1           **COMMISSIONER GIOVANNI:** So Chair, since  
2 this is kind of a wide-ranging discussion and it's  
3 probably got -- it doesn't directly touch upon the  
4 subject at hand with the Public Trust Doctrine.

5           But almost every significant development  
6 that comes before us is something that's front of  
7 mind with every politician and every civic leader  
8 are the traffic issues that we have on all of our  
9 islands. And I have found a real -- what spurs this  
10 comment here is that we're brought before us a  
11 traffic analysis on a project, and it's done by this  
12 one firm or another, usually without real touch in  
13 what's happening locally.

14           We had a petition before us here right  
15 nearby in Kapa'a, and there was this elaborate  
16 traffic study done, and the petitioner in the case  
17 spent a lot of money on it. But it was -- you could  
18 talk to any resident of this island, including the  
19 lady right there, our councilmember.

20           You don't need a traffic study from  
21 somebody in Dallas, Texas to tell you what the  
22 traffic is like in Kapa'a in mornings and  
23 afternoons. And so do you have any perspective that  
24 you can share on how this Commission can address --  
25 can better address traffic and how it comes into

1 play on our projects?

2           **CHAIRMAN SCHEUER:** I'm going to try and  
3 tie this to the public trust somehow, for agenda  
4 purposes. But -- so one of the benefits of being on  
5 the Commission is getting to go to trainings,  
6 including the National Planning Conference for the  
7 American Planning Association, and particularly, the  
8 Urban Land Institute, and state law and state  
9 practices to require TIARs, traffic impact analysis  
10 reports.

11           I think the somewhat inaccurate and blithe  
12 three-sentence retort to your question is TIARs tell  
13 us how cars are moving. And we're not actually  
14 interested in how cars are moving. We're interested  
15 in how people are moving.

16           And so the field of transportation  
17 analysis is evolving to not just require reports on  
18 traffic, but reports on how people and goods are  
19 getting to their destinations or not that can  
20 actually give this Commission the tools to  
21 understand what's happening, what would be  
22 meaningful improvement as a condition.

23           And I think Hawaii is years to decades  
24 beyond what some jurisdictions are doing to try and  
25 address those things. To really think about --

1 we're not interested in moving cars fundamentally.  
2 We get in cars because we want to move, right? So  
3 how do we move goods and people in a better way that  
4 will actually get us to better questions, because  
5 certainly asking how cars move, you're exactly  
6 correct, we get technically perfect traffic impact  
7 analysis reports that don't solve our fundamental  
8 problems.

9 Commissioner -- Executive Officer?

10 **MR. ORODENKER:** If I may for a moment kind  
11 of address that a little bit. This is part of the  
12 larger training that we give our commissioners when  
13 they come on.

14 The problem with TIARs is that they're  
15 usually disclosure documents. And if you read the  
16 details and you really understand what they're  
17 saying, when they say, "no impact," what they may be  
18 saying is it already stinks, and this is just going  
19 to make it -- it's -- so it's not going to make it  
20 any worse, because it already stinks, you know.

21 And we have to look at them in light of  
22 the fact that they are disclosure documents. And  
23 that's what makes public input so important. And  
24 there -- public input can be used to help render  
25 decision and can be used to cross-examine the



1 daylight side of the expert witness who prepared the  
2 TIAR.

3 I -- in my past experience as, you know, a  
4 consultant for developers, and as, you know, a  
5 public employee and working on planning projects for  
6 various parts of government, TIARs are probably the  
7 least reliable documents that I deal with. You can  
8 make them come out any way you want now.

9 So I think it's good that this commission  
10 is skeptical of TIARs. I think that public  
11 testimony is, in many cases, more important than the  
12 TIAR.

13 That being said and linking this back into  
14 the Public Trust Doctrine discussion, one of the  
15 things that this Commission faces is there is a  
16 constitutional requirement to protect agricultural  
17 land. And the way we've been dealing with housing  
18 is inconsistent with what most the rest of the  
19 country is doing. And that is we promote sprawl. I  
20 mean, and we shouldn't be doing that.

