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
APPEARANCES:

COMMISSIONERS PRESENT:
Jonathan Scheuer, Chair
Dan Giovanni
Lee Ohigashi
Edmund Aczon
Nancy Cabral
Gary Okuda
Kuive Kamakea-Ohelo

STAFF PRESENT:
Daniel Orodenker, Executive Officer
Scott Derrickson, Chief Planner
Riley Hakoda, Staff Planner
Martina Segura, Staff Planner
Natasha Quinones, Chief Clerk
Ariana Kwan, Administrative Assistant
Linda Chow, Esq. Deputy Attorney General

PUBLIC TESTIMONY:
Felicia Cowden, Council Member, County of Kauai
CHAIRMAN SCHEUER: Finally, any decisions that are made that compromise that use (inaudible) require a process with the highest levels of openness, diligence, and foresight possible (inaudible).

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

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

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

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

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

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

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

So first, how did the public trust arise in Roman law make its way into English law and American common law and all the way to Hawaii?
And it's just a brief preface. There are people in this room who know more about these particular things and who actually trained attorneys more than I am. Hopefully, the point of this talk will be more of a synthesis of a bunch of disparate things that bring them together rather than trying to say, oh, I know all about any particular thing in depth.

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

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

Emperor Justinian, when he codified Roman law, one of the provisions was, "By the law of nature these things are common to mankind - the air, running water, the sea, and consequently, the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects the habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations."
In other words, there's some resources that everybody needs for their existence that's so important it does not make sense for there to be private property.

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

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

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

Ignoring a very long and complex history
of American jurisprudence on this, one case that
gets cited all the time is the case of the Illinois
Central Railroad versus the State of Illinois.
Early on, the legislature of Illinois granted a huge
grant of coastal lands to the Illinois Central
Railroad, saying, "Here, we're giving these to you
in the City of Chicago, for the development of port
and railroad facilities."

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

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

And in 1892, the year before the
overthrow, the legislature of Hawaii expressly
adopted English common law to be the law -- part of
the law of Hawaii, and this survives to this day as
Hawaii Revised Statutes, Chapter 1, Section 1. "The
common law of England, as ascertained by English and
American decisions, is declared to be the common law
of the State of Hawaii in all cases, except as
otherwise expressly provided by the Constitution or
laws of the United States, or by the laws of the
State, or fixed by Hawaiian judicial precedent, or
established by Hawaiian usage."

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

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

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

They had a second child which was Haloa,
or the first human. That legend speaks to many
things, including the duty of humans, as the younger
sibling of Kala, to take care of it, but also points to what appears throughout Hawaiian mythology the idea that what we now call "resources" are actually physical embodiments of the gods.

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

I have two long quotes. I wanted to include this because Commissioner Okuda, during our conversation yesterday, mentioned knowing Kawena Pukui as a child. And there's a quote from Handy in Handy and Pukui's book "Native Planters in Old Hawaii," where they specifically talk about this.

It's a long quote. I put it on two slides.

Pukui says, "Inalienable title to water rights in relation to land use" -- so it should say "was" -- "a conception that had no place in the Hawaiian way of thinking. Water, whether for irrigation, for drinking, or other domestic purposes, was something that 'belonged' to Kane-i-ka-wai-ola (Procreator-in-the-water-of-life), and came through the meteorological agency of Lono-makua the Rain-provider. "The paramount chief, born on the soil and hence firstborn of the maka'ainana of
moku (island or district), was a medium in whom was vested power and authority. But this investment was instrumental in providing only a channeling of power and authority, not a vested right. But this was not equivalent to our European concept of 'divine right.' "The ali'i nui, in old Hawaiian thinking and practice, did not exercise personal dominion, but channeled dominion. In other words, he was a trustee. The instances in which an ali'i nui was rejected and even killed because of abuse of his role are sufficient proof that it was not personal authority but trusteeship that established right (pono)."

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

Legal understanding and really what was a religious as well as a legal understanding of the world was incorporated into the very first laws of the Kingdom of Hawaii. In the 1840 constitution it states, "The land, along with its resources, 'was not the King's private property. It belonged to the Chiefs and the people in common, of whom the King was the head and had the management of landed
property.'" So this idea that certain resources were not privately held but were really held as trust was there.

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

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

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

And so partly with that sort of historical understanding, the legislature takes this monumental
move to privatize some resources, some land, and some rights in land rather than have it held in trust. But really clear exceptions are made, which we now understand to be including the traditional customary rights of native Hawaiians which exists on all undeveloped private property, less than fully developed private property, as well as on water.