21 I mean, most of the rest of the country is  
22 dealing with it -- housing shortages by doing infill  
23 development, redevelopment in the urban core and  
24 things like that. And the benefit of that is that  
25 you don't have traffic problems.

1           So one of the things that this Commission  
2 may want to think about is saying no, you know, just  
3 saying no, so -- to promote development inside the  
4 urban core. And to that extent, I think that state  
5 policy has been -- at least in our -- in the city  
6 and county of Honolulu has been somewhat successful  
7 in that all of the recent development -- the lion's  
8 share of the recent development is going on in  
9 Kaka'ako.

10           I mean, whether or not that's the right  
11 kind of development is another issue. But you know,  
12 yeah. So --

13           **CHAIRMAN SCHEUER:** Thank you, Mr.  
14 Orodanker.

15           **MR. ORODENKER:** Thank you, Chair.

16           Given that this is a training device that  
17 we're going to be using for the future, a couple of  
18 things, if I can be indulged, is I'd like to ask the  
19 Chair a few questions about his presentation. And  
20 I'd also like to give the rest of the staff the  
21 opportunity to ask questions and things like that,  
22 if you can indulge me for a few moments.

23           **CHAIRMAN SCHEUER:** No concerns from the  
24 Commissioners?

25           **MR. ORODENKER:** Thank you. One of the

1 things that I think would assist future  
2 commissioners is an understanding of besides water,  
3 what other things you feel fall within the Public  
4 Trust Doctrine?

5 **CHAIRMAN SCHEUER:** Certainly, all publicly  
6 owned natural resources, so anything that the state  
7 has title to. Things it doesn't have title to but  
8 owns or controls, essentially, such as the near-  
9 shore ocean, the sky, less tangible things like  
10 light and light pollution and noise and noise  
11 pollution.

12 And in addition, I think it's -- and this  
13 is where the -- the constitutional series of cases  
14 on (indiscernible) practices is really critical, and  
15 the whole series in particular that found that most  
16 private property in Hawaii is not like private  
17 property on the continent because certain rights  
18 were never granted. They were exempted.

19 And so rights to access, rights to do  
20 traditional and customary practice and other things  
21 were never granted in fee simple, so they're not  
22 held right now by the fee simple owners. They don't  
23 have the right to exclude. And so those are  
24 essentially public trust resources that exist on  
25 private lands. So it's where the courts have, I

1 think, been evolving in a direction of sort of  
2 relying on these, kind of, separate lines of cases  
3 on water and land, but they're starting to merge  
4 together.

5           There's another constitutional provision  
6 about the right to a healthy environment that I  
7 think is going to start to merge into that, too,  
8 that could get to issues of traffic as well.

9           I think my last response to that question  
10 is that -- I'm trying to figure out how to phrase  
11 this. The doctrine really is expansive. For  
12 instance, during the contested case hearing in Mauna  
13 Kea, you know, you had a private sector attorney  
14 saying, no, the public trust only exists applied to  
15 water. That's the only extent of it. And it's  
16 like, it's just -- it's so wrong, it's hard to  
17 express how wrong that stance is, but it clearly  
18 applies very, very broadly to a whole set of  
19 resources.

20           So Commissioner Ohigashi?

21           **COMMISSIONER OHIGASHI:** What about nature  
22 species (indiscernible)?

23           **CHAIRMAN SCHEUER:** Yep. Every little bit  
24 applies to flora and fauna as well, particularly  
25 fauna, given common law rulings about that, but

1 yeah.

2 **MR. ORODENKER:** On a more practical  
3 standpoint, what about runoff issues? I mean --

4 **CHAIRMAN SCHEUER:** How does it apply to  
5 runoff issues --

6 **MR. ORODENKER:** Does the Public Trust  
7 Doctrine analysis apply to issues --

8 **CHAIRMAN SCHEUER:** So I tend to agree that  
9 the -- that runoff is going to be negatively  
10 impacting public trust resources along the coast,  
11 absolutely.

12 **MR. ORODENKER:** Okay.

13 **CHAIRMAN SCHEUER:** And this is right. One  
14 thing I think we see often in Ka Pa'akai analyses  
15 that we receive as well as public trust analysis,  
16 people look at the four squares of the property, and  
17 they're like, oh, yeah, there's nothing here. We're  
18 good. They have to look at that property in its  
19 landscape and its offset effects.

20 **MR. ORODENKER:** Okay. Thank you. I think  
21 some of the Commissioners have already touched on  
22 some of the other questions that I had, but just two  
23 more intellectual sort of questions for you that  
24 really don't have an answer, but I'd just like to  
25 get your opinion on.

1           Where do you see the Public Trust Doctrine  
2 evolving towards?

3           **CHAIRMAN SCHEUER:** Okay. So this is  
4 absolutely personal opinion here.

5           **MR. ORODENKER:** That's all I'm asking for.

6           **CHAIRMAN SCHEUER:** It is frightening, when  
7 you actually understand it, in my opinion, how  
8 little power our local and state governments have  
9 over our own future. You even get elected governor,  
10 and you find out that actually what's happening in  
11 international capital markets, the decisions of  
12 hedge funds and investment funds over key resort and  
13 other properties, decisions being made by the U.S.  
14 Military command can turn your local plans and world  
15 upside down nearly immediately.

16           And there is -- once land is zoned in the  
17 urban district, can't force somebody to run a resort  
18 if they don't make money on it; can't force people  
19 to employ our local folks if it doesn't make  
20 economic sense.

21           The public trust, which we are the  
22 trustees of, really is our most meaningful leverage  
23 for determining our own future, I think, to a much  
24 greater degree than most people appreciate. Sure,  
25 you got land. If you don't got water, which we get

1 to say who gets, you're not going to get to do what  
2 you want to do. And we can ask that the transaction  
3 be one where our people, our Hawaii, Native  
4 Hawaiians benefit much more than we have.

5 That is probably an answer to where would  
6 I like to see the Public Trust Doctrine evolve to  
7 more than where do I necessarily see it evolving to.  
8 Where I see it evolving to is a much broader  
9 application and increasing appreciation at levels of  
10 -- at all levels of government, that it is something  
11 that has to define their actions.

12 Thank you.

13 **MR. ORODENKER:** I'm going to twist your  
14 head a little bit here, but how do you think the  
15 Public Trust Doctrine should be applied to climate  
16 change and sustainability issues that were -- at  
17 least the ones we're presently dealing with?

18 **CHAIRMAN SCHEUER:** I feel I already sort  
19 of answered it with Commissioner Ohigashi's  
20 question, so do you want to expand a little bit?

21 **MR. ORODENKER:** Well, okay. So we now  
22 require -- our rules now require that applicants  
23 give us information with regard to the impact of  
24 their development on climate change issues and  
25 sustainability issues. Do you feel that, especially

1 with regard to sustainability issues, that the  
2 Public Trust Doctrine analysis should be applied to  
3 sustainability?

4 **CHAIRMAN SCHEUER:** Yes, I do.  
5 Commissioner Giovanni?

6 **COMMISSIONER GIOVANNI:** One of my  
7 observations is that recently, the environmental  
8 impact statements that have come and presented, they  
9 follow a form, standard format. And in the  
10 environmental assessment area, no surprise, climate  
11 change and sustainability is often overlooked  
12 because it wasn't in the form that they used, the  
13 template that they used three years ago.

14 Is that a vehicle by which -- I mean, is  
15 the environmental impact statement and the demands  
16 that this Commission can make, for example, if it  
17 has an accepting agency for an EIS, that it has to  
18 do proper diligence to those --

19 **CHAIRMAN SCHEUER:** I believe there are  
20 additional requirements that were recently enacted.  
21 So we are going to see more meaningful explicitly --

22 **COMMISSIONER GIOVANNI:** Okay.