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

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

So that is how that comes into Hawaii law, that really ancient tradition of a public trust. How did it arrive into the state constitution? There's some very specific provisions that were included in the 1978 Constitutional Convention,
Article XI, Section 1: "All public natural resources are held in trust by the State for the benefit of the people." Unambiguous.

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

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

And then also, the traditional and customary rights of native Hawaiians which are related to property rights are also included. "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."
And this is a report from the committee that recommended the final language of the provision that called for the creation of the water code. As they -- the committee and the Constitutional Convention in 1978 reported to the whole body. Why did we write it this way?

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

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

This is language directly form the Waiahole Water case, which I'll talk a little bit more about later. But direct quote from the Supreme Court, "The Code and its implementing agency, in this case, the Water Commission, do not override the Public Trust Doctrine or render it superfluous."
Even with the enactment and any future development of the Water Code, the doctrine continues to inform the Code's interpretation, define its permissible 'outer limits,' and justify its existence."

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

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

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

Now, a lot of things happened the next month of March 2020, including the pandemic. But
the point of my putting this up is that every year
I've been on the Land Use Commission and every,
every year before that, people tried to get rid of
the LUC in various ways or reduce our powers.

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

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

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

   So this is crazy, right? But despite the
fact that -- oh, my -- the first Constitution said,
hey, all these public resources are held in trust,
and despite the kuleana that said water is to be
held in trust, the plantations arise soon after.
Sugar plantations, the large ranches, later pineapple.

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

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

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

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

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

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

They appealed the decision to the Hawaii Supreme Court, which was now headed by Justice William S. Richardson, a Native Hawaiian, and they
used that opportunity to overrule all these previous
decisions that had ignored the original laws in the
state.

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

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

And really, so that's State Constitutional
provisions are put into place to clarify and put in
place a method for managing this public trust
resource. So the provision that all public natural
resources are held in trust and the creation of the
law or code are response to the McBryde decision.

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

And one of the biggest compromises in the Code was this statement of a dual mandate. And it's on a couple slides because it's a long provision. They direct this new Water Commission, "The State Code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. "However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply,
agriculture, and navigation. Such objectives are declared to be in the public interest."

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

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

So it's not just surface water. It's surface and ground. It's not just water on public property. It's water everywhere.
Because one of the bizarre rulings from the courts during the territorial period was that somehow if you allowed water to flow mauka to makai, it was wasted. They overruled that. And they said that obviously that has an important cultural and ecological use. They clarified that clearly the State is the trustee of the water resources trust. The precautionary principle applies. And so the Water Commission -- one thing the Water Commission has done in their conclusions of law for the Waiahole case was they said they adopted this principle called "the precautionary principle," which says that when scientific evidence is uncertain or unconclusive, the trustee still has an obligation to make a decision and to make the decision that is most likely to protect the resource.

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

And so the Commission actually said,
"Actually, the principle is to be precautionary."

And the Supreme Court ratified that part of the Commission's decision, so that is correct. And then they included language that has been included in many court decisions to this day. There's a level of openness, diligence, and foresight necessary for a State agency to include when making these kinds of decisions.

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

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

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

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

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

And they laid out certain things. And a three-part Ka Pa'akai test is to first identify the
valued cultural, historical, or natural resources and the extent to which traditional practices are exercised in relationship to them; the extent to which the resources and rights will be affected or impaired by those resources -- sorry for the typo -- and the feasible action to be taken to protect those rights.

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

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

So certainly, for the Land Use Commission, but also applying to the Water Commission, these Kapa'akai duties are part of how you fulfill your public trust duties and other boards and commissions.
Now, the Kauai Springs case, on this island as well, was a very interesting case. There was a private water bottler who wanted to expand their facilities from an old plantation spring, and they were bottling water and selling it commercially around the island. And they wanted to expand their operations, but they needed certain permits from the County Planning Commission.

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

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

The Planning Commission said, "Okay. Then I guess we're doing it on our own because we really do think we have these duties." And they said, on the basis of not having sufficient information from the applicant on the impact of the -- on the public
trust of this bottling operation, which would be expanded via these permits. They denied it.

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

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

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

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

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

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

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

They have to demonstrate that there's no practicable alternative to what they're proposing. And if there is a reasonable allegation of harm against the public trust purposes, they have to do
one of two things: either demonstrate there is no harm, or that the right use -- there is harm, but nevertheless, the use is reasonable and beneficial.