23 **CHAIRMAN SCHEUER:** -- considerations.  
24 This is just reacting to these two questions, but  
25 right on Oahu, we're dealing with the Red Hill water



1 crisis. And because of the way our current water  
2 withdrawal system is designed, the Honolulu Board of  
3 Water Supply took the preemptive act of shutting  
4 down one well that provides 20 percent of water for  
5 urban Honolulu as well as some nearby wells, so they  
6 don't suck pollution towards it.

7 This is a drought, but it is an  
8 engineering drought. We can put in additional wells  
9 in other areas right now to deal with that. But  
10 until those wells are in, the Honolulu Board of  
11 Water Supply has advised that there might be a  
12 temporary succession of issuing of new water meters.  
13 People are losing their shit.

14 So a temporary thing, which is not the  
15 fundamental thing, which isn't like we need this  
16 money and sites and drill wells, and we will  
17 actually get back to the level of water we can.

18 Climate change will -- because of two main  
19 things, right, the dry areas are just getting drier  
20 fundamentally, and precipitation is coming more in  
21 what I colloquially called these rain bombs where  
22 they're not soaking into the ground. So recharges,  
23 reducing, even in areas where we're getting possibly  
24 even more water but not as much as going into the  
25 ground, so we're going to have less water available,

1 fundamentally, and this is going to be very clear on  
2 the leeward sides of all the major islands.

3 If we can't handle right now politically a  
4 temporary pause, I have no idea how we are  
5 administratively, regulatory or politically ready  
6 for our more fundamental limits which are coming  
7 down the pike.

8 **MR. ORODENKER:** I have one last question.  
9 It's a bit self-serving, but year in, year out, we  
10 -- as you mentioned, we fight with the legislature  
11 over the curtailment, at the very least, of Land Use  
12 Commission authority.

13 And part of what we've argued in front of  
14 the legislature time and again is that the counties  
15 don't seem to be able to handle the Public Trust  
16 Doctrine. Can you comment on that a little bit?

17 **CHAIRMAN SCHEUER:** Certainly, the general  
18 lack of using tested case processes limits it.  
19 There's awesome people at each county level, right,  
20 and great volunteers on the Planning Commissions.  
21 Some of it is a matter of training; some of it is a  
22 matter of administrative practice.

23 In a small group, to air dirty laundry,  
24 what I have found is that publicly, every time these  
25 bills are introduced at the legislature, the

1 county's like, yeah, yeah, we want those powers.

2           Privately, whenever they get a real  
3 stinker of development, they're like, LUC, can you  
4 guys handle this? Because it's too hard at the  
5 local level to fight against local interests with  
6 people you're that close to on a small county.

7           And so we are the bad cop, and sometimes  
8 the bad cop is really helpful for addressing those  
9 public trust concerns. I think -- I mean, to the  
10 degree -- you know, whether or not American  
11 democracy is working well is a very arguable  
12 question. But frequently cited as one of the things  
13 that makes it work reasonably well is the  
14 diffuseness of power, the same thing that makes it  
15 hard to get anything done also has multiple checks  
16 and balances, and we are one of those checks.

17           **MR. ORODENKER:** Thank you, Chair. If once  
18 again, you can indulge me, I'd like to ask whether  
19 any of our staff has any questions with regard to  
20 Public Trust Doctrine?

21           **CHAIRMAN SCHEUER:** Mr. Derrickson?

22           **MR. DERRICKSON:** What would you tell the  
23 Commission to look at to try to make sure it's on  
24 the record for fact-finding purposes to support the  
25 Public Trust Doctrine, due diligence

1 (indiscernible)?

2 **CHAIRMAN SCHEUER:** The question Scott  
3 asked, just so it's clear on the audio recording, is  
4 what questions would I encourage the Commission to  
5 ask to get -- make sure things get on the record to  
6 ensure that the Public Trust Doctrine is addressed.

7 Certainly, the questions are on Ka Pa'akai  
8 and delving deeper than the just what are the  
9 extent, really questioning who their consultants are  
10 and what their experience and the relevance is to a  
11 particular area.