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

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

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

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

If the uses are inconsistent but they're
reasonable and beneficial, you have to impose mitigation in order to -- not just that individual's impact, but the cumulative impacts on the proposed use if you're going to approve it.

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

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

There were a number of other very important findings in the concurring decision. This long quote basically expands on and interprets Ka Pa'akai test. Basically, you have an affirmative obligation to look -- to look at what's being proposed and what's in the area, and how those proposed uses are going to be impacting in order to protect -- basically, have a presumption in favor of protecting those uses.
This gets at what a reasonable allegation is. "When an individual Native Hawaiian descent asserts that a traditionally exercised cultural, religious, or gathering practice in an undeveloped or not fully developed area would be curtailed by the proposed project. The State or agency is obligated to address this adverse impact in its findings."

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

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

And finally, they said, "The role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not simply fulfilled by providing a level playing field."
Right? They have a duty, as the trustee, to take that active role in trying to protect these public trust resources and the uses associated with them. And you can't hand it off.

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

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

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

There was -- and it's such a contentious case, interestingly, there was a majority opinion which was three members, but only as to the decision
that the Commission made. There was a two-party
consenting and non-concurring decision from two of
the justices who said -- who agreed with what we did
and agreed with how we made the decision, and then
there was one justice who disagreed with the entire
position. And so there were three separate
opinions.

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

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

And the concurring and dissenting opinion
said, "Based on the record in this case, the Resort
has complied with the Water Commission requirements
in Condition 10, established to protect the Public
rust, and no threat of harm to the public trust has
been shown."

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

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

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

So to be really clear, like as has
happened in cases we've talked about like in Olowalu
where an established Native Hawaiian practitioner, a
fisherman, came and said, "You know what? I'm super
concerned that this development is going to impact
my traditional and customary practices in this area.
Plus, they never talk to me."

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

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

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

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

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

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

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

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

So there's not full replacement as those
who are older among us pass away and young people
are born, but there's also this demographic change
that's happening.

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

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

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

How do we address that? And how do we
deal with the impact that, as the population of
Hawaii changes, the people who fought, in some cases
for like their entire lives, to like have some say
over water in their communities or have some say
over where the shoreline goes or some say over the
protection of resources? When they move away and
new people move in, what do we do when that
constituency changes that we're really -- our job is
to fulfill?

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

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

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

And what we've seen in Mauna Kea and
Honokohau (Maui), and Kawela, Molokai on stream
restoration, even over my lengthening but relatively brief lifetime, compromise was like a waiahole. Folks were stoked. Hey, we got half the water back, right? Half the water that was taken by this system, we're getting back in our communities.

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

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

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

Finally, Coordination and Cooperation. I
talked a little bit about the Water Commission.

They only fully fulfill their public trust duties in many ways and designated water management areas and other places that don't have the administrative tools to do so.

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

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

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

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

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

But what I've seen on this Commission is
that because contested cases are a default, people have rights. They get heard. And many times, people have come to us and they're like, I didn't like your decision, but I felt it was fair. Right?

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

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

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

Our understanding continues to evolve in a particular direction. The trust is pretty expansive and the duties are pretty clear. The constraints on
the Public Trust Doctrine, like you need to make a reasonable allegation of harm, exists, but they're fairly small. The duties on the trustees, us, who make these decisions, are pretty clear in what the standards are that we're supposed to follow.

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

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

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

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

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

Do you swear or affirm the testimony
you're about to give is the truth?

COUNCILMEMBER COWDEN: I do.

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

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

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

I'm very confident in Dan, our own person from Kauai. But I have very much valued what you just shared for the Public Trust Doctrine, and I thank the group for really giving that focus, because it is so important -- I just can't even state how important it is to have your organization do the kind of robust review of what happens just to keep our land and water in good shape. We need it to continue.
I get a little discouraged if I'm hearing it might be a threat. So thank you. I just want to say that. And great job. Great job, Jonathan.

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

Commissioners, are there any questions for the witness?

Mahalo nui for your testimony.

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

Commissioner Okuda.

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

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

But I think the importance of this presentation is to show that the Public Trust Doctrine in Hawaii has a legal and historical basis, as you pointed out, separate from the Public Trust Doctrine as it is laid out in federal or state cases on the mainland.
And it really comes down in my view to the fact that, historically and legally, the source of land title in Hawaii is historically different. And if I can just spend a minute.

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

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

In other words, if I owned -- if I -- I can write a deed -- and I used this example once in a quiet title case. I can write a deed saying, I, Gary Okuda, convey to Jonathan Scheuer all my right, title, and interest in Iolani Palace, and that deed can be recorded at the Bureau of Conveyance and -- but does Jonathan get Iolani Palace? No, because I
1 didn't own Iolani Palace.
2
3 So the real question on a lot of land title
4 issues in Hawaii and the rights that people have is:
5 what was the original source of title, and what did
6 people get from the original source of title?
7
8 And the original source of title is
9 Kamehameha, III, through the process of the Mahele.
10 And I asked this question of one expert lawyer who
11 oftentimes appears in front of us, who is giving a
12 presentation at one of the planning officers, I
13 think, convention, where he tried to show, oh, look
14 at these federal court cases regarding water rights,
15 mainly from the mainland.
16
17 Look at how the land -- the Public Trust
18 Doctrine is applied on the mainland. And then he
19 kind of like tried to bootstrap it, saying, well,
20 because of these recent U.S. Supreme Court cases,
21 maybe you can relitigate ownership of water in
22 Hawaii.
23
24 And my question to him was, Well, the real
25 question is what did the King convey out at the
26 original time of the Mahele. And my question to him
27 was, What is the evidence in the historic record
28 that the King intended to convey ownership of water?
29 And even he had to admit there's no evidence of
And so what the King didn't convey out is retained by the King, retained by the successors to the King, which is the State of Hawaii. And because the constitution basically says that the sovereignty or the power of the state derives from its people is reserved back to the citizens of the State of Hawaii.

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

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

And again, it's not a radical proposition. This is a simple, English, American common law rule, which is you only get what your grantor gives you. And if your grantor never gave you, you don't get
One more point. And I don't think our trust duties end with just the decision we make. Sometimes we have to defend our decision, okay? And I don't want to, you know, get people pissed about the politics, so I won't talk about, you know, recent events and other areas where people sometimes do the long-term, long-range thing, which is, okay, we'll fight the issue over this long-term because in the end, we'll get what we want, even if the law might be different.

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

You know, we got to be willing to defend that, you know, through the appellate court system. We really do. Because if we just make a decision and we don't defend our decision or we don't defend what we think is the proper exercise of the public trust, then essentially, it's like we never made the decision because the other side will -- is going to take the long view. They're going to appeal it,
appeal it, or they're going to, you know, just chip
away at whatever we do, and in the end you get --
you know, you get the results.

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

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

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

CHAIRMAN SCHEUER: Thank you, Commissioner
Okuda.

Commissioner Ohigashi?

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

Where do you see the litigation going
forward or the -- or the problems going forward in
terms of utilizing the Public Trust Doctrine
(indiscernible) issue climate change?
CHAIRMAN SCHEUER: You know, it's -- what do I see with the climate change happening? What direction? You know, I only had, like I say, the Henson preliminary thoughts and possibly entirely incorrect responses to where it might go.

(Indiscernible speaking.)

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

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

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

We have a real, real problem. There is already more land zoned, for instance, on Maui than we actually have ready water available to deliver to
it in the existing urban district. Climate change is going to exacerbate that.

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

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

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

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

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

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

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

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

But when I say -- use the word "we" about defending it, okay, you know, the legal system is human beings. Judges aren't, you know, omnipotent
or smarter than any of us, and people sometimes view things differently. If it's a situation where we make a decision -- when I say "we" -- and for some reason a decision is overturned at the next step, my point was we, as a Land Use Commission, should -- if it's an appropriate case that we consider appropriate, we should insist that the decision be defended against at the next step, okay?

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

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

I'm really concerned when, for example, and we can get into it at some other hearing when it's properly agendized, but as a general principle, you know, I'm just a little bit concerned when a
single circuit judge is going to make a decisions
would set statewide public policy, because if we
don't go and appeal that decision, you know, it --
it becomes now something that's paraded around at
other hearings saying, look, look, look, this is the
decision overturning Land Use Commission. Yeah,
it's only a circuit judge, but hey, you know, yeah,
it's precedent or it's persuasive.

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

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

You know, we're bound to follow that
highest precedent, and that's the rules, and it's
going to apply statewide. But I think there's a
real danger to democracy and to our public trust
duties where we, by default, just let, you know, a
lower-level judge, who we might all have the highest
respect for, but make a decision that now is going
to have implications statewide.

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

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

    Sorry, Dan.