12 So one part I struggled with in putting  
13 this presentation together is, you know, the Water  
14 Commission clearly has a standard in their statute  
15 and has been incorporated into all the rulings of  
16 the Public Trust Doctrine that the proposed use of a  
17 public trust use needs to be reasonable and  
18 beneficial for water.

19 We don't have that exact same standard.  
20 People can impose -- propose projects and they can  
21 be like in line with zoning, but they can kind of be  
22 like, at least sometimes, to some of us, kind of  
23 stinkers of a project, right, that don't necessarily  
24 serve any local existing need.

25 I don't know where that evolution will or

1 can go, but I think you're right, the edges of the  
2 Public Trust Doctrine, at least, by asking project  
3 proponents, why is this even good? Why do we need  
4 this? How does this improve public trust resources  
5 or at least not impact them and overall fulfill the  
6 goals of the state?

7           It's a good question, which is why it's  
8 tough one to answer. Fortunately, we have  
9 incredible commissioners who read all 3,000 pages of  
10 EAs and point out to testifiers, such as  
11 Commissioner Okuda, that what they just said a  
12 document says is not actually what a document says.  
13 That ability to be both kind and firm is really  
14 critical.

15           Any other questions?

16           I kind of wasn't sure, I think I said yeah  
17 quickly to -- Dan's like, hey, can you give a  
18 presentation of the Public Trust Doctrine a couple  
19 of months ago, so I hope it's of some service to  
20 everyone as you continue this work.

21           **COMMISSIONER OHIGASHI:** Before you go,  
22 Jonathan, (indiscernible). Sometimes on the  
23 Commission (indiscernible). The Public Trust  
24 Doctrine (indiscernible) trying to be more  
25 generalistic (indiscernible).

1 (Indiscernible.)

2 MR. ORODENKER: You shouldn't have slept  
3 through his last presentation.

4 CHAIRMAN SCHEUER: To respond a little bit  
5 more to Scott's question, I did because I -- in the  
6 course of writing my -- cowriting my book on the  
7 water in West Maui, I forced myself to understand  
8 how the state sets sustainable yields, and it's just  
9 frightening how much is assumed and not, in my mind,  
10 just not really getting at core issues of public  
11 trust protection or even providing for future for  
12 (indiscernible) for water -- or water for  
13 (indiscernible) housing.

14 I did give a talk to the Water Resources  
15 Restrict Seminar. It's about an hour long, and it  
16 summarizes all of this, and it's on YouTube, and the  
17 link is posted to the commissioner's checkpoint,  
18 also just available to the public on YouTube.

19 And I would love if there were questions  
20 from future commissions about water when people come  
21 in with just really simple statements like, oh,  
22 yeah, we're below sustainable yield. Everything's  
23 good.

24 Among the things we should be frightened  
25 about is that the Water Commission sets sustainable

1 yields in their Water Resources Protection Plan, and  
2 they have a long discussion of how climate change is  
3 coming and how it's going to affect things, and then  
4 they say, and we set sustainable yields based on  
5 historic rainfall. So it's going to be a huge issue  
6 and we're not incorporating it into how we set  
7 sustainable yields.

8 So when you see those documents come in  
9 front of you and they say the analysis is -- "this  
10 is a sustainable yield. We're only using part of  
11 it. We're all good," vigorous questioning, I think,  
12 would be in the public's interest.

13 Dan?

14 **COMMISSIONER GIOVANNI:** Again, I want to  
15 thank you, Jonathan, for sharing your wisdom. And I  
16 want to invite you as a citizen to the open mic for  
17 public testimony on these issues as we go forward.

18 **CHAIRMAN SCHEUER:** Thank you.

19 Commissioner Okuda?

20 **COMMISSIONER OKUDA:** I'm only going to  
21 talk if I'm the last person and if -- if you can  
22 give me, I think, since we're supposed to follow  
23 Robert's Rules of Procedure, this is a point of  
24 personal privilege. And I only state it here -- I  
25 wish it was a bigger crowd, but I'm only stating it

1 here because I might not be around because of some  
2 litigation matters for, you know, the final meeting  
3 that you will chair, whenever that might be. And so  
4 I don't want to take a chance that I'm not there  
5 where I can tell you this.