CHAIRMAN SCHEUER: And that was the answer
to "what did you mean by 'we.'" Thank you. But it
was a very beautiful and eloquent answer.
COMMISSIONER GIOVANNI: Actually, that's
the answer I was looking for.

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

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

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

It's incumbent on us. It's part of our
job. And whether it be at the forefront in a
contested case or in defending our decisions through
some appellate process, appeal process, it's serious
stuff, and I really appreciate it.
I got another comment, just because I want to emphasize what you said very briefly in your remarks just a moment ago about a limitation on our Commission to actually stand behind and make our decisions strong decisions, and that is enforcement.

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

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

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

And so this whole area of enforcement, to
me, is one which might hopefully see some real
development. So thank you. And I look forward to
our conversation.

CHAIRMAN SCHEUER: Mahalo, Commissioner
Giovanni.

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

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

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

And having sat on the developers' side, if
you will, seeking a lot of these permits for the
Department of Hawaiian Homelands, one of the things
we did to ensure that when we talk to people about potential impacts of additional water use, we would get real answers, was that the people we used to conduct those interviews were people who had lived, at a minimum, two decades on the island. And so I don't know whether it is legislative change or a possible policy or guideline change within our rules, but you're going to get better answers on cultural impact assessments when they are done largely by people from that community. And then you're going to get Oahu-based or Continental-based firms who are sending out letters saying, please tell me about your cultural practices. And when they don't get a response, they conclude that there must be none. So that's another -- that more thoughtful engagement could include some overlapping questions about "Do you see your practices changing in light of climate change? How are you addressing them now? How might this project limit or enhance your ability to address them in the future?"

COMMISSIONER OHIGASHI: I just want to make a comment about what Dan indicated. I agree that we need more -- that there's an enforcement deficit and difficult time getting people to comply.
But what I'm finding is that the difficulty -- the most difficult ones are the state and the counties. And we put all the conditions (indiscernible) landfills, expecting them to comply, and then they're going to come back and say, "We're not complying."

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

CHAIRMAN SCHEUER: Commissioner Giovanni.

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

CHAIRMAN SCHEUER: I think even yesterday we had a testifier from a state agency saying, we're objecting because we don't like the process. It's like, okay, well, sorry you don't like it.
COMMISSIONER GIOVANNI: So Chair, since this is kind of a wide-ranging discussion and it's probably got -- it doesn't directly touch upon the subject at hand with the Public Trust Doctrine.

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

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

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

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

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

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

And I think Hawaii is years to decades beyond what some jurisdictions are doing to try and address those things. To really think about --
we're not interested in moving cars fundamentally.

We get in cars because we want to move, right? So how do we move goods and people in a better way that will actually get us to better questions, because certainly asking how cars move, you're exactly correct, we get technically perfect traffic impact analysis reports that don't solve our fundamental problems.

Commissioner -- Executive Officer?

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

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

And we have to look at them in light of the fact that they are disclosure documents. And that's what makes public input so important. And there -- public input can be used to help render decision and can be used to cross-examine the
daylight side of the expert witness who prepared the TIAR.

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

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

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

I mean, most of the rest of the country is dealing with it -- housing shortages by doing infill development, redevelopment in the urban core and things like that. And the benefit of that is that you don't have traffic problems.
So one of the things that this Commission may want to think about is saying no, you know, just saying no, so -- to promote development inside the urban core. And to that extent, I think that state policy has been -- at least in our -- in the city and county of Honolulu has been somewhat successful in that all of the recent development -- the lion's share of the recent development is going on in Kaka'ako.

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

CHAIRMAN SCHEUER: Thank you, Mr. Orodenker.

MR. ORODENKER: Thank you, Chair.

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

CHAIRMAN SCHEUER: No concerns from the Commissioners?

MR. ORODENKER: Thank you. One of the
things that I think would assist future
commissioners is an understanding of besides water,
what other things you feel fall within the Public
Trust Doctrine?

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

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

And so rights to access, rights to do
traditional and customary practice and other things
were never granted in fee simple, so they're not
held right now by the fee simple owners. They don't
have the right to exclude. And so those are
essentially public trust resources that exist on
private lands. So it's where the courts have, I
think, been evolving in a direction of sort of relying on these, kind of, separate lines of cases on water and land, but they're starting to merge together.

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

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

So Commissioner Ohigashi?

COMMISSIONER OHIGASHI: What about nature species (indiscernible)?

CHAIRMAN SCHEUER: Yep. Every little bit applies to flora and fauna as well, particularly fauna, given common law rulings about that, but
MR. ORODENKER: On a more practical standpoint, what about runoff issues? I mean --

CHAIRMAN SCHEUER: How does it apply to runoff issues --

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

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

MR. ORODENKER: Okay.

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

MR. ORODENKER: Okay. Thank you. I think some of the Commissioners have already touched on some of the other questions that I had, but just two more intellectual sort of questions for you that really don't have an answer, but I'd just like to get your opinion on.
Where do you see the Public Trust Doctrine evolving towards?

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

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

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

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

The public trust, which we are the trustees of, really is our most meaningful leverage for determining our own future, I think, to a much greater degree than most people appreciate. Sure, you got land. If you don't got water, which we get
to say who gets, you're not going to get to do what you want to do. And we can ask that the transaction be one where our people, our Hawaii, Native Hawaiians benefit much more than we have.

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

Thank you.

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

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

MR. ORODENKER: Well, okay. So we now require -- our rules now require that applicants give us information with regard to the impact of their development on climate change issues and sustainability issues. Do you feel that, especially
with regard to sustainability issues, that the Public Trust Doctrine analysis should be applied to sustainability?

CHAIRMAN SCHEUER: Yes, I do.

Commissioner Giovanni?

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

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

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

COMMISSIONER GIOVANNI: Okay.

CHAIRMAN SCHEUER: -- considerations.

This is just reacting to these two questions, but right on Oahu, we're dealing with the Red Hill water
crisis. And because of the way our current water withdrawal system is designed, the Honolulu Board of Water Supply took the preemptive act of shutting down one well that provides 20 percent of water for urban Honolulu as well as some nearby wells, so they don't suck pollution towards it.

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

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

Climate change will -- because of two main things, right, the dry areas are just getting drier fundamentally, and precipitation is coming more in what I colloquially called these rain bombs where they're not soaking into the ground. So recharges, reducing, even in areas where we're getting possibly even more water but not as much as going into the ground, so we're going to have less water available,
fundamentally, and this is going to be very clear on
the leeward sides of all the major islands.

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

    **MR. ORODENKER:** I have one last question.

  It's a bit self-serving, but year in, year out, we
-- as you mentioned, we fight with the legislature
over the curtailment, at the very least, of Land Use
Commission authority.

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

    **CHAIRMAN SCHEUER:** Certainly, the general
lack of using tested case processes limits it.

There's awesome people at each county level, right,
and great volunteers on the Planning Commissions.
Some of it is a matter of training; some of it is a
matter of administrative practice.

    In a small group, to air dirty laundry,
what I have found is that publicly, every time these
bills are introduced at the legislature, the
county's like, yeah, yeah, we want those powers.

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

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

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

**CHAIRMAN SCHEUER:** Mr. Derrickson?

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

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

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

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

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

I don't know where that evolution will or
can go, but I think you're right, the edges of the Public Trust Doctrine, at least, by asking project proponents, why is this even good? Why do we need this? How does this improve public trust resources or at least not impact them and overall fulfill the goals of the state?

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

Any other questions?

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

(Indiscernible.)

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

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

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

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

Among the things we should be frightened about is that the Water Commission sets sustainable
yields in their Water Resources Protection Plan, and they have a long discussion of how climate change is coming and how it's going to affect things, and then they say, and we set sustainable yields based on historic rainfall. So it's going to be a huge issue and we're not incorporating it into how we set sustainable yields.

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

Dan?

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

CHAIRMAN SCHEUER: Thank you.

Commissioner Okuda?

COMMISSIONER OKUDA: I'm only going to talk if I'm the last person and if -- if you can give me, I think, since we're supposed to follow Robert's Rules of Procedure, this is a point of personal privilege. And I only state it here -- I wish it was a bigger crowd, but I'm only stating it
here because I might not be around because of some litigation matters for, you know, the final meeting that you will chair, whenever that might be. And so I don't want to take a chance that I'm not there where I can tell you this.

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

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

I think your father is remembered as somebody who put the University of Hawaii Chemistry Department on the map. You've told other people
like Commissioner Ohigashi, who used to be a
University of Hawaii Regent, how he mentored Joyce
Tsunoda. What was her position in the end?

COMMISSIONER OHIGASHI: She was Vice-

Chancellor of --

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

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

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

So this is the part I try not to cry, but
you know, your father would be proud of you,
Jonathan. Sorry. And I'm proud to call you my friend.

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

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

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

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

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

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of June, 2022.

[Signature]

Jodi Dean