6           So I'd like to give a eulogy even though  
7 you're alive. And I hope -- like, when I give  
8 eulogies, I don't - - I don't cry when I give it.  
9 But you know, we talk about ancestors at many of  
10 these hearings. And you know, I know about your  
11 father being one of those Ritchie Boys, a German Jew  
12 who fled Hitler, came to United States, and you  
13 know, put on American uniform, was trained at Camp  
14 Ritchie, were some of the Nisei MIS interpreters  
15 were also trained, went back to Germany as an  
16 interpreter and defeated Hitler and fascism.

17           And you know, the historic record is clear  
18 that a number of the Ritchie Boy interpreters were  
19 captured by the German Army and were summarily  
20 executed. And so it, frankly, was not safe for a  
21 German Jew to put on an American uniform and go back  
22 to Germany.

23           I think your father is remembered as  
24 somebody who put the University of Hawaii Chemistry  
25 Department on the map. You've told other people



1 like Commissioner Ohigashi, who used to be a  
2 University of Hawaii Regent, how he mentored Joyce  
3 Tsunoda. What was her position in the end?

4 **COMMISSIONER OHIGASHI:** She was Vice-  
5 Chancellor of --

6 **COMMISSIONER OKUDA:** Community college,  
7 yeah, community colleges. You know, I mean, that  
8 might not seem like a big deal now, but it was a big  
9 deal then where, you know, Japanese women were  
10 supposed to keep quiet and become schoolteachers.

11 And a schoolteacher is an honorable  
12 profession, you know. My wife spent her career  
13 helping disabled kids. But you know, your father,  
14 he was just out of the box regarding that.

15 So I think having known you all these  
16 years, watch your service as Chair, I think knowing  
17 you, I know what your political bent is on a lot of  
18 these things, but, frankly, I don't think anybody  
19 could really tell, the way you handled the hearings,  
20 that it was even keeled. And even, like you pointed  
21 out, people who didn't like the decision at least  
22 came away with the feeling that it was fair and it  
23 was open-minded.

24 So this is the part I try not to cry, but  
25 you know, your father would be proud of you,

1 Jonathan. Sorry. And I'm proud to call you my  
2 friend.

3 **CHAIRMAN SCHEUER:** I will cry for you.  
4 Though I still have a couple hearings to go, I think  
5 it has been a tremendous honor and pleasure. And to  
6 the degree I've done things that have not been wrong  
7 -- right, I apologize. But to the degree that we  
8 have accomplished some, I think, very meaningful,  
9 good decisions for the state, it has been because of  
10 the breadth of intelligence and heart of my fellow  
11 commissioners.

12 And it is and will remain one of the  
13 greatest pleasures and accomplishments of my life.  
14 So thank you very, very much.

15 I would like to adjourn, if that's okay.  
16 Is there any further business, Mr. Orodenger?

17 **MR. ORODENKER:** No, there is not.  
18 Although, I would like to say that we share  
19 Commissioner Okuda's sentiments. We are thrilled  
20 that you've been here, and we're very proud -- I'm  
21 very proud to call you friend.

22 **CHAIRMAN SCHEUER:** Thank you. Thank you,  
23 everyone. Much aloha. We are adjourned. It's  
24 11:01.

25 **(Meeting adjourned at 11:01 a.m.)**

1 CERTIFICATE

2  
3 I, Jodi Dean, do hereby certify that the  
4 proceeding named herein was professionally transcribed on  
5 the date set forth in the certificate herein; that I  
6 transcribed all testimony adduced and other oral  
7 proceedings had in the foregoing matter; and that the  
8 foregoing transcript pages constitute a full, true, and  
9 correct record of such testimony adduced and oral  
10 proceeding had and of the whole thereof.

11  
12 IN WITNESS HEREOF, I have hereunto set my  
13 hand this 1st day of June, 2022.

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20 Jodi Dean  
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